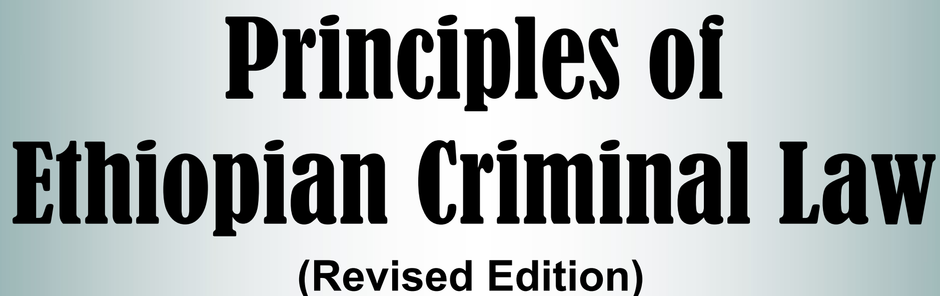

(Revised Edition)

A Textbook

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Addis Ababa, Ethiopia
2022

Principles of Ethiopian Criminal Law

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Elias N. Stebek
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Dedication:

To my parents
Askale Habteyes and Nour Mohammed

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Preface

Criminal Law is a two-semester course in Ethiopian law schools. Criminal Law I introduces the basic concepts, purposes and general principles, and particularly focuses on the objective and subjective elements of criminal liability. Criminal Law II, deals with, *inter alia*, the defenses to criminal liability and determination of punishment. Parts I and II of the book respectively deal with the themes covered under Criminal Law I and Criminal Law II.

The elements that are stated in the course descriptions and learning outcomes of Criminal Law I in most Ethiopian law schools include:

- the nature, purposes and sources of criminal law
- the definition of crime and the distinction between civil and criminal wrongs
- the purpose and scheme of the Revised Criminal Code of FDRE 2004 and the classification of offences
- basic principles of criminal law such as the principle of legality, principle of equality and principle of individual autonomy
- the principles of principal and subsidiary jurisdiction
- elements of criminal liability (legal, material and moral elements of an offence)
- the criminal conduct (including the identification of the elements in the definition of a specific offence, act, omission, causation, inchoate offences, etc)
- criminal guilt or moral blameworthiness (which includes criminal intention and negligence)
- degrees of moral guilt (single and multiple offences)
- principal and secondary participation in criminal conduct

Criminal Law II is the continuation of Criminal Law I, and it, *inter alia*, deals with the issue of irresponsibility that is, where appropriate, invoked during the preliminary objections, and the course gives due attention to affirmative defences and the determination of punishment. The core themes of Criminal Law II include:

- the main grounds for absolute irresponsibility and limited responsibility (i.e. insanity, immaturity and intoxication)
- the distinction between lawful acts, justifiable and excusable acts
- the affirmative defences under Ethiopian criminal law that render an act lawful, justifiable or excusable
- the purposes of punishment and different types of penalties embodied in the Ethiopian Criminal Code
- the principles embodied in the determination of punishment in single offences, multiple offences and under recidivism

- the circumstances that aggravate or mitigate penalties
- the elements of offences selected as samples and sentencing based on the Sentencing Guidelines issued by the Federal Supreme Court
- sample petty offences
- the impact of social change in criminal law

This book addresses the themes stated above in 11 chapters that can be covered as readings for Units 1 to 5 in Criminal Law I, and for Units 6 to 11 in Criminal Law II. It is envisaged that each semester has 14 weeks of contact sessions (three hours per week) and two weeks of assessment. Each contact hour requires independent off-class learning of at least an hour and a half devoted to reading, note taking, exercises and other tasks of self study. Off-class student workload is thus about four and a half hours per week in law schools that offer Criminal Law as a semester course along with other courses. The weeks assigned for each unit (chapter) are expected to be as follows:

Part I (Reading for Criminal Law I)	**Part II (Reading for Criminal Law II)**
Unit 1 (4 weeks)	Unit 6 (2 weeks)
Unit 2 (3 weeks)	Unit 7 (3 weeks)
Unit 3 (3 weeks)	Unit 8 (3 weeks)
Unit 4 (2 weeks)	Unit 9 (3 weeks)
Unit 5 (2 weeks)	Unit 10 (2 weeks) & Unit 11 (1 week)

Preface for the First Edition

Updated January 2022

The revised edition includes a new chapter (Chapter 10) in Part II of the book that highlights three selected offences enacted in special legislation. Various sections in Chapter 9 that discuss offence levels, penalty categories and tentative sentencing ranges have been revised based on the *Revised Federal Supreme Court Sentencing Guidelines* No. 2/2013 ((Tikimt 2006 Ethiopian Calendar/ October 2013) that was issued after the publication of the first edition. Other elements of revision and updating have also been made in the other chapters.

Part I

Introductory Concepts, Criminal Conduct and Criminal Guilt

General Objectives of Part I

Part I of this book, comprising Chapters 1 to 5, introduces general principles on the objective and subjective elements of an offence, multiple offences and multiple offenders. Chapter 1 explains introductory concepts and basic principles. The chapter highlights major principles of criminalization and compares criminal law with morality and civil law. Moreover, the source, application and basic principles of Ethiopian criminal law are highlighted. Finally, the elements that constitute an offence are introduced as a prelude to the themes discussed in Chapters 2 to 5.

Chapter 2 deals with the objective elements that are manifested through the conduct (act or omission) of an offender and the conduct's violation of criminal law. Chapter 3 addresses the subjective conditions which deal with the mental condition of the offender during criminal conduct. The last two chapters in Part I deal with criminal guilt and material participation in an offence from the perspectives of multiplicity. Chapter 4 deals with criminal guilt in multiple offences committed by the same offender, and Chapter 5 discusses principal and secondary participation of two or more offenders in the same offence.

In short, Chapters 2 to 5 (in Part I) deal with the *positive conditions* of criminal liability: the objective and subjective conditions that should exist and be proved by the prosecution. And Part II discusses the *negative conditions* of criminal liability that can be presented by the defence counsel, such as the issues of *irresponsibilit*y (e.g. insanity) and *affirmative defences* under Chapters 6 and 7 respectively.

Chapter 1

Introductory Concepts and Basic Principles

Criminal law is usually regarded as the category of law that prohibits crimes, i.e. acts that are "capable of being followed by criminal proceedings" and punishment.[1] From such instrumental perspectives, a *crime* "may be defined as an act (or omission or a state of affairs) which contravenes the law and which may be followed by prosecution in criminal proceedings", conviction, and punishment.[2] However, procedural or instrumental definitions, as Allen

noted, do not reveal “the characteristics of acts which are defined as criminal”[3] because they do not enable us to classify an act (or omission) as *crime* on the basis of its intrinsic content and essence.

For example, the act of inflicting bodily injury on another person is an offence (under Articles 553–559 of the 2004 Criminal Code),[4] and it also entails tort (noncontractual) liability (under Article 2067 of the Civil Code). An act which was not criminalized in the past might be regarded as an offence under the current criminal law. Likewise, an offence might be decriminalized (cease to be an offence) at some time in the future. These examples show the difficulty in defining offences based on the intrinsic characteristics of acts or omissions.

As Graven observes, Carrara’s definition has influenced Article 23 of the 1957 Penal Code.[5] According to Carrara (1805–1888), “an offence consists of the violation of a legal prescription, resulting from human behaviour, whether positive or negative, which is prohibited under pain of a criminal sanction.”[6] The three elements in Carrara’s definition are

1. the violation of a legal prescription (the legal element),
2. resulting from human behaviour, whether positive or negative (which can be regarded as the material element and which can also imply the mental aspect of the act or omission), and
3. the criminal sanction (such as punishment) that can be imposed.

Sub-Articles 1 and 2 of Article 23 of both the 1957 and 2004 Codes also state the legal, material and mental elements of an offence in addition to which Sub-Article 1 states the punishment that can ensue. This can thus be used as an introductory definition although it does not address the intrinsic nature of the acts that are prohibited under criminal law and does not expressly state the mental element of offences.

The drafters of the 1957 Penal Code and the 2004 Criminal Code duly specify what sorts of conduct can be considered an offence rather than attempting to define the term “offence” or “crime”. Accordingly, the definitions of specific crimes are articulated in the various provisions (embodied in the Special Part of the criminal law) which state the elements that constitute a publishable offence. On the other hand, the part of criminal law that deals with general principles (i.e. the General Part) does not attempt to define ‘a crime’ or ‘criminal law’ but rather lays down the principles applicable in criminal law.

The specific provisions that define offences may have a *descriptive approach*,[7] which aims at stating those acts whose commission or omission is prohibited under the pain of punishment. The descriptive approach does not relate criminality with morality, and it requires clarity and certainty in

the description of specific offences and punishment. The *moralistic approach*, on the other hand, does not separate facts from values, or the criminal law from morality.[8] This approach envisages "ethically rich criminal law," which goes beyond "descriptively specified types of conduct" to forbid and punish 'wrongs' that "are already recognizable pre-legally as wrongs"[9] (i.e. recognizable as wrongs regardless of their embodiment in criminal law). The moralistic approach may include terms such as 'cruelly' and 'dishonestly' which go beyond the strict fact of a given act or omission.

The moralistic approach of 'wrongfulness constraint' in the definition of offences has two downsides. First, its validity relies on shared values; second, it cannot apply to *mala prohibita*,[10] i.e. acts such as violating traffic rules that are criminalized as legal wrongs but not regarded as moral wrongs. The downside to a purely descriptive approach to the definition of an offence is that this approach does not acknowledge that an act or omission occurs within a setting of attendant circumstances and is guided by internal motives and mental states. Thus it is usually necessary to synthesize both approaches in defining offences.

Smith and Hogan discuss the characteristics of an offence rather than attempting to define it. They note the difficulty in defining *a crime* based on the intrinsic elements of an act or omission because "a particular act shall become a crime or … an act which is now criminal shall cease to be so" depending upon an enactment by Parliament.[11] This is so even if "the act does not change in nature in any respect other than that of legal classification" and all "its observable characteristics are precisely the same before as after the statute comes into force."[12] Smith and Hogan use the example of suicide, which was a crime until the Suicide Act of 1961, enacted on 3 August 1961.[13] They thus describe the characteristics of offences as public wrongs and moral wrongs rather than attempting to define them.

The features of crimes as 'moral wrongs' influence criminal law through their impact on lawmaking bodies. With regard to the characteristics of crimes as public wrongs, Smith and Hogan state:

> Crimes . . . are wrongs which the [law maker] has from time to time laid down are sufficiently injurious to the public to warrant the application of criminal procedure to deal with them. Of course this does not enable us to recognize an act as a crime when we see one. Some acts are so obviously harmful to the public that *anyone* would say they should be criminal –and such acts almost certainly are– but there are many others about which opinions may differ widely. . . . Public condemnation is ineffective without the endorsement of an Act of Parliament or a decision of a court.[14]

Although the general principles embodied in criminal law do not define crimes, they indirectly address the issue by stating the function and purpose of criminal law. After all, words are mere sound and letter symbols unless they appropriately represent the thing, action, thought, feeling or concept they refer to, i.e. the referent. Thus, the next section states a brief functional explanation rather than a lexical definition.

1. Function and Purpose of Criminal Law

The *function* of a thing is what it does towards a certain *purpose*. Function thus relates to activity or task, while purpose is the ultimate objective to be attained. However, if a given function is not only a means to a certain end, but an end in itself, it can be considered to have combined the attributes of both *function* and *purpose*.

Article 1 of the 2004 Criminal Code,[15] entitled "Object and Purpose," states the function and purpose of Ethiopian criminal law. The first paragraph states the purpose of Ethiopian criminal law, and it embodies the *ultimate end* that is intended to be achieved by the Criminal Code. The second paragraph of Article 1 states the function of Ethiopian criminal law. Article 1 reads:

> The purpose of the Criminal Code of the Federal Democratic Republic of Ethiopia is to ensure order, peace and the security of the state, its peoples, and inhabitants for the public good.
>
> It aims at the prevention of crimes by giving due notice of the crimes and penalties prescribed by law and should this be ineffective by providing for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others, or by providing for their reform and measures to prevent the commission of further crimes.

The second paragraph of the provision starts with "It aims at," thereby giving us the impression that it merely elaborates the purpose embodied under the first paragraph. But this paragraph states *what* the function of criminal law is (i.e. 'prevention of offences') and also *how* the Criminal Code undertakes its function of 'preventing offences' *to achieve its purpose* of "ensuring order, peace and the security of the state, its peoples and its inhabitants for the public good."

1.1 Function of Criminal Law

'Law' in its jural meaning refers to rules of social conduct (i.e. conduct at various levels of social, economic and political relationships), and it is different from other norms of conduct, such as morality and custom, because it is enacted (or sanctioned) and enforced by the various organs of the State. Legal rules have, inter alia, the function of regulating relations, defining rights and duties, determining law enactment and enforcement schemes, and availing remedies and procedures for the settlement of disputes towards the purpose of attaining individual freedom within the framework of public order and social harmony. To this end, law provides a binding regulatory framework of social organization in the social, economic, administrative and political domains. Rephrasing Hoebel's list,[16] law can be said to have the following functions:

- Law defines rights, duties and relations at various levels among individuals and groups within the society to maintain at least minimal integration of activities.
- It determines the function, responsibility and accountability of the various public authorities, and duly determines mechanisms of law enforcement towards maintenance of rights and order.
- It facilitates the disposition of trouble cases as they arise.
- It maintains adaptability to change by redefining relationships between individuals and groups as objective and subjective realities change through time. To this end, it proactively facilitates and accommodates inevitable economic, technological, social, cultural and political progress.

Private law (civil and business law) undertakes these functions by regulating relations between individual members of the society in their day-to-day private (civil) life or with regard to occupational or business activities. *Public law* (constitutional law, administrative law, tax law, criminal law and others) involves not only individuals but also the state in its capacity as a public entity at various levels of hierarchy.

Criminal law has the general function briefly stated above and the particular function stipulated under Article 1 of the 2004 Criminal Code, "the prevention of crime," by specifying offences and penalties, by providing for punishment or reform of offenders, and by stipulating measures of prevention. The issue of whether punishment and reform are alternative functions of the 2004 Criminal Code should be carefully addressed, because an offender who is convicted and sentenced does not only serve the sentence, but is also expected to be reformed through correctional services such as education and vocational training. On the other

hand, suspended sentences (Article 192) and measures applicable to persons with no or limited responsibility (Articles 129 *ff.*) target reform and not punishment.[17]

The phrase 'prevention of crimes' refers to safeguarding and securing

- the State, national or international interests (Book III, Articles 238–374)
- public interest and the community (Book IV, Articles 375–537)
- life, person, liberty and honour (Book V, Titles I to III, Articles 538–619)
- morals and the family (Book V, Title IV, Articles 620–661)
- property (Book VI, Articles 662–733)

Part III of the Criminal Code, Code of Petty Offences, identifies the petty offences and the corresponding penalties. The interests protected herein are

- public interests and the community (Book VIII, Title I, Articles 776–837)
- persons and property (Book VIII, Title II, Articles 838–865)

Note that there are offences in special legislation, such as proclamations applicable to corruption, terrorism, human trafficking, fire arms, hate speech, cybercrimes, money laundering and other offences that are covered under special legislation. Moreover, various proclamations state offences such as tax offences and environmental offences that include penal provisions and thus fall within the domain of Ethiopian criminal law, but that are not incorporated in the Criminal Code.

Robinson identifies three functions of criminal law: (i) *rule articulation*, (ii) the *liability* function and (iii) the *grading* (punishment) function of criminal law. In its rule articulation function, the law "must define and announce the conduct that is prohibited [or required] by the criminal law" so that it can provide "ex ante direction to members of the community as to the conduct that must be avoided [or that must be performed] upon pain of criminal sanction."[18]

Criminal law assumes its second function when "a violation of the rules of conduct occurs", and Robinson considers it as "setting the minimum conditions for *liability*". This function "marks the shift from prohibition to adjudication."[19] It "typically assesses ex post whether the violation is sufficiently blameworthy" to warrant conviction.[20] And finally, after the conviction of the offender, criminal law has the third function of determining the relative gravity of the offence, the individual circumstances of the offender and the particular circumstances of the criminal conduct to determine the "relative blameworthiness of the offender" and accordingly set "the amount of punishment that is to be imposed". While the adjudication

function of criminal law can culminate in a guilty or not-guilty verdict, its grading function goes beyond conviction and it involves "judgments of degree" by considering "such factors as the relative harmfulness of the violation and the level of culpability"[21] of the offender.

These three functions of criminal law clearly correspond with the functions stated in Article 1 of the Ethiopian Criminal Code, "giving due notice of the crimes and penalties prescribed by law" and then resorting to the other two functions of criminal law if this becomes ineffective. However, Article 1 has elements that go beyond the functions of adjudication and punishment because it articulates the immediate results of these functions (prevention of crime), and it also states the functions of reform and 'measures' in addition to punishment.

Section 1.02 (1) of the US Model Penal Code[22] uses the title "Purposes; Principles of Construction". However, its content mainly includes the function of criminal law. It provides the following:

> (1) The general purposes of the provisions governing the definition of offenses are:
> (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
> (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
> (c) to safeguard conduct that is without fault from condemnation as criminal;
> (d) to give fair warning of the nature of the conduct declared to constitute an offense;
> (e) to differentiate on reasonable grounds between serious and minor offenses.

The function stated under (d), fair warning, falls under the rule articulation function of criminal law while (b) and (e) respectively correspond with the adjudication (liability) and grading (punishment) functions of criminal law. Moreover, the function stated under (a) embodies the function of crime prevention as embodied in Article 1 of the Ethiopian Criminal Code.

1.2 Purpose of Criminal Law

Jerome Hall[23] notes that "[c]riminal law represents the major social effort to eliminate serious conflict, and to do so not arbitrarily, but in accordance with methods and directed toward ends that we are pleased to call 'rational'." Hall uses the term 'rational' to show that criminal law controls harm against

individuals and society which may be caused by offenders who pursue their inner drives of passion rather than restraint, self-control and reason. He figuratively expresses a human being as frail who can be susceptible to "the limitations of his brute ancestry" and states his optimism that we can have "irrepressible intelligence and indomitable will to achieve the vision of the good life." Hall notes that those "who build their view of law on passion" should be guided "to the sciences, to art and philosophy, as the irrefutable evidence of creative imagination, of thought, of wise experiment", and should also be harnessed by "mature legal systems" including the criminal law.[24]

The functions of Ethiopian criminal law thus have the purpose stated under Article 1 of the Criminal Code: ensuring order, peace and the security of the State, its peoples and inhabitants for the public good. The term 'peoples' has been supplemented in the new Code in recognition of the linguistic and ethnic heterogeneity in Ethiopia. Yet, there are arguments against using the collective noun '*people*' as '*peoples*' in the plural as long as the term refers to all individuals in a given city, region or country.

The order, peace and security of the State, its people and individuals are interdependent. Yet it may, at times, be difficult to strike a balance between the interest of the State and individuals where both interests seem to be legitimate but in conflict. The words 'for the public good' (under Article 1) can serve as a tool of interpretation during such ambiguities. However, diverse political, philosophic, religious and cultural views inevitably influence our definition of the 'public good'. The libertarian, for instance, tends to emphasize individual autonomy and self-interest while the utilitarian considers the interest of individuals within the context of a larger community. Yet utilitarians do not perceive "community" in the abstract, but as a "*body* composed of the individual persons" who are considered as its members, and they consider the interest of the community as "the sum total of the interests of the several members who compose it."[25]

The term 'public good' tends to imply the utilitarian conception of 'good', namely, "the greatest good for the greatest number of people". According to Graven's commentary on Article 1, "whichever angle one looks them, penal prescriptions aim at protecting society and, are in this sense, purely utilitarian."[26] In other words, the interest of society (and by implication, the State) prevails whenever legitimate interests of the State and an individual are in conflict. However, unless the conflicting interests are both lawful and legitimate, the issue of choice cannot arise because the validity of interests does not merely depend on the number of people on either side.

Readings on Section 1

Reading 1: Johannes Andenaes[27]

The Concept of Crime

The two fundamental concepts in the penal law are crime and punishment. . . .

A crime in its broader sense may be defined as an act (or omission) which is punishable. It is, in other words, a purely positive juridical concept. As old penal laws are repealed and new ones enacted, the concept of the punishable changes in content. That which is a crime today need not be so [in the future]. It has been discussed and questioned whether or not it would be possible to create a 'natural crime concept' independent of changes in the positive law. However, it has not been possible to agree on what a "*natural crime*" is.

If one wishes to define "*natural crime*" as an act which is deemed criminal in every society, not very many acts will fall within the definition. We need only think of the situation of our forefathers, during the Viking Era: murder and robbery, when committed in foreign lands (during the Viking raids) was not considered objectionable, but rather manhood. For parents to abandon new-born babies without economic necessity was certainly considered shameful, but it was not punishable.

The term 'natural crime' can be used with more ease if it is based on a well-recognized moral viewpoint, such as Christian or humanistic viewpoint. Natural crimes would then be acts or omissions which are wrong in themselves (*malo per se*) as distinguished from those which are morally neutral in themselves, but which, for some reason or another, are punishable, such as the driving of an automobile on the left-hand side of the street (*malo quia prohibitum*). This distinction within the category of crimes is of interest, even though the boundaries are extremely difficult to draw. But not every immoral act should be punished and thus made a crime. Considerations of many kinds will often render moral and social reprobation sufficient. When the punishment for adultery was repealed in 1927 by a unanimous vote in the *Storting* (Parliament) it was not thereby implied that adultery should thenceforth be considered permissible; various practical considerations, however, led to a decision that the moral principle of faithfulness in marriage was not capable of enforcement through the criminal law.

The concept of 'natural crime' can also be taken in a third sense, as a description of those acts which it is a social necessity to punish in a society of a specified type, such as a modern Western European state. Between countries of similar cultural levels, there is in fact a very great similarity in the concepts of the penal law. Murder, assault, rape, larceny, fraud and embezzlement are punishable everywhere in our cultural circle. But, even here there are differences where details are concerned. . . . [For example] in Sweden extortion was made punishable in 1934, and attempted crimes are still punished to a lesser degree than in Norway. In Denmark, attempts are punishable, and the laws against them are broader than in Norway; what Norway considers as non-punishable preparation are punishable as attempts in Denmark. . . .

Reading 2: Philippe Graven[28]

[Objectives and Function of Criminal Law]

Given two identical cases tried, one by a court which would think more in terms of punishment, and the other by a court which would think more in terms of protection or correction, the decisions in each case are likely to be quite different, this difference being ultimately attributable to the absence of directive principles in the law regarding what steps can best serve its purpose. By describing the objectives of criminal law and how they are to be accomplished, Article 1 [of the Ethiopian Criminal Code] precisely aims at eliminating the risk of uncertainty. . . .

There seems to be no question today that the main function of criminal law is to preserve a certain amount of order and peace without which no human collectivity can exist. By stating that penal prescriptions are intended to ensure such order and peace "for the public good", Article 1 indicates that the criminal law is not primarily concerned with the protection of private rights but with the protection of society at large. As such, it regulates the behaviour of human beings in their capacity as members of a group more than as individuals and, in order to determine what a person should or should not do, it considers whether and how the whole group may be affected by the deeds of this person. Insofar as the peace of the collectivity firstly depends on the amount of peace enjoyed by each of its members, the criminal law contains provisions designed to ensure that this individual peace is not disturbed; if it penalizes attacks against private interests, it is only to the extent that, in addition to causing individual harem, they are a source of public disturbance and destroy or call in question the peace of the collectivity. But the "order, peace and security of the State" actually exist independently of the order, peace and security enjoyed by the citizens, and are protected as such. For, if the security of the State depends on the security of its inhabitants, the contrary is equally true. Therefore, apart from penalizing attacks against private rights because they endanger the security of the community, criminal laws also penalize attacks against the community because they endanger the security of its members even though no individual is in direct or immediate jeopardy. Thus, from whichever angle one looks at them, penal prescriptions aim at protecting society and are, in this sense, purely utilitarian.

How does the criminal law achieve its protective purposes? This question is answered in the second alinea of Article 1.

Inasmuch as the preservation of public order depends upon the compliance with certain rules, these rules have to be made known. Accordingly, the [Criminal] Code gives due notice of the offences". It informs the citizens of how they are expected to behave and calls their attention to the rules the infringement of which is deemed contrary to the general interest; furthermore, by stating that ignorance of the rules is not defence to an infringement thereof, it supposes that everyone is aware of the existence and meaning of such rules. But the [Criminal] Code also gives "due notice of the penalties". Penal prescriptions differ from moral prescriptions by reason of the immediate and tangible consequences which follow if they are not observed. Since knowledge of the law and respect for the law do not necessarily go together . . . respect of

the law is ensured by sanctioning violations of the law. Therefore the [Criminal] Code also informs the citizens of what would happen to them if they should fail to comply with the law; it makes them realize that it is worthwhile, in their own interest, not to break the rules, for such a breach would in the terms of Locke, be an 'ill bargain' in all respects (see for instance [Article 92], imposition of fine in cases of offences committed for gain, and Article [100]—forfeiture of the fruits of an offence). . . .

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2. Major Principles of Criminalization: An Overview

In the hierarchy of laws, constitutional law is the supreme law, and all laws should be in conformity with the constitution. Article 9(1) of the Constitution of the Federal Democratic Republic of Ethiopia provides that "The Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect".[29] Another fundamental stipulation enshrined in the Constitution is the status of international conventions on human rights. Article 13(2) of the Constitution provides:

> The fundamental rights and freedoms specified in this Chapter [i.e. Articles 13 to 44 of the Constitution] shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.[30]

Ethiopian criminal law should thus be in conformity with the FDRE Constitution and the international conventions stated in Article 13(2) of the Constitution. *Robinson v. California*[31] illustrates an instance where a criminal law provision was declared unconstitutional.

> Robinson was convicted under a California statute that made it an offense for a person to 'be *addicted* to the use of narcotics.' The Supreme Court struck down the statute on [Constitutional] grounds.
>
> Essentially, the Court held that, although a legislature may use criminal sanctions against specific acts associated with narcotics addiction, e.g., the unauthorized manufacture, sale, purchase, or possession of narcotics, it *could not criminalize the status of being an addict*, which the Court analogized to other illnesses.[32]

The question regarding the underlying justifications in criminalizing acts has been subject to debate among jurists. The major considerations in criminalization are the *preventive* (harm) and the *immorality* (legal

moralism) considerations. There are also two competing principles that are considered in the process of criminalization: the *principle of individual autonomy*, which gives much importance to liberty and individual rights, and the *principle of welfare*, which gives weight to collective goals. In the debate between the principles of individual autonomy and the principle of welfare, adherents of both views are concerned with the corresponding significance of *minimal criminalization*, although the threshold varies depending upon the perspectives and principles that underpin these views.

The harm principle "takes harm and its prevention to be the primary concern of the criminal law," while the principle of legal moralism "takes wrongdoing or immorality, and its punishment or prevention, to be its primary concern." [33] With regard to what should count as 'harm' for criminal-law purposes, Duff and Green raise the following questions:

> Is . . . analysis in terms of setbacks to interests adequate? Should we refine it so that harm requires some relatively lasting setback, or a setback to a subset of interests, such as 'welfare' interests? When, if ever, is the risk of harm, rather than actual harm, sufficient to justify criminal sanctions? What room is there for ideas of harm not only to individuals, but also to groups, communities, and the state? Is harm to self (as opposed to harm to others) the kind of harm with which the criminal law is properly concerned? Are there cases in which the causing of something other than harm—such as 'offence'—will justify criminal penalties?[34]

Turning to the principle of legal moralism, Duff and Green ask what kinds of immorality fall within the scope of criminal law; for example, whether the law should "be concerned with moral vice, or at least with 'the grosser forms of vice'; or only with moral wrong*doing*, however that should be understood."[35] They also ask whether the wrongs embodied in criminal law ought to "be wrongs *against* some person," or whether they can be "in some respect 'free-floating'." Finally, Duff and Green inquire into the relationship between harms and wrongs and the extent to which the two concepts are intertwined.

The principles of harm and legal moralism address the issue of criminalization from the perspective of *why* certain wrongs are regarded as crimes. The justification of criminalization or decriminalization raises the question of whether individuals are free to determine their being and actions, or whether their being and behaviours are defined by objective realities over which they have no control. The latter view, determinism, in its extreme form might hold that moral guilt or moral blameworthiness (which is the core ingredient in the commission of an offence) is 'moral luck' attributable to factors beyond the control of the offender.

On the other hand, human persons are apparently endowed with the faculties that enable them to rationally act upon given (even determined) settings and freely choose between courses of action by avoiding acts or omissions that are regarded as public wrongs. This premise can take us to the conclusion that all persons (subject to the conditions of sanity and a certain age level of maturity) are morally responsible for the wrongs they commit. The latter conception regards individuals as autonomous persons and renders them responsible for their conduct. Moreover, the 'normative element' in the principle of individual autonomy envisages that "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 regarded as moral persons."[36]

One may at this juncture raise the issue of whether there can be a blend or synthesis between the principles of individual autonomy and welfare:

> Most philosophers arrive at compromise positions which enable them to accept the fundamental propositions 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 (e.g. by threats from another) that the normal presumption of free will may be displaced. Similar in many ways is the 'principle of alternative possibilities', according to which an individual may properly be held responsible for conduct only if he could have done otherwise...[37]

Mayson supports Duff's view that criminal law "censures particular acts in the polity's name" as "a mechanism of collective condemnation."[38] However, Duff warns against the risks of over-criminalization, as a result of which criminal law becomes "chaotic, unprincipled and over-expansive." He thus "proposes a normative theory of criminal law, and of criminalization, that shows how criminal law could be ordered, principled, and restrained":

> The theory is based on an account of criminal law as a distinctive legal practice that functions to define a set of public wrongs, and to call to formal public account those who commit such wrongs; an account of the role that such a practice can play in a democratic republic of free and equal citizens; and an account of the central features of such a political community, and of the way in which it constitutes its civil order. Criminal law plays an important, but limited, role in such a political community in protecting, but also partly constituting, its civil order. On the basis of this account, we can see how such a political community will decide what kinds of conduct should be criminalized—not by applying one or more of

> the substantive master principles that theorists have offered, but by considering which kinds of conduct fall within its public realm (as distinct from the private realms that are not the polity's business), and which kinds of wrong within that realm require this distinctive kind of response (rather than one of the other kinds of available response). The outcome of such a deliberative process will probably be a more limited, and a more rational and principled, criminal law".[39]

As Simeneh K. Assefa notes, the state "does not have a free hand to criminalize conduct at whim" and he states two cumulative conditions that can justify criminalization. "The positive condition for criminalization is that the legal interest must be one that demands the protection of the criminal law"; in addition to which a second negative condition should exist, i.e., "the purpose that requires the protection of the criminal law cannot be achieved by other means, such as, administrative measures and civil actions."[40]

Review Exercises on Sections 1 and 2

1. Discuss 'purpose' vis-à-vis 'function' and provide examples. Comment on the title of Article 1 of the 2004 Criminal Code ('Object and Purpose') in light of the content of the provision.
2. Define 'peace', 'order', 'security', 'rights' and 'interests', and discuss the relationship between peace, order and rights.
3. Article 1 of the Criminal Code states the purpose of the Code and embodies the following elements:
   - Ensure order for the public good
   - Ensure peace for the public good
   - Ensure security of the state, its people and its inhabitants for the public good.

   Give examples of *public good*.
4. Can there be conflict between legitimate interests of the state and an individual? If so, how can it be resolved?
5. According to Ayn Rand, "there are no conflicts of interests among rational [persons]."[41] Comment.
6. Assume that you are a Member of Parliament, and a draft law (bill) is presented to criminalize the production and sale of 'chat (khat)' State your opinion based on the principles of individual autonomy, welfare, harm and minimalism. Would your view differ if the bill proposes higher tax on chat (khat) production and sale, including licence restrictions?

7. Discuss the constitutional limits of criminalization and the hierarchy between the 2004 Criminal Code and international conventions ratified by Ethiopia.
8. According to Article 23(1) of the Ethiopian Criminal Code "[a] crime is an act which is prohibited and made punishable by law." The second paragraph of the provision defines a criminal act as "the commission of what is prohibited or the omission of what is prescribed by [criminal] law." Relate this definition with the following definitions or descriptions of 'crime':[42]
   a) *Crime as public wrong*: "A crime is a violation of the 'public rights and duties' due to the whole community, considered as a community." (Blackstone)
   b) *Crime as moral wrong*: "Crime is an immoral and harmful act that is regarded as criminal by public opinion because it is an injury to so much of the moral sense as is possessed by a community—a measure which is indispensable for the adaptation of the individual to society." (Garaflo)
   c) *Crime as conventional wrong*: "Criminal behaviour is violation of the criminal law. No matter what the degree of immorality, reprehensibility, or indecency of an act, it is not a crime unless it is prohibited by the criminal law. The criminal law, in turn is defined conventionally as a body of specific rules regarding human conduct which have been promulgated by political authority, which apply uniformly to all members of the classes to which the rules refer, and which are enforced by punishment administered by the state. Characteristics, which distinguish this body of rules regarding human conduct from other rules, are therefore, politicality, specificity, uniformity and penal sanction." (Sutherland)
   d) *Crime as social wrong*: "Crime is an act that has been shown to be actually harmful to society, or that is believed to be socially harmful by a group of people that has the power to enforce its beliefs, and that places such act under the ban of positive penalties." (Gillin)
   e) *Crime as procedural wrong*: "A wrong which is pursued by the sovereign or his subordinates is a crime (public wrong). A wrong which is pursued at the discretion of the injured party and his representatives is a civil injury i.e. private wrong." (Austin)
   f) *The difficulty in defining crime*: "A final answer to the question 'what is crime'?, is impossible, because law is a living, changing thing, which may at one time be based on sovereign will and at another time on juristic science, which may at one time be uniform,

and at another time give much discretion, which may at one time be more specific in its prescription and at another time much more general." (Roscoe Pound)

9. The following readings highlight the competing principles of autonomy and welfare, and indicate the balance that can be observed in *preventing harm* and at the same time *minimizing* the scope of criminalization. Summarize (one third précis) and comment with respect to Ethiopian criminal law on the following excerpts[43] on the controversy between the naturalist and positivist schools of thought regarding the origin, essence and nature of criminal law:

(i) Natural Law Theory

… Under [the Natural Law] theory, the love and respect we owe to our neighbour makes his killing or mutilation or seduction a violation of natural law, hence a crime. Under the natural law theory, certain conduct is inherently and immutably criminal, whether or not any enactment of man has so declared. Conversely, acts that do not violate the natural order are not criminal no matter what classification the legal order may give them.

Natural law relies heavily on feeling, on moral sense, and on individual instinct for the fitness of things. Under the natural law theory, an act that violates the basic moral code is a crime, and by implication, an act that does not violate the moral code is not a true crime.

The great difficulty here lies in determining what basic moral code is. Natural law today leaves us with the amorphous guidance that the basic moral code is what we feel is right and its violation is what we feel is wrong. … In such a state of affairs, crime, and with it criminal law, becomes plagued with vagueness, uncertainty, mutability, and lack of definition.

(ii) Positive Law Theory

The alternative concept of crime considers it a man-made creation. Under this view, crime is a violation of a man-made command of a sovereign, a violation identified as a public wrong. This view of crime as conduct, formally prescribed by sovereign authority, carries the name positive law. …The virtue of positive law lies in its precision and its predictability—qualities that enable positive law to escape the theoretic tyranny of natural law's vagueness, uncertainty, and reliance on objective moral sense and feeling. Positive law possesses the added virtue of practicable application to communities of diverse races, religions, classes and cultures, for it appears to dispense with the need for commonly held beliefs about right and wrong. Crime under positive law consists of those acts, and only those acts, specifically prohibited by criminal law under threat of punishment. Both crime and punishment are explicitly defined and specified in advance.

The positive law theory is particularly troubled by the problem of the unjust law, exemplified by the Nuremberg law of Hitler's Germany that withdrew certain basic human rights and legal protection from Jews. If law is the command of the sovereign, does the sovereign who is corrupt and

inhumane create genuine law? Need such law be obeyed? The usual positivist answer is that a regularly adopted law, even if … immoral, remains law until repealed. If the unjust criminal law oppresses beyond endurance, resort maybe had to the right of revolution, that is, overturn of the entire legal order, and with it, the unjust law. In short, bad law may be repealed or overruled, but in the meantime, it remains law. …

Between natural law and positive law theories, the positivists appear to have the better and more practical side of the argument, and in criminal law they have generally carried the day. Natural law tends to assume the role of a brake on excesses of positive law, to function as a tribune of the people.

Readings on Section 2

Reading 1: Ashworth[44]

[a] The Principle of Individual Autonomy

. . . 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. Indeed, a major part of its thrust is that 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. . . . We will also see that H.I.A. Hart's famous principle that an individual should not be held criminally liable unless he had the capacity and a fair opportunity to do otherwise, is grounded in the primary importance of individual autonomy. On the other hand, returning to the scope of criminalization, this emphasis on individual choice militates against creating offences based on paternalistic grounds . . .

In liberal theory, the principle of autonomy goes much further than this. . . . The difficulty is to decide how far this is to be taken. Whilst the principle of autonomy gives welcome strength to the protection for individual interests against collective and State interests, it seems less convincing in other respects. The question 'whose autonomy?' must always be asked … In some of its formulations the principle of autonomy gives little or no attention to the social context in which all of us are brought up (which may both restrict and facilitate the pursuit of certain desired ends) and the context of powerlessness in which many have to live. The idea that individuals should be free to choose what to do is quite unsustainable, without wide-ranging qualifications. This has led several modern liberals to develop autonomy-based theories which find a central place for certain collective goals, seen as creating the necessary conditions for maximum autonomy. . . .

[b] The Principle of Welfare

. . . Whereas the individualistic principle of autonomy seems to suggest that individual rights should be given high priority in the legal structure, the principle of welfare recognizes the social context in which the law must operate and gives weight to collective goals. Clearly there are conflicts between the two principles, but that may not always be the case. If the principle of autonomy is taken to require a form of positive liberty rather than merely negative liberty, then the principle of welfare may work towards the same end of ensuring that citizens

benefit from the existence of facilities and structures which are protected, albeit in the last resort, by the criminal law. Some criminalization may therefore be accepted as the only justifiable means of upholding certain social practices as 'necessary for the general good.' Matters such as the obligation to state one's income accurately for the purpose of taxation or for the receipt of benefits can hardly be analysed convincingly in terms of individual autonomy: once a public decision has been made about the system to be adopted, it may be justifiable for at least egregious departures from these rules to be criminalized. The same may be said of laws relating to industrial safety, food safety, environmental protection, and so on. Although it remains to be decided whether violations of these should be criminalized or dealt with in some other way, the legitimacy of some criminalization on the basis of welfare as well as on the basis of autonomy cannot be put in doubt. Those versions of the principle of autonomy which suggest that individuals should remain free to decide these matters according to their own preferences are not sustainable.

Yet the value of autonomy as a restraint upon collective and state action should not be overlooked. Decisions by the wider community may threaten basic interests of individuals, unless there is recognition of a set of protected rights. . . . On any realistic view, the principles of autonomy and welfare have a degree of mutual interdependence, which should be recognized and structured. One approach would be to start 'with the idea that the criminal law should protect common or collective goods, and then ask whether (and if so which) individual goods should count as common goods which the criminal law should protect.'

[c] Harm and Minimalism

The obvious starting point of any discussion of criminalization is the '*harm principle*'. It takes several different forms, but the essence is that the State is justified in criminalizing any conduct that causes harm to others or creates an unacceptable risk of harm to others. . . .

. . . Yet, (the harm principle) lacks a clear focus on the distinctiveness of the criminal sanction and on the need for special justifications for invoking penal rather than civil or regulatory controls. This focus is supplied by the minimalist approach. *Minimalism* accepts the need for criminal law in order to safeguard the interests of individuals, the State, and the collectivities, but it emphasizes the protection of individuals from the abuse of power—whether by state officials or by groups or other individuals. Among other things, the minimalist approach emphasizes respect for the rights of individuals as suspects and defendants (requiring criminal laws to punish only the culpable, and to conform with, for example, the European Convention on Human Rights) and it insists that the criminal law 'should be used only as a last resort or for the most reprehensible types of wrongdoing'.

Thus the basic principle ought to be the harm principle: the reduction of harm to others is always a good reason in support of penal legislation. Minimalism draws attention to the criminal law's role as generally the most powerful form of censure, and thus advocates the minimum use of criminalization. In most systems it is hardly practical to restrict the criminal law to direct victimizing harms. Some obligation of individuals towards the collectivity should be

reinforced by the criminal sanction, and we have also . . . other forms of harm, such as remote harms (e.g. offences of possession) and harms to self (e.g. drug offences).”

Reading 2: Bloy et al[45]

The Decision to Criminalise Conduct

. . . Professor Ashworth’s view is that ‘political opportunism and power, both linked to the prevailing political culture of the country’ is the main determinant (*Principles of Criminal Law,* 2nd edn, 1995, Oxford: Clarendon, p 55) but traditionally commentators have asked two questions:

- is the conduct *harmful* to individuals or to society?; and
- is the conduct *immoral*?

If the answer to both questions is ‘yes’ then the conduct is considered *prima facie* suitable for criminalisation. But this traditional view is too simplistic to be helpful to the student because some acts are both immoral and harmful and yet have not been criminalised (for example, adultery [in various legal regimes]), whilst others are neither immoral nor harmful and yet are crimes (for example, failure to wear a seat belt and some other ‘victimless’ crimes).

The law does not criminalise all immoral acts because:

- difficulties of proof (many such acts occur in private and in the absence of independent witnesses);
- difficulties of definition (take the example of the husband whose wife deserted him many years ago and who has now found a new partner. If he engages in sexual intercourse, do we really wish to see him punished as an ‘adulterer’?);
- rules of morality are sometimes difficult to enforce without infringing the individual’s right to privacy;
- the civil law sometimes provides an adequate remedy to the parties affected by the conduct (for example, the deserted wife);
- in any event, how do we ascertain prevailing ‘moral opinion’ given the deep divisions within modern society?

Lord Devlin has argued that an act should be criminalised if it incurs ‘the deep disgust’ of the right-minded individual (*Enforcement of Morals*, 1965, Oxford: Oxford UP) but as HLA Hart has pointed out: what if the right minded man’s opinion is based upon ignorance, superstition or misunderstanding? (*Law, Liberty and Morality*, 1963, Oxford: Oxford UP.) It is arguable that if Lord Devlin’s view prevailed, law making powers would, in effect, be delegated to the proprietors of popular tabloid newspapers –a horrible thought! On the other hand, if the law makers move too far away from the values of the ‘right minded man’ we face the danger of a loss of respect for the rule of law itself amongst the general populace –an equally horrible thought!

Perhaps the most useful and practical contribution to the debate about what conduct ought to be criminalised has been made by the American academic Herbert Packer. He suggests the following criteria in addition to immorality and harm being caused to a person or property (*The Limits of the Criminal Sanction*, 1968, Stanford, CA: Stanford UP):

- most people view the conduct as socially threatening;
- the conduct is not condoned by a significant section of society;
- criminalisation is not inconsistent with the goals of punishment;
- suppressing the conduct will not inhibit socially desirable conduct;
- it may be dealt with through even-handed and non-discriminatory enforcement;
- controlling the behaviour will not expose the criminal justice system to severe qualitative or quantitative strains;
- there are no reasonable alternatives to the criminal sanction for dealing with it;
- the costs of enforcement are not prohibitive.

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3. Criminal Law versus Civil and Moral Wrongs

A person's act or failure to act may negatively affect other persons and the society. There are thus various wrongs that individuals or juridical persons are not allowed to commit. The wrongs that entail liabilities can be classified into civil (private) wrongs and public wrongs. In a way, both affect private individuals. But certain kinds of wrongs are grave enough to involve the public as an interested party.

The acts and threat of a thief, a robber or a murderer affect not only the individual victim, but also the public at large. By contrast, nonperformance of a contractual obligation or extracontractual harm is regarded as a private wrong. In contractual or extracontractual civil liabilities, law enforcement is not empowered to initiate and institute cases, but merely avail remedies for those who have valid claims. With regard to public wrongs, however, the law criminalizes those acts or omissions that are regarded as offences, and determines corresponding penalties.

As Ashworth notes, criminal offences concern the state, "and not just the persons(s) affected by the wrongdoing." He states that there are various crimes that are civil wrongs as well. Although the injured party is entitled "to decide whether or not to sue for damages" criminalization and prosecution of the conduct imply that "there is public interest in ensuring that such conduct does not happen, and that, when it does, there is the possibility of State punishment."[46]

An offence is thus an antisocial behaviour that the legislator considers serious enough to deserve criminal liability. The definition of the term 'antisocial' may have spatial or temporal variation. The sale of alcoholic drinks is an offence in Saudi Arabia while it is not so in Ethiopia. Even within the same legal system, definitions may change over time; for example, female genital mutilation was not considered an offence in the

1930 and 1957 Penal Codes, but female circumcision is now a crime under Article 565 of the 2004 Criminal Code.

Ethiopia's legal tradition, both in the *Fetha Neguest* and the 1930 Penal Code, made no distinction between extracontractual private wrongs (civil law) and public wrong (criminal law). However, the 1957 Penal Code and the 2004 Criminal Code deal exclusively with criminal law, leaving tort law to the 1960 Civil Code (Articles 2027–2161). If a lorry owner, for example, kills a pedestrian by accident, in the absence of criminal intention or negligence, he is free from criminal punishment but not from civil liability to pay damages pursuant to tort law. Thus, criminal law does not regulate every possible wrong in society, but only public wrongs –that is, wrongs which the legislature has expressly stated as sufficiently injurious to the public and thus punishable. In effect, criminal law falls under the category of public law, while laws dealing with contracts and torts (extracontractual liability) are under private law.

3.1 Criminal Law versus Contractual and Noncontractual Liability

Non-performance of contract entails the civil liability of the debtor, potentially resulting in forced (specific) performance, cancellation of the contract and/or payment of damages. But unlike criminal law, the State will not be involved in the dispute or litigation other than providing the legal framework that facilitates contractual transactions, enacting and enforcing laws that provide remedies in case of non-performance and adjudicating over the case if the creditor files a suit. Moreover, contractual liability does not involve punishment, but rather, inter alia, entails performance of obligations (specific performance) and/or payment of damages. Similarly, noncontractual liability (tort) is a private wrong and the remedy available is reparation of damages and not punishment. The factor that distinguishes noncontractual from contractual liability is the absence of contractual relations between the litigating parties in tort cases.

Numerous factors distinguish torts from offences. Criminal offences require moral blameworthiness while noncontractual (tort) liability may arise not only as a result of fault, but also irrespective of fault[47] or due to fault committed by others. The latter tort liability arises for fault committed by another person for whom one is answerable, as in the case of harm caused by one's child or by one's employee in due course of his work.[48] Tort liability is said to be 'strict' (i.e. irrespective of fault) if it arises from acts that do not constitute fault or due to harm caused by things owned or possessed by a person (e.g. animals, buildings, machines, vehicles and manufactured goods). Moreover, the term 'fault' for the purpose of tort

liability –but not for offences– may include violations of private law,[49] professional fault[50] and others that are considered 'faults' by 'the reasonable-person's conduct' standard under similar circumstances.[51]

Criminal liability under Ethiopian criminal law requires moral guilt (*intention* or *negligence*). The exception to this moral guilt requirement is corporate criminal liability as stipulated under Articles 23(4) and 34 of the Criminal Code.[52]

The creation of offences by analogy (to other cases) is forbidden under Ethiopian criminal law. By contrast, the application of a legal provision that does not expressly state a certain fact situation may be permissible in civil cases, where, for example, legal provisions embody illustrative (rather than exhaustive) lists. And the degree of certainty in evidence varies: In civil cases, the preponderance of evidence in the balance of probability suffices, but criminal cases require a higher standard of evidence.

Among the numerous differences between criminal and civil liability, the most salient may be the imposition of punishment on criminal offences versus the imposition of reparation of damages for civil cases. In other words, punishment is usually the counterpart of offences, and reparation the counterpart of torts.

Although the term 'delicts' is not usually used in the academic literature in Ethiopia, some comparison between delicts and crimes is necessary. Snyman[53] distinguishes these terms as follows: "a delict is an unlawful, blameworthy act or omission resulting in damages to another and in a right on the part of the injured party to compensation"; a crime, on the other hand, is "unlawful, blameworthy conduct punished by the state." He continues:

> One and the same act may constitute both a crime and a delict. If X assaults Y, Y can claim damages from X on the grounds of delict. He can also lodge a complaint with the police against X on the grounds of assault which may lead to X's conviction and punishment for the crime of assault. This, however, does not mean that all delicts also constitute crimes. . . . Again, most crimes, for example high treason, perjury, bigamy and the unlawful possession of drugs, are not delicts.[54]

In addition to the difference in the imposition of punishment vis-à-vis compensation for damages, crimes are "almost invariably injurious to the public interest, by which is meant the interest of the state or the community" while "a delict (same as contracts) is ordinarily injurious only to private or individual interests."[55] This does not, however, mean that the state and the society at large do not have interest in the realm of delicts, because damage incurred by the member of the society or community in fact concerns the

respective community or society. Yet, the initiative towards complaint is considered as a private undertaking, after which the state and the legal regime shall adjudicate and implement valid claims for compensation.

3.2 Criminal Law versus Morality

The moral values of right, wrong, good or bad may be religious, reverential and/ or conscientious. Religious morality has its source from the ethical and spiritual creeds of a person's religion. Reverential morality mainly emanates from a person's reverence to parents, elders, superiors, public opinion and the like. Conscientious morality may be cultural, customary or mostly secular. It is based on a person's inner self-control, self-actualization, introspection and corresponding self-esteem and self-blame.

"Criminal liability is the strongest formal condemnation that society can inflict, and it may also result in a sentence which amounts to a severe deprivation of the ordinary liberties of the offender."[56] The observance of moral norms may be secured by transcendental belief in heaven and hell, or by internal sense of guilt, desire for inner harmony, respect for public opinion and the like. Of course, there are many acts that are both morally and legally wrong. Yet criminal law is still distinct from morality, even with regard to such acts, because morality (unlike laws) covers not only acts or attempts, but bad thoughts as well. Moral wrongs, such as bad thoughts, are obviously beyond the grips of criminal law.

Review Exercises on Section 3

1. Consider the following excerpt and answer the questions that follow:

> Since the very beginning of human civilization, man has recognised certain acts committed by an individual, for instance, lying, gambling, cheating, stealing, killing, kidnapping, raping a woman, etc., as reprehensible, because they tend to reduce human happiness. 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. For instance, lying, refusal to give a mouthful of rice to save a fellow creature . . . are not considered sufficiently serious for an action in law. Such acts are simply considered as immoral or ethical wrongs and the concern of social and religious laws. On the other hand, wrongs like nuisance, deceit, libel, robbery, dacoity, murder, rape, kidnapping, etc., are considered sufficiently serious for legal action.

> The State may respond to any such act in two ways, either at the instance of the injured individual or group, or by itself taking a direct action. In other words, where the magnitude of injury is supposed to be more concentrated on the individual, the wrongdoer is asked to compensate the injured in terms of money. . . . This type of wrong is called 'civil wrong' . . . for which civil remedy is open to the injured. Where the gravity of the injury is comparatively more directed to the public at large, public condemnation or provision for compensation, as in the case of moral and civil wrongs, is ineffective. 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 widespread panic. Therefore, the State stresses punishment on the wrongdoer. This category of wrong is called 'public wrong' or 'crime' for which criminal proceedings are instituted by the State, and the culprit is punished by a court of law if found guilty.[57]

a) A pickpocket stole Birr 50 from Ato X while both were on a bus. Why is this act a 'public wrong' in view of the fact that what the thief has stolen is the private property of Ato X?
b) State (i) an act that is both a moral wrong and a crime, (ii) an act that is immoral but not an offence, and (iii) an act that is an offence (or petty offence) but not a moral wrong.

2. Kenny argues that the usage of the term 'public wrong' to define crime is misleading. He wrote:

> It is possible that, without committing any crime at all, a man may by a breach of trust, or by negligent mismanagement of a Company's affairs, bring about a calamity incomparably more widespread and more severe than that produced by stealing a cotton packet handkerchief, though that petty theft is a (felonious) crime.[58]

Comment.

3. In *R. v. Ward* (1836), "the accused was guilty of the offence of common nuisance for constructing a sloping causeway in Cowes Harbour, which was meant for facilitating the landing of passengers and goods".[59] The Ward's act was advantageous to the public. Yet, an act may be a crime without being a public wrong. Discuss.

Reading on Section 3

Smith and Hogan[60]

1. Characteristics of Crime

A Public Wrong

. . . [Crimes] are generally acts which have a particularly harmful effect on the public and do more than interfere with merely private rights. Sir Carleton Allen writes:

> Crime is crime because it consists in wrongdoing which directly and in serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured.

. . . [The] 'public' nature of crimes is evidenced by the contrast between the rules of civil and criminal procedure. Any citizen can, as a general rule and in the absence of some provision to the contrary, [initiate criminal cases], whether or not he has suffered any special harm over and above other members of the public. As a member of the public, he has an interest in the enforcement of the criminal law. . . .

All this contrasts sharply with civil wrongs –torts and breaches of contracts. There only the person injured may sue. He (and only he) may freely discontinue the proceedings at any time and, if he succeeds and an award of damages is made in his favour, he may at his entire discretion, forgive the defendant and terminate his liability. . . .

A Moral Wrong

The second characteristics of crimes which is usually emphasized is that they are acts which are morally wrong. . . . In the early days of the law, when the number of crimes was relatively few and only the most outrageous acts were prohibited –murder, robbery, rape, etc.– this was, no doubt, true. But now many acts are prohibited on the grounds of social expediency and not because of their immoral nature. . . . Moreover, many acts which are generally regarded as immoral –for example, adultery– are not crimes [in various countries]. Thus the test of immorality is not a very helpful one. . . .

2. Criminal Proceedings

.... Any attempt to distinguish between crimes and torts comes up against the same kind of difficulty encountered in defining crimes generally: that most torts are crimes as well, though some torts are not crimes and some crimes are not torts. It is not in the nature of the act, but in the nature of the proceedings that the distinction consists and both types of proceeding may follow where an act is both a crime and a tort. . . .

3. The Practical Test

. . . The question whether a particular proceeding is a criminal cause or matter has frequently come before [courts]. . . . In these cases, the test which has regularly been applied is whether the proceedings may result in the punishment of the offender. If it may, then it is a criminal proceeding. As a practical test, this seems to work well enough; but it must always be remembered that it is a rule

with exceptions; for some actions for penalties are undoubtedly civil actions, and yet they have the punishment of the offender as their objectives; for this reason the test of punishment is jurisprudentially unsatisfactory.

The meaning of punishment itself is not easy to ascertain; for the defendant in a civil case, who is ordered to pay damages by way of compensation, may well feel that he has been punished. . . .

. . . Surely [the distinction can be made] only by ascertaining whether the legislature (or the courts in the case of a common law crime) have prescribed that the proceedings shall be criminal ; and this must depend, primarily, upon whether it is intended to be punitive. . . .

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4. Sources and Form of Ethiopian Criminal Law

4.1 Sources of Ethiopian Criminal Law

The preface of the current Criminal Code has (as of May 9, 2005) expressly repealed the 1957 Penal Code and the 1982 Revised Special Penal Code (Proclamation 214/1982).[61] Moreover, Article 3 of the Code considers other laws of a penal nature as part of Ethiopian criminal law subject to the requirement that the general principles embodied in the Criminal Code shall be applied to these legislations of criminal law, unless otherwise expressly provided therein. Articles 735, 736 and 776 of the Criminal Code refer not only to the petty offences embodied in the Criminal Code but also to other special legislation, i.e. laws, regulations, orders, directives or measures lawfully issued by the appropriate authority.

Decisions of the Cassation Division of the Federal Supreme Court (by a panel of five or more judges) also serve as a binding source (for all courts) in the interpretation of similar legal issues in a given legal provision or set of provisions.[62] The Cassation Division "presided by not less than seven judges may review the same issue by not less than seven judges". [63]

It is to be noted that FSC Cassation Division's decision is not case law, but a binding judicial interpretation. The difference lies in the fact that the decision of the Cassation Division will not have the authority of case law as such, even if its interpretation over a given legal issue is binding on lower courts. In case law, the principles adopted in a given decision are binding legal principles based on which future judicial decisions are made. In other words, the case is cited as law and courts have lawmaking powers though creating precedents where there is gap in the law. Federal Supreme Court decisions, however, are not cited as case law; instead, the interpretation given to a legal provision as applied to given issues and material facts becomes binding on future cases that involve similar issues, facts and material circumstances.

4.2 Sources of the 2004 Criminal Code

The 2004 Criminal Code incorporates most of the provisions of the 1957 Penal Code, and has made amendments to provisions that require changes or clarity. Moreover, the 2004 Criminal Code has incorporated new provisions necessitated by current realities that have unfolded since the promulgation of the former penal code.

The 1957 Penal Code pursued the French pattern of codification and, by way of primary influence, it benefited from the criminal laws of continental Europe (mainly from the penal codes of Switzerland, Germany, Italy, Greece, Yugoslavia and others). The language and cultural diversity of Switzerland justifies the drafter's due attention to the Swiss penal code. Professor Jean Graven, the drafter of the Code, also adopted a few features of the Anglo-American legal family in various provisions such as the ones that deal with young offenders, suspended sentences and probation. The following excerpt from the *Process Verbal* of 1954 indicates the sources of the 1957 Penal Code:

> M. Graven stated that [the draft of the Penal Code] is founded upon a modern and continental base, but suggestions based upon older codes or Anglo-Saxon codes will be taken into consideration only if they do not run counter to the adopted system . . . and if their usefulness is recognized by all.
>
> . . . Graven further responded . . . by citing the diverse national sources which he has used. The Fetha Neguest, the Penal Code of 1930 and all the Negarit Gazeta Proclamations have been examined with the greatest care and taken into consideration each time that it was possible to do so.[64]

Professor Graven reiterates these statements after the promulgation of the 1957 Penal Code.

> . . . The foundation of the [1957] Penal Code was not, in fact, a single, fixed such as the French, Anglo-Saxon or Swiss.
>
> Certainly the Continental System, and the great French model in particular, has been retained with respect to the general juridical method. . . .
>
> . . . Also, the group of experts and the inspiration that they derived from understanding their own national laws had considerable influence on the new Ethiopian legislation. The most modern codes and projects which are generally considered the best –the Swiss, German and Italian among others– were precious sources providing numerous suggestions and solutions.[65]

The Ethiopian Penal Code of 1930, the Fetha Neguest and Ethiopia's legal and cultural tradition were among the sources of the 1957 Penal Code. During the reign of Emperor Haile Selassie I, a radical transition was made in Ethiopia from traditional law to modern law. The Penal Code of 1930 was indeed the first modern code in Ethiopia, and it was enacted on the year of the Emperor's coronation.

The 1957 Code has further departed (in both content and structure) from the 1930 Penal Code and the *Fetha Neguest*. In contrast to the *Fetha Neguest* and tradition, offences (according to the 1957 Penal Code) were not mere private affairs that could be charged or set aside depending on the victim's decision or the decision of a victim's relatives, but were considered public wrongs that involved the State as a principal party in the investigation, prosecution and adjudication process. The 2004 Criminal Code has adopted these features of the 1957 Penal Code.

4.3 Form and Organization of the 2004 Criminal Code

Codes of law of modern legal systems stand on the shoulders of the legacy that has developed through the preceding centuries and millennia. The 1930 Penal Code, the 1957 Penal Code and the 2004 Criminal Code have adopted continental Europe's pattern of codification. Although codified laws discourage initiatives of prompt updating, codification has the advantage of convenience for reference and facilitates organized structure and contextual harmony. The structural organization of the 2004 Criminal Code and the major themes of the Books, Titles, Chapters and Sections can easily be understood from the table of contents. The Code is classified into three Parts that have eight Books: i.e., Part I, the *General Part* (Books I and II); Part II, the *Special Part* which specifies offences and prescribes penalties (Books III to VI); and Part III, the *Code of Petty Offences* (Book VII, the General Part, and Book VIII, the Special Part).

Graven[66] indicates that "[t]he General Part sets out rules common to all serious offences and explains what is meant by a criminal offence, irresponsibility, criminal intention or negligence, imprisonment, probation, limitation, and the like." He also states that "[t]he Special Part describes the various acts which are deemed to be criminal and lays down the penalties applicable thereto" and "defines the elements of the offences such as murder and theft, as well as the fate awaiting a murderer or a thief."[67]

Moreover, Graven underlines the manner in which the specific provisions embodied in the Special Part of the Code should be related with the provisions in the General Part:

> [T]he penalties may not 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 stand by itself but has to be considered together with the General Part. . . . Since those who administer justice . . . are expected to individualize their decisions . . . they must bear in mind the provisions of the General Part, for these provisions . . . will enable them to arrive at a decision truly reflecting the circumstances of each individual case. . . .[68]

Professor Strauss notes that the Ethiopian Penal Code has unduly failed to "state expressly the relationship between the General Part, Part I, and its Special Part, Part II."[69] In the absence of such express statement, "[o]ne is left to infer the obvious, as indeed Ethiopian courts have almost uniformly done, that the 'principles of the General Part of the Penal Code" *also* apply to all offences defined in the Special Part."[70] Such inference, Strauss notes, derive from various provisions such as the following:

> Article 3, aliena 2 states "that the general principles embodied in the Code are applicable to (. . . special laws of a penal nature) except as otherwise expressly provided therein"; and Article 690, [Article 734 in the 2004 Criminal Code] the first article of Part III of the Code, the Code of Petty Offences, states that "In all cases where the provisions of this Book (the General Part of the Code Petty Offences) are either silent or contain contrary indications or do not provide exceptions, the principles and rules of the General Part of the Penal Code shall apply to petty offences . . . due regard being had to the nature of the case, as well as to the spirit and purpose of the law."[71]

The words "Police Regulations" are omitted in Article 3 of the 2004 Criminal Code.[1] Article 734 of the 2004 Criminal Code has a similar content with Article 690 of the 1957 Penal Code except for some changes that are made for the purpose of clarity. It reads "Except in cases where the provisions of the Book state otherwise, the principles and rules of the general part of the Criminal Code shall apply to petty offences, due regard being had to the spirit and nature of the law (Art. 3, Par. 2).

4.4 Looking for a Specific Offence in the Criminal Code

The 1957 Penal Code had systematically and coherently embodied Ethiopian criminal law, and the 2004 Criminal Code has pursued the same framework. As stated earlier, other special legislations that include penal sanctions are also considered part of criminal law pursuant to Art. 3 of the Criminal Code.

The Code is organized into three parts. Part I, the General Part, is composed of Book I –Offences and the Offender (Articles 1-86), and Book II –The Criminal Punishment and Its Application (Articles 87–237). Book I lays down the 'General Principles' as regards to scope of criminal law (Articles 1–22), the offence and its commission (Articles 23–47) and conditions of liability to punishment (Articles 48–86). This is the most technical portion of the Code and is the basic tool in the interpretation of the provisions that embody specific offences. It covers the basic concepts and principles of criminal law, including the principle of legality, nonretroactivity, elements of an offence, causation, attempt, participation, intention, negligence, responsibility, lawful acts, justifiable and excusable acts, extenuating and aggravating circumstances, and others.

The General Part sets out rules common to all serious offences and explains what is meant by a criminal offence, irresponsibility, criminal intention or negligence, imprisonment, probation, limitation and the like. The Special Part describes the various acts which are deemed to be criminal and lays down the penalties applicable thereto; it defines the elements of offences such as murder and theft, as well as the fate awaiting a murderer or a thief.[72]

As noted earlier, the Special Part "does not stand by itself" for the purpose of defining specific offences and its provisions need to be interpreted and applied in synchrony with the relevant provisions of the General Part. In order to look for a specific offence, comprehension about the principles stipulated in Book I is thus mandatory. A person with such knowledge can then proceed to search for an offence in the Special Part (Part II) of the Code, if the act or omission under consideration is not a petty offence.

For instance, we may intend to look for the specific provision that defines the offence of robbery under Ethiopian law. Assuming that the act involves 'robbery of various merchandise from a shop by using violence against the guard at midnight', we will refer to Part II (the Special Part) because robbery is a specific act and not a general principle. We will also disregard Part III because robbery is an apparently grave offence beyond the scope of the Code of Petty Offences. Our reference guide is of course the table of contents of the Criminal Code. Part II embraces four Books, which in turn have Titles. The Titles embody Chapters, Sections, Paragraphs and Articles. As shown in Table 1 below, the 1957 and 2004 Codes have a similar pattern of classifying Books and Titles.

Table 1:
Range of Comparable Provisions in the 1957 Penal Code and 2004 Criminal Code

Part I: General Part	**1957 Penal Code**	**2004 Criminal Code**
Book I: Offences and the Offender	**1–84**	**1–86**
Title I: Criminal Law and Its Scope	1–22	1–22
Title II: The Offence and Its Commission	23–47	23–47
Title III: Conditions of Liability of Offenders	48–84	48–86
Book II: Criminal Punishment and Its Application	**85–247**	**87–237**
Title I: Punishment, Measures and Their Enforcement	85–182	87–177
Title II: Determination, Suspension, Discontinuance & Extinction of Penalty	183–247	178–237
Part II: Special Part		
Book III: Offences against the State or against National or International Interests	**1957 Penal Code 248–382**	**2004 Criminal Code 238–374**
Title I: Offences against the State	248–280	238–268
Title II: Offences against the Law of Nations	281–295	269–283
Title III: Military Offences and Offences against the Armed Forces and Police Forces	296–353	284–342
Title IV: Offences against Fiscal and Economic Interests	354–365	343–354
Title V: Offences against Currencies or against Official Seals, Stamps and Instruments	366–382	355–374
Book IV: Offences against the Public Interest or the Community	**383–520**	**375–537**
Title I: Breaches of Confidence	383–403	375–395
Title II: Requirements of Secrecy	404–409	396–401
Title III: Offences against Public Office	410–437	402–442
Title IV: Offences against the Administration of Justice	438–459	443–465
Title V: Offences against Public Elections and Voting	460–470	466–476
Title VI: Offences against Law, Order; Breaches of Peace	471–487	477–493
Title VII: Offences against Public Safety and the Security of Communications (and Transport)	488–502	494–513

Title VIII: Offences against Public Health	503–520	514–537
Book V:	**1957 Penal Code**	**2004 Criminal Code**
Offences against Individuals and the Family	**521–626**	**538–661**
Title I: Offences against Life of the Person	521–551	538–579
Title II: Offences against Liberty	552–573	580–606
Title III: Offences against Honour	574–588	607–619
Title IV: Offences against Morals and the Family	589–626	620–661
Book VI:		
Offences against Property	**627–689**	**662–733**
Title I: Offences against Rights in Property	627–670	662–715
Title II: Economic and Commercial Offences	671–689	716–733
Part III: Code of Petty Offences		
Book VII: General Part		
Title I: Directives Governing Liability to Punishment	690–701	734–745
Title II: Rules Governing Penalties	702–732	746–775
Book VIII: Special Part		
Title I: Petty Offences against Public Interests and the Community	733–792	776–837
Title II: Petty Offences against Persons and Property	793–820	838–865

To look for a specific provision that criminalizes a certain act or omission, we need to primarily look through the table of contents of the Criminal Code and pay attention to the headings of the four Books in Part II. After having identified the relevant Book, we ought to do the same towards identifying the relevant Title, and its subdivisions.

For example, in our search for the relevant provisions on robbery, we can easily narrow down our range of reference by setting aside Books III, IV and V, because Book VI, Offences against Property, immediately captures our attention. Furthermore, we will definitely choose Title I (Offences against Rights in Property) as the most relevant. Looking at the table of contents of Book VI, Title I, we will find Chapter I, General Provisions; Chapter II, Offences against Property; and Chapter III, Offences against Rights in Property.

'General provisions' are of course always relevant. Skimming through the headings of the provisions under Chapters II and III, we will realize that Chapter II is relevant for our purpose. Once again we will get three Sections under Chapter II. We can forthwith disregard Sections II and III, which

respectively deal with immovable property and damage to property. We will then be left with Section I, Offences against Movable Property. And finally, a careful reading of the heading of Articles 665 through 684 will enable us to choose Articles 670 and 671. These two provisions and the General Provision that lays down the 'principle' (Article 662) are thus the ones that are relevant to the offence of robbery. The act(s) of the defendant, resultant harm, the material circumstances and the defendant's guilt will then determine the provision that must be applicable.

We are not required to recite every provision (or most provisions) in the Special Part (Articles 238–733) of the Criminal Code or in the Special Part of the Code of Petty Offences (Articles 776–865). All we need is a method that can enable us to identify the relevant provision(s) (if any) that is (are) violated by a certain act or omission.

Determining the relevant provision(s) is not an end in itself. It has to be read within the context of all provisions that are relevant to the issue(s) under consideration. It must also be noted that every element of the provision(s) must be related to the established facts and material circumstances. The following four cumulative elements of Article 670 (one of the provisions we had identified earlier) clarify this point.

Whosoever:

1. with intent to obtain (or procure to a third person) an unlawful enrichment, and,
2. with the intention of facilitating his act of abstracting of a movable thing belonging to another person,
3. uses violence (or direct grave intimidation) towards a person (or otherwise renders such person incapable of resisting),
4. during (or after) the commission of the offence

is punishable with rigorous imprisonment not exceeding 15 years.

The terms 'intent' (in the first element) and 'intention' (in the second element) require reference to the General Part of the Criminal Code, which defines *criminal intention*. The terms 'violence,' 'intimidation' and 'commission of the offence' (in the third and fourth constituent elements) require reference to the relevant provision(s) in the General Part. Such terms, which are found in almost every provision on specific offences, inevitably lead us to the remaining two elements of punishable offence: the *material* and *moral* elements, embodied in the General Part of the Criminal Code.

Readings on Section 4

Reading 1: Peter Strauss[73]

[The Fetha Nagast]

...

There is general agreement that the Fetha Nagast had its immediate source in a compilation made in Arabic from the original Greek for use of the Egyptian Coptic Church, by a thirteenth century Christian Egyptian jurist usually referred to as Ibn Al'-Assal. (Until recent times, the Ethiopian Coptic Church was a dependency of the Egyptian church and, at least in name, its prelates came from there.) Ethiopian tradition traces the Fetha Nagast's origins back as far as the 318 sages of the Council of Nicea, during the reign of the (Christian) Roman Emperor Constantine. Just when it came to Ethiopia and was translated into Ge'ez (the Ethiopian ecclesiastical language equivalent to Latin) is uncertain, but accounts that seem to have a fair grounding in historic fact have it brought up the Nile at the request of the mid-fifteenth century emperor Zara Yacob, seeking a written basis for law by which to govern. What he received was a document at least as concerned with ecclesiastical as secular matters, and it may well have had more use in church than official circles. …

Little is known about its actual use in connection with Ethiopian law-administration. There are accounts of consulting it in important criminal contexts from the moment of its arrival. Prof. Aberra Jembere reports:

> When exactly the Fetha Negest became an integral part of the Ethiopian legal system is not yet definitely established. Nor is it known when it started to be cited as an authority in the process of adjudication of cases by courts. . . . Even though the Fetha Negest cannot be said to have been codified on the basis of the objective realities existing in Ethiopia, it was put into practice as well as interpreted in the context of Ethiopian thinking, and all this has given it an Ethiopian flavor. It was, however, formally incorporated into the legal system of Ethiopia only in 1908 by Emperor Menelik II, when he established ministries for the first time in Ethiopia. The law that established ministries and defined their powers and duties laid down the following as one of the functions of the minister of justice: "He shall control whether any decision has been given in accordance with the rules incorporated in the Fetha Negast.". . . The criminal provisions of the Fetha Negest were applied in Ethiopia until they were replaced by the 1930 Penal Code of Ethiopia.[*An Introduction to the Legal History of Ethiopia, 1434–1974,* African Study Center of Leiden University, The Netherlands (Lit Verlag 2000), p. 194]

That code, like those produced in mid-century at the behest of Emperor Haile Selassie, took the Fetha Nagast as a starting point.

Perhaps, then, the principal importance of the Fetha Nagast, certainly today, is as a symbolic document –and that, at many levels. It strongly reflects the Christian heritage of the Ethiopian highlands ... .

Reading 2: Jean Graven[74]

. . . From Traditional Law to Modern Law

. . . Until the recent dawn of modern times and the beginning of the new Ethiopian Empire, indeed, up to the promulgation of the Penal Code of 1930, which occurred with the advent of the present Emperor, Ethiopia had no unified, written or codified legal system. The principal origins of law were the *Fetha Negast*, for the Coptic-Christian populations of the ancient provinces; the Moslem law, for the populations of Harrar and the coastal areas of the Red Sea; and the customary law, for the other regions of the country . . .

1. The "Law of the Kings" or "Fetha Negast"

The *Fetha Negast* [or *Neguest*] is a juridical and social monument of the first order which embraces the religious and the civil domains at the same time. Its extraordinary influence on Ethiopia is explained by the fact that this country has, from time immemorial, attached itself to the Coptic Church of Alexandria. Its first bishop, Saint Frumentius (for the Ethiopians, Aba Salama, Father of peace) was consecrated by Athanasius, defender of the Nicaea faith, shortly after his promotion to patriarch of Alexandria in 328. Later, in the 13th century, the patriarch Cyrill III (1235–1243), anxious to introduce a general reform of his church which had been weakened and threatened from all sides, established a code, or more accurately, a compilation of religious and civil precepts which was to serve as a guide. The sources of the Cyrilian Code are the old and the New testaments, a certain number of apostolic writings, the canons of the first councils and some writings of various fathers of the Church . . . The Fetha Negast expressly refers to Constantine and to the "Three Hundred Sages" or "Wise Men" (Selest Meeti, the 318 Fathers of the Church), who are reputed by Ethiopian tradition to be the authors themselves. . . . Translated into Ge'ez, the learned language of the Ethiopian Church, and adopted, they say, upon the order of Emperor Zara Yacob (1426–1460) –a prince who loved justice so much that he condemned his own son to death for the murder of a slave, and who studied the "Law of the Kings" assiduously. This law was received as a true canon and lay code of law, with its contents in some way inviolable and sacred, which the priests, scholars and jurists taught, explained and caused to be respected throughout the generations. . . .

. . . One cannot help being struck by the loftiness of the rules and their perfect accord with the time. The narrow and pitiless talion law under which the punishment is in proportion to the harm done has long been extinct. Concrete cases are cited, for laws develop only slowly from the specific case to the abstract rule, from the "casuistry" (that part of theology that deals with cases concerning conscience) to the doctrine from which there appear the principles that dictate them, especially concerning problems of responsibility and guilt, participation, penalty and its proportion to the fault. Mistake and coercion, legitimate defense and necessity, instigation, complicity and being an intervening causes and brawls, which still worry jurists nowadays, are resolved in nuances with remarkable common sense and juridical finesse. The "personality of the fault" is clearly defined: "Fathers are not to be put to death instead of their sons; a son is not to be punished for his father's crime, nor a

father for his son's." So too is the principle of the "individualization" of the punishment, "Do not judge all crimes with the same judgment: the punishment for he who sins by actions is not to be the punishment for he who sins by word or deed." There are certain wrongdoers against whom one must become only irritated and whom one must scold; for others, one must order the giving of alms or fasting, still others must be banished from the church in proportion to the crime committed; for the Law of Moses does not impose one punishment for all the guilty. The punishment for one who commits a crime voluntarily is not the same as the punishment for one who does so involuntarily. For some the penalty of death is due, for some a flogging, for some a levy on their goods, and for others the punishment of the "talion"; they must suffer what they made another suffer. "Know then a different punishment for each guilty one in order that there not be any iniquity on your part, for it is said, as you judge, so shall you be judged."

Therefore, the application of the principles of the penal law found in the "Law of the kings," in light of Christian canons and doctrine concerning personal fault and its reparation, is worthy of attention and is very advanced for its time. Bearing in mind the conditions at the time, as well as the fact that harsh punishments did not shock anyone because they were in accordance with the popular sentiments and seemed perfectly adequate to what might be called the "criminal policy" of the epoch, it must be conceded that the said principles often correspond to what is required today of a law subjectively evolved. Ancient corporal punishment was, incidentally, on the decline at the time of the penetration of western ideas into this high fortress which Ethiopia represented and the Penal Code of …1930 will have no trouble leading almost effortlessly into a *new regime*.

2. The First Ethiopian Penal Code (… 1930)

The first effort at modern codification in Ethiopia was accomplished in the domain of penal law. This was natural, since this is the law which above all others needed to be separated from ancient customs in order to be adapted not only to the needs of present day "criminal Policy," but also to the demands of individual protection and to the principles of legality included in modern written law, so as to create the conditions for a better and more general enforcement of the law at a time when Ethiopia was opening its doors to international relations, trends of modern thought and foreigners.

The Ethiopian Penal Code of 23 Tekemt, 1923 (Ethiopian Calendar) or of November 2, 1930 (Gregorian Calendar) was proclaimed on the occasion of the crowning of the reigning Emperor, His Imperial Majesty Haile Selassie I. Conceived in the fashion of our codes, it includes an important Preamble of 22 articles, which expresses, according to the Sovereign who gave it to His people, its reason for being, its spirit, its scope and the results which it expects to attain. A General Part covers the general principles concerning offences and liability to punishment (Book I); the Special Part contains the definitions and the punishment for offences against the State, persons and property, as well as petty offences.

The preamble, reflecting a feeling for progress and for equity, has demonstrated well (in its Articles 5, 15 and 16) how a modern legislator can still be inspired by the spirit of justice and correction of the *Fetha Negast* or of the "*Law of the kings*," and it has pointed out justly (Article 3) that the principles of the modern European Codes used as models are still often very close to those which are found expressed in this venerable legislation, a fact which is not surprising after what we have said about the Ethiopian judicial tradition being tied in with the great Christian trend. . . . The Code of …1930 is a first interesting attempt which is praiseworthy in this sense, as it has opened the paths toward the delicate task of modernizing and codifying Ethiopian law in general.

A primary fundamental advantage of the Code is the defining, in an exact fashion, the crimes and respective punishments . . .

A second attribute of the Code is that it not only defined, and restricted but also considerably softened and improved the penalties. . . . Mutilations were fundamentally abolished and totally excluded, and the remaining traces of the talion were forbidden. After much hesitation, and in keeping with the example of other countries, such as England, only flogging was kept as a form of corporal punishment . . .

A third very interesting and very acceptable aspect in the principle, if not in the form in which it had been operated, is the manner in which this first Code, within the just idea that one who is higher placed, more cultured or more favored by good fortune is generally more guilty and must be more seriously punished so that a true equality and a tempered judicial treatment may be assured, has strained to individualize a penalty by making it proportionate to the crime, the rank, the duties and the resources of the criminal. . . .

Finally, the Code of … 1930 has also created a well expressed special part, setting its sights on the three great classic categories of protected interests; the state and collectivity (Book II, Articles 160 to 272), persons (Book III, Articles 273 to 415), and property (Book IV, Articles 416 to 418). One can find therein most of the usual crimes with their penalty. . . . A certain number of these provisions have been able to serve as points of departure, inspiration, or comparison for the provisions of the new Code, after naturally having been methodically reviewed, completed and adapted to the present practical and juridical requirements. For it is obvious that this first transitory legislation did not suit modern requirements. It presented still too many vestiges of the ancient system which were both formalistic and rigid according to the ancient universal tradition (Articles 404 to 419), such as the application of various fines and their rates, similar to those of the customary feudal law (Articles 52 to 142), the general conception of extenuating and aggravating circumstances, excuses and justification, no longer corresponding to an elaborate methodic system for keeping an account of the extent of a crime and its punishment (Articles 46 to 51, 145 and 151), or the regulation of homicide and its penalty, still partly based on the old rule of agreement with the family of the victim and payment of blood money in case of excusable homicide. In this sort of compromise between traditional principles which still had a marked private character and the necessity of regulations and modern public order, there was an element of

perplexity and of difficulties which had to disappear. . . .

…

4. The Directives for the New Penal Code

Such was the foundation upon which was to be built a new, complete and clear penal law in accord with "Directives" revealed by His Imperial Majesty, the Emperor, at the opening session of the consultative commission for the new legislation on March 26, 1954 . . .

As for the method to be followed, two essential principles were to serve as a guide and were reaffirmed in the Imperial preface of the new Code, in a way, although Ethiopia might justly claim "what is, perhaps, the longest-standing system of law in the world today" the Emperor observed, "we have never hesitated to adopt the best that other systems of law can offer, to the extent that they respond and can be adapted to the genius of our particular institutions" . . . "The point of departure must remain the genius of Ethiopian legal traditions and the institutions which have origins of unparalleled antiquity and continuity." It would not be fitting simply to copy foreign codes, however good and famous they might be, without considering the historical and political development of which they are the product or the conditions and customs for which they were made, nor those often so totally different from the country for which they are intended.

Therefore …, it was a question of elaborating a system of penal legislation which would be totally original and truly national, corresponding to the tradition of justice, the vital needs and the possibilities of enforcement in this country. This difficult work of complete renovation in keeping with the Ethiopian spirit, animated by the best contributions possible from foreign legislative experience, the method of work adopted, and the cooperation of the Legislative Commission were to make possible its realization in spite of foreseeable obstacles. These were surmounted in a relatively rapid and, we trust, satisfactory manner, since the commission, as well as the parliament, considered that this adaptation of Ethiopian realities and needs had met the demands of tradition and recent progress, of the past and of the future. . . .

[After a detailed description of the new code and several of its innovations, Professor Graven makes the following brief statement concerning specific foreign sources of the Code.] Every effort has been made to formulate each precept methodically, in a way which is easy to grasp and, so to speak, popular without including technical or complicated terms. Inspiration has been drawn from the methods of Bellot, in the Genevan codification of the last century, and of Eugene Huber and Carl Stooss in the more recent Swiss Civil and Penal Codes. …

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5. Application of Ethiopian Criminal Law

The parties in a criminal proceeding are the public prosecutor representing the State and the defendant who is accused of having committed a crime. The public prosecutor files charges against offenders on behalf of the State, because, as stated earlier, crimes (unlike moral and civil wrongs) are public wrongs that are harmful to the public at large. Most of the provisions that specify offences do not require the victim's complaint as a perquisite for filing a charge. Nor does withdrawal of complaint by the victim terminate the charge.

However, certain offences[75] are charged only upon complaint of the victim.[76] According to Article 221 of the 1957 Penal Code, the victim of an offence chargeable upon complaint could at any time withdraw his complaint and in effect terminate the prosecutor's right to prosecute the case. The 2004 Criminal Code is silent in this regard. The *exposé des motifs* (*Hateta Zemiknyat*) of Article 213 of the 2004 Criminal Code states that Article 221 of the 1957 Penal Code ought to be part of the Criminal Procedure Code rather than the Criminal Code.

Upon report, accusation or complaint against the commission of an offence, the criminal justice process involves the following:

1. Investigation by the police.
2. Examination of the case and instituting charges by the public prosecutor.
3. Defence by the defendant and his defence counsel.
4. Judicial decisions.
5. Enforcement of sentences, custody, reform and rehabilitation by the prison administration.

The efficient and effective administration of criminal justice (which involves the police, the prosecutor, courts and prison administration), like all law enforcement endeavours, requires sustained march towards narrowing down and ultimately eliminating the gap between the stipulations in the law and their actual application. Various principles govern the application of the 2004 Criminal Code. It "applies to all alike without discrimination"[77] and does not apply retroactively to the disadvantage of the accused in the definition of offences.[78] Nor does the Code impose graver penalties that were not prescribed at the time of the commission of the offence. The scope of application of Ethiopian criminal law also involves the issue of application as to place in terms of principal and subsidiary jurisdiction.[79] The principles of equality, non-retroactivity and jurisdiction of courts in the application of criminal law are highlighted below.

5.1 Equality before the Law

The principle of equality is embodied in constitutional law, civil law, penal law and UN conventions on human rights. As stated in Article 4 of the Criminal Code, criminal law applies to all alike aside from certain immunities provided by the law. These exceptions are stated in the second paragraph of Article 4 as deriving from "immunities sanctioned by public international and constitutional law" or they may "relate to the gravity of crime or the degree of guilt, the age, circumstances or special personal characteristics of the [offender], and the social danger which he represents."

Aside from these exceptions, criminal law is equally applicable to everyone irrespective of social status, race, religion, sex and other factors. The immunities enshrined in constitutional law and public international law can easily be identified. With regard to the third exception, the rationale of unequal sentencing is not to create inequality among offenders who might have committed similar offences. But factors such as degrees of guilt, various circumstances, recidivism, and the like render equal sentencing impossible. Although mathematical precision is impractical, courts should not impose drastically varying sentences on two offenders with similar acts and moral guilt.

5.2 The Principle of Nonretroactivity

The purpose of nonretroactivity is to make sure that citizens shall in no way be punished for acts which were not punishable offences when they were committed. The principle of nonretroactivity also secures citizens against retroactive enforcement of more severe penalties embodied in new laws.

Articles 5 to 10 demarcate the period of time over which the Criminal Code is applicable. The principle of nonretroactivity (stipulated under Articles 5 and 6) enforces the principle of legality embodied in Article 2 and prohibits the enforcement of criminal law over a period prior to its enactment. Accordingly, the 1957 Penal Code was applicable to an act committed before May 9, 2005, if the act constituted an offence in both the 1957 Penal Code and the 2004 Criminal Code. If a given act committed prior to the promulgation of the Code was not declared an offence under the former Penal Code, it was not punishable even if it constituted an offence under the current Criminal Code. However, an act which was classified as an offence under the 1957 Penal Code ceased to be so if the new Criminal Code does not consider it an offence.[80] This is justified by the rationale that the new Code should not punish what it does not consider as a crime.

The major exception to the principle of nonretroactivity is if the new Code is to the offender's advantage.[81] That is to say, if the 2004 Criminal

Code is more favourable to the offender, the court shall allow retrospective application of the new Criminal Code for acts performed before its promulgation. For example, in *Cassation No. 105289*, the FSC Cassation Division has rendered a binding interpretation (on Megabit 15, 2007 Ethiopian Calendar/ March 24 2015) that the former Sentencing Guidelines (የወንጀል ቅጣት አወሳሰን መመሪያ ቁጥር 1/2002) that was issued in May 2010 shall apply if it is favorable to the accused person for the offence that was committed before the issuance of Revised Sentencing Guidelines No. 2/2013 (የተሻሻለው የወንጀል ቅጣት አወሳሰን መመሪያ ቁጥር 2/2006) in 2013.

Articles 7 to 10 specify the permissible applications, which include imposition of measures,[82] period of limitations, enforcement of judgments passed under repealed legislation, and application for reinstatement and for the cancellation of entries in the judgment register.

5.3 Principal and Subsidiary Jurisdiction of Courts

Although the issue of jurisdiction falls under procedural laws, the Criminal Code has laid down the basic principles of principal and subsidiary *judicial jurisdiction*. A court is said to have jurisdiction over a given case where it has the judicial, material and local jurisdiction of adjudication. Such classification is usually used in civil cases, yet it may also facilitate conceptual comprehension regarding jurisdiction of courts that adjudicate criminal cases.

Judicial jurisdiction refers to the jurisdiction of courts in a given legal system to adjudicate or try a given case. The type and gravity of an offence determine *material jurisdiction*, i.e. the level of the court that adjudicates or tries a case. The category of criminal cases that are heard at the various levels of the court system indicates material jurisdiction. And a particular court (among courts of the same level that have material jurisdiction) is said to have *local jurisdiction* on the basis of its spatial or physical proximity to the commission of an offence or the resultant harm.

The issues of principal and subsidiary jurisdiction embodied in Articles 11 to 20 of the Criminal Code deal with judicial jurisdiction. These provisions determine the cases over which Ethiopian courts have principal jurisdiction (i.e. original jurisdiction to try offenders). The rationale of entrusting Ethiopian courts with such jurisdiction emanates from the principal concern of Ethiopia over certain offences.

According to Williams:

> Jurisdiction in [English] criminal law is generally territorial. One of the exceptions is murder . . . by a British citizen. Also, in the case of result-crimes and attempts to commit them, our law assumes

> terminatory jurisdiction even where the act itself was committed abroad. Conversely, our law does not assume initiatory jurisdiction where the intended result was to take place outside England and Wales, except that conspiracy here to murder elsewhere is, by statute, punishable here.[83]

Ethiopian courts have *principal jurisdiction* (original jurisdiction to try offenders) over:

- Ethiopians and foreign nationals (not having immunity under public international law) for offences committed on Ethiopian territory (Article 11)
- any person who in a foreign country commits an offence against Ethiopia (Article 13)
- Ethiopians who commit offences in a foreign country where they enjoy diplomatic immunity (Article 14)
- offences against international law and military offences (Articles 269–322) committed in a foreign country by members of the armed forces (Article 15(2))

Under the aforementioned circumstances, an offender sentenced or acquitted in a foreign country shall be tried and sentenced again by Ethiopian courts.[84] But the court shall deduct the punishment already undergone if the offender has faced punishment in a foreign country.

With regard to offences that do not directly and chiefly concern Ethiopia, our courts have *subsidiary jurisdiction.* Such jurisdiction is derivative and not original. Under these circumstances, Ethiopian courts substitute foreign courts in trying offenders who ought to have been (but have not been) tried in a foreign country. Such a subsidiary jurisdiction involves

- offences committed by members of the Armed Forces against the ordinary law of a foreign country (Article 15(1)
- offences committed in a foreign country "against international law or international offence specified in Ethiopian legislation, or an international treaty or a convention to which Ethiopia has adhered" (Article 17(1)(a))
- offences committed in a foreign country "against public health and morals specified in Articles 525, 599, 635, 636, 640, or 641" (Article 17(1)(b))
- offences committed abroad against an Ethiopian national or offences committed by Ethiopians while abroad, if the offence is punishable under both laws and is grave enough to justify extradition (Article 18(1))
- other offences (punishable by rigorous imprisonment of not less than 10 years) committed by nonextradited foreigners (Article 18(2))

Foreigners who have committed ordinary (i.e. nonpolitical) offences outside Ethiopia may be extradited [85] according to extradition laws, international treaties and international custom, where the offence does not directly and principally concern Ethiopia. However, no Ethiopian shall be extradited from Ethiopia; he "shall be tried by Ethiopian courts under Ethiopian law."[86]

Articles 3 to 7 of the Federal Courts Proclamation No. 1234/2021 deal with the common jurisdiction of federal courts. With regard to criminal jurisdiction, Article 8 lists dwon the criminal offences that are under the jurisdiction of federal courts.

6. Basic Principles of Ethiopian Criminal Law

At the foundation of criminal law are certain fundamental principles. They can be stated generally as follows:

- legality
- *actus reus*, the 'guilty act': conduct in the form of an act prohibited by law or omission of act required by law
- *mens rea*, the 'guilty mind': moral blameworthiness, criminal intention, or negligence
- concurrence of *mens rea* and *actus reus*
- occurrence of harm (where it is an ingredient of the offence) and causation
- prescription of punishment under criminal law

These principles are discussed in the following sections in light of their embodiment in the Ethiopian Criminal Code.

6.1 The Principle of Legality

6.1.1 The Principle of Maximum Certainty of Offences and Penalties

The principle of maximum certainty requires that offences and their corresponding penalties be clearly defined. It guarantees 'fair warning' and should be free from vagueness and ambiguities. Article 2, Sub-Article 1 requires the enactment of provisions that specify acts or omissions that are considered crimes, and provisions that state the corresponding penalty or measure that shall be imposed on each crime. Sub-Article 2 embodies Roman law doctrines that are the cornerstone of this principle of certainty. Primarily, *courts cannot punish acts or omissions which are not prohibited by law*.[87] And, secondly, *courts cannot impose penalties or measures other than those prescribed by law.*[88] Courts cannot at their own discretion impose

sentences outside the range stated in the law, subject to mitigating and aggravating circumstances stipulated in the law.

These principles of legality are Roman law doctrines embodied in almost every modern legal system. They are, in short, "No crime unless specified by law (*Nullum crimen sine lege*)" and "No penalties other than those prescribed by law (*Nulla poena sine lege*)," which are briefly described as follows:

> The principle of legality or *nullum crimen, nulla poena sine lege* covers both prohibited criminal conduct (*nullum crimen sine lege*) and sanctions for it (*nulla poena sine lege*). In its broadest sense, the principle of legality encompasses the following in respect of criminal provisions: (1) the principle of non-retroactivity (*nullum crimen, nulla poena sine lege praevia*); (2) the prohibition against analogy (*nullum crimen, nulla poena sine lege stricta*); (3) the principle of certainty (*nullum crimen, nulla poena sine lege certa*); and (4) the prohibition against uncodified, i.e. unwritten, or judge-made criminal provisions (*nullum crimen, nulla poena sine lege scripta*). In sum, this means that an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached.[89]

In continental criminal codes the principle of certainty of offences and punishment is further materialized in the embodiment of this requirement as one of the elements of an offence. For example, Article 23(2) of the Ethiopian Criminal Code states the legal element as one of the constitutive elements of an offence, thereby rendering legislative definition of an offence and determination of the punishment mandatory by virtue of Articles 23(1), 2(1) and 2(2). The legal element of offences is further discussed in Chapter 2, Section 1.

6.1.2 The Principle of Strict Interpretation and Prohibition of Analogy

The second paragraph of Article 1 states that criminal law "gives due notice" of offences and penalties as means of achieving its purpose. If this preventive notice fails, criminal law ultimately resorts to punishment. The 'due notice of offences and penalties' is one of the pillars of the 'principle of legality' embodied in Article 2, a principle that requires the express statement of acts or omissions that constitute offences and the penalties to be imposed upon their commission. This principle safeguards citizens against arbitrary acts by prohibiting the punishment of acts or omissions not stated in the criminal law and the imposition of penalties other than those prescribed by law.

Article 2 further forbids the ‘creation of offences by analogy,’ thereby requiring courts to be confined to ‘interpretation in cases of doubt’. If an act is not at all referred to as an offence in the Criminal Code, the court cannot declare it an offence by analogy (i.e. by comparing the act with another offence stated in the Code). This does not, however, rule out interpretation in cases of ambiguity, inconsistency or unreasonable wording of a provision that refers to an act in question. Strauss makes the following distinction between forbidden analogy and permissible interpretation:

> . . . When a criminal statute provides warning that a certain act is considered criminal . . . then that statute may be applied to punish that act. . . . When no statute provides a warning, either by direct statement or by wording which the reader would think might apply, then the court may not punish the act. ‘[Creation] of offenses by analogy’ would then be the finding of the offense when a person, reading the statutes, would think none existed. The right to interpret is the right to give a statute [a] meaning . . . in accordance with legislative purpose and spirit . . .[90]

The power of courts to interpret the law is only allowed in cases of doubt.[91] A court may be in doubt under various circumstances. Where the law is clear, the issue of interpretation should not arise. But there are instances where clear readings lead to unexpected and unreasonable absurdities. Or a certain legal provision may be ambiguous or contradictory, thereby putting the court in doubt. In this regard, Article 2(4) of the Criminal Code provides that in cases of doubt, the court shall interpret the law in accordance with the meaning and purpose intended by the legislature.

Krzeczunowicz[92] enumerates three kinds of interpretation: doctrinal, legislative and judicial. *Doctrinal* (i.e. academic) interpretation may be persuasive, but it is not authoritative and binding. *Legislative* interpretation (i.e. legislation enacted to solve ambiguities and inconsistencies) is conclusive and relatively explicit. *Judicial* interpretation occurs in due course of court judgments over cases. Although Professor Krzeczunowicz predominantly deals with civil law, his points are equally relevant to criminal law. In his discussion of the prohibition of analogy in penal law whenever the law is silent, he offers the following methods of interpretation:

- When the law is ambiguous, ‘word meaning’ should be interpreted through
    - overall context,
    - the specific meaning of general terms, and
    - positive interpretation.

In cases of ambiguity, positive interpretation should in no way be construed to the disadvantage of the accused.

- Where a provision is neither clear nor fully explained by the context, the judge should examine what the legislature had in mind.
- Where two or more laws of different ranks are contradictory or inconsistent, a higher law prevails over the lower. For example, constitutions prevail over statutory laws, and statutes (e.g. proclamations) supersede executive ordinances (e.g. regulations).
- If laws of the same rank contradict:
    - Posterior law prevails over prior law.
    - Special law prevails over general laws.
    - Inexplicable repugnance in the same law will require interpretation by overall context, reason and legislative intent.

Strauss notes that there may be words in a legislation which can be susceptible to different meanings by different persons[93] and states the need to examine legislative purpose:

> [T]he interpreter's first response will be to ask "What is this statute all about? What was it meant to do?" That is, he will make several important assumptions: (1) the legislative activity is purposeful, that is, undertaken to accomplish some social ends or goals; (2) that the language and form of legislation are chosen to reflect these purposes; and (3) that application of a statute should be limited to the cases indicated by its purposes so that, in connection with our earlier assumption, for a statute to apply, its words and purposes should both bear on the case at issue. . . .[94]

Moreover, Strauss states that the framework of the Code is a rational and consistent system of laws, thereby necessitating the consideration for consistency during interpretation. He underlines the following assumptions:

- "It is fair to attribute consistency to the Penal Code, and thus to seek consistency in results under the Code."
- "It is fair to assume that language usage is consistent throughout the Code."
- "At least initially, one may seek solution to all problems within the framework of the Code."
- "It is fair to interpret the Code to avoid redundancies between provisions."[95]

Strauss holds that "in case of conflicts, the provision of the Special Part prevails over that of the General Part."[96] He further notes the relationship of provisions as applied to particular offences and discusses the issue of cross-references within the Code. He also shows the legal limitations in the

process of interpretation by duly offering an explanation of the principle of legality[97] and its embodiment in the Ethiopian legal regime.

Graven notes that the meaning intended by the legislature "may be sought from 'within' (i.e. grammatical or logical interpretation) or from 'without' (i.e. historical interpretation)" in light of "the purposes of the law as defined in Article 1 and the particular purposes of the provision calling for construction".[98] If, however, "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."[99]

For example, in *R v. Taylor* (England, 1950)[100] the Court of Appeal (Criminal Division), facing a conflict of precedents, adopted the view which favoured the defendant. According to Ashworth, "[t]he foundation of this view probably lies in the inequality of power and resources between the individual defendant and the state, a justification also influential in the presumption of innocence."[101] Such interpretation is used only if doubt remains after examining legislative purpose.

6.1.3 The Prohibition of Double Jeopardy

By virtue of Article 2, Sub-Article 5, "nobody shall be tried or punished again for the same crime for which he has already been convicted, punished or subjected to other measures or acquitted by a trial decision in accordance with the law." This principle forbids double jeopardy and has its source in the Roman law doctrine *Non bis in idem*. But it should be noted that a single sentence may embody more than one item of punishment (e.g. imprisonment and payment of fine).

6.1.4 The Principle of Nonretroactivity

The principle of nonretrospective application of criminal law (Article 5), as discussed above (in Section 5.2), holds that no one shall be punished for an act that was not an offence during the period of its commission, nor shall a graver penalty be imposed other than the one that was in force when the offence was committed.

6.2 Principles Regarding Criminal Guilt, Act, Harm and Causation

In addition to the principles of legality stated in Article 2, which mainly refer to the legal element of offences, there are provisions under the General Part of the Criminal Code that deal with criminal guilt, act (conduct), harm and causation. The basic principles of criminal law that are embodied in Articles 23 to 41 and Articles 57 to 59 are summarized next.

6.2.1 No Liability for Mere Bad Act in the Absence of Criminal Guilt[102]

This principle states that a finding of criminal liability requires *mens rea*, or moral guilt (i.e. criminal intention or negligence).

Illustration

Ato X had lunch at a restaurant. As he was leaving, he took an umbrella that belongs to Ato Y in the belief that it was his own.

Even though Ato X took another person's umbrella, there is no criminal liability because there is no criminal intention. The offence of theft is committed where:

- a person
- with intent to obtain for himself or to procure for another an unlawful enrichment
- abstracts a movable or a thing detached from an immovable
- [that is] the property of another
- by taking and carrying or by direct appropriation or by having it pass indirectly to his own property.[103]

In this illustration, the elements of 'abstracting a movable' 'that belongs to another person' 'by taking it' are met. But *criminal intention* must exist for the act to be considered an offence of theft.

6.2.2 No Liability for Mere Bad Thought in the Absence of an Act or Omission[104]

Mere criminal intention or thoughts of a person to commit an offence are beyond the concern of criminal law. There must also be the material element of the offence in the form of an act (or omission) that constitutes complete offence, an attempt (Article 27), or in certain cases a preparatory act (Articles 256, 257, 274, and others.). If, for example, A intends to commit a crime against the property of B, A must have not only the intention but also engage in conduct that constitutes a criminal act or preparation for a criminal act (where preparation is punishable) to be charged with an offense.

6.2.3 No Liability without Causal Link between an Act (or Omission) and Resultant Harm[105]

The following illustrates the requirement of causal link between act and result:

> [I]f A shoots at B intending to kill but misses, but at that moment B drops dead of some cause wholly unconnected with the shooting, A is not liable for the murder of B, in spite of the simultaneous existence of the two required ingredients, A's intentional conduct and the fatal result. What is missing is the necessary causal connection between the conduct and the result of conduct; and

causal connection requires something more than mere coincidence as to time and place.[106]

Causation involves two considerations, stated in Article 24(1): whether the offence was in fact the consequence of the accused person's act or omission, and whether the act or omission of the accused was the decisive cause of the offence. The test of causation for the purpose of criminal liability is the 'adequate' or 'effective' causation test, according to which the act or omission of the accused must "in the normal course of things produce the result charged".

Illustration

A inflicted physical injury on B, causing B to be taken to a hospital. There, B contracted meningitis, from which he died some days later.

Had B not been injured by A, he would not have gone to hospital and would not have been infected by meningitis and died as a result, hadn't he gone to hospital. Thus B's death is the consequence of A's act. In other words, A's act of injuring B was the necessary condition for the chain of events that caused B's death. Yet *adequate causation* is required under Article 24(1). The issue of whether A's act *normally* causes death determines whether A has committed homicide. Causation is discussed in Chapter 2, Section 2.3.

6.2.4 No Offence without the Concurrence or Fusion of Act (or Omission) with Criminal Guilt

The Latin phrase *actus non facit reum nisi mens sit rea* may be translated as "an act does not make a man guilty of a crime unless his mind is also guilty".[107] This means that "criminal liability not only requires proof of the presence of both the *actus reus* and the *mens rea*, but also that there must be coincidence or concurrence of mens rea with the act which causes the actus reus."[108] Both must exist contemporaneously and in the manner required by the elements of the provision that define the offence.

Illustration

In the Indian case of *Palani Goundan v. Emperor*,[109] "[t]he accused struck his wife a blow on her head with a ploughshare, which, though not known to be a blow likely to cause death, did, in fact, render her unconscious and believing her to be dead, in order to lay the foundation of a false defence of suicide by hanging, the accused hanged her on a beam by a rope and thereby caused her death by strangulation, and it was held by the Full Bench that the accused was not guilty of either murder or culpable homicide not amounting to murder as the original intention was not to cause death but only to cause injury and the second intention was only to dispose of a supposedly dead body in a way convenient for the defence. . ."

There are two criminal acts in this case: the act of striking and the act of hanging. The first act was not committed with the direct intention to kill. In the second act Goundan believed that he was hanging his wife's corpse, while in fact she was alive but unconscious. Goundan's intentions and actions were thus not concurrent.

Under the 2004 Criminal Code, Goundan's acts would not be deemed intentional homicide unless Goundan had the awareness of and will (volition) towards the act and the result[110] or unless he had foreseen the possibility of his wife's death[111] as a result of his act. However, this would not absolve Goundan from criminal liability, because he could be charged for grave wilful injury[112] due to his first act and negligent homicide[113] for the second act. Where negligent homicide covers the act of bodily injury, it is unlikely for an accused to be convicted of the latter act. In Goundan's case, the first act of intentional bodily injury was followed by a separate second act of hanging the victim's body (flowing from a separate criminal guilt, i.e. negligence), which caused her death. Had the offence been committed in Ethiopia, the offence of negligent homicide would not have subsumed the act of striking the victim with a ploughshare. This could have enabled the prosecution to charge the defendant with both grave wilful injury and negligent homicide. Intention and negligence are discussed in Chapter 3.

Concurrence between criminal act and criminal guilt involves *the principle of contemporaneity*, which requires the act of the accused and his moral guilt to coincide in point of time.

Illustration

> "In the famous case of *Fagan v. Metropolitan Police Commissioner*, the defendant accidentally drove his car on to a policeman's foot, and then deliberately left it there for a minute or so. The defence to a charge of assault was that the conduct element had finished before the fault element began; the act and the intent never coincided. The Divisional Court held that the defendant's conduct in driving the car on to the foot and leaving it there should be viewed as a continuing act, so that the crime was committed when the fault element arose [i.e. when the defendant decided to leave it there]."[114]

Ethiopian criminal law does not seem to allow such analysis. A criminal act under the 2004 Criminal Code (Article 61(1)) is either *a single act* or *combination of acts* committed towards a punishable offence. Combination of acts may be simultaneous or continuous within a given setting, but prior accidental act cannot be taken as part of the latter intentional conduct.

Unlike common law systems, judicial interpretation in codified legal systems is restrictive. Thus, under Ethiopia's Criminal Code, the defendant's conduct can be sequenced into his *accidental driving* on to the policeman's

foot (Article 57(2), if the facts do not prove inadvertent negligence under Ethiopian law) and then his *omission* in deliberately leaving the car there. Such omission (Article 23(1)) is punishable and we do not need to prove the continuity of the defendant's act to hold him criminally liable. Depending on the facts involved, the defendant can be charged with common wilful injury (Article 556) or assault (Article 560).

6.3 Principles Regarding Evidence and Sentencing

Article 23(4) of the 2004 Criminal Code provides that "A crime is punished where the Court has found the crime proved and deserving punishment." The burden of proving the guilt of the accused is borne by the prosecutor and the accused has the constitutional right to be presumed innocent until the offence charged is proved.

6.3.1 The Principle of Certainty beyond Reasonable Doubt

Detailed discussion on the principle of certainty beyond reasonable doubt that the accused has committed the offence belongs to the domain of law of evidence. The principle does not of course require 100 percent certainty, but it does require a very high level of certainty *beyond any reasonable doubt.* This is in contrast to the 'preponderance of evidence' test in civil cases. In the highly publicized US case of O. J. Simpson,[115] the accused was found not guilty of the criminal charge as a result of such a strict standard for criminal liability, although he was later held liable in a tort suit.

This principle, long regarded as one of the basic principles of Ethiopian criminal law, was influenced by the teachings and writings of professors who were mostly from the common law tradition. However, it was being challenged in some courts on the ground that there is no law that renders the principle binding. The principle has been articulated under Articles 296 and 297 of Draft Code of Criminal Procedure and Evidence. According to Article 296(1), the public prosecutor should prove "the material and moral ingredients constituting the crime, and other facts in issue and relevant facts beyond a reasonable doubt". This principle is further reiterated under Article 297/(1) which provides that the accused shall be acquitted "after the case for the prosecution is concluded" if "the commission of the crime is not proved *beyond reasonable doubt*."

6.3.2 Sentencing According to Prescribed Penalties

After the offender is found guilty of having committed an offence, the determination of punishment must be within the range provided for each specific offence and in accordance with the factors set in the Criminal Code,

subject to the stipulated extenuating and aggravating circumstances. Determination of punishment and sentencing is briefly discussed in Chapters 8 and 9.

Case Problems and Review Exercises

1. Ato P and Ato D live in a village about 50 kilometers from Addis Ababa. Ato D was falsely accused of having stolen P's ox on the 15th of Tikimt 2002 Ethiopian Calendar. Ato P had misled the court by producing his relatives as 'witnesses'. Ato D, although innocent, was sentenced to one year of rigorous imprisonment. After serving his sentence, Ato D found out that the real thief lived some kilometers from the village. D went to that village on Tahsas 1st 2003 Eth. C. and managed to steal the same ox, believing that he deserved to take it due to the false accusation and perjury that had caused his unjust imprisonment. D was caught and arrested some days later after having sold the ox. Does a charge and conviction against D violate the prohibition of double jeopardy under Article 2(5) of the Criminal Code?
2. Article 618(3) of the 1957 Penal Code sets forth the penalty imposed against adultery. It reads, "Where the offender, being of the Christian faith, installs a concubine in the conjugal home while not divorced or separated from or abandoned by his wife, simple imprisonment shall be for not less than three months." Compare it with Article 652(3) of the 2004 Criminal Code. Would applying Article 618(3) of the former Code against a married woman who kept her lover in the conjugal home under the same circumstances stated in the provision violate the principle of prohibition of analogy?
3. D decided to kill X. Some days later, while negligently driving (at midnight), D hit and killed a person whom he later learned was X. Discuss D's criminal liability assuming that he was unaware that the person who was crossing the street was X.
4. While he was leaving a restaurant, R took a raincoat thinking it was his own. After he arrived home, he realized the raincoat was not his. He did not want to suffer the inconvenience of going back to the hotel, and so he kept the raincoat with the feeling that it was of an equal value with the one he left at the restaurant. Discuss whether R has committed a criminal act (or omission).
5. Read the following case and compare it with the Palani Goundan case stated earlier under Section 6.2.4. Is there concurrence of fusion of act and intent?

Thabo Meli v. Regina[116]

Judicial Committee, Privy Council

The judgment of their Lordships was delivered by Lord Reid. The four appellants in this case were convicted of murder after a trial before Harragin, J., in the High Court of Basutoland, in March, 1953.

. . . It is established by evidence . . . that there was a preconceived plot on the part of the four accused to bring the deceased man to a hut and there to kill him; and then to fake an accident, so that the accused should escape the penalty for their act. The deceased man was brought to the hut. He was there treated to beer and was at least partially intoxicated; and he was then struck over the head in accordance with the plan of the accused.

There is no evidence that the accused then believed that he was dead . . . . The accused took out the body, rolled it over a low krantz or cliff, and dressed up the scene to make it look like an accident. Obviously they believed at that time that the man was dead, but it appears from the medical evidence that the injuries which he received in the hut were not sufficient to cause the death and that the final cause of his death was exposure where he was left at the foot of the krantz.

The point of law which was raised in this case can be simply stated. It is said that two acts were necessary and were separable: first, the attack in the hut; and, secondly, the placing of the body outside afterwards. It is said that, while the first act was accompanied by mens rea, it was not the cause of death; but that the second act, while it was the cause of death, was not accompanied by mens rea; and on that ground it is said that the accused are not guilty of any crime except perhaps culpable homicide.

It appears to their Lordships impossible to divide up what was really one transaction in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as parts of their plan; and it is much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law. Their Lordships do not think that this is a matter which is susceptible of elaboration. There appears to be no case either in South Africa or England, or for that matter elsewhere, which resembles the present. Their Lordships can find no difference relevant to the present case between the law of South Africa and the law of England, and they are of opinion that by both laws there could be no separation such as that for which the accused contend, as to reduce the crime from murder to a lesser crime, merely because the accused were under some misapprehension for a time during the completion of their criminal plot.

Their Lordships must, therefore, humbly advise Her Majesty that this appeal should be dismissed.

6. Consider the following case and discuss the relationship between the petitioner's criminal possession and his unintended presence in the United States.

New York v. Newton[117]

Supreme Court, Criminal Term, Queens County, Part I

MOSES M. WEINSTEIN, Justice.

. . .

On December 7, 1972 petitioner boarded Air International Bahamas' flight #101 bound from the Bahamas to Luxembourg. While on board, the petitioner had concealed on his person a loaded .38 caliber revolver and a quantity of ammunition. At some time during the flight, the captain became aware of the fact that petitioner might possibly be carrying a firearm. There is some indication that the petitioner, severely handicapped and ambulatory only with the aid of prosthetic devices, caused himself to be unruly. The extent to which petitioner was unruly on board the plane, if in fact he was, cannot be ascertained from the evidence before the Court. Suffice it to say that the captain of flight #101, for reasons best known to himself, saw fit to interrupt the course of the plane which was flying over international waters and effected a landing in the County of Queens at the John F. Kennedy International Airport. The landing was made at approximately 12:35 A.M. on December 8, 1972. Officers from the Port Authority Police Department, in response to a radio transmission, went to the runway where the plane, with petitioner on board, was waiting. One of the officers boarded the plane, approached the defendant-petitioner, and inquired of him as to whether or not he had a weapon. The petitioner answered that he did have a weapon which he allowed to be removed from his person. He was then arrested and charged with a violation of section 265.05(2) of the Penal Law of the State of New York after his admission that he had no license to possess or carry the weapon in question. Section 265.05(2) of the Penal Law is as follows:

> Any person who has in his possession any firearm which is loaded with ammunition, or who has in his possession any firearm and, at the same time, has in his possession a quantity of ammunition which may be used to discharge such firearm is guilty of a class D felony….

Intent is not an element of the crime of possessing, without a license, a loaded pistol or revolver which might be concealed on the person of an accused (Peo. v. Terwilliger, 172 Misc. 70, 14 N.Y.S.2d 267). Guilty knowledge, or scienter is not an element of the crime of unlawful possession of a firearm.

'The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing. . . . (Penal

Law section 15.10). The doing of an act may by statute be made criminal without regard to the doer's intent or knowledge, but an involuntary action is not criminal. . . .

The Court finds that the petitioner . . . did not subject himself to criminal liability by virtue of a voluntary act. Flight #101 was not scheduled to terminate in or pass through the territorial jurisdiction of the US. The landing at John F. Kennedy International Airport on December 8, 1972 was merely an interruption of flight not attributable to a voluntary action by the petitioner. No documentary evidence or official records are before this Court to indicate anything to the contrary. This Court will not create jurisdiction where none exists, solely on the basis of a fortuitous happening. It is therefore, the opinion of this Court that the Writ of Habeas Corpus be sustained and the petitioner be discharged from custody forthwith.

Reading on Section 6

Soler[118]

[Why Does Criminal Law Need Rational Systematic Principles?]

For a discipline of cultural character such as law, as opposed to the natural sciences, the necessity of unity and systematic coherence stands out very clearly, because it is almost the only means of overcoming the merely empirical points of view. Natural Sciences, such as physics, biology and chemistry are always submitted to the test of experience. In them also is the necessity of systematic coherence; but facts and experiments decide their theories and systems. Law lacks this test, or, at least, what can be called experience in law is something very different from physical experience.

This necessity for systematizing principles is very clear in the thought of all great jurists. This is what Carrara said: . . . "If criminal law is an empirical art let us throw the pen away, and cease meditating upon the mysterious beginnings that, as such, it does not have. If it is a science, and if we want to maintain it on that level, it must have some principles; and these cannot be recognized when they are not accepted on the basis of logical deductions because truth is unitary and must appear as such in all its various forms." (Program, 1493). It is clear that Carrara's thought is inspired in the historical rationalist conception of the rights of man; but ignoring its content, it is a formal truth. A theory in penal law that does not succeed in building a system can neither aim at the dignity of a science, nor at the modest dignity of a University discipline.

But it happens that in penal law this need of systematic construction is not a mere idle, theoretical or doctrinal aim. As in all juridical subjects within the network of the system we, as social beings, find ourselves confined: we live and suffer the consequences of these theories on our own selves. This happens in penal law in a very significant manner, because this is the law that goes so far as to exact our liberty and even life itself; in writing about it we always speak of our possible personal destiny.

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7. Elements of a Punishable Offence

It is preferable to use "the broader term 'conduct' rather than 'act' because the former term "covers omissions or failures to control what one could control."[119] But the usage of the term conduct "presupposes that as a matter of general doctrine or principle the law should not criminalize mere thoughts, or conditions or states of affairs that cannot be portrayed as (flowing from) conduct."[120]

7.1 The Legal, Material and Moral Elements of a Crime

Article 23(2) provides: "A crime is only completed when all its legal, material and moral ingredients are present." The provision embodies three elements: legal, material and moral. The *legal element* (discussed in Chapter 2) relates to the express prohibition of an act, omission or possession by the criminal law and the penalties or measures are prescribed thereof.[121] Acts or omissions not prohibited by law are not considered offences.

Some jurists define the legal element as *unlawfulness*. But such a narrow definition can be misleading because it is difficult to separate the unlawfulness of a given act from its material and moral elements. It is thus preferable to have a wider conception of the legal element of offences and consider it as the embodiment of the definition and elements of an offence in a specific criminal law provision.

For example, in the absence of *intent* to enrich oneself or to procure enrichment to a third person, the act of abstracting property of another person is not theft (within the meaning of Article 665), since some of the constitutive ingredients of theft are missing. Yet the same act may violate another legal provision such as Article 678, which prohibits the act of removing "a thing from the owner, in order to deprive the owner thereof or to defraud him, or to make temporary use thereof" without the intention to enrich oneself or a third party. It thus seems to be more convenient to offer an objective definition to the legal element in relation to its articulation in one of the specific provisions that define an offence or a petty offence.

The *material element* (discussed in Chapter 2, Sections 2 to 4) embraces the *act* or the *omission* of the offender (Article 23(1)) and its *causal relation* to the consequences in offences of result (Article 24) and the *material circumstances* in which the act or omission is committed. There are also offences that do not require result, in which case mere act or omission suffices without reference to resultant harm and causation. Preparatory acts (Article 26), attempts, (Article 27), possession, and the like are thus topics that fall under the material element of an offence.

> I]t has long been established [in France] that a person should not be punished for their thoughts alone, but that these thoughts must have crystalised into some material conduct. Though applied in practice, no direct reference was made to this principle by the 1810 Criminal Code. An exception to this general rule was that criminal conspiracy made no mention of any requirement of an *actus reus*. The general principle is now expressly provided for in article 121-1 of the new Criminal Code which states that 'a person is only criminally responsible for his conduct.' A conspiracy now requires the existence of some 'material facts', though the Code does not specify what form these must take.[122]

The legal and material elements can be jointly referred to as the *actus reus* of an offence. *Actus reus* considers whether the offender's act or omission has caused an event (e.g. death) or a state of affairs (e.g. endangering) *prohibited by criminal law*. "*Actus reus* means the external elements of a crime."[123] The literature and judicial jurisprudence on Ethiopian criminal law does not, however, combine the legal and material elements of an offence under the notion of *actus reus* although it has been used in this book for the purpose of conceptual analysis.

The *moral element* (*mens rea*) refers to the moral blameworthiness of the offender. *Actus reus* without *mens rea* does not constitute a punishable offence. To use the Latin maxim, *actus non est reus nisi mens sit rea* (an act is not guilty without a guilty mind). The moral element of an offence under Ethiopian law is discussed in Chapters 3 and 4. Under Ethiopian criminal law, there are four categories of moral guilt:

- *Direct criminal intention* (referred to as *dolus directus* or *absicht* by many jurists of continental Europe) involves *awareness* and *desire*. It is synonymous to the term 'purpose' in Anglo-American legal systems. A second form of direct intention may be referred to as *ancillary direct criminal intention*. It involves awareness of substantial certainty of harm not desired as an end, but instrumentally desired as inevitable means towards the primarily intended harm. It is known as 'knowledge' in Anglo-American law and *dolus indirectus* by some jurists of continental Europe.
- *Dolus eventualis* (referred to as 'indirect criminal intention' in Ethiopian legal literature) involves *awareness* and conduct *regardless* of a *possible* event of harm. It is close to, but not identical with, 'excessive' recklessness in Anglo-American legal systems.
- *Advertent (conscious) negligence* is deemed to exist where the accused has *awareness* but *disregards* possible harm.

- *Inadvertent (unconscious) negligence* refers to a mental state where the accused, by criminal lack of foresight, causes harm while he could and should have been aware of possible harm.

Identifying the elements of a punishable offence may be approached from different perspectives. Although Graven has adopted Carrara's approach in formulating the elements of an offence under Ethiopian law as embodied under Article 23 of the 1957 Penal Code (and currently under the 2004 Criminal Code), Schumann, for example, indicates the three constituent elements of a punishable crime that are recognized by the German penal code: "In order to be punishable, a given conduct must (1) fulfill the statutory definition of an offense; (2) be unlawful; and (3) there must be 'guilt' on the part of the offender."[124]

The first element in Schumann's approach, the fulfillment of the definition of crime, requires that the definition of an offence "must comprise all those objective and subjective elements of the conduct which make it unlawful unless 'justification is present'." While the *objective sub-element* describes "the external facts such as the outward act, attending circumstances, and consequences which characterize the conduct in question as socially harmful or dangerous",[125] the *subjective sub-element* refers to the identification of the internal moral facts that are included as one of the definitional elements of a specific offence.

Schumann's second element, the unlawfulness of the conduct, refers to the fulfillment of "the definitional elements of an offense" "unless it is justified, i.e. unless it also falls within the definition of a so-called 'justification ground'."[126] And finally the third element, the presence of the *guilt* stated as an element of an offence, envisages that:

> the offender bears the responsibility for his unlawful conduct since it was an act of self-determination on his part. This presupposes that the actor, at the time he acted, could have conformed to the requirements of the law which, in the case of a crime by commission, means nothing more than that he could have abstained from his unlawful conduct.[127]

Schumann relates these elements to the German penal code, noting that the code suggests that guilt requires two elements "which must be present at the time the offender engages in his conduct: (1) the offender's capacity to gain insight into the unlawfulness of his conduct; and (2) his capacity to behave in accordance with the insight, i.e. to adapt his conduct to the requirements of the law."[128] The latter element of *mental capacity* inevitably leads us to consider the issue of irresponsibility and diminished responsibility owing to factors such as mental condition and age, an issue which is not considered in the identification of elements of an offence, but

rather can be invoked by the defence as a ground of irresponsibility. These conditions are also relevant under Ethiopian criminal law because the second paragraph of Article 57(1) of the Ethiopian Criminal Code duly embodies the requirement of *responsibility* (i.e. mental capacity), which can be raised by the accused's counsel before the prosecution proceeds to prove criminal guilt and commission of the offence.

7.2 Comparative Overview on Conditions of Criminal Liability

Logoz summarizes the three component elements of a criminal offence that are cumulative conditions for criminal liability under the Swiss penal code:

> Three essential conditions must be realized in order to constitute a criminal offence:
>
> a) The offense must be the manifestation of *human activity* and this activity must be prescribed by law. . . . the human activity may also be inactivity as there are crimes of commission and those of omission.
>
> b) Only those acts which are contrary to law may constitute offences.
>
> c) Even when the first two conditions are realized, there will not be an offence unless there is guilt (in the form of intention, or in certain cases, in the form of negligence) ...[129]

These three elements are embodied in other penal codes of continental Europe as well. Aside from some variation in form, similar principles are embodied in English and American criminal law. The following definitions of *actus reus* and *mens rea* state similar conditions of criminal liability:

> Actus reus refers to the physical aspect of the criminal activity. The term generally includes (1) a voluntary act (2) that causes (3) social harm. . . .
>
> Simply put, *mens rea* refers to the mental component of a criminal act. . . .
>
> Much more prevalent today is a narrow definition of *mens rea* which refers to the particular mental state set out in the definition of an offense. In this sense, the specific *mens rea is* an element of the crime. . . .[130]

The specific *mens rea* requirements in American criminal law vary from those of continental Europe's criminal codes with which Ethiopia's Criminal Code has much in common. The specific *mens rea* requirements in American or English criminal law are expressed by specific terms such as

intentionally, *purposely*, *knowingly*, *willfully*, *negligently*, *recklessly*, *with malice*, etc. These specific requirements state the particular mental state that constitutes the *mens rea* in the definition of a particular offence.

However, continental Europe's penal codes and Ethiopia's Criminal Code use distinct definitions for what is meant by the different forms or types of criminal intention and criminal negligence and then apply these generic terms with relatively consistent meaning. Despite such variation in the hierarchy of criminal guilt and in spite of the difference in the specific definition of the various shades of criminal guilt, *mens rea* in continental legal systems refers to the moral element (intention or negligence) that is one of the preconditions for criminal liability.[131]

It is to be noted that the legal, material and moral ingredients of an offence are cumulative conditions of criminal liability. The legal element, as stated earlier, is whether a given act or omission is prohibited and punishable by criminal law. The next question that pertains to the second element, the material element, is whether the accused has committed the act (by commission or omission). But punishment is not imposed without considering moral guilt, a factor that is decisive to determining whether the offender's act or omission prohibited by law deserves punishment (Article 23(4) *cum* 57(1)).

We should thus distinguish between acts prohibited by criminal law (Article 23(1)) and punishable criminal acts or punishable offences (Article 23(1) *cum* Article 23(4) and 57(1)). Article 57(1) provides that "A person is guilty if, being responsible for his acts, he commits a crime either intentionally or by negligence." This stipulation incorporates (1) a *negative* condition of criminal liability, i.e. *absence* of irresponsibility; and (2) *positive* conditions of criminal liability, namely, the existence of the objective condition of committing a crime (*actus reus*) plus the subjective condition of criminal liability, i.e. intention or negligence (*mens rea*).

According to Dubber and Kelman:

> One modern way of understanding the traditional distinction between *actus reus* and *mens rea* is to think of the first as referring to the *objective* elements of an offense and the latter as referring to its *subjective* elements. The elements of an offense are objective in the sense that they refer to states of affairs, or facts that exist independently of how they might be perceived by someone, most importantly the person who stands accused of having committed an offense. They are subjective if they refer to a person's–the alleged offender's– perception of a state of affairs. . . .[132]

7.2.1 Negative Conditions of Criminal Liability

The negative conditions of criminal liability refer to conditions that negate the presumption of mental capacity, rationality and autonomous behaviour. Criminal law presumes that "the defendant is 'normal', i.e. is able to function with the normal range of mental and physical capabilities."[133] As Ashworth notes, many of the principles of "individual fairness" presuppose that individuals are "rational and autonomous".[134] Thus, an accused who is mentally ill may not deserve to be liable to criminal punishment because such a person "may fall below these assumed standards of mental capacity and rationality."[135]

Under Ethiopian criminal law there are two categories of negative conditions of criminal liability. First, the accused must be *responsible* for his acts (Article 57(1)), because irresponsibility (Articles 48 to 56) negates the presumption of the accused person's mental capacity and rationality. Second, the accused must have acted under circumstances that do not negate the presumption of rationality and autonomous behaviour.

Acts that enable the accused to invoke the affirmative defences discussed in Chapter 7, such as absolute coercion (Article 71), necessity (Article 75), legitimate defence (Article 78) or mistake of fact (Article 80), are deemed to have been committed under circumstances that negate the presumption of the accused person's rational and autonomous behaviour if the average rational person under his circumstances would not have acted otherwise.

Illustration

> "[The defendant] left England because the duration of her permitted stay had come to an end. She went to Ireland, from where she was deported back to [England]. On her return she was convicted of 'being found in the United Kingdom' contrary to the Aliens Order 1920. Her appeal based on the argument that her return to England was beyond her control was dismissed by the Court of Criminal Appeal. The case was widely criticized [because] her return to [England] was not her own act, and was contrary to her will and desire."[136]

Under Ethiopian law, it is not the duty of the public prosecutor to prove the absence of irresponsibility or the nonexistence of other affirmative defences because, in the ordinary course of events, persons are presumed to be rational beings capable of acting according to their own autonomous free will. The presence of irresponsibility (discussed in Chapter 6) or other negative conditions of criminal liability is an exception and not a usual occurrence, and in effect, the accused bears the burden of invoking and proving them.

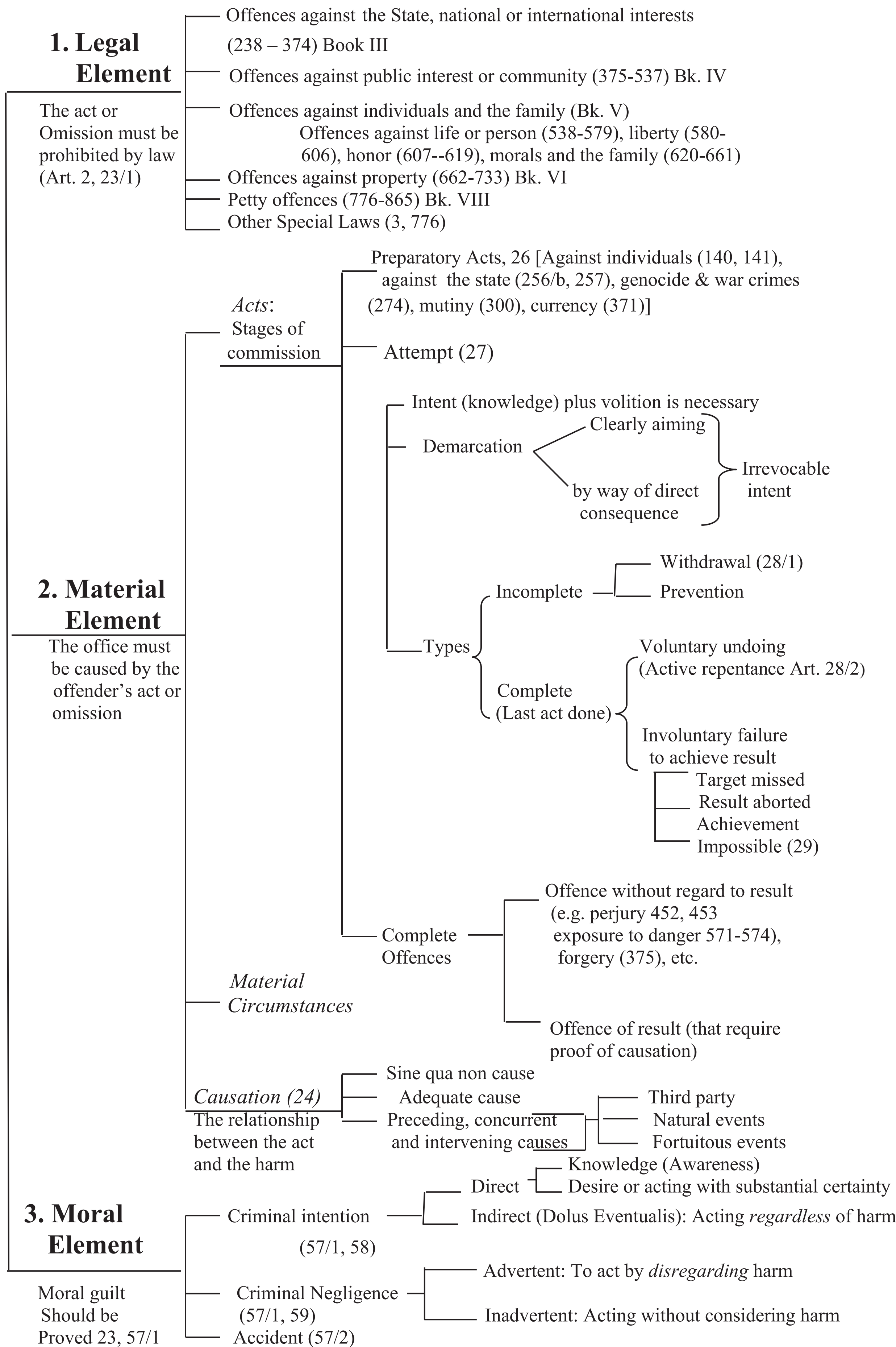
7.2.2 Positive Conditions of Criminal Liability

This refers to the objective and subjective conditions whose existence must be proved on the part of the prosecutor. As stated earlier this refers to:

- the criminal conduct or *actus reus*, i.e. the commission of an act, omission or possession and its prohibition by law, and
- the *mens rea*, i.e. the moral guilt that accompanies the criminal conduct.

Subject to affirmative defences, Article 57(1) thus renders criminal liability contingent upon two conditions. Primarily, it presupposes that the accused is a *responsible* person (Articles 48–56), and requires the commission (material element) of an offence (legal element). Secondly, the moral guilt of intention or criminal negligence (Articles 58 and 59) must be established. The following Table summarizes the legal, material and moral elements of punishable offences under the 2004 Criminal Code, and it can serve as a skeletal signpost for Chapters 2 and 3.

Table 2: Legal, Material and Moral Elements of a Punishable Offence (Article 23)



Reading on Section 7

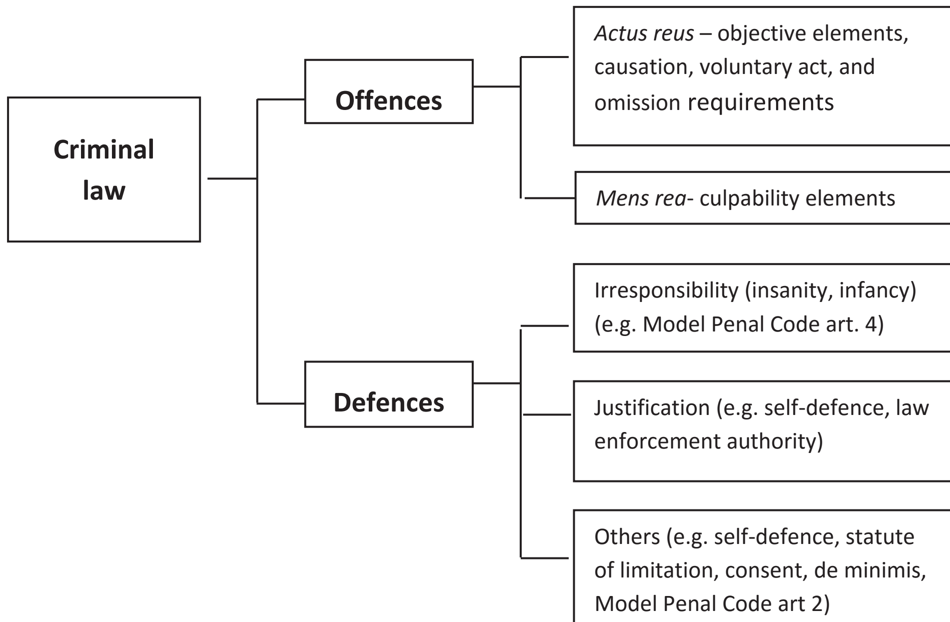
Robinson[137]

[The Offence-Defence Distinction]

The distinction between offences and defences and between *actus reus* and *mens rea* are criminal law's basic organizing distinctions for most lawyers, judges, and code drafters. The offence-defence distinction is reflected in the structure of modern codes. The American Model Penal Code, for example, groups offences in Part II of the Code, leaving defences for Part I. The Code recognizes three kinds of defences. Those relating to an actor's irresponsibility, such as mental illness and infancy, are contained in Article 4 of Part I, entitled 'Responsibility'. Those relating to the justification of an act or the justification of an actor's conduct, such as self-defence and law-enforcement authority, are grouped in Article 3 of Part I, 'General Principles of Justification'. Other miscellaneous defences, such as duress, statute of limitations, consent, and the *de minimis* defence are included in Article 2 of Part I entitled 'General Principles of Liability'.

The *mens rea–actus reus* distinction is another basic organizing distinction of current law. The *mens rea* of an offence typically consists of the culpable state of mind or culpable negligence required for liability. The *actus reus* of an offence consists of the other offence requirements, including the objective elements, any causation requirements, the voluntary act requirement, or in the absence of an act, any special requirements for omission liability.

To summarize, the current conceptual structure of American criminal law looks something like this:



Endnotes, Chapter 1

[1] A. P. Simester and G. R. Sullivan (2003), *Criminal Law: Theory and Doctrine*, 2nd edn. (Oxford: Hart Publishing), p.1.

[2] Michael J. Allen (2005), *Textbook on Criminal Law*, 8th edn. (Oxford: Oxford University Press), p. 1.

[3] Allen (*ibid.,* pp. 1–2) states the following:

> When Parliament passes legislation making a particular act criminal, the nature of that act does not change . . .
>
> . . . The definition of crime is thus of limited usefulness. It only indicates which acts are criminal by reference to consequences which may ensue from their commission; it tells us nothing about the function of the criminal law or why particular conduct is classified as criminal. The definition, therefore, is essentially concerned with the legal consequences of the act.

[4] The Criminal Code was enacted as Proclamation No. 414/2004 and came into force as of 9 May 2005. It is referred to as the 2004 Criminal Code in this book because of the designation of the Proclamation, i.e. Proclamation No. 214/2004. It is the year of enactment and not the year in which a certain law comes into force that is used in designating laws. For example, the 1957 Penal Code was enacted on July 23, 1957 as Proclamation No. 158/1957 and it came into force on May 5, 1958. Yet it is invariably referred to as the 1957 Penal Code.

[5] Philippe Graven (1965), *An Introduction to Ethiopian Penal Law: Arts. 1–84 Penal Code* (Addis Ababa: Haile Selassie I University and Oxford University Press), p. 57.

[6] Carrara, in Graven, *ibid.*

[7] R.A. Duff and Stuart T. Green, editors (2005), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford: Oxford University Press), p. 10.

[8] *Ibid.*, p. 13.

[9] *Ibid.*, p. 16.

[10] *Ibid.*

[11] John Smith (2002), *Smith and Hogan Criminal Law*, 10th edn. (London: LexisNexis Butterworths), p. 15.

[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid.*, p. 17.

[15] Proclamation No. 414/2004.

[16] E. Adamson Hoebel (1954), *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Cambridge, Massachusetts: Harvard University Press), p. 275.

[17] The purposes of punishment are discussed in Chapter 8, Section 1. Reform is one of the purposes of punishment and does not constitute punishment per se.

[18] Paul H. Robinson (1994), "A Functional Analysis of Criminal Law", *Northwestern University Law Review*, Vol. 88, No. 3, p. 857. *See* also, Paul H.

Robinson (2014), *"*A Functional Analysis of Criminal Law", in *The Structure and Limits of Criminal Law* (Routledge), p. 58.

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

[22] US Model Penal Code (American Law Institute 1962).

[23] Jerome Hall (1941), "Prolegomena to a Science of Criminal Law", *University of Pennsylvania Law Review*, Vol. 89, No. 5 (Mar. 1941), p. 550.

[24] *Ibid.*

[25] Jeremy Bentham (1789), *An Introduction to the Principles of Morals and Legislation*, Ch. I, § IV.

[26] Graven, *supra* note 5, p. 6.

[27] Johannes Andenaes, *The General Part of the Criminal Law of Norway, translated by Thomas P. Ogle* (South Hackensack: Fred B. Rothman and London: Sweet and Maxwell, 1965), pp. 5, 6.

[28] Graven, *supra* note 5, pp. 5, 6.

[29] Constitution of the Federal Democratic Republic of Ethiopia (1994), Art. 9(1).

[30] *Ibid.*, Article 13(2).

[31] *Robinson v. California*, 370 U.S. 660 (1962).

[32] *Criminal Law Capsule Summary*, LexisNexis, Chapter 3, § 3.02, D(1) <http://www.lexisnexis.com/lawschool/study/outlines/html/crim/crim03.htm.>

[33] Duff and Green, *supra* note 7, p. 4.

[34] *Ibid.*

[35] *Ibid.*

[36] Andrew Ashworth (2003), *Principles of Criminal Law*, 4th edn. (Oxford University Press), p. 29.

[37] *Ibid.*, p. 28.

[38] Sandra G. Mayson (2020), "The Concept of Criminal Law", *Criminal Law and Philosophy* **14**, 447–464

[39] R. A Duff (2018), *The Realm of Criminal Law, (Abstract)* Oxford University Press

[40] Simeneh Kiros Assefa (2018), "Sovereignty, Legitimacy & fundamental rights as Limitations to Criminalization Power of the State", Mizan Law Review, Vol. 12, No. 1, p. 150.

[41] Ayn Rand (1964), "The 'Conflicts' of Men's Interests" in *The Virtue of Selfishness* (New York: New American Library), pp. 50–56.

[42] K .D. Gaur (2003), *Criminal Law and Criminology* (New Delhi: Deep & Deep Publications), pp, 4-9, citing Blackstone 4 BI Comm. 5; Garaflo (1914), *Criminology* (Boston: Little Brown), p. 59; Edwin Sutherland (1965), *Principles of Criminology*, 6th Ed.; John Gillin (in Bassiouni & Savitiski (1979) *The Criminal Justice System of USSR* (USA: Charles & C. Thomas), p. 137; Roscoe Pound (1946) *Interpretation of Legal History* (Harvard University Press),

Chapter III.

[43] Macklin Fleming in Gaur, *Ibid.,* pp. 10, 11.

[44] Ashworth, *supra* note 36,

[45] Bloy & Parry (2000) Molan &Lanser (Editors), *Bloy and Parry's Principles of Criminal Law*, 4th edn. (London/ Sydney: Cavendish Publishing Ltd.), pp. 12–14.

[46] Ashworth, *supra* note 36, pp. 1, 2.

[47] Civil Code of Ethiopia, Arts 2027(2), 2066-2089

[48] Civil Code, Arts 2027(3), 2124-2136.

[49] Civil Code, Art. 2035.

[50] Civil Code, Art. 2031.

[51] Civil Code, Art. 2030.

[52] Corporate criminal liability is discussed in Chapter 5, Section 5.

[53] C.R. Snyman (1995), *Criminal Law*, 3rd edn. (Durban: Butterworths), pp. 5–7.

[54] *Ibid.*, p. 6.

[55] *Ibid.*

[56] Ashworth, *supra* note 36, page 1.

[57] Gaur, *supra* note 42, pp. 14, 15.

[58] *Kenny's Outlines of Criminal Law* (19th edn. JWC. Turner.) Appendix, p. 533 (cited in Gaur, *Ibid.,* p. 5).

[59] R. v. Ward (1836), 4 A. & E. 384.

[60] Smith and Hogan, *supra* note 11, pp. 16–22 (footnotes omitted).

[61] The primary legislation on Ethiopian criminal law is the 2004 Criminal Code. Although this Code is referred to as the 2005 Criminal Code in some academic works, it is referred to as the 2004 Criminal Code throughout this book for the reasons stated in note 4, above.

[62] Article 10(2) of the Federal Courts Proclamation No. 1234/2021. This provision was also embodied under Article 2(1) of the Federal Courts Proclamation Re-amendment Proclamation No. 454/2005.

[63] Article 26(4) of the Federal Courts Proclamation No. 1234/2021. Error of legal interpretation made by the Cassation Division is thus corrigible. The Proclamation allows the Cassation Division to render an interpretation different from its preceding interpretation thereby enabling corrections in judicial interpretation whenever necessary.

[64] *Process-verbal* of May 28, 1954 and November 24, 1954. pp. 18, 35, in Steven Lowenstein (1965), *Materials for the Study of The Penal Law of Ethiopia* (Addis Ababa: Haile Selassie I University Faculty of Law and Oxford University Press), p. 63.

[65] Jean Graven (1957), "Modern Ethiopia and the Codification of its New Law", *Revue Penal Suisse*, Vol. 72, p. 404, in Lowenstein, *ibid.*, p. 63.

[66] The quotes used in this paragraph (from Graven, *supra* note 5, p.4) briefly state the interdependent functions of the General and Special parts of the 1957 Penal Code which are equally applicable to the 2004 Criminal Code.

[67] *Ibid.*

[68] *Ibid.*

[69] Peter Strauss (1968), "On Interpreting the Ethiopian Penal Code", *Journal of Ethiopian Law*, Vol. 5, No. 2, p. 395.

[70] *Ibid.*

[71] Strauss, *supra* note 69.

[72] Graven, *supra* note 5, p. 4.

[73] Preface to the Second Printing, *The Fetha Nagast*: The Law of Kings, Translated from the Ge'ez by Abba Paulos Tzadua, Edited by Peter Strauss (2009), Carolina Academic Press, p. xxxiv, xxxv. [First Printing, 1968, Haile Selassie I University, Faculty of Law].

[74] Jean Graven (1964), "The Penal Code of the Empire of Ethiopia," *Journal of Ethiopian Law*, Vol. 1 (pp. 268–290) (footnotes omitted). In Lowenstein, *supra* note 64, pp. 57–61, 63. The publication in the *Journal of Ethiopian Law* is the English translation of 'Le Code Pénal de l'Empire d'Ethiopie" (Centre Français de Droit Comparé, 1959), pp. 5–29.

[75] For example, breaches of professional secrecy (Art. 399), violation of the right of freedom of work (Art. 603), violation of privacy of correspondence (606), seduction (Art. 625), adultery (Art. 652), unlawful use of the property of another (Art. 678), misappropriation of lost property (Arts. 679, 680), damage to property of another caused by herds or flocks (Art. 685) and unfair competition (Art. 719) are offences which are prosecuted only 'upon complaint'. The provisions that embody such offences clearly state that these offences are charged only '*upon complaint*'.

[76] Crim. Code, Art. 212.

[77] Crim. Code, Art. 4.

[78] Crim. Code, Art. 5.

[79] Crim. Code, Arts. 11–20.

[80] Crim. Code, Art. 5(3).

[81] Crim. Code, Art. 6.

[82] *See* Crim. Code, Arts. 129 to 165.

[83] Glanville Williams (1983), *Textbook of Criminal Law*, 2nd edn. (London: Stevens & Sons), p. 167.

[84] Crim. Code, Art. 16.

[85] Crim. Code, Art. 21(1).

[86] Crim. Code, Art. 21(2).

[87] Crim. Code, Art. 2(2).

[88] *Ibid*.

[89] Claus Kreß, Max Planck Encyclopaedia of Public International Law <http://www.uni-koeln.de/jur-fak/kress/NullumCrimen24082010.pdf>, last visited 13 Aug. 2011.

[90] Strauss, *supra* note 69, p. 420.

[91] Crim. Code, Art. 2(4).

[92] George Krzeczunowicz (1964), "Statutory Interpretation in Ethiopia", *Journal of Ethiopian Law*, Vol. I, No. 2.
[93] Strauss, *supra* note 69, p. 383.
[94] *Ibid.*, p. 386.
[95] *Ibid.*, pp. 390–394.
[96] *Ibid.*, p. 397.
[97] *Ibid.*, pp. 417–439.
[98] Graven, *supra* note 5, p. 10.
[99] *Ibid.*, p. 11.
[100] 1950, 2 K.B. 368, in Ashworth, *supra* note 36, 75–77.
[101] Ashworth, *supra* note 36, p. 77.
[102] Crim. Code, Arts. 23, 48, 57, 58, 59, etc.
[103] Crim. Code, Art. 665.
[104] Crim. Code, Art. 23 and other provisions.
[105] Crim. Code, Art. 24.
[106] Wayne R. LaFave and Austin W. Scott Jr. (1986), *Substantive Criminal Law*, Vol. 1, Ch. 3 (St. Paul: West Publishing Group), pp. 391–392.
[107] Wing Cheong Chan (2000), "The Requirement of Concurrence of Actus Reus and Mens Rea in Homicide", *Singapore Journal of Legal Studies*, p. 75.
[108] *Ibid.*
[109] *Palani Goundan v. Emperor*, 1920 Madras 862 (India).
[110] Crim. Code, Art. 58(1)(a).
[111] Crim. Code, Art. 58(1)(b).
[112] Crim. Code, Art. 555.
[113] Crim. Code, Art. 543.
[114] *Fagan v. Metropolitan Police Commissioner*, [1969] 1 Q.B. 439 (Eng.), in Ashworth, *supra* note 36, p.161.
[115] Famous American Trials, O. J. Simpson's Case (1995), <http://law2.umkc.edu/faculty/projects/ftrials/Simpson/simpson.htm>, last accessed 21 March 2011.
[116] *Thabo Meli v. Regina*, [1954] 1 All ER R 373.
[117] 72 Misc. 2d 646 (1973).
[118] Sebastian Soler (1945), "The Political Importance of Methodology in Criminal Law", *Journal of Criminal Law and Criminology*, Vol. 34, No. 6 (March–April 1945), p. 367.
[119] Duff and Green, *supra* note. 7, p.4 n.6.
[120] *Ibid.*
[121] Crim. Code, Art. 2(1).
[122] Catherine Elliott (2001), *French Criminal Law* (Devon, UK and Oregon, USA: William Publishing), p. 60.
[123] Williams, *supra* note 83, p. 87.
[124] Heribert Schumann, "Criminal Law", in *Introduction to German Law* (2005),

Mathias Reimann and Joachim Zekoll, editors, 2nd edn. (The Hague: Kluwer Law International), pp. 392–399.

[125] "Many offenses explicitly or implicitly require the conduct of the offender to cause some proscribed result. Although the [German] Penal Code does not define causation, there is widespread agreement that the concept of 'cause' is to be defined as a *conditio sine qua non*, i.e. any antecedent but for which the result in question would not have occurred. It is generally acknowledged, however, that the 'but for' formula does not supply a ready-to-use test of causation . . ." Schumann, *ibid.*

[126] *Ibid.*

[127] *Ibid.*

[128] *Ibid.*

[129] Paul Logoz, *Commentaire de Code Penal Suisse*, 30 (in Lowenstein, *supra* note 64, p. 70).

[130] *Criminal Law Capsule Summary*, LexisNexis, §§ 3.01, 5.01.

[131] See for example, Michael Bohlander (2009), *Principles of German Criminal Law* (Hart Publishing), pp. 59–70.

[132] Markus D. Dubber and Mark G. Kelman (2005), *American Criminal Law* (New York: Foundation Press), p. 198.

[133] Ashworth, *supra* note 36, p. 205.

[134] *Ibid.*

[135] *Ibid.*

[136] *Ibid.*, pp. 107, 108.

[137] Paul H. Robinson (1997), *Structure and Function in Criminal Law* (Oxford: Clarendon Press), pp. 4, 5.

Chapter 2

The Legal and Material Elements of Offences

The term 'criminal conduct' has two elements. The word 'criminal' represents the *legal* element, i.e. prohibition by the law whose violation is punishable. The word 'conduct' (i.e. 'act' or 'omission') refers to the *material* element: what a person who is suspected, accused or convicted of an offence has done. Thus 'criminal conduct' relates to the legal and material elements of offences, which constitute the *objective* elements of criminal liability. These are discussed in this chapter. Criminal guilt (i.e. the *moral* element of offences), which relates to the *subjective* element in criminal liability, is discussed in Chapter 3.

1. The Legal Element of Offences

One of the ingredients of a punishable offence is its *legal element,* that is, *its embodiment and prohibition* by a specific criminal law provision. The legal element is the express prohibition of an act, omission or possession and the articulation of the penalties or measures thereof. In other words, the legal element of offences under Ethiopian criminal law refers to the requirement that an act or omission which constitutes an offence and its punishment be expressly stated by legislation.

The Ethiopian Criminal Code shares this requirement with other codes of the continental legal system, and the principle traces its roots to the Declaration of Rights of Man (1789),[1] which was the outcome of the French Revolution. Article 5 of the Declaration provides that "[l]aw can only prohibit such actions as are hurtful to society" and that "[n]othing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law." Article 8 of the Declaration of Rights of Man applies the same principle of legality in relation to punishment. It provides that "[t]he law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense."

This principle has been adopted in the French penal code and other penal codes of continental Europe, and it has ultimately found its way to other criminal codes, including the Ethiopian Criminal Code. As stipulated under Article 111-3 of the French Criminal Code, "No one can be punished for a serious crime or for a major offence whose elements are not defined by an act or for a minor offence whose elements are not defined by a regulation."

> Montesquieu developed the idea that offences and punishments should be fixed by the legislation and, after the Revolution, this principle was expressly included in articles 5 and 8 of the Declaration of Rights of Man. While in England central offences such as murder are the creation of the judiciary under the common law, and continue to be applied in the absence of any legislative provision, this is not possible in France.[2]

Elliott states the similarity between English and French criminal law with regard to *actus reus* and *mens rea* as elements of an offence, and she observes that "[s]ome academic authors also add a third requirement, that the offence must be laid down in a written source of law."[3] She further explains that this principle "developed as a backlash to the perceived abuses of judicial discretion under the *Ancien Régime*" during which vague royal ordinances "left considerable discretion to the judges to determine the precise punishment to impose" thereby causing "considerable uncertainty which was particularly worrying as the punishments in vogue at the time could be extremely cruel."[4]

1.1 Offences: Characteristics and Classification

The Special Part (Part II, Articles 238–733) of the Criminal Code embodies 'very serious' and 'not very serious' offences without distinctly classifying them under different categories. And, the Special Part of the Code of Petty Offences (Part III, Book VIII, i.e. Articles 776–865) identifies particular petty offences. As petty offences are embodied in Part III of the Criminal Code with a distinct designation (as 'petty offences"), they clearly fall under a different classification.

The *legal element* of an offence or a petty offence is thus said to be present only where the act or omission under consideration is expressly covered in Part II or in Part III, Book VIII of the Criminal Code (or where there is violation of other special criminal laws envisaged under Article 3 –such as the laws highlighted in Chapter 10). An inquisitive reader may ask: "To what extent should an act or omission be *expressly* stated in these provisions, and can the Criminal Code accommodate every possible offence?"

Criminal law does not forecast every particular criminal conduct that might possibly occur and cannot, to the minutest detail, enumerate the specific material circumstances that can unfold in various offences. Over-detailed approach to codification results in volumes of criminal law that entail more complications than solutions. Ambiguity or inconsistency of provisions is thus unavoidable, thereby necessitating 'interpretation' without resorting to 'analogy', as highlighted in Chapter 1, Section 6.1.2.

The act (or omission), material circumstances, resultant harm (in offences of result) and the requisite mental state are embodied in every criminal law provision that defines a given offence. Thus the legal element should not be confused with the ingredients of the provision, because it merely refers to the fact that a certain conduct committed under a given mental state is defined as a punishable crime.

There are various acts or omissions that are considered ‘evil’ (wrong) in society without being embodied in criminal law. A clear distinction should thus be made between offences and other wrongs as a prelude to a closer look into characteristics and classification of offences. Lies, unwillingness to pay a loan, robbery, and so on are acts that almost every society would consider as ‘evil’. But society’s response to a liar is negative public opinion and not criminal punishment. The reaction of the law against nonperformance of a contractual obligation or extracontractual liability is civil remedy and not imprisonment. An act of murder or robbery, however, is considered to be an evil grave enough to deserve punishment under criminal law.

The factor that distinguishes an offence from other wrongs (that are not embodied in the law) is thus its legal element, i.e. *its embodiment in criminal law.* In the realm of certain wrongs, the state does not involve itself. In civil cases the state acts as a referee between disputants. When an offence is committed, however, the state (unlike civil cases) does not only adjudicate a claim, but becomes actively involved in investigation, arrest, prosecution of the case, litigation, appeal and execution of sentences.

Offences are classified into varying degrees of seriousness. English law, for example, categorizes offences into treason (offences against the State), felonies (major crimes) and misdemeanours (minor offences). Some legal systems classify offences into two, as in the case of the Swiss penal code, which classifies offences into felonies and misdemeanours. Article 10 of the Swiss penal code distinguishes felonies from misdemeanours “according to the severity of the penalties that the offence carries.” According to this provision, felonies “carry a custodial sentence of more than three years” while misdemeanours “carry a custodial sentence not exceeding three years or a monetary penalty.” Moreover, there are legal systems that classify offences into felonies, misdemeanours and petty offences.

Ethiopian Criminal Code and the 1957 Penal Code have not adopted such a tripartite distinction, but simply classify offences into various titles on the basis of content rather than scale of punishment. The only distinction that is made in the Criminal Code is between ‘offences’ in Part II (Special Part) of the Code and ‘petty offences’ embodied in Part III of the Criminal Code, entitled “The Code of Petty Offences”. A petty offence (የደንብ መተላለፍ),

according to Article 735, is an act or omission that “infringes the mandatory or prohibitive provisions of a regulation, order or decree lawfully issued by a competent authority.”

The comment written (in this regard) by Jean Graven, drafter of the 1957 Ethiopian Penal Code, reads:

> [A]bandoning the famous ‘tripartite division’ of offences according to their supposedly different natures into felonies, misdemeanours 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 . . .[5]

Although explicit distinction is not made between offences, the range of punishment implies the gravity of offences. ‘Offences of a very grave nature’ (ከባድ ወንጀል) are punishable with ‘rigorous imprisonment’ (ጽኑ እሥራት) in central prisons for life or for a period of one to 25 years (Article 108). ‘Offences of not very serious nature’ (ከባድነቱ መካከለኛ የሆነ ወንጀል) may face ‘simple imprisonment’ (እሥራት) for a term of 10 days to three years (Article 106), subject to special provisions that may extend the period beyond three years. ‘Petty Offences’ (የደንብ መተላለፍ) on the other hand, are punishable with fine or arrest (የማረፊያ ቤት እሥራት) for a relatively short period of one day to three months,[6] subject to aggravation in case of recidivism and concurrence.[7] It must be noted that rigorous imprisonment and life imprisonment are (as per Articles 108(1) and 202, respectively) entitled to parole (አመክሮ) like the lower categories of punishment.

These forms of deprivation of liberty, namely: ‘rigorous imprisonment’, ‘simple imprisonment’ and ‘arrest’ denote the de facto classification of public wrongs into ‘very serious offences’, ‘not very serious offences’ and ‘petty offences’. This does not, however, indicate tripartite classification. According to Philippe Graven, the 1957 Penal Code pursues a bipartite classification:

> [S]ince nothing in Ethiopia’s legal traditions required that distinctions be made between felonies and misdemeanours, or between ‘*crimes*’ and ‘*délits*’, the 1957 Code follows the so-called bi-partite classification of offences which permits laying down principles applicable to all offences, regardless of the kind or term of punishment they carry or of the court by which they are triable. The Code accordingly deals with serious offences (Arts. 1–689 [Articles 1–733 in the 2004 Criminal Code]) and petty offences

(Articles 690–820 [Articles 734–865 in the 2004 Criminal Code]).

The provisions concerning serious offences are either general or special and are respectively contained in the General Part and the Special Part of the Code. A similar division will be found with regard to petty offences. [8]

1.2 Offences Depending upon Formal Complaint

Offences are public wrongs and are charged and punished even if the victim has not lodged a complaint or an accusation against the offender. For example, robbery is charged even if the person who has been robbed does not accuse the robbers due to fear of gang reprisal. And a negligent driver is criminally liable even if his victim had died (and unable to accuse the offender) by the time the offender was arrested.

According to Article 211 of the 2004 Criminal Code, prosecution with a view to a judgment and penalty is a public proceeding instituted by the public prosecutor unless the law expressly provides otherwise. However, certain special provisions require that a formal complaint be lodged by the victim or his legal representatives. Article 212 of the 2004 Criminal Code, titled '*Crimes Punishable upon a Formal Complaint*' stipulates that such offences cannot be prosecuted except upon a *formal complaint* of the aggrieved person or his legal representative.

All offences that are incorporated in the Criminal Code are public wrongs. Yet certain offences are *predominantly of a private nature*. In spite of public concern in the prosecution of private cases such as adultery (Article 652), the aggrieved person may decide whether to have the case prosecuted. It is the task of the prosecutor to institute proceedings if the aggrieved or his legal representative lodges a complaint according to the Criminal Procedure Code.

The time within which complaint can be lodged[9] is three months from the day the aggrieved person becomes aware of the act or identity of the offender. Where a complaint could not be made owing to good cause, the period of three months shall run from the day on which the aggrieved is capable of lodging the complaint. However, careful interpretation is required to reconcile Article 213 with the period of limitation of two years (Article 218) and the period of absolute limitation stipulated under Article 222.

Issues such as the capacity to exercise the right to lodge a complaint, legal representation, collective complaint, withdrawal of complaint and indivisibility of complaint in the event of two or more offenders (Articles 218, 219, 221 and 222 of the 1957 Penal Code) have been omitted from the 2004 Criminal Code. The *exposé des motifs* (*ሀተታ ዘምክንያት*) of the 2004 Criminal Code (for Articles 212 and 213) states that the themes in these provisions fall

under criminal procedure rather than criminal law. Accordingly, Articles 65 (Complaint) and 68 (Withdrawal of complaint and its result) of the Draft Code of Criminal Procedure and Evidence have substituted these provisions with some changes in content. [10]

Offences whose prosecution depends upon a complaint are easily identifiable because the special provisions that require formal complaint invariably incorporate the phrase "upon (on) complaint." For example, Articles 238 to 278 under Book III, Title I (Offences against the State) do not embody offences that are *predominantly of a private nature* and do not thus include provisions that require the formal complaint of an aggrieved individual. On the contrary, among the special provisions regarding injury to honour (Articles 613 to 619), we do not find a provision that does not require formal complaint by the aggrieved person or his legal representative. However, certain chapters of the Criminal Code may require formal complaint for certain specified offences that are predominantly of a private nature and that seem to stand at a lower hierarchy in terms of gravity.

For example Book V1, Title I of the Criminal Code is entitled "Offences against Rights in Property." Chapter II, Section I therein deals with offences against movable property and embodies 20 provisions (i.e. Articles 665 to 684). Prosecution of offences of theft (Article 665) and abstraction of power such as electricity (Article 666) do not require formal complaint of the aggrieved person, while prosecution against abstraction of things jointly owned (Article 667) requires formal complaint. And among Articles 675 to 684, breach of trust (Articles 675, 676), misappropriation of state or public property (Article 677), receiving (Articles 682, 683), and the like can be prosecuted irrespective of complaint, whereas prosecution against unlawful use of the property of another (Article 678) and misappropriation of lost property (Articles 679, 680) necessitate prior complaint by the aggrieved or his legal representative.

It is to be noted that where an offender and the victim are members of a family, the offences other than those stated in Article 664 (and other than expressly stated exceptions such as Article 682(5)) are chargeable only upon complaint. Other examples that require complaint by the victim for persecution to be conducted include Articles 380(2), 399, 556(1), 559(3), 560, 580, 593, 603, 606, 625, 643, 646, 658, 664, 685- 689, 700, 704, 705, 717–721, 725 and 726(3).

2. Material Element of Offences

The material element is one of the three ingredients of an offence, and involves

- the act or the omission
- the material (attendant) circumstances in which the act or omission occurred
- the cause and effect relationship between act/omission and the resultant harm

From the perspective of resultant harm, offences can be classified into 'offences of result' and 'offences of conduct'. The former requires harm and involves the issue of causal relationship between act and harm, whereas in the latter case mere commission, omission or possession in violation of criminal law constitutes an offence.[11] Cases of attempt, possession, and so forth are offences of conduct that do not require the proof of causation of harm.

According to Article 23(1), "a crime is an act which is prohibited and made punishable by law." The provision further stipulates that the term 'criminal act' shall mean the commission of an *act* prohibited by law or *omission* of an act prescribed by law. These two elements of the definition, namely, *'act prohibited by law'* and *'omission' of an act required by law,* require some analysis.

The term 'act' throughout this book includes *positive acts* (doing) and *negative acts* (failure to do or omission). There is a recent tendency among some jurists to consider possession (of controlled drugs, unlicensed armaments, etc.) as a third variety of criminal conduct because they may come into a person's possession without any contributory conduct on his part, under circumstances in which his failure to get rid of them has not been defined as an offence. Nevertheless, we will focus on acts of commission and acts of omission, and for the sake of convenience, we will presume that possession usually falls under acts or omissions.

2.1 Acts

An act involves volitional or willed physical activity (behaviour) and is usually defined as 'willed muscular (bodily) movement.' If an offender shoots at and kills a person, his act does not include the event of the victim's death, but only the willed act of crooking the finger, thereby squeezing the trigger. The resultant death is the *consequence* of the act, but not the act itself. The material or attendant circumstances, meaning facts surrounding the act (such as the type of weapon and bullets, place and time of the commission, range of shooting, the organ hit by the bullet etc.), should also be distinguished from

the act. The same act of shooting under different material circumstances (e.g. defensive warfare justified by international conventions, executing a court decision of death penalty) may render an act lawful.

Cook illustrates the component elements of a criminal act by using an example of homicide and he relates the act or series of acts with the surrounding circumstances and the resultant harm:

> What is 'the act'? The usual answer would probably be, 'the act of killing B'. Even a brief consideration shows us that we have here a complex rather than a simple thing; that if we are to use words in an accurate, scientific manner we must recognize that the term *act* is here used so as to include more than one thing. Apparently, it covers (1) what may be called the act (or series of acts) in a narrow sense of the word, i.e., a muscular movement (or movements) willed by the actor; (2) some reference to the surrounding circumstances; (3) the consequences or results of the movement (or movements). It seems obvious that if we are to make any careful analysis, we must distinguish between these three things; to do so, we need to have separate names for them. Perhaps we cannot do better than to restrict the word act to the narrower sense above suggested. . . .[12]

Cook explains the acts involved in the course of shooting a pistol, the concomitant circumstances and the consequences and indicates that the latter are different from the act but related to it in the definition of an offence:

> In the concrete case which we are considering, the acts of A [in the example above] consist of a series of muscular movements willed by A. The *concomitant circumstances* include, for example, the fact that B was within range of the pistol; that the pistol was loaded, etc., etc. The *consequences* of A's acts are of course very numerous. Some are, for example, the pistol is raised and turned in B's direction; the trigger is pulled back; the hammer falls; the powder is ignited and explodes; the bullet is expelled from the pistol; goes through the air toward B, strikes the surface of B's body and penetrates the same; as a result B's body undergoes physical changes which result in death. Strictly and scientifically, all these things and many others are not parts of A's act, but merely the consequences of the same. . . ."[13]

2.1.1 Voluntary versus Involuntary Acts

The core issue that must be addressed in any discussion regarding the distinction between voluntary and involuntary acts is as to what is meant by 'willed'. *Oxford Advanced Learner's Dictionary* defines 'will' as "mental power by which a person can direct his thoughts and actions," and 'willpower' as "control exercised over oneself, one's impulses".

Impulses (drives), desire, will, etc. precede voluntary acts. And certain acts may in addition involve preconceived plans and preparatory acts. Day-to-day habitual acts such as walking, speaking and eating need not of course require such plans and preparation. Yet they are voluntary. There are, however, automatic acts at the subconscious level as in the case of instinctive (reflexive) responses such as defensive bodily movements during a sudden fall on a slippery floor. This raises the issue of *automatism* regarding acts over which the doer has no control or acts which are beyond the willpower of the doer. According to Ashworth:

> Automatism . . . is more of denial of authorship, a claim that the ordinary link between mind and behaviour was absent. The person could not be said to be acting as a moral agent at the time. What occurred was a set of involuntary movements of the body rather than 'acts' of defendant. The usual examples of this act are behaviour following concussion, being physically overpowered by another person, or being attacked by a swarm of bees while driving.[14]

The example of being overpowered by another person may at times be susceptible to restrictive interpretation. Yet, the accused person can still invoke absolute coercion. There are, however, situations that are clearly unwilled. If a person, for example, is physically overpowered and pushed, thereby damaging property, his act is involuntary.

Willed acts normally go through various mental and physical activities. Impulsive behaviour is predominant during early infancy. A child's hunger drive entails the impulse to feed, and the baby sucks whatever comes into its mouth, the same as its instinctive curiosity leads it to touch an 'attractive' candle flame nearby. As years go by, 'reason' and 'conscience' will keep on developing. 'Reason' channels our instincts (drives) without of course necessarily suppressing them. 'Conscience' meanwhile evaluates our acts through the mechanisms of self-esteem and self-criticism, in effect nourishing our 'reason or will' to the benefit of future thoughts and acts.

A person is said to be 'reasonable' if his acts are regulated (directed) by a rational *will* rather than blind passion. And one is said to be 'conscientious' if his conscience effectively evaluates his acts and imposes on himself the sanctions of inner-praise or regrets. Freud's notion of the *Id*, the *Ego* and the *Super Ego* as a "triad to reveal the bio-sociological conflict" and "as the basis of personality conflict"[15] can be regarded as a conceptual foundation for the roles of and the interrelation between *passion*, *reason* and *conscience* in a person's conduct. An act of irresistible impulse due to abnormal lack of this balance may be subject to limited irresponsibility based on medical evidence.

A willed act may be good or bad, right or wrong, lawful or unlawful. Good, bad, right and wrong involve philosophical issues. But criminal law expressly states what it considers to be 'a public wrong.' If what a person considers 'right' or 'wrong' is at variance with the law, he either wilfully acts against the law (despite punishment), or harmonizes his willed acts with the law. Section 1.13 of the US Model Penal Code prepared by the American Law Institute offers the following definitions to various terms that are relevant to the material element of offences:

§1.13 *General Definitions*.

In this Code, unless a different meaning plainly is required:

. . .

(2) "act" or "action" means a bodily movement whether voluntary or involuntary;

(3) "voluntary" has the meaning specified in Section 2.01;

(4) "omission" means a failure to act;

(5) "conduct" means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions;

. . .

(8) "person," "he" and "actor" include any natural person and, where relevant, a corporation or an unincorporated association;

Section 2.01 of the Model Penal Code states the requirement for voluntary act and illustrates involuntary acts:

§ 2.01 *Requirement of Voluntary Act; Omission as Basis of Liability; Possession as an Act*.

(1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.

(2) The following are not voluntary acts within the meaning of this Section:

(a) a reflex or convulsion;

(b) a bodily movement during unconsciousness or sleep;

(c) conduct during hypnosis or resulting from hypnotic suggestion;

(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

In short, an act presupposes 'will', and involuntary bodily movements do not constitute an act for the purpose of criminal law. The Model Penal Code's comment underlines that "[p]eople whose involuntary movements threaten harm to others may present a public health or safely problem, calling for

therapy, or even custodial commitment; [but] they do not present a problem of correction.''[16]

2.1.2 Material Circumstances

Acts (or omissions) become offences only under particular material or surrounding circumstances. For example, if a person is accused of adultery, the act that should be proved is sexual intercourse, and the material (attendant circumstance) required is married status of the accused and/or his/her partner. Shooting at and killing a person is homicide. But the same act of crooking the finger to pull a trigger in a target shooting practice at an Army Academy does not constitute an offence. To use a frequently cited illustration, if Ato B intending to steal a wallet hides it and then finds a note addressed to him that reads, "It is a surprise gift for you", there is no theft despite intent and act (owing to the material circumstances under Article 665). One of the elements of Article 665 is that the thing abstracted be *the property of another person*. The gift renders the wallet B's property; and his intent and act do not thus satisfy the material circumstance embodied in Article 665. Similarly, a person who takes goods (which he thinks are stolen) as a gift does not commit the offence of receiving (Article 682) if the goods are not actually stolen.

The *place* and *time* of the crime (Article 25) are among the material circumstances of an offence. Different material circumstances may alter the nature of an offence. For example burglary can be defined as "breaking and entering the dwelling house of another in the night, with the intent to commit a felony therein."[17]

Criminal law does not thus consider the act or omission on its own, but within the context of the attendant circumstances that surround its commission. The criminal act or omission is of course the central feature of the material element of an offence. But it is not the mere 'willed muscular movement' or the inaction, but the material circumstances as well, that are taken into account.

____

Case Problems and Review Exercises

1. Choose any specific provision in the Special Part of the Criminal Code, create a hypothetical case that satisfies the elements of the provision and identify the act (or omission), the attendant circumstances and the resultant harm.
2. D's car had been driven at an excessive speed but it was not proved whether D or E was driving.[18] Discuss the *actus reus* that the public prosecutor can prove under Ethiopian law if both are unwilling to tell who the driver was.
3. Daniel Richardson and Samuel Greenow accosted a prosecutor as he was walking along a street, by asking him, in a peremptory manner, what money he had in his pocket. He replied that he had only two-pence half penny, and one of the men immediately said to the other, "Do not take that," and turned away. The other man robbed the two-pence half-penny, but the prosecutor could not ascertain which one robbed him.[19] Both were discharged. Can this be tenable under the 2004 Criminal Code?
4. State the act, the attendant circumstances and the harm in the following:
   a) Bowen advised Jonathan Jewett who was convicted of murdering his father and awaiting death penalty to commit suicide on the eve of his execution in order to disappoint the sheriff. The Northampton jail keeper found him dead. (George Bowen's case, 1816, England)
   b) Ato D talked to Ato V, a dying man, for about five minutes, in effect causing exhaustion and accelerating the death of Ato V.
5. In *Robinson v. California*[20] the defendant was convicted under a California statute that made it an offence for a person to "be *addicted* to the use of narcotics." As stated in Chapter 1, Section 2, the Supreme Court struck down the statute on constitutional grounds. "[T]he Court held that, although a legislature may use criminal sanctions against specific acts associated with narcotics addiction, e.g., the unauthorized manufacture, sale, purchase, or possession of narcotics, it could not criminalize the status of being an addict, which the Court analogized to other illnesses."

   In *Powell v. Texas*,[21] Powell was charged with violating a Texas statute that prohibited drunkenness in a public place. Powell argued that he was a chronic alcoholic and was thus unable to prevent appearing drunk in public and sought relief under the reasoning of *Robinson v. California*.

   a) Discuss Robinson's case under Ethiopian criminal law and whether Powell can be punished 'for the act of public drunkenness' or 'for his status as a chronic alcoholic.'
   b) If Powell is punished for an act, does that imply that his act is voluntary? Why or why not?

6. Consider the following case and state the act prohibited by law in the ordinance. Identify the act of the defendant (if any), and discuss whether her act has violated the law. Do you agree with the reasoning and holding of the court? State your reasons. Compare this case with *W. J. Newton's case* (New York v. Newton) in Chapter 1, Section 6, Review Exercise 6.

New York v. Shaughnessy[22]

Decision after Trial, John S. Lockman, Judge

On October 9th, 1970 ..., the Defendant in the company of her boy friend and two other youngsters proceeded by automobile to the vicinity of the St. Ignatius Retreat Home, Searingtown Road. . . . The Defendant was a passenger [in the automobile]. The vehicle in which the Defendant was riding proceeded into the grounds of the Retreat House and was stopped by a watchman and the occupants including the Defendant waited approximately 20 minutes for a Policeman to arrive. The Defendant never left the automobile.

The Defendant is charged with violating Section 1 of the Ordinance prohibiting entry upon private property of the Incorporated Village of North Hills, which provides: 'No person shall enter upon any privately owned piece, parcel or lot of real property in the Village of North Hills without the permission of the owner, lessee or occupant thereof. The failure of the person, so entering upon, or found to be on, such private property, to produce upon demand, the written permission of the owner, lessee or occupant to enter upon, or to be on, such real property, shall be and shall constitute presumptive evidence of the violation of this Ordinance.' . . .

. . . The problem presented by the facts in this case brings up for review the primary elements that are required for criminal accountability and responsibility. It is only from an accused's voluntary overt acts that criminal responsibility can attach. An overt act or a specific omission to act must occur in order for the establishment of a criminal offense . . . The physical element required . . . designated as the *Actus Reus* . . . is always necessary.

. . . In the case at bar, the People have failed to establish any act on the part of the Defendant. She merely was a passenger in a vehicle. Any action taken by the vehicle was caused and guided by the driver thereof and not by the Defendant. If the Defendant were to be held guilty under these circumstances, it would dictate that she would be guilty if she had been unconscious or asleep at the time or

even if she had been a prisoner in the automobile. . . .”

In the case of the Defendant now before the Court, however, the very first and essential element in criminal responsibility is missing, an overt voluntary act or omission to act and, accordingly, the Defendant is found not guilty.

Readings on Section 2.1

Reading 1: Elliott and Quinn[23]

A person cannot usually be found guilty of a criminal offence unless two elements are present: an *actus reus*, Latin for guilty act; and *mens rea*, Latin for guilty mind. Both these terms actually refer to more than just moral guilt, and each has a very specific meaning, which varies according to the crime, but the important thing to remember is that to be guilty of an offence, an accused must not only have behaved in a particular way, but must also have had a particular mental attitude to that behaviour. The exception to this rule is a small group of offences known as crimes of strict liability. . . .

The definition of a particular crime . . . will contain the required *actus reus* and *mens rea* for the offence. The prosecution has to prove both of these elements . . .

Actus Reus

An *actus reus* can consist of more than just an act; it comprises all the elements of the offence other than the state of mind of the defendant. Depending on the offence, this may include the circumstances in which it was committed, and/or the consequences of what was done. For example, the crime of rape requires unlawful sexual intercourse with a person, without their consent. The lack of consent is a surrounding circumstance which exists independently of the accused’s act.

Similarly, the same act may be part of the *actus reus* of different crimes, depending on its consequences. Stabbing someone, for example, may form the *actus reus* of murder if the victim dies, or of [attempted murder or] causing grievous bodily harm (GBH) if the victim survives; the accused’s behaviour is the same in both cases, but the consequences of it dictate whether the *actus reus* of murder, [attempted murder] or GBH has been committed.

- ***Conduct Must Be Voluntary***

If the accused is to be found guilty of a crime, his act or her behaviour in committing the *actus reus* must have been voluntary. Behaviour will usually only be considered involuntary where the accused was not in control of his or her own body (when the defence of insanity or automatism may be available) or where there is extremely strong pressure from someone else, such that the accused will be killed if he or she does not commit a particular offence (when the defence of duress may be available). . . .

- ***Types of Actus Reus***

Crimes can be divided into four types, depending on the nature of their *actus reus*.

1. Action Crimes

The *actus reus* here is simply an act, the consequences of that act being immaterial. For example, perjury is committed whenever someone makes a statement which they do not believe to be true while on oath. Whether or not that statement makes a difference to the trial is not important to whether the offence of perjury has been committed.

2. State of Affairs Crimes

Here the *actus reus* consists of circumstances, and sometimes the consequences, but no acts—they are 'being' rather than 'doing' offences. The offence committed in R v. Larsonneur [1933] is an example of this, where the *actus reus* consisted of being a foreigner who had not been given permission to come to Britain and was found in the country. [The case involved a French national whose passport status did not allow her to work in the UK. She went to Ireland but the Irish Police deported her back to England where she was found guilty (under the Aliens Act of 1920) although she was there at this particular time not out of her free will but due to deportation from Ireland.]

3. Result Crimes

The *actus reus* of these is distinguished by the fact that the accused's behaviour must produce a particular result—the most obvious being murder, where the accused's act must cause the death of a human being.

Result crimes raise the issue of causation: the result must be proved to have been caused by the defendant's act. If the result is caused by an intervening act or event, which was completely unconnected with the defendant's act and which could not have been foreseen, the defendant will not be liable. Where the result is caused by a combination of the defendant's act and the intervening act and the defendant's act remains a substantial cause, then he or she will still be liable. . .

4.Omissions

. . . There are . . . situations where the accused has the duty to act, and in these cases there may be liability for a true omission. . . .

Reading 2: Williams[24]

Actus reus in the wide sense means an occurrence constituting the external elements of an offence, or that would constitute such elements if there were *mens rea* or that would constitute other required fault element. Some kind of external element is always necessary, but it need not involve bodily movement or be injurious in itself. It may, for example, be an act, an omission, or a bodily position, all of which may be called "conduct." It may even be a mere "situation."

An act means a willed movement. Sometimes a willed movement may be hard to find in offences like manslaughter, even though they appear at first sight to involve positive conduct.

An omission implies that breach of a duty to act, the duty being imposed by law. Murder and manslaughter are common crimes requiring a "killing," but the courts hold that killing may be by an omission to save life in breach of duty. Other common law crimes are not generally committed by omission, and the courts do not generally construe active verbs in statutes as covering omissions. However, in determining negligence, conduct may be regarded as on the whole an act, even though some component part is an omission. Where a person creates a dangerous situation and then intentionally or recklessly fails to avert the danger, he can generally be convicted on the basis of having done an act (*Miller*) [1983, A.C. 161]. Physical inability can negative a requisite fault element.

Offences of unlawful possession are statutory; they can be analyzed as involving either an act of acquisition or an omission to inform the police of the arrival of an unlawful object. A person may possess through another, and the other may be regarded as being in possession . . .

Normally the act and metal element must concur in point of time. But there are exceptions and quasi-exceptions, notably in the case of continuing acts and under the doctrine of *Miller*. The latter case [*Miller*] holds that where an act has accidentally caused a result, and the actor intentionally or recklessly failed to prevent the result, he can be held to have caused the result intentionally or recklessly, at any rate in loss of criminal damage.

A statute may make (or be interpreted to make) a person guilty by reason of his bodily position, voluntarily assumed. There are also purely "situational" offences (without relevant conduct), an extreme example being *Larsonneur*. On principle the courts should strive to interpret such offences as requiring some kind of relevant act or omission involving fault, at any rate where the offence involves obloquy or may result in imprisonment.

A person cannot be convicted of a completed offence if an external element is missing, but it can in appropriate circumstances be convicted of an attempt. On principle, a person should not be guilty if the acts constituting a *justification* are present, even though he is unaware of it; but he must know the facts constituting an *excuse*, or believe that they exist.

2.2 Acts of Omission

The second paragraph of Article 23(1) of the Ethiopian Criminal Code states the two manifestations of criminal conduct, i.e. "the commission of what is prohibited by law" and "the omission of what is prescribed by law". 'Omission' refers to the failure to perform an act that is required by law. Alexander notes that "where criminal law imposes a duty to act, the duty must be one that the defendant is physically capable of performing and without undue risk of sacrifice" and that "the defendant's failure to act must be accompanied by whatever *mens rea* the crime requires for the commission."[25]

Most of the provisions that define specific offences deal with acts of *commission* (i.e. the commission of a forbidden act). The law also imposes certain duties of performance, and failure to perform acts required by law

constitutes an offence of *omission*. The following (among others) are acts of omission, i.e. violations of the duty to act:

- failure to report (Article 39) the preparatory acts of treason and mutiny (Articles 254, 335)
- failure to obey enlistment or mobilization, or failure to enlist (Articles 284, 285)
- failure to report danger in time of emergency, general mobilization or war (Article 308)
- failure (without good cause) to inform the law of an offence punishable with death or life sentence (Article 443(1)(a))
- failure to appear before courts as a witness or an accused person (Article 448)
- omission to notify of gangs without threat not to do so (Art. 479(1)(b))
- failure to lend aid to another in imminent and grave peril without risk to himself or to third parties (Article 575)
- omission to register the birth of an infant (Article 656(1))
- failure to report the finding of an abandoned infant (Article 656(2))
- failure to provide the maintenance allowances stated under Article 658
- a parent's gross neglect in bringing up a child (Article 659)
- failure to report the possession of counterfeit money (Article 779)
- failure to exercise proper supervision over dangerous persons and animals (Article 824)
- failure to notify the competent authority about mislaid, lost or stolen property or about treasure (Article 855)

The terms 'failure' and 'refusal' usually overlap, but may also express different situations. If a shop-keeper expressly states his refusal to accept a legal tender, i.e. a Birr note (Article 778), saying "እምቢ" or "አልቀበልም", he has performed an act of verbal expression through a 'willed' movement of his lips, tongue etc. If his refusal takes the form of a negative sign normally in use, he has still acted through customary signs of refusal. Failure to do what is required by law (or omission), on the other hand, usually involves nonaction. The term 'refusal' may also denote omission as in Article 537, which deals with refusal, contrary to one's duty and without just cause, to provide medical assistance by a "doctor, pharmacist, dentist, veterinary surgeon, midwife, nurse or any other person lawfully entitled to render professional attention and care."

Certain omissions produce harm that could as well be brought about by criminal acts. Such offences are called *commission by omission* (*delicta per omissionem commissa*). Philippe Graven gives the example of an offender who fails to render assistance to a person in danger in violation of his duty to

do so.[26] If the person dies as a result, the offender is said to have committed an offence of commission by omission. Refusal to provide professional service by a doctor (in violation of Article 537) is an offence of commission by omission if harm is caused.

Similarly, failure to bring up children[27] is basically an offence of omission, but it becomes commission by omission if the gross neglect causes injury to the child.[28] In short, failure to perform an act required by law is omission, and bringing about harm by omission can be referred to as commission by omission.

Anglo-American law has a relatively strict definition of criminal omission. It stems from the common law principle that a person is not duty bound to act in order to prevent the occurrence of harm to another person, subject to the express exceptions to this rule. The usual exceptions are

- duty that arises from relationships of status, such as marriage, filiation, etc.
- duty expressly or implicitly created by a contractual obligation
- duty to render assistance to the victim based of a prior faulty or accidental act of a person in having caused harm (or danger) to victim's life, person or property
- duty to continue providing assistance that the defendant has voluntarily started to undertake "if the subsequent omission would put the victim in a worse position than if the defendant had not commenced the assistance at all"[29]
- the duty to perform acts imposed by statutes

As Alexander states,[30] Anglo-American criminal law does not impose "general duty to save others from harm, even when one can do so at little risk or cost to oneself"[31] subject to "several exceptions to the 'no duty to rescue' principle". He cites LaFave's portrayal of the criminal law regarding omissions as follows: "Some criminal statutes specifically require affirmative acts, such as those requiring the filing of a tax return, the reporting of draftees for induction into the military, or the reporting by motorists of accidents in which they have been involved."[32]

As enumerated above, Anglo-American law attaches such duty to act with special relationships "such as husband and wife or parent and child" or "contractual duty to save the victim from harm," or "those in which the defendant has created the victim's peril." It may also include relationships "in which the defendant has voluntarily assumed a duty to rescue the victim; and those in which the defendant's status as parent of children who are threatening harm to the victim, or as owner of land that is hazardous to the victim, place a duty on defendant to protect the victim from harm."[33] Section 2.01(3) of the

US Model Penal Code provides the following:

> Liability for the commission of an offense may not be based on an omission unaccompanied by action unless: (a) the omission is expressly made sufficient by the law defining the offense; or (b) a duty to perform the omitted act is otherwise imposed by law.

Alexander briefly states the following regarding the commentary of these sections of the Model Penal Code:

> The official commentary on these sections implies that duties 'imposed by law' include the standard exceptions to the 'no omission liability' principle. In those cases where the criminal law imposes a duty to act, the duty must be one that the defendant is physically capable of performing, and without undue risk or sacrifice.
>
> Moreover, the defendant's failure to act must be accompanied by whatever *mens rea* the crime requires for its commission. . . .[34]

The Ethiopian Criminal Code shares the wider conception of *duty to act* with the French, Yugoslavian, Italian, German and other penal codes of continental Europe. The legislative extension of the duty to act seems to have been influenced by the utilitarian conception of the duty to provide assistance if one can do it "without exposing himself to sensible inconvenience." Jeremy Bentham illustrates this concept:

> A woman's head-dress catches fire; water is at hand; a man, instead of assisting to quench the fire, looks on, and laughs at it. A drunken man, failing with his head downward into a puddle, is in danger of suffocation; lifting him a little on one side would save him; another man sees this and lets him die. A quantity of gunpowder lies scattered about a room; a man is going into it with a lighted candle; another, knowing this lets him go in without warning. Who is there that in any of these cases would think punishment misapplied?[35]

After setting forth some examples and formulating a question that captures our attention, Bentham argues that every person "is bound to assist those who have need of assistance, if he can do it without exposing himself to sensible inconvenience." This obligation, according to Bentham, "is stronger, in proportion as the danger is the greater for the one, and the trouble of preserving him the less for the other."

> Such would be the case of a man sleeping near the fire and an individual seeing the clothes of the first catch fire, and doing nothing towards extinguishing them: the crime would be greater if he refrained from acting not simply from idleness, but from malice or some pecuniary interest"[36]

Macaulay, who drafted the Indian penal code, had "strongly opposed such a wide measure of criminal responsibility for a mere omission. In the main his objection was that there would be grave difficulties in defining the limits of a duty to act."[37] He argued that if it were to be criminal to fail to provide food to a beggar although death was the certain result, it would raise the issue of whether the duty falls on another beggar who has a little food. "Macaulay concluded that omission should be left to public opinion, religion and morality, and criminal responsibility for omissions should be confined to those cases where the omission to act was already an offence, a breach of existing law or an existing civil wrong."[38]

Article 575(1) of our Criminal Code seems to be closer to Bentham's wider conception of the duty to act rather than Macaulay's position. It provides: "Whosoever 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 . . . is punishable with simple imprisonment not exceeding six months, or fine". If the offender has himself caused the harm, or if he is "under an obligation professional or contractual, medical, maritime, or other, to go to the victim's aid or to lend him assistance" (Article 575(2)) the offence is relatively grave.

Review Exercises

State the material elements of offences, if any, based on the 2004 Criminal Code under the following circumstances:

1. "The defendant's husband killed himself, by hanging, over material, and domestic troubles. After he had become unconscious, but at a time when he still could have been saved, the defendant appeared on the scene, perceived the situation, but let him hang. She was 'quite satisfied with the course of events which was brought about without her intervention and did not wish to change it by rendering aid'."[39]
2. M. Chunga and K. Mapalanga (a husband and wife) "were charged with the manslaughter of their small daughter Kasango. The charge was based on the parents' alleged neglect with regard to the care and treatment, and specially the feeding of the child".[40]
3. "The defendant [Knowles] is charged in the indictment with the crime of murder upon the high seas. It alleges that the defendant was, on the first day of April, 1864, captain of the American ship Charger belonging to citizens of the United States; that the ship had on board ten mariners, and among them one John P. Swainson; that the ship was provided with three boats, for the protection and safety of the lives of the persons on board, in case of accident; and that it was the duty of the defendant to manage and control the ship and boats, so as to insure such protection and safety; that on the first of April,

1864, the said Swainson was employed as seaman upon the royal-yard-arm of the mainmast of the ship in furling the royal-sail; that whilst thus employed he accidentally fell into the sea; and that the defendant willfully omitted to stop the ship, or to lower either of the boats, or to make any attempt to rescue and save Swainson, as was his duty to do; that Swainson would have been rescued and saved had the defendant stopped his ship and lowered either of the boats, and . . . Swainson was drowned.[41]

4. A gatekeeper at a railway company opened the gate to let a cart pass but forgot to shut it again when he went to his lunch. Ten minutes later, a hay cart crossing the line was struck by a train and the driver of the cart was killed immediately.[42]
5. A wealthy man saw a beggar who appears to be about to die. Is he legally obliged to give alms? Is he required to give the beggar enough money to restore his health? Must he take the beggar to the hospital? Does the man have to be wealthy to incur liability under Article 575 of the 2004 Criminal Code?[43]
6. Ato Mushiraw is on his honeymoon with his bride at Langano beach. A group of young boys enthusiastically but imprudently strive to swim. Is he bound to watch them closely so that none of them will drown?
7. A doctor refused to attend a seriously ill patient due to his desire to attend (a) his son's wedding; (b) his son's funeral. Note that motive, quite exceptionally, is included as an essential element of criminal liability under Article 537 of the 2004 Criminal Code. Can this doctor also be prosecuted under Article 575(2)(b)?[44]
8. Dr. D refused to go to Nazareth to perform a critical surgery, and the patient died. Dr. D is the only surgeon who could have successfully undertaken the operation.
9. Ato A was trying to change his flat tire around midnight when he saw Ato B passing by in another car. Ato B did not offer help although Ato A stretched his hands for assistance. Soon after, Ato C, an ex-convict in robbery, approached Ato A, and despite Ato A's refusal, he insisted on helping to change the flat tire. After a short while, Ato C inflicted grave physical injury while he was attempting to rob Ato A. Ato C fled when he saw a car coming towards the spot. Is Ato B criminally liable for not having assisted Ato A?
10. In Miller's case (1983), the defendant "fell asleep while smoking, woke up to find the mattress smouldering, but simply left the room and went to sleep elsewhere." The fire caused extensive damage to property.[45]
11. A doctor withdrew treatment from a patient in a persistent vegetative state, and the death was inevitably hastened by that conduct. (1993)[46]

Readings on Section 2.2

Reading 1: Elliott[47]

Omissions [under French Law]

In most cases the *actus reus* consists of a positive act and it can only consist of an omission if that is expressly incriminated by a specific text. In all these cases it is the omission itself which constitutes the offence and which is punishable, whatever may be the consequences of the omission. Liability is analyzed by the academic writers as being imposed for a failure to carry out a particular duty to act. For example, the offence of allowing a military secret to be divulged is based on the duty to protect the military interests of the State.[a]

In the nineteenth century there was no general duty to act in relation to one's neighbour, as it was considered that this fell within issues of moral responsibility rather than criminal responsibility, but this individualistic approach was gradually abandoned. First, offences for omissions were created to protect the vulnerable in society, such as minors and the disabled. Offences were therefore created of neglecting a child in 1898 and of abandoning a family in 1924. Then in the 1940s offences imposing obligations to act to protect a wider range of people were created, with offences such as failing to give evidence in favour of an innocent person and failing to prevent the commission of a crime against another. This development reached its heights with the new Criminal Code which created the offence of failing to help a person in danger.[b] This offence is committed regardless of whether any harm has actually been caused and is an important tool for imposing liability for an omission—it was initially raised as a possible ground for imposing liability on the paparazzi who were accused of failing to assist Princess Diana after the car accident in which she was killed.

But, where legislation does not expressly provide for liability by omission, there can be no liability by treating an omission as if it were an action.[c] This approach of the criminal law was highlighted by the case known as the 'hostage of Poitiers'.[d] In that case the court of Poitiers decided that the crime of intentionally injuring another[e] had not been committed by parents who had left without care, in a dark room, an old and frail person suffering from a mental illness to the point that her life was in danger. It was held that this omission could not be treated as equivalent to an act, and so fell outside the legal definition of the offence.

Comparison with English law on Omissions

The French law on omissions is very different to the English law in the field. It requires that the offence itself be expressly defined to include omissions for liability to be imposed. The academic writing merely analyses the duty owed in order to justify the approach taken by the law, but there is no requirement on the courts to find this duty. English law not only imposes liability for omissions where offences are expressly defined to include omissions, but also if the courts consider that a person owed a duty to the victim to act.

[Notes]

[a] Art. 413-10 of the Criminal Code.

[b] Art. 223-6 of the Criminal Code. . . .

[c] Crim. 29 January 1956. . . .

[d] [omitted.]

[e] *coups et belessures volontaires*: art. 309 and 311 old Criminal Code.

Reading 2: Stuart[48]

Omission under Canadian Law

...

A variety of terms have been used to distinguish acts of commission from acts of omission. Whether one speaks positive and negative acts, or misfeasance and nonfeasance, different considerations are raised by active misconduct and situations where the accused has done nothing. D watches V, who is completely blind, walk over a cliff. D could easily have stopped him. To hold D continually responsible would involve, however one puts it, a departure from the act requirement.

Often the problem of responsibility for an omission may legitimately be avoided by characterizing the act rather as one of commission on the bases that there was an earlier positive act and the conduct should be viewed as continuous. If the blind man, V, had asked D for directions and he is walking towards the cliff as a result of these directions, D's act could well be viewed as one of commission. A motorist who has caused a traffic accident might be viewed as having omitted to take reasonable precautions or having driven carelessly. In this process it would be pedantic not to view the series of events as a whole rather than in isolated segments. This may account for decisions, none of them Canadian, where an accused was convicted of cruelty to a dog as he had failed to release it from a trap he had previously set,[a] homicide as a result of failing to prevent a baboon from killing a child where he had assumed control over the dangerous animal,[b] and finally, arson by an accused who accidentally started a fire and omitted to put it out when he had the power and the ability to do so.[c]

Perhaps the most interesting decision along these lines is that of the English Court of Appeal in *Fagan v. Commissioner of Metropolitan Police* (1968).[d]

The question was whether the accused could be guilty of assaulting a police officer where, in responding to the police officer's directions as to where to park his car, the accused had driven it, perhaps accidentally, onto the police officer's foot and had abusively refused to move it until he had been requested several times to do so. It was unanimously accepted that there could be no assault by mere omission. It was further held, but only by a majority,[e] that the accused's conduct was more than a mere omission. The accused's act was not complete at the moment the car made contact with the police officer's foot but continued until it was removed. They pointed to the evidence that, once he knew his car was on the officer's foot, he had remained seated, switched off the ignition,[f] kept the wheel on the officer's foot and used words indicating that he intended to keep it there. The dissenting judge saw it differently:

> [A]fter the wheel of the appellant's car had accidentally come to rest on the constable's foot, what is that the appellant did which continued the act of assault? However, this question is approached, the answer I feel obliged to give is: precisely nothing. The car rested on the foot by its own weight and remained stationary by its own inertia. The appellant's fault was that he omitted to manipulate the controls to set it in motion again.[g]

This reasoning is a good example of the dangers of artificially segmenting a course of conduct.

Fagan must now be read subject to the decision of the House of Lords in Miller (1983).[h] After going out for a few drinks, the accused returned to the house where he had been squatting. He lay down on his mattress smouldering, got up, moved to the next room and went back to sleep. The fire spread and he was later rescued from the blazing house. The Court of Appeal [i] has upheld the conviction on the *Fagan* approach of viewing the conduct of the accused as one continuous act. However, Lord Diplock, for an unanimous House of Lords, preferred to confirm the conviction on the basis that the accused should be held responsible for an omission to act where, it was held, there was a duty to act.

. . . Lord Diplock justified the choice of the "duty theory" . . . There is nothing to stop Canadian courts from continuing to resort to the continuous act approach as a convenient device to avoid the omission problem where responsibility seems appropriate. Clearly *Miller* is an important extension of the common law duty to act. However it should be applied with caution in the Canadian statutory context, to which we now turn.[j]

Existing law

. . . Under our present Code the position is patchwork and underdeveloped. There is no general section on criminal responsibility for omissions. The common law approach that there is no criminal responsibility without a legal, not merely a moral, duty to act is implicit in the specification in the Code of a number of duties to act. Despite Section 8's prohibition of resort to common law offences, it would seem that criminal responsibility for omissions in Canada can arise if:

1. the statutory offence definition includes omission, and
2. there is a legal duty to act recognized by statute or common law.

. . .

[Notes]

[a] Green v. Cross, (1910) 74 J.P. 357 (K.B).

[b] S. v. Fernandez, (1966) 2. S.A. 259 (A.D.). A similar Canadian decision was reached in *Petzoldt* (1973) 11 C.C.C. (2d) 320 (Ont. Co. Ct.), but there was no mention of omissions.

[c] Commonwealth v. Cali, 141 N.E. 510 (Mass. 1923). . . .

[d] [1969] 1 Q.B. 439 (C.A.). The case also raised the issue of whether *actus reus* and *mens rea* must coincide . . . : "The Simultaneous Principle."

[e] Parker C.J. and James J. Bridge J. dissented.

[f] It was not determined whether this occurred before or after the engine stopped running.

[g] [omitted]

[h] [1983] A.C. 161. . . .

[i] [1982] Q.B. 532, [1982] 2 All E.R 386 (C.A.).

[j] [omitted]

Reading 3: Bohlander[49]

Omissions under German Law

German law, as most legal systems, operates on the general idea that a crime requires a positive act and that by doing nothing you do not normally violate any legal commands. Omissions are thus only criminally relevant if the law expressly provides for an offence based on inactivity (genuine omission offences—*echte Unterlassungsdelikte*), or if the offender is under a duty to act and prevent the occurrence of an event that forms part of an offence normally committed by positive acts and the omission equals commission by a positive act in seriousness (derivative omission offences—*unechte Unterlassungs-delikte*), § 13(1). § 13(2) provides for a facultative reduction in sentence for this second category.

Genuine omission offences present no great conceptual challenge: the law states that if you do not act in a certain manner in a certain situation, you will be held criminally liable if a certain result ensues from your inactivity. A prime example, which also shows how wide the rift between systems can be, is § 323c, the offence of omitting to effect an easy rescue (*unterlassene Hilfeleistung*), which applies to anyone and the violation of which can be punished by imprisonment of up to one year or a fine. Such a law is still unacceptable to most English lawyers because it is seen to constitute an intrusion into personal privacy.

The central feature of the second category is the requirement of a duty to act, which in German law is split up into two subconcepts, the duty of care (*Garantenstellung*) and the scope of the duty to act in the strict sense (*Garantenpflicht*)[a] in the specific circumstances, meaning that although there may be a legal basis for D's duty of *care* towards V, that duty of care may not entail D's duty to *act* with regard to all dangers to or circumstances of V. For example, although the fact that D as V's employer took her into his home may create a duty of care towards her, that duty does not require D to prevent V from having an illegal abortion.[b] Likewise, a building insurance policy may not be a sufficient legal foundation to create an omissions liability for aggravated arson under § 306a[c] when the insured house burns down. So although D may have a duty of care towards V, it is always necessary to determine the exact scope of the action that D is required to take. This will not be a problem in most cases, especially when looking at the category of result crimes which form the vast majority of offences that can be committed by omission. It is also in this category that the least problems with the 'equal seriousness' requirement will occur.

Recent scholarship[d] and case law[e] suggest that the traditional categories of circumstances that give rise to a duty of care have been superseded by a more generalist classification that divides them into two large groups based on the substantive legal reasons for creating a duty: so-called *Beschützergaranten* (based on duty of protection) and *Überwachergaranten* (based on duty of supervision). However, this distinction is not clear-cut and there are areas of conceptual overlap.[f] In addition, we must make a logical difference between establishing conceptual classifications and the individual scenarios that under law give rise to one of the two duties, that of protection or that of supervision. In other words, the fact that somebody has to supervise or protect a certain person is not

the same as the reason *why* he or she has that duty. It is also a function of the underlying legal principles that decides whether a duty is one of supervision or protection. This means that while the new classification may help in putting certain scenarios into conceptual drawers, it does nothing to tell us *when* and *why* someone should be put into those drawers.[g] That can only be determined by analysing the reason and purpose behind a legal rule giving rise to a duty of care. In effect, that realisation leads us back to the traditional classifications of duties with the added awareness that not every obligation under law may be enough for a duty of care—it is, to my mind, unclear whether in substance this does not really mean amalgamating the concepts of duty of care and duty to act into one.

The main[h] categories of duties of care are as follows, and there is little difference in substance to what is generally accepted under English law:

a) duties based on specific legislation when that legislation does not provide for genuine omissions liability already;
b) duties based on close personal relationship;
c) duties based on joint dangerous enterprise or mutual trust (*Vertrauens-* and *Gefahrgemeinschaft*);
d) duties based on assumption of risk;
e) duties based on specific qualities of the offender; and
f) duties based on creation of dangerous situations.

It can easily be seen that these categories do also overlap: for example, § 1353 BGB,[i] the basic norm of the German civil law of marriage, contains a duty of care which both partners owe each other. It is thus a duty based on legislation, yet one could just as well base the duty on close personal relationship and indeed, as we will see shortly, the factual circumstances of the relationship influence the reach of the legal command. However, it is not surprising that the legislators over time found it necessary to codify some of the most important areas of personal relationships. Let us take a look at a few examples that highlight the problems.[j]

Duty Based on Legislation

The BGH held in the context of the criminal responsibility of the members of the former GDR government for border killings that even norms of constitutional law can in exceptional cases create a duty of care towards the citizens of a country. The court derived a duty of care towards life and limb of GDR citizens who wanted to leave the GDR within the meaning of § 9 StGB-GDR from article 30(1) and (3) of the GDR Constitution.[k] It is, of course, a fair comment that this extensive view may have been politically result-driven in the context of German unification and the desire not to fall into the same mistakes made after the so-called Third Reich again. However, the general duty of care owed by a government to its citizens does not suffice to establish a duty that entails criminal liability or even state liability, such as, for example, when a prisoner on furlough commits a murder, if there was no indication that he or she posed a danger in that respect.[l]

Duty Based on Close Personal Relationship

The most obvious case of a close personal relationship is marriage. As stated above, § 1353 BGB is seen as a fundamental provision codifying the duties that

spouses owe to each other. Yet family ties as such do not give rise to duties of care without further qualification.[m] The tendency appears to be to restrict the sphere to the core family, although just who belongs to the core family is unclear. Parents, grandparents and children or grandchildren as well as sisters and brothers will usually have a duty of care vis-à-vis each other, but already the case of the fiancé(e) is doubtful.[n] It is not normally necessary that the persons from this circle of relatives live together, but in the case of separated spouses the BGH has accepted that a duty of care may not exist if the separation is the preparation for a divorce.[o] Conversely, relatives who do not belong to that circle or non-marital partners may under certain circumstances owe a duty of care if they live together.[p]

Duty Based on Joint Dangerous Enterprise or Mutual Trust (Vertrauens- and Gefahrgemeinschaft)

This category derives from the scenario of people being together, even if only for a short time, where the nature of their joint—and often dangerous—activities presupposes or even requires that they each look out for each other. Examples are mountaineers, people going on a joint wild water rafting trip or an expedition to the jungle, etc.[q]

Duty Based on Assumption of Risk

The obvious way of assuming responsibility for a certain risk is by contract; however, this is not sufficient in itself: factual assumption of that responsibility is required,[r] yet in the absence of a contract that can also be enough.[s] Whether the contract is binding, voidable or void under civil law is irrelevant.[t] If D transfers the discharging of his or her responsibilities to another, his or her own duty of care will not cease and he or she will at least remain liable to supervise and check the actions of the person to whom it was entrusted.[u] This applies also to medical treatment, where the assumption of a relationship of medical care, over and above the obvious duties with regard to the direct relationship between doctor and patient, may, according to (controversial) case law, for example,[v] require the doctor to inform persons about the HIV infection of their partners,[w] to protect hospital patients from dangers posed by other patients[x] and to protect minors from suicide.[y]

Duty Based on Specific Qualities of the Offender

Many people, whether in the work place or otherwise, are subject to certain duties arising from that very position. Chief executive officers will be under a duty to safeguard the financial interests of their enterprises and if they do not, they may be liable under § 266 for causing damage to the assets of the enterprises by omission. A large segment of these job-related duties occur in public service, especially with civil servants, whose office not only empowers them to perform certain functions, but also makes them liable if they omit to do so properly. An obvious example is the police officer who lets a thief get away on purpose because the thief is a friend of his or her own son; by omitting to arrest the thief, the officer is guilty of an offence under § 258.[z]

Duty Based on Creation of Dangerous Situations

As in English law under *Miller*[aa] scenarios, German law[bb] recognises a duty to act arising out of prior conduct which created a source of risk or danger, to take all necessary steps in order to prevent the risk from materialising. The risk-causing conduct may in turn have been an omission in violation of a duty to act.[cc] The exact conditions regarding the nature and qualities of the dangerous conduct are unclear, but it would appear that the prevailing view does not tend to require any fault on the part of D. However, his or her conduct must have been dangerous as such in relation to the legal interest threatened as a result of his or her actions, and it must have been in breach of a duty itself, meaning that behaviour which is legal cannot normally give rise to omissions liability. Exceptions to this are the cases where the legal reasons for creating a certain source of danger cease to apply after a while: in that case, D is required to eliminate the danger source as soon as the reasons for its creation have ceased. An example is V, who was locked up by the police because he or she was found drunk in public and posed a danger to others; he or she must be released as soon as the drunkenness ends. A road block set up because of road flooding must be removed as soon as the flooding has subsided.[dd]

[Notes]

[a] The *Garantenpflicht*, ie the duty to act, as such is not an element of the *Tatbestand*, but of the second tier of the tripartite structure, the general unlawfulness criterion, or *Rechtswidrigkeit* (BGHSt 16, 148). This may have an impact on the question of mistake.

[b] See OLG Schleswig, NJW 1954, 285.

[c] It had, however, been accepted as such in the older case law; see RGSt 64, 277 and BGH NJW 1951, 204.

[d] See Tröndle/Fischer, § 13 Mn. 5–5b.

[e] BGHSt 48, 77; 48, 301.

[f] As conceded by Tröndle/Fischer, § 13 Mn. 5c.

[g] See Sch/Sch-Stree, § 13 Mn. 9.

[h] For an overview of the ramifications, see Sch/Sch-Stree, § 13 Mn. 17 *ff*.

[i] Tröndle/Fischer, § 13 Mn. 6b.

[j] For reasons of space, we cannot address all possible permutations. An overview with references to the case law and commentary is provided by Sch/Sch-Stree, § 13 Mn. 17–59.

[k] BGHSt 48, 77 at 84.

[l] Tröndle/Fischer, § 13 Mn. 6a, referring to the jurisprudence of the ECtHR in *Mastromatteo v. Italy*, judgment of 24 October 2002, Application No 37703/97.

[m] See generally Sch/Sch-Stree, § 13 Mn. 17 *ff*.

[n] See BGH JR 1955, 104, emphasising the circumstances of the individual case.

[o] BGHSt 48, 301.

[p] Sch/Sch-Stree, § 13 Mn. 25.

[q] Sch/Sch-Stree, § 13 Mn. 23 *ff*.

[r] BGHSt 46, 203; 47, 229.

[s] Sch/Sch-Stree, § 13 Mn. 28.

[t] RGSt 16, 269; 64, 84.

[u] BGHSt 19, 288; 47, 230.

[v] See for more examples Sch/Sch-Stree, § 13 Mn. 28.

[w] OLG Frankfurt, NJW 2000, 875; NStZ 2001, 149.

[x] BGH NJW 1976, 1145.

[y] OLG Stuttgart, NJW 1997, 3103.

[z] For an overview, see Sch/Sch-Stree, § 13 Mn. 31 with further references.

[aa] [1983] 2 AC 161. See, for a similar German case with an almost bizarre course of events, BGH NJW

1989, 2480: D spends the night in the hay loft of V's barn. On the next morning he lights his cigarette lighter to have a look at his watch; this causes the hay around him, and consequently himself, to burn. He jumps down from the loft to get outside to put the fire out, only to be suddenly confronted by V who is in shock at the sight of burning D. She instinctively raises her pitchfork and the two engage in a struggle during which D grabs her throat and V faints. D leaves her in the barn and runs outside to extinguish the fire at a pond. He omits to tell the neighbours who have come to help about V; V's charred corpse is found later in the completely destroyed barn. The autopsy finds that she must have died before the smoke or fire engulfed her because there were no smoke or soot particles found in her upper airways. The trial court convicted D of negligent arson and acquitted him of attempted murder; the BGH quashed the acquittal and remanded the case for re-trial with an instruction that, depending on the circumstances of the case and the evidence, D could be guilty even of attempted aggravated murder under § 211.

[bb] For an overview of categories and examples from the case law, see Sch/Sch-Stree, § 13 Mn. 32 42.

[cc] RGSt 68, 104.

[dd] Examples by Sch/Sch-Stree, § 13 Mn. 36. It would, of course, be an apposite observation to say that in the latter examples, the conduct giving rise to omissions liability is itself an omission, namely not to remove the previously legally created danger. However, the permission to create the danger source is by interpretation a conditional one dependent on the need for its continuation. In effect, this is less a case of liability because a danger was created, but one based on the law directly, where the law allowing the creation also demands its cessation when the conditions for its establishment no longer apply.

2.3 Causation of Harm

Certain acts and most omissions are considered offences *without regard to consequence*. In perjury (Articles 452, 453) a false statement need not mislead a court and bring about miscarriage of justice in order for the perjurer to be held criminally liable. In exposure to danger (Articles 573, 574) the completion of the offence does not require the realization of the potential danger. Similarly, forgery (Article 375) is punishable even if the offender has not yet procured an undue advantage from the forged instrument. Such offences that can be deemed to be complete irrespective of resultant harm are called *offences of conduct*, distinguished from *offences of result* (or 'result offences'), which require the defendant's causation of harm.

Offences of result are regarded as complete offences when the result is achieved; short of that, they are considered as attempted offences. Result offences require harm, and the causal relationship between the criminal act of the accused and the harm ought to be established. Offences of omission may also be punishable irrespective of result, and (as discussed in Section 2.2) certain omissions known as *commission by omission* bring about resultant harm the same as criminal acts.

The offence of bodily injury (Article 555), for example, involves not only the act of striking (or another act), but also presupposes the actual harm of being wounded, maimed, and so on. If the actual harm does not occur, the offence shall be an attempt and not a complete offence. In case of offences that require result, the cause-and-effect relationship between act (or omission)

and the resultant harm must be established in accordance with the principles of causation embodied under Article 24 of the Criminal Code.

2.3.1 'Sine Qua Non' Cause or 'But-for Test'

> "For want of a nail the shoe is lost,
> for want of a shoe the horse is lost,
> for want of a horse the rider is lost.
> For want of a rider the message is lost,
> for want of a message the battle is lost—
> the war is lost—the fatherland is lost."[50]

This poem, written by Benjamin Franklin in 1757, indicates a chain of events starting from the failure to inspect the hoofs of the horse. Did the horseman cause the loss of the fatherland? Apparently, there is some chain of causation between the horseman's omission and the resultant harm. In this regard, the first paragraph of Article 24(1) of the Ethiopian Criminal Code provides: "In cases where the commission of an offence requires achievement of a given result, the offence shall be deemed to have been committed only if the result achieved is the consequence of the act or omission with which the accused person is charged."

In a broader interpretation, result achieved may be regarded as the *consequence* of a certain act or omission if the resultant event would not have occurred without the act or omission. Such a relationship, referred to as 'sine qua non' cause or 'but-for causation', is normally a remote probability, but a necessary condition for the particular event that has occurred. If a person invited to lunch dies in a car accident on his way to the place of invitation, it would be absurd to sue the person who has in good faith made the invitation, even if the victim would not have died had he not been invited to lunch.

Thus, it is not enough to say that 'had it not been for this act or omission the harm would not have occurred.' The invitation to lunch, for instance, is merely a *condition* and not the *cause* of the victim's death, because people under similar circumstances do not normally encounter this event of accidental death. Nevertheless, the sine qua non (but-for) relationship between act/omission and result must be examined in order to get a list of possible causes to choose from.

2.3.2 Adequate (Substantial) Cause

In the example of the fatal accident on the way to lunch, although the invitation was a *necessary condition* for the death, such an invitation does not in the 'regular course of events' *cause* death. Opening doors and windows, for example, may be a necessary condition for daylight to come into a room. Yet this act is not the cause of the daylight that comes into the room, because the

same act does not on its own produce light at midnight. The cause and effect relationship between act/omission and result must therefore have a restrictive interpretation. To this end, the second paragraph of Article 24(1) provides that the "relationship of cause and effect shall be presumed to exist when the act [or omission] . . . would in the normal course of things produce the result charged."

Accordingly, an act should not only be a necessary condition for the result, but should also be *adequate enough* to normally (if not invariably) bring about the harm under consideration. The same holds true for offences of commission by omission, where a causal relationship is presumed to exist if the omission could have in the normal course of events prevented the occurrence of the harm. Causation of harm does not, however, render the accused person's act or omission punishable if the resultant harm is unintended or goes beyond the offender's intent (Article 58(3)), subject to criminal liability under negligence, i.e. if the accused foresees and disregards the harm (Article 59(1)(a)), or if he fails to foresee same (Article 59(1)(b)) while he could or should have.

2.3.3 Extraneous (Concurrent, Intervening and Preceding) Causes

A certain defendant's act or omission need not be the sole cause of harm. Two or more persons may concurrently (simultaneously) cause harm to a victim. For example, a man may be struck by two bullets at the same time. If both shots are independently fatal, both acts are said to have jointly caused the harm. Even where each shot cannot independently (but can jointly, Article 24(3)) cause death, the two defendants are considered to have jointly caused the harm, i.e. death. Such causes may be referred to as multiple actual causes. If instead, A's shot could merely inflict bodily injury, and B's shot actually caused C's death, B is considered to have caused the death. A will then be liable for bodily injury or attempted murder according to the circumstances of the case (Article 24(2)), i.e. having regard to the legal and moral elements of the offences under consideration.

The same applies to *preceding* and *intervening causes*, i.e. causes that happen one after the other. In *R. v. White* (1910)[51] the defendant put potassium cyanide into a drink called nectar with intent to murder. The deceased was found dead shortly afterwards, and medical evidence showed that she died of heart failure and not of poison. The heart condition of the deceased is a preceding or preexisting cause, and the heart failure which caused the death is an intervening cause that occurred after the act of poisoning. The core issue in this case is whether the heart failure was, according to Art 24(2), 'in itself sufficient to produce the result' thereby breaking the chain of causation between the defendant's act of poisoning and the victim's death.

One may argue that the heart failure of the deceased cannot be regarded as independent cause because it can be a preceding cause exacerbated by the poisoning. The contributory causes referred to under the Article 24(2) of the 1957 Penal Code were "concurrent causes" and "intervening causes." Article 24(2) of the 2004 Criminal Code has amended this provision so that preceding contributory causes can be expressly covered. It reads:

> Where there are preceding, concurrent or intervening causes, whether due to the act of a third party or to a natural or fortuitous event, which are extraneous to the act of the accused, this relationship of cause and effect shall cease to exist when the extraneous cause in itself produced the result.

As stated in the *Hateta Zemiknyat* (*exposé des motifs*),[52] 'preceding causes' are included in Article 24(2) because extraneous causes have three temporal possibilities: pre-existing, simultaneous and supervening causes. Thus the issue is whether the heart failure was on its own adequate to cause death irrespective of the poison. If for example, it takes a certain length of time for the poison to start taking effect, and the heart failure caused the death of the victim before the poison started taking effect, the preceding cause can be regarded as having independently caused death. Expert evidence may also make a distinction between heart condition and heart failure, and state that the victim had an unhealthy heart condition before the act of poisoning, but her heart failure came after the poisoning and independent of it.

As highlighted earlier, if the intervening cause is the natural consequence of the original cause, the chain of causation is not broken as long as the original cause is adequate enough to normally cause the harm. Such interpretation is reasonable although the literal reading of Article 24(2) seems to be susceptible to erroneous interpretation. Assuming that D throws V into an ocean and V is eaten up by a shark, the latter event (although seemingly intervening), should not exempt D from punishment if (depending upon the distance of the spot from the shore or other reasons) V would have died anyway from the drowning. But if A strikes and injures B, and B goes to a hospital for treatment where he catches meningitis from a patient who was beside him, the adequate efficient cause of B's death is the latter intervening event, and not A's act.

Common law upholds the same principles in this regard and it renders the defendant liable where the intervening act or event is 'foreseeable.' In order to determine foreseeability, common law "tends to distinguish between 'responsive' (or 'dependent') and 'coincidental' (or 'independent') intervening causes."[53]A responsive intervening cause is an act (or event) that occurs as a result of the defendant's prior wrongful conduct [such as] . . . subsequent negligent medical treatment that contributes to the victim's death

or accelerates it. However, grossly negligent or reckless medical care is sufficiently abnormal to supersede the initial wrongdoer's causal responsibility.

> A coincidental intervening cause is a force that does not (in the normal course of events) occur in response to the initial wrongdoer's conduct [even if] the defendant placed the victim in a situation where the intervening cause could independently act upon him.[54]

Concurring or intervening causes may be due to an act of a third party, a natural event or a fortuitous event. In the examples stated earlier, the bullet from a second shot is an act of a *third party*. In *White*, the victim's death from heart failure is a *natural* intervening event. And where a victim of an assault is coincidentally exposed to meningitis in a hospital, the event is *fortuitous.*

As stated earlier, the extraneous cause may be preceding, concurrent or intervening. For example, if a victim was fatally shot by D and then by D_2 (whose shot would not have caused death), the cause of death is attributed to the preceding act of D. Yet D_2 is liable (Article 24(2)) for attempted homicide or for having caused bodily injury depending on the particular facts of the case. If the harm (for example, death) was inevitable but "the defendant's act accelerated death, he can be found criminally liable. . . . A defendant [who] shoots a terminally ill patient may still be found guilty of homicide"[55] because even though the victim's death was inevitable, the accused has accelerated the harm.

Another issue that can arise involves harm caused by an act of a third party that was caused by the defendant's act. In *R v. Pagett* (1983),[56] the defendant held a girl as a shield while he was resisting lawful arrest and shooting at policemen. The Court of Appeal rejected the defendant's argument that the shot fired by the policemen was the intervening cause of the girl's death. It held that reasonable acts of a third party committed in self-defence cannot be considered as new intervening acts (*novus actus interveniens*).

2.3.4 Necessary Condition versus Contributory Causes

Where harm can be attributed to more than one act or event, the core issue to be addressed is whether the extraneous (i.e. concurrent, intervening or preceding) cause was merely a necessary condition or whether it was a contributory cause to the resultant harm. "In the *Benge case* (1865) Piggot B ruled that, if defendant's negligence mainly or substantially caused the accident, it was irrelevant that it might have been avoided if other persons had not been negligent"[57]

In *R v. Malcherek* (1981)[58] the defendant inflicted injuries to a woman and she was placed on a life-support machine. The doctors determined that she

was brain dead and switched off the machine. The Court of Appeal rejected the defendant's argument that the doctors' deliberate act of switching off the life-support machine broke the chain of causation. The court found that the defendant's act was the substantial and operating cause whose fatal effect was temporarily suspended, and the original wounds brought about the effect when the life-support machine was switched off.

In contrast, in *R. v. Jordan*,[59] the wound inflicted on the victim by the defendant's act of stabbing was nearly healed when the victim died eight days later, as a result of medical treatment. The victim was allergic to the antibiotic he was given and he was also provided excessive intravenous liquid. These modes of treatment, according to medical evidence, were 'palpably wrong' and constituted the direct and immediate cause of the victim's death. The Court of Appeal quashed the conviction on the ground that the stab merely constitutes a setting for another cause of death.

The following examples by Smith and Hogan illustrate what can be regarded as operating cause even if an act is intervened by subsequent causes. D will be held to have caused the death of the victim where the injury "inflicted by D is still an operating cause and a substantial cause" even if there is a "further injury inflicted by E, not in itself mortal, but caused death".[60] Smith and Hogan cite *People v. Lewis*, in which "P received a mortal gunshot wound from which he would have died within the hour" but the victim "cut his [own] throat and died within five minutes."[61] The original wound in this case was considered as operating cause.

However there can be circumstances in which the harm may not be the natural consequence of a defendant's act. Smith and Hogan use Perkin's examples to illustrate the issue. If the defendant "knocks down another and leaves his victim not seriously hurt but unconscious" and in case there is an earthquake which causes the death of the victim from a fall from a building before the latter regains consciousness, the death is not attributable to the assault. If, however, the act was committed "on the seashore, and the assailant had left his victim in imminent peril of an incoming tide which drowned him" before he regained consciousness, death of the victim can be attributed to the assault.[62]

The earthquake is not a foreseeable occurrence while the incoming tide is foreseeable. The same holds true where human intervention is involved, and any act that is not foreseeable breaks the chain of causation whether the intervention is "intentional, negligent or merely accidental":

> The surgeon to whom the injured P is taken for an operation deliberately kills him; or the ambulance driver taking P to hospital negligently drives into a canal and drowns him; or a careless nurse gives him a deadly poison in mistake for a sleeping pill; or as in a

> Kentucky case, *Bush v. Commonwealth* (1880), the medical officer attending P inadvertently infects him with scarlet fever and he dies of that. None of these is an act which might be expected to occur in the ordinary course of events and they free D from liability. But if the injured P is receiving proper and skilful medical attention and he dies from anesthesia or the operation, D will be liable.[63]

However, such intervention of extraneous causes requires careful interpretation. According to Article 24(3) of the 2004 Criminal Code, two defendants are deemed to have cumulatively caused the death of the victim "even though each cause cannot independently produce the result." This sub-article is an amendment to Article 24 of the 1957 Penal Code, and it indeed constitutes a reversal to the interpretation of contributory but independently nonfatal acts.

Case Problems and Review Exercises

Discuss causation under the 2004 Criminal Code based on the following facts and material circumstances:

1. "In *Ex parte* Heigho, 18 Idaho 566, 110 Pac. 1029 (1910), the defendant had gone to the home of *B,* armed with a pistol, and without provocation had struck *B* in the face with his fist. *B*'s mother-in-law saw the assault and the excitement caused her to die of an aneurism in the heart".[64]
2. A taxi bumped against a donkey. The donkey's load pushed a pedestrian. The pedestrian fell and fatally hit his head on the pavement.[65]
3. D inflicted a nonfatal injury on V. During the treatment a negligent physician aggravated the effects of the injury and V died.
4. After the defendant Preslar beat his wife severely, she left home to go to her father's home. About 200 yards from her father's house, she decided not to bother her father. In spite of the extreme cold, she laid down on a bed cover through the night, as a result of which she could not walk and died afterwards.[66]
5. P and P_2, who were drinking and driving, insulted pedestrian D. D answered back. P_2 emerged from the car and, after exchanging more insults, P_2 and D began fighting. P_2 fell backwards and hit his head on the asphalt road. There was no external bleeding, but P took P_2 to hospital because P_2 felt drowsy. Dr. X said that P_2 had no problem aside from alcoholic influence and gave him no medical help. P_2 died the next day.
6. D assaulted P during a fight and inflicted a severe cut across his fingers with an iron instrument. The victim did not take care of the wound and did not pursue medical assistance. As a result, he incurred a severe

infection which eventually became gangrenous. Eventually the surgeon advised the victim to have his finger amputated, but he refused even though he was informed that his life was in danger. By the time the wound caused lockjaw, it was too late to save the victim and the victim died.[67]

7. D and the victim were drinking for some hours and they got into argument. The defendant hit and head-butted the victim who was not only drunk but had mental illness from time to time. The victim ran away and fell into a gutter where he was killed by a car.[68]
8. A girl jumped out of a moving car that was driven by the defendant. She was injured and she attributed her act to the sexual advances made by the defendant and his attempts to pull off her coat.[69]
9. Solve the following

   P is shot by D_1 and then by D_2. P died few minutes after the second shot. Give your opinion with regard to causation:

   (a) If both shots could have independently caused P's death;

   (b) If neither could have by itself caused death;

   (c) If the first shot was not fatal.
10. "The victim quarreled with defendant. Both are taxi drivers. Victim and defendant threw stones thereby hitting each other on the head. As soon as defendant hit the victim, an assistant of the defendant jumped upon the victim and repeatedly hit the latter on the head with a stone. Victim got some medical assistance and returned home. However, he died a day later and cause of death was found out to be hemorrhage in the head due to the beating he sustained." Discuss causation. (Source: Nuru S., Consultant & Attorney at Law, former Federal High Court judge)
11. The defendant fired a shot upwards to celebrate a holiday. The bullet bounced against a concrete pole and struck the victim causing grave bodily injury.[70] Discuss causation. Does it make a difference if the shot was fired accidentally?
12. A stone shot out from an asphalt road when it was run over by an automobile, severely injuring a pedestrian. Does it make a difference if the event happened on a gravel road?
13. D set fire to T's tukul with intent to burn the house. All persons escaped from the tukul, but one man, mistakenly believing a child was left behind, reentered the house and received injuries from which he later died.[71]
14. Consider the facts in the following cases and discuss causation based on Article 24 of the Criminal Code:

    a) "Anthony M., a 12 year old, in the early evening of April 17, 1982 [crouched behind a] . . . 83-year-old victim, Lee Gibson . . . grabbed .

. . her handbag and, when Mrs. Gibson would not release the bag, he pulled the strap with such force that she was whirled around, thrown to the sidewalk on her left side, and dragged a short distance, whereupon Anthony let go and disappeared into the subway station. Mrs. Gibson was taken to the hospital, where a fractured left hip and other bruises were diagnosed. She was also that day examined by her cardiologist, Dr. Jerome Zacks, who recommended transfer to another hospital for surgery involving the implantation of a pin in order that she might walk again. In the initial days following the incident, she exhibited no symptoms of heart trouble, despite a medical history that included hypertension, long- standing angina (both believed to be under control), an enlarged heart, arteriosclerosis of the coronary artery and vascular disease. After hip surgery was performed, on April 19, in the second hospital, her condition progressed normally.

"On April 25, Mrs. Gibson developed congestive heart failure, and two days later died of a myocardial infarction.

"At a fact-finding hearing on charges against Anthony involving manslaughter, attempted robbery and assault, three medical experts testified regarding the cause of Mrs. Gibson's death. The testimony of Dr. Manuel Navarro, Associate Medical Examiner, who had performed the autopsy on April 28, 1982, established that the direct cause of Mrs. Gibson's death was a myocardial infarction, three to five days old. However, he could not with any medical certainty pinpoint the April 17 incident as a cause of the heart attack, nor could the medical witness called by the defense, Dr. Tina Dobsevage, an expert in internal medicine. Both felt, in substance, that given her general physical condition Mrs. Gibson could well have died at any time even without the stress of the attempted purse-snatching. Dr. Zacks, the cardiologist, while acknowledging that he would not have recommended the hospital transfer and surgery if he perceived an undue risk, and that Mrs. Gibson was doing well postoperatively, expressed the opinion with a reasonable degree of medical certainty that the indirect cause of her death was the "stress of a mugging and subsequent fracture of a hip, surgery for that hip fracture, thereafter, pain and anxiety and fear of never being able to walk again while she was in the hospital prior to her sudden cardiac arrest. . . . [T]he stress precipitated the myocardial infarction with subsequent cardiac arrest and ultimate death. . . ."[72]

b) "During the early evening the defendants were drinking in a Rochester tavern along with the victim, George Stafford. The bartender testified that Stafford was displaying and 'flashing' one hundred dollar bills,

was thoroughly intoxicated and was finally 'shut off' because of his inebriated condition. At some time between 8:15 and 8:30 p.m., Stafford inquired if someone would give him a ride to Canandaigua, New York, and the defendants, who, according to their statements, had already decided to steal Stafford's money, agreed to drive him there in Kibbe's automobile. The three men left the bar and proceeded to another bar where Stafford was denied service due to his condition. The defendants and Stafford then walked across the street to a third bar where they were served . . .

"After they left the third bar, the three men entered Kibbe's automobile and began the trip toward Canandaigua. Krall drove the car while Kibbe demanded that Stafford turn over any money he had. In the course of an exchange, Kibbe slapped Stafford several times, took his money, then compelled him to lower his trousers and to take off his shoes to be certain that Stafford had given up all his money; and when they were satisfied that Stafford had no more money on his person, the defendants forced Stafford to exit the Kibbe vehicle.

"As he was thrust from the car, Stafford fell onto the shoulder of the rural two-lane highway on which they had been traveling. . . . . Before the defendants pulled away, Kibbe placed Stafford's shoes and jacket on the shoulder of the highway. Although Stafford's eyeglasses were in the Kibbe vehicle, the defendants, either through inadvertence or perhaps by specific design, did not give them to Stafford before they drove away. It was some time between 9:30 and 9:40 p.m. when Kibbe and Krall abandoned Stafford on the side of the road. The temperature was near zero, and, although it was not snowing at the time, visibility was occasionally obscured by heavy winds which intermittently blew previously fallen snow into the air and across the highway; and there was snow on both sides of the road as a result of previous] plowing operations. . . . There was no artificial illumination on this segment of the rural highway.

"At approximately 10:00 p.m. Michael W. Blake, a college student, was operating his pickup truck in the northbound lane of the highway in question. Two cars, which were approaching from the opposite direction, flashed their headlights at Blake's vehicle. Immediately after he had passed the second car, Blake saw Stafford sitting in the road in the middle of the northbound lane with his hands up in the air. Blake stated that he was operating his truck at a speed of approximately 50 miles per hour, and that he 'didn't have time to react' before his vehicle struck Stafford. After he brought his truck to a stop and returned to try to be of assistance to Stafford, Blake

observed that the man's trousers were down around his ankles and his shirt was pulled up around his chest. A deputy sheriff called to the accident scene also confirmed the fact that the victim's trousers were around his ankles, and that Stafford was wearing no shoes or jacket.

"At the trial, the Medical Examiner of Monroe County testified that death had occurred fairly rapidly from massive head injuries. In addition, he found proof of a high degree of intoxication with a .25%, by weight, of alcohol concentration in the blood.

"For their acts, the defendants were convicted of murder, robbery in the second degree and grand larceny in the third degree. However, the defendants . . . [claimed] that the People failed to establish beyond a reasonable doubt that their acts 'caused the death of another', as required by the statute . . ."[73]

c) "On Sunday, January 18, 1987, the defendant, then a freshman in engineering at the University of Rochester, returned to the campus after a vacation as did other students. During the course of the evening, he drank heavily and, at the time of the criminal incidents, he was under the influence of alcohol. At some point during the evening, the defendant . . . drew a knife and stabbed three people before he was subdued by the campus security personnel. Two of the persons survived although they received cuts which required stitching. One, Gary Kramer, received wounds to his stomach, buttocks and hand. The other, Rana Mattreja, received wounds to his stomach. The third person, Darrell Tornay, died about a month after he was stabbed.

"It was the defendant's contention that Tornay's death was caused not by the stab wound but by medical malpractice in the treatment of the wound. Much of the evidence at the trial consisted of medical testimony. Tornay had received a single stab wound to his abdomen, located in the upper right quadrant below the rib cage but above the belly button. An exploratory operation (laparotomy) was performed by Dr. Jerry Svoboda. He testified that he found, among other things, that the front and back of the intestine and a blood vessel had been cut. He did not, however, perform a Kocher maneuver, a procedure by which organs behind the abdominal cavity are brought out of that area so they can be examined. Because this was not done, a two-millimeter hole in the duodenum was not found. In the weeks following the January 19 operation, Tornay improved slowly. At times, however, there were signs of an infection including a fever. Nevertheless, on the morning of January 31, he was released. That evening Tornay became ill and vomited. He vomited several more times in the next few days

and was returned to the hospital on February 2. Over the course of the next two weeks, he was treated for an infection. On February 19, a second operation was performed during which the wound to the duodenum was discovered. . . . Tornay experienced increasing difficulty and he died around 11:45 P.M. on February 19. . . .

"The legal standard of causation applicable here was set forth in *People v. Kane*. . . . There, this Court held that even though improper medical assistance may have contributed to a death, a defendant whose assault had also been a cause of the death could be held criminally liable. In that case, a pregnant woman was shot twice by the defendant. As the result, she suffered a miscarriage following which septic peritonitis set in. On appeal from defendant's murder conviction, this Court stated that where the improper medical treatment was the sole cause of death, a defendant would not be liable for murder: 'If a felonious assault is operative as a cause of death, the causal co-operation of erroneous surgical or medical treatment does not relieve the assailant from liability for the homicide. It is only where the death is solely attributable to the secondary agency, and not at all induced by the primary one, that its intervention constitutes a defense'. . . .

". . . In *Stewart*, this Court reduced a manslaughter conviction to assault in the first degree when the evidence did not clearly establish a knife wound as the cause of death. In fact, the knife wound to the abdomen had been surgically repaired when the doctors noticed "an incarcerated hernia." During the attempt to correct the hernia, the patient went into cardiac arrest and he died a month later. There was expert testimony that the patient would have survived the knife wound if the hernia operation had not been attempted.

". . . Contrary to the contentions of the defendant herein, *Eulo* did not change the standard enunciated in *Kane*, supra. . . . Indeed, the passage defendant relies upon cites *Kane* with approval, and our decision in *Matter of Anthony M*. . . . , decided the same day as *Eulo*, makes evident the continuing vitality of *Kane*. The test for relief from criminal responsibility for a death applicable to the facts of this case remains whether the death can be attributed solely to the negligent medical treatment. . . .

"We have considered the defendant's other points and find them to be without merit.

"Accordingly, the order of the Appellate Division . . . should be affirmed."[74]

Consider the following abridged translation of a case report and write your opinion on the majority and minority decisions of the Supreme Court.

Case 1

Supreme Court, Circuit Chilot

Criminal Appeal File No. 162/Wollo/74 (Eth.C)

Judges: Moges Zewge, Adamu Desta, Agegnehu Gebre

The appeal was lodged against the decision of the High Court which passed a sentence of rigorous imprisonment for life against the appellant upon convicting him for aggravated homicide against two women and attempted aggravated homicide on a third victim.

The appellant was accused of repeatedly beating three women two of whom were found dead (on the next and the third day) surrounded by snow, while the third was injured but fortunately rescued by a passerby who (some hours after the attack) found her lying unconscious on the ground. The victims had fallen at three different locations while they were running to escape from the beatings of the appellant who used wooden stick and stones. The attack occurred on Hamle 3rd 1972 Ethiopian Calendar (July 10, 1980) in Sayint Woreda (Wollo) and the appellant started the beating after asking the victims why they didn't greet him, while in fact the evidence indicated acts of robbery as well.

The three issues examined in light of Article 24 of the Penal Code of 1957, were:

a) Whether the appellant committed the acts of beating and robbery;
b) Whether the beating was adequate cause for the death of the two deceased and for the bodily injury of the third victim; and,
c) Whether there was an intervening cause that was sufficient in itself to cause the death of the two victims.

The Supreme Court found that the appellant has committed the acts he has been accused of. With regard to the second and third issues, the Court held that although there was rain and snow after the victims were left lying on the ground, and even if their bodies were found surrounded by snow, their death cannot be attributed to the intervening cause due to the following reasons:

a) The nasal and oral bleeding of the victims indicates the gravity of the injury inflicted on the victims;
b) The victims were left helplessly lying on the ground not because of the rain (and snow) but as a result of the beating;
c) One of the victims, whose corpse was discovered on the next day of the attack, was found on the same spot she was last seen by the third (i.e. the injured) victim;
d) Beatings that are grave enough to entail such bleeding can in the normal course of events bring about death; and,
e) The fact that the victims could not save themselves from the rain and snow indicates the fatal nature of their injury.

The Supreme Court (by majority opinion) ruled that the intervening natural event of rain and snow has not been proved to have on its own caused the death of the two victims, and thus confirmed the judgment of the High Court.

Dissenting Opinion

The second judge held that although the appellant has beaten the victims, sufficient evidence has not been produced to the Court which proves that the victims actually died as a result of the beating. Moreover, the result of the beating has been intervened by rain and snow. The evidence rather shows that the deceased were running after the beating . . . and could as well have been rescued if they were discovered by another person like the third victim.

It is thus doubtful and indeed difficult to conclude that the victims died due to the beating. In such situations where the actual cause of the death is uncertain, the causal link between the first act and the result should be considered to have been interrupted.

The decision of the High Court based on aggravated homicide and attempted aggravated homicide should thus be reversed and the appellant be held guilty for physical injury in accordance with Article 538(a) of the 1957 Penal Code and be sentenced with five years of rigorous imprisonment.

Activity

Do you agree with the reasoning and the holding of the court? State your reasons. State your opinion on the dissenting opinion.

Readings on Section 2.3

Reading 1: Williams[75]

Questions of causation arise where a law expressly or impliedly requires that a given result be produced as an element of the offence, e.g. murder, manslaughter, . . . aggravated assaults . . . , and criminal damage. In homicide cases the death must follow within a year and a day, but it is no defence that death was merely accelerated.

For an act or omission to be a cause or an event it must cause the event in the sense that the event would not have occurred but for the act or omission. However, two sufficient causes may operate together, whether independently or complementarily. The necessity for providing but-for causation can be particularly important in cases of omission.

In addition, the conduct in question must be an imputable cause of the event. Intended consequences are nearly always imputed; the problems relate to unintended consequences. Trial judges now generally elide the two kinds of causation by asking the jury whether, e.g. the defendant’s conduct was a substantial cause, or something more than a purely trivial cause. Occasionally, however, the trial judge will be upheld in excluding an alleged cause as a matter of law.

In cases of negligence it must be shown that the result was caused by the feature of the defendant’s conduct that is accounted negligent.

. . .

A person's conduct may be regarded as an imputable cause of an event notwithstanding that the sequence of occurrences following his conduct was unexpected; and he may be held to intend an event notwithstanding that the event occurred in an unexpected way. But he is not responsible if what happened was too far from his initial fault to be justly regarded as his responsibility; and on this question the following rules have some support in authority or common sense.

An event is not imputable to the defendant if it was the result of an ordinary hazard.

Also, an event or chain of causation is not imputable to the defendant if he did not foresee it and if a reasonable person would not have contemplated the risk as part of the general risk involved in the conduct in question; but if the risk is one of a group of risks that were generically foreseeable, it does not matter that the particular risk was so unlikely that if it had stood alone the conduct would not have been negligent. An injury sustained in fleeing from an attack can be a foreseeable risk. The special sensitivity rule appears to be an exception from the risk principle.

A wrongdoer is not liable for a *novus actus interveniens*, that is, for an evil caused by the interposition of some other responsible person who acts knowingly and otherwise than under pressure caused by the defendant's act. A *novus actus* can exempt the defendant even in a case of strict liability.

The death of a victim may be attributed to the attacker even though it occurred directly through fright or shock, or through an attempt by the victim to escape where his act was reasonably foreseeable.

The contributory negligence of the victim is not a defence in itself, but sometimes it is this negligence rather than the fault of the defendant that alone is regarded as causing the result. . . . At least where the defendant has inflicted a serious injury on another, the victim's unreasonable failure to accept medical help does not make his consequential death too remote, and even the victim's negligent aggravation of his injury does not necessarily do so.

Improper medical treatment preventing recovery will not make the death too remote if the wound inflicted by the defendant was the medical cause of death. There may be rare exceptions when the wound was slight and the medical negligence great.

Reading 2: Elliott[76]

Causation

The problem of causation can arise where an offence is defined as requiring a certain result and it has to be determined whether the defendant caused the harm to the victim. French academics consider that there are three possible approaches that can be taken in determining the issue of causation. The first is that of the 'equivalence of conditions' according to which all the events which have led to the realization of the harm are treated as having equivalent weight, it being possible to treat each one of them in isolation as the cause of the harm. The second approach is that of the 'proximity of the causes' which means that the

only factor that will be treated in law as the cause is the one that is the nearest in time to the harm caused—this significantly limits the chain of causation. The third analysis is that of 'the adequate cause', by virtue of which the factor that will be treated as the cause will be the one that was most likely in normal circumstances to have been the cause.

The criminal courts have rejected the proximity theory and favour the 'equivalence of conditions.' Thus, in the context of the fatal and non-fatal offences against the person that do not require intention, the courts regularly state that there need not exist between the fault and the damage 'a direct and immediate causal link', nor that the wrongful conduct of the defendant be the 'exclusive cause' of the harm. . . .

The courts, however, fall back on the doctrine of the 'adequate cause' where the imposition of liability for conduct that indirectly caused a harm would appear unfair. ...

Following the Act of 10 July 2000, the legislature now draws a distinction between direct and indirect causation for the purposes of non-intentional offences committed by natural persons. Where the harm was indirectly caused by the accused a higher level of fault will be required. Until this reform there was no legal significance of the distinction between direct and indirect causation, all that mattered was that the accused caused the result. It has been left to the courts to develop a clear dividing line between the two forms of causation.

Comparison with English law on Causation

The French approach is very different to that taken under English law, where the courts have a fairly flexible approach to causation. There are a range of questions that the English courts will ask themselves in order to determine whether the chain of causation has been broken, including whether the intervening act was reasonably foreseeable and whether the original injury was an operative and significant cause of death. The test relied on depends on which is most suitable to the particular facts and where appropriate a combination of tests can be used. But in determining causation the real impact of the defendant's conduct will be considered and there is no concept of the 'equivalence of conditions.'

3. Offences of Possession

Mere possession of controlled drugs, armaments, etc. may constitute a criminal offence where the defendant is aware of his control over the possessed item and fails to terminate the possession. According to Section 2.01(4) of the US Model Penal Code, criminally punishable possession is said to exist where "the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession."

The offence of possession presumes the future use of the object or its transfer to another person with or without consideration (sale). Possession with the intention to personally use the object is *simple possession* whereas possession with intention of distribution is *compound possession*. There are also cases of *innocent possession* where for example, a passenger unknowingly possesses heroin, a firearm, etc. that has been slipped into his bag without his knowledge. However, the defendant must "immediately seek to submit" the unlawful possession that has come under his control to law enforcement.[77]

Possession may be manifested by physically possessing the object (*actual possession*) or by having control over an object without directly possessing it (*constructive possession*). "Constructive possession derives from a person's control over an area, or over another person in actual possession of an item."[78]

Offences and petty offences of possession embodied in the 2004 Criminal Code include the following:

- "possession of weapons or instruments" by a person who falls under the definition of 'dangerous vagrancy' if they are "fitted by their nature to the commission of a crime" (Article 477(2))
- possession without special authorization and with the intent of trafficking poisonous, narcotic or psychotropic plants or substances (Article 525(1)(b))
- possession of poisonous or narcotic or psychotropic drugs or plants, which the person knows to have been procured through or intended for the commission of one of the crimes specified in Article 525(1) and (2) (Article 525(3))
- possession of firearms or ammunition in contravention to the law (Article 808) or carrying in public place an arm which the person is not authorized to acquire (Article 809)
- possession of substances or products stated under Article 831 without taking the precaution required by official or professional regulations,

custom or the dictates of common prudence, in particular where there is a risk of mistake or confusion (Article 831(c))

- possession of suspicious articles namely "keys, hooks, pincers, instruments or weapons, or securities, articles or objects the origin of which he cannot explain satisfactorily or the use of which he cannot justify" (Article 854)

Dubber states that in the criminalization of possession "the legislature really criminalizes import, manufacture, purchase" and he notes that criminalizing possession may also be forward-looking, in which case possession may resemble inchoate offences in the form of "an attempt to use, sell, or export (the item whose mere possession constitutes an offense)."

> In its design and its application, possession is, in doctrinal terms, a doubly inchoate offense, one step farther from the actual infliction of actual harm than ordinary inchoate offenses like attempt. In practical terms, it is an offense designed and applied to remove dangerous individuals even before they had the opportunity to manifest their dangerousness in an ordinary inchoate offense. On its face, however, it does not look like an inchoate offense, nor does it look like a threat reduction measure targeting particular types of individuals."[79]

According to Ashworth, it is possible, under English law, to commit the offence of possession of "offensive weapons, any articles for use in a burglary, theft, or deception, and controlled drugs" without any act on the part of the accused.[80] He underlines that the "reason for enacting offences of possession is that they enable the police to intervene before a particular wrong or harm is done" and as a result "offences extend the scope of criminal liability beyond the law of attempts." In effect, "there is no room for the argument that the possessor did not intend to use them but was carrying them for some other reason."[81]

4. Inchoate Offences

Acts that have *just begun* (and that are punishable under criminal law) are called *inchoate* offences. They may be a preparatory act (where such preparation constitutes an offence), a criminal attempt or another inchoate offence.

4.1 Preparatory Acts

Criminal law punishes overt acts and not mere intentions. Criminal intent, no matter how immoral it may be, is beyond the grip of criminal law until it is manifested by external conduct. Various phases normally precede acts. The phases of decision and initial planning (within the realm of thoughts) are mental states that do not involve exterior acts. From the moment these phases develop into external conduct that aims at the commission of an offence, the phase of preparatory act is said to have begun.

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 offender himself tells us. This uncertainty is inevitable because preparatory acts are *remote* from the ultimate harm and *equivocal* as regards criminal intent, and thus unable to prove "an unlawful *design* (*dessein criminel*) and the *determination* to carry it out (*la resolution de l'accomplir*)."[82]

Most criminal laws (including Ethiopia's 2004 Criminal Code) do not, in principle, punish preparatory acts. Article 26 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 expressly constitute a special crime by law owing to their gravity or the general danger they entail.

Article 26 requires the following elements:

a) Commission of an overt act (i.e. overt conduct beyond thoughts)

b) to prepare or make possible the commission of a crime

c) in particular (i.e. *inter alia*)

   i) by procuring the *means* (e.g. instruments) for its commission, or

   ii) by creating the *conditions* for its commission.

The elements under (c) –the procurement of means or the creation of conditions for the commission of an offence– are *illustrative* in Article 26 of the 2004 Criminal Code while they were *exhaustive* under the English version of Article 26 of the 1957 Penal Code. Strict interpretation seems to be necessary in this regard so that the overt act of the defendant should be equally (*a pari*) or even more strongly (*a fortiori*) be able to prove the preparatory phase of an offence in comparative reference to the illustrative standards set by Article 26 of the 2004 Criminal Code.

Punishing preparatory acts is an exception than a rule under Ethiopian criminal law. Yet the Criminal Code has a remedy of precautionary measures. The Criminal Code has a mechanism of precaution against preparatory acts where an unprosecuted person behaves or is likely to behave in a manner which threatens peace or security of the public or a person.[83] In such cases dangerous articles are seized[84] and the person who poses a threat is required to enter into recognizance (የመልካም ጠባይ ማረጋገጫ ዋስትና).[85]

Certain preparatory acts are punishable under the circumstances stated in Article 26. Pursuant to Article 26(a), a preparatory act is punishable if it constitutes an offence by itself. A person who buys a gun as a preparatory step towards homicide is punished for the petty offence of retaining a gun without license (Articles 808, 809) even though he is not punishable for his preparatory act.

Besides, certain preparatory acts "expressly constitute special crimes by law owing to their gravity or the general danger they entail" (Article 26(b)). For example, material preparation of offences against the State (Articles 256, 257), preparing a mutiny or seditious movement (Article 300) and preparing machinery and means of counterfeiting currency (Article 371) are expressly stated to constitute special offences. This is so because:

> "in these instances . . . a mere attempt might have consequences of such seriousness (civil war, rebellion, counterfeiting currency) that it must be prevented . . . at least earlier than is usually possible. [Even under such cases] . . . 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 arrangement 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."[86]

4.2 Attempt

The three elements of criminal attempt are "a purpose to commit a crime, an act toward the commission of the crime, and a failure to commit the crime".[87] The first element involves the subjective aspect or the intention of the accused; the second element is objective as it refers to an act committed towards the offence; the third element shows that attempts are punished due to the danger they pose and not for the harm that has materialized.

Various approaches are pursued in balancing the first and second elements, and these approaches are usually classified into two. According to the subjective approach, "only an act that is sufficiently close to the completion of a crime to establish a criminal intent" proves attempt, whereas the objective approach "requires an act that is proximate to the commission of a crime."[88] The subjective approach thus examines the act not from the perspective of its material proximity to the commission of the crime but as a factor in establishing the criminal intent and determination of the accused.

The first paragraph of Article 27(1) reads:

> Whoever intentionally begins to commit a crime and does not pursue or is unable to pursue his criminal activity to its end or who pursues his criminal activity to its end without achieving the result necessary for the completion of the crime shall be guilty of an attempt.

The constituent elements of the provision are the following:

a) Whoever
b) intentionally
c) begins to commit a crime
and
d) does not pursue his criminal activity to its end
or e) is unable to pursue his criminal activity to its end
or f) pursues his criminal activity to its end
    (i) without achieving the result
    (ii) necessary for the completion of the offence.

The cumulative conditions (a), (b) and (c) plus one of the alternative conditions (d), (e) or (f) must be satisfied for a person to be guilty of attempt. Condition (a) is apparent in its reference to any person without discrimination (Article 4). But the remaining conditions, (b) through (f) must be carefully analyzed.

4.2.1 The *Intention* Requirement and the Demarcation Line of an Attempt

Attempt involves intended consequences whenever the offence under consideration requires the achievement of result. A negligent attempt is in fact unimaginable. As long as the consequence is intended, erroneous appreciation of the material circumstances may not alter the liability for attempt. However, an unintended act that does not constitute criminal attempt may on its own be an offence. Graven states the example of a driver who without "desiring to cause harm, embark[s] upon a course of conduct which might bring about unlawful consequences"[89] in such a manner that the conduct may lead to harm that is punishable as negligent offence. Even where the act does not cause harm, it may be punishable as an offence of endangering under Article 506 of the 2004 Criminal Code.

One is said to have attempted an offence when he *begins* to commit the offence. As stated earlier, *preparation* to commit an offence does not amount to *beginning the execution* of the offence. But it is indeed difficult to draw a precise demarcation point between preparation and the beginning of executing the offence. As Holmes noted, "lighting a match with intent to set fire to a haystack has been held to amount to a criminal intent to burn it although the defendant blew out the match on seeing that he was watched."[90] However, he underlines that there should be limits to such acts of liability. He gives an example of a person who "starts from Boston to Cambridge" to commit a murder "but is stopped by a draw and goes home" and who will not be liable for criminal attempt, the same as a person who sits in his chair and decides to shoot somebody and then gives up his decision.[91]

If a person starts a journey to murder his target victim we may say that he is in a preparatory phase. When is the prospective offender considered to have begun the commission of the offence? Is it when he arrives at the would-be victim's premises? When he faces the victim? When he raises his gun? When he aims at the victim? When he pulls the trigger? Holmes suggests that "the nearness of the danger, the greatness of the harm and the apprehension felt"[92] by the accused person can determine the line of demarcation between preparation and attempt.

> When a man buys matches to fire a haystack, or starts on a journey . . . to murder at the end of it, there is still a considerable chance that he will change his mind before he comes to the point. But when he has struck the match or cocked and aimed the pistol, there is usually little chance that he will not persist to the end, and that danger becomes so great that the law steps in.[93]

Criminal law does not give a clear-cut formula with regard to the demarcation line for attempt because the *subjective* condition of the

prospective offender and the *objective* conditions of the particular situation may lead to varying conclusions. In spite of such difficulties, criminal law provides various tests for a reasonable and pragmatic demarcation line. The following tests have emerged "to determine the point at which a defendant passes beyond the preparation stage and consummates the criminal attempt."[94]

- *"Last act" test*—an attempt occurs *at least* by the time of the last act.
- *"Physical proximity" test*—the defendant's conduct need not reach the last act but must be "proximate" to the completed crime.
- *"Dangerous proximity" test*—an attempt occurs when the defendant's conduct is in "dangerous proximity to success," or when an act "is so near to the result that the danger of success is very great."
- *"Indispensable element" test*—an attempt occurs when the defendant has obtained control of an indispensable feature of the criminal plan.
- *"Probable desistance" test*—an attempt occurs when the defendant has reached a point where it was unlikely that he would have voluntarily desisted from his effort to commit the crime.
- *"Unequivocality" (or res ipsa loquitur) test*—an attempt occurs when a person's conduct, standing alone, unambiguously manifests his criminal intent.[95]

According to the *last act test*, "an attempted murder-by-shooting [for example] does not occur until [the defendant] pulls the trigger of the gun".[96] Under the *physical proximity test*, however, the actor's conduct "need not reach the last act," but "it must approach sufficiently near to it to stand either as the first or some subsequent step in a *direct movement* towards the commission of the offense after the preparations are made".[97] Under the physical proximity test, robbery, for example, can be considered proximate if the accused has a weapon in hand and "has her victim in view and can immediately proceed to rob her, absent external factors (such as the intervention of the police)".[98] In *Commonwealth v. Kelley*,[99] the court held that a criminal attempt does not occur according to the physical proximity test "if two men, intending to trick the victim out of his money, convinced him to go to the bank and withdraw some of his cash, but the men were arrested before he withdrew the cash, and before they made overtures to secure the money from him".[100]

The *dangerous proximity test* includes the physical proximity test but further considers the dangerous proximity of an act to success. In *People v. Rizzo* (1927), the defendants planned to rob a payroll from a person. Their plan was to rob him while he was walking from the bank to his business. They looked for him for a long time but they were arrested before they saw their target victim. The decision of the trial court was reversed and the New York

Court of Appeal held that there is no attempt because the defendants were not in dangerous proximity to the offense, as the opportunity for the commission of the crime did not come.[101]

The *indispensable element* test considers whether necessary factors, such as the instrument of the crime, have been acquired or accomplished. It is, however, to be noted that the mental intent of the accused person should accompany the possession of the instrument for the offence. Although the tests so far discussed predominantly fall under the objective approaches in the determination of the demarcation between preparation and criminal attempt, the internal (mental) element is not entirely dismissed.

The last two tests, i.e. the probable desistance test and the unequivocality test, have a predominantly subjective inspiration. The *probable desistance test* "centers on how far the defendant has already proceeded" and it particularly examines whether the defendant "has reached a point where it was unlikely that he would have voluntarily desisted from his effort to commit the crime."[102] And finally, under the *unequivocality* (or *res ipsa loquitur*) test, "an act does not constitute an attempt until it ceases to be equivocal", i.e. until such a point when "the person's conduct, standing alone, unambiguously manifests her criminal intent."[103]

This unequivocality theory was, for example, applied by Salmond J. in a judgment in New Zealand's Court of Appeal, which held that "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".[104] The probable desistance test and the unequivocality test envisage that the overt acts of the accused person show the determination to commit the offence if the person is not interrupted. These tests relate intent and behaviour, as overt acts emanate from intention and in return verify criminal intent and determination.

Section 5.01(1)(c) of the US Model Penal Code stipulates that a criminal attempt exists where a person "purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a *substantial step* in a course of conduct planned to culminate in his commission of the crime." According to Section 5.01(2) of the Model Penal Code a criminal conduct "shall not be held to constitute a *substantial step* . . . unless it is strongly corroborative of the actor's criminal purpose."

Under the Ethiopian Criminal Code, an attempt is deemed to exist where a person "*begins*" to commit an offence. As Graven stated:

> [T]here is no attempt, unless an offence is in the course of being executed. An offence is not in the course of being executed unless the act done reveals not only that the doer has a criminal intent, but also that he is determined to carry it out. The doer may not be

> deemed to have criminal intent which he is determined to carry out unless he has done something which is neither equivocal nor remote.[105]

Criminal attempt is deemed to exist when the accused unequivocally proves his determination to carry out the offence (subjective dimension) and where the act of the accused is not remote to the last act and harm (objective dimension). However, Graven argues that the 1957 Penal Code has a predominantly subjective inspiration because the requirement of proximity to the last act is merely an element in the determination of the defendant's criminal intent to the point of no return in the pursuance of his/her criminal activity to its end.[106] According to Graven, French law of attempts is of subjective inspiration. He cites Saleilles: "[T]here is a punishable attempt when the acts done show that the doer has an irrevocable criminal intent when the moral distance between what he did and what he desired to do is so small that, had he been left to himself, he would almost certainly have crossed it."[107]

Graven relates 'the beginning of execution' with the intention that is irrevocable. He cites a Swiss case (*Waiblinger*) in which it was held that "an act amounts to the beginning of execution when the *intention* behind it is *irrevocable*", and underlines the following:

> The doer should, therefore, be beyond what might be called the point of no return, … i.e. a step such that only circumstances beyond his control, and not a change of purpose, would subsequently prevent or have prevented the desired result from being achieved. 'This execution of the offence includes the doing of an act, which in the offender'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' which means that 'leaving alone external obstacles that may compel him to abandon, the doer will normally not change his plans' . . ."[108]

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 test does not of course lay down an absolutist formula, because

> the point of no return may vary considerably according to the character and antecedent of the accused . . . for the habitual offender may overcome 'the crisis of the imminent act' and reach the point of no return earlier than a person who has no previous convictions. . . . [T]he court must be satisfied that, in the circumstances of the particular case, the accused and not a hypothetical person, would in all likelihood have persisted or is determined to cause harm.[109]

The Criminal Code defines 'attempt' as the intentional act of beginning to commit an offence (Article 27(1)), and thus renders the definition of the point of commencement necessary. The second paragraph of Article 27(1) defines what is meant by "the act of beginning to commit an offence." It reads: "The crime is deemed to be begun when the act performed clearly aims by way of direct consequence, at its commission." Two questions need to be addressed. First, when is an act deemed to *clearly aim* at the commission of an offence? Second, when are acts of an accused said to aim at the commission of the offence by way of *direct* consequences? The terms 'clearly' and 'direct', in particular, require careful analysis.

The French version of the second paragraph of Article 27(1) of the 1957 Penal Code is identical to the *'Avant Projet'*. It reads "L'infraction est réputée commencée lorsque l'acte accompli tend le manièire non équivoque et par voie de conséquence directe à sa realization".[110] The term 'clearly' is thus intended to mean in an *unequivocal* manner (*le manière non équivoque*). An act *unequivocally* aims at a desired harm where the doer's criminal *intent* and *determination* clearly or unequivocally aim at the completion of the offence.

A given act normally manifests two things: (1) intent (the doer's subjective state) and (2) the act's material (objective) proximity or remoteness to the intended consequence. The word 'clearly' refers to the doer's subjective state (i.e. unequivocal intent), and the phrase 'by way of direct consequences' may logically be presumed to apply to the objective location of an act in the path towards the desired result. Graven argues that the two conditions that ought to be satisfied in attempts under the Penal Code are *criminal design* and *the determination to carry it out*. Both fall under the subjective approach in the determination of the demarcation line between preparation and attempt. He raises the issue of whether the words "by way of direct consequences" represent an additional objective condition of physical proximity, and he answers this question in the negative:

> Although the phrase ["by way of direct consequences"] appearing in the *Exposé des Motifs* would tend to suggest that an attempt also requires material proximity, it seems irrelevant, having regard to the law of attempts as a whole, how close the doer may have been to causing harm. If objective proximity were a condition for the existence of an attempt, it should logically follow that the execution of an offence is begun only when an act is done which creates a concrete danger. This would be inconsistent with the provisions of Art. 29, according to which the doer is punishable because he did something such as to show that he was irrevocably determined to cause harm, even though the desired harm could not possibly have been caused in the circumstances.[111]

Graven's arguments can be challenged on two major grounds. First, material proximity does not only envisage a uniform level of threat to "create a concrete danger". As the earlier discussion indicates, the last act, physical proximity and dangerous proximity tests represent the various tiers of proximity standards that can inform a court's inquiries about the remoteness of a given act to concrete danger. And second, the argument based on Article 29 does not seem tenable. According to the second paragraph of the provision, impossible attempts are not punishable where the accused, due to superstition of simplicity of mind, uses "means or processes which could in no case have a harmful effect." This goes against Graven's argument and implies that the Criminal Code takes the creation of concrete danger into account in addition to the subjective dimensions of criminal design and determination.

Even if the subjective inspiration is pervasive in the determination of attempt under Article 27 of the Ethiopian Criminal Code, reference to the objective location of a given act in terms of its proximity to the concrete danger is inevitable, because an attempt constitutes a phase of activity in the *direct movement* from preparation to the consummation of the offence. This notion of the "commencement of the consummation" of the intended crime was raised in *Ex parte Turner* (1909):

> [T]he act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must be not merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.[112]

If an act *directly* aims at its consequence, the final act is no more remote. Even if Graven does not consider proximity as a distinct factor in the determination of attempts, he nevertheless acknowledges its relevance as one of the factors in the determination of the point of no return. He underlines that "the more 'imminent' and 'proximate' the act is, the clearer is that the doer has a criminal intent, and the more likely it is that the point of no return is behind him."[113]

How proximate (close) should an act be to the harm or the last act in order to be considered an attempt? When does an act directly aim at its consequence? Criminal law should not of course wait for the completion of the final act and punish complete attempts alone. The purpose of Article 27 is to punish danger (not necessarily concrete) before it crystallizes into harm. The material proximity of a given act is thus relative.

The phase of buying a gun for the purpose of murder, for instance, does not prove *unequivocal intent* and is definitely *remote* from the desired result. On the contrary, the act of putting one's finger on the trigger and aiming at a person apparently renders intent *unequivocal* and the harm *imminent.* The act of buying a gun is typical act of preparation and putting one's finger on a trigger is punishable incomplete attempt. But certain acts that fall between these phases are controversial.

For example, in the series of acts towards the offence of homicide, the act of buying a gun is a *preparation of means*. Target practice, studying the habits of the victim and looking for a suitable place of attack are *preparation of conditions*. Putting on a disguise and leaving one's home to take up position are also acts of preparation.

Is an accused person liable of attempt if he is caught while taking up position or while loading a gun? Should the 'decisive step', 'the point of no return' and other tests be uniform for all persons and circumstances? Should the material proximity test apply equally to an obstinate habitual offender and to a person with a background of good conduct who may possibly regret and withdraw the pursuance of his acts towards the completion of the offence?

If the law places the 'decisive step' or the 'point of no return' very close to the harm, an unequivocally determined habitual offender, who under his psychological circumstances has already taken the 'decisive step' and who has gone beyond the 'point of no return', will possibly be set free. And on the other hand, undermining the test of objective (material) proximity will entail an arbitrary punishment of acts that are remote from the ultimate act and consummation of the offence. A pragmatic balance with due regard to the character and background of the accused and in view of the particular circumstances that surround an act under consideration thus becomes necessary. Graven duly suggests the following:

> [M]ight 'A' be deemed to have an irrevocable intent to commit homicide if he (intending to mail poison) had been caught when pouring poison into the bottle or on his way to the post office? If the act was considered in isolation, the answer should be in the negative. On the other hand, if there were evidence to show that 'A' had ensured that his finger-prints were not on the bottle or that he is a violent and obstinate man who does not care much about consequences of his acts, the answer might well be in the affirmative on the ground that, having regard to the scheme as a whole and to his personality, who would in all likelihood have persisted, although the achievement of the result was not yet imminent and a different person might still have abandoned.[114]

Although ‘imminence’ of real harm is an essential criterion, it should not be taken as an absolute requirement, as long as an act under consideration is proximate enough (under the defendant’s circumstances) to the desired result and if it, in effect, proves unequivocal intent and determination. The subjective consideration is thus pervasive, because it is the cornerstone of the subjective test (unequivocal intent and determination) and the objective test of material proximity to the defendant’s last (or ultimate) act. This is so because our Criminal Code has subjective inspiration. Yet, due attention should also be given to the objective test of remoteness and proximity. These subjective and objective tests (in combination) can be carefully utilized to distinguish attempts from preparatory acts, although drawing a clear-cut demarcation line is virtually impossible.

4.2.2 Incomplete Attempt

If the accused *chooses* not to do or is *prevented* from doing the last act of the offence, the attempt is said to be incomplete. The words “does not pursue . . . his criminal activity to its end” in Article 27 define incomplete attempts as a result of complete voluntary withdrawal or abandonment. The portion of the provision that reads “or is unable to pursue his criminal activity to its end” indicates incomplete attempt as a result of external intervention that is outside the volition or will of the accused.

An accused who, for example, raises his pistol targeting 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 (of his own free will) renounces the pursuit of his criminal activity by allowing reduced punishment (Article 179), or free mitigation “‘if circumstances so justify” (Article 180), or no punishment “if the renunciation was prompted by honesty and high motives” (Article 28(1)).

In cases where the withdrawal occurs due to external circumstances, the nonpursuance of criminal activity is involuntary. Such cases will not thus be considered voluntary abandonment or withdrawal. The *Taylor case* illustrates such events, whereby the court held that that an attempt was committed “where 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 plan on finding that he was being watched.”[115]

4.2.3 Complete Attempt

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 result. If an offender, having poisoned a victim with a dosage sufficient to cause death, regrets and voluntarily takes him to hospital thereby enabling recovery, the offender is said to have 'undone' the effects of what he had done. Such 'active repentance' (Article 28(2)) enables courts to reduce punishment without restriction (Article 180).

Involuntary failure to achieve intended result occurs upon *missing a target* or *abortion of result*, or (as specified in Article 29) due to the *impossibility of achievement*. If an offender's deliberate shot, for instance, is intended to hit the victim but misses the target, the attempt is considered to be complete. In the earlier example of poisoning, if a person other than the offender takes the poisoned person to hospital, the intended result is said to have been aborted, thereby rendering the offence a case of complete attempt.

4.2.4 Attempting Impossible Offences

Certain attempts are absolutely incapable of achieving the desired result. Such attempts, by virtue of Article 29, involve situations where an offender attempts "to commit a crime by means or against an object of such nature that the commission of the crime was absolutely impossible." For an attempt to fall under Article 29, the impossibility of achievement must be absolute and not relative. There is absolute impossibility where the circumstances in which the offender acted are unable to cause the offender'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 means used. In some cases, the means used may be fatal, but insufficient, as in the case of poisoning a person with insufficiently fatal poison.

If a doctor attempts abortion on a woman who is not pregnant, there is absolute impossibility due to object. In case, however, the attempted abortion fails because the woman is resistant to a particular drug, the doctor's attempt (although normally capable of causing abortion) is said to be relatively incapable of achieving result due to the object over whom it is practiced. Such a distinction between absolute and relative impossibility is significant because free mitigation (Article 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 or processes which could in no case have a harmful effect". This bold consideration to objective harm rather than subjective criminal intent seems inconsistent with the overall subjective inspiration of the Penal Code of 1957 and the Criminal Code of 2004. Yet it is indeed difficult to interpret Article 29 otherwise.

4.3 Other Inchoate Offences

As stated above, preparatory acts may be punishable in certain rare cases, and attempt to commit an offence is always punishable. There are also other inchoate offences under Ethiopian law, namely instigation that has induced an attempt (Article 36), complicity in an attempt (Article 37), and conspiracy (Article 38) irrespective of resultant harm. The issues of instigation, complicity and conspiracy are briefly discussed in Chapter 5. Yet it is necessary to consider here the inchoate aspects of these acts. Any incitement or complicity (i.e. intentional assistance provided to the principal offender before or during the criminal activity) entails criminal liability if the crime is at least attempted.[116] In effect, charges of attempt may include instigators (Article 35(2)) or accomplices (Article 37(3)). However, acts of instigation or complicity shall not be grounds for criminal liability in charges of preparatory acts against a principal offender.

The act of conspiracy aggravates punishment[117] in cases of punishable preparatory acts (towards the commission of the offences stated in Section 4.1 above) or in cases of attempt to commit an offence. Moreover, conspiracy is itself an inchoate offence where it constitutes an offence irrespective of the realization of its objectives.[118] Further explanation is given on these offences under Chapter 5, and it suffices to mention that they fall under inchoate offences as long as they are attached to incomplete offences.

Case Problems on Preparatory Acts and Attempt

Discuss criminal liability for punishable preparatory acts or criminal attempt in the following cases:

1. Ato Hailemariam while intoxicated tried to shoot a bottle in a *tej bet* and narrowly missed hitting a customer.[119]
2. A jeweler, D, insured his stock against theft and later concealed some of it in his premises, tied himself up with rope, and called for help. When the police came, D said he had been robbed. The jewellery was insured for £1,200. A policeman, suspicious of the story, searched the store and found the hidden property. D then confessed that he had planned to commit fraud against the insurance company.[120]
3. D raised his arm against another person[121] but then refrained from hitting the person.

4. E, while in battle, shoots with intent to kill his superior officer, but in fact hits an enemy soldier[122] [because the officer was an agent who had infiltrated into the army].
5. G is a young recruit in the Army at Assab in 1976 Eth. Cal. (1983). He wanted to defect and flee abroad. His immediate superior X, suspicious about G's intentions, disarmed and ordered him not to leave the camp. After a few days, G asked for a permit to go to a hospital (a few kilometers from the camp) for medical attention. X refused to allow him on the pretext that he does not have paper to write on. G, upset by the silly response, went to his ward and picked up his friend's Kalashnikov gun. His friends, however, intervened before G arrived at X's office. While Y (one of G's friends) was pulling the barrel to take away the gun from G, the trigger happened to be pulled, and Y was shot dead.
6. The defendant Miller, somewhat under the influence of liquor, and in the presence of others, threatened to kill Albert Jeans. While Ginochio (constable of the town), Jeans and others were planting hops, the defendant entered Ginochio's hop field carrying a rifle. Ginochio was about 250 or 300 yards away and Jeans about 30 yards beyond him. The defendant walked in a direct line toward Ginochio. When the defendant had gone about 100 yards he stopped and appeared to be loading his rifle. At no time did he lift his rifle as though to take aim. Jeans fled on a line at about right angles to Miller's line of approach. The defendant continued toward Ginochio, who took the gun, the defendant offering no resistance. The gun was found to be loaded.[123]
7. "Wickihalder, a habitual offender, in the company of his wife and another person, Rogermoser, planned to rob persons that they would find walking along a certain street. After having waited without success for about a quarter of an hour for a victim, they began to move toward another route. Before reaching the road they spotted a cyclist moving along the route. They hastily returned to the Neuheim route by a shortcut in the hope of arriving soon enough to be able to carry out their attack. Contrary to their expectation, the unknown cyclist did not pass them. They resumed their lookout for another victim but did not succeed."[124]
8. a) A man shoots at a tree stump thinking it to be a person.
   b) A pickpocket reaches into an empty pocket.
   c) A man has sexual relations with a 16-year-old girl whom he believes to be 14 years old.[125]
9. German courts "have held that D had crossed the threshold of attempt liability in the following cases."[126] Although there are attempts by courts to employ a formula for the threshold[a] that constitutes attempt, Bohlander uses illustrations rather than rigid points of demarcation while exploring

the threshold. (The cases are cited in the endnotes following the question.) Discuss the thresholds under the Ethiopian Criminal Code:

a) pulling out a gun with the intention of shooting immediately[b] or pointing the gun at V, even if it was not yet cocked[c]
b) pursuing V with a weapon[d]
c) asking V to let D into the house in order to carry out a clandestine theft (notorious cases of tricking old people)[e] or ringing the bell on V's door whom D intends to rob[f]
d) lying in wait in V's corridor or rooms if D thinks that V will appear at any moment[g]
e) a pick-pocket in a crowd putting his hand between people in order to reach into their pockets[h]
f) fixing steel girders to railroad tracks in order to block the rail traffic[i]
g) checking in luggage that contains illegal drugs in order to import them at the destination, unless there is a delay between check-in and departure of several days,[j] similarly nearing a border customs office by car or even having passed the last exit from the motorway before the border[k]
h) closing a contract to obtain illegal drugs unless the drugs are not going to be handed over directly[l]
i) installing an ignition-triggered explosive device in V's car if D knows that V will show up very soon.[m]

[Notes for Question 9]

[a] [E]g. BGHSt 26, 203; 28, 164; 37, 297; 40, 268; 48, 36. …
[b] BGH NStZ 1993, 133.
[c] RGSt 59, 386; 77, 1. RGSt 68, 336 even accepted the act of merely grabbing the gun.
[d] RG JW 1925, 1495.
[e] BGH MDR 1985, 627.
[f] BGHSt 26, 201; 39, 238.
[g] RGSt 77, 1.
[h] BGH MDR 1958, 12.
[i] BGHSt 44, 34.
[j] BGH NJW 1990, 2072.
[k] OLG Düsseldorf MDR 1994, 1235; BGHSt 36, 249.
[l] BGHSt 40, 31.
[m] BGHSt 44, 91.

Case 2

Federal Supreme Court, Criminal Cases Chilot

Criminal Appeal No. 18/87 (Eth.Cal.)

Judges: Abate Yimer, Menberetsehai Tadesse, Mekuria Endashaw

The Public Prosecutor appealed against the decision of the High Court that had ordered the acquittal of two respondents on the ground of no case for prosecution (based on Article 141 of the Criminal Procedure Code).

On Hamle 26th 1986 (August 2, 1994), the first respondent was found to have a knife, hand grenade and fuses thereof concealed in the heels of his shoes and was arrested while he was attempting to pass through the passenger searching point at Dire Dawa Airport. The second respondent had already taken his passenger seat in Ethiopian Airlines Boeing 737.

The High Court decided that the second respondent had possessed no weapon, and the Court also ruled that the act of the first respondent constitutes a preparatory act that had not yet reached the level of an attempt (as defined under Article 27) to hijack the plane. The appellant [i.e. the public prosecutor] contended against this holding and reasoning of the High Court while the defense counsel argued that a person who is not yet on board an airplane cannot be considered to have attempted to hijack it.

The counsel also contended that even after entry into the airplane, attempt to hijack cannot be deemed to have begun unless the accused (even if armed) is captured after having started acts that target at controlling the direction of the flight. The defense further stated that admission of the respondent about their plans to hijack a plane does not prove unequivocal intention and determination but mere thoughts.

Reasoning and Holding of the Supreme Court

The Supreme Court found that the material facts of the case regarding the plan and preparation to hijack the airplane have not been contested, and in effect, the sole issue is whether an attempt to hijack the airplane can be said to have begun. The respondents are not residents of Dire Dawa, and the courage and determination of the first respondent to smuggle in armaments into the airplane in spite of the search proves determination and point of no return.

Moreover, this determination is manifested in the spatial and temporal proximity towards the realization of the complete offence. With regard to spatial proximity, the second respondent is already in the plane, while the first respondent is near the plane. And regarding temporal proximity, passengers were in the course of getting on board the plane after which the plane would take off. If it were not for the capture of the first respondent, they were very close to the commission of the offence.

The holding that the acts of the respondents had not yet reached at the phase of attempt shall violate the legislative purpose [of Article 27] that has the objective of preventing offences before their completion. The phase of direct access to the pilot shall indeed create the condition of immediate completion of the offence.

Acquittal of the respondents on the ground of no case for prosecution has thus been reversed, and the High Court is ordered to resume the hearing of the case and allow the respondents to submit their defence.

Case 3

Federal Supreme Court

Criminal Cases Appeal No. 13241
Hamle 26th 1996 (August 2, 2004)
Judges: Tegene Getaneh, Desta Gebru, Asegid Begashaw

The appellant was convicted and sentenced for life imprisonment as co-offender for attempted homicide (27/1 and 522/1/a of the 1957 Penal Code) against three persons under an intelligence operation coded '*Wolfgang*' that was designed to be carried out in West Berlin, Germany. The appeal contested the conviction and sentence passed by the High Court on grounds of fact and issues of law.

The appellant and other co-defendants were accused of having planted explosives at the Library and office of Hassel Blant (hereinafter referred to as Blant's) in an attempt to assassinate three target victims and of having caused damage to Dems Hotel. The evidence against the appellant proved that explosives were taken to Germany and two persons were assigned to execute the plan during which the appellant acted as a facilitator as per instructions from Addis Ababa.

One of the defendants who was in charge of carrying out the plan discovered that the timer of the explosive does not work, and went out of his room at Dems Hotel (where he had kept the explosive) in order to buy a timer from a shop. He found that the shop was closed, and a few minutes after he was back in his room, the bomb exploded while he was trying to adjust and recheck the timer that had failed to work.

Holding of the Federal Supreme Court

The Supreme Court found that the judgment of the High Court is based on mistaken appreciation of facts and the appellate court also held that the explosion of the bomb in the hotel room of one of the defendants, before it was repaired and taken to the target site does not constitute criminal attempt as defined under Article 27(1). The Court instead found the appellant (who was liaison of operation) guilty of (participation in the) possession of arms for unlawful purpose in violation of Proclamation No. 214/1974 (Eth. C) and sentenced him to twelve years of rigorous imprisonment.

Reasoning of the Federal Supreme Court

The target victims were expected to be found at Blant's and not at Dems Hotel. And, the bomb went off while it was being checked before it was taken to Blant's. Thus the charge that accuses the defendants to have planted explosives at Blant's has not been proved. Moreover, the finding of the High Court that states that the defendants had conducted the explosion ". . . after having gone to the hotel where the target victims were found" is neither in conformity with the charge nor supported by the facts.

The issue is whether the bomb blast at the hotel room of one of the defendants before it was repaired, adjusted and taken to Blant's constitutes an attempt. Article 27 provides that attempt requires the beginning of the commission of an offence, and the offence is deemed to have begun when a given act clearly aims at the commission of an offence by way of direct consequences.

The defendants have taken arms and explosives from Ethiopia to Germany and they have chosen the site where the bombs were to be planted. The books in which the explosives were to be concealed have also been made ready. These acts precede the crucial step towards the commission of the offence because the defect in the explosive was yet to be repaired and adjusted, and then it had to be taken to the target site i.e. Blant's.

The issue whether the defective timer was repaired has not been established. What has been proved is that the timer was found defective and that one of the defendants could not buy the item because the shop (which he thought would have the timer) was closed. The explosive is a time bomb and unless its timer is functional, the acts that have been committed until the moment of the accidental blast (in the defendant's room at Dems hotel) constitute preparatory acts and not an attempt. And, preparatory acts are punishable only where the acts in themselves constitute an offence or where the acts expressly constitute a special offence.

There were yet other acts to be committed before the ultimate act of planting the explosive at Blant's. The defects in the bomb had to be repaired, i.e., the timer had either to be repaired or replaced. After repair and adjustment, it had to be taken to Blant's and be planted. However the explosion has interrupted all these phases.

Conviction for attempted homicide requires material proximity to the commission of the offence and an unequivocal intention and determination. However, the point in the chain of acts where the bomb accidentally exploded does not clearly indicate material proximity to the commission of the offence. Attempt does not of course require the commission of the last act, yet the act of a defendant has to reach at such a decisive step which unequivocally proves that the offence is about to be committed.

The appellant should thus be convicted and sentenced not on the ground of attempted homicide, but for the possession of arms for unlawful purpose in violation of Article 41(1) of Proclamation No. 214/1974 (Eth. C).

(N.B.— Supplementary facts: Blant's is some kilometers from Dems Hotel and the blast occurred in the evening. The defendants had yet to decide when to carry out their plan after the defects in the explosives were repaired or replaced.)

Case 4

Supreme Court, 6th Criminal Cases Chilot

Criminal Appeal File No. 65/79 (Eth. C)

Judges: Mengistu Hailemariam Araya, Esmael Hadji Mahmoud, Seifu Feyissa

The appellant has lodged an appeal against his conviction and the sentence passed by the High Court on the charge of attempted aggravated fraudulent misrepresentation in violation of Articles 27/1, 656 and 658 of the 1957 Penal Code.

The appellant applied (to Ethiopian Road Authority) for a taxi licence on Nehassie 25th 1975 (31st August, 1983). He claimed to have previously applied for the license and stated that his vehicle (Mazda Plate No.3-06592), was accordingly checked by the technicians of the Authority after which his younger brother encountered a crash while he was driving the vehicle outside Addis Ababa. The appellant requested to be given a taxi licence for his current vehicle (Peugeot 404, Plate No. 2-01716) which he claimed to have bought by financial assistance from relatives.

However, Mazda Plate No.3-06592 had never had an accident and it belongs to Ato Redwan Sultan. The appellant had tried to obtain taxi licence from Ethiopian Road Authority by claiming to be the owner of Mazda Plate No. 3-06592, but failed to produce title certificate.

The core issue considered by the Supreme Court was whether the appellant's act of fraudulently applying for a taxi licence by claiming to be an owner of a vehicle that belongs to another person constitutes an attempt of aggravated fraudulent misrepresentation under Articles 27/1 *cum* 658/d of the 1957 Penal Code. The Court held that Article 27/1 requires unequivocal intent and material proximity to the commission of the offence and that the taxi licence sought by the appellant cannot be obtained without the presentation of title certificate due to which the request of the appellant was duly rejected.

The Supreme Court thus reversed the holding of the High Court and decided that the act of the appellant that targets at fraudulent misrepresentation is remote from and not proximate to the intended result and does not thus constitute attempt as defined under Article 27(1).

Case 5[127]

Federal Supreme Court Cassation Division

Cassation File No. 66856 (Megabit 26, 2004 E.C. /April 4, 2012)

Judges: Hagos Woldu, Teshager G/Selassie, Ali Mohammed, Nega Dufesa, Adane Nigussie

> *Holding of the Court*:
> The accused have pursued their criminal activity of robbery to the end but there was no vehicle to be robbed. Their act on its own shows that they had reached the point of no return in their pursuits of committing robbery which makes them liable for attempted robbery.
> Articles 27(1), 32(1)(a), and 671(1) of the Criminal Code

…

The issue in this case is the determination of the stage at which an act can be considered as criminal attempt.

On Megabit 7 and 8, 2001 E.C., (March 16 and 17, 2009) in the Gurage Zone SNNPR, the petitioner and the co-offenders were in possession of [a pistol], masks, battery torch and knife. They waited for vehicles at night with the intention of robbery. Vehicles did not appear during the evening. As they were getting back to their village they were arrested based on the information obtained and charged with attempt for aggravated robbery. The petitioner has contested the commission of the act and has pleaded not guilty.

The evidence is based on witnesses and the statements of the defendants made to the police and then to court in accordance with Articles 27 and 35 of the Criminal Procedure Code. According to one witness, information was obtained from a driver about a planned robbery, but no evidence was obtained. Searches were made on passengers and three persons were found without ID cards. They said that they are engaged in construction work, and that they are going back to their village because there was shortage of instruments in their work place. When they were searched, a [pistol], a knife and mask were discovered. They had admitted during police investigation about their planned robbery.

The lower court had examined the defence submitted by the defendants and convicted the first and second defendants. The petitioner was sentenced to 22 years of rigorous imprisonment.

The petitioner was previously sentenced to 10 years for homicide and released on parole. The petitioner's appeal has not been accepted by the Region's appellate court, and the present petition which invokes fundamental error in law is submitted to this Cassation Division.

The issue that is involved in this case is whether the act of the defendants constitutes criminal attempt.

According to Article 27 of the Criminal Code, whosoever intentionally begins to commit a crime shall be guilty of criminal attempt even if he "does not pursue or is unable to pursue his criminal activity to its end", or even if he does not

achieve "the result necessary for the completion of the crime" after having pursued his criminal activity.

The facts indicate that the defendants had gone to the forest where robbery was usually being committed; information was obtained and they were arrested while travelling in public transport. During the search they were found to be in possession of [a pistol], a knife and a mask. During their statements, they admitted the commission of the offence and that they passed a night in the forest after arranging the necessary weapons for robbery, were waiting for vehicles to be robbed during the night but no vehicle appeared, and that they were arrested on their way back with all the weapons under their possession in the course their preparation for robbery.

The petitioner and the co-offenders thus pursued the criminal activity of robbery to the end but there was no vehicle to be robbed. In other words, the act committed by the petitioner and his co-offenders on its own shows that they had reached the point of no return in their pursuits of committing robbery. Therefore, the decision of the lower court has duly considered all these points in accordance with the provisions stated in the charge, and there is no error of law committed by the court.

Decree

The decision of SNPPR Supreme Court under Cassation File Number 33619 on Yekatit 12, 2002 E.C (February 19, 2010) is affirmed in accordance with Article 195(2)(b)(ii) of the [Criminal] Procedure Code. ...

Review Questions on Cases 2 to 5

Activity 1

Do you agree with the reasoning and the holding of the court in Cases 2, 3, 4 and 5? State your reasons.

Activity 2

Read the following case comment on Cases 2 and 3 above and state your opinion on the threshold of attempt suggested in the comment:

> **Testing the Cases against the Different Legal Standards**[128]
>
> 1. Under the standard of equivocality
>
> . . . Under normal circumstances, a civil passenger does not carry the types of items mentioned in [Case No. 2]. The items mentioned in [Case No. 3] are also deadly and there is no reason why anyone should transport and store them as such places like hotels, except to commit a crime. . . .
>
> 2. Under the standard of proximity
>
> This standard . . . makes use of three tests, namely: the last

proximate act, acquiring the indispensable instrument and physical proximity. It appears that in [Case No. 3] the appellate court has based its decision mainly based on the standard of the last proximate act, though it seems to contradict this by saying that "this does not, however, mean that in order to conclude that a crime is attempted, one should wait till the last act is done but that it should have been proved with certainty that the crime was to be committed and that [the acts have reached] at a decisive stage." . . .

In both cases, defendants had acquired the indispensable instruments, which were the items they intended to use and they did not need other instruments under the circumstances. . . .

Though physical proximity is a subjective standard, it may be argued that acts done by defendants [in Case 2] are by far significant compared with what remains to be done by them. [They have travelled] all the way from Addis Ababa to Dire Dawa—more than 500 Kilometers and then to the airport and the checkpoint. [This] is not comparable with the distance between the checkpoint and ... the plane ... probably 300 or so meters. In [Case No. 3] too, the distance covered—[from Addis Ababa] to W. Germany—is quite substantial compared to the distance between the hotel and the library. It should also be noted that taking the seriousness of the crimes intended and the seriousness of apprehension, the standard should be applied restrictively. Thus since both the intended crimes were serious crimes, the defendants should have been found guilty of attempt. Mention should also be made here regarding the difference between mental and material proximity. Accordingly, when intention is known, material proximity is immaterial. In both cases it was admitted that appellants had the intention to commit the intended crimes. Thus, let alone the last acts done by them till arrest, any other move beyond acquisition of the items should have made them criminally liable.

3. Under the probability of desistance standard

. . . [The defendants] . . . could not achieve their intended results due to external factors beyond their control (i.e. arrest at the check point [in Case 2] and explosion at the hotel [in Case 3]) but not change of mind; and it was unlikely that they would have abandoned their design out of any other cause. . . . [G]iven their personal backgrounds (i.e., political activists [in Case 2] and security personnel [in Case 3]), the defendants were more likely to persist in their criminal path unlike in the case of other individuals who commit crimes for other personal purposes.

4. Under the standards of irrevocable intent and point of no return

Under both standards, what is important is the high degree of determination beyond which a criminal could not desist from going further except from external circumstances but not change of purpose. The physical as well as mental proximity and the personal profiles of the defendants . . . amply prove that they have all reached the point of no return and had irrevocable intents to achieve what they were set for. The facts that the hijacking failed due to arrest [in Case 2] and the homicide due to the explosion [in Case 3] amply prove that the causes for failure were extraneous to the defendants but not change of purpose which is not expected of such actors. Thus, they should have been convicted for attempted crimes on these standards too.

5. Under the substantial step standard

This standard . . . focuses on the quality of the conduct to corroborate the actor's criminal purpose, . . . the emphasis should be upon what is done than what remains to be done. . . . [T]he only reasonable inference that can be made out of the possession of such deadly weapons at such places is that they are intended to be used for criminal ends but not any imaginable innocent purpose(s). Moreover, if more attention is given to what is done than what remains to be done, all acts done before failure were so alarming so as not to give defendants any benefit of doubt. It should be noted here that the whole reasoning of the court in [Case No. 3] focused on what remains to be done than on what is done. Based on this line of argument, defendants should have been convicted for their attempt to commit those crimes for which they were charged.

6. The articles under which appellants were charged and convicted

Apart from the issues of attempt and preparation, these cases also call for a brief discussion on the relevance of the articles under which the defendants were charged and convicted.

a) In [Case No. 2] the respondents were charged and convicted for attempted plane hijacking. A closer look at the statements of the decision also shows that they were charged and convicted for robbery. It should, however, be noted that Ethiopia had no anti-hijacking law at the time when this crime was committed, i.e. in 1986 [E.C] 1994 [G.C.]. The first anti-hijacking law was enacted on

February 22, 1996. Under the Penal Code, robbery is a crime against property and has no relevance to the acts done by the respondents. Thus, though it is not clear why this was not raised as an issue, the case should have been rejected for being against the principle of legality provided under Article 2 of the code.

b) In [Case No. 3] the appellant was set free on the charge of homicide but found liable for unauthorized possession. Article 41(1) of the Revised Penal Code No. 1981 [, i.e. Proclamation No. 214/1974 (Eth. C.) under which the appellant was charged provided the following:

> apart from of offences against the security of the state (Art. 4), whoever] makes, imports, exports or transports, acquires, receives, stores or hides, offers for sale, puts into circulation or distributes, without special authorization or contrary to law, weapons or ammunitions of any kind is punishable with rigorous imprisonment from five years to twenty five years.

It is noted from the facts of the case that the defendant and his accomplices were personnel of the then Ministry of Security and sent abroad for this specific purpose that was ordered and directed by the minister himself. Thus, their acquisition of those weapons employed in the attempt cannot be said to be unauthorized. Moreover, the intention behind was not trafficking but, to commit homicide. Thus, if not found liable for the attempt, they should have been set free on this count.

By way of conclusion and in retrospect, given what happened on September 11th, 2001, in the US, . . . those deadly items recovered from respondents in [Case No. 2] should have given sufficient ground to convict them as charged. The appellant and his accomplices in [Case No. 3] had shown their exceptional dangerousness by daring to commit series of crimes in another country and had they had their own way, they would have killed a number of individuals. Given the seriousness of the crimes intended to be committed and the apprehension felt in this regard, defendants should have been convicted of the crimes for which they were charged. . . .

Activity 3

German courts did not consider the following as cases of attempt.[129] (The cases are cited in the endnotes for each theme.) Would you take the same position under Ethiopian law? Why or why not? How do you compare the thresholds which German courts have used vis-à-vis the positions taken in the

Ethiopian court decisions in Cases 1, 2 and 3, and the case comment stated under Activity 2?

1. poisoning a guard dog on the grounds of V's estate if D intends to enter into V's house at another location of the estate[a]
2. merely lying in wait for V, unless D expects her to appear within a few moments[b]
3. HIV-positive D asking V for unprotected intercourse[c]
4. disposing of an insured object in order to declare it as stolen to the insurance company[d]
5. ringing the bell at V's door if D wants to find out whether V is at home, before robbing V later as intended[e]
6. preparing the location of a bank for a robbery meant to take place the next day[f]
7. bank robbers parking the getaway car in front of the bank but not having got out guns and put on masks[g]
8. entering a supermarket with a hidden gun, and before putting on the mask[h]

[Notes for Activity 3]

[a] RGSt 53, 218.
[b] BGH MDR 1973, 728.
[c] BayObLG NJW 1990, 781.
[d] BGH NJW 1952, 430.
[e] BGH GA 1971, 54.
[f] BGH NStZ 2004, 38.
[g] BGH MDR 1978, 985.
[h] BGH NStZ 1996, 38.

Readings on Section 4

Reading 1: Williams[130]

Inchoate offences are committed when some step is taken to put a criminal intention to effect, which step is regarded as sufficiently serious to be punishable although the crime in view has not been accomplished.

It is a statutory offence under the Criminal Attempts Act 1981 to attempt to commit any indictable offence, with small exceptions. The attempter may be sentenced to the fine and imprisonment up to the maximum specified for the consummated crime. In practice a substantial discount is given.

An attempt is judged according to the facts as the defendant believed them to be, so one can attempt the impossible. There must be an intention to commit the crime in question. . . .

The act of attempt is defined as "an act which is more than merely preparatory to the commission of the offence." Whether the courts will stretch the meaning of "act" to include an omission is undecided. An act that goes beyond mere preparation, and so constitutes an attempt, was formerly called proximate act; but the statute abandons this term. Under the Act, if the judge holds that there is evidence of such an act of attempt for the jury, he must then leave the jury to

decide whether it went beyond mere preparation, however clear the case may be. The judge may, however, withdraw the case from the jury on the ground that there is no sufficient evidence. . . .

Reading 2: Cheong *et al.*[131]

Various conceptual problems arise with regards to ascribing criminal liability in the case of a person who tries but fails to commit his intended offence. This is unlike the paradigm case where criminal liability follows on proof of the commission of the prohibited action which is accompanied with the requisite wrongful state of mind.

The reasons for failing to complete an intended offence are diverse. For example, if X decides to rob a rich businessman, Y, he may procure a weapon and work out a plan as to when and where to make his move. On the chosen day, however, X may not have carried out the plan because he decided that the risks of getting caught were too great. Or Y may not have showed up at the place where X planned to strike. Or the robbery could have failed because Y was not carrying any items of value with him at the time. Should X be guilty of attempted robbery in any of these situations? What if X had changed his mind about the robbery the day before? Would that situation be different from changing his mind on arrival at the chosen place and time, and finding out that the place had too many police officers on patrol?

One way to conceptualise the different reasons for such a failure is to divide the attempts into (1) complete but imperfect attempts; and (2) incomplete attempts. The former involves situations where the accused has done all that he sets out to do, but fails to achieve the desired goal. The example given above of Y not showing up at the place where X planned to strike, and of Y not carrying any items of value would fall within this category. An incomplete attempt, on the other hand, involves the situation where the accused does some of the acts to achieve his criminal purpose, but he either desists from seeing it through or is prevented from doing so by a third party.

One problem in the law of attempts is fixing the point in time when the 'attempt' should be criminalized. Obviously, the police will be unable to prevent crime if the offence of attempt requires virtually the entire intended offence to be committed. Conversely, if the point is fixed too early in time, there are serious repercussions on individual liberty and dangers of creating 'thought crimes'.

Another area that has attracted a lot of academic and judicial attention is where the intended offence is impossible under the circumstances. Examples include trying to steal from an empty pocket, trying to kill a person who is already dead and trying to kill by sticking needles into a voodoo doll. Should the person be punished in each of these cases? Distinctions between the types of impossible attempts have sometimes been made, holding a person liable in some situations but not in others.

The manner in which the issues raised above are resolved may depend on whether one takes a subjective or objective approach towards criminal liability. The subjective approach focuses on the accused person's state of mind to assess the level of danger posed by him rather than his actual conduct on the particular occasion.

On the other hand, the objective approach towards criminal liability argues that the accused should not be punished unless harm is caused by his conduct. Taking this approach, conduct which justifies punishment must be more proximate to the final result than under the subjective approach. Hence, objectivists would not support the punishment of X in the example above if he had changed his mind about committing the robbery and decides not to show up at the appointed place. But note that in recognition of attempts as a form of inchoate crime, some objectivists would consider 'harm' to include causing apprehension, fear or alarm to the community.

The difference between subjective and objective approaches can be seen most starkly with regards to impossible attempts. Suppose X intends to cause Y to miscarry. He purchases a herbal concoction from a traditional medicine practitioner who assures him that it will be effective. This is administered to Y, but no harm results because the herbs were later found to be innocuous. A subjectivist would approve of punishing X for attempted causing of miscarriage in view of his intent, as shown by his action of administering the portion to Y. An objectivist, on the other hand, would argue that X should only be punished if his actions come sufficiently close to the commission of the intended offence. In this example, no discernible harm was in fact caused to Y.

The *mens rea* of an attempt to commit an offence is also a matter of concern. Should this be the same as the *mens rea* for the intended offence, whatever it may be? Or should a higher threshold be set such that only an intention to commit the offence will do? . . .

. . . [V]arious stages are involved before a criminal offence is actually committed. A person may begin by forming an intention to commit an offence, followed by preparing to commit it by finding the means necessary to commit the offence, deciding on the date and time when the offence will be committed, and finally, when the appointed date and time arrives, embarking on the offence itself. At which stage can the person be said to have 'done enough' to be liable for attempting to commit the offence?

The phrase 'does any act towards the commission of the offence' in section 511 of the [Indian] Penal Code cannot be taken to mean literally that doing *any* act towards the commission of the offence is punishable as an attempt, otherwise the distinction commonly accepted between acts of preparation (for which there is no criminal liability) and an attempt would not be possible.

. . .

Endnotes, Chapter 2

[1] The Declaration of Rights of Man, approved by the National Assembly of France on August 26, 1789.

[2] Catherine Elliott (2001), *French Criminal Law* (Willan Publishing), p. 59.

[3] *Ibid.*

[4] *Ibid.*

[5] Jean Graven (1959), 'Le Code Pénal de L'Empire d'Ethiopie,' 5-29 (Centre Français de Droit Comparé), English translation, *Journal of Ethiopian Law*, Vol. 1, pp. 268–290 (1964), in Lowenstein, *supra* note 47, Ch. 1, pp. 64–65.

[6] Crim. Code, Art. 747.

[7] Crim. Code, Arts. 769, 770.

[8] Philippe Graven (1965), *An Introduction to Ethiopian Penal Law: Arts. 1–84 Penal Code* (Addis Ababa: Haile Selassie I University and Oxford University Press), pp. 3,4.

[9] Crim. Code, Art. 213.

[10] *See* Articles 65 to 68 of the Draft Criminal Procedure and Evidence Code, Proclamation.

[11] We need to take note of the first clause in Article 24(1) which relates causation only to "cases where the commission of a crime requires achievement of a given result."

[12] Walter Wheeler Cook (1917), 'Act, Intention, and Motive in the Criminal Law', *Yale Law Journal*, Vol. 26, No. 8 (June 1917), p. 647.

[13] *Ibid.*

[14] Andrew Ashworth (2003), *Principles of Criminal Law*, 4th ed. (Oxford University Press), p. 96.

[15] Read Bain (1939), Book Review, *American Sociological Review*, Vol. 5. No. 1. (Feb. 1940, American Sociological Association), p. 127.

[16] Herbert Morris, ed. (1961), *Freedom and Responsibility: Readings in Philosophy and Law* (Stanford: Stanford University Press), p. 112.

[17] Joshua Dressler (2001), *Understanding Criminal Law*, 3rd ed. (Lexis Nexis), p. 377.

[18] Du Cros v. Lambourne, [1907] 1 K.B. 40.

[19] Richardson's Case (1785), 168 E.R. 296.

[20] Robinson v. California, 370 U.S. 660 (1962).

[21] Powell v. Texas, 392 U.S. 514 (1968).

[22] New York v. Shaughnessy, 66 Misc. 2d 19 (N.Y.D.C. 1971).

[23] Catherine Elliott and Frances Quinn (2004), *Criminal Law*, 5th ed. (Harlow: Pearson Education Ltd.), pp. 8–10.

[24] Glanville Williams (1983), *Textbook of Criminal Law*, 2nd ed. (London: Stevens & Sons), p. 166.

[25] Larry Alexander (2002), "Criminal Liability for Omissions: Inventory of Issues" in *Criminal Law Theory: Doctrines of the General Part*, Stephen Shute and A. P.

Simester, editors (Oxford University Press), p. 122.

[26] Graven, *supra* note 8, p. 58.

[27] Crim. Code, Art. 659(1).

[28] Crim. Code, Art. 659(2).

[29] *Criminal Law Capsule Summary*, Lexis-Nexis, Chapter 3, § 3.03 Omissions, B(4)

[30] Alexander, *supra* note 25, pp. 121–122.

[31] For statements of the doctrinal point that there is no general duty under the criminal law to save others from harm, see Wayne R. LaFave, *Criminal Law*, 3rd ed. (St. Paul, 2000) 215; Model Penal Code, s, 2.01(3). For some of the literature criticizing (and defending) the absence of a duty of Good Samaritanism, see Joel Feinberg, *The Moral Limits of the Criminal Law, Vol. I: Harm to Others* (Oxford, 1984), ch. 4.

[32] Alexander, *supra* note 25 (citing Wayne R. LaFave, *Criminal Law*, 3rd ed. (St. Paul, 2000), p. 214).

[33] Wayne R. LaFave, *Criminal Law*, 3rd ed. (St. Paul, 2000), pp. 214–219.

[34] Alexander, *supra* note 25 (citing American Law Institute, § 2.01 cmt., at 222, 223; Joshua Dressler, *Understanding Criminal Law* (2d ed., 1995), pp. 89–91; LaFave, *supra* note 33, pp. 221, 222; Model Penal Code, §. 2.01(1)).

[35] Jeremy Bentham, in Steven Lowenstein (1965), *Materials for the Study of the Penal Law of Ethiopia* (Addis Ababa: Haile Selassie I University and Oxford University Press), pp. 93, 94.

[36] *Ibid.*

[37] Don Stuart (1987), *Canadian Criminal Law: A Treatise*, 2nd ed. (Ontario, Canada: Carswell Co. Ltd.), p. 74.

[38] *Ibid.*

[39] German Federal Supreme Court, 1st Criminal Senate Decision of 2-12-1952, 1 St. R. 59/50; 2 B.G.H. St. 150 (1952; translation Mueller, Comparative Criminal Law, 75-80a (1960), in Lowenstein, *supra* note 35, p. 82.

[40] R. v. Mwila Chunga and Kunge Mapalanga, 5 L.R.N.R. 160 (1952) (Zambia), in Lowenstein, *ibid.*, p. 83.

[41] United States v. Knowles, 26 Fed. Cas. 801 (N.D. Cal. 1864).

[42] R v. Pitwood (1902) 19 TLR 37.

[43] Lowenstein, *supra* note 35, p. 94.

[44] *Ibid.*, pp. 94, 95.

[45] *Miller*, [1983] 2 AC 161.

[46] Airedale NHS Trust v. Bland [1993] AC 89.

[47] Elliott, *supra* note 2, pp. 60–61.

[48] Don Stuart, *supra* note 37, pp. 72- 76.

[49] Michael Bohlander (2009) *Principles of German Criminal Law* (Hart Publishing), pp. 40–45.

[50] Benjamin Franklin (1757), "Poor Richard's Almanac," in Lowenstein, *supra* note 35, p. 121.
[51] R v. White (1910), 2KB 124 (Can. C.A.).
[52] *Hateta Zemiknyat* (*Exposé des Motifs*), June 2004, pp. 17-18 (Article 24 of the 2004 Criminal Code).
[53] *Criminal Law Capsule Summary*, LexisNexis§ 4.03, B(2)
[54] *Ibid.*
[55] *Ibid.*, Ch. §4. 4.02, A(3)
[56] In *R v. Pagett* (1983) 76 Cr App R 279.
[57] John Smith (2002), *Smith and Hogan Criminal Law*, 10th ed. (London: LexisNexis Butterworths), pp. 43, 44.
[58] R v. Malcherek (1981) 73 Cr App R 173.
[59] R v. Jordan (1956) 40 Cr App R 152.
[60] Smith, *supra* note 57, p. 47.
[61] *Ibid.*
[62] *Ibid.*, p. 48.
[63] *Smith*, *supra* note 57, p. 49 (citing Bush v. Commonwealth, 78 Ky. 268 (1880)).
[64] "Recent Decisions", 13 *Fordham Law Review*, Vol. 13, pp. 92, 107 n.18 (1944).
[65] Hypothetical, raised during class discussion. Alemu A.
[66] State v. Preslar, 48 N.C. 421 (1856).
[67] R v. Holland (1841) 2 Mood. & R. 351.
[68] R v. Corbett [1996] Crim LR 594.
[69] R v. Roberts (1971) 56 Cr App R 95.
[70] Hypothetical, raised during class discussion. Shimellis A.
[71] Lowenstein, *supra* note 35, p. 133.
[72] Court of Appeals of New York 63 N.Y.2d 270 (1984).
[73] People v. Kibbe & Krall., 35 N.Y.2d 407 (1974).
[74] People v. Griffin, 80 N.Y.2d 723 (1993).
[75] Williams, *supra* note 24, pp. 400, 401.
[76] Elliott, *supra* note 2, pp. 61–63 (Footnotes omitted).
[77] United States v. Jackson, 598 F.3d 340, 348 (7th Cir. 2010)
[78] Markus D. Dubber and Mark G. Kelman (2005), *American Criminal Law* (New York: Foundation Press), p. 263.
[79] Markus Dirk Dubber (2001), "Policing Possession: The War on Crime and End of Criminal Law", *Journal of Criminal Law and Criminology*, Vol. 91, Issue 4, Summer 2001, at p. 908.
[80] Ashworth, *supra* note 14, pp. 109, 110.
[81] *Ibid.*
[82] Graven, *supra* note 8, p. 68.
[83] Crim. Code, Art. 141.
[84] Crim. Code, Art. 140.
[85] Crim. Code, Art. 141.

[86] Graven, *supra* note 8, p. 69.
[87] Matthew Lippman (2010), *Contemporary Criminal Law: Concepts, Cases and Controversies*, 2nd ed. (Sage Publications), p. 176.
[88] *Ibid.*
[89] Graven, *supra* note 8, p. 71.
[90] Oliver Wendell Holmes (2009 [1881]), Forward by Stephen L. Carter, *Common Law* (ABA Publishing), p. 45 (citing Reg. v. Taylor, 1 F&F. 511).
[91] *Ibid.*, p. 46.
[92] *Ibid.*
[93] *Ibid.*
[94] *Criminal Law Capsule Summary*, LexisNexis, Chapter 20.
[95] *Ibid.*
[96] Joshua Dressler (2001), *Understanding Criminal Law*, 3rd ed. (Lexis Publishing), p. 391.
[97] State v. Dowd, 220 S.E. 2d, 393, 396 (N.C. Ct. App. 1975) in Dressler, *ibid*, p. 392.
[98] Dressler, *supra* note 96.
[99] Commonwealth v. Kelley, 58 A 2d 375, 377 (Pa Super. Ct. 1948) in Dressler, *ibid.*
[100] Dressler, *supra* note 96.
[101] People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (1927).
[102] American Law Institute, Comment to §5.01, at 325, in Dressler, *supra* note 96, p. 394.
[103] Dressler, *ibid.*
[104] Salmond J. in Baker [1924], *New Zealand Law Review*, in Modern Law Review, Vol. 18, No. 6, Nov. 1955, p. 620.
[105] Graven, *supra* note 8, p. 70.
[106] *Ibid.*, pp. 74–76.
[107] Saleilles, quoted by Donnedieu de Vabres, in Graven, *supra* note 8, p. 72.
[108] Graven, *ibid.*
[109] *Ibid.*, p. 73.
[110] The offence is deemed to have begun when the act committed unequivocally and by way of direct consequences aims at its realization.
[111] Graven, *supra* note 8, p. 75.
[112] *Ex parte* Turner, 3 Okl. Cr. 172, 104 P. 1071 (1909).
[113] Graven, *supra* note 8, p. 75.
[114] *Ibid.*, p. 76.
[115] R. v. Taylor, 1 F&F. 511 (1859).
[116] Crim. Code, Arts. 35(2), 37(3).
[117] Crim. Code, Art. 38(1) *cum* 84(1)(d).
[118] Crim. Code, Art. 38(2) *cum* Articles 257, 274,300 . . .

[119] Lowenstein, *supra* note 35, p. 98.
[120] Smith, *supra* note 57, p. 336.
[121] Lowenstein, *supra* note 35, p. 98.
[122] *Ibid.*, p. 110.
[123] People v. Miller, 42 P.2d 308 (Cal. 1935).
[124] Wickihalder c. Ministère Public du Canton De Zoug, RO 83 IV 142, JT IV 99 (1937), Switzerland, in Lowenstein, *supra* note 35, pp. 103, 104.
[125] Lowenstein, *supra* note 35, p. 115.
[126] Bohlander, *supra* note 49, pp. 142–143.
[127] *Wudima A. v. Southern NNPR Public Prosecutor*, FSC Cassation File No. 66856, FSC Cassation Division Decisions Vol. 13, pp. 296-298. (Abridged Translation in: 'Selected Federal Cassation Decisions, and Ethiopian Law Index (1995-2012)', *EtLex* Volume 1, Ethiopian Legal Information Consortium, published by Justice and Legal System Research Institute, December 2013, pp. 118-119.)
[128] Tsehai Wada (2008), "Case Comment: The Law of Attempt", Journal *of Ethiopian Law*, Vol. 22, No. 2 (December 2008), pp. 53–56 (citations omitted).
[129] Bohlander, *supra* note 49, pp. 142–143.
[130] Williams, *supra* note 24, pp. 418, 419.
[131] Chan Wing Cheong, Michael Hor Yew Meng, and Victor V. Ramraj (2005), *Fundamental Principles of Criminal Law: Cases and Materials* (Singapore/Malaysia/Hong Kong: Lexis Nexis), pp. 653–654.

Chapter 3

Criminal Guilt (*Mens Rea*): Subjective Elements of Criminal Liability

Criminal guilt is a blameworthy state of mind punishable under criminal law. The maxim "there are no guilty acts but only guilty persons" indicates the decisiveness of a person's specific moral guilt in rendering an act punishable. According to Article 57(1) of the Criminal Code, "No one can be punished for a crime unless he has been found guilty thereof under the law." The same provision defines 'guilt': "A person is guilty if, being responsible for his acts, he commits an offence either intentionally or by negligence." In the absence of criminal intention or criminal negligence on the part of the doer, harm is considered to have been caused by force majeure or accident.[1]

The moral conditions of liability to punishment are thus *responsibility* and *criminal guilt*. This chapter briefly discusses the two components of criminal guilt, namely, intention and negligence in simple offences. Criminal guilt in multiple offences is discussed in Chapter 4. Responsibility is briefly explained in Chapter 6.

Articles 58 and 59 of the Criminal Code (which deal with the types of criminal guilt) are highly influenced by the criminal codes of continental Europe. Under German law, criminal liability requires intent in the form of *mens rea* before criminal liability can be established, and Bohlander states that "[n]egligence is the exception and must be explicitly provided for by law".[2] He further explains that "[t]here is in fact, no provision prescribing negligence liability that does not have an intentional counterpart." [3] Negligence liability is restricted to gross negligence under English criminal law, whereas Germany's criminal law renders negligence criminally liable if it is expressly stated to be punishable. Although English and US criminal laws do not render simple negligence punishable, they have, unlike German criminal law, the notion of strict liability. According to Bohlander, Section 15 of the German penal code "precludes any liability without individual fault, such as strict liability of any sort."[4]

1. Criminal Intention

Criminal intention is composed of two component elements: awareness/ ግንዛቤ/ማወቅ (cognition) and will/ፈቃደኝነት (volition). According to Article 58(1) of the 2004 Criminal Code, a person is said to have *intentionally* committed an offence under the alternative circumstances embodied in Sub-Articles 1(a) and 1(b). The provision reads:

A person is deemed to have committed a crime intentionally where:

a) he performs an unlawful and punishable act with full knowledge and intent to achieve a given result; or

b) he being aware that his act may cause illegal and punishable consequences, commits the act regardless that such consequences may follow.

Article 58(1)(a) defines direct intention (intended result) as the performance of an unlawful and punishable act with *awareness* (እያወቀ) and *volition* (በራሱ ፍላጎት); Article 58(1)(b) defines *dolus eventualis*, in which the probable harm is foreseen and the accused accepts the probable event of resultant harm.

1.1 Direct Intention and Ancillary Direct Intention

In Article 58(1)(a), quoted above, the Code uses the words “full knowledge” and “intent” as elements of intention to respectively express *awareness* and *volition* (will). Using the term ‘intent’ as an element (to define intention) in the English version of Article 58 of the 1957 Penal Code was a tautology (definition in a circle), and this error has again found its way into the current Criminal Code.

The phrase “*d’en obtenir le résultat*”[5] (ውጤት ለማግኘት) was missing in the English version (Article 59(1)) of the 1957 Penal Code, but has now duly been incorporated in the 2004 Criminal Code. Moreover, the terms “full knowledge” and “intent” in the English version lacked the necessary precision and clarity to represent the drafter’s original French words ‘*la conscience*’ (awareness) and ‘*la volonté*’ (will or volition). The ambiguity of the terms ‘full knowledge’ and ‘intent’ does not, however, exist in the binding official Amharic version of the 2004 Criminal Code, which uses the phrase ‘እያወቀ በራሱ ፍላጎት.’ The term ‘ፍላጎት’ is to be understood as ‘ፈቃደኝነት, i.e. volition’ and not merely ‘desire’ so that it can accommodate the second form of direct intention (*ancillary direct intention*). The French words “*conscience*” and “*volonté*” should have thus been translated as “*awareness*” and “*volition*” in the English version and ‘እያወቀ በፈቃደኝነት’ in the Amharic version.

Awareness means the ability to foresee the nature, factual circumstances and consequences of one’s act or omission. It is established by common knowledge having regard to the particular circumstances of the accused. There are events of unawareness or mistake of facts whereby criminal intent is deemed to be nonexistent.[6] A person who picks an umbrella believing that it is his does not commit theft. But ignorance (unawareness) of the law[7] is no excuse aside from a possible mitigation of penalty under justifiable circumstances.

The *will* (ፈቃደኝነት) to accomplish an act and obtain the result thereof (*la volonté d'accomplir un acte . . . et d'en obtenir le résultat*) takes two forms. Primarily, '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 knowingly (deliberately) strikes another with the desire to inflict bodily injury. In this case there is *awareness* of the act, the circumstances and the probable result; and there is also the *desire* to bring about the harm. Under such cases, there is criminal intention even though the chance of achieving the result desired may be small. A person shooting at his chosen victim from a distance with the desire to kill has a criminal intention in spite of the considerable likelihood that he will miss his target. Certainty or uncertainty of obtaining result is thus immaterial as long as the accused desires the occurrence of the harm as his primary objective. This form of intention may be qualified as *direct intention*.

Secondly, 'will' manifests itself in the form of willingness to bring about a *substantially certain* (but not necessarily desired) result, while acting to achieve a desired objective. In such cases a person's 'secondary will' is a means to his primary objective. The accused, being aware that a given harm will certainly occur or having foreseen that the harm is substantially certain, willingly accepts it as the necessary consequence of his act or omission.

> If A, with a view of hitting B, throws a stone through the [glass] window of B's bedroom, the two consequences he brings about (bodily injury [which is the result desired] and damage to property [an inevitable result under the circumstances]) must be regarded as having been intentionally produced.[8]

The accused, according to Sklar, "knows that should he succeed in achieving his desired objective (bodily injury) . . . the secondary result (damage to property) will certainly or nearly certainly occur."[9] For the purpose of distinction we may refer this form of direct intention as *ancillary direct intention*. It is subordinate or ancillary to direct intention, but the near certainty of the occurrence of the harm makes it very close to direct intention. In German criminal law this moral guilt is referred to as *dolus indirectus* (indirect intention) or in some cases *dolus directus* (direct intention).

Indirect intention is referred to as *dolus eventualis* under French and Swiss criminal law. It is to be noted that most of the literature on Ethiopian criminal law uses the term 'indirect intention' interchangeably with *dolus eventualis*, which is embodied in Article 58(1)(a) of the Criminal Code. We will thus use the term 'ancillary direct intention' (rather than *dolus indirectus* or 'indirect intention') in order to avoid the conceptual confusion with *dolus eventualis*. As presented in the first reading of this chapter,

Austin uses the word *Absicht* for what we now consider as 'direct intention', and he uses the term *dolus directus* to express the *mens rea* we are now referring to as 'ancillary direct intention.'

Article 58(1)(a) refers to either form of 'will': *direct intention*, i.e. awareness plus desire for intended harm, or *ancillary direct intention*, i.e. willingness to bring about a substantially certain result. These two forms of intention belong to the general category of direct intention and are different from *dolus eventualis* stipulated under Article 58(1)(b).[10]

1.2 *Dolus Eventualis*

At times, an accused foresees a possible harm, and yet pursues his activity *regardless* of the harm. Article 58(1)(b) deals with such a mental state whereby the offender, being aware that his act *may* cause illegal and punishable consequences, commits the act *regardless* that such consequences may follow by accepting the result. This 'intent to accept a possible event' is referred to as *dolus eventualis*. This mode of moral guilt is also referred to as 'indirect intention' in Swiss (e.g. Paul Logoz) and Ethiopian legal literature, while certain jurists use the term 'indirect intention (*dolus indirectus*)' for acts committed under knowledge of inevitability of harm ancillary to bringing about the directly intended result. For the purpose of avoiding confusion with the term *dolus indirectus* (indirect intention), which has different meanings in various literature, it seems to be appropriate to use the term *dolus eventualis* rather than *indirect intention*.

In *dolus eventualis*, unlike direct intention, the accused does not desire the occurrence of the harm. Yet although he is aware of its *possible* occurrence, the accused is willing to bring about the harm rather than prevent it by renouncing his act. In other words, the offender *accepts* the occurrence of the *possible harm*. To illustrate, if a speeding driver foresees the possibility of hitting a pedestrian on an overcrowded street and accepts the possible harm, *dolus eventualis* is said to exist if the driver causes bodily injury, death or damage to property

In contrast to ancillary direct intention, a *dolus eventualis* offender is not certain (or nearly certain) about the inevitability of the harm. The speeding driver of the preceding example does not foresee the harm as a certainty (or near certainty), but as a possibility. *Dolus eventualis* thus varies from the two forms of direct intention. Yet it has much in common with both forms of intention, because the accused is *aware* of possible consequences and *willingly* pursues his act by *accepting* the occurrence of the *possible* harm.

1.3 Harm that Goes beyond Criminal Intention

Article 58(3) stipulates that "[n]o person shall be convicted for what he neither knew of [n]or intended, nor for what goes beyond what he intended either directly or as a possibility, subject to the provisions governing negligence." Harm caused that is neither directly intended nor foreseen and accepted as a possibility goes beyond the intention of the accused person and shall not be liable to criminal punishment provided that the defendant's act does not fall under negligence.

Graven notes that this rule also applies to "praeterintentional offences, i.e. when the doer intends to cause harm and actually causes more harm than he had intended either directly or indirectly."[11] He illustrates this issue with an example whereby A sets fire to B's house without knowing that B is at home, and thus is unaware of the possibility of harm to B. If B dies as a result of the fire, the death "is in excess of, or 'goes beyond' what is directly intended."[12] However, the defendant shall be punished for damage to property (which he has intentionally committed) and may also be liable for negligent homicide based on the provisions and concepts to be discussed in Section 2.

In FSC Cassation File No. 164030,[13] the 2nd defendant and the deceased had a quarrel, and the latter had informed the relevant office about the 2nd defendant's threats against him. The 1st defendant was assigned by the 2nd and 3rd defendants to attack the victim. The 1st defendant who had initially hesitated was insulted by the 3rd defendant as a coward, and threw a rock against the deceased as a result of which the latter was severely injured and died. The 2nd and 3rd defendants argued that they had only expected physical attack against the deceased.

The majority opinion of the FSC Cassation Division (on Hedar 30, 2012 EC/ December 10, 2019) held that the second and third defendants planned the criminal offence and have shown the victim to the first defendant. It stated that they have accepted the consequences of the first defendant's act. The Cassation Divisions' majority opinion convicted the three defendants under aggravated homicide (Articles 32/1/a and 539/1/a) thereby confirming the Regional High Court's decision and reversing the Regional Supreme Court's Decision. The dissenting minority opinion (two judges) affirmed the Regional Supreme Court's decision indicating that the intention of the 2nd and 3rd defendants to have the deceased killed has not been proved and they stated that the 1st defendant should have been convicted under Article 540 (ordinary homicide), and the 2nd and 3rd defendants should have been liable under Article 556(2) due to their intention to cause physical injury.

2. Criminal Negligence

In popular parlance, the definition of criminal negligence usually has the elements of *failure to exercise care* thereby causing harm (undesired by the accused) that *could* or *should* have been normally avoided. Such definition is too brief and simplistic for the purpose of criminal law, because the definition of criminal negligence involves elements that need to be carefully analyzed. Article 59(1) of the 2004 Criminal Code defines criminal negligence as follows:

> A person is deemed to have committed a criminal act negligently where he acts:
> (a) by imprudence or in disregard of the possible consequences of the 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.

Article 59(1) thus embodies two forms of negligence. Article 59(1)(a) defines conscious (*advertent*) negligence whereby the offender is *aware* of but *disregards* the possible harm. Article 59(1)(b) deals with unconscious (inadvertent) negligence where the offender acts by *criminal lack of foresight* or *without consideration* (i.e. without awareness while he should or could have been aware of the possible consequences of his act).

2.1 Advertent (Conscious) Negligence

Dolus eventualis and advertent negligence have a certain common denominator. In both cases, the offender *foresees* the possibility of certain harm. The difference between indirect intention (*dolus eventualis*) and advertent negligence lies in the volitional state of the offender after his awareness of possible harm. Under indirect intention (*dolus eventualis*) the offender *accepts* (or reconciles with) the occurrence of the possible harm, whereas the advertently negligent person *rejects* (disregards) the possibility of the harm which in fact materializes as a result of his imprudence. The following illustration by Philippe Graven clarifies 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 he replies 'you needn't worry, I am a good driver'. . . . A moment later, B again insists that A should slow down. A then answers, 'I've told you I am a good driver. Anyway, it is two o'clock in the morning, the police are asleep and nobody will see us if something should happen'. Thereupon 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 [thereby entering into the domain of *dolus eventualis*].[14]

2.2 Inadvertent (Unconscious) Negligence

Where a person, *by criminal lack of foresight* or *without consideration*, acts while he should or could have been aware of the possible consequences of his act, he is said to be inadvertently negligent. Under inadvertent negligence the accused is unaware of (or does not at all foresee) possible harm.

The accused, for example, believing that a gun is unloaded, pulls a trigger and injures a person. If instead, an offender foresees possible harm, but disregards the possibility of hitting B and shoots at a certain target unfortunately injuring B, there is advertent negligence. Lack of awareness about the probable occurrence of harm distinguishes inadvertent negligence from all forms of blameworthy mental states.

2.3 Standards of Foresight and Prudence

Article 59(1) states the factors that determine the existence of *imprudence* in case of advertent negligence (Article 59(1)(a)) and *criminal lack of foresight* in the case of inadvertent negligence (Article 59(1)(b)). These objective standards of advertent and inadvertent negligence are interpreted in light of the personal circumstances of the accused as stipulated under the second paragraph of Article 59(1) which reads:

> A person is guilty of criminal negligence when having regard to his personal circumstances, particularly to his age, experience, education, occupation and rank, he fails to take such precautions as might reasonably be expected in the circumstances of the case.

The objective standard is not thus purely ideal because it gives due consideration 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 test' therefore, does not denote an abstract mythical model, but refers to the 'prudent man' under the circumstances of the accused.

2.4 Required Express Statement of Negligence in the Law

Article 59(2) provides that "offences 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 element. The specific provision that establishes an offence should thus clearly declare that an act negligently committed is a punishable offence, as in Article 543 (homicide by negligence), Article 559 (injury caused by negligence), and others.

Many provisions that constitute offences or petty offences do not distinctly refer to intention or negligence. For example Article 539 (homicide in the first degree) and Articles 555, 556 (wilful injury) clearly require criminal intention. On the other hand, the provisions cited in the preceding paragraph (i.e. Articles 543 and 559) embody negligence among their ingredient elements.

However, there are provisions such as Article 560 (assault), 580 (intimidation), 643 (indecent publicity and advertisements) that do not state intention nor negligence among their elements. Yet by virtue of Article 59(2), negligent acts are not punishable unless the law so expressly provides, and in effect, provisions that do not state intention or negligence *invariably require criminal intention*.

2.5 Factors that Determine the Gravity of Negligence

The second paragraph of Article 59(2) stipulates factors that are considered during the determination of punishment. They are (1) the degree of guilt of the offender, (2) the dangerous character of the offender, and (3) the degree of the offender's realization of the possible consequences of his act, or his failure to appreciate such consequences as he ought to have done.

Although the first and third factors seem to have some overlapping features, the first factor relates to the distinction between advertent and inadvertent negligence. The first factor, i.e. 'degree of guilt' requires the court to consider whether the negligence of the offender is advertent or inadvertent, or whether the negligence is single or concurrent.[15] The third factor seems to create (a) hierarchy within advertent negligence based on the magnitude of the defendant's awareness of the possible consequences of his act, and (b) the extent to which the inadvertently negligent offender ought to have foreseen the resultant harm.

3. The Notion of Strict Liability

The concept of strict liability in criminal offences is not envisaged under the Ethiopian Criminal Law subject to the exception under Article 23(3) of the 2004 Criminal Code which deals with criminal liability of juridical persons (under Article 34 as discussed in Chapter 5, Section 5). For example, in *Callow v. Tillstone,*[16] the court did not need to examine the criminal guilt of the defendant who was convicted for selling meat which was not fit for sale.

The veterinary surgeon had given the defendant a certificate that the meat was sound after an examination that was negligently conducted, and the defendant killed a heifer just before it died of yew poisoning. The defendant delivered the meat for sale by making use of the certificate. The conviction did not need to examine the diligence of the defendant toward ensuring the safety of the meat.

Offences of strict liability do not require proof of moral guilt and they are mainly regulatory offences usually meant to regulate health and safety. In certain legal regimes, the prosecution of acts such as speeding while driving may not require proof of criminal guilt. Advocates of the principle of strict liability invoke public protection, practical benefits and lower punishments as justification. In *Cundy v. Le Cocq*,[17] for example, the defendant was convicted for selling liquor to a person who was drunk, in violation of a statutory provision. The defendant argued that he was unaware that the customer was drunk. Section 13 of the Licensing Act (1872) did not expressly require knowledge while other offences under the same act did so. This was interpreted to mean that awareness was not necessary. Under Ethiopian criminal law, however, the absence of terms such as knowingly, intentionally, and the like would not have led the court to such interpretation, because, as highlighted under Section 2.4 above, any provision that does not express negligence as the required moral guilt is interpreted as requiring criminal intention.

If courts decide on the basis of strict liability, the defendant is held guilty even where he/she was not even negligent. Under the Ethiopian Criminal Code, the mental element constitutes one of the elements of every offence, and this also applies to any special legislation on criminal law envisaged under Article 3 of the Criminal Code as they are required to apply the "general principles" embodied in the Criminal Code. Yet intention may not be difficult to prove in various cases which might come under strict liability in other legal regimes. Even more so, inadvertent negligence, a tier of negligence which seems to be nonpunishable in many common law jurisdictions, can be used in this regard.

For example, the two cases mentioned above, (*Callow* and *Cundy)*, could have (under the Ethiopian Criminal Code) at least respectively met the standards of advertent and inadvertent negligence, if the higher tiers of moral blameworthiness were difficult to prove. In fact, the negligence of the veterinary surgeon who was acquitted in *Callow v. Tillstone* could have been subject to criminal liability under the Ethiopian Criminal Code. The challenge, however, occurs when a given negligent conduct is not expressly rendered punishable by a specific provision of the Ethiopian Criminal Code or other criminal law provision of a special legislation.

4. Comparative Concepts on Modes of Moral Guilt

4.1 US Model Penal Code

It is important to examine the concepts and terminology that express the different modes (or categories) of moral guilt under different legal systems. According to Section 2.02 of the US Model Penal Code, "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense", subject to the exception laid down under Section 2.05, which envisages cases such as strict (absolute) criminal liability. Section 2.02(2) defines the various types of moral culpability:

(2) Kinds of Culpability Defined.

(a) *Purposely.*

A person acts purposely with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) *Knowingly.*

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) *Recklessly.*

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) *Negligently.*

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Robinson[18] relates the four kinds of moral guilt in the Model Penal Code to each of the three kinds of objective elements—conduct, circumstances, and result—and he gives the definition for each variation embodied in Section 2.02(2) as shown in the table below.

Table 3:

Level of moral guilt and the corresponding objective (material) elements

	Type of Objective Element		
	Result	**Circumstances**	**Conduct**
Purposely	'It is in his conscious object . . . to create such a result'	'he is aware of such circumstances or hopes that they exist'	'it is his conscious object to engage in conduct of that nature'
Knowingly	'he is aware that it is practically certain that his conduct will cause such a result'	'he is aware . . . that such circumstances exist'	'he is aware his conduct is of that nature'
Recklessly	'he consciously disregards a substantial and unjustifiable risk that the material element . . . will result from his conduct'	'he consciously disregards a substantial and unjustifiable risk that the material element exists'	—
Negligently	'he should be aware of a substantial and unjustifiable risk that the material element . . . will result from his conduct'	'he should be aware of a substantial and unjustifiable risk that the material element exists'	—

In short:

- *Purposely* refers to conscious object. The defendant is aware of and desires the resultant harm, and believes or hopes that the desired goal can be achieved without necessarily being certain about the result.
- *Knowingly* expresses awareness of the nature and circumstances of the act and certainty about the result. The defendant who throws a stone through a glass window injures the target victim *purposely* and breaks the window *knowingly*.
- *Recklessly* expresses *conscious disregard* to substantial and unjustifiable risk about the existence of the material element of the offence or about the resultant harm from his conduct.
- *Negligently* expresses failure to perceive substantial and unjustifiable risk while the person should have been aware of the substantial and unjustifiable risk considering the nature and purpose of the conduct and the circumstances known to him/her.

The terminologies and their respective definitions above show that the term *negligently* is equivalent to "inadvertent negligence" embodied under Article 59(1)(b), which uses the words "lack of foresight or without consideration while [the offender] could or should have been aware that his act may cause illegal and punishable consequences." The word 'recklessness' seems to be closer to 'advertent negligence' defined under Article 59(1)(a) of the Criminal Code which envisages awareness about the possible harm and imprudently disregarding its occurrence, although certain gross forms of recklessness can be closer to *dolus eventualis* rather than advertent negligence.

The definition of 'purposely' under US Model Penal Code corresponds with the concept of direct intention embodied in Article 58(1)(a) which requires awareness and volition. The term 'knowingly' clearly represents a *mens rea* which is different from the mental state of *dolus eventualis*. A person who *knowingly* commits an offence acts is *certain or nearly certain* that the resultant harm will occur, and this is comparable with *ancillary direct intention* (that can be classified under Article 58(1)(a)) because there is knowledge and willingness to bring about a substantially certain result as highlighted in Section 1.1. However, *dolus eventualis* involves a defendant's conduct *regardless* of his awareness of *possible* harm as envisaged under Article 58(1)(b).

4.2 Types of Moral Guilt in German Criminal Law

According to Article 15 of the German penal code, "[o]nly intentional conduct is punishable, unless the law expressly provides punishment for negligent conduct." Likewise, Article 59(2) of the Ethiopian Criminal Code provides that negligent offences are punishable only if the law so provides. Under German criminal law, criminal guilt is classified into five categories, out of which three fall under criminal intention. Although Sections 17 and 18 of the draft were not included in the final draft of the German penal code, the provisions "nonetheless provide a useful summary of the commonly drawn distinction between intention and negligence in German criminal law."[19] The three types of criminal intention in German criminal law[20] are referred to as *Absicht*, *dolus directus* and *dolus Eventualis*.[21]

- *Absicht* refers to conscious object or desired objective, and the range of probability of resultant harm is irrelevant. It is comparable to the term "purposely" in the US Model Penal Code. Some writers[22] designate this category of *mens rea* as *dolus directus* (direct intent) of the first degree.
- *Dolus directus*: This category of criminal guilt is synonymous to "knowingly" in the US Model Penal Code. Some jurists, including Austin, consider this mode of moral guilt as *dolus directus* but different from (and ancillary to) 'desire'. There are writers who refer this type of intention as *dolus directus* of the second degree.[23]
- *Dolus eventualis*: Acceptance of the resultant harm which is foreseen and whose probability of occurrence is high.

The concept of *dolus directus* (sometimes stated as *dolus indirectus* or indirect intention) in German law is different from *dolus eventualis* in part because *dolus directus* requires certainty or near certainty of the resultant harm while *dolus eventualis* does not have such requirement. This notion of *dolus directus* (which is termed *ancillary direct intention* in this book) is not expressly stated in Article 58(1)(a) of the Ethiopian Criminal Code, although the provision can cover such situations.

The two forms of negligence in German and Ethiopian criminal laws are nearly similar. The modes of negligence in German law are the following:

- *Negligence with awareness* expresses the existence of awareness on the part of the defendant and conduct under the belief in nonrealization of risk whose probability of occurrence may be low.
- *Negligence without awareness* refers to a mental state where there is no awareness of resultant harm whose probability of occurrence may be low.

4.3 Moral Guilt in French Criminal Law

Unlike the Ethiopian Criminal Code, the French penal code does not define intention and negligence, and the definitions have developed through academic writings and court decisions. Elliott[24] states that there are two forms of intention under French criminal law: *dol général* ('general intention') and *dol special* ('special intention'). Emile Garçon, defines general intention as "the desire to commit a crime as defined by law; it is the accused's awareness that he is breaking the law."[25] This definition has "two mental elements that make up general intention: desire and awareness."[26] Elliott notes that the requirement of desire refers to the "desire to commit the wrongful act" and does not mean "a desire to commit the result of that act" because the desire for the result will not be required to establish general intention.[27]

General intention, in French criminal law, is usually presumed from the nature of the *actus reus* of the offence.

> It is only in exceptional situations that an accused, who carried out the *actus reus* of an offence, will be found not to have general intention. This will arise where the person made a mistake as to the true nature of their act and was therefore not aware that [he] broke the law, in other words, mistake as to the facts: a person is not guilty of theft if [he] mistakenly believe[s that he is] the owner of the goods which are the subject matter of the accusation. In the same way, a person will not be guilty of sexually assaulting a minor under the age of 15 if [he] reasonably and honestly believed that the person was older. Of course, an error of fact that was unrelated to the *actus reus* of the offence would not prevent the existence of general intention. For example, a thief who makes a mistake as to the object he is taking, believing it to be made of gold when it was in fact made of copper, would still have the general intention. . . .[28]

Special intention under French criminal law "requires an intention to cause a result forbidden by the law" and this *mens rea* usually applies for offences that need a particular result.

> If one takes the offence of theft, the general intention required is the desire to take property belonging to another and an awareness that such conduct breaks the law; while the special intention required is the intention to behave as the owner of the property belonging to another. So a person who picks up an object that has been lost by its owner with the intention of returning it to him or her has not thereby committed a theft.[29]

However, the offender need not attain all the result he had sought while committing the offence. "This is the case where it is not possible for the defendant to know precisely what the result of their conduct will be and is known in French as *dol indéterminé* [also known as le *dol imprésis*]."[30] It means indeterminate intention or imprecise intention. A person who hits the victim may not foresee the specific type of harm which may be "a nose bleed, a broken nose, or unconsciousness" and "the special intention required for a non-fatal offence against the person is an intention to injure. . . .[31]

Indirect or *oblique intention* is known under French law as *le dol éventuel*. This is similar to the notion of *dolus eventualis* under Ethiopian criminal law because in both laws the accused foresees the possibility of the resultant harm which he/she does dot desire as such, but acts regardless of the risk of causing the harm.

The concepts of *dol aggravé* and *dol dépassé* may aggravate or mitigate the blameworthiness of criminal intention. "These concepts have no direct translation in English criminal law. In fact, on closer examination, these are not different forms of intention, but instead raise separate issues with implications for the punishment incurred by the defendant."[32] The concept of 'malice aforethought' in Anglo-American law seems to be analogous to the concept of *dol aggravé*.

> The *dol aggravé* refers to the situation where some additional *mens rea* is required beyond general or special intention. For example, the crime of *[assassination]* is more serious than 'ordinary' murder because in addition to general and specific intention, it requires the *dol aggravé* of premeditation. It can therefore be punished [more severely than] murder. . . .
>
> The *dol aggravé* will often be the requirement for the crimes to have been carried out with a particular motive. While intention is essentially an abstract concept which remains the same for each offence, regardless of the defendant, the potential motives for a crime are infinite and dependent on the individual and their circumstances. . . . The existence of this *dol aggravé* will render the person convicted liable to a punishment which is one level higher on the sentencing scale than if the *dol aggravé* had not been present.[33]

Ethiopian criminal law does not, in principle, expressly create such hierarchy in criminal intention. Yet the aggravated features of the accused person's criminal intention may lead to the application of provisions on aggravated offences. For example, the offence of aggravated homicide defined under Article 539(1)(a) requires "premeditation". However, the

element of premeditation does not apply as *dol aggravé* in all aggravated offences such as the types of aggravated homicide defined under Sub-Articles (b) and (c) of Article 539(1).

The concept of aggravated criminal intention is reflected in Ethiopian criminal law through the aggravation of penalty in many specific offences where certain motives specified in a provision exist. For example, motives, such as the ones stated in Article 84(1)(a) of the Criminal Code, aggravate the level of criminal intention and justify graver punishment. This provision requires the court to increase the penalty when the offender "acted with treachery, with perfidy, with a base motive such as envy, hatred, greed, with a deliberate intent to injure or do wrong, or with special perversity or cruelty."

The concepts of *'dol indéterminé'* and '*dol dépassé'* become relevant in French criminal law "when the result desired is different to the result attained."[34]

> *Dol dépassé* occurs where the result that is caused goes beyond the intention and foresight of the defendant, for example, where the defendant merely wanted to injure the victim but in fact the victim is killed. On these facts, the defendant lacks the special intention as regards the result caused. In principle, a *dol dépassé* is not sufficient to constitute a special intention. But the legislature sometimes takes into account both the intention and the result by punishing defendants more severely than would have been the case if they had been judged uniquely on the basis of their intention, but less severely than if they had been judged solely according to the result caused. Such is the case where a person commits acts of violence against [his] victim without intending to cause death, but death results.[35]

This concept of *dol dépassé* has clearly influenced Article 58(3) of the Ethiopian Criminal Code, which exempts an accused person from conviction "for what he neither knew of [n]or intended, nor for what goes beyond what he intended either directly or as a possibility, subject to the provisions governing negligence." The clause "what goes beyond what he intended either directly or as a possibility" (i.e. *dol dépassé)* does not apply in cases of *transferred malice* (*abberatio ictus*)[36] where, for example, an offender shoots and kills a person other than the one he had intended to kill. In the offence of homicide, the identity of the person is irrelevant as long as there is the awareness and the volition (direct or indirect) to cause the death of a person (Article 538), or where there is advertent or inadvertent negligence.

Case Problems and Review Exercises

Discuss the mental elements of offences under the following fact situations, based on Articles 57–59 of the 2004 Criminal Code:

1. "D, a foreman platelayer, was employed to take up a certain section of railway line, but misread the timetable so that the line was up at a time when a train arrived. He placed a flagman at a distance of only 540 yards, instead of 1,000 yards as required by the company's regulations and entirely omitted fog signals, although the regulations specified that these should be put at 250-yard intervals for a distance of 1,000 yards. (P died due to the accident that ensued.) . . . [I]n spite of D's mistakes, the accident could not have happened if the flagman had gone the proper distance or if the engine driver had been keeping a proper look-out, which he did not."[37]
2. "D's child, P, was in the care of a nurse (Mrs. X). D, intending to murder the child, delivered to X a large quantity of laudanum, telling her it was a medicine to be administered to P. X did not think the child needed any medicine and left it untouched on the mantelpiece of her room. In X's absence, one of her children, Y, aged five, took the laudanum and administered a large dose to P who died."[38]
3. A government official was quite late to an appointment. He took a taxi, and upon reaching his destination he rapidly opened the door of his taxi without looking to the rear. An automobile approaching from behind at a normal distance and speed had to swerve to the side of the road where an old man was standing. The old man was knocked down and seriously injured. Persons standing nearby called a policeman. "In his attempt to help the old man who was then conscious, the policeman lifted him up to carry him toward a hospital. He had not, however, gripped him firmly and the old man again fell to the ground which aggravated his condition and led to his death soon thereafter."[39]
4. D, a bus conductor, "negligently signaled to the driver of the bus to reverse, so that two pedestrians, whom it was not possible for the driver to see, were knocked down and one of them killed."[40]
5. A doctor (John Bodkin Adams) gave drugs to a patient under severe pain to shorten his life.[41] Although the court found no special defence it was held that the doctor is "entitled to do all that is proper and necessary to relieve pain even if the measures he takes may incidentally shorten life" as a secondary intention. Can the intention of the doctor to 'ease the passing away' be regarded as the primary intention and relieve the doctor from criminal guilt under the Ethiopian Criminal Code?

6. The defendant kept a baboon and failed to repair its cage properly, with the result that the animal escaped and bit a child, who later died.[42]
7. Based on Readings 4 and 5 of this chapter, discuss '*aberratio ictus*' (harm on another but similar victim or object) under Articles 58 and 59 of the 2004 Criminal Code.
8. X allowed a teenage girl, who did not even have a learner's licence, to drive his large motor car while he was talking to another passenger in it. As a result of X's omission to properly exercise control over the girl's driving, she collided with a cyclist, killing him.[43]
9. "D, having resolved to kill his wife, prepares and conceals a poisoned apple with the intention of giving it to her tomorrow. She finds the apple today, eats it and dies."[44] Has D committed:
   a) Intentional homicide?
   b) Negligent homicide?
10. Compare the following cases[45] and state their *mens rea*:
    a) Alice plants a bomb on an aeroplane intending to blow up the plane so that she can claim money for goods on board which she has insured. She knows it is virtually certain that the bomb will cause the death of those on the plane.
    b) Ben is at the top of a burning building with his baby. As the flames grow closer he is convinced he and the baby are about to be burnt to death. He throws the baby from the rooftop, even though he knows the baby is almost bound to die because he believes that that is the only way the baby's life may be spared.
11. Bill[46] is suffering from a terminal illness and is in great pain. His doctor gives him a large dose of painkillers which cause Bill's death within 24 hours. Consider the following states of mind the doctor could have. Which would lead to a conviction of murder?
    a) The doctor wants to lessen Bill's pain by the pills, although she knows that the pills will hasten Bill's death.
    b) The doctor believes Bill has suffered enough and wants to end his pain by killing him.
    c) The doctor wants Bill to die because she knows Bill has left her a huge sum of money in his will.
12. In Criminal Appeal No. 7331, the Federal Supreme Court on Hamle 23rd 1994 Eth. Cal (July 30, 2002), reversed the Federal High Court's decision of acquittal on the ground of no case for prosecution. The respondent, while driving a taxi, Plate No. 1-07124, hit a 75 year-old pedestrian as the latter was crossing a street about eight meters wide. The victim had yet to cross the last one and a half meters of the street

when the right side rear view mirror of the taxi hit him, as a result of which he died. The respondent claims that he could not see the victim at a reasonable distance because his view was blocked by another vehicle, and by the time he saw the victim the latter was only three meters from the taxi. However, the appellate court held that it was impossible (under the circumstances) for the victim to be blocked from view by another vehicle and ordered the Federal High Court to receive evidence of the defence for the charge of negligent homicide.

a) State what the defendant (if he can) ought to prove at the High Court that can convince the court to decide that it was a case of accident and not negligence.
b) State hypothetical facts in the mental state of the taxi driver that would classify this case into advertent negligence or inadvertent negligence.

13. Consider the facts of the following two cases and discuss criminal liability of the defendants under the Ethiopian Criminal Code:

a) "The record discloses that the defendant [a leader in the Sudan Muslim faith] … purportedly exercising his powers of 'mind over matter', claimed he could stop a follower's heartbeat and breathing and plunge knives into his chest without any injury to the person. There was testimony from at least one of defendant's followers that he had successfully performed this ceremony on previous occasions. Defendant himself claimed to have performed this ceremony countless times over the previous 40 years without once causing an injury. Unfortunately, on January 28, 1972, when defendant performed this ceremony on Kenneth Goings, a recent recruit, the wounds from the hatchet and three knives which defendant had inserted into him proved fatal."[47]
b) "Over an 18-hour period, the accused, a companion of his and the deceased shared a large quantity of alcohol and cocaine at the deceased's apartment. With the deceased's consent, the accused injected a quantity of cocaine into her forearm. She immediately began to convulse violently and appeared to cease breathing. Subsequent expert testimony confirmed that, as a result of the injection, she had experienced a cardiac arrest, and later asphyxiated on the contents of her stomach. Both the accused and his companion attempted unsuccessfully to resuscitate the deceased. The companion indicated he wanted to call for emergency assistance but the accused, by verbal intimidation, convinced him not to. The accused placed the deceased, who was still convulsing, on her bed. He then proceeded to clean the apartment of any possible fingerprints, and the two men

then left. The companion returned unaccompanied to the deceased's apartment six to seven hours later and called for emergency assistance. The deceased was thereupon pronounced dead. The accused was charged with manslaughter. Defence counsel conceded at trial that the injection into the deceased's body constituted 'trafficking' within the meaning of s. 4(1) of the *Narcotic Control Act*. The Crown argued that the accused was guilty of manslaughter as the death was the direct consequence of an unlawful act, contrary to s. 222(5)(*a*) of the *Criminal Code*. The accused was convicted, and the Court of Appeal upheld the conviction. This appeal is to determine whether the common law definition of unlawful act manslaughter contravenes s. 7 of the *Canadian Charter of Rights and Freedoms*. . ."[48]

14. Y had two blood tests before her marriage to X. The blood tests indicated negative for HIV. She had asked X to take a blood test, but believed him when he told her that he had recently taken the test and that his status was HIV negative. They now have a child who is HIV negative. Two years after the marriage, Woizero Y discovered that she was HIV positive. She believes that Ato X did not know about his HIV status before their marriage, and that he did not wish to take the test for fear about his status.

    Consider **Excerpts 1** and **2** hereunder, and answer the following:

    a) Woizero Y feels that she cannot undo what has already happened and does not seek divorce, particularly in the interest of her child. Is this a case that can be charged only upon formal complaint of the victim?

    b) Give your legal opinion whether Ato X has committed an offence under the 2004 Criminal Code if he had doubts and did not want to take an HIV blood test.

    c) What if Ato X was aware of his status, but concealed it because he passionately loved Y and did not want her to leave him.

    d) Consider two issues in relation to HIV/AIDS, i.e. criminal intention (or negligence) to homicide, and the transmission of the disease. Does the development in medical science towards enabling longer lives to HIV/AIDS patients alter criminal liability on the first issue, i.e. intentional or negligent homicide?

Excerpt 1

Felonious Assault by the HIV/AIDS Infected[49]

" . . . A number of case decisions have recently considered whether an accused can be convicted of felonious assault with intent to kill by spitting, biting, scratching, or throwing blood when the person knew and was aware of his own HIV-AIDS infection.

. . . Murder is a killing caused by conduct where the accused was acting with either extreme recklessness or purpose or knowledge that a death would occur. Manslaughter is a killing committed with ordinary recklessness or gross negligence, thus involving a lesser degree of culpability than murder. The most obvious difficulty in prosecuting such cases is proving the accused had the requisite mental state. Generally, when someone engages in risky behavior he is not going to be acting with an intent to kill, although there have been a few cases of "revenge sex" where the defendant adopts an attitude toward a sexual partner of "Since I am dying, you are going to die, too."

A practical problem in homicide prosecution of HIV/AIDS carriers is that the person prosecuted is likely to die before the victim. Also, a homicide prosecution is not possible because the "victim" will not have died.

Attempted murder may be easier to prosecute, since a death is not necessary for an individual to be guilty of an attempted crime. Therefore, no causation is required. Still, the state must prove purpose to kill. Missouri eliminates impossibility as a defense. The Missouri law, somewhat of a non-traditional statute, was allegedly drafted under the coercion of having something worse if it was not drafted.

. . . Certainly intent to kill may be inferred from the use of a deadly weapon directed at a vital part of the body. If a person knows he is AIDS-infected and that the infection is fatal and intends to inflict others with the disease, he should be charged. But the intent to kill must be "more than a mere tenuous, theoretical, or speculative 'chance' of transmitting the disease." There must be proof beyond a reasonable doubt that the accused knowingly took a substantial step toward the commission of murder.

In one case a prisoner spit saliva into a guard's face. In another, a prisoner bit and punctured the skin of a prison guard. The court allowed the prosecution for assault with intent to kill, since there was "ample evidence . . . that [the] defendant did all that he believed was

necessary to infect [the corrections officer].” In another case, a defendant bit and spit at emergency technicians and police who came to his aid after a failed suicide attempt. An officer was hit in the mouth with a blood-soaked wig, causing blood to splatter onto the officer’s eyes, mouth, and skin. . . .

In another case, an accused told a convenience store clerk, “I’ll give you AIDS” before sticking her with a needle attached to a syringe containing a clear innocent liquid. There was a strong possibility the needle was infected with HIV since the defendant pulled it from his pocket and was an intravenous drug user. A defendant may not be overcharged with assault with intent to kill unless sufficient facts exist and perhaps should only be charged with intent to do great bodily harm or a lesser type felony. *There must be clear evidence the accused not only knew that he was AIDS infected, but also that he had or voiced specific intent to kill.*

The problem, especially in assault with intent to murder, is that there must not only be: (1) proof of an assault, but also (2) *proof of intent to murder*. It should be inferred from the natural consequences of the acts. Most HIV cases involving violence are prosecuted under traditional criminal statutes, the intent component made easy for the prosecution. In nearly every instance the defendant claimed he had intended to injure, kill, or transmit the virus while engaging in some kind of conduct.

Within the past few years approximately half the states have adopted some form of HIV-Specific Criminal Transmission Law. Missouri criminalizes placing another at risk for HIV transmission regardless of whether the other person has consented to the sexual act while knowing of the infection risk:

Missouri Revised Statute §191.677, Prohibited acts, criminal penalties

1. It shall be unlawful for any individual knowingly infected with HIV to: (1) Be or attempt to be a blood, organ, sperm or tissue donor except as deemed necessary for medical research; or (2) Deliberately create a grave and unjustifiable risk of infecting another with HIV through sexual or other contact when an individual knows that he is creating that risk;
2. Violation of the provisions of subsection 1 of this section is a class D felony.
3. The department of health may file a complaint with the prosecuting attorney of a court of competent jurisdiction alleging

that an individual has violated a provision of subsection 1 of this section. The department of health shall assist the prosecutor in preparing such a case.

Excerpt 2

Criminalization of HIV Manslaughter in Europe (Finland)[50]

From responses received, it appears that between six to twelve people have been prosecuted for HIV transmission in Finland. Of these, the Ministry of Justice estimates that between five and ten of these cases have led to convictions. AIDS and Mobility puts the number of people convicted at about seven, while the Finland AIDS Council puts it at about five. One department of the Ministry of Justice provided the full list of laws listed above as being applicable to HIV transmission. However, another department only listed Sections 1, 6, 9 and 11 as being applicable. Finland AIDS Council listed Sections 5 and 6 and added to the list Section 13 on Imperilment. Section 13 reads:

> A person who intentionally or through gross negligence places another in serious danger of losing his/her life or health, shall be sentenced, unless the same or a more severe penalty for the act is provided elsewhere in the law, for imperilment to fine or to imprisonment for at most two years. . . .

Only actual transmission of HIV to another person is subject to prosecution. The maximum sentence applicable is ten years' imprisonment. Transmission of other sexually transmitted infections is subject to prosecution."

Case 6

Federal High Court

Criminal File No. 50/88 (Eth. Cal.)

Megabit 10th 1993 Eth. Cal. (March 19th 2001)

Judges: Seid Hussein, Birzaf Tefahunegn, Elias Tewoldeberhan

Upon appeal by the Public Prosecutor, the Federal High Court reversed the decision of the lower Court (that had decided no case for prosecution). The appellate court ordered the lower court to continue the trial and pursue the hearing of the defence.

The respondent was accused of two counts. According to the first count, the respondent (in violation of Article 518(1) of the 1957 Penal Code) gave injection to a child (Lydia K.) on her right thigh and received Birr 10 without having been licensed as medical practitioner. The lower court had ruled that the respondent has earned a diploma as Health Assistant and that the clinic has a licence from

the Ministry of Public Health in the name of Dr. Tesfaye Birru.

The respondent has also been accused of causing willful bodily injury in violation of Article 538(a) of the 1957 Penal Code. The lower court decided that this count requires intention on the part of the accused to cause bodily injury to the victim, a point that has not been proved by the Public Prosecutor.

The issues examined by the Federal High Court were:

a) whether the respondent was lawfully entitled to render medical service and whether he has given injection to the victim
b) whether the injury received due to the injection falls under Article 538(a) of the 1957 Penal Code.

The statement given by Lydia's mother to the lower court included the following:

> Lydia had headache and I took her to the clinic where the respondent gave her an injection. When we arrived home, Lydia could not stand on her right leg. I took her to the respondent the next morning. He told me that there was deflection of the injection owing to persistent movement of Lydia during the injection. He also told me that the medicine went to the wrong part of Lydia's body and advised me to use warm water and salt to treat the swelling on her thigh. I did, and the swelling oozed down after three days. However, her right foot is not straight thereafter. The respondent initially promised to help me financially for Lydia's surgery at Black Lion Hospital, but he later avoided meeting me whenever I tried to approach him.

The expert witness summoned by the appellate court (Dr. Ayele Gebremariam) stated that nerves in Lydia's right leg have incurred a damage of 20 to 30 %. He also stated that such damage on the nerves can be caused by injection at wrong spots or due to polio virus. According to the expert witness Lydia's injury cannot be conclusively attributed to the injection.

Decision of the Federal High Court

Although the respondent has a diploma as health assistant, the evidence received by the Court from Addis Ababa Health Bureau on Tahsas 4th 1993 (Eth. Cal.) states that the respondent ought to have had professional registration and permit pursuant to Regulations No.174/1986 (Eth. Cal.). The respondent should thus defend the accusation on the first count based on Article 518(1) of the 1957 Penal Code.

With regard to the second count, Article 538(a) is inapplicable to the case at hand mainly because there was no intention on the part of the respondent to cause the injury. Rather, the injury was caused while the respondent was giving medical service. The respondent had professional training, and he ought to have accordingly taken due care not to give injection at the wrong spot of the victim's thigh thereby causing damage to her nerves. Such negligence is covered under Article 543(2) and not Article 538(a) of the 1957 Penal Code. We thus hold that the respondent defend the case against him on the basis of Article 543(2).

Questions

1. Article 538(a) of the 1957 Penal Code and Article 555(a) of the 2004 Criminal Code are identical and both provide the following:

   > "Whoever intentionally wounds a person so as to endanger his life or to permanently jeopardize his physical and mental health" . . . is punishable . . ."

   State a hypothetical mental state of the defendant that could have made it possible for the court to remand the case to the lower court by invoking *dolus eventualis* pursuant to Article 58(1)(b) of the Criminal Code.
2. Compare Articles 543(2) of the 1957 Penal Code and 559(2) of the 2004 Criminal Code. State the amendments and explain the difference, if any, which would occur, had the 2004 Criminal Code been applicable to the case.
3. Which form of negligence (inadvertent or advertent) would be applicable to this case? State possible mental states that would lead to the applicability of advertent or inadvertent negligence.

Case 7

Supreme Court, Circuit Chilot

Criminal Cases Appeal No. 207/77 (Eth. Cal.)

Judges: Asmelash Gebremedhin, Asfaw Wondimagegnehu, Feleke Wago

An appeal dated 27th Sene 1977 Eth.Cal (July 4th 1985) is lodged against the appellant's conviction by the High Court for ordinary homicide and against the sentence of ten years rigorous imprisonment.

The appellant struck the victim once over his head with a wooden stick (ዱላ) due to which the victim died after spitting blood through his mouth and nose. The appellant had quarrelled with other persons. The victim and other neighbours arrived at the site and the victim did not do any harm to the appellant.

The Supreme Court by majority decision affirmed the judgment of the High Court while the presiding judge delivered a minority dissenting opinion. The majority opinion held that the resultant death caused by a single beating indicates the strength of the stick and also shows the force exerted by the appellant when he committed the act. The majority and minority opinions were in short the following.

Majority Opinion

It cannot be inferred that a person who intends to kill does not use a wooden stick. If a person is beaten by wooden stick at a fatally delicate part of his body, the act can apparently cause death. We cannot invariably presume mere negligence whenever a wooden stick is used as means of attack. Such presumption will be an unduly narrow interpretation of the law. One can be said to have negligently caused death if he beats a victim imprudently and by

criminal lack of foresight. But, where a defendant purposely beats the victim with a stick aiming at a fatally delicate part of the victim's body, the defendant's act cannot be attributed to negligence.

Even though the appellant has merely used a wooden stick, the appellant's mother had held the victim by his throat and the appellant could thus aim with precision at the delicate part of the victim's skull (አናት) just above the forehead. Moreover the oral and nasal bleeding that ensued forthwith proves the fatality of the stick and the appellant's forceful beating. We therefore believe that the appellant committed the act having foreseen but regardless of (i.e. having accepted) the possibility of the victim's death. The High Court's decision regarding conviction and sentence has thus been affirmed.

Dissenting Opinion:

The core issue is whether a single beating with a wooden stick proves criminal intention for homicide beyond reasonable doubt.

Volition is internal, and where a defendant's intention cannot be conclusively known, inference should be made on the basis of what can be deduced from practical experience. Wooden stick may rarely cause death. However, rural dwellers in Ethiopia use it even upon unexpected brawls, and persons engaged in such fighting usually aim at the head. Unlike bullets and knives, we cannot consider sticks as weapons of murder. The appellant's act of a single beating does not thus lead towards the presumption of criminal intention and volition.

Where a defendant shoots at or stabs a person, the former is usually charged with attempted homicide. If every defendant's act of striking a victim's head with a stick justifies the presumption of intention to kill, such a beating would have entailed charges of attempted homicide wherever the victim incurs physical injury instead of death.

Dolus eventualis under Article 58(1) is said to exist only where the defendant is fully aware that his act can bring about death, but accepts the resultant harm to achieve the objective he desires. For example, Abebe aims to shoot at Bekele, but Kebede covers the target victim so save the latter from the shooting. If Abebe nonetheless pursues with his act and kills not only Bekele, but Kebede as well, we can hold that Bekele is killed under direct intention. Moreover, the defendant is deemed to have killed Kebede under *dolus eventualis* because he was aware of the possible harm but acted regardless of the possibility of Kebede's death.

Aside from such cases of *dolus eventualis*, extended interpretation of *dolus eventualis* would render negligence superfluous and in effect would create confusion and overlapping between negligence and *dolus eventualis*. The act of beating was a single act and resulted from unpremeditated incidence thereby entailing doubts whether the appellant had the intention to kill or to merely strike and injure. Apparently, these questions cannot be assertively answered.

In such cases of doubt, where alternatives of interpretation arise under criminal law, the line of interpretation that favours the accused ought to be taken. Thus even if we think that the facts may equally lead to presumptions of indirect intention or negligence, we should pursue the latter course.

To conclude, a defendant is held criminally liable only where the moral element of an offence, i.e. criminal guilt, is conclusively proved. In the case before this court, the criminal intention of the appellant has not been proved, and by virtue of Article 58(3) he should not be convicted for intentional homicide because the result is beyond what he intended.

Although the intention of the appellant was to cause physical injury (538(1)(a)) he (as per Article 63(1)(b)[51] could or should have foreseen the result. Therefore he should be convicted under Article 526(1) for having negligently caused the death of the victim. With regard to the sentence, six years of rigorous imprisonment should have been imposed on the basis of the unforeseen occurrence of the event and the gravity of the harm.

Questions

1. Article 58(1) second paragraph of the 1957 Penal Code and Article 58(1)(b) of the 2004 Criminal Code provide that a person who "being aware that his act may cause illegal and punishable consequences, commits the act regardless that such consequences may follow" is considered to have committed an offence intentionally. Do you agree with the majority opinion that the case comes under intentional homicide based on the *mens rea* of *dolus eventualis*?
2. The minority opinion holds that the defendant could and should have foreseen the possibility of the victim's death. The dissenting opinion seems to have reached at this conclusion in light of the defendant's act and the part of the victim's body he has hit. The wording of the dissenting opinion seems to have classified the *mens rea* of the defendant into inadvertent negligence.
   a) Can we equally assume that the defendant could have foreseen the possible harm but disregarded the result?
   b) If we can go thus far in our assumptions, why shouldn't we be able to assume that the defendant could have foreseen the possible harm but hit the victim regardless of what may ensue.
3. Which offence do you think is graver: grave wilful injury or negligent homicide? Compare the punishments imposed on these offences by reading the relevant provisions that define them. If negligent homicide is punishable with a sentence lower than inflicting grave wilful injury should a defendant benefit from the death of a victim whom he had merely intended to injure?

Readings on Chapter 3

Reading 1: Mannheim[52]

Intention

The German “Absicht” may be compared with the English “intention” or “intent,” at least in so far as there is a partial equality of the problems. In English law, too, intention is required only in certain statutes. Its contents, however, are much wider than those of the “*Absicht*.” The widest conception is used by Austin, who distinguishes between three kinds of intention. As an instance of the first kind he gives the quite unambiguous test-case which is also chosen in the first part of this essay under No. I. In this case, immediate purpose and ultimate purpose are identical. Austin’s second example corresponds to the second case which is characterized above as *dolus directus*: “You shoot me, that you may take my purse. . . . I defend my purse to the best of my ability. And, in order that you may remove the obstacle which my resistance opposes to your purpose, you pull out a pistol and shoot me dead. Now here you intend my death, and you also desire it as a means, and not as an end. . . . Your ultimate motive is your desire for my purse. And if I would deliver my purse, you would not shoot me.” This case is a matter of opinion in German Criminal Law. As above mentioned, it might often be covered by the conception of “*Absicht*.” It is the difficulty of such cases that, on the one hand, the intention—as Austin and several other English writers rightly emphasize—need not be referred to the ultimate purpose. On the other hand, however, it is repugnant to us—as Clark and Kenny feel—to call undesired results “intended.” It is, therefore, necessary to make some differentiation among the results which are not ultimately intended, separating those which are welcome from those which must merely be taken into the bargain. Only welcome results can be called “intended.”

. . .

Austin, since he makes expectation the cardinal point of intention, is able to distinguish between intention and mere rashness according to the probability of this expectation. In German law, however, even when the “Wahrscheinlichkeit” is taken as a basis, the degree of probability is important only for the differentiation between *dolus eventualis* and conscious negligence, not for the definition of “*Absicht*.” Salmond also acknowledges that the degree of probability is unimportant in this connexion, and he uses the following formulation: “True intention is the foresight of a desired issue, however improbable—not the foresight of an undesired issue, however probable. If I fire a rifle in the direction of a man a mile away, I may know perfectly well that the chance of hitting him is not one in a thousand; I may fully expect to miss him; nevertheless I intend to hit him if I desire to do so.” As Turner says, English jurists have not followed Austin in his wide definition of intention. He regrets, nevertheless, that this definition has not been adhered to also as to undesired results. . . .

As to the terminology, Austin differentiates as follows: “Negligence and heedlessness are precisely alike. In either case, the party is inadvertent. In the first case, he does not [commit] an act which he was bound to do, because he adverts not to it. In the second case he does an act from which he was bound to forbear, because he adverts not to certain of its probable consequences. . . .”

By that, Austin, evidently means only unconscious negligence, whilst his expression “rashness” only means conscious negligence. Setting aside these questions of terminology, the chief differences between the two legal systems are the following:

(a) In English law an action due to negligence is punishable in fewer cases than in German law; so, for instance, burning and swearing of false oaths are not punishable when only due to negligence.

(b) The possibility of applying the conception of negligence is limited by the fact that —as ensues from the foregoing— many actions which, in German law, are treated as “fahrliissig” are, in English law, punished as actions committed with intent.

(c) English law, when punishing the commission of an unlawful act due merely to negligence, demands a higher degree of negligence than does German law. . . . Slighter degrees of negligence are not punishable at all. In *R. v. Bateman* [(1925) 28 Cox 33], a case that deals with the problem of responsibility of physicians giving assistance at a confinement, it is held: “In the civil action, if it is proved that A fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. . . . In the criminal court, on the contrary, the amount and degrees of negligence are the determining question.” The difference between criminal and civil negligence has always been strongly emphasized in English doctrine and practice. The antagonism, however, seems to consist more in the fact that the average requirements, the non-fulfilment of which may produce a criminal conviction, are on a higher level than the average requirements, the non-fulfilment of which may lead to an obligation to pay damages. But it does not appear that English law applies, as does German law, at least theoretically, a subjective standard of negligence in criminal cases. Kenny, for instance, says: “A person may be criminally negligent although taking all the care that he can. . . . [I]f he undertakes the work of an expert, he must exercise an expert’s skill.” And Keedy, who, it is true, deals with this question more with reference to American law and especially to the doctrine of error, calls attention to a decision Commonwealth v. Pierce [138 Mass. 165, 178 (1884)], which stated: “that the care of a reasonable prudent man under similar circumstances should be the test in criminal as well as in civil cases.” Keedy himself inclines more to a subjective standard. Neither in English nor in German Criminal Law does contributory negligence justify impunity, although it may lead to a mitigation of punishment.

Reading 2: Elliott[53]

Comparison with the English law on Intention

. . . Unlike the French system, under English law there is legally only one concept of intention. While for the purposes of analysis and comprehension this can be divided for convenience between direct and oblique intention, this division has no significance as regards the definition of criminal offense requiring intention. A person has direct intention when [he wishes] to cause a

particular harm. This harm is not necessarily the result required as part of the *actus reus* of an offence. . . .

The French concept of special intention and the English concept of direct intention have the same meaning. Both, while close, do not reach the standards of the hypothetical ideal intention, as they do not always require a desire to achieve the result of the crime which is defined to include a result; instead a desire to commit some lesser harm can suffice. . . .

Indirect intention can arise in English law where the person does not wish the relevant harm to occur (be it the result of some lesser harm, depending on the definition of intention for the particular offence) but foresees that it is virtually certain to do so. In this case there is strong evidence from which it can be concluded that the defendant had the requisite intention. . . . [T]his would not be sufficient to constitute special intention in French law, though such foresight can be used to aggravate a punishment under the doctrine of *dol indéterminé*. . . .

For neither direct or oblique intention, unlike the French concept of *dol general*, are the English courts concerned with whether the person intended to carry out the act; this is considered as part of the *actus reus*, in analyzing whether the act in analyzing whether the act was voluntary and whether the defence of automatism is available. Nor does the issue of awareness of the law fall within the definition of intention; any defences put forward by the accused claiming that they were unaware of the law will be rejected on the basis of the principle *nemo censetur ignorare legem* [no one can ignore the law].

Reading 3: Herring[54]

***Mens Rea*: The Mental Element**

. . .

Distinguishing Intention and Motive

The courts have consistently stated that “intention is something quite different from motive or desire” [Malooney [1985] AC 905, 926]. In other words it is possible to intend a consequence without wanting it to happen. In *Hales* [(2005) EWCA A Crim 1118], the defendant ran over a police officer . . . in attempting to escape from an arrest. It was not his motive to kill the police officer, but he was, Keene L.J. explained, ‘prepared to kill in order to escape’ and therefore intended to kill. . . .

Distinguishing Intention and Premeditation

A person may act instinctively in the heat of the moment and yet intend to kill. It should not be thought that a person can intend a result only if he has carefully formulated a plan as to how he is going to product the result. The person who kills in the heat of an argument wanting to kill the victim can be said to intend to kill as much as the premeditated killer.

. . .

The following provides a useful chart of deciding whether a defendant has intention:

Was it the result of the defendant's purpose?	YES: He intended it
	NO: ask the next question:
Was the result a virtually certain result of his actions and did the defendant realize that the result was a virtual certain result of his actions?	YES: Then [it can be held] that he intended the result.
	NO: He did not intend the result

. . .

Recklessness

If purpose is the heart of intention, risk-taking is the heart of recklessness. For many years the law on recklessness was confusing because there were two definitions of recklessness . . . However, recently the House of Lords have abolished [the second type of recklessness] and now there is only one kind of recklessness used. . . .

There are two elements that need to be shown for . . . recklessness:

1) the defendant was aware that there was a risk that his or her conduct would cause particular result;
2) the risk was an unreasonable one for the defendant to take.

. . .

In *Cunningham* [(1957) 2 Q.B. 395 (Can. C.A.)], Byrne J. explained that recklessness meant that 'the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it.' Two points in particular need to be stressed about this definition. First, it is necessary to show only that the accused foresaw that there was a risk. It does not have to be foreseen as highly likely to occur. Secondly, the question is whether the accused foresaw the risk, not whether the risk was obvious or would have been foreseen by a reasonable person. . . .

. . .

Negligence

. . . If a defendant has behaved in the way in which a reasonable person would not, then he or she is negligent. There are a huge number of crimes for which the *mens rea* is negligence, although most of them are minor crimes of regulatory nature. . . . Negligence uses an objective test. In other words the defendant's state of mind is not relevant in deciding whether the defendant is negligent. There is no need to show that the defendant intended or foresaw a risk. What matters is the conduct of the defendant: did the defendant behave in a way which was reasonable in the circumstances? If the defendant behaves in the way in which a reasonable person would not then he or she is negligent. To give a practical example, if a defendant while driving crashes into the car in front, to decide whether or not he or she was negligent you simply ask: would a reasonable person in D's shoes have crashed the car or not? If even a reasonable driver would have crashed then the defendant is not negligent. If the reasonable person would not have been traveling as fast as the defendant or would have braked earlier or avoided the accident then the defendant is negligent. . . .

There are a number of disputes over the definition of negligence:

1) [W]hat if the defendant has acted a result of panic? Consider a case where a person is driving a car when suddenly a child runs out in front of her and she swerves to the right and hits an oncoming car. We might say that in fact it would have been better and reasonable to swerve to the left, where the driver could have hit no one. . . . As long as he or she responded in a way that a reasonable person might have done when faced with a similar emergency the defendant will not be negligent.
2) [I]s the standard expected of the person 'reasonable' or 'ordinary'? Does negligence require people to live up to the standard of behaviour which we think people ought to abide by, or the standard of behaviour that is the norm? In many cases there will be identical tests. But not always. We know that drivers ought always to keep strictly to the speed limits. However, we also know that most drivers do on occasion exceed them. If the driver was driving at 35mph in a 30mph speed zone could he or she claim not to be driving negligently if it could be demonstrated that on that stretch of road most drivers exceeded 30mph? There is no definitive ruling on this question by the courts.
3) [W]hat if the defendant is unable to act in accordance with the standard of the reasonable person? Simester and Sullivan argue that the defendant should be expected to live up only to the standard expected of a reasonable person with the defendant's physical characteristics, including age, sight and hearing. . . .
4) [I]s it possible to expect the defendant to show a higher standard of behaviour than that expected of the reasonable person? It is clear that if a person is purporting to act in a professional capacity he or she is expected to act as a reasonable professional. For example, a doctor is expected to exercise the skill expected of a reasonable doctor, not just the standard of an ordinary person [*Adomako* (1995) 1 AC 171 (HL)].

Gross Negligence

In relation to manslaughter a defendant's negligence must be labeled gross negligence (in essence really bad negligence) if there is to be a conviction. It must be shown that the defendant killed negligently and that this negligence was so bad to justify a criminal conviction. Manslaughter is the only offence which requires the negligence to be gross. . . .

Distinguishing between Intention, Recklessness and Negligence

. . . It is clear that if the result was the defendant's purpose then the result is intended. If the result is not the defendant's purpose but is foreseen as a possible result of his actions then the defendant is reckless. The borderline between intent and recklessness is where the defendant foresees the result as virtually certain. . . . [It is to be noted that what Herring regarded as a borderline *mens rea* falls under indirect or oblique intention based on his earlier analysis and discussion].

The difference between recklessness and negligence is fairly straightforward. To be reckless the defendant must foresee the result, while for negligence, the only question is whether the defendant acted as a reasonable person would. . . .

Reading 4: Smith and Hogan[55]

Transferred Malice

If D, with the *mens rea* of a particular crime, does an act which causes the *actus reus* of the same crime, he is guilty, even though the result, in some respects, is an unintended one. D intends to murder O and, in the dusk, shoots at a man whom he believes to be O. He hits and kills the man at whom he aims, who is in fact P. In one sense this is obviously an unintended result; but D did intend to cause the *actus reus* which he has caused and he is guilty of murder. Again, D intends to enter a house, No. 6 King Street, and steal therein. In the dark he mistakenly enters No. 7. He is guilty of burglary.

The law, however, carries this principle still further. Suppose, now that D, intending to murder O, shoots at a man who is in fact O, but misses and kills P who, unknown to D, was standing close by. This is an unintended result in a different —and more fundamental— respect than the example considered above. Yet once again, D, with the *mens rea* of a particular crime, has caused the *actus reus* of the same crime, and once again is guilty of murder. . . . 'The criminality of the doer of the act is precisely the same whether it is [O] or [P] who dies' [Mitchell [1983] Q.B. 741, [1983] 2 All ER 427,(Can. C.A.)]. The application of the principle to cases of this second type is known as the doctrine of 'transferred malice.' . . .

It is important to notice the limitation of this doctrine. It operates only when the *actus reus* and the *mens rea* of the same crime coincide. [The principle does not apply if] D, with the *mens rea* of one crime, does an act which causes the *actus reus* of a different crime . . . [as in the case where] D shoots at P's dog with intent to kill it but misses and kills P who, unknown to D, was standing close by. . . .

Coincidence of *Actus Reus* and *Mens Rea*

The *mens rea* must coincide in point of time with the act which causes the *actus reus*. . . . *Mens rea* implies an intention to do a present act, not a future act. Suppose that D is driving to P's house, bent on killing P. A person steps under the wheels of D's car, giving D no chance to avoid him, and is killed. It is P. Clearly D is not guilty of murder. . . .

Where the *actus reus* is a continuing act, it is sufficient that D has *mens rea* during its continuance. Where the *actus reus* is part of a larger transaction, it may be sufficient that D has *mens rea* during the transaction, though not at the moment the *actus reus* is accomplished. D inflicts a wound upon P with intent to kill him. Then, believing that he has killed P, he disposes, as he thinks, of the 'corpse.' In fact P was not killed by the wound but dies as a result of the act of disposal. D has undoubtedly caused the *actus reus* of murder by the act of disposal but he did not, at that have *mens rea*. In an Indian and Rhodesian case [Khandu (1890), ILR 15 Bom 194; Shorty (1950) SR, 280] it has been held, accordingly, that D must be acquitted of murder and convicted only of attempted murder. But in *Thabo Meli* [(1954) 1 All ER 373] the Privy Council held that it was impossible to divide up what was really one transaction in this way. There is no doubt that the accused set out to do all these acts in order to achieve their

plan and as parts of their plan; and it is much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law.

This suggests that the answer might be different where there was no antecedent plan to dispose of the body. Thabo Meli was distinguished on this ground in New Zealand [Ramsay [1967] NZLR 1005], at first, in South Africa [Chriswibo 1960 (2) SA 714]. But in *Church* [(1960) 1 Q.B. 59, (1965) 2 All ER 72], the Court of Criminal Appeal applied *Thabo Meli* where D, in a sudden fight, knocked P unconscious and, wrongly believing her to be dead, threw her into the river where she drowned. He was charged with murder and his conviction for manslaughter was upheld. Here there was no antecedent plan. The point was not considered by the court, but it was apparently thought to be enough that the accused's conduct constituted 'a series of acts which culminated in [P's] death. . . .

Motive Not an Element of an Offence

If D causes an *actus reus* with *mens rea*, he is guilty of the crime and it is entirely irrelevant to his guilt that he had a good motive. The mother who kills her imbecile and suffering child out of motives of compassion is just as guilty of murder as is the man who kills for gain. On the other hand, if either the *actus reus* or *mens rea* of any crime is lacking, no motive, however evil, will make a man guilty of a crime. . . .

Sometimes, when we speak of motive, we mean an emotion such as jealously or greed, and sometimes we mean a species of intention. For example, D intends (i) to put poison in his uncle's tea, (ii) to cause his uncle's death, and (iii) to inherit his money. We would normally say that (iii) is his motive. Applying our test of 'desired consequence' (iii) is certainly also intended. The reason why it is considered merely a motive is that it is a consequence ulterior to the *mens rea* and the *actus reus;* it is no part of the crime. If this criterion as to the nature of motive is adopted then it follows that motive, by definition, is irrelevant to criminal responsibility . . .

In some exceptional cases motive is an element of an offence. A new and conspicuous example is the 'racially aggravated offence' created by the Crime and Disorder Act of 1998. Any of the existing offences specified in the Act becomes a new racially aggravated offence with an enhanced penalty if, inter alia, 'the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership to that group." . . .

As evidence, motive is always relevant. This means simply that if the prosecution can prove that D had a motive for committing the crime, they may do so since the existence of the motive makes it more likely that D in fact did commit it. Men do not usually act without a motive.

Motive is important again when the question of punishment is in issue. When the law allows the judge a discretion in sentencing, he will obviously be more leniently disposed towards the convicted person who acted with a good motive. When the judge has no discretion . . . a good motive may similarly be a factor in inducing the Home Secretary to grant an early release on licence.

Reading 5: Snyman[56]

Aberratio Ictus

Aberratio ictus means the going astray or missing of the blow. It is not a form of mistake. X has pictured what he is aiming at correctly, but through lack of skill, clumsiness or other factors he misses his aim, and the blow or shot strikes somebody or something else. Examples of *aberratio ictus* are the following:

i. Intending to shoot and kill … Y, X fires a shot at Y. The bullet misses Y, strikes a round iron pole next to Y, ricochets and strikes Z, who is standing a few paces to Y's right, killing him.
ii. X wishes to kill … Y by throwing a javelin at him. He throws a javelin at Y, but just after the javelin has left his left hand, Z unexpectedly runs out from behind a bush and in front of Y and the javelin strikes Z, killing him.
iii. Intending to kill … Y, X places a poisoned apple at a spot where he expects Y to pass, expecting Y to pick up the apple and eat it. However, Z, and not Y, passes the spot, picks up the apple, eats it and dies.

What all these examples have in common is that the blow aimed at Y went awry and struck somebody else, namely Z. The question that arises is whether in the eyes of the law X had the intention also in respect of Z's death.

[There are] two opposite approaches. . . . According to [the first] approach, X wished to kill a person. Murder consists in the unlawful, intentional causing of the death of a person. Through his conduct X in fact caused the death of a person. The fact that the actual victim of X's conduct proved to be somebody different to the particular person that X wished to kill (Y), ought not to afford X any defence. In the eyes of the law X intended to kill Z, because X's intention to kill Y is transferred to his killing of Z, even though X might perhaps not even have foreseen that Z might be struck by the blow. The Anglo-American legal systems, which for the most part follow this approach, refer to this approach as '*the doctrine of transferred intent'* (or *the doctrine of transferred malice*), because X's intent in respect of Y's killing is transferred to his killing of Z. . . .

There is, however, another alternative approach to the matter. [According to *the concrete intent approach*], one can only accept that X intended to kill Z if it can be proved that X knew that his blow could strike Z, or if he had foreseen that his blow might strike Z and had reconciled himself to this possibility. In other words one merely applies the ordinary principles relating to intention, and more particularly *dolus eventualis*. . . . [T]he question is not simply whether he had the intention to kill a person, but whether he had the intention to kill *that particular figure which was actually stuck by the blow. . . .*

If one adopts the concrete intent approach, it follows that in *aberratio ictus* situation one merely applies the ordinary principles relating to culpability (intention or negligence) in order to determine whether X had intention in respect of Z's death. . . . X will normally always be guilty of attempted murder in respect of Y,—that is, the person he wished to, but did not, kill. . . .

As far as X's liability in respect of the person actually struck by his blow (Z) is concerned, there are three possibilities:

a) If he had foreseen that Z would be struck by the blow, and had reconciled himself to this possibility, he had *dolus eventualis* in respect of Z's death and is guilty of murder in respect of Z.
b) If X had not foreseen the possibility that his blow might strike Z, or if he had foreseen such a possibility but had not reconciled himself to this possibility, he lacked *dolus eventualis* and therefore cannot be guilty of murder. However, this does not necessarily mean that, as far as Z's death is concerned, X has not committed any crime. If the evidence reveals that he had caused Y's death negligently, he is guilty of culpable homicide. This will be the case if the reasonable person in X's position would have foreseen that the blow might strike Z.
c) Only if it is established that there was neither intention (in these instances, mostly in the form of *dolus eventualis*) nor negligence in respect of Z's death on X's part, does it mean that X is not guilty of any crime in respect of Y's death.

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Endnotes, Chapter 3

[1] Crim. Code, Art. 57(2).

[2] Michael Bohlander (2009), *Principles of German Criminal Law* (Hart Pub), p. 59.

[3] *Ibid.*

[4] *Ibid.*, p. 60.

[5] The *Avant-projet* and the French version of Article 58(1), paragraph 1 of the 1957 Penal Code reads: "Commet intentionellement une infraction celui qui agit avec la *conscience* et la *volonté* d'accomplir un act illicite et punissable et d'en obtenir le résultat."

[6] Crim. Code, Art. 80.

[7] Crim. Code, Art. 81.

[8] Philippe Graven (1965), An Introduction to Ethiopian Penal Law: Arts. 1–84 Penal Code (Addis Ababa: HSIU and Oxford University Press), p. 156.

[9] Ronald Sklar (1972), "'Desire', 'Knowledge of Certainty' and Dolus Eventualis", *Journal of Ethiopian Law*, Vol. VIII, No. 2 (December 1972), p. 379.

[10] See Sklar, *ibid.*, pp. 373–416.

[11] Graven, *supra* note 8, pp. 158–159.

[12] *Ibid.*, p. 159.

[13] Federal Supreme Court Cassation Decisions, File No. 164030 (Hedar 30, 2012 EC/ December 10, 2019), Vol. 24, pp. 332-340)

[14] Graven, *supra* note 8, p. 158.

[15] The issue of degree of guilt in concurrent offences will be discussed in other chapters that deal with moral guilt in multiple offences and sentencing.

[16] Callow v. Tillstone (1900) 64 JP 823 322.

[17] Cundy v. Le Cocq (1884) 13 QBD 207.

[18] Paul H. Robinson (1997), *Structure and Function in Criminal Law* (Oxford: Clarendon Press), pp. 44, 45.

[19] It is to be noted that various authors refer the three forms of intention as *Dolus Absicht*, *Dolus indirectus* and *Dolus Eventualis*. See for example Dubber, *American Criminal Law*, p. 286, footnote.

[20] Hermann Mannheim (1936), "Mens Rea in German and English Criminal Law", *Journal of Comparative Legislation and International Law*, Third Series, Vol. 18, No. 1, pp. 78–93; see also Bohlander (2009), *supra* note 10. He uses the same pattern of classification.

[21] *Ibid.*, pp. 63–67.

[22] *See* for example Heribert Schumann, "Criminal Law", in *Introduction to German Law* (2005), Mathias Reimann and Joachim Zekoll, editors, 2nd edn. (The Hague: Kluwer Law International), p. 392.

[23] *Ibid.*

[24] Catherine Elliott (2001), *French Criminal Law* (Devon, UK and Oregon, USA: William Publishing), pp. 64–66.

[25] Emile Garçon, quoted in Elliott, *ibid.*

[26] Elliott, *ibid.*
[27] I*bid.*
[28] *Ibid.*, p. 67.
[29] *Ibid.*, p. 69.
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid*, p. 71.
[33] *Ibid.*, pp. 71, 72.
[34] *Ibid.*, p. 72.
[35] *Ibid.*, p. 72.
[36] See Readings 4 and 5 on the concept of *transferred malice* (*abberatio ictus*).
[37] (1865) 4 F&F; in Smith, *infra* note 44, p. 43.
[38] Michael's case (1840) 9 C&P, 356, in *ibid*. p.55.
[39] Steven Lowenstein (1965), *Materials for the Study of the Penal Law of Ethiopia* (Addis Ababa: Haile Selassie I University and Oxford University Press), p. 157.
[40] (Thornton v. Mitchell, 1940) in Smith, *infra* note 44, p. 175.
[41] R v. Adams [1957] Crim. LR 365.
[42] Fernandez, 1966 2SA 259 (A), South Africa.
[43] Classen, 1979 SA (460) 2S, South Africa.
[44] John Smith (2002), *Smith and Hogan Criminal Law*, 10th ed. (Butterworths: LexisNexis), p. 93.
[45] Jonathan Herring (2008), *Criminal Law: Text, Cases and Materials*, 3rd ed. (Oxford and New York: Oxford University Press), p. 146.
[46] *Ibid.*, p. 147.
[47] People v. Strong, 37 N.Y.2d 568, 338 N.E.2d 602, 376 N.Y.S.2d 87 (1975).
[48] R. v. Creighton, File No.: 22593. 1993.
[49] Dee Wampler (1998), *Journal of the Missouri Bar*, Volume 54, No. 1, January–February 1998 (internal citations omitted).
[50] Research conducted by: Global Network of People Living with HIV/AIDS Europe(GNP+ Europe) and Terrence Higgins Trust (THT). <http://www.cphiv.dk/portals/0/files/rapidscan.pdf> Last accessed: 12 December 2010.
[51] The issue of whether Article 63(1)(b) of the 1957 Penal Code or 66(1)(b) of the 2004 Criminal Code) is applicable to such cases is briefly revisited in Chapter 4 (Moral guilt in multiple offences).
[52] Hermann Mannheim (1936), "Mens Rea in German and English Criminal Law", *Journal of Comparative Legislation and International Law*, Third Series, Vol. 18, No. 1, pp. 79–80, 88–89 (footnotes omitted).
[53] Elliott, *supra* note 24, pp. 73, 74.
[54] Herring, *supra* note 45, pp. 138–159, with omissions (footnotes omitted).
[55] Smith, *supra* note 44, pp. 90–96 (footnotes omitted).
[56] CR Snyman (1995), *Criminal Law*, 3rd ed. (Durban Butterworths), pp. 181–185.

Chapter 4

Criminal Guilt in Multiple Offences

The degree of criminal liability depends, *inter alia*, upon the feature of criminal guilt and the degree of the defendant's participation in an offence. As discussed in the preceding chapter, the mental state of the individual offender is taken into account to determine the existence of criminal liability. If one of the modes of moral guilt specified in a given offence (i.e. direct intention, ancillary direct intention, *dolus eventualis*, advertent negligence, or inadvertent negligence) exists, there is criminal liability. However, criminal guilt may not be single, but concurrent. There is also the case of recidivism, i.e. relapse into the commission of an offence (offences) after conviction and punishment. These factors create variation in the degree and gravity of moral guilt.

Most offences may involve "a single act (or omission) whereas others might be more accurately described as a venture in which the defendant commits several acts."[1] If two or more acts (omissions) flow from the same criminal guilt, they can be referred to as *transactions* or *ventures*. Burglary, for example, requires two wrongful acts: trespass "and some sort of 'further offence' (the infliction or attempted infliction of grievous bodily harm or theft or attempted theft)."[2] As another example, robbery involves "either two completed harms –the theft and the use of force against the person– or one complete harm and one threat of harm."[3] It is to be noted that "[t]he victim of the theft need not also be the victim of the (actual or threatened) violence."[4]

Such ventures or transactions that involve two or more acts are referred to as *combination of acts* under the Ethiopian Criminal Code.[5] As Graven notes, such combination of acts "may seem to fall under several provisions of the law; yet this concurrence is only imperfect" where the combination of acts violates "only one legal provision that applies to this behaviour or combination."[6]

On the other hand, there may be a single act (omission) or a combination of acts (venture or transaction) which entail the violation of more than one penal provision. Where such violation of two or more Criminal Code provisions occurs from a single incident (which may be a single act or omission or a combination of acts), the offences are said to have occurred *concurrently*. Ashworth states that a distinction ought to be made between concurrent offences (that occur concurrently) as a result of a single act/omission or a combination of acts during a single incident vis-à-vis consecutive offences which are committed in two or more incidents.

> Its most obvious reference is temporal: offences committed concurrently ought to receive concurrent sentences. Of course, concurrence in time is not a precise concept: if one offence follows immediately upon another, or even rapidly upon another, one might be tempted to refer to them as occurring at the same time and to treat them as parts of the same incident. On the other hand, the longer an incident continues, the more serious it usually is; therefore, irrespective of the procedural issue …, it is surely right that such a series of offences should be regarded *ceteris paribus* as a more serious manifestation of criminality … and as justifying a greater total sentence.[7]

Ashworth notes the difficulty in defining 'a single transaction' and uses *King's case* (2000)[8] to illustrate his point.

> The offender pleaded guilty to dangerous driving and to driving while unfit through drugs, having crashed his lorry into a parked car when under the influence of diazepam.
>
> … The Court of Appeal held that, as the dangerous driving arose out of the taking of drugs, 'it was not correct to impose consecutive sentences'. The sentences were made concurrent. On the other hand, the court has recognized that concurrence in time is insufficient to justify concurrent sentences where the offences are of different types, upholding consecutive sentences where (for example) a person who has driven with an excess alcohol level then attempts to bribe a police officer to refrain from administering the breath test.[9]

The *single transaction approach* is thus taken as a general principle with exceptions that are analyzed by Ashworth. However, the Ethiopian Code uses the term 'concurrence' for both *concurrent* and *consecutive* offences as long as the offences are *concurrently* charged. The term thus denotes the temporal concurrence in prosecution and not concurrence in its strict literal interpretation of a single transaction that gives rise to the concurrence of offences.

1. Definition of Concurrence

Various factors determine the degree of moral guilt in offences. Two offenders who have committed similar acts (material element) and who have violated the same provision (legal element) may have varying degrees of *guilt* even where both offences were committed under the same category of criminal guilt (e.g. direct intention). This can occur even in single criminal guilt. For example, homicide committed with direct intention does not

invariably fall under the same degree of guilt, and in effect, intentional homicide with premeditation (Article 539) is graver in terms of moral guilt than intentional homicide under intense emotion (Article 541).

Even if there is such variation in the gravity of moral guilt in single offences, the major factors that usually cause considerable variation in degrees of guilt are *concurrence* (commission of two or more offences that are concurrently chargeable) and *recidivism* (relapse into the commission of offences after conviction). An offence that arises from a single criminal guilt, i.e. a single criminal intention or a single criminal negligence, can be considered *single offence* (subject to the issue of notional concurrence to be discussed below). Obviously, two or more offences that arise from separate (distinct) guilt of criminal intention or criminal negligence duly justify aggravation of penalty as a result of concurrently charged offences.

A person who is charged with two or more counts in the same charge is said to have been tried with *concurrent offences*,[10] i.e. offences charged and tried together against the same defendant. The offences embodied in the charge are said to be concurrent because they are concurrently incorporated in a charge (**የክስ ማመልከቻ**) as counts (**ክሶች**). The counts are tried under the same file, after which the court gives its verdict and passes a sentence that takes all the counts into consideration.

1.1 Concurrence versus Recidivism

A recidivist[11] is an offender who commits an offence punishable with at least simple imprisonment of six months within five years after having served a sentence (in full or in part) or after having been released on pardon. For example, D was convicted of theft and was sentenced to three years of rigorous imprisonment. If he is released on parole after two years of imprisonment, and then commits another offence (of any kind) within five years from his date of release, he is said to be a *recidivist*. If, however, a defendant commits two or more offences that are tried together under the same charge, the two offences are said to be *concurrent*.

1.2 Retrospective Discovery of Concurrence

Retroactive or retrospective concurrence[12] exists where an offence which was committed concurrently with a previously tried offence is discovered after the former conviction and sentence. The newly discovered offence would have been tried and charged concurrently with the previous offence had it been discovered earlier. Thus, the offender shall not be "punished more severely than if all the offences had been tried together"[13]

Let us assume that D has committed four offences, and three of the offences were discovered and charged at the end of the same year. If the

fourth offence is discovered and charged while D was serving his sentence (or after his release), the fourth offence is retrospectively (retroactively) concurrent. In other words, the latter sentence shall take the previous sentence into account so that D shall not be punished more severely than the sentence that would have been imposed had all four offences been tried together.

2. Types of Concurrence

Articles 60 to 66 of the 2004 Criminal Code deal with moral guilt under concurrence. The content of Article 82(1)(a) of the 1957 Penal Code that states types of concurrence has duly been clarified in Sub-Articles (a) and (b) of Article 60 of the 2004 Criminal Code. Article 60(c) of the new Criminal Code embodies a new stipulation that did not exist in the former Penal Code.

According to Article 60, *concurrent offences* are committed when:

- two or more successive acts violate the same or different criminal provisions (Article 60(a))
- the same act causes a single material result, but violates two or more criminal provisions (Article 60(b), first phrase)
- the same act causes two or more material results punishable under criminal law (Article 60(b), second phrase)
- when a criminal act flowing from the same criminal guilt (i.e. same intention or negligence), violates the same criminal provision, but causes harm against the protected rights or interests of two or more persons (Article 60(c))

Article 60(a) deals with *material concurrence,* and the two alternative phrases under Article 60(b) are cases of *notional (ideal) concurrence*. Article 60(c) may be assimilated to notional concurrence, possibly subject to some problems of interpretation. For instance, if an offender intentionally kills three persons with a machine gun (or if a truck driver negligently causes the death of two pedestrians), the offence committed was regarded as a single offence under the 1957 Penal Code, subject to the determination of punishment according to degree of individual guilt, the dangerous disposition of the offender, gravity of the offence and other factors.

If D_1 intentionally shoots a machine gun and causes the death of three victims, and another offender (D_2) with a similar machine gun intentionally causes the death of one victim and the bodily injury of two victims, the act of D_1 did not involve concurrent offences under the former Code (because it violated the same provision) while the act of D_2 involved concurrent offences owing to the resultant offences of homicide and bodily injury. Nevertheless, the punishment against D_1 would not have been lesser than

that of D_2 merely because the former was considered a single offence. As indicated in the Hateta Zemikniyat (*Exposé de Motifs*) of the 2004 Criminal Code[14], Article 60(c) is meant to solve such problems of application.

According to Article 60(c), a person commits concurrent crimes "in the case of a criminal act which, though flowing from the same criminal intention or negligence and violating the same criminal provision, causes the same harm against the rights or interests of more than one person." The interpretation of this provision needs caution and the determination of sentences in cases that fall under Article 60(c) requires utmost attention.

In FSC Cassation File No. 96078[15] it was held that a defendant who has, under the same criminal intention or negligence, violated a single criminal provision shall be considered to have committed concurrent offences if it has caused harm against the rights or interests of more than one persons. The defendant was arrested while he was processing smuggling of persons that involved five different individuals on different dates. The promises of overseas employment involved different destinations and transactions.

Even though the Cassation Division cited both Articles 60(a) and 6(c) along with the provisions that were relevant to attempted smuggling of persons in the guise of overseas employment (Arts. 27(1) and 598(1)), this case clearly falls under material concurrence because the acts were successively performed even if they failed to materialize at the same time upon the defendant's arrest. The acts are thus said to have begun successively at different times with different dates of forecasted completion. Thus the acts of the defendant cannot be considered as a single criminal act that is envisaged under Article 60(c) of the Criminal Code. Nor is this a case of imperfect concurrence (that represents unity of guilt and penalty) that falls under Article 61(2) as in the case of a store clerk who steals 50 wrist watches at different times (until he was caught) from the same owner as discussed in Section 3. In this example the successive acts were committed against the same person.

2.1 Material Concurrence

Two or more (similar or different) criminal acts committed successively constitute concurrent offences. This type of concurrence is referred to as *material concurrence* under Article 60(a). If an offender robs B's shop and C's residence, there is material concurrence due to the offender's successive acts. If the offender in addition rapes a woman in the house while he was robbing, there is material concurrence of three offences, i.e. two offences of robbery and an offence of rape.

Materially concurrent offences may be *independent* (as in the offender's acts of robbery and rape) or *related*. In related concurrent offences, "an

offender commits a crime with the intention of causing or facilitating the commission of another punishable crime."[16]

In some cases, related offences whose constitutive elements fall under different provisions are (in combination) embodied in a special aggravated offence.[17] For instance, coercion (Article 582) and theft (Article 665) are embodied in robbery (Article 670). Raping a girl between 13 and 18 years of age (Article 620(2)(a)) combines related offences of coercion (Article 582) and sexual outrages on young persons (Article 626(1)). Such provisions bear an aggravated penalty because they incorporate acts that could have independently constituted an offence had they not been incorporated as ingredients of an aggravated offence. Under such circumstances, secondary aggravation on the ground of concurrence would violate Article 185(2).

However, where related offences are not embodied in an aggravated special offence, the Criminal Code resorts to aggravation of penalty by concurrence[18] provided that the offence under consideration is at least attempted. To illustrate, infringement of literary or artistic copyright (Article 721) to "further the commission of fraudulent misrepresentation" (Articles 723, 692) is subject to an aggravation of penalty on the basis of material concurrence of related offences. Yet such related offences are not invariably concurrent because they may be considered as *ancillary* (or subordinate)[19] as briefly defined in Section 3.3, thereby constituting an exception to concurrence.

2.2 Notional Concurrence

A single criminal act or omission may give rise to simultaneous concurrent offences by violating two or more provisions. Such events are referred to as 'notional concurrence' under Article 60(b) of the Criminal Code. To use Graven's example, if "a married man rapes his [relative] . . . he is punishable for [three] offences."[20] The offences of rape (Article 620), incest (Article 655) [and] adultery (Article 652) . . . arise from the offender's single act. Under such *simultaneous* notional concurrence,[21] the accused is guilty of the concurrent offences if he is proved to have caused one of them with criminal intention or negligence, because *they invariably occur at the same time from the same causal relation*. In the example above, the accused has simultaneously committed three concurrent offences by the *same act* and *causal relation*.

Moreover, two or more material harms[22] may result from the same act or combination of acts. In such cases of combined notional concurrence, there is a single act (or a combination of acts), but causation and the particular state of criminal guilt must be independently proved for each offence. There are three possibilities of *combined notional concurrence*, namely: the

concurrence of intentional offences (Article 66(1)(a)), the concurrence of intentional and negligent offences (Article 66(1)(b)), and the concurrence of negligent offences (Article 66(1)(c)).

For example, an act of setting fire to intentionally destroy a hut is an intentional offence of arson (Article 494). If the dweller of the house dies, and if the offender had foreseen and accepted the possible harm, the offender is concurrently (Article 66(1)(a)) punishable for both intentional homicide (*dolus eventualis*) and the intentional offence of arson (direct intention). If the offender, having foreseen the possibility of the harm to the residents, had believed they could save their lives, there is concurrence between the intentional arson (Article 494) and the resultant negligent homicide (Article 543), and in effect the case falls under Article 66(1)(b). If, however, arson has been negligently caused at a fuel (gas) station causing bodily injury to a person and damage to property, the two notionally concurrent offences arise from the same act and the same guilt of criminal negligence. The offender's negligent damage to property (Article 498) has caused another offence of negligent bodily injury (Article 559), thereby constituting *combined* notional concurrence of negligent offences (Article 66(1)(c)).

The concurrence of offences between the harm intended and the one that actually occurred can be susceptible to different interpretations if the harm intended is entirely substituted by the harm that is negligently caused. If a person hits the victim on his head with a stick to intentionally injure him and the victim dies as a result, it will be arguable whether intentional bodily injury and negligent homicide can be concurrently invoked because the harm that ensued is death and not bodily injury. It is also difficult to invoke the concurrence of attempt for bodily injury and negligent homicide because physical injury is an element in homicide. The dilemma lies in the fact that Defendant A will receive a lesser punishment (a maximum of three years for negligent homicide under Article 543) than Defendant B who does the same act but without causing the death of the victim, in which case he can be charged with grave wilful injury (Article 555) that may be punishable up to 15 years.

In order to resolve such inconsistencies and absurdities, we can envisage two scenarios in which different lines of interpretation can be pursued. If D, with the intention to kill V, shoots at or stabs the victim with a knife, causing physical injury but not death, D can only be charged with attempted homicide because the moral guilt of criminal intention is covered under attempted homicide, and the harm of physical injury flows from the same criminal intention. If on the other hand, D had only intended to inflict bodily injury to V, but in fact causes V's death (by having foreseen the probable harm but disregarding it), the death does not flow from the criminal intention

to inflict injury, thereby making it possible to charge D with a combined notional concurrence (Article 66(1)(b)) of physical bodily injury that had occurred before the victim's death, and negligent homicide. By the time the injury is inflicted, the intended offence is said to have been committed, and the subsequent death which goes beyond the intention of the defendant (Article 58(3)) is concurrently liable to criminal liability under negligence. Owing to the death of the victim, such concurrence can thus lead to the aggravation of punishment (Article 187(2)(a) *cum* 184) that is severe than mere bodily injury.

Concurrence is one of the grounds for special aggravation of penalties.[23] Recidivism (Articles 67, 188), material concurrence (Articles 60(a), 64, 184) and notional concurrence (Articles 60(b), 65, 66, 184,187) are grounds of special aggravation of punishment with varying degrees of severity. The determination of punishment on the basis of these grounds of concurrence and recidivism and other factors that ought to be considered upon determination of punishment are discussed in Chapter 8.

3. Unity of Guilt and Penalty

Certain acts constitute a single offence although they may seem concurrent at first glance. A store clerk who steals 50 wristwatches from the store over a period of six months commits the offence of aggravated theft (Article 669(2)(d)) from the day he takes the first wristwatch. The issue that can arise is whether he will be considered to have committed 50 concurrent offences of aggravated theft if he has stolen the items on 50 different occasions. In this regard, Article 61 states the instances of 'imperfect concurrence' whereby the seemingly 'concurrent' offences are merged (united) by the same criminal guilt and purpose, as discussed in the following sections.

3.1 Single Act or Combination of Criminal Acts

By virtue of Article 61(1), an offender cannot be punished under two or more concurrent provisions of the same nature for "the same criminal act or a combination of criminal acts against the same legally protected right flowing from a single criminal intention or act of negligence." Article 61(1) embodies three cumulative elements:

1. A single act or combination of acts
2. against the same legally protected right, and
3. a single criminal guilt.

a) *Single act or combination of acts*

In FSC Cassation File No. 134549, the defendant was convicted of two offences because he committed infibulation surgery in violation of Article 566(1) of the Criminal Code at his residence during which the victim died due to the injection of diazepam and tramadol that were used for anesthesia. The suffocation caused by the injection resulted in the victim's death. The Cassation Division invoked Article 61(1)[24] and decided that the act of the defendant falls under negligent homicide (Article 543/3) and both acts (i.e the injection of anesthesia and the illegal infibulation were committed under the same intention that ultimately caused the victim's death.

According to the FSC Cassation Division's decision, the defendant would have been convicted under Article 566(1) if his acts had not caused the death of the victim. However the death of the victim (negligent homicide, Article 543/3) is the graver offence punishable with rigorous imprisonment from five to 15 years and it covers all acts of the defendant and the harm caused to the deceased. It thus reversed the decisions of the Federal High Court and the Federal Supreme Court that had convicted the defendant under two concurrent offences; and it found the defendant guilty only under Article 543(3). It also reduced the sentence from 10 years of rigorous imprisonment to three and a half years of rigorous imprisonment.

In this case the FSC Cassation division could have been cautious in invoking Article 61(1) because the injection for the purpose of anesthesia and the act of infibulation surgery are not elements of the same offence. Such analysis would be appropriate if, for example, an accused person intentionally causes physical injury to a victim who ultimately dies due to the injury under material circumstances that prove negligent homicide.

In certain offences the combination of acts that constitute the offence (e.g. coercion and theft in robbery) *must be committed only once*. Repeated or successive acts are materially concurrent (Articles 60(a), 63) unless habitual commission is the constitutive element of an offence or unless successive acts fall under Article 61(2) (unity of guilt and penalty) or Article 61(3) (ancillary or subordinate offences). In certain provisions, repetition is an ingredient of the offence (e.g. habitual exploitation of the immorality of others –Articles 634 *et seq.*). The 2004 Criminal Code has minimized the number of provisions that embody habitual acts as constitutive elements of an offence. For instance, Articles 696 and 715(a) have omitted the element of habitual commission that was respectively embodied in Articles 658(a) and 670(a) of the 1957 Penal Code.

b) *Against the same protected right*

According to the second element of Article 61(1), the act or combination of acts must be *against the same protected right.* If two provisions safeguard the same right they cannot be invoked concurrently (subject to other factors as well). Articles 670 (robbery) and 665 (theft) protect the same right to property although the former in addition safeguards liberty against coercion and violence. Article 670 cannot thus be concurrently invoked with Article 665 because the former fully covers the right protected by the latter provision. On the contrary, the married man who rapes his relative violates more than one protected interest, and the concurrent offences are not embraced by a single provision.

Violation of the same provision cannot be regarded as violation of the *same* protected right if an offender, through successive acts, commits the same offence against two or more victims. For example, if a guard on different occasions steals various items from his employer, he is charged with a single offence (Article 61(2)). However, if the guard leaves his former job and is employed by another person from whom he also steals, the offender's successive acts are two materially concurrent offences (Article 60(a)). The successive acts violate legally protected rights of two different persons and cannot fall under the exception stipulated under Article 61(2).

c) *Flow from a single criminal intention or act of negligence*

The third element in Article 61(1) requires that the offence under 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 sued for the concurrent offences of bodily injury and attempted homicide, but only for the latter, because bodily injury (in the case at hand) is an inevitable ingredient of attempted homicide and the injury flows from the single criminal intention to kill. By contrast, where an offender "aborts Miss B in such an unskillful manner that she is permanently disabled from bearing children,"[25] there is combined notional concurrence (Article 65) of abortion (Article 547 or 548) and injury which may fall under common wilful injury (Article 555) or injury caused by negligence (Article 559).

3.2 Successive Acts under Unitary Guilt

Unity of guilt and penalty also occurs due to successive or repeated acts against the same protected right flowing from the same criminal intention or act of negligence and aiming at achieving the same purpose (Art. 61(2)). In the store clerk's repeated acts (stated above), the successive acts are against the same protected right of property. Moreover, the acts flow from the same criminal intention of obtaining unlawful enrichment, and aim at achieving

the same purpose of abstracting and appropriating another person's property.

Provided that the elements of Article 61(2) are met, successive acts performed over a given period of time are considered as part of the same offence. The concept of the *continuing offence* (embodied in Article 61(2)) is relatively clear in Article 219(2) whereby acts "exercised on several separate occasions . . . (and) pursued over a period of time" are considered in 'continuum' for the purpose of calculating limitation periods.

3.3 Ancillary (Subordinate) Acts

Under three instances, 'the subsequent acts performed' to carry out the 'initial criminal scheme . . . are merged by unity of intention and purpose' with the main offence.[26] These instances are injury to property, utterance (circulation) of counterfeit money and use of forged documents. This stipulation is an exception to material concurrence. If a person forges a document[27] he is not concurrently punished for the subsequent act of using the forged instrument.[28] Similarly a person who utters the false money[29] which he has forged is punishable for the main offence of counterfeit currency[30] and not for the ancillary offence of uttering.[31]

These three instances seem to be illustrative and not exhaustive owing to the term '*in particular*' (in Article 61(3) of the 2004 Criminal Code) which precedes them. Difficulties of interpretation are thus likely to arise in determining comparable instances that warrant classification as ancillary offences. It is to be noted that the English version of Article 60(3) of the 1957 Penal Code had rendered the three ancillary circumstances exhaustive, rather than merely illustrative.

In File No. 104637[32] the Federal Supreme Court Cassation Division decided that in accordance with Article 61(3) of the 2004 Criminal Code, the subsequent acts of a defendant that are conducted after the commission of the main offence and that are related with the initial intention and objective, shall be considered as part of the initial offence and not a fresh offence. In this case, the defendant committed series of fraudulent acts and obtained various false documents including marriage certificates and birth certificates that carried a fake mother's name who is deceased in order to benefit from inheritance. The fraudulent acts showed that the late defendant's mother was the sister of the deceased whom the defendant had intended to inherit.

The charges against the defendant involved aggravated fraudulent misrepresentation (Article 696(c)) and use of forged documents (Article 378). The FSC Cassation Division convicted the defendant only under aggravated fraudulent representation (Art 61(3)) stating that using the forged document in violation of Article 378 of the Criminal Code was meant to

carry out the initial criminal scheme of fraudulent representation (Article 696(c)) to which the defendant has been found criminally liable.

3.4 Renewal of Guilt and Penalty

Article 61 imposes a *single penalty on single guilt and purpose*. But if there is *renewal* of guilt, the case becomes concurrently punishable. Philippe Graven's illustration clarifies this point.

> For example, if a truck driver who did not fasten his load of bricks is aware of the 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 . . . because the death of the victim is attributable to the new failure to ensure that bricks would not fall off the truck.[33]

If an offender's five shots miss his target it is a single (nonconcurrent) attempt (Article 61(2)). But if the offender fires at the victim again a week later, the prosecution may invoke renewal of criminal intention (Article 62) and sue the offender for concurrent offences.

4. Problems in the Literal Reading of Articles 63 and 60(c)

4.1 Aggravation in Case of Related Offences: Article 184 or 185?

Article 63 makes a cross-reference to Article 184 for the purpose of aggravation on the ground of material concurrence of related offences. This is inconsistent with the stipulations under Articles 64 and 185(1), thereby necessitating careful interpretation. Article 63 erroneously refers to Article 184 for aggravation while Article 185 expressly provides that the preceding provisions (i.e. Article 183 or 184) shall be applicable with regard to *related* offences. Moreover, Article 64 clearly states that Article 184 shall be applicable only where an offender "successively commits different crimes other than those specified in Articles 62 and 63."

Two issues arise with regard to interpretation. First, the cross-reference made to Article 184 conflicts with Articles 185 and 64. Second, even if the provision (i.e. Article 184) can, through *corrigenda*, be changed to 185 (for the purpose of consistency), Article 185 would still remain ambiguous on whether Article 183 or 184 shall apply for aggravation in cases of *related* material concurrence.

It is thus necessary to refer to the *exposé des motifs (Hateta Zemiknyat)* of Article 63. It explains the change made on the title of the Amharic version

so that it can clearly refer to *related* offences. The only change made to Article 62 of the 1957 Penal Code relates to the editing made to the Amharic words so that the words "የተቀራረቡ ወንጀሎች"[34] can read "የተዛመዱ ወንጀሎች". Comparison of the two English versions shows that the wording is identical except for the change in the number designation of the provisions and the alteration of "offender" and "offence" to "criminal" and "crime." No other substantial change has been stated. The *exposé de motifs* of Article 63 does not mention the change made with regard to the pattern of aggravation in the case of related offences. Had there been conscious alteration in this regard it would have been stated in the *exposé des motifs.*

Article 63 of the 2004 Criminal Code has replaced Article 62 of the 1957 Penal Code. Article 62 of the Penal Code reads:

> When an offender commits an offence with the intention of causing or facilitating the commission of another punishable offence, the provisions regarding aggravation of penalty in case of concurrence shall apply (Art. 190) when this has been attempted unless such offence is declared by law to be an aggravated offence.

And Article 190(1) of the Penal Code provides:

> In case of concurrent offences, when one of them was committed with the intent of making possible, facilitating or cloaking another offence, the Court shall aggravate to the maximum permitted by law the penalty determined under the preceding Articles.

This provision is nearly identical with Article 185(1) of the 2004 Criminal Code, and in fact the latter expressly refers to related offences. Moreover, Article 64 of the 2004 Criminal Code, as stated earlier, implies the nonapplicability of Article 184 to cases that fall under Articles 62 and 63. Contextual interpretation thus suggests that the stipulations under Articles 185(1) and 64 should prevail in resolving their inconsistency with Article 63, thereby enabling Article 185 to be used for the purpose of aggravation on the ground of material concurrence of related offences. Of course, Article 185 bears another ambiguity due to its lack of clarity as to whether the term "preceding articles" refers only to Article 184 or both Articles 183 and 184.

According to Article 85, the provisions that are applicable in cases of concurrence are Articles 184 to 188, thereby rendering the applicability of Article 183 problematic. In effect, courts are expected to address the issue with optimum precaution so that the inconsistencies in this regard can be resolved though judicial interpretation until the appropriate amendment is in place.

4.2 Ten Owners, One Robber: How Many Robberies?

According to the literal reading of Article 60(c) of the 2004 Criminal Code, an act (or omission) is subject to indictment under a charge of concurrent offences if it violates the rights or interests of two or more persons even if the act is committed under the same criminal guilt (intention or negligence) and violates a single criminal law provision. The problem that arises is whether an accused who is convicted of having robbed money that jointly belongs to several persons should be punished more severely than if the money stolen had belonged to just one person.

Article 184(2) stipulates that Article 184(1) shall (unless otherwise provided) be applicable where there exists concurrence of crimes as defined in Article 60(c). In effect, the punishment shall be aggravated. But to what extent? Article 184(1)(b) provides for the determination for each offence and aggregation without exceeding the general maximum fixed for the kind of penalty applied (i.e. 25 years, as per Article 108, for offences punishable with rigorous imprisonment). Assuming that the appropriate punishment for the robbery would have been four years (had the money belonged to one person), should the punishment be 25 years of rigorous imprisonment merely because it belongs to six or more persons?

Article 60(c) applies to cases where a person commits concurrent crimes "flowing from the same criminal intention or negligence and violating the same criminal provision" but the act "causes the same harm against the rights or interests of more than one person." For example, if a negligent bus driver causes bodily injury to 50 passengers, a literal reading of Article 60(c) would have him charged with 50 concurrent offences of negligent physical injury (Article 559).

The legislative intent regarding Article 60(c) can be clearly understood from the *exposé des motifs* (*Hateta Zemiknyat*)[35] of the 2004 Criminal Code:

> . . . እንደተደራራቢ ወንጀሎች ሊያስቀጡ ሲገባ እንደነጠላ ወንጀል የተቆጠሩባቸውም ሁኔታዎች ያጋጥማሉ። አንድ ሰው አስቦ በአንድ ጥይት ሰዎችን ቢገድል አሁን ባለው ሕግ መሠረት የሚጠየቀው በአንድ ነጠላ ወንጀል ነው። ይህም የሆነበት ምክንያት ተደራራቢ ግዙፍ ወንጀሎችን ፈጽሟል እንዳይባል የፈፀመው አንድ ድርጊት (አንድ ጥይት መተኮሱ) ብቻ ነው። ጣምራ ወንጀሎችን (Notional Concurrence) ፈጽሟል እንዳይባል የተጣሰው አንድ የሕግ ድንጋጌ ብቻ ነው። በሌላ በኩል አንድ ሰው በአንድ ጥይት አስቦ አንድ ሰው ቢገድል፣ በዚያው ጥይት ደግሞ ሌላ ሰው በቸልተኝነት ቢገድል ተደራራቢ ወንጀሎችን ፈጽሟል ተብሎ ይጠየቃል። ይህ ግን ሊደገፍ አይገባውም።
>
> . . . [T]here were instances [in the 1957 Penal Code] whereby certain offences were considered as *single* while they should have been regarded as concurrent offences. If a person intentionally kills two victims with one bullet, the defendant is charged with a single

offence under the [1957 Penal Code]. This is because he cannot be said to have committed materially concurrent offences as his act of shooting is [single and not successive]. He cannot also be deemed to have committed notionally concurrent offences [under the 1957 Penal Code] because it is a single provision that has been violated. On the other hand, if a defendant intentionally kills a person and meanwhile negligently injures another victim by the same bullet, he is liable for [notionally] concurrent offences under [the 1957 Penal Code]. This should not be acceptable.[36]

The *Hateta Zemiknyat* further clarifies the incongruent and inequitable effect of regarding an act (that contravenes a single criminal law provision) as a single offence irrespective of multiple victims.

አንደኛውን /ወንጀል/ አስቦ፣ ሁለተኛውን ግን በቸልተኝነት መግደሉ በሁለት ተደራራቢ ወንጀሎች ሲያስጠይቀው ሁለቱን አስቦ ሲገድል ግን በአንድ ነጠላ ወንጀል ብቻ ተጠያቂ መሆኑ በሕግም ሆነ በፍትህ ረገድ ተቀባይነት ሊያገኝ አይገባም። ዶክተር ፊሊኘ ግራቨን የዚህ ዓይነቱን አስተሳሰብ ያልደገፉ መሆኑን በመጽሐፋቸው ላይ የገለፁ ሲሆን አስተያየታቸው የሚደገፍ ነው።

ስለዚህ አንድ ሰው በአንድ ዓይነት የወንጀል ማድረግ አሳብ ወይም ቸልተኝነት የፈፀመው ወንጀል አንድን የሕግ ድንጋጌ ብቻ የሚጥስ ቢሆንም አንድ ዓይነት ጉዳት ያስከተለው ቁጥራቸው ከአንድ በላይ በሆነ ሰዎች መብት ወይም ጥቅም ላይ ሲሆን እንደተደራራቢ ወንጀሎች ሊቆጠር የሚገባ መሆኑን የሚያመለክት ድንጋጌ የአንቀጽ ፷ /ሐ/ አካል ሆኖ ገብቷል።

The classification of an intentional homicide committed against a victim plus a negligent homicide against a second person, by the same bullet, as concurrent offences and (on the contrary) considering intentional homicide against two victims by the same bullet as a single offence cannot be justified by law or justice. Dr. Philippe Graven had (in his book entitled 'An Introduction to Ethiopian Penal Law', 1965) duly criticized this incongruence.

Therefore, a criminal act that causes the same harm against the rights or interests of more than one person has been incorporated under Article 60(c) although the act flows from the same criminal intention or negligence and violates the same criminal provision.[37]

The influence that Graven has in the *Hateta Zemiknyat* is apparent. Graven argues against Logoz, who stated the need to exclude notional concurrence "when a person by one and the same insulting statement offends several persons or throws a bomb which kills or injures several persons. Such an act is not contrary to several different provisions."[38] Graven argues that it would be illogical to punish a single act that harms multiple victims but violates the same provision less leniently than a similar act that causes a lesser harm but violates different legal provisions:

> [T]he rule that there is imperfect concurrence when one entails two or more results infringing upon the same legally protected interest can be criticized on the following grounds: (1) It seems obvious that one who causes the same harm to several persons should be punished more severely and justify an increase in the sentence. (2) It appears contradictory to prescribe, on the other hand that the commission of several offences is an aggravating circumstance irrespective of the number of acts done and, on the other hand, that several violations of the same legal provision are punishable more or less severely depending on whether one or several acts are done. (3) It is illogical that one who, by one intentional act, causes the same harm to several persons should be treated more leniently than if he had intended to cause this harm to one of them and lesser harm to the other. Thus it is unacceptable that *A*, if he kills *B*, the lover of his wife *C*, and merely wounds his wife, should be liable to a higher punishment than if he had killed *B* and *C* by the same act.[39]

Graven seems to have equated absence of notional concurrence with relatively lenient punishment. Unlike his assumption in the example he uses, a defendant who has killed two persons with a bomb can be punished more severely than another defendant who has killed one and injured the second victim even where the latter case is regarded as notionally concurrent while the former is considered as a single offence. And indeed, harmonization of such realities in sentencing can be addressed through sentencing guidelines and in the course of sentencing jurisprudence that develops though court decisions and doctrinal interpretation. Unfortunately, however, Article 60(c) of the 2004 Criminal Code seems to have aggravated the difficulties in interpretation which seem to be graver than the problems stated by Graven regarding Article 60(1) of the 1957 Penal Code.

Article 60(c) of the 2004 Criminal Code stipulates that a person is liable for concurrent offences if he commits "a criminal act which, though flowing from the same criminal intention or negligence and violating the same criminal provision, causes the same harm against the rights or interests of more than one person." Article 60(c) cannot be classified into material concurrence because the accused has committed a single act. And unlike Article 60(b), the term 'notional concurrence' is not used in Article 60(c). In effect, doctrinal interpretation is indispensable in light of the comparative analysis of notional concurrence in other countries that pursue the continental legal tradition.

4.3 Comparative Experience and the Impact of Article 60(c) on Sentencing

Analysis and interpretation of legal provisions necessitate not only reference to legislative intent but also to its theoretical and conceptual roots that might have a bearing on legislative intent. Most penal codes of modern legal systems that belong to the continental legal tradition (including ours) share some features of the French penal code and the German penal code.

Initially, *concurrent offences* were included in the French code of criminal procedure rather than the penal code, and this was among shortcomings of the French penal code.[40] The French penal code does not equate multiple victim concurrence with concurrence of offences. It reads:

> Upon conviction for several felonies or misdemeanors, only the most severe of all applicable punishment is to be imposed.
>
> . . .
>
> In arriving at such a punishment whenever the principal punishment has been commuted by clemency, only the punishment remaining after the commutation, and not the original punishment, shall be considered for the purpose of concurrence.[41]

Articles 73 and 74 of the German penal code deal with concurrence. Article 73 deals with notional concurrence and it reads:

> If one and the same conduct violates several penal laws, only that law which provides for the most severe punishment, and in case of differing forms of punishment, that which threatens the most severe form of punishment, shall be applied.[42]

Article 74 of the German penal code[43] deals with the determination of punishment in case of material concurrence. In German criminal law, a series of similar acts that result from the same criminal intention such as a series of thefts by a store clerk from the same store over a certain period of time is considered as a single offence owing to the principle of unity of guilt. Such offence is regarded as an offence that results from a single course of action (*fortgesetzte handlung*),[44] and the unity of guilt envisages similarity and continuity of the acts.

> There can however be no continuity of offence in the case of violations of highly personal rights such as life, liberty, honour and decency. Thus there is no continuity in the technical sense where a series of indecent assault is perpetrated on several children or burtons are procured in the case of several women or where bribes are offered to several civil servants.[45]

German criminal law considers offences as perpetual *(Dauerverbrechen)* if the criminal state caused by the act of the accused endures over a period of time. For example, offences such as abduction, possession of illicit drugs and desertion from the army are regarded as perpetual offences. Concurrent offences in German criminal law are either 'real' (Article 74) or 'ideal' (Article 73). Ethiopian criminal law designates 'real' and 'ideal' concurrence respectively as *material* and *notional* concurrence under Articles 60(a) and 60(b) of the 2004 Criminal Code.

The Swiss penal code of 1937, which had a significant influence on Ethiopia's 1957 Penal Code (and by extension on the 2004 Criminal Code), was highly influenced by both the French and German penal codes. In the French, German and Swiss penal codes, ideal (notional) concurrence refers to the violation of more than one criminal law provision by the same act, while real (material) concurrence is said to exist "where the offender commits several independent punishable acts, in which case he is liable to a cumulation of the separate punishments imposed for each offence" provided that the legal maximum is not exceeded.

The issue that is most relevant for our purpose is whether Article 60(c) of the Ethiopian Criminal Code (2004) has a counterpart provision in the codes of continental Europe. As indicated above, the French penal code and the German penal code do not include stipulations that are similar to Article 60(c) of the 2004 Criminal Code. Nevertheless, an offence that violates the rights and interests of two or more persons is subject to aggravation of penalty in both Codes not on the basis of concurrence of offences, but in case such factors enhance the gravity of the offence.

One of the solutions to the problem raised by Philippe Graven could thus have been addressed by aggravating the penalty commensurate with the number of victims. However the 2004 Criminal Code has resorted to the inclusion of a new provision (Article 60(c)) which has extended the concept of notional concurrence beyond what was embodied under Articles 82(1)(a) and 60–63 of the 1957 Penal Code. This seems to have caused more problems than the solution that it had intended to offer to the problem stated by Graven.

The range in the responses of 10 randomly selected judges to the following scenarios[46] clearly shows that the application of Article 60(c) (in conjunction to Article 184(2) and 184(1)(b)) is prone to have variation in the determination of punishment. The judges were asked to determine the prison term in the following three convictions assuming no aggravating or mitigating circumstances:

1. Ato X has been convicted under Article 670 for having robbed Birr 1,000 that belongs to 10 persons. Determine punishment based on Article 60(c) and other relevant provisions of the 2004 Criminal Code.

   Prison term _____
2. Does it make any difference if the money belonged to 50 *listros* who had kept their saving in a box?

   Prison term _____
3. Assume that the money belongs to *one* person and determine punishment (on the basis of Article 670).

   Prison term _____

In variation (3) the judges gave a relatively close range of verdict, between one and four years, while in variations (2) and (1), the verdict varied from one year to 15 years of rigorous imprisonment.

4.4 Homogenous versus Heterogeneous Notional Concurrence

Article 60(c) involves a single act, a single mental guilt (intention or negligence), and the violation of the same provision; but the offence violates the interests or rights of two or more persons. Article 60(c) is closer to notional concurrence than to material concurrence. And in fact, it is regarded as *homogenous notional* (ideal concurrence) in certain countries.

In Norway, for example, Sections 62 and 63 of the penal code respectively deal with notional and material concurrence. Criminal law jurisprudence in Norway makes a distinction between homogenous ideal concurrence and heterogeneous ideal concurrence. If the same act constitutes the offences of rape and incest, two criminal law provisions are violated, thereby rendering it a case of *heterogeneous* notional concurrence. "Recognition is thereby given to the act's increased culpability as compared with a breach of only one of the provisions".[47]

Where a person kills a number of people with a bomb, it is *homogenous* notional concurrence because the same provision is violated by a single act despite the plurality of victims. Similarly if a thief steals money that belongs to several persons, it is *homogenous* notional concurrence. In the criminal law of Norway, an act that violates the same provision but violates rights or interests of two or more persons is regarded as homogenous ideal (notional) concurrence for the purpose of procedural and conceptual taxonomy. However, homogenous ideal (notional) concurrence does not involve several offences but several persons whose rights or interests are violated. Andenaes

underlines that a distinction ought to be made between homogenous ideal (notional) concurrence related to personal violations such as murder, assault and defamation and argues that "it will always be assumed that there are as many offences as there are victims".[48] However, he does not accept the same pattern of interpretation with regard to violation of property rights:

> Violations of property rights, such as theft or destruction of objects which belong to a number of people, are not so certain to be regarded as independent offenses as are violations of personal rights. The offense is no more serious if the objects in question have several owners than if they belong to only one. From the point of view of substantive criminal law, there is thus no reason to regard this situation as one involving several offenses. Procedural reasons, on the other hand, may favor this solution. If the objects all belong to one and the same person, only one offense will be deemed to exist.[49]

Whenever a single act which violates the same legal provision harms two or more victims, the first issue that needs to be addressed is whether there is material concurrence. This can easily be answered in the negative because material concurrence, as defined under Article 60(a), is said to exist when the offender "successively commits two or more similar or different crimes, whatever their nature." Thus the offender who kills two or more persons with a bomb commits a single act, and not successive acts.

The most viable option would be to classify such acts under notional concurrence and use Article 65 or Article 66 as a threshold for the determination of the degree of guilt. This is necessary because Article 65 envisages the simultaneous violation of more than one legal provision by a single act, while Article 66 envisages harm that entails various material consequences to different victims and that also entails the commission of different offences. Their difference lies in the fact that Article 66 envisages plurality of victims while there is a single victim under Article 65.

The denominator that Articles 65 and 66 have in common relates to the violation of different legal provisions by the offender's single act. Cases that come under Article 60(c) are different from the ones envisaged under Article 65 because the former envisages the plurality of victims. On the other hand, Article 60(c) varies from cases that come under Article 66 because it does not envisage the violation of more than one legal provision. Cases that fall under Article 60(c) thus have certain elements of the cases envisaged under Articles 65 and 66 while at the same time having differences from both.

Another pertinent issue relates to the difference between multiple victims in an offence against life (or person) or an offence against property. A bomb

that causes the death of five victims entails *multiple material results*, i.e. the death of five persons, whereby robbery of Birr 1,000 belonging to five persons has the *same material result*, i.e. violence (or intimidation) accompanied by the abstraction of the Birr 1,000 that belongs to another person. While the five victims of the bomb attack are subjects of rights that have distinct personality, a certain amount of money (e.g. Birr 1,000) represents an amount of value (as medium of exchange, store of value and symbol of value) which can be perceived as a single object of forceful abstraction irrespective of the number of its owners. Thus, when the same rule applies to offences against property which, unknown to the offender, happens to belong to two or more persons, aggravating punishment on the basis of the number of rights violated would be unreasonable.

In *heterogeneous notional concurrence* (Articles 60(b) and 65) there is the violation of two or more provisions while there is a single material result that emanates from the same criminal act. We can borrow the term 'homogenous notional concurrence' from Norway's criminal law jurisprudence for cases that fall under Article 60(c), and it seems unreasonable to impose punishment that is graver than the one envisaged under Article 65 unless the motive and the nature of the act of the offender justifies resort to the mode of aggravation under Article 66. The only difference between the two is the *concurrence of provisions* in Article 65, while Article 60(c) involves *concurrence of rights* that are violated.

Article 187 (aggravation of penalty in cases of notional concurrence) uses the term '*may*' rather than '*shall*' while aggravation on the ground of material concurrence (Article 184) is mandatory. In effect, courts may not even resort to aggravation in certain cases of notional concurrence, and in effect, this allows courts to refrain from aggravation of punishment where property rights of multiple victims are affected even if heterogeneous notional concurrence exists as a result of the concurrent property rights that are violated.

The capacity of the Amharic language to express conceptual referents has indeed increased since the enactment of 1957 Penal Code. The 2004 Criminal Code has thus rectified and clarified most of the ambiguities and unclear formulations in the Amharic version. This has been possible due to the availability of professionals who have been able to articulate the stipulations that balance the embodiment of technical concepts and the *clarity-cum-precision* in articulation.

A case in point is the enhanced clarity of technical provisions such as Article 58 (criminal intention), Article 59 (criminal negligence), Article 24 (causation) and many others. In addition to updating Ethiopian criminal law in conformity with current realities, the revision has enhanced the clarity of

many concepts as in the case of contributory causes embodied in Article 24(3) of the 2004 Code (which was nonexistent in the previous code).

However, provisions that are susceptible to problems of interpretation such as Articles 60(c) and 63 require careful analysis and interpretation upon application. This issue will further be discussed in Chapter 8, Section 4, which deals with the determination of punishment and sentencing in multiple offences and recidivism.

Case Problems

Summaries of robbery cases are provided below. For each case:

1. State whether material or notional concurrence can be applied.
2. Apply the notions of unity of guilty and penalty, related offences, and so forth, if they are relevant. Cite the relevant criminal law provisions.

Note that the relevant provisions of the 1957 Penal Code apply for acts committed before Ginbot 1st 1997 Eth. Cal. (May 10, 2005).

Case 1:

- *Date:* Miazia 24th 1994 (Eth. Cal.), 2 p.m.
- *Scene of the offence*: Woreda 17, Keble 25 on a road behind Imperial Hotel.
- *Material facts*: Four defendants robbed two victims (Talita and Sheba). The offenders robbed Birr 120 and a Kodak camera from the first victim, and a ring, an earring, foot bracelet (yegir albo), and a purse from the second victim.

Case 2:

- *Date*: Megabit 8th 1998 (Eth. Cal.), 1 a.m.
- *Scene of the offence*: Arada Sub-city Kebele 15/16, around Tis Abay Hotel.
- *Material facts*: The defendant threatened the first victim (Dereje) with a knife and took Birr 50, and forcefully took a purse and Birr 30 from the second victim (Sumanait).

Case 3:

- *Date:* Meskerem 12th 1996 (Eth. Cal), 10:30 a.m.
- *Scene of the offence*: Woreda 2, Atikilt Tera area and Woreda 23 Keble 16, Ayer Tena.
- *Material facts*: The defendants pretended to have items to transport to Hawassa and took the driver and his assistant to Woreda 23 Keble 16, Ayer Tena. They threatened the driver, Deginet, and his assistant, Wondimu, with knives and pistol, and then robbed Birr

880 from Deginet's pocket. The defendants also took the car (plate No. 3-10324). The defendants were charged with illegal restraint (in violation of Art. 557 of the 1957 Penal Code) by tying up the victims with ropes and plastering their mouths for two days from Meskerem 12th to until Meskerem 14th (8:30 p.m.) 1996 (Eth. Cal) after which they left them at Woreda 28, Yerer area.

Case 4:

- *Dates:* Tir 17th 1985 (Eth. Cal.) at midnight; Tir 27th 1985 (Eth. Cal.) at 10 p.m.; Tir 11th 1985 (Eth. Cal.) at midnight; and Tir 21st 1985 (Eth. Cal.) at 8:45 p.m.
- *Scenes of the offence*: Woreda 2 Andinet Hotel, Woreda 2 Kebele 12, Woreda 2 Kebele 17, and Woreda 2 Kebele 09.
- *Material facts*: The defendants used an automatic rifle and a bomb to threaten the victims and robbed money, wristwatches, jewellery, clothes, shoes and other items on four occasions. The robberies involved victim Wondimu (on Tir 17th 1985), victims Mikiyas, Wondimagegn and Samuel (on Tir 27th 1985), victim Tsegaye (on Tir 11th 1985) and victim Peter (on Tir 21st 1985). In the same file (File No. 241/85) a second count was also instituted against the defendants for having illegally without permit possessed a bomb and an automatic rifle with bullets.

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Review Exercises

State the form of concurrence (if any), identify the provisions that are relevant for aggravation of punishment, and respond to the specific questions forwarded in the exercises:

1. G was on his way with a gun to kill X when G's friend Y tried to stop him. As Y was pulling the barrel to take away the gun from G, the trigger happened to be pulled, and Y was shot dead. Give your opinion whether G can be charged with the concurrent offences of attempted aggravated homicide and ordinary homicide.
2. Kebede is convicted of four offences: negligent homicide, grave bodily injury, robbery and theft. These offences were committed at different places within a period of six months. Identify the Criminal Code provisions that are relevant for the determination of concurrence and aggravation of punishment.
3. On a rainy evening, D threw poisoned meat to V's dog, and climbed into the compound after killing the dog. He took a cassette player and a camera from V's car, and broke into the living room. After having picked portable items, he was discovered while he was leaving. V fired a shot at D but missed him. As D was running, V's neighbour (Ato X) tried to capture him. D stabbed X with a knife inflicting on him a serious injury. As neighbours were running towards V's residence, D hid the goods he stole in a hedge about 50 meters from V's compound, and fled. The next day V's seven-year-old son found a strange "food" and ate it. It was a piece of the poisoned meat, and it caused his instantaneous death. Discuss the offences in the case.
4. D, a pharmacist, sold makeup two years after its expiry date. A, B and C (teenage girls residing in the neighborhood) sued for the injury they suffered due to D's act. Is he punishable for concurrent offences? Will D be tried and sentenced again if, after his conviction, another woman, E, institutes a suit for bodily injury (before the lapse of the limitation period)?
5. D intentionally killed B and C with an explosive. Should the penalty be aggravated on the ground of concurrence? What if C was merely injured despite D's intention to kill both of them? What if, instead, the offender believed that the explosive would kill B without harming C (due to the distance between them), but in fact it inflicted bodily injury on B, killed C and caused damage to B's car?
6. A, having failed to fasten his load of bricks properly, drives a truck and two bricks fall off the truck, killing B and C. What if B was killed but C was merely injured?[50]

7. A negligent bus driver caused the death of three pedestrians, and 10 passengers incurred physical injury.
8. "D entered a *tej-bet* in which customers A, B, C and E were sitting. F, the proprietress, was standing behind the bar. Pointing a pistol at the five, D required them to throw their money and other valuables into his hat, which he then took and fled." Is this five robberies or one?[51]
9. The defendant Behailu set fire to Ato Tilahun's tukul around 8 p.m. while Tilahun's family was having dinner. Four persons were in the house. In addition to damage to property, Ato Tilahun was severely injured and his wife died due to the arson. The court has convicted Behailu on three counts, namely, arson, negligent homicide and negligent bodily injury. State the legal provisions for punishment, assuming that there are no other aggravating or mitigating circumstances.

Case 8

Federal Supreme Court

Criminal Cases Appeal No. 26021[52]

Tahsas 18th 1999 (Eth. Cal.)

Judges: Dagne Melaku, Desta Gebru, Asegid Gashaw

Tewodros A. v. Public Prosecutor

Two appeals are lodged from two decisions of the Federal High Court rendered in two files (File Numbers 16096 and 16764) against the same appellant. The Federal High Court's sentence in File No. 16096 had considered the sentences in other files, and the Court had imposed three years of rigorous imprisonment for the conviction in aggravated robbery in violation of Art. 637(1)(a) of the 1957 Penal Code [currently 671(1)(b) of the 2004 Criminal Code].

Moreover, the Federal High Court had considered the sentence of twelve years imposed on File No. 16978 and had added six years for the conviction in robbery (Art. 636 of the 1957 Penal Code [currently 670 of the 2004 Criminal Code], thereby imposing the sentence of eighteen years including the earlier sentence.

The appellant has requested that all the sentences imposed on five files be incorporated in a single sentence, and the Court has examined the following files:

1) Criminal Cases File No. 16876: 8 years
2) Criminal Cases File No. 16978: 4 years [12 yrs including earlier sentence]
3) Criminal Cases File No. 16764: 6 years [18 yrs including earlier sentences]
4) Criminal Cases File No. 16874: 6 years
5) Criminal Cases File No. 16096: 3 years.

The Federal Supreme Court has not found justifiable grounds to reverse the earlier sentences. The Federal Supreme Court has further examined whether the lower courts have taken previous sentences into account while imposing sentences. The Court has not found sentences that ought to be revised. However, it has considered the problem that can be encountered in the calculation of parole because of sentences in different files.

The Court stated that the relevant provisions in the determination of sentences in concurrent (multiple offences) are Articles 191 and 189(1)(b) of the 1957 Penal Code [currently Articles 186 and 184(1)(b) of the 2004 Criminal Code]. Pursuant to these provisions, the sentence can be aggravated on the ground of concurrence (multiplicity of offences) without, however, exceeding the statutory maximum for rigorous imprisonment, i.e. 25 years.

The court had thus decided an aggregate sentence of 25 years be imposed on the appellant which shall be applicable from the date of his arrest, and the sentence covers the convictions in all files.

Questions

1. State the reason why the court cited a legal provision on retrospective concurrence.

2. Could there have been variation in the sentence had the case been adjudicated based on the 2004 Criminal Code?
3. Assume that the five offences are charged under robbery (Article 670 of the 2004 Criminal Code), and then that all the charges were under aggravated robbery (Article 671(1)(b) of the 2004 Criminal Code). Relate the relevant provisions which you can use as a judge and state the maximum penalty that can be imposed in both situations.
4. Does your answer for question 3 change if all the offences are committed on the same day, within two hours?

Readings on Chapter 4

Reading 1: Andenaes[53]

Plurality of Offenses

I. "Realkonkurrens"

It often happens that the defendant is charged with more than one offence, all of which are adjudicated in the same trial. In such cases we speak of *realkonkurrens*. Usually, crimes of the same or at least of a related type are involved: the accusation, for example, includes rape, robbery and the unlawful sale of liquor. In the former case we speak about *homogenous*, in the latter case about *heterogeneous realkonkurrens*. Penal Code, §§ 62–63, contain rules on the determining of punishment when a person is convicted of more than one offense. If offenses of the same or closely connected types are committed in a close relationship to one another, the question may occasionally arise as to whether there exists *realkonkurrens, or idealkonkurrens* of several offenses.

Here, we can first distinguish those cases where the law covers a continuous or compound activity, such as where it penalizes one who 'by neglect, maltreatment or similar conduct, frequently or gravely violates his duties toward spouse or children" (Penal Code §219), or "participates in an association" (Penal Code § 330), or "carries on an activity" (Penal Code, § 332), or "Participates in . . . a fight" (Penal Code § 384). As long as the activity continues, it is but a single offense, even though punishable acts may have been accomplished many times. A fight is a fight whether it takes only two minutes or continues for the entire night. Here, we use the term *collective offenses*.

In practice it is customary to treat several acts as only one offense also in those cases when they are committed in immediate connection to one another. A number of degrading words spoken at the same time will be regarded as only one defamation, many blows as one assault . . . and the carrying away of many objects as one theft.

It is more doubtful whether we can go further and say that a series of punishable acts can be regarded as one *continuing punishable activity*, even though they are not committed in immediate connection to one another. The servant who each day steals cigars from his master (Penal Code § 255), the

doctor who each day writes out false prescriptions for morphine (Penal Code § 189)—are [they] to be punished for one continuous offence or several offences in *realkonkurrens*? The question has both substantive and procedural significance. Substantially, it will usually be to the accused's advantage if the punishable acts are judged as one offense, since the possible punishment is increased when more than one offense is involved (Penal Code §§ 62–63). But in some cases it may be to his advantage if the offenses are separated, such as where an addition of the value of the stolen goods would place him under a more sever theft provision, instead of a milder provision relating to pilfering. The question as to whether the acts of the accused are to be regarded as one continuous offense or as a number of separate offenses may also have significance for determining the date on which the period of limitations begins to run (Penal Code § 69), and for the issue concerning the applicability of Norwegian law (Penal Code § 12). Procedurally, the determination has significance on the drafting of the accusation (indictment) (Code of Criminal Procedure, §§ 286, 342), for example, and on the posing of questions to the jury in cases heard in the court of assize (Code of Criminal Procedure, § 343, para 3).

The practice of considering many punishable acts as one offense was well established under the Criminal Code of 1842. Since the introduction of the new Penal Code it has often been suggested in theoretical writings that such a concurrence can no longer take place. Neither in the Penal Code itself nor in the legislative history, however, is there anything to suggest that any changes on this point were intended, and practice has continued largely on its former path. It has been regarded as one continuous offense where a café owner has sold beer illegally over a long period of time (Liquor Act, § 47; see Rt. 1940, p. 25). . . . If there is a greater time span and a looser relationship between the individual acts, however, they may be regarded as independent offenses . . .

II. "Idealkonkurrens"

Penal Code, § 62 also mentions the case where someone commits more than one offense *by the same act (idealkonkurrens).* This can happen because the act is covered by more than one penal provision. One who accomplishes a fraud with the aid of a false document is punished both under Penal Code, § 270, for fraud and under Penal Code, § 183, for the use of the false document. The [person] who rapes his fifteen-year-old relative, infecting her with syphilis, is punished under . . . rape, indecent relation with children under sixteen years of age . . . , incest . . . and communicating a venereal disease. This is *heterogeneous idealkonkurrens*. But it may happen that the same provision breached many times by one act. A man throws a bomb and kills a number of people, or he writes defamatory statements about a number of people in a newspaper article. This is *homogeneous idealkonkurrens*.

It is sometimes said that *idealkonkurrens* does not really constitute a concurrence of offenses, but a concurrence of *penal provisions*. The law posits, however, that every violation of the law is an independent offense. . . .

With idealkonkurrens, just as with realkonkurrens, doubts occasionally arise as to whether we should speak about one offense or several offenses.

1. Homogeneous idealkonkurrens

This applies first of all to *homogeneous idealkonkurrens*. In the case of personal violations such as murder, assault and defamation, it will always be assumed that there are as many offenses as there are victims. On the other hand, it will not be considered more than one offense if the same person is exposed to more than one violation, such as by a defamatory newspaper article. Violations of property rights, such as theft or destruction of objects which belong to a number of people, are not so certain to be regarded as independent offenses as are violations of personal rights. The offense is not more serious if the objects in question have several owners than if they belong to only one. From the point of view of substantive criminal law, there is thus no reason to regard this situation as one involving several offenses. Procedural reasons, on the other hand, may favor this solution. If the objects all belong to one and the same person, only one offense will be deemed to exist.

2. Heterogeneous idealkonkurrens

Doubts occasionally arise in connection with heterogeneous *idealkonkurrens* as to whether all the penal provisions which are violated by the act shall apply, or only one of them.

If the provisions aim at different aspects of the punishable act, then they all apply in *idealkonkurrens*. Recognition is thereby given to the act's increased culpability as compared with a breach of only one of the provisions. Such is the case in the examples mentioned above (forgery of documents and fraud; rape, and incest etc.). It makes no difference that the penal provision have a common ground. Vagrancy Act, §§ 16 & 17, both aim at the person who intentionally or negligently drinks himself into a state of intoxication. But the elements of the offenses are otherwise somehow different: § 16 requires that the intoxication be obvious and that the person be seen in this condition in a public place; § 17 does not require any of this, but rather that the guilty person disturbs the general peace and order or the lawful flow of traffic, or annoys or causes danger to others. If the perpetrator fulfills the requirements of both provisions, then both must be applied (Rt. 1929, p. 566).

In other cases, an act which falls under one of two penal provisions necessarily falls under the other one as well. Here, it is the law that only [the] provision which most fully considers all the aspects of the act is to be used. A characteristic example is the *compound offense*. Penal Code, § 147, imposes punishment for breaking and entering, Penal Code, § 257, for theft, while Penal Code, § 258, provides that in determining whether a theft amounts to grand larceny, emphasis shall be placed upon whether it was committed in connection with a breaking and entering. If the accused is convicted of grand larceny under this provision, he cannot at the same time be convicted under Penal Code §§ 147, and 257. Other examples include violations which are similar in nature, but different in degree. A bodily injury to the person (Penal Code, § 229) is always an assault (Penal Code, § 228), but of course the provisions cannot be used simultaneously. . . .

Reading 2: French Criminal Code

Sentences Applicable to Concurrent Offences (Articles 132-2 to 132-7)

Article 132-2

There is a concurrence of offences where an offence is committed by a person before having been finally convicted for another offence.

Article 132-3

Where, in the course of the same proceedings, the accused person is found guilty of several concurrent offences, each of the penalties applicable may be imposed. Nevertheless, where several penalties of a similar nature are incurred, only one such penalty may be imposed within the limit of the highest legal maximum.

Each penalty imposed is deemed to be common to the concurrent offences within the limit of the legal maximum applicable to each one of them.

Article 132-4

Where, in the course of separate proceedings, the person prosecuted is convicted of several concurrent offences, the penalties imposed operate cumulatively, up to the limit of the highest legal maximum. Nevertheless, the partial or total concurrent running of sentences of a similar nature may be ordered either by the last court called upon to determine the matter, or pursuant to the conditions set out under the Code of Criminal Procedure.

Article 132-5

(Act no. 1992-1336 of 16 December 1992 Articles 347 and 373 Official Journal of 23 December into force 1 March 1994)

For the purposes of articles 132-3 and 132-4, all custodial sentences are of a similar nature and all custodial sentences run concurrently within a life sentence.

Recidivism is taken into account, where relevant.

Where criminal imprisonment for life is applicable to one or more of the concurrent offences but is not imposed, the legal maximum is fixed at thirty years' criminal imprisonment.

The legal maximum amount and length of day-fines and of community service work is determined by articles 131-5 and 131-8 respectively.

The benefit of partial or total suspension applied to one of the penalties imposed for concurrent offences does not prevent the enforcement of sentences of a similar nature which are not suspended.

. . .

Article 132-7

By way of exception to the previous provisions, fines imposed for petty offences are cumulated with those incurred or imposed for concurrent felonies or misdemeanours.

Endnotes, Chapter 4

[1] Barry Mitchell (2001), "Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling", *The Modern Law Review*, Vol. 64, No. 3 (May 2001), p. 394.

[2] *Ibid.*, 398.

[3] *Ibid.*, pp. 394–395.

[4] *Ibid.*, 395.

[5] *See* for example Crim. Code, Art. 61(1).

[6] Philippe Graven (1965), *An Introduction to Ethiopian Penal Law: Arts. 1–84 Penal Code* (Addis Ababa: Haile Selassie I University and Oxford University Press), p.163.

[7] Andrew Ashworth (2005), *Sentencing and Criminal Justice* (Cambridge University Press), p. 244.

[8] [2000] 1 Cr App R (S) 105; in Ashworth, *ibid*, p. 245.

[9] Ashworth, *ibid.*

[10] Crim. Code, Arts. 60—66.

[11] Crim. Code, Art. 67.

[12] Crim. Code, Art. 186.

[13] *Ibid.*

[14] *Hateta Zemiknyat* (*Exposé des Motifs*), June 2004, (Article 60 of the 2004 Criminal Code).Hateta Zemikniyat, pp. 34, 35

[15] Federal Cassation Division Decisions, File No. 96078 (Megabit 11, 2006 EC/ March 20, 2014), Vol. 16, pp. 270-275.

[16] Crim. Code, Art. 63.

[17] Crim. Code, Art. 185(2).

[18] Crim. Code, Arts. 63 and 185(1).

[19] Crim. Code, Art. 61(3).

[20] Graven, *supra* note 6, p. 257.

[21] Crim. Code, Art. 60(b), first phrase and Art. 65.

[22] Crim. Code, Art. 60(b), second phrase and Article 66.

[23] Crim. Code, Arts. 60–66, 85, 184–187.

[24] Federal Supreme Court Cassation Decisions, File No. 134549, Meskerm 23, 2010 (October 3, 2017), Vol. 22, pp. 178-183.

[25] Graven, *supra* note 6, p, 165.

[26] Crim. Code, Art. 61(3).

[27] Crim. Code, Art. 375.

[28] Crim. Code, Arts. 61(3), 378.

[29] Crim. Code, Art. 379.

[30] Crim. Code, Arts. 356, 357.

[31] Crim. Code, Arts. 61(3), 359.

[32] Federal Supreme Court Cassation Decisions, File No. 104637, Tahsas 24, 2009

(January 2, 2017), Vol. 21, pp. 332-337.

[33] Graven, *supra* note 6, p, 171.

[34] The words literally meant "proximate offences" rather than relative offences, and the current word "የተዛመዱ" accurately translates the term "related".

[35] *Hateta Zemiknyat,* June 2004. The term *Hateta Zemiknyat* literally means "exposition of reasons", and it is meant to state legislative intent.

[36] *Ibid.*

[37] *Ibid.*

[38] Logoz, in Graven, *supra* note 6, p. 165.

[39] Graven, *Ibid*, pp. 165, 166.

[40] "One is also surprised by certain defects of legislative technique which appeared in the Code, as, for instance, placing of the rules on merger and concurrence of offenses in the Code of Criminal Procedure, rather than the Penal Code. This . . . was corrected when the Code of Criminal Procedure was enacted in 1958; it no longer mentions the rules of merger and concurrence of offenses. Such matter is now treated by Article 5 of the Penal Code." *The French Penal Code* with an Introduction by Mark Ancel (The American Series of Foreign Penal Codes) New York University: 1960, p. 6.

[41] Article 5 of the 1810 French Penal Code as amended on December 23, 1952 and February 2, 1981.

[42] German Penal Code (as revised in 1953).

[43] *Ibid.*

[44] *Manual of German Law*, Volume II (Her Majesty's Stationery Office, London, 1952), p.89.

[45] *Ibid.*

[46] Woinshet Kebede (2006), Penal Law II class assignment, St. Mary's University College Faculty of Law.

[47] Johannes Andenaes (1965), *The General Part of the Criminal Law of Norway*, Translated by Thomas P. Ogle (London: Sweet & Maxwell Ltd.) p. 307.

[48] *Ibid.*

[49] *Ibid.*, p. 306.

[50] Graven, *supra* note 6, p. 171.

[51] Stanley Z. Fisher (1969), *Ethiopian Criminal Procedure: A Sourcebook* (Addis Ababa: Haile Selassie I University Faculty of Law) p. 229.

[52] *Case Report*, Federal Supreme Court, Meskerem 2000 Eth. Cal. (September 2007), pp. 28, 29. [Author's abridged translation.]

[53] Andenaes, *supra* note 47, pp. 303–307 (internal citations omitted).

Chapter 5

Participation in an Offence

The acts of planning, preparation and execution of offences are not necessarily carried out by a single individual, because two or more offenders may participate in the commission of an offence. Participation may take various levels that can be referred to as *principal* or *secondary*. Moreover, one of the defendants may be accessory after the commission of the offence. Such variations and degrees in participation determine the degree of liability in the commission of an offence.

A person who contributes in the commission of an offence through his act without having known the nature and consequences thereof is regarded an innocent agent because moral guilt is nonexistent on his part. For example, if a person gives coffee to Ato X without having known that Ato Y (X's roommate) has put poison in the coffeepot, the innocent agent will not be regarded as having participated in the offence.

As Smith and Hogan[1] stated, "[a] person who directly and immediately causes the *actus reus* of a crime is not necessarily the only one who is criminally liable for it" because persons who "abet, counsel or procure the commission of any indictable offence" shall also be punishable. Smith and Hogan state that "the charge, should, wherever possible, specify the actual mode of participation alleged. [2] They further note that although the participation may involve more than one person "[t]here is one crime" and its commission "must be established before there can be any question of criminal guilt of participation in it."

Under French criminal law, the principal material offender is known as *l'auteur matériel* and is defined in Article 121-4 as "the person who (1) commits the criminal conduct; [or] (2) Attempts to commit a serious offence. . . ." The first paragraph of Article 121-7 of the French penal code deals with joint principals, known as *coauteurs*.

The law will occasionally treat people who cause the commission of a principal offence, but do not actually personally carry out the *actus reus* of that offence, as the principal offender, known as *l'auteur intéllectuél* or *l'auteur moral* (though frequently they will be treated as accomplices). For example, if a child has been abducted, the law will treat not only the person who physically removed the child as a principal offender, but also the person who arranged for the child to be abducted.[3]

Principal participation involves persons who have actually committed the criminal act or omission and those who have planned, decided or arranged

the commission. Elliott discusses *participation in the second degree* such as complicity (Articles 121-6 and 121-7) in French law and she notes that there are three requirements to impose criminal liability on such participants in the secondary capacity. Primarily, "a crime must have been committed by a principal offender. Secondly, there must have been an act of complicity and thirdly, the accomplice must have the *mens rea*."[4]

Bohlander states the five basic categories of participation in a criminal offence in German criminal law which can be classified under participation of the first degree and the second degree. The first three forms of participation fall under principal participation:

- principal by proxy (*mittelbare Täterschaft*)
- independent multiple principals (*Nebentäterschaft*)
- joint principals acting on a common plan (*Mittäterschaft*).

The following two forms fall under secondary participation:

- abetting (*Anstiftung*)
- aiding (*Beihilfe*)[5]

According to Section 25(1) of the German Criminal Code, a principal offender may "commit the offence *himself* or through *another* person" and the latter form of principal participation envisages using an innocent agent who shall not be responsible for his acts. Bohlander lists the following examples of *principal participation by proxy* that have developed through judicial decisions and doctrinal interpretation:[6]

- "The agent is not fulfilling either the *actus reus* or *mens rea* of the offence. Example: P asks A to take V's car and bring it to P's house; he tells A that the car is his own and V had borrowed but not returned it despite P's demands. In reality, the car is V's. . . ."
- "The agent is acting objectively lawfully (*rechtmäßig*) under an accepted defence. Example: A, a police constable, is told untruthfully by P that V has just stolen a handbag from her. A pursues V and arrests her. . . ."
- "The agent is acting without personal guilt (*schuldlos*) under an accepted defence. [Example 1:] P forces A to commit an armed bank robbery by holding his wife and children hostage, threatening to kill them; A is acting under duress (*Nötigungsnotstand*). [Example 2:] P is telling A, who suffers from a mental illness amounting to insanity in the legal sense, to kill V. . . ."
- "The agent lacks criminal capacity. Example: P asks A, a 10-year-old child, to steal a packet of cigarettes. . . ."

Independent multiple offenders act independently (usually by negligence) and the extraneous acts become "important as factors in the causal chains

started by each of them."[7] For example, P1 and P2 stand to inherit a large sum on their father's death.[8] Without being aware of each other's act, P1 and P2 respectively commit the acts of poisoning. P2 commits the act through an innocent agent (insane person) after P1 has already started the criminal act. "The causal chains are completely independent. The chain set in motion by P1 has been broken by the act of A acting as an innocent agent of P2. P2 is thus guilty of murder as a principal by proxy; P1 is guilty of attempted murder". [9]

Section 25(2) of the German Criminal Code provides that "If more than one person commit the offence jointly, each shall be liable as a principal (joint principals)." Under German criminal law, the liability of *joint principals* (*Mittäterschaft*) "comes close to the English law concept of a joint criminal enterprise (JCE), but with a few important differences":

> Just like in a JCE, there needs to be a common plan subscribed to by all persons taking part in the commission of the offence. However, unlike English law after section 8 of the Accessories and Abettors Act 1861, German law still attaches a lot of weight to the distinction between principals and secondary participants . . .
>
> The consequence of establishing that offenders have acted as joint principals according to a common, that is mutually communicated and agreed, plan is that the factual contributions by each of them to the commission of the offence are attributed to all others without the need to establish the commission of a full offence as such by one of them. . . .[10]

The two forms of secondary participation under German law are embodied in Sections 26 and 27 of the German Criminal Code, which stipulate the following:

> **§ 26 Abetting**
>
> Any person who intentionally induces another to intentionally commit an unlawful act (abettor) shall be liable to be sentenced as if he were a principal.
>
> **§ 27 Aiding**
>
> (1) Any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted and sentenced as an aider. . . .

The Ethiopian Criminal Code is inspired by various penal laws of continental Europe and classifies three varieties of principal participation into the same category (Article 32), and embodies two types of secondary participation, namely complicity (Article 37) and incitement (Article 35). Moreover, the 2004 Criminal Code punishes an accessory after the fact

(Article 40), i.e. a person who helps an offender after the commission of an offence. Such assistance cannot be regarded as secondary participation, because one does not take part in an offence that has already been committed.

Ethiopia's Criminal Code provisions on participation also include provisions on conspiracy and corporate offences. Article 38 (entitled "Criminal Conspiracy") deals with cases where "two or more persons enter into an agreement to achieve an unlawful design to commit an offence". Article 34 of the 2004 Criminal Code deals with corporate offences, and this issue was not incorporated in the General Part of the 1957 Penal Code.

Principal offenders are subject to the same punishment provided by the law.[11] The punishment imposed on an accomplice[12] or an instigator[13] "shall be that provided by law for the intended offence" subject to a possible reduction of penalty[14] according to the circumstances of the case. Due regard is given to "personal circumstances" and "individual guilt"[15] in determining a particular offender's punishment. Personal circumstances and individual guilt of a particular offender refer to the "extent of his participation, his degree of guilt and the danger which his act or his person represents to society".[16] A recidivist co-offender, for instance, is punished more severely than the others. Such increase or reduction of punishment (where circumstances so permit) is strictly individualized and nontransmissible.

An offender is not liable for an offence which goes beyond his intention, where two or more offenders participate in the commission of the same offence (Articles 58(3), 32(2), 36(4), 37(5)). Assuming that A organized B and C to rob P's residence and that D knowingly lends his automobile for the purpose upon A's request, D shall not be liable as an accomplice if B rapes P's daughter, because the offence goes beyond his intention.[17] A principal offender, however, may be punished for his criminal negligence if the offence committed beyond his intention is punishable under the charge of negligence, provided that he could or should have at least foreseen the excessive or additional offence committed by his co-offender.

1. Principal Participation

Article 32 has embodied three types of principal participation, namely material participation, indirect participation and full moral association. In the first type of principal participation, i.e. *material participation* (the first phrase in Article 32(1)(a)), the co-offender actually (directly) commits the offence in person. In robbery, the material co-offenders who commit the material ingredients of the offence, i.e. coercion and abstraction of property are principal co-offenders.

> In murder, for example, he is the man who with *mens rea* fires the gun or administers the poison which causes death; . . . in bigamy, the person who knowing himself to be already married, goes through a second ceremony of marriage; and so on.[18]

The second type of principal participation is *indirect*, whereby an offender avoids direct material contact with the object of the offence. An offender may, for example, commit an offence through a nonhuman instrument such as an animal or a natural force (the second phrase of Article 32(1)(a)). To use Graven's illustration, "if 'A' trains his dog in shop-lifting, it is irrelevant that the act which constitutes theft (abstraction) is not performed directly by A".[19] The list embodied in Article 32(1)(a) is not exhaustive because the words 'in particular' render the stipulation illustrative.

The offender may also *indirectly* commit an offence by using a child or "a mentally deficient person" or a person who acts under mistake, or by compelling another person (Article 32(1)(c)). The phrase "mentally deficient person" refers to persons who are irresponsible for their acts owing to their unawareness of the nature or consequences of their acts or their inability to act according to such understanding due to the reasons stated under Article 48 of the Criminal Code.

Article 32(1)(c) of the 2004 Criminal Code has resolved the problems of interpretation created by the different wordings of the Amharic, French and English versions of the 1957 Penal Code. The English version of the 1957 Penal Code did not include infants as innocent agents of indirect commission of an offence while the word "አላዋቂ" in Article 32(1)(c) of the Amharic version could be used to include children through interpretation.

> The words "*un être inconscient*" in the French version were "broad enough to include the cases where the human instrument is irresponsible . . . (or) unaware of the true facts of the case. . . . [T]his was the 'meaning intended by the legislature' since the '*Exposé des Motifs*' states that the cases coming under Article 32(1)(c) include those where 'the indirect offender uses a human agent who does not intend to commit an offence or is not even aware of the fact that he commits an offence . . . such as a child, a lunatic or a person who, by reason of mistake, does not realize that he is instrumental to the commission of the offence'."[20]

Article 32(1)(c) of the 2004 Criminal Code has amended the same provision of the 1957 Penal Code. The amendment has considered the legislative intent stated in the latter's *exposé des motifs*.[21]

The third type of principal participation is *full moral association* (Article 32(1)(b)), whereby the moral offender does not personally carry out the execution of the offence, but masterminds or fully associates himself with the commission of the offence. The only difference between indirect offenders and moral offenders lies in the type of instrument they use.

Moral offenders execute their criminal scheme through a responsible and willing co-offender, whereas indirect offenders make use of a nonhuman instrument or irresponsible person (infants, lunatics, intoxicated persons), or an innocent (i.e. mistaken or coerced) human agent. A gang leader who organizes a group for the purpose of drug trafficking or bank robbery and takes a "recreation" trip for the purpose of an alibi (i.e. a plea of absence at the time of the offence) does not escape liability, because Article 32(1)(b) makes him a principal co-offender in view of his full association "with the commission of the offence and the intended result."

A person accused as a moral offender must be proved to have fully associated, first, "in the commission of offence", and secondly, "in the intended result". Full mental association with the commission of the offence envisages participation that goes beyond hoping for the doer's success or mere spiritual participation in the offence[22] because "punishment would then be unjustified. If the moral offender is punishable, therefore, it is because . . . he fully sides with the material offender and adopts as his own the offence and the desired result."[23]

Even where a given offence cannot be materially committed by a certain person owing to his/her physical, occupational or other attributes, such person can be held co-offender in a principal capacity (Article 33) if the latter has either indirectly committed the offence (Article 32(1)(a) and (c)) or is the moral offender (Article 32(1)(b)). Although rape, for example, can only be committed by a male offender (Article 620), a bar owner, Woizero X, who wants her 16-year-old maidservant to be a bar girl, and indirectly makes use of an intoxicated customer (Article 48(1) *cum* Article 50(3)(4)) in having the girl raped, is the sole principal offender. Likewise, if Woizero X devises the rape and uses a responsible human instrument (Ato Y), Woizero X's participation in a principal capacity as a co-offender with Ato Y renders her a moral offender. The latter case of rape involves two co-offenders: primarily, Woizero X who masterminds the offence as a moral offender and secondly, Ato Y who executes the scheme as a material offender.

2. Secondary Participation

Offenders may not have similar roles in a given offence. As discussed earlier, material, indirect and moral offenders are classified into the same category of principal participation irrespective of their distinct characteristics. Accordingly, they are in principle subject to the same punishment[24] unless personal circumstances[25] and individual guilt[26] require the reduction or increase of punishment.

However, criminal law considers the relatively secondary role played by certain offenders. If A, B and C decide to rob a bank, and C is assigned to look-out at the main gate of the bank, C is a principal co-offender although he has not in person performed the acts of coercion and abstraction of the money robbed, because he fully associates himself in the commission of the offence and desired result.[27] If, instead, C was not part of the decision to rob the bank, and was merely requested by A or B to help them in looking-out while they carry out the robbery, he is said to have "knowingly assisted" the principal offenders (Article 37).[28] The assistance is referred to as "complicity" (or aiding and abetting) and falls under secondary participation. Such participation is referred to as secondary because it is derivative, "i.e. it derives from the liability of the principal" offender.[29]

Inducing a person to commit an offence[30] is another case of secondary participation. In the example here above, if C intentionally induced A and B by informing them about the weak guarding system without actually becoming part of the decision to rob the bank, he is said to have incited the offence if his incitement has a '*sine qua non*' causal relationship with the commission of the offence.

2.1 Complicity (Aiding and Abetting)

According to Article 37, an accomplice is "a person who knowingly assists a principal offender 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." The constituent elements "knowingly assists" and "a principal offender" and the elements that state the period and the means of assistance must be carefully noted.

Primarily, there must be "assistance" that has been given "knowingly". Assistance must be distinguished from "full association".[31]

> It seems . . . preferable to emphasize the intensity of the criminal will (subjective conception) and to consider as a co-offender whoever . . . associates himself with the principal by being part of the decision from which the crime ensued or part of the execution of the crime. The accomplice, on the other hand, is not a participant

in the primary plan. His participation is secondary; he wants to provide only assistance to the offender.[32]

Assistance in the commission of an offence constitutes complicity only where it is made "knowingly". Article 37(2) reinforces this essential element by requiring complicity to be invariably intentional. Assistance without criminal intention or mere presence during the commission of an offence without contribution towards the commission of the offence is not enough. If some assistance is "knowingly" given with an awareness and desire of the harm, or even without necessarily desiring (but accepting) the result, there is complicity.

The second crucial point to note is the issue of "assistance to whom?" Does assistance to an accomplice or an instigator fall under Article 37? A strict literal reading of the phrase "knowingly assists a principal offender" may not seem to allow wider interpretation so as to include the act of assisting an instigator or an accomplice. If A, for example, asks his friend B to find him a gun for his criminal objective of killing P, and B obtains the gun from C informing him about the scheme, C's complicity is debatable if his gun is used to kill P. C has not directly assisted the principal offender; nevertheless, one may validly argue that, C has *indirectly* assisted the principal offender, A. The *exposé des motifs* (of the 1957 Penal Code)[33] supports this view and it considers aiding in an indirect manner punishable.

Third, the period of the assistance is also important. The assistance must be given either before or during the commission of the offence. In other words, the assistance should precede or be contemporaneous with the final execution of the offence. If the assistance is provided after the offence is executed, the person who assists the offender is not an accomplice but rather an accessory after the fact[34] provided that the act falls under Article 40 of the 2004 Criminal Code (discussed hereunder in Section 3.1).

Fourth, the means used and the impact of assistance deserve brief discussion. The assistance may be incorporeal (information or advice), corporeal (i.e. supply of means or material) or assistance of any kind. All that matters is the intention of the accomplice to give assistance which in the opinion of the principal, facilitates the commission of the offence he has in view. The assistance given may not even be used at all. If, for example, "A gives B the combination of C's safe . . . but B finds that the combination has been changed . . . so that he must force the safe open; or [if] he finds that the door of the safe has been left open",[35] A is still regarded as an accomplice. The accomplice assists an offender who has already decided to commit an offence. The act of assistance is not thus a *sine qua non* condition to the offence, and the principal offender may execute his design despite the ineffectiveness of the assistance.

Certain acts of assistance fall under special provisions rather than Article 37. If a prisoner intends to escape[36] and a taxi driver facilitates the escape, the taxi driver is not an accomplice to the prisoner who escaped, but a principal offender himself under Article 462, which expressly renders the assistance a punishable offence. Likewise, Article 425 shall apply if a prison guard (or any public servant) facilitates the escape.

Aiding and abetting a person to commit suicide,[37] assisting offenders by failure to report planned treason, mutiny or desertion,[38] and the like are special offences on their own. Moreover, mere attempt to aid and abet treason[39] and mutiny[40] are punishable. In the case of assistance that falls under Article 37, the offence that the accomplice knowingly assisted should either be completed or at least be attempted (as can be inferred from Article 37(3)) in order to render complicity punishable.

2.2 Incitement (Instigation or Solicitation)

An instigator is a person who "intentionally induces another person . . . by persuasion, promises, money, gifts, threats or otherwise to commit an offence" (Article 36(1)). The key constituent elements of Article 36(1) are inducement, intention and the means utilized.

Inducement is the act of influencing, convincing or causing an offender to commit an offence. The party induced is usually a principal offender, and at times an offender in a secondary capacity (e.g. an accomplice). The instigator does not go beyond inducement. He does not either directly or indirectly involve himself in the commission of the offence. Yet there is a *sine qua non* causal relationship between the incitement and the induced offender's act. It must be proved that the incited offender would not have committed the offence in the absence of the instigator's inducement. Mere encouragement does not thus amount to instigation unless it is decisive in convincing the offender, who would not otherwise commit the offence. Where a combined (but not independent) inducement of two or more persons induces an offender, they may be held jointly (though not separately) liable.

The inducement should not only convince a person,[41] but should also be acted upon, thereby causing the offender to commit or at least attempt to commit an offence (Article 36(2)). The decision and determination of the offender must be attributed to the instigation. If D, a young rural dweller, has irrevocably decided to abduct a girl whom he loves, and is then persuaded to act by his friend (D_2), the latter's act is an attempt to instigate. D is not, however, deemed to have been incited because it is impossible to induce a person who has already convinced himself towards the same end. Mere attempts to instigate are not punishable[42] unless the particular type of

instigation is expressly declared to be a specific offence (as in Articles 257, 332, 350, 427, 480, 486, 559(4), 542, 704) or unless an attempt to instigate is punishable as stipulated by Articles 255 and 301, which respectively deal with an attempt to instigate offences against the State and mutiny.

Inducing a principal offender differs from full moral association. Unlike the moral offender,[43] the instigator does not participate in the decision-making process and leaves the principal offender to make up his mind on his own. The instigator also differs from the indirect offender[44] because he does not make a decision towards the commission of an offence and then make use of an agent. However, if the induced material offender happens to be an irresponsible person (due to infancy, insanity, etc.) the person who induced the act is not an instigator, but an indirect offender.

The accused should not only induce an offender, but should in addition have the *intention* to do so. The intention may be particular or relatively broad. If a neo-Nazi intentionally induces a material offender to kill foreigners who live in a certain town, instigation is said to exist if any foreigner, even one whom the instigator does not at all know, is killed as a result of the instigation. On the contrary, unintended inducement is not punishable. For example, "if while A and B together await payment of a cheque in a bank, A casually points out to B that the watch system is defective", and if B is encouraged by the facts he was told and robs the bank, A's remarks do not amount to incitement even if "the offence would probably have not been committed but for A's remarks."[45]

The *means of inducement* stated under Article 36(1) are not exhaustive but illustrative, since the terms "or otherwise" accommodate other means not stated in the provision. Yet the act of using "threats" in inducement seems to overlap with an indirect offender's act of "compelling" a human agent (Article 32(1)(c)). But the acts of "threat" by an instigator and "compulsion" by an indirect offender are different. The instigator threatens a person and leaves the discretion of decision to the threatened person. The indirect offender, on the other hand, compels another person to carry out the indirect offender's criminal objective. In other words, the indirect offender decides what the compelled person should do, whereas the instigator threatens another person to influence the threatened person's decision.

Certain acts of instigation fall under special offences of incitement. Inciting offences against the State (Arts 240(1)(b), 257), public provocation (Articles 480, 486), incitement to disregard military orders (Article 332) and incitement to refusal to pay taxes (Article 350) are punishable special offences of incitement. In the domain of public office and private interests, acts such as solicitation (inducement) of corrupt practices (Article 427) and instigating suicide (Article 542) are likewise special offences of incitement.

3. Accessory After the Fact and Failure to Report

3.1 Accessory After the Fact

An accessory after the fact[46] assists an offender who has already committed an offence. Intention to give assistance with awareness (knowledge) about the commission of the offence is required. The accessory is not considered as participant in the commission of an offence. Instead, he is said to have committed an independent offence as per the specific nature of his assistance.

Article 40 states three instances of such intentional assistance after the commission of an offence: harbouring or helping an offender from prosecution (Article 445), saving an offender from the execution of a sentence passed by a criminal court (Article 460) and knowingly receiving the proceeds of an offence (Article 682).

3.2 Failure to Report

The act of informing the law about the preparation, commission and the perpetrator of an offence is normally left to the conscience of the person who happened to know the event. Reporting serious offences would obviously render a positive contribution to law and order. On the other hand, requiring persons to report whenever they are aware of offences and petty offences seems to violate autonomy and freedom of choice.

Various legal systems take a liberal perspective and refrain from embodying the duty to report in their penal laws. Others accept a person's liberty of choice (in principle) and meanwhile consider the importance of the duty to report under exceptionally grave cases. The Ethiopian Criminal Code takes the latter course, and renders failure to report unpunishable[47] other than the few exceptional cases[48] provided by the law.

Failure to report the preparation or commission of an offence against the State,[49] mutiny or desertion[50] is punishable. In these cases, official or professional secrecy is no defence.[51] Kinship or close ties of affection[52] cannot also be invoked against Article 254 and where Article 335 is violated in time of emergency or general mobilization of war. In all other cases, failure to report the preparation of an offence is not punishable unless the law expressly imposes the duty to report such as the plans and venue of gangs or associations established with an objective of organized crime.[53]

Failure to inform the law (without good cause) about the commission or the perpetrator of an offence punishable with death or life imprisonment is an offence.[54] Moreover, the failure to report in violation of legal or professional duty (e.g. failure to report by a policeman, security officer, etc.)

is punishable in the absence of good cause.[55] Unlike Articles 254 and 335, "good cause" such as professional secrecy,[56] kinship or close ties[57] may justify failure to report in violation of Article 443.

Article 479(1)(b)[58] imposes the duty to notify the preparation of an organized crime by bands or associations. The gravity of the threat to public and private interests justifies such a duty. The court may mitigate the penalty or impose no punishment if the person who failed to notify the preparation of organized crime has a family relationship[59] with a member(s) of the gang.

4. Conspiracy and Collective Offences

4.1 Conspiracy

Conspirators are persons who "enter into an agreement to achieve an unlawful design or to commit an offence".[60] But this definition does not apply to offences that inherently presuppose the concerted participation of two persons as in the cases of bribery, incest and the like. This exception is known as Wharton's rule, named after Francis Wharton, a well-known commentator on criminal law who noted that "[a]n agreement between two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission."[61]

Criminal law considers conspirators more dangerous than independent offenders. The independent offender is relatively free to renounce a criminal activity whereas a member of a gang or conspiracy can hardly do so, because his control over the group's activity is usually minimal. He may be bound by his commitment to the group or threat of reprisal. Conspiratorial activities are also more subtle and organized with networks that may render self-defence, arrest, investigation and prosecution difficult. The Criminal Code thus intervenes before the actual commission or attempt of offences against the State,[62] offences against international law,[63] mutiny[64] and other offences "punishable with rigorous imprisonment for five years or more".[65]

Where there is conspiracy against the State[66] in order to commit one of the offences stated in Articles 238 to 242 and 246 to 252 or in cases of conspiracy to prepare mutiny or seditious movement,[67] mere agreement to achieve the objective, is punishable. The same applies to the act of conspiring[68] "with the object of committing, permitting or supporting" any of the offences against international law embodied in Articles 269 to 273. Under these three provisions (i.e. Articles 257, 274(b) and 300), an act of mutual consultation and agreement is punishable even before the initial preparatory steps. The clarity and consistency of the provisions do not seem to justify a wider interpretation so that they may not be susceptible to abuse.

Conspiracy to commit other serious offences punishable by at least five years of rigorous imprisonment (e.g. arson) is also an offence pursuant to Article 478. This provision, however, requires a further "material" step beyond mere agreement. The provision, which reads "provided that the conspiracy materializes," requires an overt act that renders the conspiracy materially visible.

To "materialize" means to "take material form". Although its literal meaning may imply "being carried out", the term 'materialize' in Article 478(1) must be used in its restricted sense because the wider interpretation would make the provision inapplicable unless the objective of the conspiracy is carried out. Such interpretation would render Article 478(3) redundant and unreasonable because Article 478(1) will be rendered ineffective in serving its basic purpose of punishing conspirators prior to the execution of their objective. The phrase "**የወንጀሉ የተለየ አደገኛነት የተገለፀ እንደሆነ**" in the Amharic version substantiates the former interpretation that merely requires the conspiracy to be "materially" overt or visible. If A, B, and C conspire to rob P's shop, the act of buying a gun to threaten the guard or buying tools to break the door renders the conspiracy materially overt. This may be referred to as "the requirement of an overt act." Letters exchanged between offenders and the purchase of items that facilitate the commission of an offence are examples of overt acts that manifest conspiracy beyond the mental element involved in the agreement to commit an offence.

In the *Yates* case (1957),[69] for example, the US Supreme Court relates the threshold at which conspiracy can be deemed to exist with an overt act which does not merely exist in the mind. According to the decision of the Court, the overt act in a conspiracy prosecution does not simply manifest 'that the conspiracy is at work' but it also serves the function of showing that the conspiracy is not merely a project that solely rests "in the minds of the conspirators, nor a fully completed operation no longer in existence."

Preparatory acts that merely justify entry into recognizance and seizure of dangerous articles[70] may be punishable if the material preparation is undertaken by two or more conspirators.[71] Although both cases may have the same level of preparation, conspiracy involves a more dangerous collective preparation that must be promptly punished before the phase of attempt. In many cases, conspirators carry out their criminal objective to its end. Criminal law thus resorts to aggravation of penalty if the offence designed by conspirators is completed or at least attempted.

Aggravation of penalty due to conspiracy may take one of the following forms. The court may consider the conspiracy as a general aggravating circumstance.[72] The second method of aggravation is through concurrence. If the act of conspiracy[73] has been tried as a distinct offence, and if there is

conviction under this provision, the aggravation shall be special aggravation,[74] and, in effect, entails a graver penalty.

Special provisions that embody particular offences committed under conspiracy shall apply[75] as stipulated under Articles 257, 274, 300 and 478. Under such circumstances, courts do not resort to general aggravation[76] or aggravation by concurrence because the act of conspiracy is an ingredient element of an aggravated offence. For example, in case of espionage by conspiracy, Article 258(b) renders the concurrent application of Article 478 in conjunction with Article 252, 257 etc. impossible. Nor can conspiracy be a ground for the general aggravation of penalty[77] against a defendant convicted under Article 258(b) because Article 84(2) prohibits double jeopardy from the same aggravating circumstance. For the same reason, Article 539 (aggravated homicide), Article 671(2) (aggravated robbery) and similar aggravated special provisions are not concurrently applied with Article 478 for the purpose of increasing penalty.

4.2 Collective Offences

Where the offence is committed by a group of persons, the person who is not proved to have taken part in the commission of offence shall not be punished.[78] The issue as to who bears the burden of proving whether an accused has taken part in the commission of a collective offence seems to be nondebatable at the outset. The principle that 'everyone is presumed innocent until proven guilty' is enshrined in the Ethiopian Constitution, and this constitutional stipulation entitles the accused to be presumed innocent until the commission of the offence is proved, thereby requiring the prosecution to bear the burden of proof.

According to the second paragraph of Article 35 of the 2004 Criminal Code, an accused whose presence among group of persons is proved during the commission of offences such as conspiracy (አድማ) or brawls (አምባጓሮ) by a group shall not be punished where he proves his nonparticipation in the commission of the offence. It is difficult for an accused to prove nonaction. Moreover, it is unlikely for accused members of a group to take the blame and testify to the innocence of one of them because such acts may become self-incriminatory. Thus it would be reasonable to restrictively interpret the second paragraph of Article 35 (a paragraph that did not exist in the 1957 Penal Code) so that participation in an offence in the forms of moral participation (Article 32(1)(b)), complicity (Article 37), conspiracy (Article 38, 478), and so forth will not be assumed to exist in the absence of evidence. Such restrictive interpretation is in conformity with the specific provision on brawls[79] and the specific provisions that deal with various offences committed through conspiracy.

In *Ashenafi A. v. Public Prosecutor*, “in the early morning of Megabit 26, 1948 [Eth. Cal.] the three [defendants] were seen, armed with a rifle between them, on the spot from where three gun shots were heard.” Takele was later found dead “with three wounds in his body.” D_1 fired a shot and was heard shouting to have done the killing. D_2 took the rifle from D_1 and did the same after his shot. But it is not clear whether the third shot was fired by D_3, who was with D_1 and D_2 during the event.[80] D_1 and D_2 were convicted as principal offenders and D_3 as an accomplice. If a similar case is charged as a collective offence under Article 35 of the 2004 Criminal Code, the presence of D_3 in the group makes him criminally liable in the principal degree if the commission of the offence in concert with others such as conspiracy (Article 38) is proved and if he fails to prove that he has taken no part in the commission of the offence (Article 35(2)).

In *Ashebir B. v. Public Prosecutor*, three defendants, Ashebir, Gebremikael and Getachew, went to Tesfaye’s house and threw stones at him; as a result Tesfaye lost his left eye. According to the victim’s statement he was hit at his eye, shoulder and nape, but could not identify the person who threw the stone that struck his eye.[81] The first defendant, Ashebir, lodged an appeal against the decision of the High Court which convicted him of bodily injury. The majority decision of the Supreme Court affirmed the decision of the High Court mainly on the ground that Ashebir did not only fully associate in the commission of the offence as a moral offender (Article 32(1)(b)), but had also thrown a stone on the victim with the awareness of possible harm and the acceptance of probable bodily injury, thereby rendering the spot where the injury was inflicted immaterial.

The dissenting opinion stated that Article 32(b) presupposes criminal intention and full association with the offence and intended result. In collective offences where the act which caused the harm is not identified, the dissenting opinion held, members of the group should only be liable for the offence of attempt, so that the ones that did not cause the harm would not be severely punished even if this is done at the cost of letting the real offender benefit from a milder sentence.

The cases above evoke two fundamental questions. First, when is collective offence presumed to exist? And second, is every member of the group assumed to have committed the material act that has actually caused the harm? The phrase “where a crime such as conspiracy or brawl is committed by a group of persons” clearly shows that the provision can accommodate other forms of involvement in group membership towards the commission of an offence.

The second question warrants some analysis beyond the literal interpretation of Article 35 which (in the first paragraph) stipulates that

“[w]here two or more persons commit a crime in concert, the person who is proved to have taken no part in the commission of the crime shall not be punished.” The second paragraph of the provision provides that “where a crime such as conspiracy or brawl is committed by a group of persons, the person whose presence in the group is proved shall be exempt from punishment only if he proves that he has taken no part in the commission of the crime.”

However, the provision does not deal with the determination of the type and degree of each member’s participation in collective offences. According to Philippe Graven, “each of the several persons who may have participated in an offence must be punished for his own acts and ‘according to the degree of individual guilt’.”[82] Graven further underlines that “punishment as well as liability are personal, and there can be no collective liability to punishment, nor may collective punishments be imposed”.[83]

The purpose of Article 34 of the 1957 Penal Code was to reinforce Article 54 of the 1955 Constitution, which renders punishment personal, and Graven notes that Article 34 of the Penal Code was not necessary “since Arts. 57 *et seq.* are sufficient to give effect to the . . . constitutional provision”.[84] The objective of Article 34 of the 1957 Penal Code was not thus to allow the prosecution of collective offences without due regard to the ‘personal’ nature of criminal liability and punishment, but rather to safeguard a member of the group who has taken no part in the commission of the offence despite his membership to the group.

The *exposé des motifs* (*Hateta Zemiknyat*) of Article 35 of the 2004 Criminal Code has a different conception of this stipulation. It reads:

> . . . ጥቂት ሰዎች ተስማምተው የግድያ፣ የዘረፋ፣ ወይም ማናቸውንም ሌላ ዓይነት ወንጀል ሲፈፅሙ በእያንዳንዳቸው ላይ ማስረጃ አቅርቦ የማስቀጣቱ ተግባር የዐቃቤ ሕግ መሆኑ የታወቀ ሲሆን በዚህ መልክ የመጀመሪያው ፓራግራፍ ተቀርጿል፡፡ እንደ አድማ፣ አምባጓሮ፣ ግርግር ወይም ሕገ ወጥ ሰልፍ በመሳሰሉት ወንጀሎች ግን ዐቃቤ ሕግ ማስረዳት ያለበት እያንዳንዱ ሰው በሕብረቱ ውስጥ መገኘቱን እንጂ ምን ምን እንዳደረገ የማስረዳቱ ሸክም የእርሱ ግዴታ መሆን የለበትም፡፡ በጊዜውና በቦታው በሕብረቱ ውስጥ መገኘቱን የማስረዳት ሸክም የዐቃቤ ሕግ ቢሆንም የወንጀሉ ተካፋይ አለመሆኑን ማስረጃ ማቅረብ ያለበት እያንዳንዱ ተከሳሽ ሊሆን ይገባል፡፡ በዚህ መልክ አንዳንድ ምሳሌ በማስገባት ሁለተኛው ፓራግራፍ ተቀርጿል፡፡
>
> Where few people agree and commit offences such as homicide, robbery or other offences, the public prosecutor apparently bears the responsibility of producing evidence on each defendant. However, in offences such as conspiracy, brawls, riots and unlawful demonstration, the responsibility of the public prosecutor is to prove that an accused person was present, and it should not be its responsibility to prove what each member of the group has committed. Even if the public prosecutor is required to prove that

the accused was present at the time and place of the offence, the accused bears the burden of proving that he/she has not participated in the offence. The second paragraph [of Article 35] has been drafted accordingly by incorporating some examples.

The *exposé des motifs* envisages that the prosecution is merely required to prove the presence of a person in the group during the commission of offences such as conspiracy, brawls and riots. In other words, a defendant in such offences is required to prove his/her nonparticipation in the commission of an offence. This interpretation seems to be inconsistent with Article 20(3) of the Ethiopian Constitution, which guarantees the right of accused persons "to be presumed innocent until proved guilty according to law". Moreover, Article 35(2) is inconsistent with other provisions of the Criminal Code such as Articles 57–59 (which envisage individual moral guilt and not collective guilt), Article 41 (which states the principle that a person is punished only for his own act), and Article 88 (which stipulates that penalty is determined according to the degree of individual guilt).

The tenable interpretation in this regard can be distinguishing between the act of *taking part* in an offence such as brawls *vis-à-vis* causing a particular harm. While the former can be charged and punished by proving that an accused has taken part in the incident under consideration, the act of causing a specific harm cannot be attributed to each member of the group unless it is proved to that effect.

Such interpretation is in conformity with Article 577 of the Criminal Code, which imposes penalties that fall under four tiers of severity, namely:

1. Simple imprisonment from 10 days (Article 106) not exceeding one year for taking part in brawls under the circumstances stated in Article 577(1);
2. Simple imprisonment from one month to one year where injury has ensued and if the accused takes part in the brawl and carries or makes use of the weapons stated in Article 577(2);
3. Aggravation to the general maximum (i.e. three years of simple imprisonment)[85] where a person has been wounded or killed under the circumstances stated in the provision (Article 577(3); and
4. Punishment under the relevant provisions of the Criminal Code concurrently (Article 66) where those who have caused the injury or death can be discovered.

Article 35(2) of the Criminal Code and the commentary in the *Hateta Zemiknyat* should thus be narrowly interpreted, and they should apply only to the act of taking part as a member of a group in the commission of offences such as brawls, and not for having caused a particular harm. The

tiers of criminal acts stated in the provision such as holding weapons or individual liability for causing injury or death are required to be proved. In *King v. Richardson*,[86] for instance, Richardson and Greenlow:

> accosted the prosecutor as he was walking along the street, by asking him, in a peremptory manner, what money he has in his pocket. . . . [U]pon his replying that he had only two-pence, half-penny, one of the [defendants] immediately said to the other 'If he really has no more, do not take that' and turned as if with an intention to go away, but the other [defendant] stopped the prosecutor, and robbed him of the two-pence half-penny, which was all the money he had. . . . But the prosecutor could not ascertain which of them had taken the [money] from his pocket.

The court cited the *Ipswich* case "where five men were indicted for murder; . . . but it did not appear which of the five had given the blow which caused the death," as a result of which it was held that "as the man could not be clearly and positively ascertained, all of them must be discharged." Likewise, the court in *King v. Richardson* decided that "whichever of the two it was who thus desisted [i.e., who changed his intention before the act, which completes the offence] cannot be guilty of the present charge and the prosecutor could not ascertain who it was that took the property."

5. Corporate Offences

Corporate criminal liability differs from and is independent of "the individual responsibility of employees of a company in any capacity such as that of director, manager, accountant"[87] or other employees. The notion of corporate criminal responsibility "does not, of course, confer any personal immunity" for offences committed by individuals in the course of employment; it rather addresses the issue whether a corporate entity "regarded by the law as having an independent personality of its own, can be held directly responsible for a crime" [88] in addition to the criminal liability of the individuals involved in the commission of an offence.

Stuart states the academic discourse between legal theorists on "the juristic nature of corporate personality." He summarizes two legal theories, which he refers to as the 'legal fiction theory' and the 'organic theory'. According to the legal fiction theory, the corporation is "an artificial abstraction capable only of acting through human beings", and corporate responsibility particularly in relation to offences that require thought becomes unreasonable. According to this view a corporate entity "has no mind, let alone a guilty one."[89] This theory considers the notion of vicarious corporate criminal responsibility as illegitimate. According to this view,

"there is nothing in the nature of corporate responsibility which overrides the objections to this basis of liability."[90]

> On the other hand, the organic theory asserts that a corporation has real existence, being a social organism with a common will which happens to be carried out by individuals. In this sense, it has a mind of its own and is greater than the sum of the persons involved in it. Although our courts have not expressly invoked this theory, we shall discover that their fairly recent development of the doctrine of corporate responsibility is based on at least partial acceptance.[91]

Stuart observes that the procedural difficulties that "existed in directly charging a corporation with a criminal offence" have disappeared and that "detailed special rules as to the prosecution and trial of a corporation" have developed at present[92] with a penalty section which can declare "that a corporation convicted of an offence" can be punishable with fine in lieu of imprisonment.

The theory pursued by the 1957 Penal Code seems to have been that juridical persons are not susceptible to moral guilt (criminal intention or criminal negligence). The Penal Code did not thus expressly deal with corporate offences, and Book I (Articles 1–84) did not include a provision(s) regarding corporate offences. The only measure that affected the activities of juridical persons on the ground of offences was the secondary punishment of deprivation of licensed activities[93] permanently or for the specified period stated in the sentence[94] against the offender in whose name the license was issued. This could hardly be considered punishment against corporate offences because the measure was subsidiary to a principal punishment imposed against an individual offender.[95]

Under the 1957 Penal Code, restriction of activities could be imposed against the licencee offender as a measure[96] that entails restriction on activities. Such measures could develop towards punishment[97] where there is infringement of measures that prescribe the closing down, suspension or prohibition stated in the judgment. All these provisions do not make direct reference to the juridical entities (which may be subject to various measures), but to the individual who is convicted and against whom such measures are taken.

The 2004 Criminal Code has made an amendment in this regard and incorporates the criminal liability of juridical persons. Article 34 deals with offences that entail the criminal liability of juridical persons. For the purpose of corporate criminal liability, 'corporate body'[98] shall mean any public or nongovernmental organ and includes public or private entities lawfully established for commercial, industrial, political, religious or other lawful

purposes. Where the law expressly provides, juridical persons other than organs of public administration may be liable to punishment as principal offenders, instigators or accomplices.[99]

Bodies corporate are not of course capable of feeling, thoughts and physical acts. They have no corporeal existence other than the artificial recognition accorded to them by the law for the purpose of legal interactions. Article 23(3) of the 2004 Criminal Code provides that notwithstanding the provisions stipulated under Article 23(1&2) "a juridical person shall be criminally liable to punishment under the conditions laid down under Article 34" of the Code. Thus, the act or omission stated in the second paragraph of Article 23(1) and the legal, material and moral elements of an offence stated under Article 23(2) shall, for the purpose of corporate liability, be construed in light of Article 34.

Offences committed by juridical persons[100] do not require moral guilt on the part of the juridical entity because bodies incorporated by the law are not (as entities) capable of awareness and volition. The criminal liability of a juridical person rather arises from the occupational activities of managers (at various levels) and employees for offences done in the discharge of their functions to the benefit of the juridical person. The conditions of such criminal liability are stipulated in the second paragraph of Article 34(1), which states that corporate liability is vicarious and arises from the acts of managers or employees

- in connection with the activity of the juridical person,
- with the intention to carry out the organization's interest unlawfully, or
- in violation of the responsibilities of the organization, or
- by misusing the organization for an illegitimate end.

The type of punishment[101] may be imposition of fine, and where necessary the corporate entity may be penalized with suspension of activities, closure or termination. Such punishment against a corporate body does not absolve the criminal liability[102] of managers or employees for the offence that they have personally committed.

Although Ethiopia's 2004 Criminal Code does not envisage strict liability, i.e. irrespective of fault, this notion of liability is expected to develop in the realm of regulatory regimes. In countries that have introduced strict liability in certain offences, it is easier to enforce laws such as health and safety regulations. In this regard, Ashworth states the following.

> [A] company is a legal person, separate from the individuals involved in its operations. . . . [Companies can be] liable for a whole range of offences of strict liability: they can cause pollution,

> sell [prohibited] goods, fail to submit annual returns etc. An offence of strict liability is one which requires no fault for conviction: any person may be found guilty simply through doing or failing to do a certain act. Thus, if a company owns the business or premises concerned, it may be convicted of failing to control emissions of pollutants, or for causing polluting matter to enter a stream. . . . In a case like *Alphacell Ltd. V. Woodward* [(1972) AC, 824] where polluting matter escaped from the company's premises into a river, it seems both fairer and more accurate to convict the company rather than to label one individual as the offender. [W]here the law imposes a duty, the company should be organized so as to ensure that the duty is fulfilled.[103]

Review Exercises

Discuss the degree and type of participation in the following cases.

1. D induces E, an innocent person, to go through marriage with F, which D knows to be bigamous.[104]
2. B intentionally assists the making of an agreement (conspiracy) to murder by providing room, telephone numbers and other information but is entirely indifferent whether murder is committed.[105]
3. D_2 sees D_1 committing a crime and comes to his assistance by restraining the policeman who would have prevented D_1 from committing the crime. The assistance is unforeseen by and unknown to D_1.[106]
4. D_2 added alcohol to D_1's drink without D_1's knowledge or consent, knowing that D_1 was going to drive and that the ordinary and natural result of the added alcohol would be to bring D_1's blood/alcohol concentration above the prescribed limit.[107]
5. X had an affair with Y's girlfriend. Z incited Y to challenge X to a fight or at least to scare X and in effect give him a lesson so as not to get away with his acts unharmed. A week later, Y stabbed X with a knife, causing bodily injury.
6. A hired a professional assassin B to kill Y. B was caught while he was about to shoot at X, the bodyguard of Y, a preliminary step that was necessary in order to kill Y who was in the next room. Does it make a difference if B is hired to kill X and Y who are colleagues working in the same office?
7. D organized a robbery to be committed by A and B. A and B broke into P's residence. But P's portrait in the living room enabled A to realize that the

residence belongs to an old classmate. A abandoned the robbery due to which the scheme did not materialize.

8. A, B and C planned to rob a bank. Ato A alone did the act of coercion and abstraction of the bank notes. B merely stood by, and C was assigned to look out in case of external obstruction.
9. A girl who was below the age of 16 aided and abetted the defendant to have unlawful sexual intercourse with her.[108]
10. The defendant "put Judith Gerber in touch with the procurer, Ineichen, who gave her, during their visit, the address of the abortionist Wyss, and informed Wyss that she would come to him and recommended her to him. Wyss then attempted the abortion."[109]
11. A suggested that B "could easily rob the X bank. Several days later, before B actually robbed the bank, A told B that he no longer" thought it was a good idea.[110]
12. A suggested to B, C and D that they go with him to the house of his ex-mistress, Yondi, to beat the man, X, who replaced him. C and D did not agree, but B did. A and B accordingly went to Yondi's house armed with ukkazes. A challenged X to come out which the latter reluctantly did. X had a knife. Subsequently, A and X exchanged insults. Seeing X armed with a knife, B went to E, aroused him from his sleep and brought him to the scene without telling him why he was wanted. E came to the scene unarmed. A and X were still insulting one another. X found that he was standing against three persons and started to put his hand on his knife. B attempted to take the knife from X, whereupon X stabbed B, inflicting an injury. E, intending to play the role of the Haggaz, attempted to take the knife from X. While doing so, E's fingers were injured. X stabbed E, who fell on the ground. Then A and B started to hit X with their tall and heavy ukkazes. At that stage, C and D came running armed with ukkazes and joined in striking X, who collapsed due to the joint beating. C and D tied X's hands behind his back, and left him in that state. X managed to drag himself to a nearby hut where he shortly died as a result of the hard beating.[111]
13. "Ato A sold two guns to Ato B and Ato C. Ato A testified that at the time of the sale, he had overheard B and C discussing which type of gun could be most easily concealed for the 'job' they had to do. The police arrested A, B and C soon after B and C left A's premises and charged them with conspiring to commit robbery."[112]
14. A, B and C agreed to set P's hut on fire at midnight the next day. A was assigned to prepare a box of matches and a litre of petrol. C changed his mind, and urged A and B to change their decision, but in vain. C then informed the police, and A was caught while he was leaving a shop where he had purchased a box of matches. Does it make a difference if A had instead bought cigarettes from the shop, and if he already had a box of

matches in his pocket (to be used for their objective) by the time they agreed to commit the offence?

15. State the type and degree of participation and the relevant provisions in the following examples by Graven:
    a) A organizes a gang for committing robberies and instructs the members of the gang merely to frighten the victims. On one occasion a member of the gang kills the victim.[113]
    b) A agrees to watch while B commits a robbery, but when taking his post A passes out and does not regain consciousness until after the offence is committed.
    c) A agrees to delay C so as to give B enough time to rob C's house, but B is caught long before C would have returned home.
    d) A informs B that he incited C to kill D but is short of money so that he cannot make the advance payment C has required, whereupon B lends A the necessary sum.
    e) A incites B to commit theft in C's house on an afternoon when he knows C to be out of town, but B instead commits the theft at night.
    f) A being determined to kill B, but uncertain as to the best way to do it, attends a lecture by Dr. C about poisons which leave hardly any trace in the human body. A thereafter uses one of the said poisons to kill B.
    g) A incites B to kill C and B runs C down in a traffic accident and kills him by negligence.
16. State the difference between *vicarious liability* under torts (Civil Code Articles 2027(3), 2129-2133) whereby a company shall be liable for the damages incurred by an employee in the discharge of duties vis-à-vis *corporate criminal liability* for an offence committed by an employee or a manager of a company based on Articles 23(3) and 34 of the Criminal Code. Give examples.
17. Read the following and state your reflections in relation with the criminal liability of a company that is the employer of the person who committed the abuse and assault:

> In *Mahmoud v Wm Morrison Supermarkets*,[114] [FN7] the Supreme Court held that the conduct of a petrol station attendant who had racially abused and assaulted a customer was closely connected with his duties: the course of conduct had started while he was acting within the field of activities assigned to him, albeit in a "foul-mouthed" and "inexcusable" way, and "what happened thereafter was an unbroken sequence of events" and "a seamless episode".[115]

Case 9

Federal First Instance Court

File No. 90370[116]

Ginbot 25th 2003 (Eth. Cal.)

Judge: Yeshaneh Almaw

Public Prosecutor v. Nesredin G. and Fozia D.

The first defendant (Nesredin) is owner of a shop and the second defendant (Fozia), his employee. The first defendant was charged as the principal offender and the second defendant as his employee for exchanging foreign currency without having the banking permit to do so. Foreign currencies of USA, Saudi Arabia, Dubai, Canada, Qatar, Egypt, South Africa, Sudan, Europe (i.e. euro) were found under the possession of the 2nd defendant and the charge further states that the search has also seized Ethiopian Birr 367,350 (Three hundred sixty seven thousand three hundred and fifty Birr), an amount which is given to her by the first defendant.

The first defendant has not appeared to the court and his whereabouts could not be identified. The court has thus discontinued the charge against the first defendant. The second defendant pleaded not guilty and proceeded with the trial during which prosecution and defendant's arguments and evidence were submitted to the Court.

On June 2nd 2011, the Federal First Instance Court convicted the 2nd defendant for the violation of Art. 32(1)(a) and Arts. 3(1) and 58(1) of Proclamation No. 592/2000. Based on the conviction rendered, the Federal First Instance Court sentenced the 2nd defendant with six years of rigorous imprisonment and imposed the fine stated in the judgment.

Questions

1. What is the degree of participation of the second defendant?
2. Assuming that she was charged as an accomplice, was it possible to convict her without convicting the first defendant?

Readings on Chapter 5

Reading 1: Elliott[117]

Secondary Party Liability

. . .

Actus Reus

A Principal Offence

A crime must have been committed by the principal offender in order for liability to be imposed on the accomplice. . . . Where the complicity took the form of the accomplice instigating the principal offence liability can be imposed. . . .

Liability can be imposed on the secondary party though they could not themselves have committed the principal offence. Thus, a person who is not a director of a company can be liable as an accomplice to the offence of abuse of

company property, even though the principal offender must be the company director.

. . . Complicity is not punishable where [inter alia] the acts of the principal offender can no longer be punished due to the expiry of the limitation period, or due to a general amnesty on offences of that type (as opposed to an amnesty for the principal offender personally).

The principal offence can be an attempt, though a person cannot be liable for attempting to be an accomplice. When the potential principal offender has started to carry out the principal offence but has voluntarily chosen to desist and thus avoided liability for an attempt, the accomplices will also avoid liability even though they were not party to this voluntary decision. The *cour de cassation* has therefore decided that a defendant was not liable as an accomplice where he had hired a hit man to assassinate a designated person, but the hit man failed to carry out the offence.

The case law has partly got round this potential gap in criminal liability by imposing instead liability for conspiracy. In one case a man was found in possession of notes concerning the movements of a woman described at the trial as ‘blond and attractive’. He admitted to the police that he had been contracted by a third party who had been abandoned by the woman and wanted to get revenge against her. The third party had paid him money to attack her and driven him to the place where he was to carry out the attack. He had taken the money and spent it, but had subsequently changed his mind and not carried out the attack. The two men were both convicted of conspiracy.

There must exist a sufficiently clear causal link between the conduct of the supposed accomplice and the commission (or the attempted commission) of the principal offence.

The principal offence need not have been the subject of a conviction. The absence of a conviction may be due to the fact that, for example, the principal offender has escaped detection or died, or it may be due to the existence of a defence such as insanity, being a minor or having received a personal amnesty. In the same way, the accomplice can be punished, even though the principal offender has been acquitted for subjective reasons of non-responsibility (such as the existence of the defence of constraint or madness) or has benefitted from an exemption from punishment. In other words, the accomplice can be punished, even if the principal offender escapes punishment. It suffices that the decision concerning the principal offender does not exclude the existence of a criminal act. . . .

An Act of Complicity

Article 121-7 lists the type of conduct that can give rise to liability as an accomplice, and conduct falling outside this widely drawn list cannot give rise to liability.

A positive act is usually required. Generally mere presence at the scene of a crime is not sufficient to constitute complicity. Thus, in an old case a defendant was not liable for complicity where he had found several individuals in the act of committing a crime and had agreed to remain silent on the payment of a sum of money. However, liability as an accomplice will be imposed on an individual

who did not carry out a positive act when this abstention was blameworthy. . . . Alternatively, it may be that there was a prior agreement with the principal offender. . . . Or the accused may have had an obligation due to his or her profession. Thus, a club owner was liable as an accomplice when he failed to stop his clientele from causing excessive noise at night which prevented his neighbours from sleeping. Another example arose when a police officer was found to be a secondary party to theft when he failed to stop his colleague from committing the theft while they were on duty together.

Indirect complicity is punishable. This occurs where the defendant assists the accomplice and not the principal offender, for example, where a housekeeper gives information to an acquaintance about the layout of her employer's house, and her acquaintance then passes this information on to a burglar.

Complicity can consist of helping or assisting the commission of the principal offence or instigating its commission.

Help or Assistance

The old Criminal Code had expressly included as a form of complicity the provision of means for the commission of the principal offence. The drafters of the new Code decided that this was merely a specific form of help or assistance and therefore did not need to be expressly included in the Code.

A classic example of providing help or assistance is where a bugle was played to hide the victim's cries while the principal offender raped her. Other examples are providing duplicate keys for the commission of a burglary, or loaning a car to be used to commit a theft. . . .

It does not matter that the principal offender did not actually take advantage of the help or assistance provided.

Complicity by Instigation

A person will be treated as an accomplice where they have instigated the commission of the principal offence (Art. 121-7 para. 2). This instigation can take either the form of either provocation or the giving of instructions.

In order for there to be a provocation two conditions must be satisfied. Firstly, the provocation must be directed at a specific individual, rather than being addressed to the world at large. Secondly, the provocation must have been accompanied by one of the circumstances listed in Article 121-7, that is to say it must have been committed through a gift, promise, threat, order, abuse of authority or of power. . . . An example of a threat occurred when an employer obtained false statements from his employees by threatening them to sack them. If an individual merely gives advice, even if it is forceful advice, that is not sufficient to constitute a provocation. Where these two conditions are not satisfied, there are sometimes autonomous offences for which liability can be imposed on the individual as a principal offender. For example, there are offences of provoking a person to use drugs in the Code for public health, of provoking racial discrimination in the Act of 29 July 1881 and of provoking a person to commit suicide under article 223-13 of the new Criminal Code.

As regards the giving of instructions, there is no need for these to be accompanied by one of the circumstances listed for provocation. The instructions must be precise as the provision of vague information is not sufficient. Giving the address of an abortionist has been found to be sufficient, as has the provision of details of the future victim's movements. By contrast, when a man simply advised his mistress that she could have an illegal abortion by means of injections, he was not liable as an accomplice. The instructions may be given directly or through the intermediary of a third person. Liability will still be imposed even if the principal offender did not carry out the offence according to the instructions given by the accomplice.

Timing

The instigation, help or assistance must have been provided prior to or at the time of the principal offence. An exception exists where assistance was provided after the commission of the offence, but had been promised beforehand. In one case an individual was found guilty as an accomplice where he had been paid by two women to wait at the wheel of a car ready for them to make their escape, while they went into a shop to steal.

Mens Rea

Accomplices must have knowingly participated in the principal offence. They need to have known the criminal intention of the principal offender, though they need not have shared this intention. Thus in the case of Maurice Papon, the *Cour de cassation* found that he had been an accomplice to a crime against humanity and it was not necessary that he personally shared the same political ideology as the principal offenders.

Problems can arise where the principal offence differs from that which had been foreseen by the potential accomplice. If the offence committed has a different *actus reus* or *mens rea* than that foreseen by the potential accomplice, the latter is not liable. For example, where a person lent another a gun so that the other person could go hunting, but that person actually used the gun to kill someone else, the owner of the gun could not be treated as an accomplice to the murder. The creditor who gave a third party two revolvers to intimidate a debtor into paying back the money owed could not be convicted as an accomplice to the murder of the caretaker of the building by the third party following an argument.

If on the other hand, the only difference between the offence foreseen and the offence committed is a secondary circumstance, then this will not prevent the accomplice from being liable, provided he caused the offence to be committed. Thus, where a person provided information to help the commission of an ordinary theft, and the principal offender committed this offence at night with a group of people, the person will be liable as an accomplice to the aggravated form of theft. The courts take the view that 'he should have foreseen all this forms of the offence which the conduct was susceptible of giving rise to.' In a case known as l'affaire du SAC, the instigator of the principal offence had wanted members of the *Service d'Action Civique* (SAC) to take back compromising documents from a rival member. Five people were killed in the process and he was found to be an accomplice to these killings. By contrast, in

another case, the potential accomplice was not liable when he gave instructions for the killing of one individual, but the principal offender decided not to kill this person but killed another instead.

Sometimes, the secondary party has not foreseen the commission of a specific type of offence, instead he or she has given an open hand to the principal offender. For example where people are seeking revenge they might simply give some money to a person with a bad reputation and tell them to take revenge. In such circumstances the courts take the view that the accomplice accepts all the risks and is liable as a secondary party to whatever offence is subsequently committed.

An individual can be found liable as a secondary party to an offence of carelessness. This could be committed, for example, where a passenger encourages a driver to speed and this causes an accident. In one case a bobsleigh was launched at excessive speed down a slope and killed a child. The driver was convicted as the principal offender, and the other occupants were convicted as the accomplices because bobsleighing constitutes a team sport in which all the participants have a role to play in driving the device.

Reading 2: Dressler[118]

Conspiracy

. . . A common law conspiracy is an agreement by two or more persons to commit a criminal act or series of criminal acts, or to accomplish a legal act by unlawful means.[a] . . . [T]he offence is punished more severely today than it was at common law. . . .

Because of conspiracy law's emphasis on *mens rea*, and its consequent de-emphasis on conduct, there exists a greater than normal risk that 'persons will be punished for what they say rather than for what they do, or [simply] for associating with others who are found culpable". [b] Historically, conspiracy laws have been used to suppress controversial activity, such as strikes by workers and public dissent against governmental policies . . .

According to advocates of conspiracy laws, two people united to commit a crime are more dangerous than one or both of them separately planning to commit the same offense: "the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts a lone wrongdoer".[c]

The purported dangers inherent in collective criminal action are many. First, out of the fear of co-conspirators, loyalty to them, or enhanced morale arising from the collective effort, a party to a conspiracy is less likely to abandon her criminal plans that if she were acting alone. Other special dangers are said to inhere in conspiracies: Collectivism promotes efficiency through division of labour; group criminality makes the attainment of more elaborate crimes possible; and the '[c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed."[d]

The assumption that the whole is greater than the sum of its parts has never been verified empirically. As one scholar has noted,[e] it is as likely that conspiracies will frustrate as that they will promote crime: with more people

involved, there is an enhanced risk that someone will leak information about the offense, turn against others; or try to convince colleagues to desist from their criminal endeavor. . . .

[Common Law Terminology]

1. Comments

Except for the offense of treason,[f] the common law created two categories of parties to crime—principals and accessories;—each . . . category was subdivided into two subgroups.[g] . . . [T]he distinctions between the parties were of considerable significance. Today, however, almost every state has legislatively repealed the common law distinctions, in whole or in part. Nonetheless, many courts persist in using common law language. Therefore, knowledge of common law terminology remains valuable.

2. Principal in the First Degree

a) General

A "principal in the first degree" is the person who, with the *mens rea* required for the commission of the offense: (1) physically commits the acts that constitute the offense; or (2) as described in subsection (b) below, commits the offense by use of an "innocent instrumentality" or "innocent human agent".[h] In modern cases, the principal in the first degree is often described as the "perpetrator" of the offense. It is his conduct from which all secondary parties' liability derives.

In most cases, the principal in the first degree is the individual who personally commits the crime. . . .

b) Innocent-Instrumentality Rule

. . . The innocent-instrumentality rule provides that a person is the principal in the first degree if, with the *mens rea* required for the commission of the offense, he uses a non-human agent or a non-culpable human agent to commit the crime.

. . . A human being may also be an innocent instrumentality. A person may be the principal in the first degree of an offense if he uses or manipulates another to commit an offense, such that the other person is subject to acquittal on the basis of the lack of *mens rea* or the existence of an excusing condition. . . . [This refers to] a non-culpable agent being manipulated by a culpable party to commit an offense.

A party is also the principal offender in the first degree if he causes X, an insane person[i] or a child,[j] to commit an offense, or if he coerces X to commit the crime. In these circumstances, X is innocent or the offense as the result of an excuse (insanity, infancy, or duress).[k]

3. Principal in the Second Degree

A "principal in the second degree" is one who is guilty of an offence by reason of having intentionally assisted in the commission thereof in the presence, either actual or constructive, of the principal in the first degree.[l] A person is "constructively" present if he is situated in a position to assist the principal …, e.g., if *S* serves as a "lookout" or "getaway" driver outside a bank that *P* robs.

4. Accessory Before the Fact

An "accessory before the fact" does not differ appreciably from a principal in the second degree, except that he is not actually or constructively present when the crime is committed.[m] An accessory before the fact often is the person who solicits, counsels, or commands (short of coercing[n]) the principal in the first degree.

5. Accessory After the Fact

An "accessory after the fact" is one, who, with knowledge of another's guilt, intentionally assists the felon to avoid arrest, trial and conviction.[o] The line between a principal in the second degree, on the one hand, and accessory after the fact, on the other hand, is a thin one: for purposes of accomplice liability, the commission of an offense continues—and, therefore those who aid are principals in the second degree—until all of the acts constituting the crime have ceased. For example, in a bank robbery, the offense is not complete until the principal in the first degree takes possession of another's property and carries it to a place of temporary safety.[p] Therefore the driver of the "getaway" car is a principal in the second degree rather than accessory after the fact; once the property has reached a point of temporary safety, anyone who intentionally assists the robber to avoid prosecution is an accessory after the fact.[q]

. . . Today, nearly all jurisdictions treat accessoryship after the fact as an offence separate from, and often less serious than, the felony committed by the principal in the first degree.[r] . . .

[Notes]

[a] People v. Carter, 380 N.W.2d 314, 319 (Mich. 1982).

[b] Philip E. Johnson, the Unnecessary Crime of Conspiracy, 61 Cal. L. Rev., 1189 (1973).

[c] Krulewitch v. United States, 386 U.S. 440, 448–49 (1949) (Jackson J. Concurring) . . .

[d] Callman v. United States, 384 (U.S. 587, 593–94 (1961).

[e] Abraham S. Goldstein (1959), "Conspiracy to Defraud the United States" *Yale Law Journal*, Vol. 8, at 414.

[f] The common law treated all parties to treason as "principals."

[g] McKnight v. State, 658 N.E.2d 559, 560 (Ind. 1995).

[h] State v. Weed, 396 A.2d 1041 (Md. 1978), Overruled in part, on other grounds, Lewis v. State. 404 A.2d 1073 (Md. 1979).

[i] 4 Blackstone at 35 (a party is a principal if he kills another by inciting a madman to commit murder).

[j] Queen v. Manley, 3 Cox Crim. Cas. 104 (1844) (by dictum, D is the principal in the first degree if he convinces a child to take money from his father).

[k] People v. Hack, 556 N.W.2d 187 (Mich. Ct. App. 1996) . . .

[l] McKnight v. State, 658 N.E.2d 559, 560 (Ind. 1995).

[m] McKnight v. State, *ibid.* at 561.

[n] If D coerces X to commit the offense, D is the principal in the first degree through an innocent instrumentality. . . .

[0] State v. Ward. 396 A.2d at 1047.

[p] People v. Cooper. 811 P.2d 742, 747–48 (Cal. 1991).

[q] See also People v. Montoya, 874 P.2d 903, 912–13 (Cal. 1994) (for purposes of accomplice liability, a burglary remains underway as long as the principal in the first degree remains inside the dwelling, therefore, one who joins the scene after the initial entry and intentionally aids at that time is an accomplice to burglary).

[r] *E.g.*, IND. CODE ANN. § 35-44-3-2 (West 1998).

Endnotes, Chapter 5

[1] John Smith (2002), *Smith and Hogan Criminal Law*, 10th ed. (Butterworths: LexisNexis), p. 140.
[2] DPP for Northern Ireland v. Maxwell [1978] 2 All ER 1140. HL; Taylor [1998] Crim. LR. 582, in *ibid.*
[3] Catherine Elliott (2001), *French Criminal Law* (Devon, UK and Oregon, USA: William Publishing), p. 84.
[4] *Ibid.*, p. 85.
[5] Michael Bohlander (2009), *Principles of German Criminal Law* (Hart Publishing), p. 153.
[6] *Ibid.*, p. 156.
[7] *Ibid.*, p. 161.
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*, pp. 161, 163.
[11] Crim. Code, Art. 32(3).
[12] Crim. Code, Art. 37(4).
[13] Crim. Code, Art. 36(3).
[14] Crim. Code, Art. 179.
[15] Crim. Code, Art. 88.
[16] Crim. Code, Art. 41.
[17] Crim. Code, Art. 58(3).
[18] Smith *supra* note 1, p. 142).
[19] Philippe Graven (1965), *An Introduction to Ethiopian Penal Law: Arts. 1–84 Penal Code* (Addis Ababa: Haile Selassie I University and Oxford University Press), p. 94.
[20] *Ibid.*, pp. 95, 96.
[21] The *exposé des motifs* of the 1957 Penal Code shall remain the most reliable supplement to the *Hateta Zemiknyat* (of the 2004 Criminal Code) whenever examining the drafter's intention or legislative intent becomes necessary.
[22] Graven, *supra* note 19, p. 94.
[23] *Ibid*.
[24] Crim. Code, Art. 32(3).
[25] Crim. Code, Art. 41.
[26] Crim. Code, Art. 88.
[27] Crim. Code, Art. 32(1)(b).
[28] Crim. Code, Art. 37.
[29] Smith, *supra* note 1, 140.
[30] Crim. Code, Art. 36.
[31] Crim. Code, Art. 32(1)(b).
[32] Graven, *supra* note 19, p. 105.

[33] The *exposé des motifs* of the 1957 Penal Code reads, "il veut aider l'autrui, de manière indirect, dans l'accomplissement de l'infraction" thereby rendering "aiding . . . in an indirect manner" punishable.
[34] Crim. Code, Art. 40.
[35] Graven, *supra* note 19, p. 106.
[36] Crim. Code, Art. 461.
[37] Crim. Code, Art. 542.
[38] Crim. Code, Arts. 39(1), 254, 335.
[39] Crim. Code, Art. 255.
[40] Crim. Code, Art. 301.
[41] Crim. Code, Art. 36(1).
[42] Crim. Code, Art. 27(2).
[43] Crim. Code, Art. 32(1)(b).
[44] Crim. Code, Art. 32(1)(c).
[45] Graven, *supra* note 19, p. 101.
[46] Crim. Code, Art. 40.
[47] Crim. Code, Art. 39.
[48] Crim. Code, Arts. Arts. 254, 335, 443, 479(1)(b).
[49] Crim. Code, Art. 254.
[50] Crim. Code, Art. 335.
[51] Crim. Code, Arts. 254(3), 335(2).
[52] Crim. Code, Art. 83.
[53] Crim. Code, Art. 479(1)(b).
[54] Crim. Code, Art. 443(1)(a).
[55] Crim. Code, Art. 443(1)(b).
[56] Crim. Code, Art. 399.
[57] Crim. Code, Art. 83.
[58] This provision has erroneously been omitted from the list of articles stated in Article 39.
[59] Crim. Code, Art. 83.
[60] Crim. Code, Art. 38.
[61] I. R. Anderson (1957), "Wharton's Criminal Law and Procedure", in John M. Scheb (2008), *Criminal Law*, 5th ed.(Wadsworth, Cengage Learning), p. 102.
[62] Crim. Code, Art. 257.
[63] Crim. Code, Art. 274(b).
[64] Crim. Code, Art. 300.
[65] Crim. Code, Art. 478.
[66] Crim. Code, Art. 257.
[67] Crim. Code, Art. 300.
[68] Crim. Code, Art. 274(b).
[69] Yates v. United States, 354 U.S. 298 (1957).

[70] Crim. Code, Arts. 135, 140.
[71] Crim. Code, Art. 438.
[72] Crim. Code, Arts. 38(a), 84(d).
[73] Crim. Code, Art. 478.
[74] Crim. Code, Arts. 85, 184–188.
[75] Crim. Code, Art. 38(2).
[76] Crim. Code, Arts. 38(1), 84(1)(d).
[77] Crim. Code, Art. 84(1)(b).
[78] Crim. Code, Art. 35(1).
[79] Crim. Code, Art. 577.
[80]Ashenafi A. v. Public Prosecutor, Supreme Imperial Court, Criminal Appeal No. 35/52 (Eth. Cal., in Steven Lowenstein (1965), *Materials for the Study of the Penal Law of Ethiopia* (Addis Ababa: Haile Selassie I University), p. 254.
[81] *Ashebir B. v. Public Prosecutor*, Supreme Court, Circuit Chilot, Crim. Appeal No. 4/80 Eth. Cal.
[82] Graven, *supra* note 19, p. 99. Graven cites Article 86 of the 1957 Penal Code (i.e. Article 88 under the 2004 Criminal Code).
[83] *Ibid.*
[84] *Ibid.*
[85] Crim. Code Art. 106.
[86] The King v. Richardson, Old Bailey, 168 All Eng. Rep. 296 (1785), in Lowenstein, *supra* note 78,(1965), pp. 255–256.
[87] Don Stuart (1987), *Canadian Criminal Law*, 2nd ed. (Ontario: Carnwell Co.), pp. 527.
[88] *Ibid.*, pp. 527, 528.
[89] *Ibid.*, p. 528.
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*
[93] 1957 Penal Code, Art. 122(c).
[94] 1957 Penal Code, Art. 123(1).
[95] The 1957 Penal Code and the 2004 Commercial Code make a clear distinction between penalties and measures. For example young offenders are not punished but merely face certain measures under the circumstances stipulated under Articles 157 to 165 of the 2004 Criminal Code (Articles 161- 169 of the 1957 Penal Code). To use another example, seizure of dangerous articles according to Article 140 of the 2004 Penal Code (Article 144 of the 1957 Penal Code) was a protective measure and not a penalty. The 1957 Penal Code had a similar lenient position with regard to deprivation of activities that require licence.
[96] 1957 Penal Code, Arts. 146–148.
[97] *Ibid.*, Arts. 148(2), 453.
[98] Crim. Code, Art. 34(4).

[99] Crim. Code, Art. 34(1).
[100] Crim. Code Arts. 34, 513, 716, 777, etc.
[101] Crim. Code, Arts. 34(2), 90(3), 90(4).
[102] Crim. Code, Art. 34(3).
[103] Andrew Ashworth (2003), *Principles of Criminal Law*, 4th ed. (Oxford: Oxford University Press), pp. 115, 116, 119.
[104] Smith, *supra* note 1, p. 143.
[105] *Ibid.*, p. 145.
[106] *Ibid.*, p. 147.
[107] *Ibid.*, p. 145.
[108] R v. Tyrell (1894) 1 Q.B. 710.
[109] Stauffer c. Ministére Public, RO 78 IV 6 (1952) (Switzerland).
[110] Lowenstein, *supra* note 80, p. 258.
[111] Sudan Government v. Abu Ras Teirab and others, 1961, Sudan L. J. 117–118) in Lowenstein, *ibid.*, pp. 258–259.
[112] Lowenstein, *ibid.*, p. 278.
[113] Graven, *supra* note 19, p. 97.
[114] *Mahmoud v Wm Morrison Supermarkets* [2016] UKSC 11, [2016] AC 677 (cited in *infra* note 115).
[115] Law Commission, Corporate Criminal Liability: A Discussion Paper (UK, 9 June 2021), p. 37.
[116] Public Prosecutor v. Nesredin G & Fozia D. Federal First Instance Court, Ginbot 25th 2003 Eth. Cal. (2 June 2011) [Author's summary.]
[117] Elliott (2001), *supra* note 3, pp. 84–91), Footnotes omitted.
[118] Joshua Dressler (2001), *Understanding Criminal Law*, 3rd ed. (New York: Lexis Nexis), pp. 415–497, with omissions. (Most footnotes are omitted, and the original numbers in the footnotes are changed into "a" to "r").

Part II

Responsibility, Defences, Sentencing and Special Offences

General Objectives of Part II

Criminal law is said to have three limbs, namely: (a) establishing the elements of criminal liability, (b) examining whether the defendant has the defences of irresponsibility and/or affirmative defences, and (c) determination of punishment. Part II of this book covers the second and third limbs, and it addresses the issues of responsibility and affirmative defences that can be invoked by the defence counsel and it also deals with the determination of sentences by courts. Moreover, Part II briefly discusses sample offences, overview of three special offences, sample petty offences and the influence of social change on criminal law.

Criminal responsibility (i.e. the absence of grounds of irresponsibility such as insanity) is presumed by the public prosecutor, and the burden of proving otherwise is borne by the defence. Chapter 6 mainly discusses absolute irresponsibility and diminished responsibility. It also highlights the impact of intoxication and infancy in criminal responsibility.

Chapter 7 deals with affirmative defences, i.e. defences not based on the denial of criminal conduct or the *mens rea*, but grounds of defence that are invoked to prove that the conduct of the defendant is lawful, justifiable or excusable. The chapter also relates these categories of affirmative defences with the non-imposition or mitigation of punishment.

Chapter 8 deals with issues that are relevant in the determination of punishment. It explains the purposes of punishment (why punish), the types of punishment (what to punish) and the principles that are relevant in the determination of punishment. Chapter 9 highlights sample offences/petty offences and it briefly discusses sentencing upon conviction based on the Sentencing Guidelines revised in October 2013 (Tikimt 1, 2006 Ethiopian Calendar) and Drafts which were among the background documents during the preparation of the earlier version of the Guidelines that was issued in May 2010 (Ginbot 9, 2002 Ethiopian Calendar).

Chapter 10 highlights special proclamations that deal with issues of a criminal nature that are envisaged under Article 3 of the 2004 Criminal Code, subject to the application of “the general principles” embodied in the Criminal Code unless it is “otherwise expressly provided therein”. They relate three special laws of a criminal nature: anti-terrorism, hate speech and human trafficking and smuggling of persons.

And finally, Chapter 11 deals with the role of social evolution and social change in the development of criminal law. Such wider perspectives facilitate a deeper understanding of the progress in criminal law in the context of the social setting it emanates from and in return regulates.

Chapter 6

Criminal Responsibility

Under Ethiopian criminal law, the term 'responsibility' is mainly used in the context of *status-responsibility*, i.e. the status or capacity of a person to be held liable for offences he/she has committed. For example, Article 52 of the Criminal Code stipulates that "[i]nfants who have not attained the age of nine years shall not be deemed to be criminally responsible" and the provisions of the Criminal Code shall not apply to infants under this category.

The term 'responsibility' may also apply to *role-responsibility*, where a "defendant was responsible for caring for a particular person, or for performing a particular kind of action" as in the case of a lifeguard who "might be held responsible for the death of a drowning child in a swimming pool because the lifeguard is responsible for helping to ensure the safety of those in the pool."[1] The third context in which the word 'responsibility' can be used is *attribution-responsibility*, where "an event is appropriately [attributable] to the defendant such that the defendant can be held responsible for an action of a particular kind."[2] This chapter deals exclusively with *status-responsibility*.

The notion of status-responsibility can be influenced by various theories of criminal responsibility. As Tadros noted, "[t]he most common are theories based on *capacity*, theories based on *choice* and theories based on *character*." According to the *capacity theories of responsibility*, "an individual is responsible for an action only insofar as he had . . . capacity with regard to the action. This might include the capacity to have done otherwise, or the capacity to recognise the wrongfulness of what he has done." On the other hand, *choice* theories "contend that an individual is responsible for his action only insofar as he chose to do it and that he has an acceptable range of choices." Advocates of the *character* theories argue that "an individual is responsible for his action only insofar as his action was reflective of his character."[3]

The notion of status-responsibility under Ethiopian criminal law is highly influenced by the capacity theories of criminal responsibility as can be observed in Articles 48–56 of the Criminal Code. Article 57(1) defines a guilty person as one who, "being responsible for his acts, . . . commits an

offence either intentionally or by negligence." Criminal responsibility and criminal guilt are thus cumulative moral conditions of criminal liability. Unlike criminal guilt (intention or negligence), criminal responsibility is not required to be established by the prosecution. Responsibility is normally presumed unless irresponsibility is invoked by the accused, particularly during preliminary objections (as per Article 130(2)(g) of the Criminal Procedure Code) on the first day of a criminal proceeding. The court may also examine responsibility when it doubts the mental condition of the accused due to signs of partial or complete deprivation of mental faculties.

The provisions that deal with absolute irresponsibility, limited irresponsibility and the defence of intoxication are (respectively) Articles 48, 49 and 50. The issue of responsibility also arises in relation to infants below nine years (Article 52) and young offenders age nine to 15 (Articles 53–55). Although offenders between the ages 15 to 18 are tried under the ordinary provisions of the Penal Code (Article 56), they are entitled to mitigation of penalty (Article 179) or the application of special penalties specified for young persons under Articles 166–168.

1. Absolute Irresponsibility

An offender is said to have performed a criminal act or omission only where his conduct is "willed". A willed act apparently requires the capability to understand the *nature* and *consequences* of one's act and presupposes *the ability to regulate conduct* through reason and conscience. Certain persons, however, lack these capabilities.

There is the tradition of giving due consideration to unhealthy mental state (e.g. insanity) for many centuries. In 1278, for instance, Hugh de Misyn's act of hanging his daughter Cicely "whilst suffering [from] madness" [4] was not considered a criminal offence. *M'Naghten's case* (England, 1843) in particular is a widely cited precedent in this regard. The defendant, obsessed "with certain morbid delusions", murdered a government official. The presiding judge, in his widely quoted instruction to the jury stated the issue to be "whether at the time of his act . . . the . . . accused had a sufficient degree of reason to know that he was doing an act that was wrong."[5] This 'awareness' test and the relatively recent 'irresistible impulse (self-control)' test have been adopted by various legal systems, including Ethiopia's.

Article 48(2) recognizes complete irresponsibility due to biological defects *plus* the resultant psychological effects. The biological defects that constitute grounds of absolute (complete) irresponsibility are:

- age
- illness
- abnormal delay in development
- deterioration of mental faculties or understanding
- any of the biological defects stated under Article 49(1), or
- any similar biological reason

Age refers to the impact of senility because infancy and youth are specifically dealt with under Articles 52–56. *Illness* embraces mental and/or physical diseases that are detrimental to mental faculties. *Abnormal delay* in mental development covers cases where a person has not attained a healthy mental state and includes cases such as "idiotism, cretinism, the consequences of deafness, dumbness, sleeping sickness and the like."[6] And finally, *deterioration* of mental faculties and understanding means derangement due to poison, chronic alcoholism and similar reasons.

In addition to one of these biological defects, the accused who invokes irresponsibility should also suffer from the *psychological* effects of the pathological deficiency. That is, the accused must be "incapable of understanding the nature and consequences of his act, or of regulating his conduct according to such understanding . . . at the time of his act" (Article 48(2)).

Three points must be noted in the psychological domain. First, 'the incapability to *understand* the *nature* and *consequences* of one's act' refers to the inability to know what one is doing and the incapability to foresee the possible consequences of one's act. This is in short the *incapacity for awareness (knowledge).* Second, 'the incapacity to regulate conduct' means the *deprivation of the minimum willpower (volition)* required for willed acts and self-control. Unlike many legal systems, the Penal Code accepts the inability to control one's conduct due to an irresistible impulse caused by the aforementioned biological defects as an alternative ground of irresponsibility. "This is so when the offender is incapable either of making any decision at all (hypnosis, somnambulism) or of refraining from acting as he does . . . (internal coercion depriving him of the power to choose between right and wrong as may occur in cases of kleptomania, pyromania or indecent exposure)."[7] Third, the deprivation of awareness or will must exist "at the time of the act" and not necessarily during the proceedings. Nor should the condition be permanent. For example, an act performed during 'lucid intervals' is punishable if the insane person was, at the moment of the act, sane enough to be aware of his act and to control himself.

In short, if one of the two psychological conditions (i.e. deprivation of awareness or deprivation of will) are proved to exist 'at the time of the act', and if these psychological conditions emanate from one of the biological

(physiological) grounds embodied in Articles 48 and 49, then the person is not responsible for his acts. In such cases courts shall not punish the accused, but shall, according to Article 48(3), pronounce the appropriate measures of treatment; or it shall require confinement in a suitable institution (Articles 129 to 131) if he poses a danger to society or persons living with him. The term "may order" in Article 48(2) of the English version (1957 Penal Code) should have read "shall order" as in the Amharic and French versions. The English version of Article 48(3) of the 2004 Criminal Code has done the same mistranslation while the Amharic version reads "ያዝዛል /shall order".

The amendments made to Articles 48 and 49 have indeed enhanced the clarity of both provisions and have taken developments in medical science into account. The biological conditions stated under Article 48(1) paragraph 2 of the 1957 Penal Code have been amended under Article 48(2) of the 2004 Criminal Code, and the biological grounds that constitute one of the ingredient elements of the provision include "one of the causes specified under Article 49 sub-Article 1 or any other similar biological cause". A similar amendment is made in Article 49, which now refers to the biological conditions stated under Article 48(2) and further allows courts to consider "any other similar biological cause". The phrase "or any other similar biological cause" which is embodied in Articles 48 and 49 of the 2004 Criminal Code is meant to accommodate current and prospective changes and dynamism in medical science.

The concept of irresponsibility as a result of insanity can be examined from teleological or purpose-driven (e.g. utilitarian) and deontological (duty-based) perspectives. Cognitive disorder does not allow the victim to have an accurate perception of reality, and a person under an evaluative or volitional disorder cannot control himself. According to the utilitarian perspective, punishing such persons does not serve the purposes of deterrence or reform. And with regard to prevention or incapacitation, imprisonment is not the only means towards attaining this objective because mental institutions can serve the objective of segregating the insane from the society and they can meanwhile avail treatment than punishment. From the retributive perspective, insane persons are "no more the proper subjects of moral evaluation than are young infants. . . ."[8] In *Holloway v. United States*, the court ruled that "a man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame."[9]

Dressler[10] states the various arguments forwarded against the insanity defence, including the following:

- Abolitionist arguments favour the abolition of the insanity defence “as part of the broader effort to reduce the number of excuse defenses”. There are also abolitionists who advocate the expansion of the law of excuses but “do not want to treat mentally ill people more leniently than others perceived by them to be equally morally blameless.”
- “Abolitionists assert that the insanity defense results in abuse of the criminal justice system” although “there is little or no empirical support for this proposition”. Moreover, the insanity plea is rarely invoked and has a relatively low success rate.
- Abolitionists fear that the insanity defence will diminish the deterrent effect of criminal sanctions on would-be wrongdoers whose mental illness is not severe because it would give them the wrong impression that they can invoke the defence to avoid conviction. Defenders of the insanity defence accept the validity of this argument, but suggest that “the solution is not to abolish the defences, but . . . to educate the public regarding the true effect of the insanity defence.”

Although there are few states in the US that are influenced by such abolitionist arguments, they “permit a defendant to introduce evidence of her mental disease or defect in order to rebut the prosecution’s claim that she possessed the mental state required in the definition of the crime.”[11] Apparently, the insanity defence cannot be invoked where an accused becomes insane after the offence he/she is charged of is committed. Under such circumstances the issue becomes whether the defendant can pursue the criminal proceedings under his/her condition of insanity; or, if the defendant is convicted, whether the sentence must be implemented.

2. Partial Irresponsibility

We can observe that “[t]here are innumerable transitional [mental] states between the insane and the normal.”[12] The line of demarcation between the sane person and the person with partial insanity (or diminished sanity) thus becomes difficult. Persons “who are mentally ill but who are at least partially capable of discerning their wrongdoing or of controlling their conduct fall outside the defence”[13] of absolute irresponsibility. The defendant who falls under neither complete irresponsibility nor responsibility is classified into the category of limited or diminished responsibility in view of his reduced awareness and willpower. Article 49 deals with such persons.

The alternative biological defects stated under Article 49(1) are the following:

- any of the biological reasons stated (under Article 48(2)) with regard to absolute irresponsibility
- derangement of mind and understanding
- arrested mental development
- abnormal or deficient condition, or
- any other similar biological reason.

The English version of Article 49(1) has omitted the words "of mind and understanding" after the word "derangement" and it has also omitted the element "arrested mental development." This seems to be an error and not an amendment because these changes do not appear in the official Amharic version. The changes have not also been indicated in the *exposé des motifs* (*Hateta Zemiknyat*).

The biological defects in both provisions (i.e. Articles 48(2) and 49(1)) are similar in content despite variation in form. The reciprocal cross-reference embodied in both provisions renders Articles 48(2) and 49(1) applicable in the identification of the biological factors in absolute irresponsibility and diminished responsibility. However, the psychological effects stated under Article 49 are less serious than those embodied in Article 48. At times, the same biological defect (e.g. retarded mental development) may, in varying gravity, entail psychological effects with different degrees of seriousness. The psychological effect is thus crucial in distinguishing limited irresponsibility from absolute irresponsibility.

Unlike totally irresponsible persons, offenders with limited responsibility do not psychologically suffer from total deprivation of understanding and self-regulation (volition). They are "partially incapable of understanding the nature or consequences thereof or regulating their conduct according to such understanding".[14] In effect, such persons are partially responsible and are entitled to reduced penalty under Article 180, which allows free mitigation. The court may in addition order appropriate measures of "treatment, correction or protection" (Article 49(2)) in accordance with Articles 133 *cum* 129 to 131.

3. Determination of Absolute and Partial Irresponsibility

The court determines irresponsibility (complete or partial) by expert evidence and through an inquiry into the "character, antecedents and circumstances of the accused person" (Article 51(1) paragraph 1). It is mandatory that courts obtain expert evidence (Article 51(1) paragraph 2) when the accused person shows signs of deranged mind or epilepsy, is deaf and mute or is suffering from chronic intoxication due to drugs or alcohol.

The court appoints one or more experts and identifies the doubts to be examined and the terms of reference. Expert evidence will describe the condition of the accused at the time of the act and during the trial and "its effect upon his faculties of judgement and free determination" (Article 51(2)). The court may freely draw the legal inferences from the medical evidence (Article 51(3)) although it shall be bound by "definite scientific findings."

Certain questions can arise in relation with Article 51(2) paragraph 2, which provides that "[t]he expert evidence shall describe the *present* condition of the accused person and its effect upon his faculties of judgment and free determination" [italics added]. What does the term "present" indicate? Does it mean that the court enquires into the cognitive and evaluative conditions of the accused person during the trial rather than his conditions during the commission of the offence?

Articles 48 and 49 require that the biological conditions and the psychological effects stated therein should exist "at the time of [the offender's] act." The question then arises whether a medical examination can evaluate the cognitive and volitional conditions of the accused retroactively. Of course there may be times when a person's condition is known at the time of the criminal act, as in the case when an inmate of a mental institution or a person under treatment somehow manages to escape and commits an offence. For the most part, however, it is difficult to expect expert evidence regarding the retroactive mental condition of an accused person, and the problem becomes graver as more and more days separate the time of the act and that of the medical examination.

There is inconsistency between the Amharic and English versions. The Amharic version of Article 51(2) paragraph 2 of the 2004 Criminal Code provides:

> ተከሳሹ ወንጀሉን ባደረገበት ጊዜና ለፍርድ በቀረበበት ጊዜ ያለውን ሁኔታ፣ በማመዛዘንና በመወሰን ችሎታው ላይ ሊያደርስ የሚችለውን ውጤት ምርመራው ማረጋገጥ አለበት። . . .

Its direct translation would read, "The expert evidence shall describe the condition of the accused during the commission of the offence and during trial and its effect upon his faculties of judgment and free determination. . . ." However, the English version of the same provision stipulates: "The expert evidence shall describe the *present* condition of the accused person and its effect upon his faculties of judgment and free determination." [italics added]

This discrepancy did not exist between the English and French versions of the 1957 Penal Code. However, the Amharic version of the 1957 required expert evidence to describe the "condition of the accused" without including

the word “present” as a temporal qualification. It reads:

> በተከሳሹ ሁኔታ፣ በማመዛዘንና በመወሰን ችሎታው ላይ ሁኔታው ሊያደርስ የሚችለውን ውጤት ምርመራው ማረጋገጥ አለበት። . . .

The words used in the English version of Article 51(2) paragraph 2 of both the 1957 Penal Code the 2004 Criminal Code are identical. The original version of the provision as it was drafted in French also had identical content with the English version in making reference to the *present condition* of the accused and not to his/her condition during the commission of the offence:

> L’expertise établira l’état existant et ses effets sur les facultés d’appréciation et de détermination de l’inculpé. . . .

The words *l’état existant* clearly show that expert evidence is expected to describe the *present* condition of the accused. The content of the Amharic version of this provision in the 2004 Criminal Code is not thus a mistranslation. The *exposé des motifs* of the 2004 Criminal Code (*Hateta Zemiknyat*) indicates the reason why the change has been made:

> . . . በዚህ ንዑስ ቁጥር ሁለተኛው ፓራግራፍ ላይ በተከሳሹ ሁኔታ ላይ የሚለው አገላለጽ የተከሳሹን ሁኔታ ሲመረምር ልዩ አዋቂው መመልከት ያለበት ወንጀሉ በተፈፀመ ጊዜ ያለውን ሁኔታ መሆን ስላለበት ተከሳሹ በሚመረመርበት ወይም ለፍርድ ቤት በሚቀርብበት ጊዜ ያለው ሁኔታ በወንጀል ሥነ ሥርዓት ሕግ ሊሸፈን ስለሚገባ ይህንኑ ለማሳየት ሲባል ተከሳሹ ወንጀሉን በሠራበት ጊዜ በሚል ተገልጿል።
>
> . . . The second paragraph of the sub-Article [i.e. Article 51(2)] refers to the condition of the accused, and this should refer to his condition during the commission of the offence, while the present condition of the accused should be addressed in the Criminal Procedure Code. The phrase “at the time of the commission of the offence” has thus been used.

Unlike the *exposé des motifs’* statement, however, the present condition of the accused has not been left to the Criminal Procedure Code but covered under Article 51(2) second paragraph because the Amharic version of the provision requires expert evidence to describe “the condition of the accused during the commission of the offence and during trial and its effect upon his faculties of judgment and free determination.”

It is indeed difficult to require retroactive expert description of the cognitive and evaluative conditions of an accused person. It is reasonable to seek an expert evaluation of the present condition of the accused person so that the court can make inference about his condition during the commission of the offence based on, *inter alia*, expert explanation of what the present condition of the accused may indicate about his or her mental and volitional state during the commission of the offence.

4. Current Trends in the Defence of Insanity

There has been doctrinal and judicial scrutiny towards the re-interpretation of the defence of 'insanity'. This includes the discourse on 'disease of the mind' vis-à-vis 'defect of reason.' As Tadros notes:[15]

> The leading case in which the phrase 'defect of reason' has been considered by the judiciary in England and Wales is *R. v. Clarke* [(1972) 1 All ER 219].
>
> In that case, the Court of Appeal upheld the conviction of a depressed shoplifter who transferred some items from her shopping basket to her own bag before getting to the checkout in a supermarket. …[H]er confusion and absentmindedness at the time of performing the act were insufficient to be called a defect of reason for the purposes of the M'Naghten Rules. As Ackner J put it:
>
> > The *M'Naghten* rules relate to accused persons who by reason of a disease of the mind are deprived of the power of reasoning. They do not apply and never have applied to those who retain the power of reasoning but who in moments of confusion or absent-mindedness fail to use their powers to the full (footnote omitted).

Tadros states that the Court of Appeal made a distinction between mere failure "to recognise the nature and quality of the act as a result of her mental disorder" (which is insufficient for the defense of insanity) and being deprived on one's 'power of reasoning', and the subsequent "failure to recognise the nature and quality of her act or that it was wrong."[16] In other words the Court of Appeal distinguished between "the defendant who merely *did not* recognise the nature and quality of her act and the defendant who *could not* do so." It is in this regard that Duff notes that "[t]he idea of capacity rather becomes more problematic when we cannot so easily separate capacity from will, or distinguish 'will not' from 'cannot' as different explanations of 'does not'."[17]

In *R. v. Clarke* the defendant stated that "she had no intent to steal. She suffered from diabetes and had various domestic problems. There was evidence that prior to the alleged theft, she had behaved absent-mindedly in the home."[18] She argued that "she must have put the articles in her bag in a moment of absent-mindedness." Moreover, two expert witnesses who were her doctor and a consultant psychiatrist "testified that she was suffering from depression which one of them accepted to be a minor mental illness which could produce absent-mindedness consistent with her story."[19]

In the US, the reform regarding the insanity defence is underway since "the wake of John Hinckley's insanity acquittal for the attempted murder of President Reagan."[20] The reforms mainly included revisiting the affirmative defence of not guilty by reason of insanity (NGRI) and the inclusion of the guilty but mentally ill (GBMI) verdict.

> … [T]he GBMI verdict option reduced markedly the proportion of psychotic defendants found NGRI and the proportion of personality disordered defendants found guilty. There were no significant differences between diagnostic groups in the likelihood of being found GBMI. Most subjects preferred to utilize the GBMI option as a compromise verdict even in the face of very severe mental illness.[21]

The Federal Insanity Reform Act that was enacted in the US in 1984 came after the acquittal of the defendant in President Reagan's attempted assassination. There are still proposals for change regarding offenders with severe personality disorder "based on current clinical knowledge, neuropsychology and neuroimagining studies of the brain."[22] Suggestions have been forwarded that "criminal non-responsibility be changed from strict mental illness to a *disease of the mind or state of mind,* which, at the time of a crime, incapacitates the cognitive and decisional capacities of the offender."[23] Gaines and Miller note that:

> In 1981 John Hinckley was found not guilty of the attempted murder of President Ronald Reagan by reason of insanity. Due to the media attention gained by this and other high visibility cases many Americans see the insanity defense as an easy means for violent criminals to 'cheat' the criminal justice system. In fact this public perception is faulty. The insanity defense is rarely entered and is even less likely to result in an acquittal as it is difficult to prove. [24]

The notion of GBMI (*Guilty but Mentally Ill*) has gained attention as the result of "the public backlash against the insanity defense" which has "caused seven state legislatures to pass 'guilty but mentally ill' statutes." Under these laws, a defendant is guilty but mentally ill if:

> At the time of the commission of the act constituting the offense, he [or she] had the capacity to distinguish between right from wrong ... but because of mental disease or defect he [or she] lacked sufficient capacity to conform his [or her] conduct to the requirements of the law.[25]

This has enabled the conviction of defendants based on the premise that the accused is not insane (and thus criminally responsible) but mentally ill.

"Defendants found guilty but mentally ill generally spend the early years of their sentences in a psychiatric hospital and the rest of the time in prison, or they receive treatment while in prison."[26]

5. Intoxication

A person who intentionally puts himself into a state of partial or complete intoxication by means of alcohol, drugs or other means in order to have the courage to commit an offence cannot invoke irresponsibility.[27] But if one puts himself into intoxication without a prior direct or indirect intention to commit a crime, he shall be punished for his negligence[28] if "he was aware or could or should have been aware that he was exposing himself . . . to the risk of committing an offence." But the accused shall not be punished where the offence committed is not punishable on the charge of negligence. In case the accused is only partially (but not completely) drunk, he is punishable under limited responsibility[29] for the offences that are not (directly or indirectly) intended prior to partial intoxication, because the offender is not completely incapable of awareness and self-control. Philippe Graven illustrates the issues:

> A gets completely drunk in order to kill B, but when in B's house, rapes B's daughter. Even though it is established that . . . alcohol stimulated his sexual urge, he may not be convicted of rape, for the latter offence is always an intentional one. . . . If A [however gets partially drunk] . . . for the purpose of killing B, but rapes B's daughter, he is guilty of intentional rape . . . for he was not completely incapable . . . of understanding the nature of his act. . . ."[30]

Where the offender puts himself into complete intoxication by his own fault, he is punishable under Article 491 for the offence he commits without contemplation or intention.[31] Pursuant to Article 491, a penalty not exceeding one year is imposed for the offence of disturbing the public peace if an offence punishable by at least an imprisonment of one year is committed under complete drunkenness.

Article 50(4) of the 2004 Criminal Code is a new provision. It states that a person who commits an offence without criminal fault or under coercion shall not be liable to punishment. Its literal reading seems to repeat the stipulation regarding absence of moral guilt in Article 57(1) and the affirmative defence of absolute coercion (Article 71). According to the *exposé des motifs* (*Hateta Zemiknyat*), Article 50(4) deals with cases whereby an offender commits an offence under complete intoxication if such intoxication occurs without fault of the accused or as a result of absolute coercion by another person.

6. Infants and Young Offenders

Criminal law is not applicable to infants although the age limit varies in different legal systems. Under Article 52, infants who have not attained the age of nine years are not responsible for their acts. However the family, teachers, guardian or other organs (in charge of taking care of a child) take the appropriate steps in the upbringing and control of infants. The Criminal Code not only considers infants as irresponsible for their acts, but also safeguards them by rendering maltreatment and neglect (by parents or by those in charge) a punishable offence.[32]

In view of the current information age and social media, there are arguments that children are increasingly becoming vulnerable to movies and other scenes that can induce them toward the commission of offences. This has raised the issue whether the age threshold for exoneration from criminal liability needs to be classified into rebuttable and irrebuttable presumptions. There are jurisdictions which hold that children below the age of seven are unable to form a criminal *mens rea* and this is considered as irrebuttable, while children between seven to fourteen are also, in principle, unable to form criminal *mens rea* which can be rebuttable based on particular cases.

Young offenders between the ages of nine and 15 years are not entitled to complete irresponsibility. Yet they are not subject to ordinary penalties.[33] In case a young offender is convicted, the measures and penalties stated in Articles 157 to 168 shall apply. The measures may be admission to a curative institution (Article 158), supervised education (Article 159), reprimand (Article 160), or school or home arrest (Article 161). The court may order admission to a corrective institution[34] "where the character, antecedents or disposition of young offenders is bad." Such measures[35] are not regarded as criminal sentences.

The measures stated in Articles 158 and 159 shall continue for a period "deemed necessary by the medical or supervisory authority, and may (if necessary) continue until the young offender attains the age of eighteen years".[36] Admission to a corrective institution, on the other hand, is for a period fixed by the judgment. The period shall be from one to five years,[37] but shall not extend beyond the "coming to age" of the young offender. This is expected to be interpreted as attainment of civil majority upon 18 years of age, rather than reference to penal majority at 15 years of age.

If the young offender commits a serious offence which is punishable with rigorous imprisonment of 10 or more years or with the death penalty, the offender is normally sent to a corrective institution.[38] In case this measure is ineffective, that is, "if he is incorrigible and is likely to be a cause of trouble, insecurity or corruption to others",[39] the court may resort to penalty and send

the young offender to a penitentiary institution (detention). The period of detention may be one to 10 years.[40] The minimum penalty was three years under Article 173(2) of the 1957 Penal Code. It is to be noted that the term served in a corrective institution[41] and its favourable impact on the reform of the young offender shall be taken into account while the court determines the term of detention.

A young offender who was initially sent to a corrective institution shall be transferred to a detention institution[42] if such measure becomes necessary due to the young offender's misconduct or due to the danger he constitutes to others, or if he attains the age of majority while serving a sentence. However, the regime of detention shall be simple imprisonment[43] and the young offender shall be entitled to conditional release, i.e. parole,[44] under the usual conditions provided under Article 113 if he appears to have been reformed. The term spent in a corrective institution is taken into account, and the detention takes place "under the regime of simple imprisonment."

Upon the attainment of 15 years of age, a person is said to have reached the age of *penal majority*. Offenders between the ages of 15 and 18 at the time of the offence are thus regarded as responsible for their acts and are subjected to ordinary penalties,[45] except the death penalty.[46] Nevertheless, the court may, according to the particular circumstances of the case, allow mitigated sentence[47] or impose a penalty[48] designed to young offenders.

Review Exercises

1. D was a man of subnormal intelligence who suffered from stomach ulcers. One day, he came home from work and took a hammer to mend the bed which was broken. As he worked, the 14-month-old child of the woman with whom he was cohabiting cried and would not stop crying. He lost his temper, picked up the child and shook it "with full force", and the child died. The evidence showed that the child's skull was fractured into two places but the medical evidence was that the death was probably due to asphyxia.[49] Can D invoke diminished responsibility under Article 49 of the Criminal Code?
2. D kills P under the delusion that he is obeying a divine command. Discuss D's criminal liability, if any.
3. Discuss criminal responsibility based on the relevant provision of the Criminal Code:
   a) A decided to kill P but felt incapable of carrying out his plan in cold blood. He got drunk to dampen his inhibitions until he reached a condition in which his fear was obliterated. While he was driving to P's house D ran down a pedestrian, who happened to be P himself.[50]

b) A spends a quiet evening at home, reading a book. As the night is cold and there is no fireplace in his sitting room, he puts his book down and pours himself brandy. Finally, he gets completely drunk and rapes his female servant.[51]

c) The defendant, according to his own admission, killed his uncle's wife. He said that he strangled her with his necktie at her own request. There was evidence that he had acted under the direction of his subconscious mind. Counsel argued that a person under an impulse he cannot control is not criminally responsible.[52]

d) Byrne strangled a young woman in a Y.W.C.A hostel, and after her death committed horrifying mutilations on her body. Byrne had been subject to violent desires from an early age. The impulse or urge of those desires was stronger than the normal impulse or urge of sex, so that he found it very difficult or, perhaps, impossible in some cases to resist putting the desire into practice. The act of killing the girl was done under such an impulse or urge.[53]

Case 10

Addis Ababa High Court

Sene 3rd, 1979 Eth. Cal. (June 10th 1987)

Hundie v. Public Prosecutor[54]

The defendant is charged with ordinary homicide (Article 523 of the 1957 Penal Code). Although the defendant invoked insanity, the letter form Emmanuel Mental Hospital (dated Tikimt 26th 1979 Eth. Cal.) stated that the defendant is not mentally insane, and that he was not also insane during the commission of the offence.

In the course of the trial, the first prosecution witness (W/ro Nardos) stated the following:

> I know the defendant. He is the nephew of my husband. I don't know what he is accused of. The defendant . . . had come to our house on Meskerem 30th 1978 at noon. He was not talking coherently, and he did not control his actions properly. We tried to restrain . . . and lodge him at our house. But on Tikimt 3rd 1978 Eth. Cal. he was entirely sick mentally and he was running towards various places such as forests and to houses of persons whom he doesn't know. . . . I couldn't constrain him . . . and he kept on running. At one point I heard screams and went to the place where a crowd had gathered. He had an axe which he didn't have while he left our house, and was saying "zeraf, who am I ?".

The witnesses of the prosecutor and the defence indicated that the defendant did not have a sound mind. This was further substantiated by a letter from the Ethiopian Air Force where the defendant was working.

The issue raised by the court was whether it should pursue the expert

evidence from Emmanuel Hospital or what was stated by the witnesses regarding the factual circumstances under which the offence was committed.

The circumstantial evidence, testamentary evidence and the letter from Ethiopian Air Force indicated the mental illness of the defendant. However, the Court ruled that the expert evidence from Emmanuel Mental Hospital indicated that the defendant is not mentally ill, and is in effect, responsible to the offence he has committed; and it found him guilty of ordinary homicide under Article 523 (of the 1957 Penal Code).

After having convicted the defendant, the court mitigated the sentence to the duration he has stayed in prison, i.e. a year and eight months. One of the reasons for the mitigation of penalty was that the acts of the defendant during the period that surrounded the commission of the offence did not indicate sound mind even if the expert medical evidence stated otherwise.

Questions

1. Article 51 of the Criminal Code provides the following:

   (1) When there is a doubt as to the responsibility of the accused person, whether absolute or partial, the Court shall obtain expert evidence and may order an enquiry to be made as to the character, antecedents and circumstances of the accused person. . . .
   (2) The expert or experts shall be appointed by the court under the ordinary rules of procedure. . . .
   (3) On the basis of the expert evidence, the Court shall make such decision as it thinks fit. In reaching its decision it shall be bound solely by definite scientific findings and not by the appreciation of the expert as to the legal inferences to be drawn therefrom.

   What does the phrase "When there is a doubt as to the responsibility of the accused person" mean under Article 51(1)?

   Could the court have harboured "doubt as to the responsibility of the accused person" even after it received the "expert evidence" from Emmanuel Mental Hospital?

   If so, could it have sought further expert evidence in light of the inconsistency between the 'expert evidence' and other evidence obtained from prosecution witnesses, defence witnesses and the letter from the Ethiopian Air Force?

2. The existence of one of the biological reasons stated under Articles 48 and 49 and the psychological effects stated therein clearly show that the existence of insanity is not a *sine qua non* condition for the applicability of the provisions on absolute irresponsibility or diminished responsibility. In other words, any other biological reason that affects the cognition of a person and that causes the psychological effects (stated in the provisions) during the commission of the offence would render Articles 48 or 49 applicable. Was the court thus required to probe further and seek expert evidence as to whether the defendant was suffering from mental and

psychological problems other than insanity?

3. Assuming that the defendant was found irresponsible or partially responsible, what would the outcome of the case be?
   a) Would the defendant be released on the day of the court's decision?
   b) Would the defendant be sent to an institution for treatment?
   c) Which one of these two courses of action ("a" or "b") would serve the purpose of criminal law, the welfare of the society and the well-being of a defendant under similar circumstances?

Case 11

Addis Ababa High Court

Meskerem 11th 1981 Eth. Cal (September 21st 1988)

Abebe D. v. Public Prosecutor

The defendant is charged with ordinary homicide (Article 523 of the 1957 Penal Code) for having stabbed Captain Yilma Delelew to death on Hamle 1st 1979 Eth. Cal. (July 8th 1987). The victim and other neighbours of the defendant were informed that the defendant had locked his doors to commit suicide. They called the defendant's name aloud and then broke into his house to save him from the suicide they thought he was committing. It was getting dark and they had kerosene lamps (kuraz). The victim, who was in front of the other neighbours, did not see the defendant, who was standing beside the door holding a knife. The defendant then puffed the kerosene lamp (kuraz) off and stabbed the victim, attempted to stab another person and finally tried to kill himself.

Expert evidence from Emmanuel Mental Hospital indicated that the defendant has limited (partial) responsibility. The Court accordingly convicted the defendant under Article 523 (of the 1957 Penal Code) and decided that the defendant has partial responsibility for the offence charged pursuant to Article 49. The court then mitigated the penalty to three years of imprisonment and ordered the Prisons Administration to send the defendant to Emmanuel Mental Hospital for treatment.

Questions

1. Compare the decisions in Cases 10 and 11 and discuss their conformity with purposes of punishment.
2. The defence counsel (in Case 11) had invoked absolute irresponsibility. The reasoning of the court towards its decision of limited responsibility reads:

   > The victim and defendant were friends. Moreover there was no quarrel between them before the incident. The act of the defendant in stabbing the victim, his attempt to attack another person and then kill himself are acts that are not expected from a person with a sound mind. On the other hand, the defendant knowingly closed his door, hid himself behind the door when the victim and others

> broke in to save him, puffed off the [kerosene] lamp and was under a condition contrary to the previous expectation of the neighbours who thought that he was in the act of committing suicide. These conditions show that the defendant was not totally unconscious.

Does the reasoning of the Court justify limited responsibility rather than absolute irresponsibility?

Should a person be entirely "unconscious" for absolute irresponsibility to be invoked?

Or is the word "unconscious" stated as a passing remark rather than as a core element of the reasoning in view of the fact that the basis of the decision was expert evidence?

3. The decision of the court cites the expert evidence from Emmanuel Mental Hospital that indicated limited responsibility. On the contrary, Article 51(2) paragraph 2 (of the 1957 Penal Code and the current Criminal Code) provides that "the expert evidence shall describe the present condition of the accused person and its effect upon his faculties of judgment and free determination", and according to Article 51(3) the Court shall "be bound solely by definite scientific findings and not by the appreciation of the expert as to the legal inferences to be drawn therefrom." Discuss the difference between "definite findings" in expert evidence and an expert's views on "the legal inferences to be drawn therefrom."

Case 12

Supreme Imperial Court

Criminal Appeal No. 91/51 (1959 G.C)

Getachew G. v. Advocate General

The defence counsel for the appellant invoked insanity and a plea of irresponsibility for the appellant's act of killing "Lieutenant Tsigeh Getaneh by shooting him in the back." The expert witness called by the defence, the medical director of the Emmanuel Mental Hospital, had the appellant under observation and concluded that the appellant is a "constitutional psychopath". According to the expert evidence:

> [The appellant] belongs to the group of the emotionally pathological personalities, characterized by defects in the nature or control of the emotional or affective function of the personality; they are impulsive and excitable. The usual amount of stress and strain (physical, psychological, professional, 'military disciple') which in the average or so-called normal individuals, would not elicit any normal reaction, is, for this kind of constitutional psychopathy, too strong, and, owing either to the increased strength of their instinctual drives or to the inability to appropriately control and restrain them –may bring about an unusually pronounced tendency to yield to impulses of violence without restraint and thus become dangerous to society.

The appellate counsel argued, *inter alia*, that the High Court "confined itself to the consideration and interpretation of the medico-legal phrase 'mental disease', an expression which does not appear in [Articles 48 and 49]".

The Imperial Supreme Court accepted the argument that neither Article 48 nor Article 49 mentions "mental disease", but stated that the term "psychopath" is "a vague term that does not indicate a particular state of mind or condition." The medical evidence, according to the Imperial Supreme Court, merely indicates that "the appellant is more inclined to give way to his instincts than another person who is normally referred to as 'normal'." The Court further stated that the appellant "fully understands the nature and consequences of his acts" and "he is not subject to act on an irresistible impulse", but is "merely inclined to use less resistance than another person to do what he knows is wrong even knowing the consequences of his acts." And finally the Court's reasoning indicated that the appellant's state or condition is not due to age, or illness, or abnormal delay in his development or deterioration of his mental faculties, thereby rendering Article 48 inapplicable.

The applicability of Article 49 was rejected by the Imperial Supreme Court on the additional ground that "Article 49 is not intended to cover a case of weakness of character which, having regard to a normal individual, may be said to be 'an abnormal or deficient condition.' The cause of the abnormal or deficient condition, within the meaning of Article 49, must be due to some biological factor and not such factors as upbringing or atmosphere of living".

The Imperial Supreme Court confirmed the decision of the High Court, which considered the appellant fully responsible and guilty of homicide of the first degree. It also confirmed the sentence of death pronounced by the High Court, and the sentence was later confirmed by the Emperor pursuant to the 1955 Revised Constitution and the Criminal Procedure Code.

Questions

1. Comment on the position of the court that the "cause of the abnormal or deficient condition, within the meaning of Article 49, must be due to some biological factor and not such factors as upbringing or atmosphere of living". Assuming that a person's upbringing or social environment brings about a deficient mental condition, shouldn't it be regarded as a 'biological condition that can possibly be regarded one of the elements under Articles 48 and 49?
2. Compare the constituent elements of Articles 48(2) and 49(1) of the 2004 Criminal Code with Articles 48(1) paragraph 2 and Article 49(1) of the 1957 Penal Code. Would the application of the new Criminal Code lead to a different decision if similar facts are brought to a court at present?
3. Compare *Getachew G.*'s case (Case 12) with the case of D, the man of subnormal intelligence in Review Exercise No. 1 above who shook a child to death, and discuss the criminal liability of D under Ethiopian criminal law.

Readings on Chapter 6

Reading 1: Comparative Code Provisions

US Model Penal Code

Article 4. Responsibility

§ 4.01. Mental Disease or Defect Excluding Responsibility.

1. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
2. As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

German Criminal Code[55]

Foundations of Criminal Liability

Section 19: Lack of Criminal Capacity of Children

Persons who have not attained the age of fourteen at the time of the commission of the offence shall be deemed to act without guilt.

Section 20: Insanity

Any person who at the time of the commission of the offence is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality, shall be deemed to act without guilt.

Section 21: Diminished Responsibility

If the capacity of the offender to appreciate the unlawfulness of his actions or to act in accordance with any such appreciation is substantially diminished at the time of the commission of the offence due to one of the reasons indicated in section 20, the sentence may be mitigated pursuant to section 49(1).

French Penal Code

Grounds for Absence or Attenuation of Liability Articles 122-1 to 122-8

Article 122-1

A person is not criminally liable who, when the act was committed, was suffering from a psychological or neuropsychological disorder which destroyed his discernment or his ability to control his actions.

A person who, at the time he acted, was suffering from a psychological or neuropsychological disorder which reduced his discernment or impeded his ability to control his actions, remains punishable; however, the court shall take this into account when it decides the penalty and determines its regime. . . .

Article 122-8

(Act no. 2002-1138 of 9 September 2002 art. 11 Official Journal of 10 September 2002)

Minors able to understand what they are doing are criminally responsible for the felonies, misdemeanours or petty offences of which they have been found guilty, and are subject to measures of protection, assistance, supervision and education according to the conditions laid down by specific legislation.

This legislation also determines the educational measures that may be imposed upon minors aged between ten and eighteen years of age, as well as the penalties which may be imposed upon minors aged between thirteen and eighteen years old, taking into account the reduction in responsibility resulting from their age.

Swiss Penal Code

of 21 December 1937 (Status as of 1 July 2020)

Art. 19 Absence of legal responsibility due to a mental disorder and diminished responsibility

1. If the person concerned was unable at the time of the act to appreciate that his act was wrong or to act in accordance with this appreciation of the act, he is not liable to a penalty.
2. If the person concerned was only partially able at the time of the act to appreciate that his act was wrong or to act in accordance with this appreciation of the act, the court shall reduce the sentence.
3. Measures in accordance with Articles 59–61, 63, 64, 67, 67*b* and 67*e* may, however, be taken.
4. If it was possible for the person concerned to avoid his state of mental incapacity or diminished responsibility and had he done so to foresee the act that may be committed in that state, paragraphs 1–3 do not apply.

Art. 20 Doubt as to legal responsibility

If there are serious grounds for believing that the accused may not be legally responsible due to a mental disorder, the investigating authority or the court shall order a specialist report from an expert.

Reading 2: Andenaes[56]

The Concept of Responsibility

Criminal responsibility assumes a certain degree of mental health and maturity in the actor. If a person fulfils these requirements, he is criminally *responsible*; otherwise he is not. The Penal Code does not use the expressions responsible and irresponsible, but they are part of the traditional legal terminology. Instead of responsibility, we could speak about the faculty of punishable guilt. Only protective measures without penal character may be imposed on criminally irresponsible persons.

Attempts have been made to give a positive description of the nature of responsibility. The best known among these is the definition by v. Lisez: "Responsibility is the normal ability to be influenced by motives." This points in the right direction, but it gives little help because it does not say *how great* the departure from the normal must be before irresponsibility can be said to exist. Both our laws and foreign laws confine themselves to stating what special circumstances preclude responsibility. Thus, responsibility is the norm, irresponsibility is something which requires special reasons. The delimitations of irresponsibility are different in various jurisdictions, and thus it is impossible to give a *universal* definition of responsibility and irresponsibility.

Various Systems

One usually distinguishes between three different systems of the reasons for irresponsibility: the *biological* (also called the medical), the *psychological* (also called the *metaphysical*) and the mixed. According to the biological systems, the law describes the conditions which preclude responsibility by biological and medical terms (age, insanity, unconsciousness). According to the psychological system, the determining factor is the person's capacity for insight and free decision –the expressions vary greatly. According to the mixed system, both types of characteristics are used.

The Penal Code of 1902 originally had a mixed system. After the 1929 revision of the provisions on responsibility, however, it rests completely on a biological basis. It recognizes three reasons for responsibility: (1) insanity, including extreme feeblemindedness; (2) unconsciousness, except when it is a consequence of voluntary intoxication; (3) age of less than fourteen years. According to the Norwegian law, therefore, a person is responsible if he is over fourteen years of age, and is neither insane, nor unconscious because of reasons other than voluntary intoxication.

Most foreign legal systems have a mixed system. A typical example is the German Penal Code of 1871, which has the following provision on responsibility in its § 51: "i. No act constitutes an offence if its perpetrator at the time of its commission was incapable of appreciating the unlawfulness of his deed or of acting in accordance with such appreciation, by reason of derangement of the senses, morbid disturbance of mental activity or mental deficiency." The Swiss Penal Code of 1937 has a very similar provision.

Such a definition limits the area of irresponsibility more than does our law. Illness must not only exist, but it must in addition either exclude understanding of the unlawfulness, or of the ability to act according to the understanding. Insight into the illegal character of the act can be said to be a psychological nature. The ability to act according to this insight is a metaphysical matter. The law presupposes that the normal person has such a power, and thus builds upon an indeterministic hypothesis. It further presupposes that the insane person may lack this power, but it gives no real assistance to the determination of when this is the case. In some respects the German concept of irresponsibility is broader than ours. It does not require insanity or unconsciousness; moreover, mental disturbances of lesser kind may exempt from punishment if they have excluded the appreciation of the unlawfulness of the act, or the ability to act in accordance with such appreciation. Furthermore, it

treats disturbances of consciousness caused by intoxication according to the exact same rules which govern other disturbances of consciousness.

The reasons for irresponsibility recognized by our law are of a greatly different nature. While insanity and unconsciousness are conditions of illness, or at least of abnormality, youth is a part of the normal development of the individual. Only in a comparison with the fully developed individual can one say that the child lacks normal qualifications. Unconsciousness is in a special position because it is usually a transitory condition, in contrast to the other two reasons for irresponsibility. Unconsciousness due to voluntary intoxication does not preclude responsibility according to our law, not because it is psychologically different from other forms of unconsciousness, but purely for policy reasons.

The Reasons for the Requirement of Responsibility

The requirement of responsibility can be justified in different ways.

The starting point can be that it is *unjust* to punish one who acts under the influence of illness or disturbances of the consciousness. He cannot be regarded as responsible for his acts. And, almost the same reason applies to one who has not yet reached a certain degree of maturity. The concept rests, consciously or unconsciously, on an indeterministic view. The thought here is that the normal person “can be blamed” for his acts, while the irresponsible person cannot. Thus if society must be protected against the irresponsible person, provisions must be used which are not condemnatory and which do not have the infliction of suffering for their purpose.

However, one may also take practical policy considerations as a starting point. From an *individual prevention* point of view, punishment is not suitable to the groups which are involved here. Insane and feeble-minded persons can be more effectively cared for in special institutions than in prisons. As to delinquent children, education is more apt than punishment. From a *general preventive* point of view the imposition of punishment upon persons who lack the capacity to be influenced by the penal threat serves no reasonable purpose. The exclusion of such persons from criminal liability will not lessen the effectiveness of punishment as a means of social control.

Thus, different points of view lead to the same result: certain mental conditions must exist before punishment may be imposed. On the other hand, the precise definition of irresponsibility may differ according to which viewpoint is adopted. Our prevailing rules have been created on the basis of historical development, in which considerations of justice, general prevention, and individual prevention have all had an influence.

Responsibility Must Exist at the Moment of the Action

Responsibility must exist at the time the offence is committed. If the actor was insane, unconscious or under fourteen years of age at the moment of the action, he cannot be punished even though the state of irresponsibility ends before the case comes before the court. By the same reasoning, if he was responsible at the moment of action, criminal liability will not terminate if he later becomes insane. . . .

It may happen that the criminal act itself is committed in a state of irresponsibility, but that the perpetrator could have foreseen this course of events at the outset. A traditional example is the following: A mother who knows that she usually throws herself back and forth in bed while asleep, nevertheless takes her child to bed with her, and crushes it to death in her sleep. She can be held liable for the course of events which she set into motion in a conscious state, just as a person who sets forces of nature in motion. In such cases one generally speaks about *actiones liberae in causa*, [i.e.] “acts which are free in their origin.” One may impose liability for both intentional and negligent causation, depending on the actor’s state of mind when setting the course of events in motion. Liability for an omission which has occurred while a person was in an irresponsible state may also be caused by a previous free action. Example: A railroad worker goes to sleep during working hours, the warning signal is not given, and an accident occurs.

Reading 3

Durham v. United States

United States Court of Appeals District of Columbia Circuit

214 F.2d 862 (1954)[57]

BAZELON, Circuit Judge.

Monte Durham was convicted of housebreaking, by the District Court sitting without a jury. The only defense asserted at the trial was that Durham was of unsound mind at the time of the offense. We are now urged to reverse the conviction . . . because existing tests of criminal responsibility are obsolete and should be superseded.

* * *

II.

It has been ably argued by counsel for Durham that the existing tests in the District of Columbia for determining criminal responsibility, i.e., the so-called right-wrong test supplemented by the irresistible impulse test, are not satisfactory criteria for determining criminal responsibility. We are urged to adopt a different test to be applied on the retrial of this case. This contention has behind it nearly a century of agitation for reform.

A.

The right-wrong test, approved in this jurisdiction in 1882, was the exclusive test of criminal responsibility in the District of Columbia until 1929 when we approved the irresistible impulse test as a supplementary test in *Smith v. United States*. The right-wrong test has its roots in England. There, by the first quarter of the eighteenth century, an accused escaped punishment if he could not distinguish “good and evil,” i.e., if he “doth not know what he is doing, no more than . . . a wild beast.” Later in the same century, the “wild beast” test was abandoned and “right and wrong” was substituted for “good and evil.” And toward the middle of the nineteenth century, the House of Lords in the famous *M’Naghten case* restated what had become the accepted “right-wrong” test in a form which has since been followed, not only in England but in most American jurisdictions as an exclusive test of criminal responsibility:

> . . . every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.

As early as 1838, Isaac Ray, one of the founders of the American Psychiatric Association, in his now classic *Medical Jurisprudence of Insanity*, called knowledge of right and wrong a "fallacious" test of criminal responsibility. This view has long since been substantiated by enormous developments in knowledge of mental life. In 1928 Mr. Justice Cardozo said to the New York Academy of Medicine: "Everyone concedes that the present [legal] definition of insanity has little relation to the truths of mental life."

Medico-legal writers in large number, The Report of the Royal Commission on Capital Punishment 1949–1953, and The Preliminary Report by the Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry present convincing evidence that the right-and-wrong test is "based on an entirely obsolete and misleading conception of the nature of insanity." The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior. As Professor Sheldon Glueck of the Harvard Law School points out in discussing the right-wrong tests, which he calls the knowledge tests:

> It is evident that the knowledge tests unscientifically abstract out of the mental make-up but one phase or element of mental life, the cognitive, which, in this era of dynamic psychology, is beginning to be regarded as not the most important factor in conduct and its disorders. In brief, these tests proceed upon the following questionable assumptions of an outworn era in psychiatry: (1) that lack of knowledge of the "nature or quality" of an act (assuming the meaning of such terms to be clear), or incapacity to know right from wrong, is the sole or even the most important symptom of mental disorder; (2) that such knowledge is the sole instigator and guide of conduct, or at least the most important element therein, and consequently should be the sole criterion of responsibility when insanity is involved; and (3) that the capacity of knowing right from wrong can be completely intact and functioning perfectly even though a defendant is otherwise demonstrably of disordered mind.

Nine years ago we said:

> The modern science of psychology . . . does not conceive that there is a separate little man in the top of one's head called reason whose

> function it is to guide another unruly little man called instinct, emotion, or impulse in the way he should go.

By its misleading emphasis on the cognitive, the right-wrong test requires court and jury to rely upon what is, scientifically speaking, inadequate, and most often, invalid and irrelevant testimony in determining criminal responsibility.

The fundamental objection to the right-wrong test, however, is not that criminal irresponsibility is made to rest upon an inadequate, invalid or indeterminable symptom or manifestation, but that it is made to rest upon any particular symptom. In attempting to define insanity in terms of a symptom, the courts have assumed an impossible role, not merely one for which they have no special competence. As the Royal Commission emphasizes, it is dangerous "to abstract particular mental faculties, and to lay it down that unless these particular faculties are destroyed or gravely impaired, an accused person, whatever the nature of his mental disease, must be held to be criminally responsible. . . ." In this field of law as in others, the fact finder should be free to consider all information advanced by relevant scientific disciplines.

Despite demands in the name of scientific advances, this court refused to alter the right-wrong test at the turn of the century. But in 1929, we reconsidered in response to "the cry of scientific experts" and added the irresistible impulse test as a supplementary test for mining criminal responsibility. Without "hesitation" we declared, in *Smith v. United States*, "it to be the law of this District that, in cases where insanity is interposed as a defense, and the facts are sufficient to call for the application of the rule of irresistible impulse, the jury should be so charged." We said:

> The modern doctrine is that the degree of insanity which will relieve the accused of the consequences of a criminal act must be such as to create in his mind an uncontrollable impulse to commit the offense charged. This impulse must be such as to override the reason and judgment and obliterate the sense of right and wrong to the extent that the accused is deprived of the power to choose between right and wrong. The mere ability to distinguish right from wrong is no longer the correct test either in civil or criminal cases, where the defense of insanity is interposed. The accepted rule in this day and age, with the great advancement in medical science as an enlightening influence on this subject, is that the accused must be capable, not only of distinguishing between right and wrong, but that he was not impelled to do the act by an irresistible impulse, which means before it will justify a verdict of acquittal that his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong.

As we have already indicated, this has since been the test in the District.

Although the Smith case did not abandon the right-wrong test, it did liberate the fact finder from exclusive reliance upon that discredited criterion by allowing the jury to inquire also whether the accused suffered from an undefined "diseased mental condition [which] deprive[d] him of the will power to resist the insane impulse. . . ." The term "irresistible impulse," however, carries the

misleading implication that “diseased mental condition(s)” produce only sudden, momentary or spontaneous inclinations to commit unlawful acts.

As the Royal Commission found:

> In many cases . . . this is not true at all. The sufferer from [melancholia, for example] experiences a change of mood which alters the whole of his existence. He may believe, for instance, that a future of such degradation and misery awaits both him and his family that death for all is a less dreadful alternative. Even the thought that the acts he contemplates are murder and suicide pales into insignificance in contrast with what he otherwise expects. The criminal act, in such circumstances, may be the reverse of impulsive. It may be cooly and carefully prepared; yet it is still the act of a madman. This is merely an illustration; similar states of mind are likely to lie behind the criminal act when murders are committed by persons suffering from schizophrenia or paranoid psychoses due to disease of the brain.

We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances. We find that the “irresistible impulse” test is also inadequate in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test. We conclude that a broader test should be adopted.

B.

In the District of Columbia, the formulation of tests of criminal responsibility is entrusted to the courts and, in adopting a new test, we invoke our inherent power to make the change prospectively.

The rule we now hold must be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire court since 1870. It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

We use “disease” in the sense of a condition which is considered capable of either improving or deteriorating. We use “defect” in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.

Whenever there is “some evidence” that the accused suffered from a diseased or defective mental condition at the time the unlawful act was committed, the trial court must provide the jury with guides for determining whether the accused can be held criminally responsible. We do not, and indeed could not, formulate an instruction which would be either appropriate or binding in all cases. But under the rule now announced, any instruction should in some way convey to the jury the sense and substance of the following: If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act

charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity. Thus your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act. These questions must be determined by you from the facts which you find to be fairly deducible from the testimony and the evidence in this case. . . .

Whatever the state of psychiatry, the psychiatrist will be permitted to carry out his principal court function which, as we noted in *Holloway v. U.S.*, "is to inform the jury of the character of (the accused's) mental disease (or defect)." The jury's range of inquiry will not be limited to, but may include, for example, whether an accused, who suffered from a mental disease or defect [and] did not know the difference between right and wrong, acted under the compulsion of an irresistible impulse, or had "been deprived of or lost the power of his will . . . ."

Finally, in leaving the determination of the ultimate question of fact to the jury, we permit it to perform its traditional function which, as we said in *Holloway*, is to apply "our inherited ideas of moral responsibility to individuals prosecuted for crime . . . ." Juries will continue to make moral judgments, still operating under the fundamental precept that "Our collective conscience does not allow punishment where it cannot impose blame." But in making such judgments, they will be guided by wider horizons of knowledge concerning mental life. The question will be simply whether the accused acted because of a mental disorder, and not whether he displayed particular symptoms which medical science has long recognized do not necessarily, or even typically, accompany even the most serious mental disorder.

The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called mens rea), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there will not be criminal responsibility. The rule we state in this opinion is designed to meet these requirements.

Reversed and remanded for a new trial.

Reading 4: Tillim[58]

Mental Disorder and Criminal Responsibility

. . . Crime often results from perversion or aberration of a sane mind. It may follow sanctioned social activity, like the pathological reactions from alcoholism, or the 'oiled' tempers of inebriate celebrants. Neurotic and psychopathic persons clash with the law largely as a result of prevailing social pressures. . ..

Social resentment of crime is justified, but the criminals are entitled to be understood. Society should recognize its share in the precipitation of criminal

behavior, although not entirely to blame. Fuller understanding of the criminal would lead to a higher level of justice while still providing the desired protection for society. When crime is due to a mental illness which is amenable to treatment, the criminal should be placed under treatment; those handicapped by mental deficiency or organic brain damage beyond remedy should be segregated under effective control; whether in a hospital or an institution with maximum security facilities is a matter of secondary consideration.

These views have been widely accepted in dealing with juvenile delinquency and non-capital crimes. It is shown by the increasing number of institutions to deal with such offenders, and the growing popularity with courts of mental hygiene clinics and psychiatric consultation services. There is no factual support for the legal presumption of uniform capacity for responsible conduct in a conglomerate population, nor for the myth that individuals are possessed with a "free will." . . .

The assumption that man functions by a "free will" is a myth thoroughly exploded. Psychoanalytic studies of human behavior have revealed beyond question the dynamic influence of the subconscious. It is within common experience that daily behavior is largely performed thoughtlessly, that behavior patterns are often directed by undisclosed motivations. The subconscious of the normal individual is finely regulated to a working balance between primitive or infantile goals (the *id*), the aspirations or desired esteem (*super-ego*), and the mediator (*ego*) between the two relatively conflicting drives. Social behavior expresses the effectiveness of ego control. This effectiveness may be readily disturbed by disease, intoxication, and sudden change in emotional tension. . . .

The inhibitive mechanism in human behavior is protective against self-debasement. Failure of function may indicate a powerful *id* or an inflated *super-ego*; the former generally results in an amoral or lawless character, the latter, in behavior of opposite extreme such as exaggerated piety. . . . Chronic alcoholics, drug addicts, and persons with other pronounced behavior disorder often evidence powerful demands from the *id*, as well as from the super-ego. Thus alcoholics and psychopathic personalities may voluntarily reduce themselves to the lowest dregs of society and yet be ready to fight over the slightest aspersions upon their persons or characters. This sensitiveness, of course, may also be due to inadequacy of the super-ego. . . .

Clearly, the test of insanity based upon knowing right from wrong can do grave injustice to many accused. Most psychotics (insane, in legal language) retain indefinitely approved ethical concepts in relation to specific deeds, and to the wrongness of murder in particular. This presents an incongruous and an untenable legal situation which should be resolved. An accused person may die if he knew right from wrong at the time he committed the act, even though he may have been at the time mentally disordered, as judged medically; he may yet escape punishment, if he is found insane (committable to a mental institution) before, during or after trial. A man might be found guilty because he knew right from wrong but may not be executed because of being medically insane. This generally requires that the insanity shall be manifest, which must be taken to mean obvious, at some time after the crime, and, of course, before execution. A patient on temporary leave from a mental institution who commits

murder or rape, knowing such acts are wrong and punishable, will be punished in those jurisdictions which hold the "right from wrong" test as the only criterion for responsibility. . . .

The special defence of "partial delusion" is no improvement. It is inconceivable in the present state of our knowledge to speak of anybody as partially insane and otherwise normal. Only relatives of insane persons may be heard to speak of mental patients as being, say 85 percent normal, to feel encouraged about the outlook. Such partially insane persons, presumably delusional, must meet the standards of judgment in relation to criminal acts as is expected from normal persons, according to the M'Naghten rules. If the accused does not meet this protective standard, "and is not in other respects insane," he is punishable as a normal person. . . .

The present application of the law does not provide maximum protection for society. Criminal law is punitive and also exemplary, primarily to safeguard individuals in a society, and the orderly functioning of the society itself. Capital punishment has not served well to materially reduce the incidence of murder. . . .

. . . The desired security and greater justice in our penal system would be as well, if not better, served by a fairer and fuller consideration of the criminal's mind at the time of the crime, and not alone by whether he knew "right from wrong." …

Reading 5: Tadros[59]

Excusing the Mentally Disordered

. . . [T]he M'Naghten Rules fail appropriately to accommodate a full theory of criminal responsibility. Firstly, they fail to provide defences to those who, as a consequence of mental disorder, have undergone sudden personality change. The Rules fail to accommodate the defendant who can rightly claim "it wasn't really me." Such defendants . . . ought to be excused from criminal responsibility. Secondly, they see the particular cognitive and evaluative abilities of the defendant in relation only to the act, and in isolation from her general abilities, and through them from her autonomy. They fail to accommodate defendants who have sufficient understanding of the particular act that they have performed, but who, as a consequence of mental disorder, lack status-responsibility. A defendant who cannot live an autonomous life to a minimal degree . . . cannot be held responsible for any particular action that he performs regardless of abilities in cognition and evaluation regarding the action in question. Such defendants . . . ought to be exempt from criminal responsibility.

Another way to put this is that the M'Naghten Rules are overly focused on the act itself, and in two ways. Firstly, they are overly focused on the time at which the act was committed, rather than taking a broader view of the history of the defendant. Secondly, they are overly focused on the particular capacities, cognitive and evaluative, that the defendant has with regard to the act in question, rather than taking a broader view of the defendant's ability to act as an autonomous agent.

. . . If the defendant is generally a responsible agent, he ought to take responsibility for his disorder by taking reasonable steps to minimise the risks that he poses to others. And this suggests that he can be held responsible for

some of his actions even if he could not, through that disorder, appreciate the nature and quality of his actions or their wrongfulness.

. . . I will assume that the defendant has status-responsibility, and that he has not undergone a sudden change of personality due to mental disorder. So we are considering a defendant whose psychology has the appropriate kind of historical development such that his responsibility has not been disrupted, and who has the appropriate general abilities and social circumstances to be regarded as autonomous, and hence a responsible agent.

. . . [T]here are different ways of reading the M'Naghten Rules, which create different problems. For analytic purposes it is useful to divide the Rules into two parts. Firstly, the defendant must show that he had a defect of reason that was a product of a disease of the mind (the psychiatric element). And secondly, he must show that the defect of reason resulted in the defendant not knowing either: (a) the nature and quality of the act (the cognitive limb); or (b) that it was wrong (the evaluative limb). The Rules have come under criticism for being too narrow. In particular, it has been argued that they fail to recognise the existence of volitional disorders that undermine responsibility. The Rules, it is argued, do not accommodate those with disorders which affect their ability to control their actions. Such a volitional limb is contained in the US Model Penal Code,* and is probably available in Scotland.** . . .

. . . Reading the M'Naghten Rules

. . . A defendant who believes that *v*ing is wrong when *v*ing actually is wrong evaluates the circumstances correctly. And evaluating the circumstances correctly is an indication that the defendant has at least gone some way to manifesting the kind of character that we should want him to manifest. If a defendant believes that an action is morally right when in fact it is morally wrong, this is at least often an indication of some kind of ethical failure. At least some wrongful action can be explained by the fact that the person lacked the moral and emotional faculties to realise that what they were doing was wrong. Such a person has a vice, not a mental disorder. . . .

. . . Cognition and Evaluation in Mental Disorder Defences

. . . If the psychopath is to be entitled to a defence, therefore, it must be an exemption rather than an excuse. The question is whether the psychopath's beliefs and evaluations are, in general, sufficiently disconnected from reality to undermine his status-responsibility. But the psychopath has no obvious claim to an excuse, precisely because of the consistency with which he falsely evaluates.

From this analysis, we can begin to consider just how to construct the cognitive and the evaluative limbs of the M'Naghten Rules. It must not only be the case that the defendant's mental disorder resulted in the defendant failing to appreciate the nature and quality of the act or that it was wrong. The defect must be such that the failure to appreciate those things could not be attributed to the agent. And that will be true only if the mental disorder was such that the belief formed was radically disconnected from the background beliefs of the defendant. Hallucinations are the most obvious example of when this will be the case. But they need not be the only example. It may be that when the defendant

is in a state of depression. . . . Beliefs formed in a state of depression may be sufficiently coloured by the defendant's emotional state that they cannot truly be said to be reflective of the agent *qua* agent as he persists over time. . . .

. . . Conclusions

. . . Under the M'Naghten Rules there are two different limbs to mental disorder defences. The defendant must have shown a defect of reason caused by a disease of the mind such that either he did not appreciate the nature and quality of the act that he has performed, or that it was wrong.

. . . [T]he M'Naghten Rules are both too broad and too narrow. The rules are too broad because they suggest that *any* failure to appreciate the nature and quality of the act or that it was wrong will be sufficient to undermine responsibility. This fails to recognise the possibility that the defendant is fully responsible for his cognitive or evaluative failure. If the defendant has made a cognitive or evaluative error, it is only where the defendant's cognition or evaluation is radically detached from his background beliefs and values that he ought to be entitled to an excuse.

They are too narrow for three reasons. Firstly, they do not provide a defence for those who lack the autonomy to develop coherent and independent lives in general. They fail to appreciate that there may be defendants who understand the nature and quality of the act that they perform, but whose general capacities are sufficiently lacking that they do not have status-responsibility at all. Such defendants ought to be provided with an exemption. . . .

Secondly, the Rules fail to understand the significance of time for responsibility. They fail to appreciate that there may be defendants who have undergone personality change such that the beliefs and desires that they have are not reflective of their settled character. Such defendants may have all of the capacities of a healthy defendant at the time at which the action is performed, but they lack responsibility for their actions on the grounds that when the action was performed *they were not really themselves*.

Thirdly, the Rules do not include a volitional limb. They fail to appreciate that there may be defendants whose desires are radically detached from their system of beliefs and values in such a way that does not reflect on them *qua* agent. If those desires are sufficiently strong that an agent of good character would not be capable of resisting the desire, the defendant ought to be provided with a defence. In short, the argument that I am pressing is that the M'Naghten Rules have two overly broad limbs where there ought to be five narrower limbs to mental disorder defences.

[Notes]

* Section 4.01.

** It is implied that such a limb exists in *HMA Kidd* 1960 JC 61, which suggests that the accused will be entitled to a defence if he falls within the existing limbs of the M'Naghten Rules, but that he might be entitled to a defence if he does not. Given the existence of a volitional limb in Scots law in the 19th century (on which, see V. Tadros (2001), "Insanity and the Capacity for Criminal Responsibility" *Edinburgh Law Review* Vol. 5, p. 371), it is fair to assume that such a limb still exists in Scotland.

Endnotes, Chapter 6

[1] Victor Tadros (2007), *Criminal Responsibility* (Oxford University Press), p. 21.
[2] *Ibid.*, p. 22.
[3] *Ibid.*
[4] 7 Edw. I 518 (1278) England.
[5] House of Lords, 10 CI. and F. 200 (1843), England.
[6] Philippe Graven (1965), *An Introduction to Ethiopian Penal Law: Arts. 1–84 Penal Code* (Addis Ababa: Haile Selassie I University and Oxford University Press), p. 134
[7] *Ibid.*, p. 135
[8] Michael S. Moore (1985), "Causation and the Excuses", *California Law Review*, Vol. 73, p. 1137.
[9] Holloway v. United States, 80 U.S. App. D.C. 3, 5, 148 F.2d 665–667 (1945).
[10] Joshua Dressler (2001), *Understanding Criminal Law*, 3rd edn. (New York: Lexis Nexis), pp. 355–359.
[11] *Ibid.,* p. 358.
[12] Johannes Andenaes (1965), *The General Part of the Criminal Law of Norway,* translated by Thomas P. Ogle (London: Sweet and Maxwell), p. 26.
[13] Catherine Elliott (2001), *French Criminal Law* (Devon, UK & Oregon, USA: William Publishing), p. 121.
[14] Crim. Code Art. 49(1).
[15] Tadros, s*upra* note 1, p. 333.
[16] *Ibid*, pp. 332- 333.
[17] R. A. Duff (2005), "Who is Responsible, For What, To Whom?" *Ohio State Journal of Criminal Law*, Vol. 2, p. 447.
[18] David Ormerod (2010), Smith and Hogan Criminal Law, Cases and Materials, 10th Ed. (Oxford University Press), p. 420.
[19] *Ibid*.
[20] Caton F. Roberts, Stephen L. Golding, and Frank D. Fincham (1987), "Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense", *Law and Human Behavior*, Vol. 11, No. 3, p. 207.
[21] *Ibid*.
[22] *See* for example, George B. Palermo (2010), Severe Personality-Disordered Defendants and the Insanity Plea in the United States: A Proposal for Change (Eleven International Publishing).
[23] *Ibid*.
[24] Larry H. Gaines and Roger Leroy Miller (2009), *Criminal Justice in Action*, 5th Edition (Thompson Wadsworth), pp. 116-117.
[25] *Ibid*, p. 117.
[26] *Ibid*.
[27] Crim. Code Art. 50(1).
[28] Crim. Code Art. 50(2) *cum* 59.

[29] Crim. Code Art. 49.
[30] Graven, *supra* note 6, p. 140.
[31] Crim. Code Art. 50(3).
[32] Crim. Code Arts. 576, 658, 659.
[33] Crim. Code Art. 53.
[34] Crim. Code Art. 162.
[35] Crim. Code Arts. 158–162.
[36] Crim. Code Art. 163(1).
[37] Crim. Code Art. 163(2).
[38] Crim. Code Arts. 168(1)(a) *cum* 162.
[39] Crim. Code Arts. 168(1)(b) *cum* 110(2).
[40] Crim. Code Art. 168(2).
[41] Crim. Code Art. 168(2), para 3.
[42] Crim. Code Art. 168(2), para 2.
[43] Crim. Code Arts. 168(3), 106.
[44] Crim. Code Art. 168(3).
[45] Crim. Code Art. 56.
[46] Crim. Code Art. 117(1).
[47] Crim. Code Art. 179.
[48] Crim. Code Art. 166–168.
[49] Regina v. Ward, [1956] 1 QB 351
[50] Graven, *supra* note 6, p. 139.
[51] *Ibid*, p. 140.
[52] R v Kopsch (1925) 19 Cr App R 50, CCA.
[53] *R v Byrne* [1960] 3 All ER 1, CCA.
[54] Criminal charge dated Tir 15th 1978 Ethiopian Calendar (January 24, 1986), File No. 629/1754/ በ/ 0/78.
[55] "Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I p. 3214. Translation of the German Criminal Code provided by Prof. Dr. Michael Bohlander © 2010 juris GmbH, Saarbrücken.
[56] Andenaes, *supra* note 12, pp. 247–251 (footnotes omitted).
[57] Footnotes omitted.
[58] Sidney J. Tillim (1951), "Mental Disorder and Criminal Responsibility", *Journal of Criminal Law and Criminology*, Vol. 41, No. 5 (Jan.–Feb. 1951), pp. 600–608 (footnotes omitted).
[59] Tadros, *supra* note 1, pp. 322–347 with omissions.

Chapter 7

Affirmative Defences

The word '*defence*' is sometimes used in its wider interpretation to include all categories of argument against a criminal charge. Robinson refers such usage as 'casual'[1] which includes all possible defences to a criminal charge such as denial of having committed a criminal act, arguments related to causation, i.e. attributability of the harm to the act or omission of the defendant, *mens rea*, *autrefois acquit* (previous acquittal), and similar grounds. Gardner notes that the usage of the term 'defence' is stricter than its usage in private law and "in its strict sense [the term] designates only those defences in the casual sense that are compatible with the defendant's conceding that the offence charged was indeed committed."[2]

Arguments of denial, *mens rea*, causation, and so forth are grounds that challenge the existence of an offence. However, the term 'defence', in its stricter interpretation, may not deny the commission of the act/omission or the causal link between the harm and the conduct of the accused, but rather invoke its lawfulness, justification or circumstances that may render it excusable. In this chapter the term 'defence' is used in its narrower interpretation, and the qualifier 'affirmative' indicates that the defendant does not deny the commission of the act or omission stated in the charge, but rather argues that it is lawful, justifiable or excusable under the Ethiopian Criminal Code.

As discussed in the preceding chapters, an act of a responsible person that satisfies the legal, material and moral elements of an offence is subject to criminal liability. However, the affirmative defences discussed in this chapter may entitle the accused to relief from punishment, or the determination of penalty based on free mitigation (mitigation without restriction) as stipulated under Article 180. Under certain circumstances the court may impose no punishment (Article 182) where the law expressly provides.

The Ethiopian Criminal Code classifies affirmative defences into 'lawful acts'[3] and 'justifiable acts and excuses'.[4] The acts stated under Articles 68 (acts required or authorized by law) and 69 (professional duty) are expressly stated as *lawful,* and they do not constitute an offence. However, the affirmative defences stated under the subsection titled "Justifiable Acts and Excuses" (i.e. Articles 70–81) are not classified as "lawful" although they warrant different levels of exoneration or mitigation from punishment.

Hart suggests the following:

> In the case of 'justification' what is done is regarded as something which the law does not condemn, or even welcomes. But where killing . . . is excused, criminal responsibility is excluded on a

> different footing. What has been done is something which is deplored, but the psychological state of the agent when he did it exemplified one or more of a variety of conditions which are held to rule out the public condemnation and punishment of individuals.[5]

Hart argues that justifiable acts are not condemned, while a certain act is said to be excused where it is condemned and not justified. There are authors who relate justifications with actions, and excuses with the defendant. According to Husak, for example, "if the facts that comprise the defense describe the defendant's act, they constitute a justification; if these facts describe the defendant himself, they constitute an excuse."[6]

The terms that represent 'justifications' and 'excuses' may vary in different legal regimes. For instance, "French academic writers draw a distinction between objective defences (sometimes called justifications) and subjective defences (sometimes called excuses), although this distinction is not expressly referred to by the Code."[7] As Elliott notes:

> Objective defences are concerned with the surrounding circumstances in which the offence was committed rather than the defendant himself or herself. They provide a justification for the criminal conduct which ceases to be viewed as antisocial.[8]

Elliott classifies order of law, order of legitimate authority, legitimate defence and necessity into *objective defences*. The ones that she regards as *subjective defences* "which are directly linked to the defendant" and "which remove the liability of the individual" are "mental illness, the defense of being a minor, constraint and mistake of law."[9]

Horowitz states that "the overall thrust of justification defenses is objective and general, whereas excuse defenses are, on the whole, *ad hoc* and individual. This contrast is attributable to the fundamentally different functions and characteristics of the two types of exculpation".[10] Horowitz relates justification with objective defences and excuses with the mental conditions of the accused person:

> Acts that are deemed to be justified typically arise out of conduct that prevents or redresses harm, particularly harm involving illegality. Justification has a self-protection or law-enforcement component. ... The defense of justification is therefore an essential element in the program of the criminal law to discourage crime, as well as to recognize and approve human impulses to respond forcefully to wrongs. [Footnote omitted] Excuse serves a completely different purpose. The usual excuses –insanity, duress (if we accept the traditional view of duress as an excuse), disease (epileptic seizures, for example), involuntary action, and occasionally

> intoxication– all relate to incapacity, disability, or infirmity, or an absence of conscious will to do evil. They go, in short, to the mental element in criminal liability.[11]

Under Ethiopian criminal law, we may not need to dwell much on the classification of affirmative defences into *justifiable* and *excusable* because the express or implied stipulations of the relevant provisions render the classification easier. The Ethiopian Criminal Code does not expressly classify each provision (stipulated under Articles 70 to 81) into "justifiable acts" and "excuses". Nor does it make a classification on the basis of the 'objective' and 'subjective' features of affirmative defences. Yet the following phrases show the absence of punishment in the event of a certain group of affirmative defences:

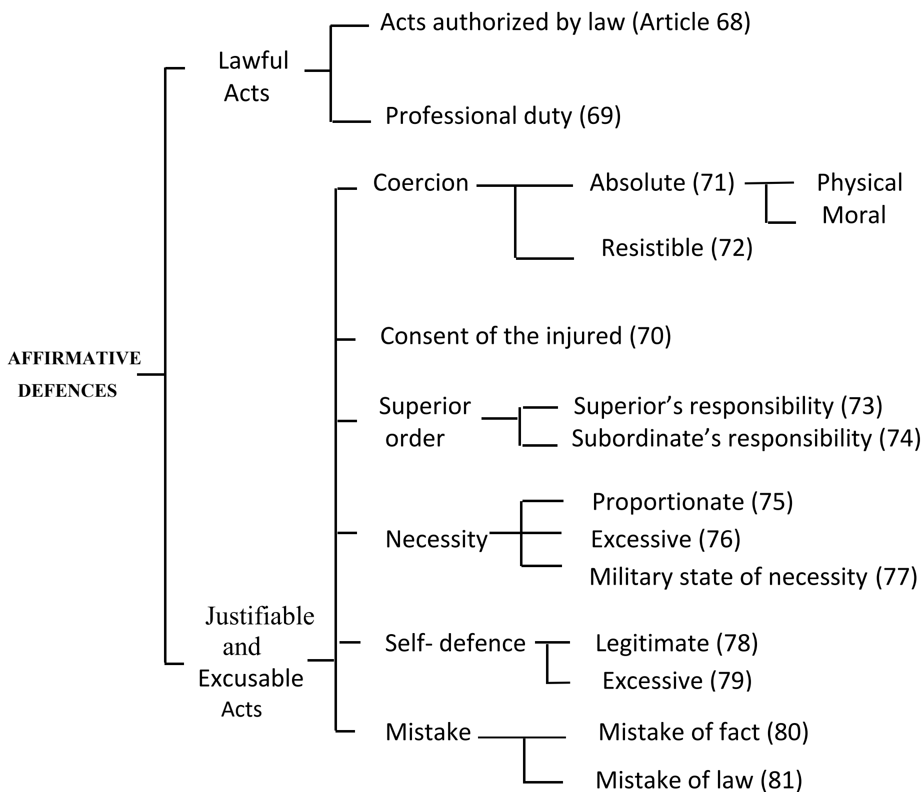
- "not liable to punishment"[12]
- "shall not be criminally liable"[13]
- "is not liable to punishment"[14]
- "shall not be punishable"[15]

The absence of punishment where the elements of Articles 70(1), 70(2), 71 paragraph 1, 75 paragraph 1, 77(1), 78 and 80(1) are satisfied shows that these acts are *justifiable.* This is in contrast to the second category of defences which may entitle the defendant to excuses through mitigation of punishment (with or without restriction).

Certain acts are *justifiable* and thus shall not be punished.[16] There are also acts that are punishable, but *excusable* and thus entitled to mitigation including *free mitigation*[17] or *exemption from punishment.*[18] Where the conditions embodied under Articles 72, 74(2) paragraph 1 second phrase, 75 paragraph 2, 76, 77(2) first phrase, 79(1) and 81(2) are established, the court *shall*, without restriction, reduce the punishment.[19] These provisions embody stipulations of *compulsory mitigation*, and in effect, the court is bound to reduce the penalty although the extent of the mitigation may vary according to the particular circumstances of each case.[20]

Article 743(1) paragraph 1 provides that the stipulations regarding acts authorized by law,[21] professional duty,[22] consent of the injured,[23] absolute coercion,[24] necessity[25] and legitimate defence[26] are applicable to petty offences. Moreover, Article 743(1) paragraph 2, Article 743(2) and Article 744 embody nearly similar stipulations with regard to the other affirmative defences. Table 4 introduces the list of affirmative defences:

Table 4. Lawful, Justifiable and Excusable Acts



1. Acts Authorized by Law and Professional Duty

Criminal law requires or authorizes the performance of certain acts. Accordingly, such acts do not constitute an offence. Public, state or military duties,[27] an act of correction or discipline,[28] and exercising private rights recognized by law[29] are referred to as 'acts authorized by law' (in the Ethiopian Criminal Code), and they fall under *lawful acts*, provided that these acts do not exceed "the limits permitted by law."

Article 122-4, paragraph 1 of the French Criminal Code states that "A person is not criminally liable who carries out an act ordered or authorized by legislative or regulatory provisions." As Elliott[30] noted, there can be collision of acts required by law:

> A situation can arise where legislative provisions conflict, with legislation laying down an offence for failure to do something, while other legislative provisions state that an offence will be committed

> if that conduct is carried out. Such a conflict arose in the Act on the Freedom of the Press of 29 July 1881. Article 13 of that Act imposed an obligation on newspaper editors to publish a statement provided by a wronged party, with the failure to publish being an offence, while the Act also lays down an offence of defamation. The courts have taken the approach that the editor can refuse to publish the statement if it contains a defamation [Crim. 19 déc. 1989, B. no. 493]. In a comparable situation, the editor of the *Journal Officiel* was found not liable for a defamation resulting from declarations of association which he was bound to publish by virtue of the law [Crim. 19 fév. 1981, B. no. 63].[31]

Under such circumstances the defence generally ceases "to be available if a person has gone beyond what is necessary to satisfy the legal imperatives."[32] Elliott cites a case[33] in which "a child had a stone in his hand and had threatened to throw it at his companion. The defendant had seen the danger and seized and twisted the child's arm so brutally that he caused a fracture." The defendant "was charged with intentionally inflicting violence on another and in his defence he relied on the existence of the offence of failing to give assistance to a person in danger (now article 223-5 of the new Criminal Code)." And ultimately defence was accepted against "the offence of intentionally inflicting violence on another, but not for the non-intentional offence as excessive force had been used."[34]

Acts done in the course of performing *professional duty* are also lawful acts. There is a distinction "between what is being allowed and whether what is being allowed is capable of being authorized".[35] Bohlander gives the following examples:

> [A] driving licence . . . only allows us to participate in road traffic; it has no relation whatsoever to the question of whether we may harm other traffic participants. The general medical permission to use amalgam in dentistry for fillings on the other hand allows the dentist to use material over which there is much scientific concern with respect to potential health hazards. [Footnote omitted]. In the latter scenario, the permission will normally cover the doctor for any consequences arising from the use of the approved materials, unless special circumstances existed that increased the general risk and he was aware of them: for example, an allergy in his patient.[36]

What is being authorized such as a permit for medical services involves acts authorized by law (e.g. the issuance of the permit by a regulatory body, the act of vaccination by a medical personnel) and at the same time it relates to professional duty, i.e. the standards of accepted practice in the profession

while the vaccination takes place. Bohlander refers to both aspects of lawful acts as "official authorization." The key attributes in these acts (either authorized by law or standard practices of a profession) purely relate to their origin. In other words, the standards of conduct in lawful acts are stated in the law itself while conformity to the accepted practice can be determined by the standards set in the profession or other regulatory regimes.

1.1 State or Military Duty

An act performed by a public servant while carrying out his occupational responsibility or military duty is lawful. As Graven states, no offence is committed if "in accordance with the Criminal Procedure Code a policeman searches a house, a prosecutor charges an offender, a judge refuses to release an accused on bail, an executioner carries out a sentence of death or when in accordance with the law of war, a soldier kills an enemy."[37] Acts authorized by law should not, however, be abused. A policeman is authorized to arrest an offender according to the law, but is not entitled to use force unless the offender forcibly resists arrest. Such abuse is punishable under Articles 407 *ff* or under another special provision that may be relevant.

In *Fantaye v. Federal Public Prosecutor*,[38] the defendant, a policeman, was on duty to control contraband smuggling. He argued that he shot at the vehicle which caused the death of the driver while the victim was attempting to escape from inspection. The car crashed with a tree and a passenger died from the injury caused by the accident. The defendant was convicted of ordinary homicide for the death of the driver and the passenger. The court found that the defendant committed the offence under *dolus eventualis* because he shot at the vehicle *regardless* of the consequences of his act. The defendant argued that the harm was accidentally caused while he was carrying out a lawful act, and in the alternative he argued that the case falls under negligence and not criminal intention. However, the Federal Court did not consider the act as lawful, and confirmed the lower court's conviction, but reduced the sentence to five years of rigorous imprisonment.

1.2 Public Duty and Acts of Correction and Discipline

A person need not be a policeman to invoke Article 50 of the Criminal Procedure Code if he, for example, captures an offender in the act of committing an offence punishable with a minimum of three months simple imprisonment. He cannot be charged with violating another person's liberty because his act is authorized by law. Similarly, defamation[39] cannot be invoked against a person who discharges his duty to report[40] or against one who exercises his right of informing the law in accordance with Article 11 of the Criminal Procedure Code although he is not required to do so.

The affirmative defence related to discipline refers to measures allowed under the law. However, there is the need for caution in the interpretation of Article 2039 of the Civil Code which allows a person to exercise reasonable corporal punishment on “his child, . . . pupil” etc. as such acts are currently unacceptable.

Restrictive interpretation is reasonable in relation to criminal liability. Article 576(1) provides for criminal liability in case of maltreatment of minors by persons having custody or having charge of minors. Under Article 548(1) of the 1957 Penal Code, actual or potential adverse effects of maltreatment (in the physical or mental developments or the health) of the minor was taken into account to establish criminal liability. This condition has not been incorporated in Article 576(1) of the 2004 Criminal Code thereby rendering ill treatment, neglect, over-task or beating an offence irrespective of (actual or potential) effects of such maltreatment. If grave harm occurs due to the maltreatment, the offender’s act falls under Article 576(2) and graver punishment is imposed than the penalty embodied in Article 576(1).

With regard to the scope of application, the 1957 Penal Code protected persons below 15 years of age. But Article 576(1) of the 2004 Criminal Code protects minors under the age of 18. It is to be noted that Article 576(1) does not apply against parents.[41] However, even parents shall be criminally liable where the right to administer chastisement on minors is abused.[42] Moral influence, persuasion and subtle mechanisms of praise and criticism would inevitably (albeit gradually) replace corporal punishment.

1.3 Exercise of Private Rights and Other Authorized Acts

Pursuant to Article 1148 of the Civil Code, a person may use force (justified under the circumstances) to repel the act of usurpation or interference and may take his property back forthwith. While doing so, the proprietor may inflict *proportionate* and *expedient* bodily injury or damage to property. Yet this right does not warrant an act of violence after a person has already recovered his/her property. Although such rights seem to overlap with legitimate defence,[43] private rights embodied in various provisions vary from an act of legitimate defence. For example, a person who captures a pickpocket who is running away and inflicts bruises upon the offender (while trying to detain the thief after having secured his property) may invoke Article 68 rather than legitimate defence.

The phrase “in particular” in Article 68 indicates the existence of other lawful acts. For instance, an act that caused injury in sport activities[44] is not punishable unless the act is “a gross infringement of the rules of sport.”

1.4 Professional Duty

Acts done in the course of carrying out lawful professional activity are not punishable.[45] A surgeon is not liable for the scar caused by an expedient operation performed in accordance with his professional duty. Two conditions are embodied in Article 69. Primarily, the act must be "in accordance with the accepted practice of the profession", and secondly, the doer is required not to commit "grave professional fault." To illustrate, accepted medical practice does not allow an optician to prescribe lenses. For the purpose of civil liability, professional fault need not necessarily be grave. Articles 1795(a) and 2031 of the Civil Code, illustrate this point with regard to contractual obligations of diligence and extracontractual liability respectively.

The rationales for the *justification* of lawful acts and professional duty are based on the right of a person to act (as required by the law and in accordance with accepted practice of the profession under consideration). However, questions may arise as to who is considered a professional and whether professional duty is different from lawful acts. Graven suggests a wider interpretation for the term 'profession' so that it can include a vocation or calling[46] which a person lawfully carries out. Graven further notes that an act such as vaccinating a person in a clinic or a hospital is in itself lawful but the act of using an unclean syringe is grave professional fault.[47]

2. Consent of the Injured

Consent presupposes various factors such as the capacity to express consent and the legality of the consent. The capacity to consent involves issues such as the maturity and sanity of the person who consents, while the issue of legality, *inter alia*, takes various policy issues into account. Thus consent related to one's life and bodily integrity are not only individual issues but also involve public policy. In a German case (1971) the victim's husband, who was a member of a certain sect of church, refused "urgent medical treatment for his wife based on religious grounds"[48] even though this put his wife's life in serious danger:

> D and his wife were of the persuasion that she did not need to go to hospital, but that she would get well if her husband and some other member of her church prayed over her. The prayer meeting took place and the wife died shortly afterwards. [Footnote omitted]. D was convicted of negligent homicide and filed a constitutional complaint that the conviction violated his religious freedom. The BVerfG accepted his argument and quashed the conviction, although D had not even argued that the creed of his sect required him and his wife to refuse hospital treatment. Similar scenarios occur time and again with Jehovah's witnesses and blood transfusions.[49]

Such cases involve the notion of consent and the extent to which a certain legal regime condones consent of the injured and the threshold where the public policy concerns step in to render consent of the injured of no effect. The Codification Commission of the 1957 Ethiopian Penal Code had, rather unwisely, changed the drafter's initial draft on consent of the injured party into an entirely negative stipulation embodied in Article 66 (1957 PC). According to the initial draft:

> He who endangers or infringes upon a right with the consent of the person, who may validly dispose of his right, commits no offence. This consent, however, does not justify the doer when his act is forbidden and punished by a specific legal provision . . .[50]

Article 66 of the 1957 Penal Code, on the contrary, unequivocally disregarded consent as an affirmative defence irrespective of the right infringed. In tattooing, for instance, it is unreasonable to allow the person who consented to the act to invoke bodily injury at a point when he regrets his previous consent. An offence punishable upon complaint[51] is not brought to trial if the injured party decides not to complain against the harm caused. Article 66 could thus have given exceptions to such cases which are of a predominantly private nature. On the contrary, mere consent of victims cannot be regarded as an affirmative defence because mandatory provisions of criminal law cannot be set aside by agreement. Examples in this regard are acts such as duels,[52] brawls,[53] traffic in women and children,[54] and rendering a person unfit by consent in a manner that is injurious to the body or health.[55]

Article 70 of the 2004 Criminal Code has entirely altered Article 66 of the previous Code. According to Article 70(1) of the new Code, an accused who has committed an offence that can be prosecuted only upon formal complaint shall not be punished if it was committed with the consent of the victim or his legal representative. However, Article 70(1) does not allow consent of the injured as an affirmative defence if the prosecution of the offence[56] does not require formal complaint.

Article 70(2) (of the 2004 Criminal Code) is a new provision that was not incorporated in the 1957 Penal Code. According to this provision, the beneficiary of the whole or part of a donor's body or any bodily organ for the purpose of organ transplant or scientific research shall not be punished if the donation was made while the donor is alive and without pecuniary consideration. The provision serves as an affirmative defence in favour of a donee who has benefited from such donation for his personal bodily transplant or a legally established institution that has used the donation for the purpose of scientific research. However, if the agreement is made for pecuniary consideration,[57] the donor and the donee shall both be criminally liable.

Article 70(2) seems to have envisaged cases such as kidney donation if the donor can survive with the remaining kidney. As Shimels Tariku *et al* stated, Ethiopia's "first national kidney transplantation center was opened at St. Paul's Hospital Millennium Medical College in September 2015".[58] Kidney transplantation is thus a lawful act subject to the standards and directives of the FDRE Ministry of Health.

Aside from such exceptions, it is impossible to imagine a situation whereby a person transfers a vital organ during his lifetime, because it is clearly an act of suicide. The fact that Article 542 punishes instigating and aiding another to commit suicide and not the person who has attempted suicide does not render suicide legal. Our Criminal Code seems to have omitted suicide among offences, not because the act is to be condoned, but because such persons need care, support and treatment rather than punishment. "It is also impossible to deter such individuals though punishment; and punishment equals to insulting them for their failure."[59]

Article 18 of the Ethiopian Civil Code of 1960 clearly provides that the act of disposing the whole or part of one's body *shall be of no effect* "where such act is to be carried out before the death of the person thus disposing, if such act has the effect of causing a serious injury to the integrity of the human body".[60] The only exception[61] to this rule is justification of the act by the rules of medical practice. In viewof the revocability of such acts of donation[62] anytime during the lifetime of the donor, agreements in this regard should be interpreted without adversely affecting the interest of the donor.

3. Coercion

Criminal liability envisages a criminal act or omission based on free will. Under certain circumstances, however, an accused person might have no choice other than to commit the act. The court in *Lynch*'s case (1975) [63] found that "the element of duress prevents the law from treating what was done as a crime" where the defendant has no choice other than committing the act he is accused of. The issues that were raised were, *inter alia*, whether a person who acts under duress intends what he does and whether there is lack of *mens rea* under such circumstances. However, duress was not allowed to be invoked in *Howe* (1987)[64] for attempted murder on the ground that duress cannot be a defence in certain serious offences including homicide.

> The appellant who at the time of the offence was aged 16 seriously . . . was charged with attempted murder and pleaded not guilty. At his trial, he raised the defence of duress . . . . The trial judge ruled that such evidence was inadmissible since duress was not, as a matter of law, a defence to a charge of attempted murder.[65]

However, Lord Keith, one of the minority in *Gotts*,[66] points out that "[i]t is unsatisfactory that the defence of duress should be available" in grievous bodily harm but not in attempted murder.[67] The extent of the duress and its imminence are taken into account in determining whether a defendant had no choice but commit a certain act. Under situations of duress such as death threats, the correct approach in determining whether duress can be invoked as a defence is "to ask whether [the defendant] would have acted differently but for the death threats."[68] In this regard, it was stated in *Hudson and Taylor*[69] that "the threats must be effective on the mind of the accused at the time the *actus reus* is perpetrated" in addition to which there should be no option available to avoid the threat.

> Two girls aged 19 and 17 were charged with perjury but claimed that when they gave false evidence they had done so only because of threats which had been made against them. They had actually seen one of those who had threatened them sitting in the public gallery, as they were about to give evidence. The defence failed presumably on the basis that the girls had failed to seek protection when it was readily available to them. The Court of Appeal, in allowing the appeal against conviction, thought the threat no less effective simply because it would not be carried out at the time the crime was committed, it was certainly a possibility that the threats could have been carried out later that night 'in the streets of Salford'. Of course, a threat of future violence may be so remote as to have little impact on the will of the defendant, but that was not the position in this case.[70]

The imminence of the threat of death was raised by the trial and appellate courts in *Abdul-Hussein* (1999),[71] in which the defendants invoked duress as a defence against the charges of hijacking a plane. The Iraqi defendants were Shiite Muslims and submitted to the court that they would be tortured and killed if they were deported to Iraq. The trial court did not instruct the jury to consider the defence of duress because it considered the threats as nonimminent during the act of hijacking. But the Court of Appeal accepted the contention by giving a pragmatic interpretation to what 'immediate' should mean under such circumstances:

> What mattered was that the defendant's will to resist the threats was overborne by the prospect of imminent peril of death or grievous bodily harm. The court usefully illustrated this point by giving the example of Anne Frank not having to wait for the Gestapo to knock on her door before being able to rely on the defence of necessity in relation to fleeing in a stolen car.[72]

In *Cole* (1994),[73] the defendant claimed that he had "no choice" as a defence for the charges of robbing two building societies. "He owed cash to moneylenders who he claimed had threatened him, hit him with a baseball bat and threatened his girlfriend and child because of his inability to repay."[74] The defendant invoked duress, but it was "ruled that duress was only available where the threats were directed to the commission of the particular offence charged." In this case, however, it was found that "the threat related to the inability or unwillingness to repay the loan" and the defendant "was not threatened with the unpleasant consequences if he failed to rob a building society."[75]

Articles 71 and 72 of the Ethiopian Criminal Code deal with such events of coercion that compels a person to commit an offence. By virtue of Article 71, paragraph 1, an act done under absolute or irresistible coercion is *justifiable* (i.e. not liable to punishment). Unlike Article 67 of the 1957 Penal Code, Article 71 of the 2004 Criminal Code does not make a distinction between physical and moral coercion, thereby rendering all acts under absolute coercion justifiable whether the coercion is physical or moral. The *exposé des motifs* (*Hateta Zemiknyat*) of Article 71 of the 2004 Criminal Code states that the distinction made between physical and moral coercion and the assumption that the latter is resistible is improper. In effect, Article 71, paragraph 1 of the new Code reads:

> Whoever, without causing greater harm than he could have suffered commits a crime under absolute coercion which he could not possibly resist, is not liable to punishment. The person who exercised the coercion shall answer for the offence. (Art. 32(1)(c).)

Unlike the intention of the drafters, however, the wording of the provision does not show the inclusion of moral coercion, and it would have been preferable to use the words "absolute physical or moral coercion". The phrase "without causing greater harm than he could have suffered" in particular is susceptible to misinterpretation because in the case of moral coercion, the physical harm is suffered by a person other than the accused (who invokes the defence of moral coercion), as in the case of a parent who is morally coerced after her son is kidnapped.

3.1 Duress of Threats and Duress of Circumstances

Some legal regimes use the terms *constraint*, *force, duress*, and so forth instead of *coercion.* Article 122-2 of the French penal code, for instance, provides that "[a] person is not criminally liable who had acted under the influence of a *force* or a *constraint* which they could not resist." Section 35 of the German penal code uses the term 'duress' and the provision shares most

of the elements of Section 34 which deals with 'necessity'. While acts committed under necessity (Section 34) are regarded as justifiable (where the defendant is said not to have acted unlawfully), acts committed under 'duress' are regarded as excusable (acts without guilt).

French criminal law uses the concepts of *constraint* and *force* to include other factors such as forces of nature, acts of third parties and other internal constraints such as the illness of the accused person. The following shows the concept of constraint under French law:

> The types of constraints can be distinguished according to their form (physical or psychological) or according to their origin. These can be due to the forces of nature such as storm, an earthquake, flood, or fire, or due to the acts of third parties such as wars, riots and strikes. Thus, where torrential rain causes a wall to collapse, the defendant had a defence to a charge of obstructing the highway, [Crim. mai 1887, *D*, 88 1 332] and a theatre owner had a defence where the customers had prevented him from being able to close his establishment at the time required by his licence [Crim. 8 août 1840, *S*, 1841 1 549].
>
> Internal physical constraints take the form of illnesses. So, the *Cour de cassation* has ruled that a prostitute (constrained by her illness) was not liable for failing to attend a compulsory health visit [Crim. 3 mars 1865, *D*, 66 5 394]; a defendant was not liable for abandoning his family when he was unable to work due to a serious heart problem [Crim. 24 avr. 1937, *D*, H, 1937 429], and a passenger was not liable for travelling without a valid ticket when he fell asleep on a train and went past his station [Crim. 29 oct. 1922, D. P., 1922 1 233].[76]

The English and Amharic versions of the Ethiopian Criminal Code respectively use the terms 'coercion' and 'መገደድ', which seem to envisage being compelled by another person. The second sentence of Article 71, paragraph 1, which reads, "[t]he person who exercises the coercion shall answer for the crime," substantiates such a restrictive interpretation and the person who does the coercion becomes the principal offender under Article 32(1)(c). Although the word used in the original French version of the 1957 Ethiopian Penal Code was '*contrainte*' (which means *constraint*), it is indeed difficult to assume that the drafter had a wider interpretation for the term 'constraint' used in the French version.[77]

Under English law duress of circumstances is considered as duress even if it was formerly included in the domain of necessity. In *Willer* (1986),[78] the defendant was charged with reckless driving because he "had driven on onto

a pavement in order to endeavour to escape from a group of youths who were going to seriously assault him and his passengers" and "he felt compelled to break the law." Unlike duress by threats, the defendant was not coerced to drive onto the pavement. But the circumstances coerced the defendant to do so.

Such duress of circumstances under English law becomes available "only if from an objective standpoint it can be said the defendant was acting to avoid the threat of death or serious injury."[79] The notion of duress of circumstances was also used in *Martin* (1989):[80]

> The defendant claimed that his wife had suicidal tendencies and on a number of occasions had attempted to take her own life. Her son, Martin's stepson, had on the day in question overslept and risked losing his job if he arrived late for work. His mother apparently distraught, urged Martin to drive him to his place of employment. She threatened to commit suicide if he did not accede to her requests. Martin had been disqualified from driving and was naturally reluctant to take his car onto the highway. Eventually, he relented because he said 'he genuinely and . . . reasonably believed that his wife would carry out her threat unless he did as she demanded'. He was apprehended by the police.[81]

Ethiopian law does not expressly deal with 'duress of circumstances' even if some of these circumstances can fall under necessity. Yet there can be events which might not fall under the provisions of the Ethiopian Criminal Code that deal with necessity and coercion. Cases in point are the French examples stated in the excerpt above, such as the theatre owner and the prostitute who were neither coerced (Article 71) nor under imminent and serious danger (Article 75). Unlike various laws on duress, Articles 71 and 72 do not thus seem to envisage 'duress of circumstances,' which is different from duress caused by threats from another person.

3.2 Absolute Coercion

By virtue of Article 71 paragraph 1 of the 2004 Criminal Code, whosoever commits an offence under absolute coercion which he could not resist and in a manner proportionate to the gravity of the potential harm is not liable to punishment. In such cases the person who is criminally liable is the offender who indirectly commits the offence[82] by compelling the material offender under the circumstances stated in Article 71.

Article 71 paragraph 1 has two requirements. First, the coercion must be absolute, i.e. *irresistible*. Irresistibility of coercion depends upon the coerced person's inability to act otherwise. The second element is *proportionality* of

the offence to the harm that would have occurred. This element of proportionality was not embodied in the 1957 Penal Code.

3.2.1 Absolute Physical Coercion

Under physical coercion the agent is deprived of his freedom of movement by the person who exercises the coercion and not by another incidence. If Ato X, pursued by a mad dog, enters into Y's fenced compound, his act of trespass cannot be justified by physical coercion, but by necessity.[83] The physical coercion, as stated earlier, should also be absolute (irresistible) and proportionate. Although Article 71 does not expressly state the standard of resistance, an exceptionally heroic standard would not be expected. The reasonable man's standard embodied in other provisions can justifiably be used with a particular reference to the agent's age, sex, health, physique and experience.

3.2.2 Absolute Moral Coercion

Under moral coercion, the agent is deprived of his freedom of choice although his freedom of movement is not curtailed. If a cashier (Woizero A) hands over money to a robber at gunpoint, she can be said to have been *physically* coerced. If she is instead threatened with an imminent harm against her kidnapped son, it will be a case of *moral* coercion. As with physical coercion, an offence is said to have been committed under absolute moral coercion where it is irresistible and proportional to the harm averted. Absolute moral coercion is narrowly interpreted. Fear or moral pressure that emanates from reverence to a superior or to an ascendant, or an irresistible impulse (such as passionate sex drive, irresistible hunger etc.) does not fall under moral coercion because the coercion is not wilfully imposed by an indirect offender.[84]

3.3 Resistible Coercion

Article 71 shall not apply (and render the commission of an offence justifiable) where physical or moral coercion could have been averted and resisted, or where the coerced person could have escaped from the threat. Under such cases of resistible coercion, the court shall without restriction reduce the penalty[85] by virtue of Article 72 of the 2004 Criminal Code. According to Article 68, second alinea, of the 1957 Penal Code, mitigation on the basis of resistible coercion was made "by taking into account the circumstances of the case," which particularly refers to "the degree and nature of the coercion, as well as the personal circumstances and the relationship of strength, age or dependency existing between the coerced person and the person who exercised it." This standard has been embodied in Article 71

paragraph 2 (rather than Article 72) of the 2004 Criminal Code, and can through interpretation (*à pari*) apply to resistible coercion.

Under Article 67, second alinea, and Article 68 of the 1957 Penal Code, the term "may" provided for optional and not compulsory mitigation. The official Amharic version took the same course, whereas the French text embodied compulsory mitigation. Apparently, the French version was not binding on Ethiopian courts beyond its influence as an authoritative source of legislative intent during interpretation. However, the Amharic version of Article 72 of the 2004 Criminal Code uses the phrase "shall without restriction reduce the penalty"[86] in addition to its cross reference to the provision on free mitigation (i.e. Article 180) while the English version merely reads "the court shall pass sentence on the criminal (Article 180)". Yet the cross reference to Article 180 enables us to interpret the word 'sentence' as 'free mitigation'.

Although we can interpret this phrase in the English version as free mitigation due to the cross-reference made to Article 180, this cannot imply compulsory mitigation. The *exposé des motifs* of Articles 72 and 180 does not state change in the content the earlier provision on resistible coercion, i.e. Article 68 of the 1957 Criminal Code (other than some editing and the incorporation of its second paragraph in Article 71 of the current Code). The literal reading of the Amharic version thus needs to be carefully interpreted. Once this issue is resolved, the extent of the reduction depends on the circumstances stated in the second paragraph of Article 71.

4. Superior Orders

Companies, governmental institutions and juridical persons at large carry out their activities through a hierarchy thereby rendering the superior-subordinate relationship inevitable. The issue of liability to punishment may thus arise where subordinates, in the course of carrying out a superior order, commit offences. Certain legal systems do not recognize superior order as an affirmative defence unless they are invoked by soldiers in the context of wars or international criminal tribunals. Yet even such legal regimes give recognition to these factors of unlawful superior orders where they constitute duress. For example, they "may constitute a basis for a defence of duress or of a mistaken case of private or public defence, both of which are recognised in English law."[87]

Ethiopian criminal law does not, in principle, recognize superior orders to commit an unlawful act as a justifiable act. Yet it states the situations where certain acts that are committed under superior order may be excusable. Articles 73 and 74 deal with the responsibilities of the superior and the subordinate, and these provisions are applicable to the hierarchy in public administration or to military hierarchy.

4.1 Superior's Responsibility

The person who gives an order must primarily have the authority to do so. Such authority is presumed to exist where the act ordered falls within the tasks of the institution to whom the superior and subordinate belong, and where the superior is authorized to make that specific order. Secondly, the act ordered must be lawful and within the limits permitted by the law.

If these requirements are not met, the act performed becomes an offence where it is declared to be so under criminal law. As regards liability, Article 73 of the Ethiopian Criminal Code provides that the person of higher rank (administrative or military) is punishable for the offence committed on his express order "so far as the subordinate's act did not exceed the order given."

4.2 Subordinate's Responsibility

Obedience to superior orders facilitates efficiency and effectiveness in public or military activities. Yet human beings are not robots; and obedience to a manifestly unlawful order is punishable. The first phrase of Article 74(1), i.e. awareness "of the illegal nature of the order", is the core element of the stipulation, and the phrase following the term 'in particular' seems to illustrate what is meant by awareness about unlawful order. Under Article 74(1), a subordinate who performs an act being "aware of the illegal nature of the order" is liable to punishment. An act is said to have an *illegal nature* where *in particular* the order is given without authority *or* where the act ordered is *unlawful.*

Both conditions in fact represent unlawful orders because an order given under abuse of authority is *ultra vires* and thus untenable; and unlawful orders are not authorized by the law. Awareness that a superior order is given without authority *or* that the order is unlawful suffices to hold the subordinate criminally liable for his acts on express superior order, subject to mitigation under Article 74(2).

The illustrative list embodied in Article 74(1) may be misinterpreted as exhaustive in the Amharic version because it does not, unlike the English version, use the words "such as" before the offences mentioned, i.e. "homicide, arson or any other grave offence against persons or national security or property, essential public interests or international law."[88] The words "such as" clearly indicate that the list of offences that are manifestly unlawful is illustrative. In other words, any reasonable person is presumed to know the criminal nature of a superior order to commit such offences.

In the English version of Article 70(1) of the 1957 Penal Code, the words "or knew that the act was ordered without authority *or* knew the criminal nature of the act ordered" seemed to stipulate alternative conditions. On the

contrary, these conditions were cumulative in the Amharic and French versions. According to the Amharic and French versions, the subordinate is liable to punishment where he is aware of the superior's lack of authority to give the order *and* of the unlawfulness of the act ordered by his superior. But both the Amharic and English versions of Article 74(1) of the 2004 Criminal Code have made the conditions alternative and not cumulative. Moreover, it is to be noted that a subordinate is liable for the acts performed beyond his superior's order.[89]

The definition of 'awareness of the illegal nature of an express order' seems to require some analysis. A person need not examine the legality of every order he receives from his superior. What Article 74(1) requires is the awareness of the order's unlawful nature at the time the subordinate received the order. This may be referred to as the *manifest illegality test*. This test is embodied in laws that are applicable to administrative and military hierarchies. For example, the Legal Notice No. 269 of 1962 stipulated that "(t)he public servant shall obey the orders of his supervisors, (but) . . . shall refuse to obey an order which is *obviously* not in accordance with the law." Article 34 of the Imperial Army Proclamation No. 68 of 1944, on the other hand, stated: "[W]hen an officer or soldier receives a *lawful order* from his superior officer, he must obey immediately." The words "lawful order" can be interpreted in light of "manifest legality". The laws that have been enacted thereafter have also pursued the manifest legality test.

The manifest illegality test is the logical and pragmatic balance between *passive obedience* to unlawful orders and the *intelligent infantry test*, which would allow subordinates to freely question the legality of every order thereby weakening discipline and effective institutional performance. Under the passive obedience approach, "the law insists that the subordinate must always obey orders of a superior without questioning their legality and as a counterbalance the subordinate will never be liable for his acts."[90] The intelligent infantry (or the 'intelligent bayonets') approach, however, "requires subordinates to ensure the legality of the order before executing it, and imposes criminal liability where illegal orders are carried out."[91] As a pragmatic compromise between these two tests, in the manifest illegality test embodied in Article 74 the subordinate becomes criminally liable only where the order is obviously illegal.

French criminal law also supports the manifest illegality test. According to Article 122-4, paragraph 2 of the French Criminal Code, "A person who carries out an act ordered by a legitimate authority is not criminally liable, except if this act is obviously illegal."

> The [defences of order of law and superior orders] are actually closely linked, as frequently the order of a law is put into practice by

> a superior authority ordering a subordinate to carry out the law. . . .
>
> In determining whether the defence applies, the courts need to consider whether the order came from a legitimate authority and whether the order was obviously illegal.[92]

5. Necessity

The issue of necessity arises where two rights are in conflict. Bohlander notes that "necessity is by definition a defence based on a balance of evils" and that the balance "must not be based on a general view of the interests involved, as, for example, damage to property versus damage to health or life."[93] He underlines that the balance between the danger and the act of necessity "must be based on the sum of the circumstances of the individual case, also on the degree of damage caused or threatened to both sides on the scales of necessity and the chances of saving each of the two."[94]

The following example by Robinson shows the scenario whereby a person can be forced to opt for the lesser evil of destroying a field of corn to prevent a town from forest fire:

> A forest fire rages toward a town of 10,000 unsuspecting inhabitants. The actor burns a field of corn located between the fire and the town; the burned field then serves as a firebreak, saving 10,000 lives. The actor has satisfied all elements of the offense of arson by setting fire to the field with the purpose of destroying it. The immediate harm he has caused –the destruction of the field– is precisely the harm which the statute serves to prevent and punish. Yet the actor is likely to have a complete defense, because his conduct and its harmful consequences were justified. The conduct in this instance is tolerated, even encouraged, by society.[95]

The actor under such circumstances encounters danger (but not assault) to himself or to another person. Meanwhile, he faces the necessity of infringing another person's interest thereby violating criminal law. Such acts of necessity may be *justifiable* or *excessive* in accordance with the standard set forth under Articles 75, 76 and 77. In *Bourne* (1938),[96] a surgeon was acquitted because his medical assistance in procuring abortion (which was unlawful at the time) to a 14-year-old girl who was raped was regarded as necessary even though it destroyed the foetus. The "abortion was justified in order to save the fourteen-year-old mother (a rape victim) from the mental trauma of having to carry her child."[97]

Necessity may take the forms of public necessity and private necessity. As the terms indicate, public necessity seeks to protect the public from serious danger while private necessity relates to the safety and security of private

individuals. Rogers[98] notes that in *Re F*[99] it was decided that "a mentally incompetent woman could be sterilized in her own 'best interests', notwithstanding that she was unable to give valid consent to the procedure" and states "[t]he decision has been applied subsequently to justify other forms of medical treatment upon incompetent patients."[100]

However, necessity is narrowly interpreted. For example, the defence of necessity does not apply in cases such as *Harris* (1995),[101] in which a policeman who while driving a police car crossed a red traffic signal and collided with another car. Even if police vehicles are allowed to avoid traffic signals under certain circumstances, the reckless driving of the defendant should have balanced the risk of serious collision at road junction against the danger of serious injury that the suspects pose to someone.[102]

Elliott states the reluctance that prevailed in France to recognize the necessity as a general defence until it was ultimately recognized in judicial jurisprudence and the Criminal Code:

> During the 19th century, the courts were reluctant to recognize openly a general defence of necessity, preferring to treat such cases as falling within the defence of constraint. Thus the famous case of *Ménard* the mother of a family who had stolen some bread to feed her children was acquitted. . . . It was in the 1950s that a court of first instance recognised the defence of necessity. The court acquitted the accused of the charge of building without a permit as he was trying to provide decent living conditions for his family, who has been living in slum accommodation. Soon afterwards the *Cour de cassation* formally recognised the defence of necessity. The defence is now expressly provided for in Article 122-7 of the Criminal Code . . .[103]

The balance between the danger and the act of necessity becomes difficult when human life is put in danger and the act considered necessary by a defendant causes death. In the well-known *Dudley and Stephens* (1884):[104]

> Three men and a boy of the crew of a yacht were shipwrecked and had to take an open boat. After eighteen days in the boat, having been without food and water for several days, the two accused suggested to the third man that they should kill and eat the boy who was in a very weak condition. The three men then fed on the boy's body and, four days later, they were rescued. The accused were indicted for murder.

In *Dudley and Stephens*, "it was held to be unjustifiable to kill one person so that three starving men might live, even though to have done nothing would probably have condemned all four to death."[105] Bohlander recalls the

traditional view under such circumstances and supports a strict and narrow interpretation of necessity when the defendant's act brings about death.

> According to a traditional view, there is one exception to [the balance of evils in the defence of justifiable necessity]: lives can never be traded against each other . . . ; to this extent German law shares the approach expressed in *Dudley and Stephens*. The approach, according to the majority view, even applies to the well-known Speluncean Explorers, mountaineers and Zeebrugge ferry disaster situations as well as to 9/11 scenarios; for them it seems, according to some, only a supra-legal *excusatory* defence could exist.[106]

However, the issue of *necessity* was the basis of the court's decision in a case[107] that involved whether conjoined twins could be separated to the detriment of the weaker twin (Mary) who could not live after the separation and to the benefit of Jodie who had a better chance of survival after separation. The court found it necessary to separate them because "[t]o leave them conjoined would be to leave both to die shortly, probably in no longer than six months."[108]

5.1 Justifiable Necessity

Article 75 (first paragraph) of the Ethiopian Criminal Code provides the following:

> An act which is performed to protect from an *imminent* and *serious* danger a legal right belonging to the person who performed the act or a third party is not liable to punishment if the danger could not have been *otherwise averted* [and the means used are proportionate to the requirements of the case].

The last phrase in square brackets is mistakenly missing in the English version. The element of proportionality was embodied in all the Amharic, English and French versions of the 1957 Penal Code. Even more so, it is included in the Amharic version of the 2004 Criminal Code which is the binding official version. Moreover, the *exposé des motifs* (*Hateta Zemiknyat*) of the 2004 Criminal Code does not mention the omission of this element from Article 75.

Article 75 paragraph 1 embodies five elements, namely:

1. the existence of danger to a legal right
2. the imminence of the danger
3. seriousness of the danger
4. inability to act otherwise
5. proportionality.

First, there ought to be danger to "a legal right belonging to the person who performed the act or a third party." The term 'legal right' covers a wide range of rights which may be related to rights of the person, property, and so forth. Elliott gives two examples where the defence of necessity may or may not be accepted:

> In one case, the defence was allowed where the danger was to a family wellbeing. A tenant had destroyed a fence which had been built by the landlord to stop the tenant's family from having access to the water, gas and electricity meters and to the toilet facilities. Where squatters have broken into property and argued that it was in order to have shelter during a housing crisis the courts have not been prepared to accept that the danger existed or was imminent.[109]

The second element, *imminence*, can be interpreted to mean existing and a danger that is about to occur or pressing. Third, the danger must be grave enough to necessitate the doer's act. The degree of seriousness is relative to the danger created by a person(s) other than the victim, or by natural or fortuitous event. Fourth, the act alleged to have been committed under necessity must be the only means of averting the danger. For example, "a defendant had taken some meat from a shop to improve the diet of his children. But his bank account was in credit and he had stolen more than £100 worth of meat so the defence of necessity was rejected."[110] Finally, the act must be proportional to the threat.

According to the second paragraph of Article 75 of the Ethiopian Criminal Code, the defence of justifiable necessity cannot be invoked "by a person having a special professional duty to protect life or health" subject to the option of the court to reduce the penalty in accordance with Article 180 of the Criminal Code. This is because certain persons are considered to have accepted the possible danger inherent in their occupation. Accordingly, a pilot or captain of a ship is not entitled to invoke the issue of "imminent and serious danger" in a situation detrimental to the passenger's life.

This paragraph did not exist in Article 71 of the 1957 Penal Code, and, as stated in the *exposé des motifs* (*Hateta Zemiknyat*) of Article 75, the amendment is made to exclude persons with professional duty, such as the captain of a ship, from invoking justifiable necessity subject to the possibility of the court's discretion to mitigate penalty based of the circumstances of the case. The defence of justifiable necessity does not involve dangers that are imposed by the law. "For example, a soldier cannot flee combat as he has an obligation to fight when ordered to do so."[111]

German courts have, for example, accepted the defence of necessity under the following circumstances:[112]

- criminal trespass (§ 123) by police informers into the house of a suspect for the purpose of uncovering facts about drug offences [OLG München NJW 1972, 2275]
- leaving the scene of an accident (§ 142) in order to avoid physical abuse [BGH VRS 25, 196; 30, 281; 36, 25]
- taking a blood sample from a deceased accident victim for the purposes of excluding drunkenness in the context of potential insurance claims [OLG Frankfurt JZ 1975, 379. This issue is now expressly regulated in the law of insurance]
- taking away someone's car key to prevent him from driving whilst drunk (§ 240) [OLG Frankfurt NStZ-RR 1996, 136]

5.2 Excess of Necessity

Article 76 reads:

> If the abandonment of the threatened right could reasonably have been required, . . . or if the encroachment of a third party's right exceeded what was necessary, or if the doer by his own fault placed himself in the situation involving danger . . . , the court may, without restriction (180), reduce the penalty.

Even where there is "imminent and serious danger," an act of necessity is not justifiable but only excusable under three alternative conditions, namely:

1. where the act is not necessary
2. where the act is necessary but not proportionate
3. where the doer, by his own fault, puts himself into the danger and the subsequent state of necessity.

In the first instance, the act performed is not at all necessary, and the doer should have rather faced the danger. In the second, the act is necessary but outweighs the threat encountered. "If a fire starts in A's house he is justified in breaking into his neighbour's house in search of an extinguisher but not killing his neighbour if the latter attempts to resist the trespass."[113] In the third instance, if a person finds himself in the state of necessity by his own fault his act is not justified. "Thus if A sets his car on fire with a view to defrauding his insurer but the fire spreads to his house and he cannot put it out except by breaking into B's house and taking B's extinguisher," necessity cannot be invoked "even though the danger could not be otherwise averted and the act is proportional."[114]

Acts of an accused person cannot thus be justified on the ground of necessity under any one of the three conditions stated above (Article 76). Similarly, justified necessity cannot be invoked where an act harmful to another person is committed to protect one's own life or interest in violation

of an occupational commitment under the contexts stated in Article 75 paragraph 2. Nevertheless, the court shall (in any of these four situations stated in Article 76 and Article 75 paragraph 2) reduce the penalty without restriction (Article 180) having regard to the degree of excess, the gravity of the doer's fault and other relevant considerations pertaining to the material circumstances of the case. As with resistible coercion,[115] Article 75 (paragraph 2) and Article 76 do not give the court the option to exempt the offender from punishment. Such acts are not justifiable, but excusable to the extent that is indicated in the law.

5.3 Military State of Necessity

Article 77(1) seems to allow a relatively wider affirmative defence of justifiable necessity for an officer of a superior rank in active service "in the case of military danger and in particular in the case of mutiny or in the face of the enemy." Under such circumstances, the officer's act is justifiable "if the act was the only means, in the circumstances, of obtaining obedience."

The term "obedience" in Article 77 should obviously be understood to mean obedience to "manifestly lawful" orders. Where a superior officer's act is not justifiable due to excess of necessity, the court *shall* freely mitigate the penalty[116] or *may* exempt the accused from punishment[117] "if the circumstances were of a particularly impelling nature." Military state of necessity is not an independent category of defence but one of the aggravated manifestations of necessity as applied to particular settings such as war. Even more so, as envisaged by Graven,[118] there may be military law that can render a certain act lawful which may be wider in scope than the defence of excusable acts embodied under Article 77 of the Criminal Code.

5.4 Collision of Duties

An affirmative defence that seems to be closer to necessity but which has some variation from it may occur upon the 'collision of duties', particularly in the realm of omissions. In terms of thresholds, it seems to be closer to 'duress of circumstances' than the stiffer standards in necessity. Collision of duties may occur where a defendant "has two or more conflicting duties to act, but can only obey one with the necessary and unavoidable consequence that he will be violating the other."[119]

> The duties may be of an unequal nature, for example, if D, who runs a professional dog care service, had taken V's dog out for a walk and brought his little daughter along, and both fall into the river. Under the contract with V, D is obliged to try and save the dog and, as a father, he has to try and save his child.[120]

Likewise, the duty "to act may conflict with duties not to do a certain act" and "legal duties might conflict with moral obligations" in the event of which not only are choices to be made, but the other conflicting course of action or nonaction should also be addressed as much as possible. For example, "the defence attorney who knows his client is a serious child abuser and works in a kindergarten [is] morally bound to inform his client's employer in order to ensure that the children are taken out of harm's way"[121] even if his client-attorney relationship does not allow him to use the information unprofessionally.

6. Legitimate Defence

Legitimate defence, also referred to as self-defence, is the act of defending one's own or another person's protected right against an unlawful and imminent attack. This legally recognized means of private justice has contributed its due share in deterring offenders since ancient times. Unlike an act of necessity, legitimate defence is not an aggressive encroachment upon another person's interest, but a defensive reaction against an actual or imminent attack. A distinction should thus be made between defensive and aggressive conduct. The following reasoning in *Palmer* (1971) illustrates the threshold that can be regarded as an act of legitimate defence:

> If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger, he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. . . .[122]

6.1 Justifiable Acts of Defence

By virtue of Article 78, legitimate defence is "An act done in defence or the defence of another person against an unlawful attack" or "an imminent or unlawful attack against a legally protected right; and it shall not be punishable if:

- the assault or threat could not have been otherwise averted, and
- the defence was proportionate to the needs of the case.

Thus the six cumulative ingredients of legitimate defence (discussed below) require careful consideration.

6.1.1 Attack or Imminent Assault

Primarily, there must be an attack or imminent attack that results from human behaviour which is unlawful under criminal law or other laws. The attack may

be on a person's life, person, property, and so forth. Under French criminal law, an attack on a person's honour will not justify the defence,[123] while "an attack on a person's morals can be sufficient, particularly where the morals of a minor are concerned."[124]

It may not be "necessary that the behaviour is intentional" and "negligence may suffice if the nature of the negligent conduct is dangerous, such as V pulling the trigger of a loaded gun pointed at D when V is unaware of that fact, but D is."[125] However, where the attack is 'outwardly ambivalent,' the defendant can only invoke mistake of fact and not self-defence. An example in this regard can be where "D runs out of a burning house and V merely gets in his way, possibly out of clumsiness or because he is involved in some fire-fighting activity."[126]

The aggression that justifies legitimate defence may be in the process of being carried out or *imminent*, i.e. about to be carried out. Elliott illustrates actual and imminent attack:

> For example, if a person is threatened, but the aggressor is held back by others on the scene, the person threatened cannot lash out violently at their aggressor and then rely on self-defence, as the attack was no longer actual or imminent. [Crim. 28 mai 1937, G.P, 1937 2, 336]. Where the threat is not actual or imminent, the law takes the view that the individual could seek the protection of the authorities, so that a direct response would be unnecessary. If there is a time lapse between the attack and the response, the latter amounts to revenge and falls outside the defence.[127]

Unlike necessity, the "seriousness" of the actual or imminent attack is not a prerequisite in legitimate defence although the magnitude of the aggression is definitely considered in determining the proportionality of the defence. This does not render the defence of justified necessity easily accessible. For example, this affirmative defence cannot be invoked "where in order to prevent possible future attack, a person has attacked first."[128] Such attack is, however, different from precautions:

> [W]hile a person cannot attack first, [he/she] can take precautions to prevent a possible attack. But the means of defence prepared in advance must not be susceptible to produce a disproportionate response compared with the actual attack eventually suffered. . . . In one case, a farmer had suffered several thefts, and had installed a trap gun in his kitchen shed which had injured a thief. The farmer was convicted of an intentional offence against the person. . . .[129]

'Threat of assault' (which was included in Article 74 of the 1957 Penal Code) has not been embodied as one of the elements of Article 78, and the

exposé des motifs (*Hateta Zemiknyat*) does not explain this omission. The issue of whether threat of imminent attack may justify legitimate defence (as in the case of defending against conspirators who have finalized their preparation to undertake robbery) may be controversial. However, threats of attack do not seem to justify legitimate defence because imminent attack is expected to be narrowly interpreted:

> For example, if V is about to shoot D with a pistol, D does not have to wait until V points the gun at him, but can already defend himself when V reaches for the gun in his pocket. Similarly, if V approaches D with a menacing posture and the intention of attacking D, or if a group of hooligans enters a bar in order to start a brawl with the customers present, the courts have held that this can already suffice as an imminent attack. V's mere flight from pursuers when V is in possession of a loaded gun is controversial: the *Reichsgericht* was prepared to accept this as an attack sufficient to allow D to use self-defence, whereas modern commentary appears to view this as going too far as long as V has not actually shown any signs of his intention to use the gun immediately.[130]

6.1.2 Unlawful Attack or Imminent Assault

The second element in legitimate defence embodied under Article 78 of the Criminal Code is that the attack or imminent assault must be unlawful and be done only against the assailant. For example, an offender who inflicts injury on a policeman who was performing an act of lawful arrest cannot invoke legitimate defence. This does not restrict the application of legitimate defence only in reaction to offences because even if the attacker may not have the *mens rea* for an offence, legitimate defence is allowed provided that the attack is not in conformity with any law including criminal law.

The target in legitimate defence is invariably the assailant, and any harm caused to a third party cannot be covered under Article 78. The following decision by a German court in 1993[131] illustrates this point:

> D had been beaten up and humiliated by V during a fight in a bar, and had about 16,000 DEM stolen from him by V. D returned with a sawn-off shotgun and threatened V with it, asking him to return his money. V refused, grabbed T and used him as a human shield whilst firing twice himself at D. [In fact, one of V's shots hit another person who was also killed.] D in return fired two shots at the group consisting of V and T; V was wounded superficially and T died. D argued that the unintended killing of T was covered by self-defence. The BGH rejected that D was acting in self-defence *vis-à-vis* V in the first place and thus could not rely on it with respect to T anyway,

and even if he had acted in self-defence, § 32 did not cover collateral harm to third parties who were not part of the attack.[132]

It must be noted that any harm caused to a third party may be covered under the defence of necessity (if the elements thereof are met) and not legitimate defence.

6.1.3 Self-Defence or Defence of Another Person

The third element under Article 78 of the Criminal Code requires that there be the necessity to defend oneself or another person. In other words, the act ought to be an act of reaction. In contrast to the proactive act of necessity against danger, legitimate defence is an act of response against an ongoing or imminent attack.

6.1.4 Directed against a Legally Protected Right

To evoke legitimate defence, the attack or imminent attack must be directed against one's own or another person's *right*. Article 74 of the English version of the 1957 Penal Code had used the words "legally protected belonging," which meant "legally protected right." Article 78 of the 2004 Criminal Code (Amharic version) merely uses the term '*right* (መብት)' without qualifying rights as "ፍትሐዊ መብት" or '*un bien juridiquement protégé (legally protected right)*' as had respectively been done in the Amharic and French versions of Article 74 of the 1957 Penal Code.

The legally protected right may involve rights guaranteed under criminal law or other laws, such as the right to life, bodily integrity, property, honour and so on. Defending another person against an attack is not of course a duty. Yet if one intervenes to defend another person's protected right against such attack, his act is justified under Article 78.

6.1.5 Unavoidability of Legitimate Defence

The fifth ingredient of legitimate defence is the indispensability or unavoidability of the act. It must be ascertained that "the assault or threat could not have been otherwise averted." A person who could call the police to avert a threat of an attack is not entitled to invoke Article 78. One's act of beating a thief after he has already been captured is an act of vengeance and not a defensive act of protecting the right to property.

The issue of whether one should retreat rather than repel an attack seems to be controversial. If one can easily avert an actual or imminent attack by a prudent and reasonable retreat, standing on his ground to repel may not be necessary. But this should not be misconstrued to mean invariable submission to aggressors. For example, retreat cannot be envisaged if the defendant is attacked at his home.

> There is no longer a general duty to retreat, yet D will generally have to employ merely defensive means (*Schutzwehr*) before moving towards a counter-attack (*Trutzwehr*), but he must never risk the endangerment of his own legal position in order to spare the attacker.[133]

A defensive act presupposes real or imminent attack. If a person erroneously believes that an attack is underway (without there being an actual attack) his act of "imaginary defence" does not fall under legitimate defence but under mistake of fact.[134]

6.1.6 Proportionality of Legitimate Defence

The last element in legitimate defence is that the act of repelling the attack must be "proportionate to the needs of the case". The proportionality test as applied to legitimate defence is relative to strength, weapon, gravity of the prospective harm and other relevant considerations. The proportionality test does not, however, presuppose absolute equality of threat and defence. If A, an armed robber, threatens B saying "your money or your life", the proportionality test does not require B to forsake his money rather than harm the robber in self-defence. Although the robber's primary desire is money and not homicide, B's life is considered to be under threat because his refusal to give away his money is lawful.

> A response must bear some relation to the intensity of the attack. Thus the legitimate defence ceases to be available when a person responds to a slap with a revolver. In one case, some people had just climbed over a boundary wall and the property owner had tried to frighten them away by shooting without visibility into the darkness. One of the intruders was hit and injured. The defence was not available to the property owner as he had carelessly used excessive force. In another prosecution, the defendant had been grabbed by her collar and, in response, she had hit her aggressor with her high heeled shoe causing a lesion to the optic nerve of [the victim's] left eye. This response was considered to be disproportionate by the *Cour de cassation*.[135]

Subjective considerations will also be taken into account. A person who kills a robber who is armed with an unloaded gun, but who believes the gun is loaded, can invoke Article 78. This is different from an imagined offence, because the robbery in the latter example is real despite a reasonable but mistaken belief as to the fatal nature of the means of violence. With regard to proportionality, Ashworth cites the Scots case of *Burns*[136] where the key question is:

> whether the violence offered by the victim was so out of proportion to the accused's own actings as to give rise to the reasonable apprehension that he was in immediate danger from which he had no other means of escape and whether the violence which he then used was no more than was necessary to preserve his own life or to protect himself from serious injury.[137]

Another point that is worth noting in relation to proportionate defence is the requirement of restraint from harming innocent persons that have not taken part in the actual or imminent attack. If an innocent third party happens to be harmed by a defensive act, the affirmative defence embodied in Article 78 (i.e. legitimate defence) cannot be invoked. Under such circumstances necessity[138] may be invoked where appropriate.

The following examples by Bohlander[139] show where self-defence may be restricted on the grounds of proportionality:

> - in cases of *de minimis* attacks, such as shining a light into someone's face [Sch/Sch-Lenckner/Perron, § 32, Mn. 49] or touching another person in the course of an argument without the intention of physical aggression [BGH MDR 1956, 372]
> - . . . a shot with fatal consequences at a thief fleeing with a bottle of syrup worth 10 pence [OLG Stuttgart DRZ 1949, 42], defending a lien on a chicken by hitting its owner over the head with an axe, [BayObLG NJW 1954, 1377] threatening to set dogs on cross-country walkers and to use firearms against them because they use D's private path [BayObLG NJW 1965, 163]
> - if the attacker is acting without guilt, as for example in the cases of children, insane persons or those labouring under an unavoidable mistake of law, where D may be required to resort only to defensive action, or at least more so than against an average person, the reason here being that the law as such is not being disobeyed by V to the same extent as in the ordinary case [BGHSt 3, 217; BGH GA 1965, 148; BGH MDR 1974, 722; BSG NJW 1999, 2302]
> - if there is a special relationship between D and V, such as, for example, husband and wife or family members, which may at the very least require D to avoid lethal means of defence [BGH NJW 1969, 802; 1975, 62; 1984, 986; 2001, 3202], which does, however, not apply to broken-down relationships and situations of long-standing abuse such as domestic battery [BGH NJW 1984, 986; BGH NStZ 1994, 581]
>
> . . .

6.2 Excess in Legitimate Defence (Imperfect Self-Defence)

Using disproportionate means or going beyond the acts necessary for averting the danger in the course of repelling an unlawful assault or imminent unlawful assault [140] constitutes excessive defence. The tests of proportionality and indispensability of an act of legitimate defence have already been discussed. A person who beats and severely injures an unarmed and physically weak pickpocket in the act of stealing Birr 100 is obviously considered to have used disproportionate means. And with regard to defence beyond what is necessary, an act of beating a thief who has already been caught, as stated above, does not at all involve the issue of legitimate defence because the person who beats the thief is no longer under a threat of theft. If instead, the thief was excessively beaten (beyond what was necessary) *while* he was being captured, it would be a case of excessive defence.

Under certain circumstances the same act might be a justifiable act of self-defence or excessive depending upon the material circumstances that surround the act:

> If, for example, you are about to step on my toe, it seems reasonable to say that I have a right to push you a short distance away if my pushing you a short distance away would be sufficient in the circumstances to fend off your threat, and that you have no right that I not push you a short distance away. But if, given where you happen to be standing, my pushing you a short distance away would unavoidably send you into the path of an oncoming bus, the extent of the harm that my pushing you a short distance away would cause you in these circumstances *overrides* my right to push you a short distance away. Here I think proportionality is both internal to liability and also an external constraint: it is proportionate to push the attacker, but impermissible given the (disproportionate) harm he would suffer by being hit by a bus.[141]

Mitigation was allowed by the High Court of Australia in its decision in *Howe* (1958)[142] for an act in which the plea of self-defence was not accepted owing to the excessive force that was used. However, this rule was changed in subsequent cases. In *Zecevic* (1987)[143] the House of Lords held that the plea of self-defence either succeeds leading to acquittal, or fails thereby culminating in a guilty verdict.

Under the 2004 Criminal Code, acts of excessive defence are not justifiable. But unlike the decision in *Zecevic*, "the court *shall* without restriction reduce the penalty."[144] The term "shall" in Article 79(1) provides for compulsory mitigation. Unlike the Amharic version of Article 75(1) of the

1957 Penal Code in which mitigation was optional, Article 79(1) of the Amharic version of the 2004 Criminal Code has made the mitigation compulsory. The English versions of Articles 75(1) and 79(1) (in the 1957 and 2004 Codes respectively) are, however, consistent in using the mandatory term "*shall*." Besides, the court *may* impose no punishment[145] if "the excess committed was due to excusable fear, surprise or excitement caused by the assault".

The extenuating circumstances of surprise, excitement and so forth may at times be constituent elements of special provisions. Articles 541 and 557, for example, embody the elements of provocation, surprise, passion and the like. An offender who is held guilty of such extenuated offences shall not be entitled to further mitigation under Article 79 because the court, according to Article 82(2), "shall not"[146] consider the same circumstance to reduce penalty "when the law in a special provision . . . has taken one of [the extenuating] circumstances into consideration."

In the Federal Supreme Court Cassation File No. 57446,[147] it was held that the defendant who was a forest ranger on duty shot and killed the victim and wounded another person while they were cutting wood in a state-owned forest. The Cassation Division held that the defendant had other means of protecting the forest and the defendant did not submit evidence that he had exhausted all other means to protect the forest before he resorted to shooting at the persons who were conducting the unlawful acts. It thus found that although the defendant was protecting the forest, his acts were excessive and found him liable under excess in legitimate defence (Article 79/1) and the defendant was convicted under extenuated homicide 541(a).

A similar decision was rendered by the FSC Cassation Division, File No. 43501.[148] Three defendants were found to have failed to prove the exhaustion of other means to protect a tantalum factory in Shakiso Woreda, Kenticha Kebele from the attack that was underway due to a riot. They were charged with ordinary homicide (Arts. 32/1/a/b and Art. 540) due to the death of three victims and the third defendant was in addition charged with the attempted homicide against four victims who were physically injured. The defendants denied the acts and argued that they were protecting the factory from the armed attack of about 300 persons.

Even though the defendants insisted that they did not commit the acts, the Cassation Division stated that it has no jurisdiction to review issues of fact other than examining fundamental error in law. It found that even if the defendants were protecting the factory, they have failed to prove that they had exhausted all other means to avert the attack and have not also proved the proportionality of their acts to the attacks against the factory. The three defendants were convicted under excess in legitimate defence (Art. 79(1)) and

extenuated homicide (541(a)) in addition to which the third defendant was convicted under the second charge of attempted extenuated homicide.

7. Mistake

Various branches of the law give due regard to mistake. In criminal law, mistake may vitiate awareness, one of the ingredients of criminal guilt, and may thus render the act unpunishable. In contracts, for instance, fundamental mistake renders the consent of a contracting party defective and thus invalid. Section 16(1) of the German Criminal Code provides that "[w]hosoever at the time of the commission of the offence is unaware of a fact which is a statutory element of the offence shall be deemed to lack intention. Any liability for negligence remains unaffected."

In *Tolson*'s case (1889),[149] a woman was deserted by her husband and did not hear any news from him for about six years. His elder brother had told her that her husband was lost at sea and she regarded herself as a widow and got married to another man. Ten months later her husband reappeared. Her conviction for bigamy was quashed on the basis that she believed and had reasonable grounds for believing her husband to be deceased, although the minority opinion "actually regarded bigamy as a strict liability offence."[150]

The 2004 Criminal Code deals with two kinds of mistake, namely mistake of *fact* and mistake (ignorance) of *law*. A person who delivers poison to a patient under the mistaken belief that it is medicine is said to have committed *mistake of fact*. Such person lacks the awareness about the nature and consequences of his act and thus does not have criminal intention. Yet he may be considered negligent if a reasonable person under his circumstances could not or should not have committed the mistake.

One may also commit an offence under the erroneous belief that his act does not violate the law. In principle, such *ignorance of law* is no defence. Yet mitigation may be allowed under certain circumstances.[151] And finally, an individual who performs a lawful act in the mistaken belief that he is committing an offence is not punishable because his act of *imaginary offence* does not objectively violate the law. Article 77 of the 1957 Penal Code dealt with this third kind of mistake (i.e. imaginary offences). However, the 2004 Criminal Code has duly omitted this provision because the issue of affirmative defences for the purpose of justification or excuse cannot arise if an act does not violate the law despite a contrary imagination of the doer. We will thus focus on mistake of fact and mistake of law.

7.1 Mistake of Fact

Awareness involves full knowledge of the nature, factual circumstances and consequences of one's act. *Fundamental mistake* with regard to facts may lead to acts without awareness. Thus the commission of an offence under an erroneous appreciation of facts without criminal intention shall not be punishable.[152] Essential or fundamental mistake may involve an object where one, for example, takes it believing that it is his. The mistake may also involve an honestly held but mistaken state of mind as in the case of imaginary self-defence whereby the doer acts in the mistaken belief that he or another person is being attacked. Moreover, the mistaken state of mind may be about a person's status of being married, status of being a public servant or the existence of a status that is a material ingredient of an offence.

In short, a fundamental mistake of fact may involve an erroneous belief about the nature of an object, the right over an object, status of a person, threat of danger and the like. In all these cases, the misapprehension of a given fact must be the material ingredient of the offence. Intentional homicide by poison requires the doer's awareness about the nature and consequences of the object he delivers. Theft presupposes an awareness that the object belongs to another person. Adultery[153] requires the knowledge that one's partner is married.

In spite of fundamental mistake, the doer is punishable if his act constitutes an offence specified in the Criminal Code.[154] Mistake committed in shooting and injuring a person at night with the erroneous belief of shooting at a domestic animal that has probably been lost by its proprietor constitutes an attempt of damage to property[155] and may also violate Article 18(11) of the Firearms Proclamation No. 1177/2020[156] that obliges the person who carries a weapon (that has licence) to observe the "safety rules issued by the Supervising Institution while carrying and using firearm".

Moreover, if the act is punishable on the charge of negligence, the doer who could or should have avoided the mistake[157] "by taking such precautions as were commanded by his personal position and the circumstances of the case" is punishable for his negligence. A physician who causes bodily injury to his patient is punishable for negligent bodily injury[158] if his erroneous prescription could have been avoided by due prudence required under the circumstances.

The Criminal Code makes a distinction between fundamental and nonfundamental mistakes. Article 80 also deals with nonfundamental mistakes that led the accused to commit an offence. *Nonfundamental mistake* is not justifiable and it involves "mistake as to the identity of the victim or the object of the offence".[159] Paul Logoz gives examples of nonfundamental (nonessential) mistakes:

> Believing (that) what he took (is) without great value, (if) X rips an original masterpiece belonging to another, this mistake (with respect to the object) does not excuse X from conviction for damage to property." [Mistake of a person's identity is not also excusable]. (If) A wants to kill B, but he shoots C mistaking him for B, this error of identity is irrelevant. In certain cases, however, mistake as to person is relevant; i.e., when it relates to the material element of an offence which has been objectively committed (for example: A corrupts B, who is an official, but A thought him not to be one). . . .[160]

As indicated in Readings 4 and 5 of Chapter 3, transferred malice (*abberatio ictus*) is said to exist where a defendant "with the *mens rea* of a particular crime, does an act which causes the *actus reus* of the same crime" and the defendant "is guilty, even though the result, in some respects, is an unintended one."[161] Such mistakes do not fall under mistake of fact envisaged under Article 80 of the Criminal Code.

7.2 Mistake (Ignorance) of Law

Mistakes of fact and law require careful distinction. As Jerome Hall noted:

> Certain differences between fact and law are easily recognized. Law is expressed in distinctive propositions, whereas facts are qualities or events occurring at definite places and times. Facts are particulars directly sensed by perception and introspection. Legal rules are generalizations; they are not sensed, but are understood in the process of cognition. Law and facts are, of course, closely interrelated. Law is 'about' facts; it gives distinctive meaning to facts. For example, that A kills B is a fact; that this is (an act of homicide) is signified by certain legal propositions.[162]

Two schools of thought propound contrasting views on mistake (ignorance) of law. The utilitarian conception gives precedence to public interest and argues that taking unawareness of the law into account would encourage ignorance. According to the pragmatic school of thought, mistake of law (no less than mistake of fact) affects a person's volition (will) and thus moral guilt, in the absence of which punishment becomes unfair.

A few generations ago, the presumption that citizens are bound to know punishable offences could have been reasonable. But as societies grew complex and as criminal law in due course addressed the violation of various rules, the presumption of general awareness about the law is becoming difficult. Various legal systems, including Ethiopia's Criminal Code, have taken a middle course of compromise by adopting the utilitarian conception as a general principle, and accepting the latter pragmatic conception as an

exceptional mitigating factor applicable under certain circumstances. Article 81 provides for such a compromise. To this end, Article 81(1) embodies the principle that ignorance of the law or mistake regarding the law is no excuse. The exception to this rule is stipulated in Article 81 Sub-Articles 2 and 3. Article 81(2) provides for mitigation of penalty and Article 81(3) allows exemption from punishment.

Article 81(2) requires two cumulative conditions for mitigation of punishment without restriction.[163] Primarily, one must, in good faith, believe that "he had a right to act". The doer is not of course presumed to know the law in detail, and the fact that he is not a lawyer does not have relevance to his liability. Mistake of law cannot be invoked if the doer was in doubt about his right to act, or if he believes that the punishment is not as severe. Moreover, ignorance of the law is no defence if one erroneously believes that he will not be punished for an act which he knows is unlawful. If, however, the doer *in good faith believed* that he had the right to do what he did, one of the two cumulative conditions set forth in Article 81(2) is met.

The second requirement for mitigation of penalty without restriction is a "definite and adequate reason for holding [the] erroneous belief" stated in the preceding paragraph. The doer is not blameworthy and will be deemed to have sufficient reason if a reasonable person under his circumstances would have held the same erroneous belief.

Where these two cumulative requirements are fulfilled, the act (though not justifiable) is excusable, and the court shall without restriction reduce the punishment.[164] The factors that are considered by the court while it determines the extent of the mitigation are "the circumstances of the case and in particular, the circumstances that led to the error."[165]

The court may exempt the accused from punishment in the exceptional cases stated in Article 81(3). This provision applies if the following four cumulative elements are fulfilled where:

- the accused is *absolutely ignorant* of the law, and
- such ignorance of the law is *justifiable*, and
- the doer's act was committed in *good faith*, and
- the criminal *intention* of the accused is *not apparent*.

The requirement of good faith seems to be ambiguous, and we may contextually interpret it to mean belief of the accused *in good faith* that he had the right to act the way he did.

Review Exercises

Identify the affirmative defence, if any, that can be invoked and give your legal opinion assuming that the 2004 Criminal Code is applicable to the cases.

1. "A poacher stealing fish had lost a leg after being injured by a trap placed in a pond by the property owner."[166]
2. Abdullah lived in Liat village (Sudan). The deceased, Nurzamal, was an old woman who lived in another village in the same district and had no relations or previous introduction with the accused before the incident. The accused heard from his mother and the villagers that there was a ghost (Afrieta) in the area and that it fought with a certain Mohammed Rahma. On the night of 26th April 1956 (the 14th night of Ramadan) at sahoor time the accused rode his donkey and went to the valley in search of a missing cow. He was on his way back to the village when he met a figure walking towards him dressed in black and carrying a stick. The accused spoke to the figure, which refused to reply. He became frightened, took the figure for the ghost and started beating it with a stick until if fell motionless to the ground. It was found out that the "ghost" was none other than the old woman Nurzamal. She was dead.[167]
3. "A believes that B threatens him with a real gun while B is actually holding a pop gun". A reacts to the threat by shooting B's leg and causing physical injury.[168]
4. D committed perjury against an innocent defendant to avoid attack from the real offenders.
5. In *Shepherd* (1987)[169] the defendant joined a gang which ultimately became violent and involved itself in five robberies. After the first act of robbery, the defendant wanted to withdraw, but he was threatened with violence against himself and his family. He carried on and participated in the offences.
6. The defendant "incurred debts with a drugs dealer and relied upon this as the explanation as to why the dealer had forced him into committing offences in order to 'repay' the debt."[170]
7. The defendant, D [in BGH NStZ 1987, 322], "had been humiliated and maltreated by her husband V over a long period of time and wanted to get a divorce. When V learned of her intention, he said, 'I'm going to waste everyone now!' and began looking for his pistol. D had previously taken his gun out of the drawer where he kept it. While the altercation was going on, their daughter started crying in her room upstairs. V then said words which led D to believe that he was going

to kill the child, and V went to another room looking for something, which D thought was an axe. She positioned herself in front of the door and drew the loaded gun, taking off the safety. When V entered the room, D fired four shots at him from a distance of two to three metres without looking at him; in fact, she had closed her eyes. V was hit by all four shots and killed by two of them. He had not been carrying an axe."[171]

8. "D and P are roped mountaineers. P has fallen from a thousand foot precipice [steep face of a mountain] and is dragging D slowly after him. D cuts the rope and P falls to his death five seconds before both P and D would have fallen."[172]

Case 13

Supreme Court, 7th Criminal Cases Bench

Criminal Cases Appeal File No. 734/79

Tahsas 26th 1980 Eth. Cal (January 4th 1987)

Bedada W. v. Public Prosecutor[173]

The appeal was lodged by the Public Prosecutor against the decision of the High Court which released the accused on the ground that the act of homicide was committed under legitimate defence. The accused claimed that he shot in self-defence after the victim misfired [የመጀመሪያው ጥይት እንደከሸፈ] and while the victim was loading his gun. The witnesses of the defence testified that they were going to market with the accused when they saw the victim misfired and then started loading his gun to shoot again during which the accused shot and killed him. The Supreme Court upheld the decision of the High Court and decided that by virtue of Article 74 [of the 1957 Penal Code][174] an act committed to defend oneself from an unlawful attack is not punishable.

The two major points of appeal submitted by the Public Prosecutor were the contention that the witnesses gave rehearsed statements and that the accused could have escaped after the first attempt to shoot at him was aborted. This, according to the Public Prosecutor, shows that the danger could have been averted without the act of killing the victim. The court stated its reasons for setting aside the arguments and evidence produced by the Public Prosecutor, and the grounds which led it to accept the evidence submitted by the accused.

The Supreme Court stated that the legislative intent of the provision is to indicate the right of self-defence proportionate to the assault. The Court further stated that the provision that allows self-defence does not require a person to run away and escape from an assault or threat of assault. Under the circumstances, expecting the accused to run and attempt to escape would mean requiring him to expose his back to the victim's bullet.

Questions

1. Compare the following provisions of the 1957 Penal Code and the 2004 Criminal Code (on legitimate defence) and state if there is change in content:
   - "An Act done under the necessity of self-defence or the defence of another person against an imminent and unlawful assault directed against a legally protected belonging shall not be punishable if the assault or threat could not have been otherwise averted and if the defence was proportionate to the needs of the case, in particular to the danger and gravity of the assault and the importance of the belonging to the defendant." (Article 74 of the 1957 Penal Code)
   - "An act done in self-defence or the defence of another person against an unlawful attack or an imminent and unlawful attack against a legally protected right shall not be punishable if the attack or imminent attack could not have been otherwise averted and if the defence was proportionate to the needs of the case." (Article 78 of the 2004 Criminal Code)
2. Relate the material facts of Case 13 with the phrase "if the assault or threat could not have been otherwise averted" and argue:
   a) in favour of the public prosecutor that the accused could have averted the threat if he had tried to escape because the victim was not aiming at him at the moment but was loading the gun for shooting
   b) in support of the reasoning of the Supreme Court, which held that the legislative intent of the provision does not warrant attempt to escape under such circumstances.
3. How do you interpret the notion of "proportionality"? Discuss the issue of 'proportionality' if a person shoots and kills a robber who has broken into his house after midnight. Would your opinion be different if the robber was shot while he was:
   a) going out of the house after carrying various stolen items?
   b) driving the accused's vehicle out of the compound after having tied up and gagged the guard?
4. Can Ato P invoke legitimate-defence from repeated burglary which occurred during the previous months if a thief is severely injured by barbed wire coil placed on the top of the fence:
   a) while he was trying to jump into Ato P's compound?
   b) while he was being chased after he was seen stealing?
5. Assume the same facts in the preceding question except that the wire had electric current and the thief died.

Case 14

Supreme Court, Circuit Bench

Criminal Cases Appeal No. 426/81 (Eth. Cal.)
Hedar 27, 1983 Eth. Cal

Public Prosecutor v. Habtamu (1st Respondent)
Berhanu D. (2nd Respondent) & Adamu B. (3rd Respondent)[175]

The appeal is lodged by the Public Prosecutor against the acquittal of the 1st and 3rd respondents and the release of the second respondent on the ground of legitimate self-defence. The respondents were charged with ordinary homicide as co-offenders under Article 523 of the 1957 Penal Code [Article 540 of the 2004 Criminal Code].

The victim was beaten to death. The Public Prosecutor's witnesses, however, gave contradictory statements to the High Court and were not thus found to be reliable by the Supreme Court. The 2nd respondent had admitted that he has beaten the victim in self-defence by snatching the latter's stick (kezera) because the victim had hit the respondent's wife and her relative by throwing stones after which the victim hit the respondent with a stick. This statement has been substantiated by two defence witnesses who stated that the victim hit the 2nd respondent with a stick and the latter snatched the victim's stick and hit him twice.

No prosecution evidence was presented against the statement of the 2nd respondent and the Supreme Court upheld the finding of the High Court with regard to this issue of fact. But the Supreme Court reversed the holding of the High Court on the legal issue of self-defence on the ground that there was no threat of further attack after the 2nd respondent snatched the stick form the victim. The Supreme Court ruled that the case does not fall under Article 74 (of the 1957 Penal Code) [Article 78 of the 2004 Criminal Code]. However, the Supreme Court found that the act of the victim in hitting the second respondent, the latter's wife and her relative is provocative and causes violent emotion. The Supreme Court thus found the 2nd respondent liable under extenuated homicide under Article 524 (of the 1957 Penal Code) [Article 541 of the 2004 Criminal Code], and passed a mitigated sentence of two years of simple imprisonment.

Questions

1. Article 541 of the 2004 Criminal Code (Article 524 of the 1957 Penal Code) provides that

    Whoever intentionally commits homicide
    (a) by exceeding the limits of necessity (Article 75) or of legitimate defence (Art. 78); or
    (b) following gross provocation, under the shock of surprise or under the influence of violent emotion or intense passion made understandable and in some degree excusable by the circumstances

    is punishable with simple imprisonment not exceeding five years.

Why is "exceeding the limits of … legitimate defence" an element of the provision while Article 79 deals with the power of the court to reduce the penalty without restriction as stipulated under Article 180?

2. According to Article 79(2) of the 2004 Criminal Code (and Article 75(2) of the 1957 Penal Code), "The Court may impose no punishment when the excess committed was due to excusable fear, surprise or excitement caused by the assault." Would a decision by the Supreme Court based on Article 75 (of the 1957 Penal Code) be more favourable to the second respondent rather than a sentence based on extenuated homicide?
3. Assume that the Supreme Court opted to render a sentence on the basis of excess in self-defence, and wanted to reduce the penalty. Should it use the sentence range for ordinary homicide or extenuated homicide as point of reference for the mitigation?

Readings on Chapter 7

Reading 1

[US] Model Penal Code

Ignorance or Mistake

(1) Ignorance or mistake as to a matter of fact or law is a defense if:

a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or
b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

(2) Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

(3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or
b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with

responsibility for the interpretation, administration or enforcement of the law defining the offense.

(4) The defendant must prove a defense arising under Subsection (3) of this Section by a preponderance of evidence.

Reading 2: Elliott and Quinn[176]

Mistake

Mistake and *Mens Rea*

In some cases, a defendant's mistake may mean that they lack the *mens rea* of the offence. For example, the *mens rea* of murder requires that the defendant intends to kill. . . . If the defendant makes a mistake and thinks that the victim is already dead before they bury their body, then they would not have the *mens rea*, because when they buried what they thought was a dead person they could not have intended to kill or cause grievous bodily harm to that person.

The mistake must be one of fact, not of law, and a mistaken belief that your conduct is not illegal will not suffice as a defence. In *R. v. Reid* (1973), a motorist had been asked to take a breathalyser test. Mistakenly believing that the police officer had no legal right to ask him to take such a test in the particular circumstances, he refused to provide a specimen. The courts held that his mistake as to the law was no defence against a charge of refusing to provide the specimen.

The *mens rea* must be negatived by the mistake; a mistake which simply alters the circumstances of the offence is not enough. If a defendant thinks that they are stealing a silver bangle, but in fact it is made of platinum, for example, they will have the *mens rea* for theft and so the mistake is irrelevant. If, however, they mistakenly thought that the bangle was their own, or that the owner had given permission to take it, the required *mens rea* is not present, and the mistake will provide complete defence.

For offences of strict liability, there is no *mens rea* to negative, so mistake will be irrelevant in this context and not serve as a defence. Thus, if it is a strict liability offence to sell bad meat, and a butcher sells infected meat under the mistaken impression that it is perfectly all right, that mistake will be no defence because no *mens rea* is needed.

Some offences provide that liability will be incurred where there was either intention or recklessness, and in these cases, an accused will be able to rely on mistake as a defence only if it meant that they had neither type of *mens rea* –so if a mistake meant that there was no intention, but the accused could still be considered reckless, mistake will not be a defence.

An Honest Mistake

For many years it was considered that a mistake could only be relied on as a defence if it was a reasonable mistake to make. Thus, in *Tolson* (1889), a woman who reasonably believed that her first husband was dead, remarried, only to discover later that the first husband was in fact alive. She was accused of bigamy, but acquitted because her mistake had been both honest and reasonable.

Recently, in the case of *B (a minor) v. DPP* (2000) the House of Lords ruled that *Tolson* was bad law and that it was not necessary for a mistake to have been reasonable; what mattered was whether the mistake prevented the defendant from having the *mens reas* of the offence. This will be the case where the *mens rea* of the offence is subjective, but where it is objective then a mistake is only likely to prevent the existence of the *mens rea* if it was reasonable. Following the case of *R v. G and another* (2003) *mens rea* will normally be subjective.

In the case of *DPP v. Morgan* . . . , the House of Lords looked at the issue of mistake in relation to the offence of rape. The House stated that if the accused honestly believed the complainant was consenting, they did not have the *mens rea* for rape, even though they were mistaken in that belief and their mistake could not even be said to be a reasonable one. The law in the context of rape has now been changed by the Sexual Offences Act of 2003. The *mens rea* of rape . . . [requires that the accused] did not have reasonable grounds to believe that the victim was consenting. An unreasonable mistake will therefore no longer be sufficient to negative the existence of *mens rea* for the offence of rape, and the decision of *DPP v. Morgan* no longer reflects the current law. . . .

Duress

Duress is the defence that applies where a person commits a crime because they were acting under a threat of death or serious personal injury to themselves or another. By allowing the defence the criminal law is recognizing that the defendant had been faced with terrible dilemma. In *R v. Symonds* (1998) it was observed that the same facts could fall within both the defences of duress and self-defence. . . . At one time the defence of duress only covered acts done as a result of express threat to the effect of ‘do this or else’; but modern cases have introduced the concept of duress of circumstances, which arises from the situation that the person was in at the time. There are thus now two forms of this defence: duress by threats and duress of circumstances.

Duress by Threats

This traditional defence of duress covers situations where the defendant is being forced by someone else to break the law under a direct threat of death or serious personal injury to himself or someone else.

Two-Part Test

In order to try to find the balance between the seriousness of the harm threatened to the accused and the seriousness of the consequent illegal behaviour, a two-part test was laid down in *Graham* (1982). The test was similar to that used in the defence of provocation as it involves both a subjective and an objective criterion:

1. Was the defendant forced to act as they did because they feared that otherwise death or serious personal injury would result?
2. Would a sober person of reasonable firmness, sharing the accused’s circumstances, have reacted to that situation by behaving as the accused did?

. . .

Following the case of *R v. Shayler* (2001), a third requirement may be imposed by the courts:

3. The evil must be directed towards the defendant or a person for whom he had responsibility.

. . .

Duress of Circumstances

The basic rules of this defence are the same as for duress by threats, except that it applies where there is no express threat of 'do this or else' but the circumstances threatened death or serious personal injury unless the crime were committed.

The defence is relatively new, originating in *R v. Willer* (1986). Willer was charged with reckless driving, and pleaded that he had to drive in such a way in order to escape from a gang of youths who appeared to be about to attack him. Driving up a narrow road, he had been confronted by the gang, which was 20 to 30 strong, and heard shouts of 'I'll kill you Willer', and threats to kill his passenger. With the gang surrounding the car, the only means of escape was to drive along the pavement and into the front of a shopping precinct. After the trial judge ruled that the defence of necessity was not available, Willer changed his plea of guilty and appealed. On appeal it was held that the issue of duress should have been left to the jury, and Willer's conviction was quashed. The Court of Appeal did not use the term 'duress of circumstances', but clearly the case was different from the 'do this or else' scenario previously associated with the defence: Willer was threatened, but he was not told that the threats would be carried out unless he drove on the pavement.

This extension of the defence was subsequently considered in *R v. Conway* (1989) where the label 'duress of circumstances' was introduced. After being followed in his car by an unmarked vehicle, Conway had driven off in a reckless manner when two men, who were police officers in plain clothes, got out of the car and started to approach him. Conway's passenger, Tonna, had earlier been in a car in which someone had been shot, and when he saw the two men running towards the car (not knowing that they were policemen) believed that he was about to be attacked. Consequently, he yelled 'Drive off' and Conway, also failing to realise the men were police officers, responded accordingly, believing that Tonna was indeed about to be attacked. Conway's conviction for reckless driving was quashed on appeal because the defence of duress of circumstances should have been put to the jury. It was said that this defence was available only if, from an objective viewpoint, the defendant could be said to be acting in order to avoid a threat of death or serious injury to himself or someone else.

The defence was discussed in *R v. Martin* (1989) where Martin had been disqualified from driving. One morning, while the driving ban was still in force, his stepson was late for work and Martin's wife, who had been suicidal in the past, started to bang her head against a wall and threatened to kill herself unless he drove the boy to work. Martin was charged with driving while disqualified, and argued that he had reasonably believed that his wife might carry out her threat. The trial judge refused to allow the defence of duress, but the Court of Appeal held that the defence of duress of circumstances should have been put before

the jury . . . . First, was the accused, or may he have been, compelled to act as he did because what he reasonably believed to be the situation gave him good reason to fear that otherwise death or serious physical injury would result? Secondly, if so, would a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by behaving as the accused did? If the answer to both of these questions was 'Yes', the defence was proved and the jury should acquit.

All the cases discussed so far have been concerned with road traffic. But in *R v. Pommel* (1995) the Court of Appeal explicitly stated that the defence did not just apply to road traffic cases, but applied throughout the criminal law. The police obtained a search warrant and burst into the defendant's London flat at eight o'clock in the morning. They found him in bed holding a loaded gun and he was charged and convicted of possessing a prohibited weapon without a licence. Defence counsel argued that the night before someone had visited Pommell with the gun, intending to go and shoot some people who had killed a friend. Pommell had persuaded the man to leave the weapon with him to avoid further bloodshed. This happened at one o'clock in the morning, so he had decided not to take the gun straight to the police, but to keep and take it in the morning. The police had arrived before he was able to do so. His conviction was set aside on appeal as the defence of duress of circumstances would technically be available in these circumstances. In the case of *R. v. Abdul-Hussain* (1999), the Court of Appeal found that the defence could be available for the offence of hijacking.

As with duress by threats, duress of circumstances usually applies only where death or serious bodily harm is feared. In *R. v. Baker (Janet)* and *Wilkins* (1997) the Court of Appeal stated that the defence of duress of circumstances could not be extended to cover situations where serious psychological injury was feared. The father of a child had refused to return the girl at the end of a contact visit. Her mother along with her husband had gone around to the father's house and, hearing a child crying, they feared for the girl's psychological health and proceeded to pound on the front door. The mother and her husband were convicted of criminal damage and their appeals were rejected, as the defence of duress of circumstances applied only where there was a fear of imminent death or serious physical injury. . . .

Arguments against Duress

A case can be made for abolishing the defence altogether. In their 1977 report, the Law Commission recognised the following arguments against duress as a broad general defence:

- doing wrong can never be justified;
- it should not be up to individuals to weigh up the harm caused by their wrongful conduct against the harm avoided to themselves or to others;
- duress could be classified as merely the motive for committing a crime, and the criminal law does not take motive into consideration for the purposes of conviction;
- the criminal law is itself a system of threats (if you commit a crime you will be punished), and that structure would be weakened if some other system of threats was permitted to play a part;

- allowing the defence helps such criminals as terrorists and kidnappers.

Despite recognizing these points, the Law Commission did not recommend that the defence should be abolished. . . .

The Law Commission (1977) recommend that duress should be a general defence and applicable to all crimes including murder. A threat of harm to the accused or another should be sufficient to constitute duress, but the threat to property should not be. . . . [D]efendants would not have the defence if they brought the circumstances of duress on themselves. . . .

Reading 3: Hart[177]

Legal Responsibility and Excuses

1

It is characteristic of our own and all advanced legal systems that the individual's liability to punishment, at any rate for serious crimes carrying severe penalties, is made by law to depend, among other things, on certain mental conditions. These conditions can best be expressed in negative form as *excusing* conditions: the individual is not liable to punishment if at the time of his doing what would otherwise be a punishable act he was unconscious, mistaken about the physical consequences of his bodily movements or the nature or qualities of the thing or persons affected by them, or, in some cases, if he was subjected to threats or other gross forms of coercion or was the victim of certain types of mental disease. This is a list, not meant to be complete, giving broad descriptions of the principal excusing conditions; the exact definition of these and their precise character and scope must be sought in the detailed exposition of our criminal law. If an individual breaks the law when none of the excusing conditions are present he is ordinarily said to have acted of 'his own free will', 'of his own accord', 'voluntarily'; or it might be said, 'He could have helped doing what he did.' . . .

. . .

2

In the criminal law of every modern state responsibility for serious crimes is excluded or 'diminished' by some of the conditions we have referred to as 'excusing conditions.' In Anglo-American criminal law this is the doctrine that a 'subjective element', or '*mens rea'*, is required for criminal responsibility, and it is because of this doctrine that a criminal trial may involve investigations into the sanity of the accused; into what he knew, believed, or foresaw; or into the questions whether or not he was subject to coercion by threats or provoked into passion, or was prevented by disease or transitory loss of consciousness from controlling the movements of his body or muscles. These matters come up under the heads known to lawyers as Mistake, Accident, Provocation, Duress, and Insanity, and are most clearly and dramatically exemplified when the charge is one of murder or manslaughter . . . .

4

. . . [W]e must cease to regard the law as merely a causal factor in human behaviour differing from others only in the fact that it produces its effect through the medium of the mind; for it is clear that we look on excusing conditions as

something that *protects* the individual against the claims of the rest of society. Recognition of their excusing force may lead to a lower, not a higher, level of efficacy of threats; yet –and this is the point– we would not regard that as sufficient ground for abandoning this protection of the individual; or if we did, it would be with the recognition that we had sacrificed one principle to another; for more is at stake than the single principle of maintaining the laws at their most efficacious level. We must cease, therefore, to regard the law simply as a system of stimuli goading the individual by its threats into conformity. Instead I shall suggest a mercantile analogy. Consider the law not as a system of stimuli but as what might be termed a *choosing* system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways. This done, let us ask what value this system would have in social life and why we should regret its absence. I do not of course mean to suggest that it is a matter of indifference whether we obey the law or break it and pay the penalty. Punishment is different from a mere 'tax on a course of conduct'. What I do mean is that the conception of the law simply as goading individuals into desired courses of behaviour is inadequate and misleading; what a legal system that makes liability generally depend on excusing conditions does is to guide individuals' choices as to behaviour by presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose. . . .

5

I will add four observations *ex abundante cautela*.

(i) . . . Human beings in the main do what the law requires without first choosing between the advantage and the cost of disobeying, and when they obey it is not usually from fear of the sanction. For most the sanction is important not because it inspires them with fear but because it offers a guarantee that the antisocial minority who would not otherwise obey will be coerced into obedience by fear. To obey without this assurance might, as Hobbes saw, be very foolish: it would be to risk going to the wall. However, the fact that only a few people, as things are, consider the question Shall I obey or pay? does not in the least mean that the standing possibility of asking this question is unimportant: for it secures just those values for the individual that I have mentioned.

(ii) I must, of course, confront the objection which the Marxist might make . . . . If starvation 'forces' [a person] to steal, the values the system respects and incorporates in excusing conditions are nothing to him. This is of course similar to the claim often made that the freedom that a political democracy of the Western type offers to its subjects is merely formal freedom, not real freedom, and leaves one free to starve. I regard this as a confusing way of putting what may be true under certain conditions: namely, that the freedoms the law offers may be *valueless* as playing no part in the happiness of persons who are too poor or weak to take advantage of them. The admission that the excusing condition may be of no value to those who are below a minimum level of economic prosperity may mean, of course, that we should incorporate as a further excusing condition the pressure of gross forms of economic necessity. This point, though possibly valid, does not seem to me to throw doubt on the

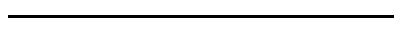
principle lying behind such excusing conditions as we do recognize at present, nor to destroy their genuine value for those who are above the minimum level of economic prosperity . . .

(iii) The principle by reference to which I have explained the moral importance of excusing conditions may help to clarify an old dispute, apt to spring up between lawyers on the one hand and doctors and scientists on the other, about the moral basis of punishment.

From Plato to the present day there has been a recurrent insistence that if we were rational we would always look on crime as a disease and address ourselves to its cure. We would do this not only where a crime has actually been committed but where we find well-marked evidence that it will be. We would take the individual and treat him as a patient before the deed was done. Plato, it will be remembered, thought it superstitious to look back and go into questions of responsibility or the previous history of a crime except when it might throw light on what was needed to cure the criminal [*Protagoras*, 324; *Laws*, 861, 865].

Carried to its extreme, this doctrine is the programme of Erewhon, where those with criminal tendencies were sent by doctors for indefinite periods of cure; punishment was displaced by a concept of social hygiene. It is, I think, of some importance to realize why we should object to this point of view; for both those who defend it and those who attack it often assume that the *only* possible consistent alternative to Erewhon is a theory of punishment under which it is justified simply as a return for the moral evil attributable to the accused. Those opposed to the Erewhonian programme are apt to object that it disregards *moral* guilt as a necessary condition of a just punishment and thus leads to a condition in which any person may be sacrificed to the welfare of society. Those who defend an Erewhonian view think that their opponents' objection must entail adherence to the form of retributive punishment that regards punishment simply as a justified return for the moral evil in the criminal's action.

Both sides, I think, make a common mistake: there i*s* a reason for making punishment conditional on the commission of crime and respecting excusing conditions, which is quite independent of the form of retributive theory that is often urged as the only alternative to Erewhon. . . .



Endnotes, Chapter 7

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[12] Crim. Code, Art. 70(1).
[13] Crim. Code, Art. 70(2).
[14] Crim. Code, Art. 71 para 1 & Art. 75 para 1.
[15] Crim. Code, Arts. 77(1), 78 and 80(1).
[16] Crim. Code, Arts. 70, 71, 75 para 1, 77(1), 78, 80(1).
[17] Crim. Code, Art. 180.
[18] Crim. Code, Art. 182.
[19] Crim. Code, Art. 180.
[20] But mitigation of penalty based on under Article 74(2) (paragraph 1, first phrase) is optional. Under the circumstances stated in Articles 74(2) paragraph 2, 77(2) second phrase, 79(2) and 81(3) the court *may* impose no punishment. Exemption from punishment on the basis of the latter provisions is clearly *optional* and not compulsory.
[21] Crim. Code, Art. 68.
[22] Crim. Code, Art. 69.
[23] Crim. Code, Art. 70.
[24] Crim. Code, Art. 71.
[25] Crim. Code, Art. 75.
[26] Crim. Code, Art. 78.
[27] Crim. Code, Art. 68(a).
[28] Crim. Code, Art. 68(b).

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[30] Elliot, *supra* note 7, p. 106.
[31] Elliott, *Ibid*.
[32] Elliott, *Ibid,* p. 107.
[33] Alger, 9 nov. 1953. D, 1954, 369, note Pageaud.
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[35] Michael Bohlander (2009), *Principles of German Criminal Law* (Hart Publishing), p. 90.
[36] *Ibid.* (footnotes omitted).
[37] Philippe Graven (1965), *An Introduction to Ethiopian Penal Law: Arts. 1–84 Penal Code* (Addis Ababa: Haile Selassie I University and Oxford University Press), p. 170.
[38] Fantaye K. v. Public Prosecutor (Criminal Appeal No. 16762, Tahsas 18, 1997 Eth. Cal), Federal Supreme Court), Case Report, Federal Supreme Court, Addis Ababa, 1999 Eth. Cal., pp. 128–130.
[39] Crim. Code, Art. 643.
[40] Crim. Code, Arts. 254, 335, 443 and 479.
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[42] Crim. Code, Art. 659(2).
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[44] Civil Code, Art. 2068.
[45] Crim. Code, Art. 69.
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[48] Bohlander, *supra* note 35 p. 85, citing BVerfGE 32, 98.
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[51] E.g. Crim. Code, Arts. 560(1), 652 etc.
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[66] Gotts [1992] 1 All ER 832.

[67] *Ibid*.

[68] Molan *et al, supra* note 65, pp. 280.

[69] Hudson and Taylor [1971] 2 All ER 244.

[70] Molan *et al., supra* note 65, pp. 280–281.

[71] Abdul-Hussein and Others [1999] Crim. LR 570, CA.

[72] Molan *et al., supra* note 65, p. 281.

[73] Cole [1994] Crim. LR 582.

[74] Molan *et al., supra* note 65, p. 281.

[75] *Ibid.*

[76] Elliott, *supra* note 7, pp. 116, 117.

[77] It reads "N'est pas punishable, celui qui acomplit une infraction sous l'empire d'une contrainte physique absolu, à laquelle il lui état impossible de résister. L'auteur de la contrainte répond de infraction commise (art. 32 (1)(c)."

[78] Willer (1986) 83 Cr App R 225, CA.

[79] Molan *et al.*, *supra* note 65, p. 284.

[80] Martin [1989] 1 All ER 652.

[81] Molan *et al.*, *supra* note 65, p. 285.

[82] Crim. Code, Art. 32(1)(c).

[83] Crim. Code, Art. 75.

[84] Crim. Code, Art. 32(1)(c).

[85] Crim. Code, Art. 180.

[86] The literal reading of the phrase "ፍርድ ቤቱ ቅጣቱን በመሰለው ያቃልላል (አንቀፅ ፻፹)" indicates compulsory mitigation.

[87] Shlomit Wallerstein (2010), "Why English Law Should Not Incorporate the Defence of Superior Orders", *Criminal Law Review,* Vol. 2, p. 110.

[88] Its content is identical with Article 70(1), para 1 except the inclusion of "national security" in the new Code.

[89] Crim. Code, Art. 74(3).

[90] Elliott (2001), *supra* note 7, pp. 108–109.

[91] *Ibid.*, p. 109.

[92] *Ibid.*, p. 108.

[93] Bohlander, *supra* note 35, p. 112 (footnotes omitted).

[94] *Ibid.*

[95] Robinson, *supra* note 1, pp. 213, 214.

[96] Bourne [1938] 3 All ER 615.

[97] Jonathan Rogers (2001), "Necessity, Private Defence and the Killing of Mary", *Criminal Law Review*, p. 518.

[98] *Ibid.*, p. 517.

[99] [1990] 2 A.C. 1.

[100] Airedale NHS Trust v. Bland [1993] 1 All E.R. 821; R v. Bournewood Community and Mental Health NHS Trust, ex p. L [1998] 3 All E.R. 289.

[101] Harris (1995) 16 Cr App R(S) 318, CA.

[102] Molan *et al.*, *supra* note 65, p. 289.

[103] Elliott, *supra* note 7, p. 114 (citing Crim. 15 nov. 1856, *B.*, no. 358; 14 août 1863, *D. P.* 64 1 399; Amiens, 22 avr. 1898. *S.*, 1899 2 1, note Roux; Trib cour, Colmar, 27 avril 1956, *D.*, 1956 500; Crim. 25 juin 1958, Lenage, J.C.P., 1959 II 10941, note J. Languier. D. 1958 693, note M.R.M.P.).

[104] The Queen v. Dudley and Stephens, 14 Q.B.D. 273 (1884).

[105] Rogers (2001), *supra* note 97, p. 518.

[106] Bohlander, *supra* note 35, p. 112.

[107] [2000] 4 All E.R. 961.

[108] Rogers, *supra* note 96, p. 516.

[109] Elliott, *supra* note 7, p. 115 (footnotes omitted).

[110] Elliott, *Ibid,* (footnote omitted).

[111] Elliott, *Ibid*.

[112] Bohlander, *supra* note 35, pp. 113–114. Bohlander's footnotes are indicated in square brackets.

[113] Graven, *supra* note 37, p. 215.

[114] *Ibid.*

[115] Crim. Code, Art. 72.

[116] Crim. Code, Arts. 180 and 77(2) first phrase.

[117] Crim. Code, Art. 182 and 77(2) second phrase.

[118] Graven, *supra* note 37, pp. 219–220.

[119] Bohlander, *supra* note 35, p. 95.

[120] *Ibid.*

[121] *Ibid.*

[122] Palmer [1971] 1 All ER 1077.

[123] Crim. 24 nov. 1899, *D.* 1901, 1, 373.

[124] Elliott, *supra* note 7, p. 110.

[125] Bohlander, *supra* note 35, p. 100.

[126] *Ibid.*

[127] Elliott, *supra* note 7, p. 110.

[128] Crim. 27 juin 1927, S., 1929. I. 356.

[129] Elliott, *supra* note 7, p. 111 (citing Reims, 9 nov. 1978, D., 1979 92, note Pradel; *J.C.P*; 1979 II 19046).

[130] Bohlander, *supra* note 35, pp. 100–101 (citing BGH NJW 1973, 255; BGHSt 25, 229; 39, 376; BGH NStZ 2000, 365; BGH NJW 1995, 973; RGSt 53, 132; 61, 216; 67, 337; Sch/Sch-Lenckner/Perron, § 32, Mn. 14).

[131] BGHSt 39, 380.

[132] Bohlander, *supra* note 35, p. 103.

[133] *Ibid*, p. 104 (citing BGHSt 24, 356; 26, 147; BGHSt 25, 229; BGH NJW 1980, 2263; NJW 1991, 503).
[134] Crim. Code, Art. 80.
[135] Elliott, *supra* note 7, p. 111 (footnotes omitted).
[136] 1995 S.L.T. 1090.
[137] Andrew Ashworth (2011), "Assault: Self-Defence—General Observations", *Criminal Law Review*, Vol. 5, p. 395.
[138] Crim. Code, Arts. 75–77.
[139] Bohlander, *supra* note 35, pp. 104–105.
[140] Crim. Code, Art. 79.
[141] Suzanne Uniacke (2011), "Proportionality and Self-Defence", *Law and Philosophy*, Vol. 30, No. 3, p. 271.
[142] Howe (1958) 100 CLR 448, Aust. HC.
[143] Zecevic v. DPP (Victoria) (1987) 162 CLR 645, Aust. HC.
[144] Crim. Code, Arts. 79(1), 180.
[145] Crim. Code, Art. 79(2).
[146] The words "may not" in the English version of Art. 82(2) of the 2004 Criminal Code is inconsistent with the Amharic version of the same provision which provides for *mandatory* prohibition against double mitigation.
[147] FSC Cassation Division Decisions, Ginbot 19, 2003 EC, (27 May 2011), Vol 12, pp. 202-205)
[148] FSC Cassation Division Decisions, Megabit 15, 2002 EC, (24 March, 2010), 20 Vol. 10, pp. 196-199
[149] 23 QBD 168; [1886–90] All ER Rep 26.
[150] Molan, *et al.*, *supra* note 65, p. 274.
[151] Crim. Code, Art. 81.
[152] Crim. Code, Art. 80(1).
[153] Crim. Code, Art. 652.
[154] Crim. Code, Art. 80(2).
[155] Crim. Code, Arts. 27, 29 and 689.
[156] Firearm Administration and Control Proclamation No. 1177/2020
[157] Crim. Code, Arts. 59, 80(1).
[158] Crim. Code, Art. 559.
[159] Crim. Code, Art. 80(3).
[160] Logoz, *Commentaire du Code Penal Suisse* 75–76, in Steven Lowenstein (1965), *Materials for the Study of the Penal Law of Ethiopia* (Addis Ababa: Haile Selassie I University), p. 233.
[161] John Smith (2002), *Smith and Hogan Criminal Law*, 10th ed. (London: LexisNexis Butterworths), p. 90.
[162] Jerome Hall, *General Principles of Criminal Law*, 376, in Lowenstein, *supra* note 204, p. 239.
[163] Crim. Code, Art. 180.

[164] Crim. Code, Art. 80(2).
[165] Crim. Code, Art. 81(2) para 2.
[166] Elliott, *supra* note 7, p. 112.
[167] Sudan Government v. Abdullah Mukhtar Nur (1959, Sudan, L. J. 1), in Lowenstein, *supra* note 204, pp. 234–236.
[168] Graven, *supra* note 42, p. 226.
[169] Shepherd (1987) 86 Cr App R 47.
[170] Molan *et al.*, *supra* note 65, p. 282.
[171] Bohlander, *supra* note 35 p. 76.
[172] Smith, *supra* note 161, p. 44.
[173] Supreme Court Law Report (1996), Vol. 1, pp. 250–252, author's translation.
[174] The content of Article 78 of the 2004 Criminal Code is similar with Article 74 of the 1957 Penal Code other than minor editing and the omission of the last phrase "in particular to the danger and gravity of the assault and the importance of the belonging to be defended" which, according to the *exposé des motifs* (*Hateta Zemiknyat*), is omitted for the purpose of clarity and brevity rather than change in content.
[175] Selected Judgments (1996), Volume 1, Federal Supreme Court(Amharic), pp. 374–381), Author's translation.
[176] Catherine Elliott and Frances Quinn (5th Edition, 2004), *Criminal Law* (Harlow: Pearson Education Ltd.), pp. 268–270, 286–287, 294, 295.
[177] H.L.A. Hart (2008), [First Edition 1967] *Punishment and Responsibility*: *Essays on Philosophy of Law*, 2nd Edition, with introduction by John Gardner (Oxford University Press), pp. 28-53 with omissions

Chapter 8

Determination of Punishment: General Principles

The issue of punishment evokes four questions: why punish, whom to punish, how to punish and how much. The first question, "why punish?" deals with the rationale or *raison d'être* of punishment. The second issue of "whom to punish" has been discussed in the preceding chapters. The person who is punished is the one who is criminally liable for having committed the elements of an offence discussed in the chapters under Part I of this book, provided that he is responsible for his acts (Chapter 6) or does not have an affirmative defence that can render his act lawful, justifiable or excusable (Chapter 7). The current chapter addresses the remaining three questions regarding punishment. The first section briefly states the purposes of punishment, after which Sections 2 and 3 deal with kinds of punishment embodied in the Criminal Code and the general principles in the determination of punishment in single offences, multiple offences and recidivism, with particular focus on imprisonment.

1. Purposes of Punishment

Criminal law (as stated in Chapter 1) gives due notice of prohibited acts or omissions that are considered punishable offences. It also states the penalties that are imposed in cases of violation of such prohibitions. If (in spite of such enactment) an offender violates a penal prescription, punishment steps in. The issue of 'punishment' has been the subject of controversy for a long time, in relation to its correlated purposes. Most of the purposes do not seem to be mutually exclusive, and synthesis of compatible theories is usually pursued by legal regimes.

The drafter of the 1957 Ethiopian Penal Code, Jean Graven, states that in addition to juridical concepts, other contributions from the sciences of psychology, sociology and penology "must be taken into consideration in the elaboration of any criminal code which would be inspired by the principles of justice and liberty, and by concern for the prevention and suppression of crime, for the welfare and, indeed, the rehabilitation of the individual accused of crime."[1] Graven also notes the need to retain punishment owing to its deterrent lesson to prospective offenders "by reason of the example it sets."

1.1 The Retributive (Deontological) Theory of Punishment

The oldest rationale of punishment was motivated by expiation, revenge and reciprocity. It imposed punishment equal and proportionate to the offence committed and the harm caused, and dates back to the earliest laws of "eye for an eye and tooth for a tooth". Retributive punishment had strong defenders like Hegel and Kant. According to Hegel, *wrong* negates *right* and punishment as negation of the negation (of wrong), should be "proportionate to the wrong done". For Hegel, "[p]unishment is only the manifestation of crime, the second half of which is necessarily presupposed in the first. [R]etribution is the turning back of crime against itself. The criminal's own deed judges itself."[2]

Immanuel Kant wrote:

> Juridical punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime, for a human being can never be manipulated merely as a means to the purpose of someone else and can never be confused with the objects of the Law of things. . . ."[3]

In short, the retributive theory of punishment holds that proportionate or equivalent punishment is deserved by any offender, and that punishment should be imposed for its own sake, or as an end in itself without a need or justification on the basis of its utility as a means to another end. According to Kant's third formulation of the Categorical Imperative, every individual is free and capable of determining right and wrong through the use of reason, and thus the principle of autonomy envisages rational volition. Kant "refers to the rational will as legislating or giving law to itself, as the author [Urheber] of the laws to which it is subject, and as bound only to its own legislation, or will".[4]

Many modern legal systems consider crude retributive sentences as outdated. Yet even such legal systems consider the harm done (e.g. complete offences vis-à-vis attempts), the gravity of the offence, and so forth while determining sentences. Modern retributive theories have departed from the original conception of revenge and reciprocity and focus on the theme of proportionality.

Norrie states that "retributivism ignores personal and social causes of criminality so persistently identified by criminology" and criticizes retributivism for its duplicity in blaming "the individual as a free, responsible being while neglecting to consider those factors that determined

his behaviour and for which he was not responsible."[5] Norrie relates this conflict with Hobbes's conception of punishment in *Leviathan*, in which he notes a "contradiction between the juridical foundation of right and its factual denial."[6] He then notes "two contradictory accounts of man—as a natural and as a juridical being."[7]

> Integral to the maintenance of society and the avoidance of nature (war) is the institution of punishment. But if the exercise of punishment is based upon an unconceded right of nature, then every threat or act of punishment is itself a reversion to the state of nature. Every such threat or act is a potential or actual act of war. …
>
> . . . The main problem for the retributivist today is to create a theory of punishment which can at the same time honour the rationality of the individual and come to terms with the material conditions of modern criminality.[8]

1.2. Utilitarian (Consequentialist) Theory of Punishment

The utilitarian theory forwards that the purposes of punishment ought to be *deterrence, disablement and reform*, and as its name indicates, utilitarianism perceives punishment on the basis of its utility, i.e. as a means of crime prevention. Torcia contrasts retributive and utilitarian theories as follows:

> The theory of retribution would impose punishment for its own sake, the utilitarian theories of deterrence and reformation would use punishment as a means to an end—the end being community protection by prevention of crime.[9]

The utilitarian (consequentialist) purposes of punishment were articulated by utilitarian philosophers Jeremy Bentham, John Stuart Mill and others. This theory of punishment was initially propounded by the ancient philosophers such as Plato and Seneca. The following quotation from Plato substantiates this point:

> [H]e who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone,—he has regard to the future, and is desirous that the man who is punished and he who sees him punished, may be deterred from doing wrong again. He is punished for the sake of protection. . . .[10]

1.2.1 Deterrence

Deterrent punishment is an exemplary sentence and is (by its adherents) recommended where a particular crime is considerably frequent. According to the preface of the 2004 Criminal Code, "punishment can *deter* wrongdoers from committing other crimes; it can also serve as a warning to

prospective wrongdoers." In other words, the Ethiopian Criminal Code regards punishment as deterrent both from the perspective of the *specific (individual)* offender and in relation to its *general* impact as a disincentive against potential offenders. The latter objective is known as *general deterrence* because the punishment of an offender is believed to deter or dissuade other potential offenders. In the former case of *specific or individual deterrence*, punishment targets at deterring the individual offender by way of making him face an uncomfortable experience so that he would not commit offences in the future.

Such a deterrent purpose has many defenders and opponents. According to Salmond, deterrent punishment "prevents offences by . . . making all deeds which are injurious to others injurious also to the doers of them."[11] Hall and Glueck, on the other hand, argue that

> fear of punishment is but one small item in a large number of forces that restrain most men from violating the law: religious and ethical training, fear of disgracing one's family, lack of need for stealing in order to supply economic needs and many others. The history of punishment shows that there is no necessary correlation between the severity of punishment and the incidence of crime.[12]

Yet, Hall and Glueck admit that deterrent punishment is effective for certain kinds of widespread violations and accept its significance as a subsidiary and not a major purpose of punishment. It is worth to note that exaggerated adherence to deterrence is relatively unjust to the offender if his punishment is solely taken as a means of deterring others without regard to the gravity of the offence and degree of guilt.

With regard to specific (or individual) deterrence, the deterrent effect of punishment "appears to be great in case of persons with no previous experience of prison . . . but its effect diminishes in proportion to the number of times a person is sentenced."[13] According to Beccaria, punishment should be *promp*t to maximize its deterrent effects on the offender and on prospective offenders. 'The smaller the interval of time between the punishment and the crime', the stronger becomes its deterrent effect.

1.2.2 Prevention (Disablement)

The second aspect of the utilitarian theory of punishment aims at disabling or incapacitating offenders from harming society: temporarily (imprisonment) or permanently (death penalty). Many modern legal systems have abolished the death penalty and others may follow suit in the decades to come, because experience has proved that the abolition of capital punishment has not increased the occurrence rate of offences in most countries.

The objective of prevention is not adequately effective if it merely focuses on individual offenders. In addition to preventing society from offenders through punishment such as imprisonment, broader preventive measures can be utilized through various social and educational schemes and policies. Disabling certain offenders does not on its own eliminate offences from society unless the larger context is taken into account. To use Buckle's famous words, "society prepares the crime, the criminal commits it."[14] Society will of course be prevented from offenders who are put behind prison bars. But the sociomaterial base (source) will definitely give rise to new offenders. Even more so, convicts may deepen and reinforce their criminality and endanger society after their release unless *reform* during custody and *rehabilitation* become the major purposes of punishment.

Preventive considerations are manifest in preventive detentions. For instance, during the preceding centuries, certain '*Ambas*'[15] in Ethiopia used to be preventive detention seats of royal princes who were regarded as contestants to the throne. This was so, not owing to the commission of offences, but rather because the monarch in power considered the measure expedient for 'peace and order.' Preventive detention is administrative or political, and not judicial (unless it is based on law and imposed by judicial decision, as in the case of criminal laws such as the measure of internment that was stipulated under Article 128 of the 1957 Penal Code, which provided for *preventive detention* applicable to a certain category of dangerous habitual offenders).[16] We should thus distinguish between *prevention* as purpose of punishment (through judicial decision) and *preventive detention* that is extrajudicial.

1.2.3 Reform (Correction)

Many jurists maintain that reformative punishment should be the main objective of sentencing although some jurists in countries with rising crime rates are currently expressing shades of pessimism. Reform is a relatively wide concept and is twofold. Primarily, it corrects the *effect* as manifested by the offender's act. "Rehabilitation theory would attempt to mould offenders' behavior towards compliance with the norms of the criminal law."[17] It also pays due attention to the *source*, i.e. the objective conditions that 'cause' similar offences. In other words, it pays attention to the 'cause' while it treats the 'symptoms'.

The preface of the 2004 Criminal Code states:

> Although imprisonment and death are enforced in respect of certain crimes, the main objective is temporarily [or] permanently to *prevent* wrongdoers 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 crimes convicts can be released on probation without the pronouncement of sentence or without the 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.

According to Philippe Graven, emphasis needs to be given for reform as it facilitates the attainment of the purpose of crime prevention and the eradication of criminality.

> Prisoners should be made to look forward rather than backward, they should be made to believe that they have a future as useful citizens. . . . The harshness of punishment basically lies in the forfeiture of one of their most precious possessions that is their freedom. So long as the element of privation remains, it is unlikely that the fear of punishment will disappear.
>
> . . . Although there are instances where the purpose of the law cannot be achieved except by purely deterrent or disabling steps . . . , the rule which should guide the application of the Code is that, more than deterrence and disablement, the eradication of criminality . . . depends on the correction of criminals.[18]

Corrective or rehabilitative treatment, no matter how benevolent, does not denote the waiver of punishment. The fact that an offender's freedom of action or movement is restricted suffices to prove the punitive aspect of imprisonment. Jurists who support the emphasis on reform and rehabilitation regard correction as an endeavour undertaken during the offender's period of imprisonment. According to the reformative theory:

> [T]he offender should, while punished by detention, be put to educative and healthy or ameliorating (but never degrading) influences. He should be re-educated and his character traits be reshaped and put once again in the furnace for being moulded.
>
> . . . Though reformative treatment involves benevolent justice, yet the detention of the offender for a sufficient period of time to bring about realization, repentance and readjustment is in itself a punishment. . . .[19]

1.3. Other Theories and Principles

Some jurists consider the crudest form of the retributive theory of punishment, i.e. *expiation,* as a distinct theory. According to this theory, the offender must suffer through punishment and atone for his crime thereby paying up for his offence and in effect rendering the slate clean. The theory of expiation has much in common with the retributive theory and does not seem to have features that distinguish it from retribution other than its extremism.

Certain jurists regard denunciation as the *expressive theory*, and state that it serves as a means of society's condemnation of an offence. This theory is said to facilitate predominantly utilitarian and simultaneously retributive purposes of punishment. They hold:

> Under a utilitarian theory, denunciation is desirable because it educates individuals that the community considers specific conduct improper, channel community anger away from personal vengeance, and serves to maintain social cohesion. Under a retributive theory, denunciation serves to punish the defendant by stigmatizing him.[20]

Ashworth[21] supports the "principle of *parsimony* in punishment." Its core theme is restraint in punishment and "its main effect is to act as a limiting factor upon the amount of punishment inflicted."

> The general justifying aim of sentencing is probably a modified version of what might be termed *modern retributivism* . . . which sees punishment primarily in terms of a disadvantage to 'cancel out' the advantage gained by the crime closely bound up with the idea of having social rules . . . [O]n this modified version of modern retributivism, punishment is justified not merely because it is deserved but also because it contributes towards crime control.
>
> Punishment, however, generally involves the infliction of some deprivation upon a member of society. Since it is generally accepted that it is wrong to inflict harm or deprivation upon members of society (indeed, much of the criminal law is concerned with that), it seems right that the State ought to inflict the minimum punishment consistent with its aims. Crimes themselves inflict misery on victims but the State ought to avoid adding to the overall misery in society except to the extent that this may be necessary to attain other aims.[22]

Many legal systems currently focus on the *restorative theory*, which is mainly concerned with compensation of victims, reconciliation of victims

and offenders, rehabilitation and reintegration of offenders, and other mechanisms of making up for the harm inflicted so that the *status quo ante* (i.e. the situation before the commission of the offence) can be restored as much as possible for the victims, offenders and the community. According to this theory remorseful first-time offenders who have reconciled with victims are better reformed and rehabilitated with community-based sanctions rather than long-term imprisonment.

1.4. Synthesis towards a Mixed or Unitary Theory

Hart and Rawls promoted a 'Mixed Theory' of punishment which argued that "the utilitarian and retributive theories were in fact answers to two different questions: utilitarianism answered the question of why we have punishment as an institution, while retribution answered the question of how to punish individual wrongdoers."[23] This view reconciles "the two great competing theories of punishment". Various authors have further enriched this theory.

Wilson states that punishment "is deserved by those who break obligatory norms of conduct" and that the "amount of punishment due cannot be fixed by retributive criteria alone" unless like cases are, as far as possible, "treated alike" and unless "coherent criteria of proportionality are adopted based upon the seriousness of the harm caused and the mental element accompanying it."[24] However, he notes that the actual level of punishment "must be determined by utilitarian criteria such as deterrence and incapacitation."[25]

> So as to ensure that punishment does not become simply an instrument of social control, a policy of maximum restraint in sentencing should be adopted in which symbolic punishment should always be considered as a starting point. Policies of deterrence should be geared towards the individual offender rather than society as a whole. Incapacitation should be the exception rather than the rule and should be limited to cases . . .
>
> From probation and community service (rehabilitation) to fines (deterrence) to prison (incapacitation, deterrence and rehabilitation) institutions of punishment, in liberal society show the indelible imprint of utilitarian philosophy. From the state's point of view, punishment must have some objective to it and that objective, it must be assumed, is . . . to make society a better place.[26]

Wilson supports the "restraint approach to punishment" which "starts from the premise that retribution fails to give an adequate account of the justification for punishment." He suggests that the synthesis of the various

approaches can get an insight from “a mixed theory such as that of Hart, in which private and public interests are balanced against each other.”

In the final analysis, no theory can exclusively be effective unless there is a *synthesis* (sometimes referred to as a unitary theory) which blends the merits of each theory and sets aside the deficiencies that are not in conformity with the prime purpose of crime prevention. Such synthesis can harmonize the deontological and utilitarian aspects punishment by simultaneously addressing public reaction to the offence that is committed and the relatively more pervasive and proactive instrumental function of punishment in the realms of deterrence (both general and individual), prevention and reform.

Review Exercises

1. “Society prepares the crime, the criminal commits it.” Comment.
2. Can and should Ethiopia abolish the death penalty? Discuss.
3. Internment was embodied in Article 128 of the 1957 Penal Code. Should it have been incorporated in the new Code despite its non-use for decades?
4. Does Article 103 of the 2004 Criminal Code envisage community service as an alternative to imprisonment? Discuss the applicability of community service in the Ethiopian context. Relate the discussion with the provisions in Prisons Proclamation No.1174/2019 that deal with the reintegration of prisoners into society.
5. “The measures (other than the penalties) stated in the Criminal Code are precautions against offences rather than punishment.” Comment.
6. Explain the following remark by the ancient Roman philosopher Seneca: “No wise man punishes because wrong has been done, but so that no wrong will be done.”
7. Discuss the overlapping features of deterrence and prevention.
8. Discuss the purposes discussed in Reading 1 (Louis E. Chiesa) below from two perspectives:
   a) *What for* is a given punishment imposed on a convicted person (በምን ምክንያት); i.e. purpose of punishment as a reaction to the offence committed.
   b) *Why* (ለምን ወይም ምን ለማግኘት) is a certain punishment imposed; i.e. the purpose that is meant to be achieved through the punishment.
9. Read the following excerpts on restorative justice and answer the questions hereunder:
   - Restorative justice is a process of bringing together the individuals who have been affected by an offense and having

them agree on how to repair the harm caused by the crime. The purpose is to restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just.[27]

- Restorative justice is concerned with the broader relationships between offenders, victims, and communities. All parties are involved in the process of settling the offense and reconciliation. Crime is seen as more than simply the violation of the criminal law. Instead, the key focus is on the damage and injury done to victims and communities and each is seen as having a role to play in responding to the criminal act. As a result of meeting with the victims . . . , offenders are expected to gain an understanding of the consequences of their behavior and to develop feelings of remorse.[28]
- Crime is a violation of people and relationships. It creates obligations to make things right. [Restorative] justice involves the victim, the offender, and the community in search for solutions which promote repair, reconciliation, and reassurance.[29]

a) Compare the theory of restorative justice with Ethiopian traditional mechanisms of reconciliation and compensation.

b) In what type of offences can restorative justice be introduced in the foreseeable future?

c) Is restorative justice feasible if the victim is unwilling to reconcile?

10. Consider the following and answer the questions below:

[A] system based on desert and proportionality can be operated humanely, without escalation of sentences. . . . [T]he criminal law, being society's strongest form of official censure and punishment, should be concerned only with the central values and significant harms. . . .[30]

a) Discuss the merits and demerits of escalated sentences.

b) Comment on the last sentence of the excerpt , i.e. concern of criminal law with the central values and significant harms.

11. In *People v. Mooney*,[31] the defendant was subjected to community-based sentence instead of imprisonment. How far and in what type of Ethiopian communities can such sentences be introduced?

. . . [T]he defendant, with two others, consumed a quart of vodka and one ounce of marihuana during the last four hours; and immediately before, the defendant also consumed two 'hits' of LSD. Based thereon, the defendant has no recollection of the actual events, and it does appear that an irrational act was involved. . . .

Considering [the series of victim reconciliation conferences and the survey of sentencing attitudes of community residents], together with the defendant's remorseful attitude, it appears that little purpose would be served here by extended confinement in a State prison for either rehabilitation purposes or to isolate the defendant from the community. Given the described circumstances and the availability of an intensive probation program . . . these purposes would be more appropriately served by a community-type sentence. . . . Experience in this area has established that lengthy incarceration is not cost effective to serve these specific purposes where community protection is not a controlling factor. As developed at the two victim reconciliation conferences, the community is supportive and, in the final analysis, no amount of punishment as a practical matter could adequately undo the harm to the actual victims. Significantly, at the community portion of the conference, an expression was made that a more realistic deterrent would be achieved if the defendant served as a living example as to the dangers of drug abuse through an education process. Accordingly, it is determined here that society would be better served by a community-based sentence with more limited incarceration on the defendant's consent to perform 600 hours of community service designed to educate the public to the problems associated [with] drug abuse.

11. Read the following provisions of the US Model Penal Code[32] and compare them with the ones under Ethiopian Criminal law:

Section 1.02. Purposes; Principles of Construction

(2) The general purposes of the provisions governing the sentencing and treatment of offenders are:

(a) to prevent the commission of offenses;

(b) to promote the correction and rehabilitation of offenders;

(c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;

(d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense;

(e) to differentiate among offenders with a view to a just individualization in their treatment;

(f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;

(g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;

(h) to integrate responsibility for the administration of the correctional system in a State Department of Correction [or other single department or agency].

Readings on Section 1

Reading 1: Chiesa[33]

What Is Punishment Imposed For?

Scholars have long debated the issue of what is the proper aim of punishment. However, there is an even more fundamental question that remains under-theorized: what is punishment imposed for? . . . First of all, I will attempt to clarify the difference between asking "what is punishment imposed for?" and "what is the aim of punishment?" Next, I will explain that punishment is imposed for the commission of an offense by elucidating how and why the concept of punishment is necessarily connected to the actual or perceived commission of an offense. I cannot cease to stress the importance of the fact that the connection between wrongdoing and punishment is conceptual. In this sense, punishment would simply not make sense without wrongdoing. . . .

Two Different Questions

Every single theorist, whether he defends a consequentialist or a deontological approach to punishment, expresses his view on the subject of punishment and its aims in the following manner: "Punishment is imposed for ______ with the aim of _______." For some reason that I still do not understand, these two questions are often confused. In other words, every writer implicitly *must* take a stand on two *very distinct* questions: (I) What is punishment imposed for? and (2) What is the aim of punishment?

Myriad examples can be given in favor of this contention. Hegel, for example, believed that punishment *is imposed for* an action that objectively contradicts the Right *with the aim of* reasserting the Right over the wrong implicated by such an action. For Kant punishment *is imposed for* a criminal action *with the aim of* doing justice. *A* famous nineteenth-century German criminal law scholar, Anselm von Feuerbach, believed that punishment *is imposed for* an act manifesting disobedience to societal norms *with the aim of* making citizens comply with the norms out of fear of being punished if they do not. For the famous turn-of-the-century Italian scholar Enrico Ferri, punishment *is imposed for* an act demonstrating the moral inferiority of a person's character *with the aim of* rehabilitating the offender. The same can be said of Anglo-American scholars. Duff, for example, believes that punishment *is imposed for* conduct that has wronged members of a moral community *with the aim of* establishing a dialogue between the wrongdoer and the community. For Fletcher punishment is *imposed for* a wrongful and culpable act *with the aim of* expressing solidarity with the victim.

The linguistic difference between asking "what is punishment imposed for?" and "what is the aim of punishment?" is readily apparent in the Spanish

language. It plays on the subtle difference between the Spanish prepositions "por" and "para." Usually, the preposition "por" is used to signify a past state of affairs while the preposition "para" is used to signify an aim that has yet to be achieved. An example illustrates this point. If a child who has just been scolded by his mother were to ask her: "por qué me regafias?' (what am I being scolded for?), she could answer, "por haberme gitado" (for yelling at me). On the other hand, if the child were to ask her, "para qué me regańas?" (why are you scolding me?) she could answer, "para qué no lo vuelvas a hacer" (so that you don't do it again).

However inconspicuous it might seem, the interplay between the prepositions "por" and "para" ultimately determine the meaning of the child's two questions and, therefore, the form the mother will give to her answers. For, in Spanish, "por" is usually used when one wishes to inquire about the causation of events while "para" is usually used when one wishes to inquire about the motivation of the actor. When the child asks, "por qué me reganas?" (what are you scolding me for?) he seeks a causal explanation that links his mother's action (scolding) to an event that triggered it (yelling at his mom). Contrarily, when the child asks, '"para qué me reganas?" (why are you scolding me?) he seeks not a causal explanation of the event but rather a motivation explaining his mother's reaction. "Por" inquires about the event that caused the scolding while "para" inquires about the aim the mother had in scolding him. One can now see why it is different saying that "la pena se impone por" (punishment is imposed for) than saying "la pena se impone para" (punishment is imposed *to).* While the latter question seeks a causal explanation that points towards the event that triggered the imposition of punishment, the former query is driven by a desire to discover the aim that motivates the imposition of punishment. The first question should be answered by ascertaining that . . . punishment is imposed for the wrongful violation of a norm. The second question, on the other hand, should be answered by ascertaining that . . . punishment is imposed *to* deter future offenders—or any other legitimate aim of punishment. In sum, "por," in this context, is backwards looking while "para" is forwards looking. The same thing should hold in English. The phrase "punishment is imposed for'" looks towards an event in the past while the phrase "punishment is imposed *to"* looks towards a goal that is to be achieved in the future. . . .

Reading 2: Simester and Sullivan[34]

The Justification of Punishment

Although punishment is not a constitutive element of the criminal conviction . . . one cannot overlook its salience in the criminal process. If we were to dismantle punishment and its forbidding infrastructure, much of the *raison d'être* of the criminal law would go with it. Despite its importance, however, the question *why* we punish remains a matter of perennial and irresolvable dispute and has given rise to a vast and challenging literature. . . .

The common starting point is to conceive of punishment as something which is problematic, something which must be justified. One should always be sure that the legal verdict which licenses punishment is well founded, a restraint with

implications for criminal procedure and evidence. If we can be sure of the facts of the instant case, one group of theorists, commonly called retributivists, would then ask whether the punishment is *deserved*. . . . Desert is a function of the moral quality of the conduct if it is bad (i.e. wrongful and culpable), a measure of hard treatment may be dispensed, the measure dependent on how bad the conduct is. . . . Indeed, it becomes something that ought to be imposed, something that will restore the moral balance with the malefactor has disturbed. . . . Consistent retributivism would entail a criminal law more scrupulous about finding fault sufficient to allow just punishment.

Retributivism is contrasted with utilitarianism, a species of consequentialism which asserts that the punishment is justified only if the welfare of society is advanced. For a utilitarian, the pain of the person to be punished is a disutility, a diminution of the quantum of general welfare. Accordingly, pain should be inflicted only if it entails net gains in welfare across society: the institution of state punishment should produce overall beneficent effects. The particular effect benefit that utilitarians most commonly claim for punishment is general deterrence, i.e. that without hard treatment of offenders there would be more offending and less welfare overall. As the term 'consequentialism' implies, the moral character of a defendant's action is determined primarily by its results. . . .

Consequentialism and retributivism are incompatible theories. This, of course, does not preclude individuals, even judges, from using consequentialist and retributivist justifications at one and the same time, as when D is sent to prison for a very long time "because you deserve it and because it will deter others of like mind"—an example of belt and braces rather than a contradiction. The dominance of one theory over the other ebbs and flows. In matters of sentencing, the retributivist approach reached its apogee with the Criminal Justice Act of 1991, whereby proportionality became the primary criterion for deciding penalties. By 1993, concern with this approach, particularly in the area of fines on motorists, had become politically salient and the Criminal Justice Act of 1993 and Crime (Sentences) Act 1997, now consolidated in the Powers of Criminal Courts (Sentencing) Act 2000, depart significantly from the 'just deserts' rationale in sentencing.

Some theorists, most notably H.L.A. Hart, have argued for a composite theory of criminal responsibility and punishment, expressed in terms of a distinction between the "general justifying aim" of the criminal law on the one hand and the principles of criminal responsibility and just punishment on the other. For Hart, the general purpose of the criminal law is consequentialist: to deter anti-social conduct. However, this goal is properly inhibited by reference to issues of blame and proportion when adjudicating guilt and passing sentence. The inhibition is necessary to ensure fairness and to maximize autonomy. Although Hart argued for his composite theory with incomparable elegance, the predominating if not the exclusive element within it would appear to be retributionism. To be sure, utilitarianism is given the task of determining which conduct will be punished. Yet retributionism would generate many of the same primary norms and it is retributionism which resolves who will be punished and how much punishment will be meted.

Reading 3: Snyman[35]

Theories of Punishment

. . .

3. Difference between Absolute and Relative Theories

A distinction is made between the absolute theory and relative theories of punishment. (The latter are also sometimes referred to as the purpose theories.) There is only one absolute theory, namely the retributive theory, while there are a number of relative theories. According to the absolute theory, punishment is an end in itself, while according to the relative theories, punishment is only a means to a secondary end or purpose (hence the name 'relative theories'). This secondary purpose differs from one relative theory to the next: according to the preventive theory it is the prevention of the crime; according to the deterrent theory it is deterring the individual or society from committing a crime, and according to the reformative theory it is the reformation of the criminal. The absolute theory is of a retrospective nature: one only looks at the past, i.e., at the crime that has been committed. If, on the other hand, one follows the relative theories, one looks at the future: the emphasis is on the object (for example prevention or reformation) which one wishes to achieve by means of the punishment.

4. The Retributive Theory

This theory is based on the premise that the commission of a crime disturbs the balance of the legal order, which will only be restored once the offender is punished for his crime. Retribution is seen as the main purpose, not only of criminal law, but of law in general: if a rule has been contravened, the balance of the scales of justice has been disturbed and can be restored only if the offender is punished. A crime is a negation of the law, and by punishing the offender one strives to "cancel out" or "wipe clean". As it were, the crime, thus restoring the balance. Punishment must therefore automatically follow upon the commission of the crime. . . .

The idea of a proportional relationship between damage and punishment, inherent in the retributive theory, is of great importance in the imposition of punishment. If the retributive theory were rejected and reliance placed merely on the relative theories, it would mean that punishment could be imposed which would be out of proportion to the crime committed. . . .

5. The Preventive Theory

We now turn our attention to the relative theories of punishment. We shall first discuss the preventive theory, according to which the purpose of punishment is the prevention of the crime. This theory can overlap with both the deterrent and the reformative theories, since both deterrence and reformation may be seen purely as methods of preventing the commission of crimes. On the other hand, certain forms of punishment are in line with the preventive theory without necessarily also serving the aims of deterrence and reformation. Examples are capital punishment, life imprisonment and the forfeiture of, for example, a driver's licence. . . .

However, like all theories of punishment this one should never be applied in complete isolation from the others, or the result would be the imposition of too severe a punishment. Its application ought to be tempered by that of the more proportional retributive theory. Nor should the preventive theory be applied unless there is a real possibility that the offender may again commit a crime. . . . Should a convicted person's record show previous convictions, indicating that he makes a habit of committing crimes, the court may take this into account and sentence him to a long term of imprisonment in order to prevent him from committing crimes again.

6. The Theory of Individual Deterrence

A distinction must be drawn between individual and general deterrence. Individual deterrence means that the offender as an individual is deterred from the commission of further crimes, and general deterrence means that the whole community is deterred from committing crimes.

The idea at the root of individual deterrence is to teach the individual person convicted of a crime a lesson which will deter him from committing crimes in the future. This does not necessarily mean that he has to serve a sentence, for a suspended sentence may well have the same effect. The suspended sentence "hangs over his head like a sword", to use the well-known expression. If he fails to comply with its conditions, he will have to serve the sentence. The premise of this theory is undermined by the high percentage of recidivists. . . . One must also remember that for many people the mere fact that they have been convicted of a crime is sufficient to deter them from contravening the law again.

7. The Theory of General Deterrence

Alongside the retributive theory this theory is today considered to be one of the most important ones. . . . According to this theory the community is generally deterred by the *threat* of possible punishment, rather than by its actual imposition on an individual (as in the case of the theory of individual deterrence). The theory is based upon the premise that man prefers the painless to the painful, and that he is a reasonable being who will always weigh the advantages and disadvantages of a prospective action before he decides to act. This, however, is by no means always so, especially where a person commits a murder or assaults someone in the heat of the moment. This consideration reveals one of the theory's weak points. Apart from this, its basic premise, namely that the average person is deterred from committing a crime by the punishment imposed upon others, can presumably never be proved: for its proof one would have to know how many people would commit the crime if there were no criminal sanction. This cannot be ascertained empirically. Many criminologists are of the opinion that a belief in the deterrent effect of punishment on the community as a whole rests on faith rather than on truly empirical evidence. . . .

8. The Reformative Theory

This theory is of fairly recent origin. According to it the purpose of punishment is to reform the offender as a person, so that he may become a normal law-abiding member of the community once again. Here the emphasis is placed not

on the crime itself, the harm caused or the deterrent effect which punishment may have, but on the person and personality of the offender. According to this theory an offender commits a crime because of some personality defect, or because of psychological factors in his background such as an unhappy or broken parental home or other undesirable influences. The theory stems largely from the recent growth of the sociological and psychological sciences. . . .

Certain aspects of this theory are undoubtedly commendable. It focuses attention on the offender as an individual. Our courts themselves acknowledge that the person of the accused should not be overlooked when the punishment to be imposed is determined, and our prison authorities have in the last few decades taken great pains to try to reform or rehabilitate offenders. The theory may also be applied if a suspended sentence is imposed, where it is a condition of the suspension that the offender subject himself to certain treatment, such as psychological treatment. On the other hand it finds no direct application when the punishment imposed is a fine. . . .

9. The Unitary Theory

. . . The courts do not reject any one of the theories outright, but, on the other hand, they do not accept any single theory as being the only correct one to the exclusion of all the others. . . . [If all] the different theories are combined . . . one may speak of a unitary theory. The idea of retribution still forms the backbone of our approach to punishment, but not in the absolute sense in which it was applied to primitive communities. The retributive theory is indispensable, for it is the only one which decrees that there ought to be a proportionate relationship between the punishment meted out and the moral blameworthiness of the offender, as well as between the degree of punishment, on the one hand, and the extent of the harm or the degree in which the law was violated, on the other hand.

At a very general level all the theories are reconcilable in the following way: it is precisely the exaction of retribution for a crime which deters both the offender and the community from committing crime, and thus also prevents crime. To put it differently, retribution is one of the best ways of deterring people from committing crimes.

Our courts emphasize that there are three main considerations to be taken into account when sentence is imposed, namely the crime, the criminal and the interests of society. By 'crime' is meant especially the consideration that regard must be had to the personal circumstances of the offender, for example, the personal reasons which drove him to crime as well as his prospects of one day becoming a law-abiding member of society again (reformative theory); by 'interests of society' is meant either that the community must be deterred from crime (theory of general deterrence) or that the righteous indignation of society at the contravention of the law must find some expression (retributive theory). There ought to be a healthy balance between these three factors. A court should not emphasize any of them at the expense of the others. It is, however, impossible to combine the factors in a particular way with specific weight allocated to each factor beforehand, and then to use this as a rigid formula in all cases. Each case is unique and each accused differs from all others. Our courts

quite rightly emphasize the importance of the individualization of sentences. This, however, [does not set aside] the principle of ensuring, in so far as possible, the uniformity of sentences where the relevant circumstances in cases resemble each other …

2. Modes of Punishment and Measures: Overview

As Dubber and Kelman noted, "[i]t is useful to distinguish the *quality* of punishment from its *quantity* or the question of how to punish from the how much to punish".[36] The provisions under Book II of the Criminal Code (Articles 87 to 237) deal with criminal punishment and its application. The second chapter of Title I, entitled "Ordinary Punishments Applicable to Adults" (Articles 90 to 128) embodies "principal punishments" (Articles 90–120) and "secondary punishments" (Articles 121–128).

2.1 Principal and Secondary Punishments

The following are the principal punishments under the Criminal Code (applicable to adult offenders):

- pecuniary penalties (Articles 90–102)
- compulsory work (Articles 103–105)
- simple imprisonment or rigorous imprisonment (Articles 106–116)
- death penalty (Articles 117–120)

When the court expressly directs, secondary punishments can be applied together with and subject to a principal punishment.[37] The secondary punishments embodied in the Criminal Code are

- caution, reprimand, admonishment and apology (Article 122)
- deprivation of civil and political rights (Articles 123–125)
- dismissal from the Armed Forces and reduction in rank (Articles 127, 128)

2.2 Special Measures

Article 2(1) provides that "[c]riminal law specifies the various crimes and *the penalties and measures* applicable to criminals". The kinds of penalties embodied in the Criminal Code are the ones listed in the preceding paragraphs. The term *measures* refers to the security and rehabilitation measures that are stated under Articles 129 to 165. The measures applicable to adults (Articles 129–156) include the following:

- measures applicable to mentally irresponsible (insane) persons, e.g.—confinement and treatment (Articles 129–133)

- protective measures such as guarantee of good conduct (Article 135), seizure of dangerous articles (Article 140), and recognizance to be of good behaviour (Article 141)
- restrictions on personal liberty (Articles 145–153)

The measure of internment applicable to recidivists and habitual offenders under Articles 128 to 132 of the 1957 of the Penal Code has been omitted in the 2004 Criminal Code.

2.3 Measures and Penalties Applicable to Young Offenders

Measures are given precedence over penalties in the case of young offenders. As discussed under Chapter 6, children below the age of nine years are exonerated[38] from criminal responsibility. If a young person between the ages of nine and 15 years[39] commits an offence or petty offence, the measures of admission to a curative institution (Article 158), supervised education (Article 159), reprimand (Article 160), school or home arrest (Article 161) or admission to a corrective institution (Article 162) may be ordered by court (Article 157) "having regard to the general provisions defining the special purpose to be achieved"[40] and "having ordered all necessary inquiries".[41]

Where these special measures (Articles 158–162) fail to be effective, the penalties of fine (Article 167), corrective measures (Article 168(1)(a)) or penitentiary detention (Article 168(1)(b)) may apply to young offenders. However, imprisonment shall not exceed 10 years (Article 168(2)), and it shall, according to Article 168(3), take place under the regime of simple imprisonment (Article 106) and be entitled to parole.[42]

2.4 Penalties against Juridical Persons

According to Article 34(2), the penalties of fine[43] and where necessary an additional penalty of suspension, closure or winding up may be imposed against juridical persons. The Criminal Code embodies measures applicable on undertakings that may entail restrictions of activities (i.e. suspension or withdrawal of a license (Article 142) and prohibition and closing of an undertaking (Article 143). The principal punishment against juridical persons is payment of fine (Article 90), and the 'measures' stated under Articles 142 and 143 (duly referred to as penalties in Article 34(2)) are resorted to only under the circumstances stated in the provisions. The penalties stated under Articles 752, 768–770 shall apply against juridical persons in case of petty offences.

2.5 Alternative to Punishment

Many legal systems have introduced *community service* as alternative to punishment for offences punishable with short-term imprisonment, e.g. 12 months. In Zimbabwe, for instance, convicts of short-term imprisonment are entitled to judgment of community service based on their consent and competence.[44] Each month of imprisonment is substituted by a fixed number of hours of community service so that the convicts can pursue their occupation and support family, and meanwhile render free community services to government institutions, public enterprises or mass organizations. The schemes of implementation vary in various countries. But public awareness about the positive aspects of community service and effective schemes of implementation are crucial.

Article 103(1) of the 2004 Criminal Code seems to have opened some room for 'community service' for offences punishable with simple imprisonment not exceeding six months. This provision provides for *compulsory work* without custody rather than free community service. Yet it is a significant step towards noncustodial sentencing. Much is thus expected from organs of criminal justice, i.e. the police, the public prosecutor, courts and correctional administrations in enforcing provisions of the Criminal Code on compulsory work so that some relief can be obtained towards alleviating overcrowding of prisons that is obviously detrimental to efforts of reform and rehabilitation.

3. Determination of Sentences: An Overview

Sentencing does not depend on an arbitrary discretion of courts. Nor is mathematical precision possible with predetermined specificity. If the court finds the defendant guilty, as per Article 149(3) of the Criminal Procedure Code, the prosecution and defence are allowed to present aggravating and extenuating circumstances that have a decisive impact upon the determination of the penalty. The various material, personal or mixed circumstances submitted to the court may lead to extenuation (mitigation) or aggravation.

3.1 Principle: Degrees of Guilt, Conduct and Circumstances

The penalties and other measures provided by the Criminal Code must be applied[45] in view of the spirit of the Code so as to achieve the purpose stated in Article 1. The court determines the sentence in conformity with the provisions in the General Part of the Code and the specific provisions[46] that are relevant to the case under consideration.

By virtue of Article 88(2), "the penalty shall be determined according to the degree of *individual guilt*, taking into account the dangerous disposition of the offender, his antecedents, motive, purpose, his personal circumstances, his standard of education, as well as the gravity of his *offence* and the *circumstances* of its commission." These considerations determine the extent of the extenuation or aggravation of penalties, which may be ordinary or special according to the merits of each case. It is to be noted that Article 88(3) embodies the principle of *parsimony* because it provides that "[s]ubject to the provisions of the Special Part of Code, the Court shall carefully examine from lightest to the most severe punishment". This is meant to ensure that courts should not impose severe sentences without first considering the range of sentences from the lightest to the most severe.

The three elements to be considered are degree of *individual guilt*, *gravity of the offence* and *material circumstances* that surrounded the commission of the offence. The imposition of a sentence which is commensurate with moral guilt, gravity of *actus reus*, and material circumstances clearly involves the principle of *proportionality*. Although various writers regard 'proportionality' as retributivist, other considerations such as general deterrence also raise the issue of proportionality of the sentence to the offence committed and the particular circumstances of the offender and commission of the offence. For example, Jeremy Bentham's utilitarian conception of sentencing in an offence of arson involves the consideration of proportionality. He limits incendiarism with "those cases in which some individual has perished by fire" and he notes that "if no life has been lost, nor any personal injury been suffered, the offence ought to be treated as an ordinary waste; whether an article of property has been destroyed by fire, or any other agent, does not make any difference."[47] According to Bentham, "[t]he amount of the damage ought to be the measure of the crime."[48]

The provisions in the special part of the Criminal Code include the elements that establish a given offence, and they also provide judges with the range within which the sentence can be imposed. This is subject to mitigating or aggravating circumstances that would determine the exact sentence to be imposed including the possibility of going below the minimum or going beyond the maximum thresholds. Regarding the offence of arson (which Bentham used as an example), Article 494(1) provides:

> Whoever maliciously or with the intention of causing danger of collective injury to persons or property, sets fire on his own property or to that of another person whether it be building or structures of any kind, crops or agricultural products, forests, timber of any other object, is punishable with rigorous imprisonment not exceeding ten years.

We can analyse the *mens rea*, *actus reus* and *material circumstances* of the offence as follows:

- *Mens rea*: maliciously or with the intention of causing danger of collective injury to persons or property
- *Actus reus*: setting fire on one's own property or another person's property
- *Material circumstances*: the property may be a building or structure of any kind, crops or agricultural products, forests, timber, etc.

The material circumstances embodied under Article 494 do not, for example, distinguish between an arson committed during the day or after midnight. This does not, however, mean that such material circumstances will not be taken into account, because elements which are not indicated in the specific provision but which aggravate the *mens rea*, *actus reus* or *material circumstances* are either included in another special provision which aggravates the offence or can be used in aggravation of sentences.

Article 494(2) states the aggravating circumstances which can raise the sentence to a maximum of 15 years. It provides:

> Where the crime creates substantial danger, or where the risk of injury to persons or property is widespread, especially where public buildings or buildings used by a public service, inhabited houses or houses used for living in, contractors' yards or stockyards, stores of provisions or inflammable or explosive substances, forests, mines, oil wells or refineries, ships, aircraft or any other objects particularly susceptible to fire affected, the punishment shall be rigorous imprisonment not exceeding fifteen years.

The provision above sets the specific maximum sentence and leaves the minimum sentence to the general minimum (i.e. the minimum sentence which is generally determined for offences punishable with rigorous imprisonment). Terms such as "is punishable with rigorous imprisonment not exceeding ten years", "the punishment shall be rigorous imprisonment not exceeding fifteen years" do not specify the minimum number of years of imprisonment. The usage of 'rigorous imprisonment' and 'simple imprisonment' also evokes the question of whether there are differences in the two types of imprisonment. The provisions that define offences and state penalties thus require reference to the Book II of the General Part of the Criminal Code (Articles 87–237).

As briefly stated in Chapter 2, Section 1.1, the Criminal Code embodies three categories of sentences:

1. *Offences of a very grave nature* (ከባድ ወንጀል) are punishable with *rigorous imprisonment* (*ጽኑ እሥራት*) in central prisons for life or for a

period of one to 25 years (Article 108).

2. *Offences of not very serious nature* (ከባድነቱ መካከለኛ የሆነ ወንጀል) are punishable with *simple imprisonment* (እሥራት) for a term of 10 days to three years (Article 106), subject to special provisions that may extend the period beyond three years.
3. *Petty offences* (የደንብ መተላለፍ) are punishable with fine or *arrest* (የማረፊያ ቤት እሥራት) for a relatively short period of one day to three months (Article 747), subject to aggravation in case of recidivism and concurrence (Articles 769,770).

These three categories of sentences—*rigorous imprisonment*, *simple imprisonment* and *arrest*—are imposed respectively on 'very serious offences', 'not very serious offences' and 'petty offences'. Although this does not represent a tripartite classification of offences, the type of imprisonment stated in each specific provision of the Criminal Code indicates the general minimum or the general maximum which the court is required to use whenever a specific minimum or a specific maximum is not expressly stipulated under the relevant specific provision which establishes the offence under consideration.

In the example of arson, stated above, Article 494 does not provide a specific minimum, and in effect the court resorts to the general minimum applicable to all 'offences of a very grave nature' that are duly punishable with rigorous imprisonment. To this end, Article 108(1) provides:

> Rigorous imprisonment is a sentence applicable only to crimes of a very grave nature committed by [offenders] who are particularly dangerous to society.
>
> Besides providing for the punishment and the rehabilitation of the [offender], this sentence is intended also to provide for the strict confinement of the [offender] and for special protection of society.
>
> Without prejudice to conditional release, the sentence of rigorous imprisonment is normally for the period of one to twenty-five years, but where is expressly so laid down by law it may be for life.

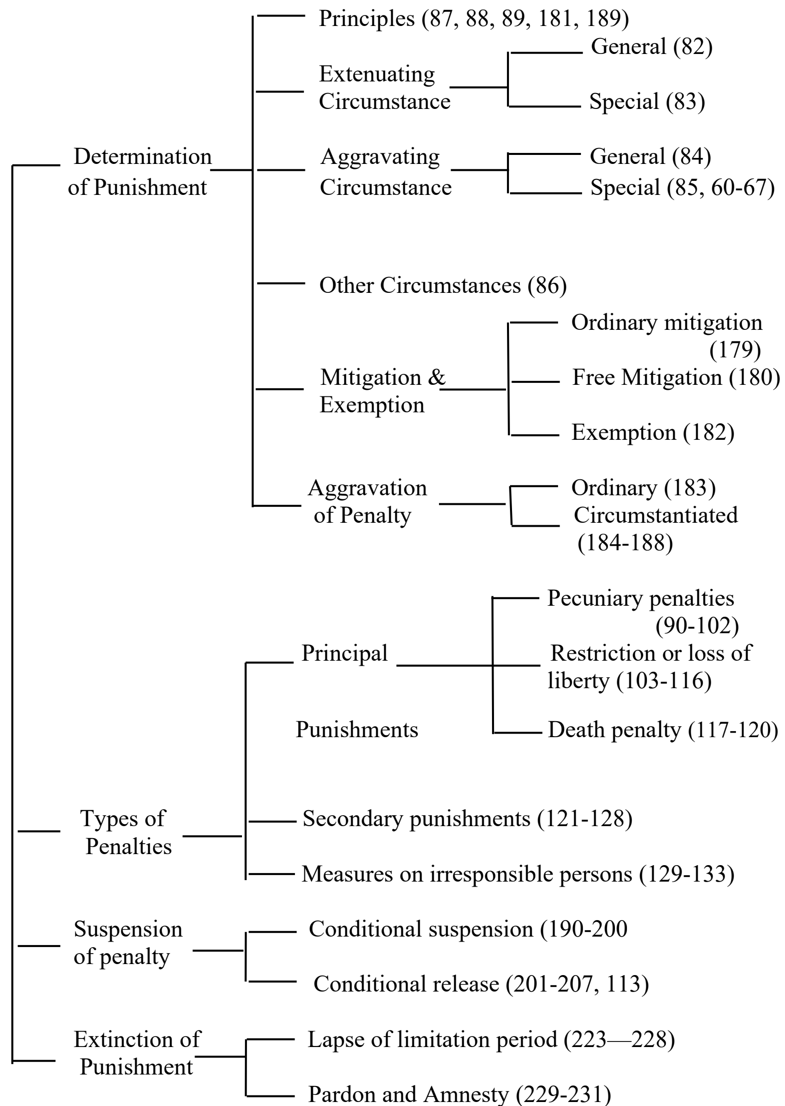
Depending on the mitigating and extenuating circumstances of a particular case of arson, the sentence imposed on an offender pursuant to Article 494(1) may thus fall within the range of one year to 10 years. If, however, the material circumstances stated under Article 494(2) exist, the sentence may extend until the specific maximum of 15 years.

3.2 General Extenuating Circumstances

Book I of the General Part of the Criminal Code embodies the provisions on extenuating and aggravating circumstances (i.e. Articles 82–86) and leaves "Punishment and its Application" to Book II of the General Part. Although

the scope of this book does not allow a closer look into Book II of the Criminal Code (i.e. Articles 87 to 237), the relevant provisions on determination of punishment, types of penalties, suspension of penalty and extinction of punishment can be easily observed upon a systematic reference to the Code. Table 5 gives a brief reference sketch in this regard, but does not include preventive and protective measures[49] and measures and penalties applicable to young persons.[50]

Table 5: Brief sketch on the determination of punishment and types of penalties



Ordinary mitigation[51] may be allowed under the following general extenuating circumstances, stated in Article 82(1):

1. Where an offender with previous good conduct:
   - acts due to lack of intelligence, ignorance or simplicity of mind, or,
   - acts without thought (Article 82(1)(a))
2. Honourable and disinterested motives (Article 82(1)(b), first phrase)
3. High religious, moral and civil conviction (Article 82(1)(b), second phrase)
4. Great material or moral distress (Article 82(1)(c), first phrase)
5. Apprehension of grave threat or justified fear (Article 82(1)(c), second phrase)
6. Reverential influence in cases of obedience and dependence (Article 82(1)(c), third phrase)
7. Grave temptation by the conduct of the victim (Article 82(1)(d), first phrase)
8. Being carried away by wrath, pain or revolt caused by a serious provocation or an unjust insult (Article 82(1)(d), second phrase)
9. A justifiable state of emotion or mental distress at the time of the act (Article 82(1)(d), third phrase)
10. Manifestly sincere repentance (Article 82(1)(e)) after the offence, in particular, by:
    - affording succour to the victim, or
    - delivering himself to the authorities by recognizing his fault, or
    - repairing, as far as possible, the injury caused by his offence, or
    - the offender's plea of guilt upon his appearance at court.[52]

Article 82(1)(a) can be invoked for ordinary mitigation where the subjective state of the defendant with previous good character manifests a lower level of awareness if the case does not fall under limited responsibility (Article 49), mistake of the fact (Article 80) or ignorance of the law (Article 81). A person who is manifestly stupid may be entitled to mitigation (Article 82(1)(a)) provided that he is not dangerous in view of his antecedents.

As regards "high motives,"[53] Philippe Graven's illustrations state the instances of killing a suffering dog that has been run over by a car, striking a person who scoffs at one's religious ceremony[54], and political crimes whereby those who commit them, according to Professor Levasseur "are not base criminals, enemies of society, but intelligent men, progressive men, who seek the happiness of their fellow citizens.[55] According to Vidal "the author of a political crime . . . may become, as a result of a revolution favorable to his ideas, the conqueror of the morrow."[56] That is why political

prisoners usually receive special treatment in prison, a broader chance of pardon or amnesty and international attention.

Subject to the need for a restrictive interpretation that is commensurate with qualifying terms such as ‘great’, ‘grave’, ‘justified’, and the like, the following are taken into account for ordinary mitigation of penalty within the range stipulated under Article 179:

- “Great material or moral distress” (Article 82(1)(c), first phrase) that does not satisfy the elements of necessity embodied in Articles 75 and 76,
- “Apprehension of grave threat or justified fear” (Article 82(1)(c), second phrase) that does not constitute coercion as stated under Articles 71 and 72,
- “Reverential influence in cases of obedience and dependence” (Article 82(1)(c), third phrase) that do not fall under superior orders (Article 74(2))

Article 82(1)(d) embodies three alternative extenuating circumstances. First, being led into grave temptation by the victim’s conduct, in such a manner that it could induce a reasonable person under the doer’s circumstances, can be considered as ground for mitigation. Second, being “carried away by wrath, pain or revolt caused by a serious provocation or an unjust insult” is an extenuating circumstance, provided that the doer, while he was carried away by the feeling that has been caused (i.e. before he cools down), acts against the person who provoked or insulted him. Such periods are usually brief, although they may at times last relatively longer.

The third extenuating circumstance [57] is “justifiable state of violent emotion or mental distress” without necessarily being provoked or insulted by another person. The reference made to “mental distress” under Article 82(1)(d) seems to overlap with the terms “material or moral distress” in Article 82(1)(c). Yet “mental distress”[58] seems to cover cases of distress that affect the regulation of one’s conduct, short of rendering the doer in a deficient mental condition. For example we may invoke mental distress “if a woman as a result of being raped aborts herself.” [59] However, double mitigation will not be allowed [60] if she is found guilty of extenuated homicide under Article 541.

The last ordinary extenuating circumstance (Article 82(1)(e)) is *sincere repentance* after the commission of the offence, in particular, by

- affording succour (assistance or relief) to his victim, or
- recognizing his fault (and) delivering himself up to the authorities, or
- repairing, as far as possible, the injury caused by his offence, or
- pleading guilty when the offender is brought to court, thereby

enabling the court to proceed towards conviction and determination of punishment by surpassing the phases of preliminary objections, appearance of witnesses and other elements of prolonged trial.

The factors of recognizing one's fault and delivering oneself to authorities were alternative conditions in Article 79(1)(e) of the 1957 Penal Code (English version). But it is impossible to prove recognition of fault unless it is accompanied by exterior conduct. The Amharic version of Article 82(1)(e) (of the 2004 Criminal Code) combines the two factors of delivering oneself to the authorities and recognition of one's fault.

Sincere repentance differs from active repentance stated in Article 28(2). Active repentance exists where the offender "prevents or contributes to prevent the consequent result", whereas the doer's act does not prevent the consequent result in cases of sincere repentance. Yet the acts of the doer after the offence show honest repentance out of remorse (genuine regret for wrongdoing) and not out of fear of being punished.

If one or more general extenuating circumstances exist, the court shall pronounce a mitigated penalty within the following range stated under Article 179. Optional ordinary mitigation under the circumstances in Article 79 of the 1957 Penal Code has been amended into compulsory mitigation in Article 82 of the 2004 Criminal Code.

Table 6: Range of Ordinary Mitigation of Penalty

Penalty	Penalty under Ordinary Mitigation
Capital punishment (death penalty)	Rigorous imprisonment, 20 years to life
Life sentence	Rigorous imprisonment, 10 to 20 years
Specified minimum period of rigorous imprisonment exceeding the general minimum period of one year	General minimum period of one year
Rigorous imprisonment that starts from the general minimum period of one year	Simple imprisonment from six months to five years
Specified minimum period of simple imprisonment that exceeds the general minimum period of 10 days	General minimum period of 10 days
Simple imprisonment not less than 10 days	Compulsory labour or fine

3.3 Special Extenuating Circumstances

Special extenuating circumstances are said to exist when the Criminal Code specifically states the circumstances that deserve mitigation of penalty without restriction pursuant to Article 180 or exemption from punishment based on Article 182. For example, excusable acts under the affirmative defences discussed in Chapter 7 (i.e. acts that fall under Articles 72, 74(2), 75 paragraph 2, 76, 77(2), 79 and 81) are special extenuating circumstances. In addition to such provisions that provide for free mitigation[61] or exemption from punishment, [62] Article 83 supplements the grounds for special extenuating circumstances. Article 83 of the 2004 Criminal Code has been amended to clearly indicate the fact that it embodies supplementary and not exhaustive special extenuating circumstances.

According to Articles 83 and 189, the court shall reduce the punishment without restriction where an offender acts contrary to the law, "for the purpose of not exposing himself, one of his near relatives by blood or marriage or a person with whom he is connected by specially close ties of affection, to a criminal penalty, dishonour or grave injury" and in particular if the offender

- fails in his duty to report to the relevant authority or assist the authority, or
- makes a false statement (or disposition) or supplies false information, or
- assists an offender in escaping prosecution or penalty.

Under free mitigation (Article 180), "the court shall not be bound by the kind of penalty provided . . . for the offence . . . nor by the minimum which the provision enacts",[63] provided that the general minimum is observed.[64] The general minimum periods stated under Articles 106 and 108 are 10 days for simple imprisonment and one year for rigorous imprisonment.

In exceptional cases where the offence committed is not grave and where the ties in question are so close, the impelling circumstances that placed the offender into "a moral dilemma of a particularly harrowing nature" may justify exemption from punishment. The court shall in such cases resort to the subsidiary punishment of reprimand and warning (Article 122). It is, however, worth noting that family relationship and relationship of affection (Article 83) cannot be invoked if the offence that has been committed is treason (Article 254(4)), receiving (Article 682(5)), or mutiny or desertion in time of emergency, general mobilization or war (Article 335(2)). The latter exceptions, i.e. Articles 682(5) and 335(2), are erroneously written as 682(4) and 335(3) in both the Amharic and English versions of Article 83(3) of the 2004 Criminal Code, and thus require corrigenda.

3.4 General Aggravating Circumstances

Offenders are liable to ordinary aggravation of punishment (Article 183) if the offence in question is committed under the general aggravating circumstances stated under Article 84, namely:

- treachery, perfidy, base motive (such as envy, hatred, greed), deliberate intent to injure or do wrong or special perversity or cruelty (Article 84(1)(a))
- abuse of powers, functions, confidence or authority (Article 84(1)(b))
- being particularly dangerous in view of antecedents, the habitual or professional nature of the offence or the means, time, place and circumstances of its commission, in particular acting by night or under cover of disturbances or catastrophes or by using weapons, dangerous instruments or violence (Article 84(1)(c))
- criminal agreement as a member of a gang organized to commit offences, particularly "as chief, organizer or ringleader" (Article 84(1)(d))
- intentionally assaulting a victim deserving special protection by reason of the victim's age, state of health, position or function (Article 84(1)(e)), in particular, assaulting a defenceless, feebleminded or invalid person, prisoner, close relative, a superior or subordinate, a representative of authority lawfully constituted by law or a public servant in the discharge of his duties

Circumstances such as "deliberate intent" and "abuse of power" are elements of offences rather than aggravating circumstances. "Deliberate intent", for instance, should not invariably justify aggravation, because doing so will overlap with criminal intention unless the offender is dangerous thereby implying a higher degree of criminal intention such as premeditation. Similarly, "weapons, dangerous instruments or violence" (Article 81(1)(c)) are frequent means of committing offences such as homicide and robbery, and should not outright be considered as factors of ordinary aggravation, unless they are unusual and extraordinary, thereby depicting the dangerous disposition of the offender.

The terms "shall increase" in Article 84(1) signify compulsory aggravation. The compulsory nature of the aggravation thus necessitates prudent and reasonable interpretation before a court accepts the existence of an aggravating circumstance forwarded by the prosecution.

In the presence of a general aggravating circumstance, the court shall apply ordinary aggravation[65] "within the limits specified in the relevant special provision (invoked for the offence), taking into account the nature

and the multiplicity of grounds of aggravation, as well as the degree of guilt of the offender." The maximum aggravated penalty allowed under Article 183 is the specified maximum sentence enacted by the special provision under which the accused is held guilty. If the special provision invoked against the offender, however, embodies the same aggravating circumstance as "a constituent element or as a factor of aggravation, the court may not take this aggravation into account again."[66]

3.5 Special Aggravating Circumstances

The two grounds of special aggravation of penalty are *concurrence* and *recidivism* (Article 85). Concurrence, as discussed under Chapter 4, is the commission of two or more offences by successive acts (material concurrence) or by a single act or combination of acts (notional concurrence). Material concurrence may be independent (Article 60(a)) or related (Article 63). At times material concurrence becomes "retrospective" (Article 186) if an offence is discovered after the trial of concurrently committed offence(s). The Penal Code had also embodied two types of notional concurrence, namely simultaneous notional concurrence (Articles 60(b), 65) and combined notional concurrence (Articles 60(b), 66), as briefly discussed under Chapter 4, Section 2.2.

The second ground of special aggravation is recidivism. As briefly discussed in Chapter 4, Section 1.1, a recidivist is an offender who commits an offence(s) punishable with (at least) simple imprisonment of six months within five years after having served the sentence (in full or in part) or after having been released due to pardon. In short, an offender is said to be recidivist where he commits an offence or offences (within the period stated by the law) after he has served his earlier sentence in whole or in part. In other words, the recidivist relapses into the commission of an offence after he is punished for his earlier offence.

Under the general aggravating circumstances stated in Article 84, the court normally inquires into the dangerous disposition of an offender if it is convinced about the existence of an aggravating circumstance. In case of special aggravating circumstances (Article 85), however, the dangerous disposition of the offender is outright presumed or taken for granted by the very existence of material concurrence, notional concurrence or recidivism. These special aggravating circumstances have varying impact on the aggravation of penalty, in spite of their common feature as grounds of special aggravation.

3.6 Other General Extenuating and Aggravating Circumstances

Certain legal systems lay down the general principles of mitigation and aggravation and leave the particulars to the court. The Ethiopian Criminal Code, however, states the particular circumstances of extenuation and aggravation, thereby restricting the court's discretion in determining the circumstances. Article 86 is thus applicable only where a particular extenuating or aggravating circumstance warrants due consideration.

Under rare cases courts are allowed to consider *general* extenuating or *general* aggravating circumstances not expressly provided for (in Articles 82 and 84 nor other provisions of the Criminal Code) and may apply ordinary mitigation (Article 179) or ordinary aggravation (Article 183). This is an exceptional course and the court that applies Article 86 for ordinary extenuation or general aggravation is bound to clearly state its reason.

The literal reading of Article 83 of the 1957 Penal Code (the predecessor of Article 86 of the 2004 Criminal Code) was susceptible to erroneous interpretation with regard to its applicability to special extenuating and special aggravating circumstances. However, the heading of Article 86 of the new Code has clearly restricted the applicability of the stipulation solely to general extenuating and general aggravating circumstances.

3.7 Cumulation of Extenuating and Aggravating Circumstances

Different circumstances can be considered as distinct components of an aggregated whole. For instance, "multiplicity of the grounds aggravation" in the course of determining punishment[67] necessitates the mechanism of handling two or more grounds of aggravation (or extenuation) upon determination of punishment.

3.7.1 Concurrent Extenuating and Aggravating Circumstances

The concurrent existence of extenuating and aggravating circumstances has a counterbalancing effect. The court shall, according to Article 189(1), "first fix the penalty having regard to the aggravating circumstances (Article 183) and then . . . reduce the penalty in light of extenuating circumstances (Articles 179, 180)." Article 84 of the 1957 Penal Code embodied a similar stipulation.

3.7.2 Coexistence of Concurrence and Recidivism

In case of the coexistence of concurrence and recidivism, both grounds of special aggravation of punishment are taken into account. Article 189(2) of the 2004 Criminal Code incorporates the stipulation that was embodied under Article 82(2) of the 1957 Penal Code and regulates determination of punishment where the new offences committed by a recidivist are concurrent. Where a recidivist "has at the same time been convicted of concurrent offences the Court shall first assess sentence for the concurrent offences and then increase it having regard to recidivism".

3.7.3 Concurrence of the Circumstances Stated under Articles 189(1) and 189(2)

Article 189(3) is a new stipulation that did not exist in the 1957 Penal Code. Where the various circumstances stated above under Sections 3.7.1 and 3.7.2 exist concurrently, the court shall first aggravate the penalty in accordance with aggravating circumstances and then mitigate the penalty based on extenuating circumstances.

> For example, within five years of being released from prison (due to conviction), A . . . shelters his brother C, a criminal wanted for homicide in the first degree, and gives the police false information concerning C's whereabouts. . . . If only harbouring [punishable with simple imprisonment (Article 445)] had been committed, one year imprisonment might have been adequate; Since A is a recidivist, two years imprisonment might appear to be adequate; . . .[68]

This is subject to mitigation on the ground of A's close relationship with C. But this case involves the issues of coexisting aggravating and extenuating circumstances (Article 189(1)), and coexisting concurrence and recidivism (Article 189(2)) thereby rendering Article 189(3) applicable. By virtue of Article 189(3), the court shall first aggravate the penalty and then consider the mitigating circumstances. The factors of aggravation are concurrence of the offences of failure to report the offence of first degree homicide[69] and harbouring.[70] The court will assess a hypothetical sentence for these concurrent offences (Articles 443, 445) and then increase the sentence having regard to the factor of recidivism (Article 189(2)), because A committed the offences within five years of being released from prison. The court shall thereafter consider the special extenuating circumstance of A's close family relationship (Article 83) with C to freely (Article 180) mitigate the punishment.

Readings on Section 3

Reading 1: Ashworth[71]

Justifying Restraint in the Use of Custody

The true principle of restraint in the use of custody is one which argues for the use of non-custodial sentences instead of custodial ones, and which argues for shorter custodial sentences instead of longer ones. The UN declaration [Resolution VIII of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990) states in paragraph 5(e) that 'imprisonment should be used as a sanction of last resort'], which refers to imprisonment as a sanction of last resort, is an inferior formulation because it implies that custody may justifiably be used for someone who persistently commits minor offences, and for whom other measures have been tried. Brief consideration is given here to three justifications for the principle of restraint—doubts about the reformative potential of custody, doubts about its individual deterrent effect, and humanitarian concerns.

(i) Doubts about the Rehabilitative Potential of Penal Institutions

In the 1930s Alexander Paterson, one of the most influential of Prison Commissioners, declared that 'it is impossible to train men for freedom in a condition of captivity'. By 1977 the mood of scepticism, encouraged by the works of criminologists, had found its way into the official publication *Prisons and the Prisoner*:

> Experience in recent years has led increasingly to scepticism about the compatibility of rehabilitation in this traditional, paternalistic form with the practicalities of day to day life in custody. The coercion which is inherent in a custodial sentence and the very nature of 'total institutions' tend to direct the whole of the inmates' individual and group energies towards adjustment to the austerely unnatural conditions; towards alienation from authority; and thus towards rejection of any rehabilitative goals towards which the staff may be working.

Important as it was to attempt to devise constructive regimes and to give prison staff a sense of purpose, the air of resignation in official publications continued and perhaps reached its zenith in 1990 when a White Paper argued that prison 'can be an expensive way of making bad people worse'. Whether and to what extent the experience of imprisonment makes offenders worse may be difficult to establish; but such factors as loss of employment, loss of housing, loss of contact with family, increased financial problems and possible deterioration in physical and mental health must all be taken into account. . . . It may be true that most of those who enter custody have previous convictions, many of them having several. But a comparative survey of reconviction rates following various types of sentence, which took account of age, type of offence and previous record, found that custodial sentences performed slightly worse than expected for all offenders other than the few first offenders. In general terms, the proportion reconvicted within two years of release was 54 per cent for prison, 49 per cent for community service, 42 per cent for 'straight' probation and 63 per cent for probation with additional requirements. . . .

(ii) Doubts about the Preventive Effect of Custody

When Mr Howard was Home Secretary, from 1993 to 1997, he proclaimed that 'prison works'. This could hardly stand as a reference to deterrence or to rehabilitation, since the reconviction figures within two years give no cause for encouragement in that respect—nor do the figures for desistance from crime in the 10 years following release. It may be true to say that 'prison works' in that it succeeds in incapacitating almost all prisoners (except the very few who escape) for the duration of their sentences. But this hardly seems a persuasive basis for penal policy, since (i) it is a short-sighted kind of effectiveness when so many of the prisoners then reoffend on release; (ii) it is also short-sighted if there is little possibility of innovative schemes for prisoners, especially in the context of considerable overcrowding in local prisons; and (iii) the impact of keeping these offenders in prison is slight in terms of additional security for the ordinary citizen since, . . . fewer than 3 per cent of offences result in conviction, and many of those are not sentenced to imprisonment. It follows that the threat to a citizen's safety and security is not likely to be diminished significantly by imprisoning 70,000 rather than 40,000 people. When in the United States the National Academy of Sciences investigated the incapacitative effect of imprisonment on the crime rate, they found it to be marginal. The Halliday Report reached the same conclusion. There is also little evidence of any general deterrent effect from greater use of custody. It is therefore clear that the preventive effects of custody are frequently overestimated.

(iii) Human Rights and Humanitarian Concerns

It is simply not acceptable for state institutions to operate in violation of human rights. There is already plenty of evidence, in reports from the CPT that English penal establishments fall below international standards in several respects. It will take individual cases to determine whether breaches are taking place, and a Scots decision finding a violation was noted above. The former Chief Inspector of Prisons took the UN *Basic Principles for the Treatment of Prisoners* (1990) as a benchmark for assessing the acceptability of English prison conditions, and the government ought to take much more seriously the task of ensuring that proper minimum standards are achieved (and surpassed) in the prisons. To the extent that they are not, this may be a reason for closing certain institutions. It is certainly a strong argument for reducing the number of people sent to prison and the length of their sentences.

Greater weight is sometimes placed on a related argument, that imprisonment should be used less because the prisons are overcrowded. There is some logic in this: a given number of months incarcerated in overcrowded conditions may be as punitive as a longer period in less unpleasant conditions. But it shares with the human rights argument a temporary dimension. Overcrowding could be removed by a massive programme of prison building. This, however, would be the opposite of restraint in the use of custody. . . .

A more durable line of reasoning stems from the inevitable pains of imprisonment. Custody entails a deprivation of freedom of movement, which is one of the most basic rights, and often involves considerable 'hard treatment'. Loss of liberty takes away the freedom to associate with one's family and

friends, and separates one from home and private life as well as from open society. Prison is therefore a severe restriction on ordinary human liberties, far above those imposed by most non-custodial sentences. And that restriction of liberties impinges not just on the offender but also on the offender's family and dependants. These considerations suggest that custody should not be used without some special reasons, and should be reserved for the most serious cases of lawbreaking. In particular, they suggest that custody should not simply be seen as the top rung of a ladder which starts with discharges and runs upwards through fines and community penalties. The imposition of a custodial sentence restricts liberty to a far greater degree than any other sentence, and for that reason should require special justification.

Reading 2: Robinson[72]

Distributing Criminal Liability and Punishment

. . . How should criminal liability and punishment be distributed within a punishment system? Who should be punished how much? These are the questions that every criminal justice system designer must answer, whether giving instructions to criminal code drafters, sentencing guideline drafters, or individual judges exercising discretion in interpreting the code or in sentencing offenders. One can imagine using any of the justifications or "purposes" of punishment as a distributive principle. That is, one could set liability and punishment distribution rules in a way that would maximize efficient deterrence, for example, or maximize rehabilitation or incapacitation of the dangerous, or maximize doing justice. . . . [E]ach purpose of punishment when used as a distributive principle gives a quite different distribution of punishment. (In contrast, when used to justify the institution of punishment, the alternative "purposes" work together toward a unanimous conclusion in support of punishment.) Because each distributes liability and punishment differently, we must decide which of the competing distributive principles should prevail when they conflict. One might initially suspect that the issue of the *distribution* of criminal liability and punishment is as academic an inquiry as the justification of the *institution* of punishment, for the two debates have commonly been combined into one. But the truth is that setting the criminal justice system's distributive principle is of enormous practical importance. Indeed, it is the single most important decision in constructing a criminal justice system. It is the means by which the legislature, the most democratic branch, can provide needed guidance on fundamental principles to criminal code and sentencing guideline drafting commissions. And an articulated principle is essential to guide the exercise of discretion by individual judges.[a]

Research has shown that different judges each have their own personal liability and punishment philosophy. One survey of federal sentencing judges, for example, revealed that "While one-fourth of the judges thought rehabilitation was an extremely important goal of sentencing, 19 percent thought it was no more than 'slightly' important; conversely, about 25 percent thought 'just deserts' was a very important or extremely important purpose of sentencing, while 45 percent thought it was only "slightly important or not important at all."[b]

Research also confirms that these differences in philosophy do indeed translate into different sentences.[c] An articulated distributive principle increases the likelihood that an offender's punishment will be a product of what he has done and his personal characteristics rather than a product of the judge he happens to draw for sentencing.

Many documents purport to give decision makers the guidance of principle. For example, the original Model Penal Code section 1.02 gives judges a list of purposes to guide the interpretation of criminal code provisions and the exercise of sentencing discretion:

(1) The general purposes of the provisions governing the definition of offenses are:
   a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
   b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
   c) to safeguard conduct that is without fault from condemnation as criminal;
   d) to give fair warning of the nature of the conduct declared to constitute an offense;
   e) to differentiate on reasonable grounds between serious and minor offenses.

(2) The general purposes of the provisions governing the sentencing and treatment of offenders are:
   a) to prevent the commission of offenses;
   b) to promote the correction and rehabilitation of offenders;
   c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;
   d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense;
   e) to differentiate among offenders with a view to a just individualization in their treatment;

Similarly, the Sentencing Reform Act of 1984, which created the United States Sentencing Commission, provides:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> 1. the nature and circumstances of the offense and the history and characteristics of the defendant;
> 2. the need for the sentence imposed—
>   A. to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>   B. to afford adequate deterrence to criminal conduct;
>   C. to protect the public from further crimes of the defendant; and
>   D. to provide the defendant with needed educational or vocational

training, medical care, or other correctional treatment in the most effective manner;[d]

But . . . these kinds of statements of purpose are more facade than guiding principle. Each of the alternative purposes listed in a subsection above is likely to give a different distribution of liability and punishment than those listed in other subsections. The now elderly former Nazi concentration camp torturer may no longer be dangerous, and therefore no longer in need of incapacitation, but may well deserve substantial punishment. The mentally ill offender may so lack any substantial capacity to understand the nature of his conduct as to be blameless for it and therefore deserving of complete excuse, yet nonetheless may be seriously dangerous and in need of incapacitation and, if possible, rehabilitation.

. . .

[The] natural conflict between alternative distributive principles means that the "laundry list" approach of the Model Penal Code, the Sentencing Reform Act of 1984, and most of such existing statements of guiding principle are seriously inadequate. If one distributive principle is to prevail, drafters and judges must be told which one and when. If more than one principle is to be relied upon as a distributive principle, such a hybrid distributive principle must articulate the interrelation among the different purposes. Without an articulation of the interrelation, the "laundry list" provides more illusion than guidance. It leaves the decisionmaker free to decide issues ad hoc and privately, and inconsistently, while portraying the decision making as being constrained by principle. One could argue that a criminal justice system would be better off without such "guiding principles" as these, for at least then the lack of a principled basis for decisions would be more apparent and therefore more likely to prompt reform. . . .

[Notes]

[a] *See* Paul H. Robinson and Barbara Spellman (2005), "Sentencing Decisions: Matching the Decisionmaker to the Decision Nature", *Columbia Law Review*, Vol. 105, pp. 1124–1161.

[b] S. Rep. No. 98-225, at 41 n.18 (1983) (Senate Report for Sentencing Act of 1984) (citing INSLAW/Yankelovich, Skelly & White, Inc., Federal Sentencing at III-4 (1981)).

[c] One study done by the judiciary gave 50 judges the same 20 cases to sentence. The differences in sentences were staggering. In one extortion case, for example, sentences ranged from 20 years' imprisonment and a $65,000 fine to three years' imprisonment and no fine. *Id.* at 44 n.23; *see also id.* at 42–43 (citing ANTHONY PARTRIDGE & WILLIAM BUTLER ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY (1974)). This same disparity in sentencing is reflected in the sentences given in real cases every day. One study compared the sentences imposed in the different federal circuits. For forgery, as an example, the average sentence ranged from 30 months in the Third Circuit to 82 months in the District of Columbia. For interstate transportation of stolen motor vehicles, the extremes in average sentences were 22 months in the First Circuit and 42 months in the 10th Circuit. *Id.* at 41 & n.21 (citing Whitney North Seymour, *1972 Sentencing Study: Southern District of New York*, 45 N.Y.S. BAR J. 163 (1973)). *See* generally MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

[d] 18 U.S.C. 3553(a).

Reading 3: Jean Graven[73]

The Reconciliation of Tradition and Progress

. . . [T]he Ethiopian Penal Code . . . rests on the age-long tradition . . . and could not entirely break with it without running the risk of imbalance or some greater upset. This could have unfortunate results quite opposed to the beneficial ends which the Code was designed to serve. The first essential of a piece of legislation, however great its innovations, is to be applicable and not to run contrary to the convictions of those for whom it is made. As long ago as the *Esprit des Lois*, Montesquieu made this observation; and the members of the Legislative Commission, who well knew the nature and requirements of the country, were constantly guided by this just concern as well as by the standard of what their profound conception of justice and national utility could accept.

Although the Code set itself firmly in the path of the "new concepts," noted in the imperial preface, in order to attain the ends of the new criminal policy, it did not and could not sacrifice the idea—deeply ingrained in the Ethiopian mind and tradition—of Criminal fault and deterrent and expiatory punishment, simply because of the principles of social readaptation and the tendency to make the law systematically milder . . .

In the Ethiopian context it would in particular have been an inconceivable mistake, and even an impossibility, to abolish the death penalty at the present time. It is not only necessary for social protection, but is based on the very deepest feelings of the Ethiopian people for justice and for atonement: the destruction of life, the highest achievement of the creator, can only be paid for by the sacrifice of the life of the guilty person . . . Corporal punishment (flogging), whose abolition was already envisaged by the Code of 1930, is another example of the conflict between tradition and ideas concerning punishment . . . after a great deal of hesitation and discussion, it was this traditional consideration that eventually carried the day before parliament when a majority of the commission had previously been in favor of abolition. But while the code of 1957 retains capital punishment –always subject to imperial confirmation– with flogging as a secondary punishment, it has naturally taken great care in regulating the conditions which provide both for the limitation of the cases in which the court can impose them and for their execution under decent and humane conditions. . . . [NB- Flogging which was embodied in Article 120 A of the 1957 Penal Code had been outdated and non-enforceable long before its omission under the 2004 Criminal Code.]

Ethiopian tradition is also evident in the field of pecuniary punishment, especially in the confiscation of property, to a limited extent, in the case of serious crimes against the sovereign and the State . . . and in the provisions for the payment of compensation for damage caused to the injured party, here, it was necessary to take account of the ancient private payment of "blood money," or pecuniary reparation, a principle which has continued down to the present day. These passages show how the transition from customary law to modern law has been carried out, and how a fundamental concept of justice can be reformulated while retaining general acceptance. The limits set on confiscation, in order to safeguard the means of subsistence of the offender and his family, and to prevent the least encroachment on the personal goods of an innocent

person, have been taken directly from custom as confirmed by the written law (for these were already present in Articles 25 to 39 of the Code of 1930). They are characteristic of the sense of equity which dominates traditional justice, and of the advantages, even for the progress of modern law, which may sometimes be gained from the inspiration of ancient solutions.

The same can be said of several provisions regulating the principle, the extent and the punishment of individual guilt. Taking into consideration involuntary mistakes or excusable ignorance of the law (Article 78); lack of intelligence or understanding, previous good conduct, lofty motive or sincere conviction, or repentance immediately shown by the offender as extenuating circumstances (Article 79); and perfidy and base motive, or the abuse of a position of power or privilege as aggravating circumstances (Article 81), are taken (Article 44 ff.), but have been given the more abstract and general form suited to a modern system of law. . . .

Reading 4: Allen[74]

The Current Approach

Until 1991 the sentencing system in England and Wales lacked a coherent rationale as retribution, deterrence, incapacitation and rehabilitation were all advocated as the aims of sentencing, without there being any explanation of how these aims were to be reconciled or of which was to take priority if they came into conflict. . . . In late 1980s the Government began to consider the sentencing system. . . . The Government recognized that rehabilitation, while it may be sought, may not always be achieved and cannot be used as a justification for imprisonment. … Deterrence, while it may have immediate appeal, possibly operates only with those who are law-abiding in the first place.

. . . The emphasis on retribution was apparent in that the concept of proportionality was made a central principle of sentencing. The 2000 Act required a court in passing custodial sentence or a community sentence to impose a sentence which was commensurate with the sentences of the offence. . . . Rehabilitation, as an aim of sentencing was not abandoned totally although retribution took priority. The [2000] Act sought to encourage the use of community sentences by making it clear . . . that custodial sentences were the sentence of last resort and should be used only where the offence was ‘so serious that only such a sentence can be justified for the offence.’ In choosing community sentence, rehabilitation could still be an aim as the court was required to choose an order which was both commensurate with the seriousness of the offence . . . , and which was ‘the most suitable for the offender.’ The idea of imposing a heavier sentence for deterrent or rehabilitative reasons was eschewed. The Act permitted a court to depart from the principle of proportionality, however, where the offender has been convicted of a sexual or violent offence and the court considered either (a) that only custodial sentence ‘would be adequate to protect the public from serious harm from him’ . . . or (b) that a longer custodial sentence ‘is necessary to protect the public from serious harm from the offender’ . . . In such cases the need to protect the public took priority over the principle of proportionality. . . .

4. Determination of Punishment in Multiple Offences and Recidivism

4.1. Material Concurrence

In case of material concurrence[75] special aggravation is compulsory. The Criminal Code has not, however, adopted the unrealistic method of arithmetical cumulation (aggregation) of the penalties *without limit*. Nor are the lesser penalties invariably absorbed by the penalty imposed against the most serious offence, subject to the exceptions under Article 184(1)(a). The Criminal Code thus strikes a balance between these two extremes of cumulation and absorption.

4.1.1 Exceptional Cases of Overriding Maximum Penalties

According to Article 184(1)(a) the maximum penalty imposed shall override any other penalty entailing loss of life under the following conditions:

- where capital punishment or rigorous imprisonment for life is provided for one of the concurrent offences, or
- where the maximum penalty of rigorous imprisonment for 25 years (Article 108) is imposed on one of the concurrent offences punishable with rigorous imprisonment, or
- where the general maximum penalty of three years simple imprisonment (Article 106) is imposed on one of the concurrent offences that are not punishable beyond the general maximum for simple imprisonment, i.e. three years.

Likewise, the court shall not impose fine for the remaining offences (Article 184(1)(e)) either as a principal or secondary penalty where confiscation of property (Article 98) is imposed on one of the concurrent offences. However, imprisonment and pecuniary penalty can be concurrently imposed[76] after the determination of imprisonment in accordance with Article 184(1)(b) and the imposition of fine pursuant to Article 184(1)(d).

4.1.2 Aggregation of Penalty and Its Restrictions

Article 184(1)(b) of the 2004 Criminal Code has amended one of the restrictions that was embodied in Article 189(1)(b) of the 1957 Penal Code with regard to aggravation of punishment on the ground of concurrent offences. According to Article 189(1)(b) of the 1957 Penal Code, the court was required to impose the penalty deserved for the most serious offence and increase its length on the ground of concurrence subject to two restrictions.

Under the previous Code, the court could exceed the basic penalty by half without, however, going beyond the general maximum fixed by law for the kind of penalty applied. The first restriction was the inability to exceed the penalty (deserved for the most serious offence) by half, and the second restriction prohibited sentences beyond the general maximum of three years for simple imprisonment (unless there is a specified maximum that may extend up to five years), and beyond the general maximum of 25 years for rigorous imprisonment. The new Criminal Code has retained the latter restriction, but has amended the first restriction.

To illustrate the first restriction that was embodied in Article 189(1)(b) of the 1957 Penal Code, if a person commits four successive offences punishable with maximum penalty of 10, seven, five and three years of rigorous imprisonment, the court was required to initially determine a hypothetical penalty it would have imposed if the offender had only committed the most serious offence, and then aggravate the penalty by half until it exceeded the maximum penalty of 10 years by half, i.e. until the penalty reached 15 years of rigorous imprisonment.

The term "basic penalty" was subject to other lines of interpretation. If "basic penalty" was to be interpreted to mean the hypothetical penalty deserved by the most serious offence (e.g. eight years) rather than the specified maximum for the offence (i.e. 10 years) this basic penalty could only be exceeded by its half (i.e. four years) thereby rendering it impossible for courts to stretch the penalty beyond 12 years. Another possible interpretation that could be given to the provision was to compute half of the maximum penalty (i.e. five years) and add it to the basic penalty (i.e. eight years in our example) and determine the ceiling of aggravation at 13 years.

The new Criminal Code has omitted the first restriction (illustrated in the preceding paragraphs) that was embodied in Article 189(1)(b) of the 1957 Penal Code. According to Article 184(1)(b) of the 2004 Criminal Code, the court shall aggravate the punishment for concurrent offences by determining the penalty for each offence and *adding* them. The word "add" is different from "increase". Under Article 189(1)(b) of the former Penal Code the length of the penalty deserved for the most serious offence was *increased* by taking into account the provisions of the law or the concurrent offences. This provision did not envisage the determination of penalty for each concurrent offence and *adding* them together, but instead provided for increasing the penalty by taking the factors stated above into account. On the contrary, Article 184(1)(b) of the 2004 Criminal Code provides for the determination of punishment for each concurrent offence and aggregation of the sentence. The amendment with regard to the first restriction thus involves a considerable change in the pattern of aggravating the penalty.

However, Article 184(1)(b) provides that the court shall not go beyond the general maximum fixed by law for the kind of penalty applied. In effect, both codes share the same stipulation with regard to the second restriction. If the penalty applied is rigorous imprisonment, the aggravated penalty cannot exceed the *general maximum* of 25 years fixed under Article 108.

For example, if three concurrent offences punishable with 20, 15 and 12 years of maximum rigorous imprisonment are committed, the aggravated penalty can only go up to the general maximum of 25 years. Similarly, aggravated penalty cannot exceed three years (Article 106) in case of concurrent offences punishable with simple imprisonment provided that none of these concurrent offences is punishable with a specified maximum that might extend up to five years of simple imprisonment.

4.1.3 Aggregation of Rigorous and Simple Imprisonment

Where an offender has committed concurrent offences punishable with rigorous imprisonment and simple imprisonment, two years of simple imprisonment shall be regarded as one year of rigorous imprisonment for the purpose of aggravating the penalty on the basis of Article 184(1)(b). This new stipulation (which was not incorporated in Article 189 of the 1957 Penal Code) is embodied in Article 184(1)(b), paragraph 2.

4.1.4 The Optimum Level of Pecuniary Penalties

In cases of concurrence of offences punishable with fines, the court shall determine the fine that is deserved for each offence and aggregate them together[77] subject to the restriction[78] that the total fine cannot exceed the general maximum amount provided under Article 90. However, Article 92 allows the imposition of fine which exceeds this limit where the offender has acted with a motive of gain. The general maximum set forth under Articles 90 and 92 are respectively Birr 10,000 and Birr 100,000. However, Article 90 imposes the general maximum of Birr 500,000 for bodies corporate.[79] According to the second paragraph of Article 92, the imposition of fine shall always be in addition to the confiscation of the gain obtained from the offence.

The general maximum stated in the preceding paragraph may be exceeded where a special provision of the law prescribes a higher maximum. In all cases of offences against the State punishable with rigorous imprisonment under Articles 238 to 258, fine not exceeding Birr 100,000 may be imposed[80] in addition to the principal penalty "where the offender exercises official functions, or where he has acted for motives of self-interest."

Even more so, Article 260 allows confiscation of property[81] in addition to the principal penalty against offenders convicted under Articles 238, 240,

241, 246 to 251 and 252(2). As briefly stated earlier, this extraordinarily aggravated pecuniary penalty of confiscation absorbs any imposition of fine owing to concurrent offences[82] as a principal or secondary penalty.

4.2. Notional Concurrence

In *simultaneous notional concurrence,* where a single act "simultaneously contravenes several criminal provisions,"[83] special aggravation on the basis of Article 184 is optional and such aggravation under Article 184 is applied only if it is justified by "the offender's deliberate and calculated disregard for the law." In all other cases of *simultaneous notional concurrence* that do not involve "the offender's deliberate and calculated disregard for the law," the court shall not exceed the maximum penalty prescribed by the most severe of the relevant provisions.[84]

As briefly discussed in Chapter 4, Section 2.2, *combined notional concurrence*[85] involves two or more material harms resulting from the same act or combination of acts. In such cases, aggravation of penalty depends on the offender's moral guilt (criminal intention or negligence) and on whether the criminal result was achieved through means that endanger public security as stipulated under Article 66. Article 187(2) envisages the following three situations of combined notional concurrence which are accompanied by different stipulations regarding aggravation of punishment:

- Where the offender has committed the concurrent offences intentionally (Article 66(1)(a)) or where at least one of the concurrent offences is committed intentionally (Article 66(1)(b)), the penalty shall be subject to *special aggravation* (Article 187(2)(a)) in accordance with Article 184.
- Where the concurrent offences are committed due to the offender's negligence (Article 66(1)(c)) the penalty shall be subject to *ordinary aggravation* under 187(2)(b) pursuant to which the court shall not exceed the maximum penalty prescribed by the most severe of the relevant provisions.
- The penalty shall be subject to special aggravation (Article 184) where the offender's intentional offences (of combined notional concurrence) harm public security and public interest (Article 187(2)(c)) as stipulated under Article 66(2) , "in particular if criminal result was achieved by means endangering public security, such as arson, use of explosives or where communications or public health are in danger as well as in the case of exposure of persons, maltreatment, duels, abortion, rape or sexual outrages".

4.3. Concurrent, Consecutive and Joint Sentencing

4.3.1 File No. 1559/74 (Eth. Cal.)

The 1957 Penal Code and the 2004 Criminal Code pursue different approaches with regard to aggravation of penalty due to multiplicity of offences. Article 189(1)(b) of the previous Code (as highlighted above) required courts to use the penalty for the most serious offence as basic penalty and then increase the penalty by taking into account the concurrent offences without exceeding the maximum statutory penalty for the most serious crime by half, subject to the condition that such aggravation does not exceed the legal maximum for the kind of penalty (e.g. rigourous imprisonment) which is applicable.

In *Diriba v. Public Prosecutor*,[86] the Panel Division of the Supreme Court's decision dealt with an appeal which involved two sentences that were separately given for two offences committed on the same day. The High Court had sentenced the appellant with 15 years of rigorous imprisonment (in Criminal File No. 27/72 Eth. C). And the appellant was sentenced to death for the second offence (in Criminal File No. 341/72 Eth. C.). The death penalty in the second charge was imposed because the public prosecutor had submitted the penalty for the first offence as a ground for aggravation. But when the two appeals were reviewed separately (by the 6th Supreme Court Division and the Panel Division of the Supreme Court), each of them was reduced to 10 years of rigorous imprisonment. The Panel Division of the Supreme Court stated that this has occurred because both charges were unduly charged separately.

The public prosecutor argued that these sentences are separate and should be served in the aggregate. The appellant on the other hand contended that the death penalty had taken the first sentence of 15 years into consideration and the Supreme Court was aware of this when it reduced the sentence to 10 years, and in effect, both sentences are concurrent and that he should serve a sentence of 10 years. The Panel Division rejected the latter argument of the appellant because it stated that the bench was not aware of the other sentence when it reduced the penalty of 15 years to 10 years in the first charge and sentence. The Panel Division then considered the issue of whether the penalty was imposed based on the principle of concurrence of offences as invoked by the appellant or whether it should be considered separately.

Because the offences were committed on the same day in an interval of two hours, the Panel Division of the Supreme Court found that the public prosecutor should have filed the offences as concurrent within the same charge, in which case punishment could have been imposed based on Article 189 and 191 of the 1957 Penal Code. The court resorted to these provisions

for its decision on the issue. The court took the first sentence of 10 years as the basic penalty and determined the maximum that could have been imposed to be 15. On Hamle 30th 1977 Eth. Cal. (6 August 1985), the majorly opinion of the Panel Division (in a decision of three against two) decided that the appellant's two sentences should be turned to 15 years of rigorous imprisonment which runs from the date of the appellant's imprisonment, i.e. Hamle 11th 1971 (18 July 1979) .

The two judges who wrote their minority opinion stated that both charges were brought separately, and the public prosecutor has admitted that there is no law in the Penal Code that can directly apply to this case. They further stated the absence of previous decisions on the issue and mentioned, *inter alia*, Article 5 of the French Penal Code for illustration which provides that sentences shall run concurrently unless the judgment states otherwise. They further cited research articles which support this position and contrasted it with the Penal Codes of two countries that pursue addition and consolidation of such sentences.

The minority opinion stated the inapplicability of Articles 191 and 189 because the latter charge and sentence imposed on the appellant was not imposed on the basis of retrospective concurrence. They noted that the appellate decisions in both appeals, i.e. Criminal Appeal File No. 1569/74 (Eth. Cal.) and Criminal Appeal File No. 1067/73 (Eth. Cal.), impose rigorous imprisonment of 10 years from the date of arrest. Both decisions were given by two benches of the Supreme Court with equal status and the 1957 Penal Code does not allow resort to a hypothetical assumption of their concurrence in adjudication and offer a different sentence. The minority opinion thus concluded that the sentences should be served concurrently, both starting to run from the date of the appellant's arrest.

Negatu Tesfaye criticizes both positions.[87] He differs from the majority in the modality of increasing the basic penalty by half from 10 to 15 years of rigorous imprisonment, but agrees to its application of Article 191 by analogy because offenders should not be punished less severely than the sentence that could have been imposed had the case been tried concurrently. According to Negatu [First name is used for Ethiopian authors due to the prevailing practice], the punishment for the charge under Article 522 of the 1957 Penal Code (life sentence or death penalty) would have absorbed the sentence for the second offence charged under Article 3(2) of Proclamation No. 8/74 (Eth. Cal.) and he believes that "had the Sixth Division [of the Supreme Court] been aware of the Commission of [another concurrent] offence, it might not have gone to the lowest limit in reducing the penalty" for the first degree homicide even if the court could have still mitigated the penalty based on Article 184 of the 1957 Penal Code.

Negatu underlines that had the cases been tried concurrently, "the court [would] have held that the penalty imposed for homicide of the first degree under Article 522" overrides the penalty imposed for the armed uprising under Article 3(2) of Proclamation No. 8/74 (Eth. Cal.). He recommends that there ought to be an amendment to bridge such gaps and he cites Chapter 34, Section 10 of the Swedish penal code which under Paragraph 2 enables the principle of retrospective concurrence to apply to the final sentence where separate sentences are imposed by courts for concurrent offences. This, according to Negatu, avoids the dual pitfalls of unduly shielding the offender from an aggravated sentence, and also saves the offender from a graver penalty than the amount "which he would have received had all the offences been tried together."

4.3.2 Potential Problems in the Implementation of Article 184(1)(b)

There seems to be a potential problem in aggravation of sentences under Article 184(1)(b) of the 2004 Criminal Code with regard to the mechanism of moderation in the determination of cumulated sentences. If for example an offender is concurrently charged with four, five or more offences, courts are expected to have a moderation scheme with regard to the cumulation of the sentences for each offence after determining the penalty for the most serious offence. In other words, there is the likelihood that sentences can be aggravated to the general maximum of 25 years even if the maximum penalty for each of the offences committed is far below this figure.

There are schemes of moderation that are used in various legal regimes. In the Netherlands, for example, "for multiple offences the judge imposes a joint sentence, the maximum term of which may be one third higher than the highest statutory maximum for one of the offences committed."[88] The 1957 Penal Code had used the same method of moderation even though it was not clear whether the ceiling of the increasing half of the basic penalty was half of the statutory maximum or half of the actual basic penalty for the most serious offence. It was also unclear whether it should be topped up from the actual basic penalty or from the statutory maximum. The 2004 Criminal Code could have made clarification in this regard. But it has resorted to changing the method of aggravation which at least literally allows adding the penalties for each offence rather than increasing the sentence until a certain limit.

The *exposé des motifs (Hateta Zemiknyat*) of Article 184 of the 2004 Criminal Code states that the two conditions that were required to be observed to aggravate the penalty are complex thereby necessitating the cancellation of the first condition, i.e. the ceiling of increasing the basic

penalty by half. However, this seems to lead to another problem that can be encountered by courts where the cumulation envisaged by the new Code becomes unreasonable even if it does not exceed the legal maximum for the type of the penalty, i.e. 25 years in case of rigorous imprisonment. For example, many concurrent offences of theft can lead to the maximum penalty being imposed if addition of sentences is considered as a mere arithmetic exercise.

Every mile or kilometer does not entail the same level of discomfort and challenge for a runner, as the latter kilometers are the most challenging. Likewise the purposes that can be served by imprisonment cannot have the same marginal effect throughout all segments of a prison term, thereby rendering mechanical addition of independent sentences unreasonable. If for example two similar offences are committed, each warranting seven years of rigorous imprisonment, mechanical addition would lead a court to 14 years of rigorous imprisonment. But it is the same person who is expected to be reformed. If the offender can be reformed during the first seven years, he does not need another seven years for a second round of reform, but some more years (beyond the seven years for the first offence) for purposes such as proportionality, deterrence, and so forth. What is needed in such cases is an addition of a prison term which does not allow free ride for multiple offenders and which at the same time does not lead to exaggerated severe prison terms.

The shortcoming of Article 189(1)(b) of the 1957 Penal Code could have thus been rectified by making it clear that the aggregation for materially concurrent offences shall not exceed by half the *statutory maximum* for the gravest offence. A mere addition of the term "statutory" could have thus solved the problem stated in the *exposé des motifs (Hateta Zemiknyat*) of Article 184 of the 2004 Criminal Code, rather than resorting to the course that has now been taken.

Mitchell[89] states that "what might be called 'transactions' or 'ventures' ... may consist of two or more acts" and he states the difference between consecutive and concurrent sentencing:

> It is . . . interesting to look briefly at the case law on consecutive and concurrent sentencing. Whilst the general rule is that where (what are currently) two or more crimes were committed during a single transaction the sentences will be concurrent, exceptions are made. For example, where D commits an offence against the person and a firearms offence, consecutive sentences will be imposed essentially as a general deterrent. Yet concurrent sentences should be imposed if consecutive sentences would effectively punish D twice for what was really one crime.[90]

Williams also states that the sentences for offences that arise from the same incidence or transaction generally run concurrently "[e]ven where it is possible to obtain a conviction on two or more serious charges,"[91] However, where the offences are different, Mitchell suggests that even sentences that arise from different transactions can have concurrent sentences in which "the aggregate of the wrongdoing could still be incorporated within a single offence without making it too clumsy or cumbersome, whereas the converse would have been true where the sentences were made to run consecutively." The difficulty in this scheme seems to be the extent to which it can be practical to incorporate the wrongs in the other concurrent offences in the offence which is the most serious.

The *joint sentence*, as is the practice in the Netherlands, seems to be a synthesis between concurrent and consecutive sentencing. It is not concurrent because each offence is taken into account in sentencing. Nor is it consecutive because the aggregate sentence is not a mere arithmetical addition of independently determined sentences for each offence. In Reading 1 of this section, Ashworth supports such synthesis:

> Where it is appropriate to impose consecutive sentences rather than concurrent sentences, . . . the basic approach is for the court to calculate separate sentences for each of the offences and then to add them together. This could, however, lead to a high overall sentence –placing thefts alongside rape, or burglaries alongside robbery, in terms of length of custody. The courts have therefore evolved a principle which Thomas has called 'the totality principle', which requires a court to consider the overall sentence in relation to the totality of the offending and in relation to sentence levels for other crimes.[92]

4.4. Recidivism

Offenders with a record of previous conviction are treated more severely than first-time offenders. A relatively severe punishment is, in principle, justifiable. Yet emphasis solely on the severity of punishment for the purpose of deterrence and prevention (without meanwhile addressing the subjective and objective grounds of recidivism) is an ineffective combat against the effect rather than the cause of recidivism.

Article 67 defines recidivism and Article 85 states that recidivism is one of the grounds for special aggravation of punishment. According to Article 67, the court shall aggravate the penalty pursuant to Article 188 where the offender:

- intentionally
- commits an offence punishable with (at least) six months of simple imprisonment
- within five years of a sentence being served in whole or in part, or having been remitted by pardon.

Although aggravation of penalty due to recidivism also applies to petty offences,[93] the following paragraphs focus on recidivism in offences. Article 67 of the 2004 Criminal Code has amended Article 82(1)(b) of the 1957 Penal Code in defining recidivism. The new Code uses the distinct demarcation line of "an offence punishable with (at least) six months of simple imprisonment" while the former Penal Code in Article 82(1)(b) had used the extraditability of the offence, an element that had problems of application and interpretation.

Moreover Article 67 or the current Code, unlike Article 82(1)(b) of the 1957 Penal Code, has not incorporated "amnesty" along with the term "pardon" (in order to avoid a superfluous element) because amnesty absolves the conviction record of the offender in relation to the offence that it covers. Article 67 embraces four components: antecedents, moral guilt, the commission of the offence and the time of its commission.

Antecedents refer to the previous convictions of the accused in Ethiopia or abroad.[94] Foreign sentences shall not be taken into account in case of petty offences.[95] The offence need not be similar or identical to the former conviction, because Article 67 provides for "general recidivism". The new offence need not also be independent. An escapee who contravenes Article 461 (while he was serving his sentence) is a recidivist although his new offence is not independent from his earlier conviction.

Moral Guilt is the second factor considered under Article 67. However, the offence must be intentional. If intention is required in relation to the new offence, it will be unreasonable to consider previous negligent offences as a ground of aggravation.

With regard to the *actus reus*, the new offence may be any violation of criminal law committed in Ethiopia, or an offence committed in a foreign country. In the latter case, however, the gravity of the offence over which Ethiopian courts have principal or subsidiary jurisdiction[96] must justify extradition[97] from the offender's country of refuge.

The *temporal component* embodied under Article 67 envisages the commission of the offence "within five years of a sentence being served in whole or in part or having been remitted by pardon." With regard to petty offences, the period is one year of a sentence being served in whole or in part or having been remitted by pardon or period of limitation.[98] This period

begins to run from the date of complete or conditional release upon wholly or partly serving a prison term. A sentence is said to have been served in part in cases of conditional release.[99] Whether the computation of such period can start from the date of escape of a prisoner is debatable because the escapee should not benefit from his offence of escape[100] from prison. Such offender is considered to have unlawfully discontinued serving a sentence. Partially serving a sentence should thus mean serving a sentence that is partially reduced in accordance with the law.

Period of detention due to remand in custody is considered part of a sentence[101] for the purpose of computing the starting date of imprisonment if the case heads towards conviction and sentencing. Yet such remand for investigation or remand (committal) for trial does not constitute a sentence for the purpose of recidivism unless the accused is ultimately convicted and sentenced. And a person whose sentence is suspended for a certain probation period[102] will not be considered to have been sentenced if the probation is properly undergone.

Where the conditions stated above are present, the court shall aggravate the penalty as follows:

- The court *may exceed* the maximum sentence prescribed for the new offence (Article 188(1) first sentence) and may extend the sentence until it is double the ceiling of the sentence prescribed for the new offence or for the gravest offence among the new concurrent offences (Article 188(1) second sentence), provided that it does not exceed (Article 188(3)) the general maximum for the kind of penalty imposed (i.e. up to 25 years of rigorous imprisonment or up to three years of simple imprisonment.
- Article 188(2) paragraph 1 allows the court to set aside the procedures under Article 188(1) and to impose punishment up to the general maximum for the kind of penalty imposed (i.e. up to 25 years of rigorous imprisonment or up to three years of simple imprisonment) where such aggravation is justified by the type and number of the offences, the degree of the offender's guilt and the dangerous disposition of the offender.
- Imposition of penalty exceeding the ceiling prescribed for the new offence is mandatory [103] in sentencing habitual recidivists, i.e. offenders who already have had previous record of recidivism prior to their current conviction.

In all cases of recidivism aggravation of penalty is obviously necessary. Nevertheless, the maximum penalty provided for the offence can only be exceeded "having regard to the circumstances of the new offence, the degree of guilt and the danger represented by the offender".

The issue of whether the court should refrain from special aggravation on account of recidivism where the repeated (habitual) commission of the offence is incorporated as element of an offence should be carefully addressed. Where the offender's act of relapsing into a given crime is the material ingredient of a special provision (as in Articles 548(1), 640 etc.), the penalty may not be increased again if the court can apply Article 84(2) through interpretation *a pari*. On the other hand, it may be argued that Article 85 does not have such a stipulation that prohibits special aggravation on the basis of Article 188 even where a special provision embodies habitual commission of an offence among its ingredient elements.

Various provisions of the 2004 Criminal Code (e.g. Articles 669(3)(a), 696(a) and 715(a)) have resolved this overlapping of aggravation (on account of habitual offences) in contrast to their counterpart stipulations under the 1957 Penal Code, such as habitual theft, habitual fraudulent misrepresentation, habitual usury, extortion or blackmail in Articles 635(3)(a), 658(a) and 670(a) of the 1957 Penal Code.

Case 15

Supreme Imperial Court, Sixth Division

Criminal appeal No. 519/56
Megabit 29, 1956 E.C. (April 7, 1964)

Geresou L. v. The Attorney General[104]

*Penal law—Extenuated homicide—Gross provocation—Causation—Art. 524 Pen. C.; Criminal procedure—Appeal—Plea of guilty—Evidence—Art. 185 Crim. Pro. C. ; Evidence—: Plea of guilty.**

On appeal against the High Court's conviction and sentence of appellant based upon his plea of guilty to a charge of extenuated homicide, appellant asked for acquittal on the ground of self-defence.

Held: Appeal allowed; conviction and sentence quashed.

1. A homicide conviction based solely upon the guilty plea of a young and [illiterate] accused cannot stand. . . .
2. Despite an accused's plea of guilty to a homicide charge, the appeal court may quash his conviction and sentence if neither the circumstances nor the evidence in the record show that he caused the death of the deceased.

. . . This is an appeal against the conviction and sentence of the High Court (First Criminal Division) dated 6th February, 1964, in Criminal Case No. 371/56, whereby the appellant was convicted under Article 524 of the [1957] Ethiopian Penal Code, and sentenced to three years imprisonment.

. . . [T]he appellant was accused, under Article 524 of the [1957] Ethiopian Penal Code, of having caused the death of the deceased, following gross provocation, by way of extenuated homicide. The appellant . . . admitted all the

truth to the trial court, and said that as he was passing by after midnight on the critical night, the deceased beat him suddenly with a broken bottle and the appellant, being so provoked, and shocked, retorted by throwing a stone at the deceased. Both appellant and deceased did not know each other. Three months after the critical night, the deceased passed away, and the prosecution alleged that he died as a result of the blow he received on that night from the stone thrown by the appellant. The trial court convicted the appellant on the strength of his own plea of guilty under Article 524 of the Ethiopian Penal Code of 1957, and sentenced him to 3 years imprisonment.

The appellant now . . . [pleads] that he was acting in self-defence against the blow received from the deceased's bottle. He asks for acquittal. It is undeniably true that the arguments of the appellant are not quite satisfactory; but the respondent, represented by Ato Negga Tessemma, showed no objection to the amendment of the judgment of the High Court.

It is evident beyond the least shadow of doubt from the records of the High Court, that the Court convicted the accused of having killed the deceased solely on the strength of his own plea of guilty. There are many accused persons who are so young and [illiterate] that they do not realize the consequences of their admitting the truth. Such a young boy of about eighteen years confessed before the court that he threw a stone at the deceased, after the latter provoked him by hitting him with a bottle; and that the deceased died three months later. There is no evidence whatsoever in the court record that the deceased passed away as a result of the blow he received from the stone on that critical night. Under the circumstances, although the deceased passed away, we are not satisfied that he really died from the blow of the stone that the appellant threw at him after he provoked him. The court of first instance should have given consideration to this important point and [should not have] simply accepted the plea of guilty and jailed the appellant for three years solely on the strength of his . . . confession which amounts to nothing but telling the truth but not confessing that he caused the homicide.

Under the circumstances, whereas the respondent himself showed no objection to an amendment of the judgment of the High Court, and whereas we are not satisfied that there is evidence beyond the least shadow of a doubt that the appellant did literally cause the death of the deceased, after three months from the date of the accident, and whereas there is no expert evidence to the effect that the deceased died as a result of the blow he received from the stone thrown at him by the appellant, we hereby see no justification to convict the appellant. We allow the appeal and quash the conviction and order the immediate release of the appellant, unless detained on any other charge. Delivered in open court this 7th day of April, 1964.

* See also Art. 134 Crim. Pro. C.

Questions

1. Can causation be an issue in this case?
2. Can self-defence be applicable because throwing a stone shows spatial distance between the accused and the deceased.

3. Couldn't the court have lowered the sentence significantly (e.g. one year or even lower) on the basis of gross provocation without resorting the issue of causation? How?

Readings on Section 4

Reading 1: Ashworth[105]

Multiple Offenders

. . . [Some multiple offenders] are being sentenced for a number of offences arising from a single incident, but most … will be sentenced for offences committed at different times during the period before their court appearance. Wherever proportionality between the seriousness of the case and the severity of the sentence is a leading principle, multiple offenders give rise to difficulties both theoretical and practical. It is one thing to compare a residential burglary with rape; it is quite another thing to draw comparisons of gravity between two, four or six residential burglaries and a single rape. . . .

8.4 Consecutive Sentences and the Totality Principle

Where it is appropriate to impose consecutive sentences rather than concurrent sentences, . . . the basic approach is for the court to calculate separate sentences for each of the offences and then to add them together. This could, however, lead to a high overall sentence—placing thefts alongside rape, or burglaries alongside robbery, in terms of length of custody. The courts have therefore evolved a principle which Thomas has called 'the totality principle', which requires a court to consider the overall sentence in relation to the totality of the offending and in relation to sentence levels for other crimes. Section 166 of the 2003 Act preserves the principle by stating that nothing in the Act should prevent a court, 'in the case of an offender who is convicted of one or more other offences, from mitigating his sentence by applying any rule of law as to the totality of sentences'.

8.4.1 Totality and Proportionality

Early authority may be found in an unreported judgment in 1972:

> When cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences.[a]

The application of such a principle would clearly produce what is in effect a discount for bulk offending. If the sentence is expected to impose a sentence which is lower than the total which has been reached by a correct assessment of the gravity of each individual offence, then it follows that the offender will receive a lower total sentence that he would have received if he had been before the court on the number of separate occasions for the same number of

offences. This is strikingly demonstrated in cases where an offender asks the court to take numerous other offences into consideration, although in those cases some might justify the discount as an incentive for the offender to own up and thereby to enable the crimes to be 'cleared up.' In most cases where a multiple offender is sentenced, however, the offender is being given a discount because his total sentence appears excessive, and that is because he managed to commit so many offences before being caught.

Implicit in the principle is a rather different sense of proportionality than that commonly used. The point is not whether one type of offence is *ceteris paribus* more heinous that another; it is a question of how a series of offences, sometimes all of the same kind and sometimes different kinds, can be brought into a conceptual scheme which relates principally to single offences. The problem is illustrated by the Court of Appeal's remarks in *Holderness*, a case described by Thomas in the following terms:

> The appellant received sentences totalling four years' imprisonment for a variety of charges, primarily motoring offences. The court stated that the sentence had failed to 'take the step . . . of standing back and looking at the overall effect of the sentences', and that if he had done so, 'he would have at once appreciated that he was imposing the kind of sentence which is imposed for really serous crime'. The sentence was reduced to twenty-seven months.[b]

The total sentence of four years passed by the trial judge was not impugned as an aggregate of the sentences appropriate for each individual crime. What the sentence had failed to do was to consider the total sentence in relation to other crimes which would attract such long terms of imprisonment—perhaps a single serious wounding or rape. . . . [I]t seems implausible merely to 'do the arithmetic' and to rest content with that. 'Doing the arithmetic' might mean that a rape is given five years, that four burglaries at 12 months each amount to four years, and that nine offences of theft from shops at four months each amount to three years. There is a feeling that any calculation which results in such a close approximation of sentences between a rape (five years) and a moderate number of burglaries or of thefts from shops goes against common sense. This feeling may lead to assertions such as 'no number of offences of taking cars can be regarded as morally so heinous as a middle-range rape' or 'no number of non-violent middle range burglaries can be regarded as the moral equivalent of a single unprovoked wounding.' Yet assertions of this kind, even if acceptable, merely lay down outer limits rather than providing the hapless sentence with guidance on the proper approach to such comparisons.

. . .

How should a court approach the calculation when a large number of offences have been proved or admitted? If the leading principle is to retain some overall proportionality with the seriousness of the type of the offence involved, it follows that each extra offence must have a diminishing incremental effect on the overall sentence. Thus, the results of German research on the subject by Has-Jorg Albrecht are presented by Nils Jareborg as follows:

> The average 'cost' for one burglary was 7.9 months, for three burglaries 15.6 months (97 per cent added for two more crimes), for

five burglaries 22.9 months (47 per cent), for seven burglaries 24.6 months (7 per cent), and for 9 burglaries 26 months (6 per cent) added for two more crimes). A rough norm resulting from the data indicates that the total sentence is found half way between the punishment for the most serious crime and the sum of punishments for all the crimes. It was also apparent that the upper limit of the scale of penalties used in practice (not the statutory maximum) has a steering effect. This is strikingly similar to English Court of Appeal practice.[c]

No such study has been done in this country, and English courts are unlikely to set out the detailed calculations. But the German approach seems to fit a rational construction of cases such as *Bosanquet* (1991),[d] where the offender pleaded guilty to eight residential burglaries and three attempted burglaries with another 59 residential burglaries taken into consideration. The Court of Appeal upheld the total sentence of four years without going into the details of the calculation. It is evident that the overriding principle was to keep the total sentence approximately within the appropriate range for burglary, and out of the ranges reserved for more serious types of offence, although incidentally this must mean that many of his burglaries had a negligible effect on the overall sentence.[e]

8.4.2 The Totality Principle in Operation

In his discussion of the totality principle, Thomas identified two sub-principles which the court of Appeal appears to use as a guide in his difficult area. The first is that

> the aggregate should not be longer than the upper limit of the normal bracket of sentences for the category of cases in which the most serious offence committed by the offender would be placed. This formulation would allow an aggregate sentence longer than the sentence which would be passed for the most serious offence if it stood alone, but would ensure that the sentence bore some recognizable relationship to the gravity of the offence.[f]

There have been exceptional cases in which even consecutive maximum sentences have been upheld, most notoriously Blake,[g] but the above proposition is advanced as the general principle. It was accepted as such by the Advisory Council on the Penal System of 1978, and they went on to propose three 'ground rules' for sentencing multiple offenders. The first was that

> Sentences passed on the same occasion for a number of offences should not in total exceed the maximum that could have been imposed for the most serious of the offences, unless the criterion for exceeding the maximum is satisfied.[h]

"No reasons were given for adopting this approach. It is undoubtedly simpler for sentencers, and it results in a more sparing use of punishment. An open question is whether it would fail to deter from further offending the offender who has already committed one or more undetected crimes." We do not know whether typically an offender who has already committed 5 undetected crimes

would be deterred from committing further crimes if the sentences would necessarily be consecutive, whereas he would not be deterred if this kind of ground rule or totality principle were adopted.

[Notes]

[a] 103 Barton (1972), cited by Thomas (1979), pp. 56–57.
[b] 104 Thomas (1979), p. 58.
[c] 105 Jareborg (1998), p. 135.
[d] 106 (1991) 12 Cr App R (S) 646.
[e] 107 Higher sentences have been given, even for individual burglaries, and the overall sentence in this case would probably be longer today. . . .
[f] 108 Thomas (1979), p. 9.
[g] 109 [1962] 2 Q.B. 377 (three consecutive maxima of 14 years upheld for espionage).
[h] 110 APS (1978), para. 219.

Reading 2: Lovegrove[106]

Sentencing the Multiple Offender

The multiple offender is one who has been convicted of at least two offences at the one hearing. The offences may relate to different incidents, for example a series of burglaries over an extended period; or they may relate to one incident, for example a burglary and an assault committed during the burglary; or a combination of the two, for example a burglary and assault committed at the one time and an armed robbery some months later. In Victoria, a sentence is imposed for each of the offences comprising the case and a sentence is imposed for the case. The sentence for the case is known as the effective sentence and, according to the totality principle, it should reflect the seriousness of the offences considered as a whole. . . .

. . . The qualitative analysis of interviews with eight Victorian County Court judges was aimed at understanding how they arrived at their judgments in cases of multiple offending. The judges were individually presented with a large number of factual circumstances representing the range of problems arising when sentencing multiple offenders and asked to think aloud as they determined the sentence in each of the cases. All the cases involved sentences of imprisonment. Thus, a case may have comprised a rape and an indecent assault committed at a later date, for which the appropriate sentences were six and three years' imprisonment. What was of interest is what factors judges take into account and how they take them into account when determining the total effective sentence for a case: in this instance what percentage of the sentence of three years for the indecent assault is to be added to the sentence for the rape. It may range from 0 per cent (full concurrency) to 100 per cent (full cumulation) or be some figure in between (partial cumulation/concurrency).

Analysis of the thought processes of the judges found three major factors governed their judgments about the appropriate degree of cumulation of sentence. These were:

- the length of sentence for the principal offence;
- the sum of the sentences for the secondary offences; and
- the need to avoid an inappropriately harsh ('crushing') total effective sentence of imprisonment.

The factors were reconciled as follows:

- the sentences for the secondary offences were not normally made fully cumulative;
- the more serious the case (the greater the sentence for the principal offence and the sum of the sentences for the other offences) the longer was the total effective sentence; nevertheless, the more serious the case, the less the degree of cumulation of the sentences for the secondary offences, so as to avoid a crushing sentence.

There were differences between the judges in their approach, but generally on matters of detail, and differences also in the clarity of their thinking.

The quantitative analysis examined data for the principal offences of rape, armed robbery and burglary from the official records for the Victorian County Court. The purpose of the quantitative analysis was to ascertain what degrees of cumulation were considered appropriate for a range of case circumstances. An examination was also made of these sentencing decisions with the aim of discovering whether the degrees of cumulation considered appropriate satisfied the principle of proportionality.

The data were analysed according to a model representing the judges' general approach to sentencing, discovered in the first part of the study. Accordingly, the results were presented by plotting, for each case, the degree of cumulation as a percentage against the sum of the principal and secondary sentences. There was one graph for each of armed robbery, rape and burglary. Each graph showed the degree of culmination, average and range, considered appropriate for any particular combination of years of imprisonment for the principal and secondary offences. For instance, for a case comprising two armed robberies, the sentence for each being three years, the average cumulation was 32 percent, resulting in a sentence of four years. However, for a case involving five similar armed robberies, the degree of cumulation was 16 per cent, resulting in a sentence of 4.9 years. The data therefore gives a description of current sentencing practice as a statistical guide.

Before the degree of cumulation in each case could be calculated, it was necessary to draft a set of rules determining whether an offence in a multiple-offence case represented a separate transaction and thus the sentence imposed required cumulation in principle. This was done by making a detailed analysis of the offence circumstances in the cases in conjunction with the judges' decisions on cumulation, with a view to discerning common practice. It was necessary to draft these rules, as appellate principle on this matter is currently stated so generally as to offer very little guidance.

. . . . In respect to case circumstances, the data showed that the degree of cumulation was greater in cases where rape was the principal offence, but generally was not affected by the average sentence for the individual offences. . . .

To determine whether the degrees of cumulation described in the study were producing disproportionate case sentences, it was necessary to derive a numerical standard of proportionality. . . . This standard is an extension of the principle of proportionality for single offences. According to this principle, the

severity of the sentence is limited by the seriousness of the offence. For the multiple offender, the limit on the severity of the total effective sentence is determined by the seriousness of classes of offence. For example, the average sentence for armed robbery may set a limit on cumulation for a large number of average thefts. In this study, the numerical standard of proportionality was derived by quantifying statements like this with the data taken from existing official sentencing statistics. . . .

The results showed that on the English standard, calibrated for Victoria, at least one-third of the case sentences imposed could be regarded as disproportionate. The category of offence (rape, armed robbery or burglary) did not appear to affect the incidence of disproportionality, nor was there a difference in disproportionality between cases for which the sum of sentences for the secondary offences was high and those for which it was low. However, disproportionality was far less frequent where the offences constituted a single incident as opposed to a series of offences over an extended period of time. Finally, whether or not the offender was deemed to be a serious sexual offender, for which there is legislative provision for disproportionate sentences, was also unrelated to disproportionality.

A legal review of High Court decisions and Victorian Court of Appeal decisions (reported and unreported) was also undertaken. This was aimed at discerning the legal principles applied to the sentencing of multiple offenders, including:

- the concepts of importance;
- what factors were considered relevant; and
- how this information should be combined to determine the sentencing decision.

. . . This analysis identified some incoherence in approach as well as inconsistencies between judgments. There was also an overall lack of detail. The courts have expressly stated that there cannot be detailed policy on these matters as the case circumstances vary infinitely and to lay down rules or introduce mathematical precision would invite injustice. There are, however, three areas that were particularly problematic. These are:

- the circumstances under which a sentence should be made at least partly cumulative;
- the meaning of proportionality as it applies to the multiple offender; and
- how to determine an appropriate sentence consistent with the totality principle.

This research has highlighted the need for policy debate over what should be the approach to the sentencing of the multiple offender. Given that a substantial percentage of cases involve a multiple offender and that criminological research has shown that the majority of offences are accounted for by a smaller group of repeat offenders, the sentencing of such offenders is a matter of significant public policy interest. The empirical work undertaken in this study indicates that there is a need to develop a more detailed and comprehensive set of sentencing principles and an associated numerical framework for guidance. This is attempted here, as a basis for discussion. The former consists of the sequence of steps to be taken in determining the

sentence for a multiple offender, together with the factors which determine whether cumulation is appropriate and, if appropriate, the circumstances affecting the degree of cumulation as a matter of principle.

The numerical framework has two elements. The first is a mathematically precise definition of the proportionate sentence for a case, together with a formula for calculating this with regard to the major factors of the sum of the sentences for individual offences, the average seriousness of these offences and the degree of connectedness of these offences. The second is a framework for exercising discretion in respect of other (principally mitigating) factors thought to be relevant in a particular case. The numerical framework represents an elaboration of the numerical standard of proportionality used in the empirical analysis. As the framework is intended to be a tool for use by the courts, the policy it gives expression to is a matter for appellate deliberation.

Justice in sentencing requires fair, coherent and openly stated policies, and the consistent application of them in sentencing judgments. The present study has attempted to achieve this for the sentencing of the multiple offender, being limited in its consideration of relevant matters by its largely empirical and numerical character.

Reading 3: German Criminal Code on Sentencing Multiple Offences[107]

Section 52: One Act Violating Multiple Laws or the Same Law More than Once

(1) If the same act violates more than one law or the same law more than once, only one sentence shall be imposed.

(2) If more than one law has been violated the sentence shall be determined according to the law that provides for the most severe sentence. The sentence may not be more lenient than the other applicable laws permit.

(3) The court may impose an additional fine to any term of imprisonment under the provisions of section 41.

(4) If one of the applicable laws allows for the imposition of a confiscatory expropriation order the court may impose it in addition to imprisonment for life or a fixed term of more than two years. In addition, ancillary penalties and measures (section 11 (1) No 8) must or may be imposed if one of the applicable laws so requires or allows.

Section 53: Multiple Offences Committed by Multiple Acts

(1) If a person has committed more than one offence, all of which are to be adjudicated at the same time, and incurred more than one sentence of imprisonment or more than one fine, an aggregate sentence shall be imposed.

(2) If a term of imprisonment concurs with a fine, an aggregate sentence shall be imposed. The court may impose a separate fine; if fines are to be imposed for more than one offence, an aggregate fine shall to that extent be imposed.

(3) If the offender, pursuant to a law according to which section 43a is applicable or under the terms of section 52 (4), has as one of the

individual sentences incurred imprisonment for life or a fixed term of more than two years, the court may impose a confiscatory expropriation order in addition to the aggregate sentence formed pursuant to subsections (1) or (2) above; if in such cases a confiscatory deprivation order is to be imposed for more than one offence, an aggregate expropriation order shall to that extent be imposed.

Section 43a (3) shall apply mutatis mutandis.

(4) Section 52 (3) and (4) 2nd sentence shall apply mutatis mutandis.

Section 54: Fixing of Aggregate Sentence

(1) If one of the sentences for the individual offences is imprisonment for life, an aggregate sentence of imprisonment for life shall be imposed. In all other cases the aggregate sentence shall be fixed by increasing the most severe individual sentence incurred and, in the case of different kinds of penalties, by increasing the sentence that is most severe in nature. The person of the offender and the individual offences shall be considered in their totality.

(2) The aggregate sentence shall be less than the sum of the individual sentences. It shall not, in the case of imprisonment for a fixed term, exceed fifteen years, in the case of a confiscatory expropriation order, the value of the offenders assets, and in the case of a fine, seven hundred and twenty daily units; section 43a (1) 3rd sentence shall apply mutatis mutandis.

(3) If an aggregate sentence is to be fixed based on a term of imprisonment and a fine, one daily unit shall correspond to one day's imprisonment for the purpose of calculating the sum of the individual sentences.

Section 55: Subsequent Fixing of Aggregate Sentence

(1) Sections 53 and 54 shall also apply to a convicted person who has had a sentence imposed upon him by a final judgment which has neither been enforced, barred by the statute of limitations nor remitted, when that person is convicted of another offence which he committed before the previous conviction. That previous conviction shall be the judgment in those proceedings in which the factual findings underlying the new conviction could last have been examined.

(2) Confiscatory expropriation orders, ancillary penalties and measures (section 11 (1) No 8) imposed in the previous sentence shall be upheld to the extent they have not been rendered moot by the new judgment. This applies also when the amount of the expropriation order imposed in the previous sentence exceeds the value of the offenders' assets at the time of the new sentence.

Endnotes, Chapter 8

[1] Foreword in Steven Lowenstein (1965), *Materials for the Study of the Penal Law of Ethiopia* (Addis Ababa: Haile Selassie I University), pp. xiii.

[2] Studies in Hegelian Criminology, p. 133, cited by Ewing, A.C., "The Criminology of Punishment", in Dubber and Kelman (2005), *American Criminal Law* (New York: Foundation Press).

[3] Immanuel Kant (1797), "The Metaphysical Elements of Justice," (Part I, 100 (John Ladd ed. and trans, 1965), in Dubber and Kelman, *American Criminal Law*, *supra* note 96, p. 8.

[4] Andrews Reath (1994), 'Legislating the Moral Law', *Noûs*, p. 435

[5] Alan Norrie (1984), "Thomas Hobbes and the Philosophy of Punishment", *Law and Philosophy*, Vol. 3, No. 2, p. 301.

[6] *Ibid.*, p. 306.

[7] *Ibid.*

[8] *Ibid.*, pp. 308, 320.

[9] Charles E. Torcia (1993), 1 *Wharton's Criminal Law*, 15th edn., § 1, at 3, in Dubber and Kelman*, supra* note 2, p. 9.

[10] Plato, *Pythagoras* 324a4; in Dubber and Kelman, *ibid.*, p. 18.

[11] Glanville Williams (1957), *Salmond on Jurisprudence*, 11th edn., p. 115, in Lowenstein, *supra* note 1, p. 20.

[12] Livingston Hall and Sheldon Glueck (1958), *Criminal Law and Enforcement,* p. 16, in Lowenstein, *ibid.*, p. 24.

[13] K. S. Chabra (2003) "Theories of Punishment", [in K. D. Gaur (2003), *Criminal Law and Criminology* (New Delhi: Deep & Deep Publications), p. 694.]

[14] Henry Thomas Buckle (1857), History of Civilization, Vol. 1, <http://web.inter.nl.net/hcc/rekius/buckle.htm>, last visited: 23 July 2011. Buckle's words may sound fatalistic and determinist. "The most convincing position is that human beings make rational choices and not objects who can be carried away by circumstances. Yet, social conditions may compel them to commit crimes not in the mainstream but exceptionally." [First assessor's comments].

[15] *Ambas* were mountainous seats where potentially dissident royal princes who could have claim to the throne were forced to establish their residence, usually with their family and some peasants.

[16] Articles 128 to 132 of the 1957 Penal Code have are not incorporated in the current Code.

[17] Andrew Ashworth (2003), *Principles of Criminal Law*, 4th edn. (Oxford University Press), p. 18.

[18] Philippe Graven (1965), *An Introduction to Ethiopian Penal Law: Arts. 1–84 Penal Code* (Addis Ababa: Haile Selassie I University and Oxford University Press), pp. 8, 9.

[19] Chabra, [in Gaur, *supra* note 13, p. 692]

[20] Criminal Law Capsule Summary (Lexis Nexis), Chapter 1, § 1.01 (C)

[21] Andrew Ashworth (1983), *Sentencing and Penal Policy* (London: Weidenfeld and Nicolson), pp. 16–19.
[22] *Ibid.*
[23] Whitley Kaufman (2008), 'The Rise and Fall of the Mixed Theory of Punishment', *International Journal of Applied Philosophy*, Volume 22, Issue 1, Spring 2008, p. 37
[24] William Wilson (1998), *Criminal Law: Doctrine and Theory* (London and New York: Longman), p. 57.
[25] *Ibid.*
[26] *Ibid.*, pp. 57–58.
[27] John Braithwaite (1999), "A Future Where Punishment Is Marginalized: Realistic or Utopian?" 46 *UCLA Law Review*, 1727, 1743.
[28] Joe Hudson *et al*. (1996), *Introduction to Family Group Conferences: Perspectives on Policy and Practice*, pp. 1,4).
[29] Howard Zehr (1990), *Changing Lenses: A New Focus for Crime and Justice*, p. 181.
[30] Ashworth (2003), *supra* note 17, pp. 17, 18.
[31] People v. Mooney, County Court of New York, Genesee County, 133 Misc. 2d 813,506 N.Y. 2d 991 (1986), in Dubber and Kelman, *supra* note 2, p. 62.
[32] *[US] Model Penal Code Annotated* (MPC © ALI, annotations & links © M. Dubber).
[33] Louis E. Chiesa (2007), "Normative Gaps in the Criminal Law: A Reason's Theory of Wrongdoing", *New Criminal Law Review*, Vol. 10, No. 1 (Winter 2007), at 106–109 (footnotes omitted).
[34] A. P. Simester and G. R. Sullivan (2003), *Criminal Law Theory and Doctrine*, 2nd edn. (Oxford: Hart Publishing), pp. 33, 34.
[35] CR Snyman (1995) *Criminal Law,* 3rd edn, (Durban: Butterworths), pp. 18–25 with omission (footnotes omitted).
[36] Dubber and Kelman, *supra* note 2, p. 33.
[37] Crim. Code, Art. 121.
[38] Crim. Code, Art. 52.
[39] Crim. Code, Art. 53.
[40] Crim. Code, Art. 55.
[41] Crim. Code, Art. 54.
[42] Crim. Code, Art. 113.
[43] Crim. Code, Art. 90(3) & (4).
[44] See for example United Nations Office on Drugs and Crime (2007), *Alternatives to Imprisonment* < http://www.unodc.org/pdf/criminal_justice/07-80478_ebook.pdf>.
[45] Crim. Code, Art. 87.
[46] Crim. Code, Art. 88(1).
[47] Jeremy Bentham (1830), *The Rationale of Punishment*, Bk. I, Ch. VIII, p. 57.
[48] *Ibid.*
[49] Crim. Code, Arts. 134–156.

[50] Crim. Code, Arts. 157–177.
[51] Crim. Code, Art. 179.
[52] Plea of guilt upon appearance at court (as a ground for mitigation) was not embodied among the examples of sincere repentance stated under Article 79(1)(e) of the 1957 Penal Code. Yet courts were using the plea for mitigation on the basis of "other circumstances of mitigation" that was stipulated under Article 83 of the 1957 Penal Code.
[53] Crim. Code, Art. 82(1)(b).
[54] Graven, *supra* note 17, p. 241.
[55] *Ibid* [Graven citing G. Levasseur "Justice and State Security", *Journal of the International Commission of Jurists*, Winter 1964, Vol. 5, No. 2, pp. 234-246]**.**
[56] Vidal, 'Cours de droit criminel et de science penitentiare (cinquieme edition, 1916), p. 112 [in Robert Ferrari (1920), "Political Crime", *Columbia Law Review*, Vol. 20, No. 3 (Mar., 1920), p. 313]
[57] Crim. Code, Art. 82(1)(d), last phrase.
[58] *Ibid.*
[59] Graven, *supra* note 18, p. 242.
[60] Crim. Code, Art. 82(2).
[61] Crim. Code, Art. 180.
[62] Crim. Code, Art. 182.
[63] Crim. Code, Art. 180(a).
[64] Crim. Code, Art. 180(b).
[65] Crim. Code, Art. 183.
[66] Crim. Code, Art. 84(2).
[67] Crim. Code, Art. 183.
[68] Graven, *supra* note 18, p. 269.
[69] Crim. Code, Art. 443(1)(a).
[70] Crim. Code, Art. 445.
[71] Andrew Ashworth (2005), *Sentencing and Criminal Justice*, 4th edn., Chapter 9, Section 9.3.1 (New York: Cambridge University Press), pp. 266–269 (footnotes omitted).
[72] Paul H. Robinson (2008), *Distributive Principles of Criminal Law: Who Should Be Punished How Much* (Oxford University Press), pp. 1–6.
[73] Jean Graven (1964), "The Penal Code of the Empire of Ethiopia," *Journal of Ethiopian Law*, Vol. 1, pp. 268–290, with omissions. The publication in JEL is the English translation of 'Le Code Pénal de l'Empire d'Ethiopie, published by Centre Français de Droit Comparé, 1959), pp. 5–29), in Lowenstein, supra note 1, pp. 62, 63.
[74] Michael J. Allen (2005), *Textbook on Criminal Law*, 8th edn. (Oxford University Press), pp. 6–8.
[75] Crim. Code, Arts. 60(a), 64, 85.
[76] Crim. Code, Art. 184(1)(c).
[77] Crim. Code, Art. 184(1)(d), first sentence.
[78] Crim. Code, Art. 184(1)(b), second sentence.
[79] Crim. Code, Art. 90

[80] Crim. Code, Art. 259.
[81] Crim. Code, Art. 68.
[82] Crim. Code, Art. 184(1)(e).
[83] Crim. Code, Arts. 60(b) first phrase, 65, 187(1).
[84] Crim. Code, Art. 187, para 2.
[85] Crim. Code, Arts. 60(b) second phrase, 66, 187(2).
[86] Criminal Appeal No. 1559/74 (Eth. Cal).
[87] Negatu Tesfaye (1979), "Assessment of Sentence in Cases of Concurrent Offenses Entailing Loss of Liberty: A Case Comment on Criminal Appeal No. 1569/74", *Journal of Ethiopian Law*, Vol. 13, pp. 199–209.
[88] Peter J. P. Tak (1995), "Sentencing in the Netherlands: Discretion and Disparity", *Federal Sentencing Reporter*, Vol. 7, No. 6, Sentencing in Europe (May–Jun., 1995), p. 301.
[89] Barry Mitchell (2001), "Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling" *The Modern Law Review*, Vol. 64, No. 3 (May, 2001), pp. 396, 397.
[90] *Ibid.* (citing R v. Faulkner (1972) 56 Cr App R 594, endorsed in R v. French (1982) 4 Cr App R (S) 57, and R v. McGrath (1986) 8 Cr App R (S) 372).
[91] Glanville Williams (1983), *Textbook of Criminal Law*, 2nd edn. (London: Stevens & Sons), pp. 166, 167.
[92] Ashworth (2005), *supra* note 71, p. 248.
[93] Crim. Code, Arts. 769, 770.
[94] Crim. Code, Art. 22(1).
[95] Crim. Code, Arts. 739, 769.
[96] Crim. Code, Arts. 11–20.
[97] Crim. Code, Art. 21.
[98] Crim. Code, Arts. 201–207, 113 or pardon (229).
[99] Crim. Code, Arts. 769, 770.
[100] Crim. Code, Art. 461.
[101] Criminal Procedure Code, Art. 114.
[102] Crim. Code, Arts. 191, 192.
[103] Crim. Code, Art. 188/2, Para 2.
[104] *Journal of Ethiopian Law*, Volume II, No. 2. (December 1965), pp. 193, 194.
[105] Ashworth (2005), *supra* note 69, pp. 239–252.
[106] Austin Lovegrove (2004), "Sentencing the Multiple Offender: Judicial Practice and Legal Principle", *Research and Public Policy Series*, No. 59 (Australian Institute of Criminology), pp. 1–5.
[107] Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I p. 3214, translated by Prof. Dr. Michael Bohlander, © 2010 juris GmbH, Saarbrücke, <http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html>.

Chapter 9

Offences, Petty Offences and Sentencing: An Overview

As highlighted in the first section of Chapter 2, the Ethiopian Criminal Code pursues a *bipartite* classification by categorizing all criminal offences into 'offences' and 'petty offences'. The difference between offences (crimes) and petty offences is attributable to the nature and gravity of the act or omission under consideration. Violations of minor offences and certain ordinances (violating prohibitive provisions and regulations) that are regarded as infractions can be referred to as petty offences (or, in some legal systems, 'summary offences').

Various jurisdictions distinguish between 'petty or summary' offences and 'misdemeanours'. The latter are graver but are not regarded as 'felonies'. The offences considered as felonies are subdivided into tiers which may extend to three degrees. In Pennsylvania, for example, first degree felony "may be sentenced to a term of imprisonment, the maximum of which is more than ten years" while the maximum sentences for offences designated as second degree felony and third degree felony are ten and seven years respectively.[1]

In spite of differences in terminology, Ethiopian criminal law classifies specific offences into various degrees of gravity and guilt. The offence of homicide can illustrate this point. Depending upon the elements of the offence that can determine the levels and degrees specific offences, intentional homicide may be classified as aggravated homicide,[2] ordinary homicide[3] or extenuated homicide.[4] However, the Code of Petty Offences[5] does not embody a provision that deals with intentional homicide, because none of its manifestations can be considered as a minor offence irrespective of the type of moral guilt (*mens rea*).

A look at another offence against the person such as the offence of wilful bodily injury can show us not only the levels or degrees in the commission of the offence but can also enable us to contrast offences with the petty offence that has some affiliation with the offence under consideration. An act may fall under grave wilful injury[6] or common wilful injury.[7] Once again, no act that has caused intentional injury to the victim can be considered a petty offence. However, the lowest in the hierarchy of offences against the person (i.e. assault as stipulated under Article 560) can be compared with the petty offence of the same genre but with a lower level, namely: "assault and minor acts of violence".

Comparing the two provisions sheds some light on what Jean Graven stated as "the natural distinction between evidently different" levels of punishable acts. Article 560 provides that "Whoever assaults another or does him violence without causing bodily injury or impairment of heath is punishable upon complaint with fine not exceeding three hundred Birr, or, in serious cases, with simple imprisonment not exceeding three months."

The provision further states that "[s]imple bruises, swellings or transient aches and pains are not held to be injuries of person or health." This demarcates the line between an assault that has not caused bodily injury or impairment of health (thereby falling under Article 560 or 561) and an act that can be regarded as (grave or common) wilful injury (Articles 555, 556) owing to the injury that an act has caused beyond the simple bruises and the like stated in Article 560.

Article 560 makes a cross-reference to Article 840, which defines the petty offence of minor assaults. An act of assault shall be considered as a petty offence where the act does not fall under Article 560. Article 840(1) applies to assaults and minor acts of violence that are committed without striking or wounding a person. A case in point can be pushing or pulling a person in a setting of assault or violence. Wounding normally renders Articles 555 and 556 applicable while assault (including striking or hitting a person) without causing injury to health or person can come under Article 560.

An assault or minor violence that does not involve striking or wounding is thus presumed to be a minor crime that comes under the Code of Petty Offences. Article 840(2) further gives an illustrative list of a minor assault (or minor act of violence) such as deliberately or negligently throwing at a person "filth or an object or liquid likely to inconvenience or soil him." The punishment imposed upon the violation of Article 840 is a fine not exceeding Birr 100 or arrest not exceeding eight days.

We can also use the example of theft to distinguish between 'offences' and 'petty offences'. The levels of the offence include aggravated theft[8] and theft.[9] The Criminal Code considers "petty abstraction of the property of another of a very small value"[10] as a petty offence punishable under Articles 852 and 853.

The following sections of this chapter highlight the elements of five sample offences and two sample petty offences. The sections also discuss the manner in which sentences are determined in the samples addressed. The scope of the chapter does not allow extensive discussion on the theme thereby rendering it necessary to focus on certain samples which can be scaled up towards analyzing other offences and petty offences.

1. Sample Offences: Elements and Sentencing

Snyman states that crimes can be classified based on "their degree of seriousness, the type of punishment which may be imposed" or "the procedure to be followed at the trial, or the form of culpability."[11] He believes that each method of classification has its deficiencies and notes that the approach with the least level of shortcomings is to classify specific offences "according to the interests which the law seeks to protect by punishing the particular crime." Accordingly, he classifies specific crimes in South African criminal law into four categories, namely:

1. Crimes against the state and administration of justice
2. Crimes against the community
3. Crimes against the person
4. Crimes against property

Both the 1957 Penal Code and the 2004 Criminal Code pursue a similar approach. Accordingly, the Special Part of the Code (Books III, IV, V and VI) respectively deal with:

1. Offences against the State or against national or international interests (Book III)
2. Offences against the Public Interest or the Community (Book IV)
3. Offences against Individuals and the Family (Book V)
4. Offences against Property (Book VI)

While the approach suggested by Snyman is used for the purpose of a textbook on criminal law, the classification in the Ethiopian context is used in the Special Part of the Criminal Code itself. The Special Part of the Code of Petty Offences (i.e. Book VIII) pursues a similar approach by omitting Offences against the State and combining the last two streams of interests, i.e. offences against persons and property as follows:

1. Petty offences against public interests and the community (Book VIII, Title I)
2. Petty offences against persons and property (Book VIII, Title II)

This shows that offences against the State or against national or international interests (Book III) do not have minor crimes that can be relegated to the Code of Petty Offences. Since most provisions that come under petty offences are infringements of ordinances and regulations, petty offences against public interests and the community include 62 provisions[12] out of the total 90 provisions[13] that define petty offences. This shows that most of the provisions that define offences against the individual, family and property do not envisage acts that can be regarded as minor offences.

It is to be noted that the classification of the interests of the state, public, community and the individual cannot be mechanically delineated. As Jeremy Bentham observed, the 'community', for example, is "composed of the individual persons who are considered as constituting as it were its members" and he equates *community interest* with "the sum of the interests of the several members who compose it."[14] There is thus the need to consider the dialectical relationship between the interests of the state, public, community and individuals that are protected by the respective provisions that define and punish offences and petty offences.

The Federal Supreme Court issued Sentencing Guidelines in May 2010 (የወንጀል ቅጣት አወሳሰን መመሪያ ቁጥር 1/2002), and it was revised in October 2013. The Revised Sentencing Guidelines No. 2/2013 (የተሻሻለው የወንጀል ቅጣት አወሳሰን መመሪያ ቁጥር 2/2006፣ ጥቅምት 1 ቀን 2006 ዓ.ም) has retained the themes under the former (i.e. 2010) version of the Guidelines with supplementary themes and provisions. The Draft Guidelines which were prepared in 2009[15] had Draft Manuals for separate categories of offences. These Draft Guidelines, the inputs obtained from a workshop conducted on the theme and the comparative experience from the Sentencing Guidelines of other countries, particularly the United States, were the inputs used in the preparation of the Sentencing Guidelines.[16]

The US Sentencing Guidelines (USSG) were initially expected to be binding until the US Supreme Court held that rendering the USSG mandatory violates the right to jury embodied in the Sixth Amendment of the US Constitution.[17] Thereafter, the USSG are applicable based on the discretion of the courts. Yet they are generally observed.

The USSG embody two factors: the *offence level*, determined by the criminal conduct, and the *criminal history category*, which takes prior convictions (within a certain period) into account. The Sentencing Table has 43 offence levels in the vertical axis, from Level 1, punishable with 0 to six months of imprisonment, to Level 43, punishable with life imprisonment. The horizontal axis lists six criminal history categories, ranging from Criminal History Category I (zero or one prior conviction) to Criminal History Category VI (13 or more convictions). The determination of the sentencing range depends on the point of intersection between the ranges in the vertical axis (offence level) and the horizontal axis (criminal history category).

For example, Offence Level 15 is punishable with 18 to 24 months of imprisonment under Criminal History Category 1. The range of punishment respectively increases to 21–27, 24–30, 30–37, 37–46, and 41–51 months in Criminal History Categories II, III, IV, V and VI, which represent the following numbers of prior offences or misdemeanours:

- 2 or 3 criminal history points (Criminal History Category II)
- 4, 5 or 6 criminal history points (Criminal History Category III)
- 7, 8 or 9 criminal history points (Criminal History Category IV)
- 10, 11 or 12 criminal history points (Criminal History Category V)
- 13 or more criminal history points (Criminal History Category VI).

The offence level in the USSG thus includes all factors (other than recidivism) which are taken as grounds of aggravation and mitigation under Ethiopian criminal law. The nature of criminal law in the United States and Ethiopia seems to have influenced the particular nature of the Sentencing Guidelines in both countries. As Ethiopia has a codified criminal law which specifies the offences and the range of punishment for each offence or petty offence, the applicability of sentencing guidelines seems to be easier. In terms of clarity of the sentencing range, however, judicial jurisprudence in Ethiopia can eventually lead to the usage of tables with the relevant horizontal and vertical axes that are easier to refer to than is currently the case in Ethiopia.

The Sentencing Guidelines No. 1/2010 embodied an introduction of about four pages that explains the justification for the issuance of the Guidelines while the Revised Sentencing Guidelines No. 2/2013 summarizes the rationale of the Guidelines in three paragraphs. Even if the details in the introduction of the former Guidelines have been summarized, the elements would remain relevant as background document. The Revised Sentencing Guidelines embodies:

- Part I (General Provisions: Articles 1-4),
- Part II (Schedules for sentences and imposition of fine: Articles 5-7)
- Part III (Determination of the base penalty: Articles 8-20),
- Part IV (Extenuating and aggravating circumstances of punishment: Articles 21-25),
- Part V (Procedures of assessing sentences: Article 26), and
- Part VI (miscellaneous provisions: Articles 27-31).

The Guidelines are meant to address the problems that were identified in relation to the sentencing practices in Ethiopian courts which include lack of consistency, proportionality and equitable thresholds. The Sentencing Guidelines underline the need for equitable, accessible, efficient, predictable, balanced, transparent and accountable sentencing schemes. To this end, the following themes are embodied in the Guidelines:

- offence level
- tentative penalty (መነሻ ቅጣት) within the penalty range of the offence level
- penalty category (የቅጣት እርከን)

- aggravation by moving upwards in the punishment category, and
- mitigation by moving downwards in the punishment category.

The *offence level* is meant to locate the particular offence committed by the defendant into one of the levels within the offence in which he/she is convicted based on the gravity of the convicted person's criminal conduct (in light of the elements of the provision violated) and the gravity of the resultant harm. The other concepts introduced by the Sentencing Guidelines are discussed in connection with the specific offences highlighted in this chapter.

Five offences are selected as samples for the purpose of this chapter because it is difficult to widen the range of themes. The order of the sample offences is based on the sequence of the Criminal Code provisions that define them:

- Ordinary Homicide (Article 540)
- Grave Willful Injury (Article 555) and Assault (Article 560)
- Rape (Article 620)
- Theft (Articles 665 and 666)
- Robbery (Articles 670, 671)

The first part under each section highlights the elements of the offence as embodied in a specific provision that defines it. The second subsection deals with determination of punishment based on the specific provision under which conviction is given and the relevant general provisions of the Criminal Code.

Article 88(2) of the Criminal Code requires courts to determine penalty taking into account:

- the degree of individual guilt
- the dangerous disposition of the offender
- the offender's antecedents
- the offender's motive and purpose
- the offender's personal circumstances
- the offender's standard of education
- the gravity of the crime
- the circumstances of the crime's commission

It is indeed difficult to come up with a one-size-fits-all manual that can offer guidance in the determination of punishment whenever particular circumstances prevail. On the other hand, mere reference to general considerations such as the ones embodied in Article 88(2) are susceptible to the risk of disparity, unpredictability and inconsistency in the determination of punishment among courts or even between cases adjudicated in the same court. The Sentencing Guidelines thus mark a significant step towards clarity, predictability, transparency and consistency in sentencing.

2. Ordinary Homicide

2.1 Definition and Elements

Article 538 of the Criminal Code defines homicide as causing "the death of a human being intentionally or by negligence, no matter what the weapon or means used." There are four types of homicide under the Criminal Code, namely, aggravated homicide (Article 539), ordinary homicide (Article 540), extenuated homicide (Article 541), and homicide by negligence (Article 543). Moreover, instigating or aiding another to commit suicide and infanticide are offences punishable under Articles 542 and 544 respectively.

The Ethiopian Criminal Code does not use the classification of homicide into murder and manslaughter. In the legal regimes that use such classification, murder covers homicide committed wilfully, deliberately and with premeditation whereas manslaughter covers a spectrum of offences whereby the accused has not deliberately committed the homicide but has unduly taken the risk that has brought about the death of the victim. The Criminal Code avoids the ambiguities that are involved in the classification of homicide based on various levels of a given mental state. For example, some foreign cases distinguish between recklessness and extreme recklessness. The latter concept is closer to *dolus eventualis* (የሆነው ይሁን) in the Ethiopian criminal law rather than advertent negligence owing to the level of indifference during the act. Under the Ethiopian Criminal Code, acts of homicide committed under direct intention, ancillary direct intention, or *dolus eventualis* are classified as intentional homicide while homicide committed under advertent or inadvertent negligence falls under Article 543.

Article 540 does not articulate the elements of ordinary homicide, but rather renders the provision applicable on any person who "intentionally commits homicide neither in aggravating circumstances as in Article 539, nor in extenuating circumstances as in Article 541." An offence of homicide which is neither aggravated nor extenuated is thus "ordinary" and falls under Article 540.

Aggravated homicide is punishable with rigorous imprisonment for life or death. The constitutive ingredients that establish the offence of aggravated homicide [18] are the commission of homicide under the following three alternative situations:

1. Commission of the offence with "such premeditation, motive, weapon or means, in such conditions of commission, or in any other aggravating circumstance, whether general (Art. 84) or other circumstances duly established (Art. 86)" which shows that the offender "is exceptionally cruel, abominable or dangerous.

2. Commission of the offence "as a member of a band organized for carrying out homicide or armed robbery".
3. Committing the offence "to further another crime or to conceal a crime already committed."

Extenuated homicide (Article 541) is punishable with simple imprisonment not exceeding five years. This provision covers the commission of homicide:

- by exceeding the limits of necessity (Article 75), or self-defence (Article 78), or
- "following gross provocation, under shock of surprise or under the influence of violent emotion or intense passion" that are "understandable and in some degree excusable by circumstances"

Any act of homicide that cannot be classified as aggravated homicide or as extenuated homicide is thus ordinary homicide. In other words, ordinary homicide is a category which applies to intentional acts of homicide that fall short of the elements stated under Article 539 and that are graver than the ones envisaged under Article 541.

Three debatable issues are usually raised in relation with the concept of homicide: namely death of fetus, ceasing medical help in terminal cases, and the time gap between the act of an accused person and a victim's death. If D strikes V, a pregnant woman, in the abdomen causing lethal injury to the fetus,[19] issues arise as to whether there is homicide if the fetus dies and whether it makes a difference if the fetus dies while in womb or dies a few minutes after it is prematurely born as the result of the harm. Article 544 of the Criminal Code (infanticide) may involve the issue of ordinary homicide if a person participates in infanticide[20] as principal, instigator or accomplice where the offence of infanticide is committed by the mother[21] "who intentionally kills her infant while she is in labour or while she is suffering from direct effects thereof."

With regard to the controversy in the definition of death, assume that a medical doctor stopped availing a breathing device which had enabled an unconscious and terminally sick patient to breathe for some weeks after his lungs failed. This evokes an issue of whether the act can be regarded as homicide. The traditional cardiopulmonary definition considers death as the "complete and permanent stoppage of the circulation of the blood and the 'cessation of the animal vital functions consequent thereon, such as respiration, pulsation, etc."[22] However, the development of life-support devices and procedures have rendered this definition unsatisfactory because it "is now possible artificially to maintain the heart and lung activities of persons who have lost the spontaneous capacity to perform these 'animal and vital functions'."[23] This capacity to enable a person to be legally 'alive' even after he is unable to live and without a brain function can evoke the issue of whether

a medical doctor who brings such ‘life’ to an end by halting the ‘assistance’ commits homicide.

> In 1968, the influential Harvard Medical School committee reported that the medical conception of death was changing. It considered that cessation of brain function is a more suitable measure of death, especially when a patient’s respiration and circulation are being supported artificially. The committee set forth a multi-step test designed to identify ‘brain death syndrome.’
>
> As is now understood, the brain automatically is divided into three parts. The cerebrum (the ‘higher brain’) controls cognitive functions, including consciousness. The cerebellum (‘middle brain’) controls motor coordination. And the brain stem (‘lower brain’) provides the ‘animal functions’, i.e., reflexive and spontaneous activities such as breathing and swallowing. ‘Brain death’ exists when the whole brain—all three portions irreversibly cease to function. The fact that respiration and pulsation can be or are artificially induced by machinery does not affect the conclusion.”[24]

With regard to the time gap between the act of the accused and the harm, it is difficult to expressly set a timeline which can work as a line of demarcation. In common law, the offence of homicide was barred based on the *year-and-a-day* rule which did not allow prosecution of homicide where the gap between the act and the death of the victim is more than one year. But this has now been refuted by modern medical technology which can enable a victim to live longer than what used to be the case and thus the attributability of death to a given harm will not be affected as long as the (*sine qua non* and *adequate*) causal link between the offence and the harm can be established. Yet the fact that the year-and-a-day point of demarcation has become obsolete does not render the issue entirely irrelevant because there can still be cases which might involve longer periods that render attributability difficult.

2.2 Sentencing in Ordinary Homicide

The sentence for ordinary homicide ranges from five to 20 years of rigorous imprisonment. The range is lower than aggravated homicide (Art. 539) and greater than extenuated homicide (Article 541). Article 12 of the Revised Guidelines deals with determination of the penalty levels for offences against life that are stipulated under Articles 539 to 543 of the 2004 Criminal Code.

2.2.1 Offence Level and Tentative Penalty

Article 12 (Sub-Articles 3 to 6) of the Revised Sentencing Guidelines allows courts that have rendered the conviction to determine the offence level based on the gravity of the elements of the criminal conduct and the manner in which

it was committed. According to Article 2(2) and 2(5) of the Revised Guidelines, the determination of offence level and penalty category is made immediately after the conviction and before the court receives extenuating and aggravating circumstances from the prosecution and defense counsel. For example in ordinary homicide (Art. 540), the court is required to classify the statutory offence for which the defendant is convicted into one of the six levels and then determine the offence level of the defendant's criminal conduct by expressly stating its grounds[25] in its judgment. The six penalty categories for ordinary homicide (Art. 540) that are stated under the one of the Tables under Article 12 of the Revised Guidelines are the following: [26]

Offence level	Description	Penalty category
1	The cause of act is the **victim** and the accused has not used a weapon/means	21
2	The cause of act is the **victim** and the accused has used a non-fatal weapon/means	23
3	The cause of act is the **victim** and the accused has used a fatal weapon/means such as fire arms and knives	25
4	The cause of act is the **accused** and has not used a weapon/means	27
5	The cause of act is the **accused** and the accused has used a non-fatal weapon/means	30
6	The cause of act is the **accused** and the accused has used a fatal weapon/means such as fire arms and knives	33

The next step would be to divide the statutory sentencing range between the minimum and maximum penalties for the specific offence (i.e. between five and 20 years in the case of ordinary homicide) into six categories[27] of tentative penalty thresholds (መነሻ ቅጣት) for each offence level. The tentative penalty thresholds in ordinary homicide will thus be as follows:

- Sentencing range: five to 20 years.[28]
- The range between the base and maximum penalty: 20 – 5 = 15 years.
- One sixth of the range to be used as the range between the levels: 15 ÷ 6 = two years and six months
- Tentative penalty thresholds (መነሻ ቅጣት):
  Level 1: five years to seven years and six months
  Level 2: seven years and six months to 10 years
  Level 3: 10 years to 12 years and six months
  Level 4: 12 years and six months to 15 years

Level 5: 15 years to 17 years and six months
Level 6: 17 years and six months to 20 years

According to Article 6(3)(b) of the Revised Sentencing Guidelines, an increase of twenty percent from the base penalty for the office shall be made within each level for offences with a penalty category of 16 or more. These computations determine the tentative range of the penalty for each level. Then, the court determines a tentative penalty (መነሻ ቅጣት) within the penalty range of the level in which the conviction is classified. After the determination of the offence level and the tentative penalty, the court identifies the penalty category as highlighted below.

2.2.2 Tentative Penalty Category

The Revised Sentencing Guidelines embody 39 tiers of penalties.[29] The maximum categories are Penalty Category 37 (20 to 25 years of rigorous imprisonment), Penalty Category 38 (life imprisonment to death) and Penalty Category 39 (death penalty). According to Annex 1 of the Revised Sentencing Guidelines, the tentative sentencing categories for Ordinary Homicide (i.e. Categories 21 to 33 are as follows):

Penalty category	**Sentencing range (Annex 1**	**Offence level**
21	5 - 6 years	1
23	6 years - 7 years and 2 months	2
25	7 years - 8 years and 4 months	3
27	8 years and 5 months - 10 years	4
30	11 years - 13 years and 2 months	5
33	14 years - 16 years and 10 months	6

It is to be noted that the penalty categories overlap. For example, the sentencing range for Penalty Category 29 is from 10 to 12 years while the range of Category 30 is 11 years to 13 years and two months. Thus a sentence of 11 years may be imposed for offences that fall under Penalty Category 29 or 30. After the tentative penalty category for the offence is identified, the court allows the submission of aggravating and mitigating circumstances (by the prosecution and the defence counsel) which can lead to a higher or lower sentence than the one tentatively identified by the court.

2.2.3 Aggravation and Mitigation

As highlighted under Chapter 8 (Section 3.4), Article 84 of the 2004 Criminal Code embodies five grounds of general aggravation of penalties. Each of the five sub-articles under Article 84(1) are separately considered, and each of them would increase the tentative penalty category.[30] If for example, three of

these sub-articles are satisfied[31] the court may raise the penalty category by 3. However, the penalty shall not exceed the statutory maximum[32] provided under the provision.

According to Article 23 of the Revised Guidelines, The five general grounds of mitigation under Article 82(1)(a) to 82(1)(e) of the Criminal Code enable to the court to reduce the penalty category it has tentatively determined. Each ground of general mitigation under Article 82(1)(a) allows the court to lower the penalty, However, the court cannot be lower than the statutory minimum. The Revised Guidelines further state the procedures to be pursued in cases of special aggravation and special mitigation.

2.2.4 Comparison with the Draft Sentencing Guidelines

Although the Draft Sentencing Guidelines on Ordinary Homicide[33] are not binding, the draft manual can enrich the discourse on sentencing. The Draft Guidelines make use of the extenuating and aggravating circumstances embodied in the Criminal Code and various grounds that are not expressly stated (but allowed at the court's discretion under Article 86). The court is required to state its reason for using a certain ground for mitigation or aggravation that is not expressly stated. The Draft Guidelines for Ordinary Homicide indicate the following gaps in the determination of sentences:

- failure of various courts to expressly state the reason (as envisaged under Article 86) why a certain ground of mitigation aggravation is used
- variation in the determination of sentences by courts based on similar grounds of aggravation (for example two defendants charged with homicide and attempted homicide have been sentenced to 18 years and 10 years of rigorous imprisonment) in two different courts, with similar charges and same ground for aggravation, i.e. concurrence of the offences
- that a defendant who has expressed regrets for having killed his son and who stated to the court that the regrets will live with him throughout his life was allowed a mitigated imprisonment of five years, while there was similar expression of regrets by a defendant who killed his mother and was sentenced with 13 years

The Draft Guidelines state eight objectives that necessitate a manual to be used by courts in the determination of sentences. They are

- transparency
- concern about individual right and the control of discretion
- demand for accountability
- minimizing or avoiding disparity
- proportionality
- consistency

- predictability
- crime control

The Draft Sentencing Guidelines for Ordinary Homicide classify various files the study had examined (as follows) on the basis of hierarchy of the sentences imposed:

- *18 years*: Where the dangerous disposition of the offender is considered for aggravation and where there is no mitigating ground submitted to the court; or, where a person is convicted of concurrent offences (causing the death, inflicting injury on a second victim and unlawful possession of a weapon).
- *15 to 17 years*: The commission of the offence indicating dangerous disposition and arrogance while on the other hand no mitigation was submitted (for example, grazing on another person's land and also committing homicide).
- *13 to 14 years*: Absence of specific ground for aggravation but general grounds of aggravation such as committing homicide after others have already intervened between the victim and the offender, offence committed against a child who cannot defend herself, and submission of mitigating circumstances that are usually invoked.
- *10 to 12 years*: Most sentences fall under this category. The grounds of mitigation that are most commonly invoked include previous record of good character, low income, lack of education, and so forth. The grounds of aggravation are also the ones that are commonly raised. They may include collaboration with others in the commission of the offence, repeated beating, attempt to escape to a forest after the murder, concurrence, dangerous commission, committing the offence against the person who intervened to settle the quarrel, public office, previous record, monetary benefits, arrogance and stubborn stance, escaping prosecution after the commission of the offence, shooting or hitting the victim from the back, and so forth.
- *Eight to nine years*: Absence of various grounds of aggravation and the existence of mitigating circumstances which include the number of dependents in the family to which the defendant is responsible, modes of living standards, hitting with only one throw, HIV/AIDS patient, immaturity in age even if the offender has reached penal majority.
- *Six to seven years*: Enhanced existence of mitigating circumstances.
- *Five years*: Total absence of aggravating circumstances and the existence of commonly invoked special mitigating circumstances. The cases on which this sentence was imposed involved acts and levels of participation such as minimal participation in the offence, a single blow with the fist, tender age in spite of penal majority, and so forth.

Part 3 of the Draft Guidelines suggests that a formula can be pursued by listing down and allocating a certain percentage (5 percent) to each mitigating or aggravating ground stated in the law and to each ground which courts can observe. The formula proposed is the following:

$$Y = A + b_1 x_1 - b_2 x_2 + E$$

The symbols are:

Y	Sentence
A	Tentative sentence before considering aggravation and mitigation
$b_1, b_2, b_3, b_4 \ldots$ etc.	The total number of grounds of mitigation or aggravation
x_1	General aggravating grounds stated in the law and general aggravating grounds observed by the court
x_2	General mitigating grounds stated in the law and general mitigating grounds observed by the court
E	Special aggravating circumstances (recidivism, concurrence)

The Draft Guidelines separate each sub-article (of the grounds for general mitigation or aggravation) into its elements and allot 5 percent for each element. For example, Article 82 (general mitigating circumstances) is separated into 20 units. Article 82(1)(a) reads:

> The court shall reduce the penalty within the limits allowed by law (Article 179) . . . when the [offender] who previously of good character acted without thought or by reason of lack of intelligence, ignorance or simplicity of mind.

The Draft Guidelines separate each element and suggest that 5 percent of reduction from the tentative sentence can be allocated to each of the following elements:

1. Previous good character of the offender and acting without thought (5 percent)
2. Previous good character of the offender and acting by reason of lack of intelligence (5 percent)
3. Previous good character of the offender and acting by reason of ignorance (5 percent)
4. Previous good character of the offender and acting by reason of simplicity of mind (5 percent).

The same pattern of computation is pursued for the mitigating ground under Article 82(1)(b) which allows mitigation in accordance with Article 179 "when the [offender] was prompted by an honourable and disinterested motive or by high religious, moral or civil conviction." The Draft Guidelines suggest the following mitigation for each element of the provision:

5. Where the offender was prompted by an honorable and disinterested motive (5 percent)
6. Where the offender was prompted by a high religious motive (5 percent)
7. Where the offender was prompted by a high moral conviction (5 percent)
8. Where the offender was prompted by a high civic conviction (5 percent).

Articles 82(1)(c), 82(1)(d), 82(1)(e), are given the same treatment and the Draft Guidelines recommend 5 percent reduction for each element even where the element is clearly shown as an *alternative*, which in effect, renders it a sub-element in the strict sense of the term:

Article 82(1)(c):

9. When the offender acted in a state of great material distress
10. When the offender acted in a state of great moral distress
11. When the offender acted under the apprehension of grave threat
12. When the offender acted under the apprehension of justified fear
13. When the offender acted under the influence of a person whom he owes obedience
14. When the offender acted under the influence of a person upon whom he depends Article 82(1)(d):
15. When the offender was led into grave temptation by the conduct of the victim (and where the case does not fall under Article 541)
16. When the offender was led into grave temptation by wrath, pain or revolt caused by a serious provocation or by unjust insult (and where the case does not fall under Article 541)
17. When the offender was at the time of the act in a justifiable state of violent emotion (and where the case does not fall under Article 541)
18. When the offender was at the time of the act in a justifiable state of mental distress (and where the case does not fall under Article 541)

Article 82(1)(e):

19. When the offender manifested a sincere repentance of his/her acts after the crime, in particular
    - by affording succour to the victim

- if the offender recognizes his/her fault or delivering himself/herself to the authorities
- by repairing as far as possible, the injury caused by the crime

20. When the offender, upon being charged, admits every ingredient of the offence stated in the criminal charge.

A similar breakdown of the elements is suggested for the general aggravating circumstances under Article 84 and other grounds that may be considered by the court (Article 86). The Draft Guidelines suggest that each sub-element in Article 84 be allocated 5 percent so that the sentence can be aggravated depending on the number of elements which are found to exist. However, grounds of aggravation that are already embodied as an element of a provision that defines the offence cannot be used for the purpose of aggravation. Moreover special aggravating circumstances (Article 85: recidivism and concurrence) will be taken into account.

The Draft Guidelines note the wide range of punishment in ordinary homicide from five to 20 years of rigorous imprisonment, and they indicate that the survey conducted in sentences for ordinary homicide shows 10 to 12 years of rigorous imprisonment as the average threshold. The Guidelines thus take this range of 10–12 years as the base (or tentative) sentence upon which the court can compute aggravating and mitigating circumstances.

The core difference between the Draft Guidelines and the Sentencing Guidelines is that the former use the threshold of 10–12 years for all offences of ordinary homicide (which hypothetically have neither aggravating nor extenuating grounds). The Draft then makes a variation of 5 percent for various levels of aggravation and mitigation which may ultimately be above or below the tentative initial threshold. On the other hand, the Sentencing Guidelines issued in 2010 and the Revised Sentencing Guidelines (2013) state offence levels and relate them with penalty categories so that the aggravating and extenuating circumstances can be determined within the minimum and maximum thresholds discussed above.

The manner of computation stated in the Revised Sentencing Guidelines is relatively easier to implement, but a caveat seems to be necessary so that a factor that is considered to determine the offence levels would not again be used for aggravation or mitigation of the penalty. Another challenge in the approach taken by the Revised Sentencing Guidelines is the risk of subjective judgements in the determination of offence levels for offences that are not expressly stated. It is expected that judicial jurisprudence will gradually narrow down such gaps in the subjective assessment of offence levels based on the gravity of criminal conduct and the resultant harm.

3. Grave Wilful Injury and Assault

3.1 Definition and Elements

The constitutive ingredients that establish the offence of grave wilful injury (Article 555) are

- the *mens rea* (moral guilt) or intention, and
- the *actus reus* and resultant harm of
  - wounding a person to endanger the victim's life or to permanently jeopardize his physical or mental health, or
  - maiming the victim's body or one of his essential limbs or organs, or disabling them, or gravely and conspicuously disfiguring the victim; or
  - in any other way inflicting upon the victim an injury or disease of a serious nature.

The Criminal Code classifies the acts of causing injury into tiers of gravity. The offences of wilful injury embodied in the Criminal Code are: common wilful injury (Article 556), wilful injury under extenuated circumstances (Article 557), grave injury beyond the intention of the offender with intention to cause common injury (Article 558), injuries caused by negligence (Article 559) and assault (Article 560). Common wilful injury (Article 556), for example, is said to have been committed if a person "causes another to suffer an injury to body or health other than those specified in Article 555."

The lowest in the hierarchy of offences against the person or health is assault (የእጅ እልፊት) which is punishable upon complaint. According to Article 560 "[w]hoever assaults another or does him violence without causing bodily injury or impairment of health" commits the offence of assault. Article 560(3) provides that "the court may refrain from [imposing] punishment other than reprimand" if "the victim has returned assault for assault". Such assault by the victim is regarded as justified, but debatable issues can arise if the counter assault, for example occurred after other persons came between the offender and the victim and after the assault has ceased.

Criminal liability for assault does not cease at the lowest tier of the offences enumerated in the Special Part of the Criminal Code (i.e. Part II), but may also entail liability under the Code of Petty Offences (Part III of the Criminal Code). If the act of the accused does not satisfy the elements embodied under Articles 555 to 560, there is still the possibility that an act may be liable to punishment as a petty offence under Article 840 which deals with assault not covered under Article 560 and minor acts of violence. This petty offence is said to occur where the accused "deliberately or negligently throws at another person filth or an object or liquid likely to inconvenience" the victim.[34]

3.2 Sentencing in Grave Wilful Injury and Assault

The punishment for the offence of grave wilful injury [35] is rigorous imprisonment which according to the circumstances of the case may extend to 15 years. Where the circumstances so justify, it may also be simple imprisonment for not less than one year. As the general maximum for simple imprisonment is three years,[36] the range of the sentence may be one to three years of simple imprisonment; or it may be one year to 15 years[37] of rigorous imprisonment.

Article 560 deals with assaults "without causing bodily injury or impairment of health" and the offence "is punishable, upon complaint with a fine not exceeding three hundred Birr, or, in serious cases, with simple imprisonment not exceeding three months." Article 560 further states that "[s]imple bruises, swellings or transient aches and pains are not held to be injuries to person or health." The sentence that is imposed based on Article 560 can thus range from the general minimum for simple imprisonment, i.e. 10 days (Article 106) to the specific maximum of three months embodied in Article 560 if the court does not opt to resort to a penalty, or fine in the case of nonserious assault.

3.2.1 Offence Levels and Penalty Categories

Article 13 of the Revised Sentencing Guidelines[38] deals with sentencing of offences against person and health embodied under Articles 555 to 560 of the Criminal Code. Article 13(2) states the preparation of the following levels:

a) grave wilful injury (Article 555): six levels
b) common wilful injury (Article 556): six levels, and
c) injury under extenuating circumstances (Article 557): seven levels.

The following levels of injury caused by the accused that constitute grounds of the classification of offence levels and penalty category for grave wilful injury (Article 555) are stated in the Table Under Article 13 of the Revised Guidelines:

Offence level	Description of the offence level	Penalty category
1	Loss of a human body or one of the vital organs or cells, or Rendering it non-functional, or Causing any other serious injury to another person	**16**
2	Loss of more than one organ of a human body, vital organs or cells, or Rendering them non-functional	**19**
3	Causing permanent harm to the body or mind of the victim; or Injury that causes disease or that can inflict serious injury	**22**
4	The injury is disgusting (የሚያሰቅቅ) and has conspicuously (ጉልህ ሆኖ በሚታይ ሁኔታ) disfigured the victim	**25**
5	The injury endangers victim's life	**28**
6	The concurrent occurrence of two or more criteria that are stated under offence level 1 to 5	**31**

The factors that are used in the classification are clearly related with the gravity of the harm. These levels have corresponding tentative penalty categories within which the tentative sentences are determined subject to variation based on the aggravating and mitigating circumstances that will be proved by the prosecution and the defence. According to Article 26 of the Revised Sentencing Guidelines, the court is, *inter alia*, required to

1. determine the offence level (Art. 26(1)(a));
2. identify the tentative penalty category among the tiers indicated in Annex I of the Revised Guidelines (Art. 26(1)(b));
3. determine whether the offence deserves simple imprisonment or rigorous imprisonment if the provision embodies these sentences as options (Art. 26(1)(c));
4. determine the tentative punishment within the range (ፍቅድ ሥልጣን) stated in the penalty category (Art. 26(1)(d)), notwithstanding that the court may determine the sentence if it has accepted mitigating and aggravating grounds ;
5. determine the penalty category ceiling where special aggravating grounds exist ; and then consider general aggravating circumstances (Art. 26(1)(d)), Art. 26(1)(e)) ; and
6. consider mitigating circumstances (Art. 26(1)(f)).

According to Annex I of the Revised Guidelines, the penalty categories (shown below) for the offence levels in grave wilful injury determine the tentative sentence prior to aggravation and mitigation:

Table 7- Offence Levels, Penalty Categories and Tentative Range for Sentencing in Willful Injury

Offence Level	Penalty Category	Tentative Sentence Range before Aggravation and/or Mitigation
1	16	3 years - 3 years and 7 months
2	19	4 years - 4 years and 10 months
3	22	5 years and 6 months - 6 years and 7 months
4	25	7 years - 8 years and 4 months
5	28	9 years - 10 years and 10 months
6	31	12 years - 14 years and 5 months

The second Table under Article 13 of the Revised Guidelines states the thresholds of sentencing in the context of extenuating circumstances that are applicable to sentences imposed based on Articles 555 (grave wilful injury) and 557 (injury caused under extenuating circumstances)

3.2.2 Comparison with the Draft Sentencing Guidelines

The Draft Guidelines for sentencing under Articles 555 and 560[39] state the wide gap between the minimum and maximum punishment for convictions under Article 555. The Draft suggests that potential aggravating circumstances can be classified and sequenced. If, for example, seven categories of aggravating circumstances are identified, the gap between the minimum (i.e. one year) and the maximum (15 years), i.e. 14 years can be divided by seven thereby enabling courts to add two years on the minimum punishment for every category of aggravating circumstance.

Article 555 does not enumerate aggravating circumstances, and the Draft Guidelines suggest that the General Part of the Criminal Code which embodies the relevant provisions on general and special extenuating and aggravating circumstances (along with the factors reflected in a given special provision) can be used in identifying the factors by setting forth a reasonable hierarchy of aggravation and mitigation. Such factors[40] include motive, dangerous disposition, method of commission and the incident that surrounds the crime, instrument(s) used, type and gravity of the harm, identity of the victim, the offender's previous character, and the level of education, maturity and awareness of the offender.

According to the Draft Guidelines, the court would first decide whether it should impose simple imprisonment from one year to three years or rigorous imprisonment from one year to 15 years. The Draft suggests that the court can pursue the second option if one of the aggravating circumstances are met, and then add two more years from the base penalty (of one year) for the presence

of a given factor of aggravating sentences. The examples given under each category are the following:

1. *Dangerous disposition of the offender's criminal intention and motive*
   - disposition of the offender in light of the harm caused to the victim's person or health
   - premeditation (ቂም በቀል)
   - envy and commission of the offence with such motives
   - commission of the offence as a means towards the commission of another offence or as a means of concealing the commission of another offence
   - optimal care and precaution so that the offence does not fail to achieve its result and full moral association with the harm expected to ensue
   - organizing and leading co-offenders in the commission of the offence
2. *Method used and surrounding circumstances*
   - commission of the offence during darkness, and making use of events such as natural catastrophes and riots in a manner that shows dangerous disposition of the offender
   - making use of situations of war, rebellion, shouts (ጫጫታ)
3. *Instrument(s) used*
   - firearm, bomb or the like
   - knife dangerous to life or poison
   - inflammables and dangerous acid
   - using a mad animal or an irresponsible person
   - transmission of HIV/AIDS or other serious fatal decease
   - electric current
4. *Gravity of the harm*
   - permanent mental illness or permanent physical injury (particularly loss of both eyes, hearing loss, loss of limb or rendering them non-functional
   - harm to lung, kidney, or other organ
   - causing infertility or loss of sexual organs
   - seriously disfiguring the victim
5. *Victim's condition*
   - age, mental condition of the victim, a victim under special care due to old age or gender
   - existence of relationships of marriage, affinity, consanguinity, common place of work, religious bondage, etc
   - existence of special relationships (guardian, tutor, medical care)
   - violation of public or state duty to protect the victim

6. *Offender's previous character*
   - subject to the provisions of special aggravation due to recidivism, the dangerous disposition of the offender in not being reformed as a result of previous sentences and commission of offences as means of living
   - notoriety of the offender in provoking quarrels
7. *Special vocation or profession of the offender*: Commission of the offence in spite of
   - professional duty to protect another person's person, health (such as medical profession)
   - a driver's duty to the safety of a passenger
   - professional duty in law enforcement
   - knowledge of the law as a result of his/her professional activities

Where none of the seven grounds that can be used for aggravation (of two years each) exists, the Draft Guidelines suggested that there can be a tentative penalty of one year of simple imprisonment which can be aggravated on the ground of recidivism at the rate of four months per record without exceeding the maximum of three years of simple imprisonment. This evokes the issue of whether any offender with a previous record does not satisfy aggravation factor (6) above, because it can be argued that relapsing into the commission of an offence can be interpreted as being dangerous in not being reformed despite earlier conviction and imprisonment.

There is a significant difference between the Draft Guidelines for Ordinary Homicide and the Draft Guidelines for Grave Wilful Injury with regard to the tentative penalty threshold. The tentative penalty that was suggested (as the basis upon which aggravation and/or mitigation can start) is 10–12 years of rigorous imprisonment for ordinary homicide. In other words, in the absence of mitigation or aggravation the court is advised to render a sentence within this range. This threshold is about one third of the range above the minimum statutory penalty and about two thirds of the range below the maximum statutory penalty for the offence.[41]

The Draft Guidelines for Grave Wilful Injury, however, take the minimum punishment threshold of one year for the offence as the tentative penalty in the absence of mitigation and aggravation. It is indeed problematic to use this tentative threshold where mitigating factors exist while no aggravating conditions are raised by the public prosecutor. Under such circumstances, the minimum statutory penalty for the offence is already considered as the tentative penalty before considering aggravating and mitigating circumstances and it becomes difficult for courts to make a variation between offenders that have submitted mitigating grounds (while there is no ground for aggravation) and those offenders in whose favour or against whom mitigating or aggravating factors do not exist.

4. Rape

4.1 Definition and Elements

Article 620(1) of the Criminal Code provides elements of the offence of rape which include the following constitutive ingredients:

1. compelling a woman to submit to sexual intercourse,
2. outside wedlock,
3. by the use of violence or grave intimidation, or by rendering the woman unconscious or incapable of resistance.

These elements articulate the *actus reus* of the offence and material circumstances (such as the status of not being married to the victim). The elements of Article 620(1) listed above involve an act, status of the offender's relationship with the victim and the means used during the commission of the offence. The offence of rape in its very nature involves intention. The *mens rea* is implied, because Article 59(2) of the Criminal Code (as discussed in Chapter 3, Section 2.4) provides that offences are punishable under negligence "only if the law so expressly provides by reason of their nature, gravity or the danger they constitute to society". The *a contrario* reading of this provision leads us to interpret all offences as requiring 'criminal intention' (in one of its forms: *direct intention, ancillary direct intention* or *dolus eventualis*) unless a specific provision which defines a given offence expressly states its *mens rea* as negligence.

Article 620 uses a three-level approach to rape. The second level is embodied in Article 620(2), which states the material circumstances which aggravate the specific maximum penalty stipulated for the offence. This is so where the victim

- is below 18 years of age
- is "an inmate of an alms-house or asylum or any establishment of health, education, correction, detention or internment which is under the direction, supervision or authority of the accused person, or … anyone who is under the supervision or control of or dependent upon him"
- is "incapable of understanding the nature and consequences of the act, or of resisting the act, due to old age, physical or mental illness, depression or any other reason"
- was attacked "by a number of men acting in concert" or was subjected to an act of cruelty and sadism.

At the third level, the penalty for the offence of rape shall be aggravated further under Article 620(3) "where the rape has caused grave physical or mental injury or death." Concurrent offences are deemed to have been committed in addition to rape[42] where the rape was committed while the victim was illegally restrained or abducted or "where communicable disease has been transmitted" to the victim.

Various questions can arise in relation to rape. Such questions, *inter alia*, include the issues of compulsion, fraud and marital rape.

4.1.1 Compulsion

One of the questions that can arise in relation to the legal definition of rape is whether there should be force and resistance or whether lack of consent satisfies the element of "compulsion" under Article 620(1). The issue of fear versus threat can also arise particularly where the victim was under 'fear' but not expressly 'threatened.'

Compulsion need not necessarily emanate from 'force' or 'violence'. For example in *R. v. Olugboja* (1981), "the defendant threatened to keep a girl in his bungalow overnight. He made no explicit threat of violence and she did not resist sexual intercourse. The court said that on the evidence she had not given a genuine consent, but had merely submitted under pressure of his threat."[43]

The traditional definition of rape required lack of consent and use of force. However, current conceptions of rape tend towards offering primary concern for "the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent."[44] Under this conception "the fundamental wrong is the violation of the woman's will and sexuality" and "the law of rape does not require that 'force' cause physical harm".[45] This is because 'force' "plays merely supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim's will".[46] According to this *autonomy and privacy test*, the only proof that is required should be lack of consent and that "a male's use of force should simply be one way of showing that the female did not consent."[47] In such patterns of interpretation where, for example, "prohibited nonconsensual intercourse" which does not involve force is regarded as rape, it is regarded as having "a lower degree of rape than the forcible variety."[48]

4.1.2 Fraud

There can be an issue of whether sexual intercourse based on fraud constitutes rape. The traditional distinction between rape and seduction seems to be receding because many instances that were classified as seduction are increasingly being regarded as rape. Fraud can involve the act of pretending

as having a certain job, identity, and so forth to induce a woman to intimate relations and intercourse. Such acts were traditionally regarded as fraud to seduce a woman and not rape.

This is different from, for example, the case of a defendant who pays a prostitute with counterfeit money.[49] In this instance, the accused is not regarded as having committed rape but a different offence such as circulating counterfeit money (or breach of contract if prostitution is legally recognized and licensed). The problem, however, arises where a person impersonates, in the dark, the victim's boyfriend "with whom the victim has been sexually intimate".[50] In the case of *Regina v. Dee*, the court found that the defendant's impersonation as the victim's husband negatives her consent and was thus regarded as rape.

4.1.3 Marital or Spousal Rape

The long-held view that the husband cannot be guilty of rape is currently being challenged. The rationale for the concept of 'husband's immunity' was that marital relations involve mutual consent to sexual intercourse. However, it may be argued that this general consent should not exclude the possibility that there can be times when a woman might not consent to it. Yet even those who support the applicability of rape in marital relations believe that it stands at a lower level of gravity than rape by a stranger or a neighbour. In the Ethiopian context, Article 620 does not apply between a married couple, and what a woman can invoke seems to be another offence relevant to the type and gravity of the violence she has encountered.

4.1.4 Erroneous Belief

There can be erroneous belief where the accused believed that the victim consented to intercourse while the victim in fact did not. Such erroneous belief of the defendant that the woman had consented has been the subject of debate. Under Ethiopian Criminal law the defences on mistake of fact can possibly be applicable. However, a stringent line of interpretation is usually pursued in examining whether the defendant's belief in the victim's consent is 'genuine and reasonable'. Some foreign decisions even take unreasonable belief into account only as long as the defendant was not reckless in leading himself to the erroneous belief.

4.2 Sentencing in Offences of Rape

The minimum and maximum punishment for rape is, respectively, five and 15 years of rigorous imprisonment,[51] subject to the extension of the maximum punishment to 20 years where the offence is committed on the persons stated in Article 620(2).

4.2.1 Offence Levels and Sentencing under the Guidelines

Article 15 of the Revised Sentencing Guidelines deals with sentences against offences that cause injury on sexual liberty and chastity that are stated under Articles 620 to 628 of the Criminal Code. In the absence of the aggravating circumstances stated under Article 620(2), and where the defendant is convicted under Article 620(1), the statutory sentencing range for the offence is from five years to 15 years. Pursuant to Article 15(2) of the Revised Guidelines, there are *nine offence levels* upon conviction under Article 620(1) including grounds of aggravation under Article 628. Article 15(3) of the Revised Guidelines further indicates *seven offence levels* for offences that are committed under the circumstances stated under Article 620(2).

The offence levels and the corresponding penalty categories are stated in sixteen Tables under Article 15 of the Revised Guidelines. The tables indicate the offence levels and base sentence (የእስራት ቅጣት የመነሻ እርከን)for rape under:

a) Art. 620(1) cum 628: 9 offence levels
b) Art. 620/2 (a to d) cum 628: 7 offence levels
c) Art. 620(3) cum 628: 1 offence level (Level 38)
d) Art. 621 cum 628: 7 offence levels
e) Art. 622 cum 628: 10 offence levels
f) Art. 623 cum 628: 10 offence levels
g) Art. 624 cum 628: 10 offence levels
h) Art. 625 cum 628: 10 offence levels
i) Art. 626(1), 626(4)(a), and 628: 10 offence levels
j) Art. 626(2), 626(4)(b), and 628: 7 offence levels
k) Art. 626(3), 626(4)(c), and 628: 10 offence levels
l) Art. 627(1) and 627(4)(a): 4 offence levels
m) Art. 627(2) and 627(4)(b): 7 offence levels
n) Art. 627(2) and 627(4)(b): 7 offence levels
o) Art. 627(3), 627(4)(c), and 628: 10 offence levels
p) Art. 627(5): 1 (Offence level 38).

The first table under Article 15 of the Revised Sentence Guidelines that deals with rape under Article 620(1) is summarized below as an example:

Offence level	Description of the offence level	Penalty category
1	Use of violence or grave intimidation or after having rendered the victim unconscious or other means	**23**
2	The act under level one is conducted by using non-fatal weapon	**24**
3	The act under level one is conducted by using weapons such as knives and arms or by using drugs (አደንዛዥ እፅ)	**25**
4	The accused transmits to the victim non-fatal venereal disease with which he knows himself to be infected (Art. 620(1) and 628(b))	**27**
5	Where the victim becomes pregnant as the result of rape (Art. 620(1) and 628(a))	**30**
6	Concurrence of the elements stated under offence levels 4 and 5	**31**
7	The accused transmits to the victim venereal disease that endangers life with which he knows himself to be infected (Art. 620(1) and 628(b))	**32**
8	Concurrence of the elements stated under offence levels 5 and 7	**33**
9	Where the victim is commits suicide due to distress, anxiety, shame and despair (Art. 620(1) and 628(c))	**34**

The tentative punishment category for each level will thus be as follows:

Table 8- Offence Levels, Penalty Categories and Tentative Range for Sentencing in Rape, Article 620(1) *cum* Article 628

Offence Level	Penalty Category	Tentative Sentence Range before Aggravation and/or Mitigation
1	23	6 years - 7 years and 2 months
2	24	6 years and 6 months - 7 years and 8 months
3	25	7 years - 8 years and 4 months
4	27	8 years and 5 months - 10 years
5	30	11 years - 13 years and 2 months
6	31	12 years - 14 years and 5 months
7	32	13 years - 15 years and 8 months
8	33	14 years - 16 years and 10 months
9	34	15 years - 18 years

Even though the sentencing range for the offence of rape is five to 15 years[52] aggravating circumstances under offence levels 32, 33 and 34 have caused ceilings beyond the ceiling of 15 years. As discussed earlier, after the tentative penalty for a given criminal conduct is determined based on the evidence that constitutes the basis of the conviction, the court will resort to

considering the aggravating and mitigating circumstances to impose the sentence.

4.2.2 Comparison with the Draft Sentencing Guidelines

Section 5 of the Draft Guidelines for Sentencing Offences of Rape[53] states the inconsistency in sentencing offences of rape in spite of relatively comparable circumstances of commission, mitigation and aggravation. The Draft duly notes that the aggravating or extenuating circumstances are not taken into account if they are already incorporated as a mitigating or aggravating element in a specific provision that defines a given offence. Section 4 of the Draft Guidelines enumerate the list of mitigating circumstances (Article 82) and it states that the aggravating circumstances (under Article 84) justify aggravation of penalty without exceeding the maximum sentence stated in the legal provision which is the basis for the conviction.

Section 4 of the Draft Guidelines also indicates the cases where the court can use special aggravating circumstances to aggravate punishment below or above the maximum stipulated for the offence provided that it observes the general maximum punishment (25 years) imposed under the category of rigorous imprisonment. The survey discussed in Section 6 of the Draft Guidelines enumerates the following grounds of aggravation and mitigation that have been accepted by various courts.

Examples of mitigating circumstances:

- the old age of the offender (80 years)
- the living condition of the offender
- self-restraint not to pursue the offence to the end
- youth of the offender (under 18 years of age)
- family responsibility and number of dependents of the offender
- simplicity of mind and low level of education
- dangerous disposition not reflected in light of the circumstances that surround the commission of the offence
- previous character of the defendant
- reconciliation with the victim and her family
- repentance and request of forgiveness from the victim and her family
- provocative behaviours of the victim
- being carried away by passion and emotion

Examples of aggravating circumstances stated in the Draft Guidelines which are taken from various judicial decisions:

- the age of maturity of the offender
- acts committed on two children
- offence committed on mentally retarded person

- offence committed on a victim at midnight at a time she could not defend herself
- offence committed on a relative
- offence committed on one's own child
- offender's position as a police
- a very wide gap between the offender and victim
- threatening the victim to submission
- commission of the offence irrespective of high resistance from the victim
- arrogance (ማንአለብኝነት) during the commission of the offence
- commission of the offence in a forest where the victim cannot get assistance from others
- participation with others to commit the offence
- offence committed on a girl whom the offender supports at his home in pursuing her education
- offence committed mischievously and cunningly
- transmission of venereal disease
- debased and committed in bad faith
- physical injury on the victim so that she could not defend herself
- the marital status of the victim and the moral harm caused by the offence
- offence committed with the intention to force the victim into matrimony
- conception as the result of the offence
- disappearance of the offender on the day of the sentence
- inhuman commission of the offence
- the commission of the offence on a student

Section 6 of the Draft Guidelines suggests the following:

1. Primarily, there must be a *tentative penalty* determined before considering grounds of mitigation and aggravation. The Draft Guidelines suggest that the statutory minimum punishment for rigorous imprisonment (i.e. one year) and the statutory maximum for the offence of rape, i.e. 15 years (where the accused is charged under Article 620(1)) should be added (1 + 15) and then be divided by two in determining the initial tentative sentence.
2. In the absence of aggravating and mitigating circumstances the Draft Guidelines suggest that the initial tentative penalty can be used as the sentence for the offence.
3. The general grounds of aggravation should be considered under Article 84(1)(a) to 84(1)(e), and the penalty be raised by one fifth of the initial penalty where each set of grounds for aggravation (under

(a), (b), (c), (d) or (e)) is wholly met; or where the sets are not fully met, the elements of aggravation can be separated in each segment of aggravation and the percentage of increase on the initial penalty can be determined accordingly.

4. The same pattern of computation can be used where there are general aggravating circumstances which the court may apply by virtue of Article 86.
5. The general grounds of mitigation embodied in Article 82(1)(a) to 82(1)(e) should be considered to deduct the penalty by one fifth of the initial penalty where each set of grounds of mitigation is wholly met; or where the sets are not fully met, the elements of mitigation in each segment can be separated and the percentage of reduction on the initial penalty can be determined.
6. Where one of the elements rather than the whole segment of grounds for mitigation under Article 82(1)(a), (b), (c), (d) or (e) is met, the rate of reduction can be determined and computed accordingly. And where the law allows free mitigation, the court can be given the discretion to decide based on the particular circumstances of the case.
7. The same pattern of computation (stated under (5) above) can be pursued where there are mitigating circumstances which the court may apply by virtue of Article 86.
8. Articles 184–188 shall be applicable where the special aggravating circumstances stated under Article 85 exist.
9. Even if equal points are suggested to be allocated to aggravating and mitigating circumstances, the court may use its own point allocation mechanisms so that it provides reasons in its decision.

The suggestions in the Draft Sentencing Guidelines for Rape seem to be more pragmatic as compared with the two drafts highlighted earlier. In contrast to the Draft Guidelines for Ordinary Homicide, it does not take a figure based on sentencing practices as a tentative threshold. The tentative penalty which is obtained by adding the minimum and maximum statutory penalties and dividing the figure by two gives a figure which is equidistant from the minimum and maximum sentences.

This figure also avoids the problem that was discussed in relation with the Draft Sentencing Guidelines for the Offence of Grave Wilful Injury which suggests the statutory minimum of one year as the tentative threshold in the absence of aggravation and mitigation. Moreover, allowing an increase or reduction of one fifth (20 percent) of the tentative penalty for each of the five general aggravating (or general mitigating) circumstances sounds reasonable. This draft also allows apportionment of the 20 percent where only part of the sub-articles on general aggravation or mitigation is met.

The suggestion under the Draft Sentencing Guidelines on Rape has relative advantages with regard to its simplicity for application and the clarity in its rationale for determining the tentative penalty. However, the Draft seems to lack differences in the threshold for the tentative penalty irrespective of the gravity of the harm and the hierarchy of gravity in levels within the offence embodied in a legal provision. One may argue that the specific provisions of the Criminal Code already embody different ranges of punishment by taking, *inter alia*, gravity of harm into account. In line with this perspective, it may be argued that the grounds of aggravation or mitigation which courts can on their own invoke (Article 86) can allow aggravation or mitigation based on the magnitude of harm and other factors. However, a relatively wider interpretation of Article 86 of the Criminal Code may unduly give courts the discretion which is intended to be narrowed down and harmonized through guidelines. To this end, the Revised Guidelines have indeed provided detailed thresholds that can enhance consistency and predictability in sentencing offenders who are convicted under Articles 620-628.

5. Theft

5.1 Definition and Elements

Theft is deemed to be committed where a person "with intent to obtain for himself or to procure for another an unlawful enrichment abstracts a movable or a thing detached from an immovable, the property of another, whether by taking and carrying, by direct appropriation or by having it pass indirectly to his own property."[54] The provision has four constitutive elements:

1. The intention to obtain unlawful enrichment to oneself or procure same to another person (the *mens rea* of the offence).
2. The act of abstracting a movable object or a thing detached from an immovable (the *actus reus* of the offence).
3. The act of taking and carrying or direct appropriation or having it pass indirectly to his own property (*actus reus*).
4. The fact that the object is the property of another person (the *material circumstances*).

Articles 666 to 667 deal with various types of theft, and share the same elements with Article 665 with some variation, i.e.:

- variation in type of item stolen (abstraction of energy such as electrical power: Article 666)
- variation in proprietorship (abstraction of things jointly owned: Article 667)
- abstraction to the detriment of a deceased person (Article 668)

The material circumstances of the commission of the offence may render the offence aggravated theft "where the act is aggravated by the object, the personal status of the [offender] or the circumstances surrounding the theft"[55] under the circumstances stated under Article 669, Sub-Articles 1, 2 and 3.

Comparative reference to the definition of theft in various criminal codes shows their shared elements with the ones embodied in Article 665. The French Criminal Code, for example, defines theft as "the appropriation of the thing of another with guilty intent." The four elements in this definition relate to "appropriation", "thing", the fact that the object "belongs to another person", and "guilty intent". "The first three elements form part of the *actus reus* [and material circumstances], and the latter the *mens rea*."[56] These elements are in conformity with the elements of Article 665, which can be identified as

- intention of unlawful enrichment
- abstraction of an object
- appropriation
- the fact that the object belongs to another person

5.1.1 Intention

Two aspects of intention, i.e. *awareness* and *volition*, can be considered in relation to theft. Awareness constitutes the general intention for theft. The *mens rea* for theft requires that the "defendant must have known that the property belonged to another" (*awareness*), and the defendant must "have intended to act against the will of the owner" (*volition*). A person who "has made a mistake of fact may lack this knowledge."[57] There is no theft in the absence of awareness. A case involving a mistake occurred where a man had in the past a permission of a landowner to look for truffles on his land. He had gone looking for truffles unaware that the land had been rented out to another person. No theft of truffles had occurred due to the absence of *mens rea*.[58]

The special intention required in the *mens rea* for theft is the "intention to treat the property as one's own". This issue can be controversial if for example, a defendant has not intended to "permanently deprive the owner of [his/her] property" as in the case of joyriding, where a person takes a car and brings it back after driving it for some time. "Initially, case law refused to recognize a theft of the car [under such circumstances] and the prosecution sought to punish for theft of the petrol."[59] However, "in 1959 the Criminal Division of the *Cour de Cassation* ruled that borrowing a car amounted to a theft of the car, as the defendant had intended, at least momentarily, to behave as if [he/she] owned the car. It is therefore now established that there is no need to intend to permanently deprive the owner of [his/her] property."[60]

Acts such as joyriding may be covered under the words "temporary use" in Article 678 of the Ethiopian Criminal Code (titled "Unlawful Use of the Property of Another") and the intention of the accused is not to permanently deprive the owner his/her property. The provision punishes a person who "without intent to unjustifiably enrich himself or a third person, removes a thing from the owner, in order to deprive the owner thereof or to defraud him, or to make temporary use thereof for his own benefit or that of a third person." The *mens rea* of the intention of temporary use thus suffices for the offence of unlawful use of property of another.

5.1.2 Abstraction of an Object

Unlike various legal systems, the term *abstraction* in Article 665 makes reference to determinate movable objects. The issue of whether Article 665 applies to abstraction of powers of economic value such as electricity does not arise because Article 666 exclusively deals with such abstraction. England's Theft Act of 1968, for instance, defines theft as dishonest appropriation of "property belonging to another with the intention of permanently depriving the other of it." In such definitions, the word 'property' is susceptible to ambiguity. Article 665, however, refers to abstraction of a movable object or a thing detached from an immovable thereby excluding intangible (incorporeal) property. Negotiable instruments and securities can be regarded as corporeal chattels by virtue of Article 1128 of the Civil Code which provides that "[u]nless otherwise provided by law, claims and other incorporeal rights embodied in securities to bearer shall be deemed to be corporeal chattels."

In the *Bourquin* case, "the Court of Appeal of Reims convicted two company employees of stealing 70 floppy disks and the contents of 47 of these. In 1989, the Criminal Division of the *Cour de Cassation* rejected the appeal against this decision."[61] In the *Antoniolli* case, "an employee had used financial information from his company to create tables and graphs which he passed on to a competitor. He was convicted of theft and his conviction was upheld by the *Cour de Cassation*."[62] The floppy disks in the *Bourquin* case could have fallen under Article 665 of the Ethiopian Criminal Code, while the information in both cases could not have been regarded as movable objects under Article 665, thereby rendering it necessary to resort to other appropriate criminal law provisions, i.e. Articles 717 to 724 of the Criminal Code that deal with crimes against intangible (incorporeal) rights.

5.1.3 Appropriation

Taking and carrying an object, or directly appropriating it, or indirectly transferring a moveable object (or a thing detached from an immovable) to one's own property leads to the defendant's assumption of a right of owner of

the object. Such *appropriation* may be defined as "doing something with the property that the owner has a right to do, but which no one else has the right to do without the owner's permission."[63] The fact that the owner has consented cannot be invoked to prove the absence of appropriation if the 'consent' was based on fear or misleading or deceiving acts of the person who appropriates an object.

The same holds true where the property was handed over to the defendant while the owner was intoxicated. However, the victim's own mistake (to which the defendant did not contribute) has been treated differently in foreign cases, when the victim who, for example, gave more cash "from a cash point machine" to the defendant and "the latter decides to keep it."[64] In this situation the court may find that "there is merely a potential breach of contract, and criminal liability will not normally be imposed."[65]

Whether such cases can fall under Article 665 of the Ethiopian Criminal Code depends on whether the act satisfies the concept of *appropriation* as envisaged under the provision, and whether the case comes under the offence of misappropriation[66] rather than theft. Article 665 seems to have a broad definition of appropriation. In light of the wording of the phrase "taking and carrying or by direct appropriation or by having it pass indirectly to his own property", taking extra change with the intention of unlawful enrichment can, albeit arguably, be regarded as taking money that belongs to another person. Even more so, if having an object pass 'indirectly' to one's own property constitutes appropriation under Article 665, taking extra money (by taking advantage of the victim's mistake) with the intention of unlawful enrichment can *a fortiori* (for a stronger reason) fall under Article 665, unless Article 679 (misappropriation) becomes more applicable depending upon the circumstances of the case. For example, a defendant who realizes the mistake of the victim after the former has left the shop (but keeps the extra money), can be charged with misappropriation (Article 679) while the defendant who has realized the victim's mistake at the counter and intends to keep the extra money seems to have committed an omission closer to theft than misappropriation.

In principle, appropriation envisages physical removal such as taking away. This has been the traditional concept of appropriation. The current notion of 'appropriation', however, adopts a wider interpretation which can include 'legal transfer' without physical removal. As clearly stated in Article 665, any means, which directly or indirectly passes the property of the owner to the defendant satisfies the element of appropriation. If the holder of a thing (entrusted to hold it according to Article 1141 of the Civil Code) refuses to return the object to its owner, appropriation is deemed to have occurred even if the initial transfer of the *corpus* of the object was legal.

Under such circumstances, physical removal may not happen, because it had already occurred legally at an earlier point of time. This can also occur in cases of *breach of trust* in relation to which Article 675 of the Criminal Code embodies 'appropriation' as one of its elements even if the object is already in the hands of the defendant who commits the offence. Where a holder who already had physical control over a thing appropriates an object, the existence of 'appropriation' is thus apparent, and all one can argue is whether the offence comes under breach of trust (Article 675) rather than theft.

5.1.4 Object Belonging to another

Theft is deemed to have been committed where the object appropriated belongs to another person. The title of ownership is determined by the law of property under the Civil Code and other relevant laws. Protection against theft does not only apply to objects that are owned but also extends to objects that are possessed. For example, a person might have possessed an object which he has borrowed from a friend. One who appropriates it can be said to have appropriated an object belonging to another person even if it is taken from the possessor and not the actual owner. The person from whom such object is taken may also be the holder as envisaged under Article 1141 of the Civil Code. The core element here is that the object abstracted does not belong to the offender.

An issue that can arise is whether a person can be regarded as having stolen an object which is his own, if he takes the object while owing some obligation to the possessor. In *R. v. Turner*, the defendant "had taken his car to a garage to be repaired. When the repairs were done, he saw the car parked outside the garage and drove it away without paying for the work that had been carried out."[67] The court decided that the defendant "was liable for stealing his own car, because the garage had possession of the car at the time he took it, and all the other elements of theft existed."

But it would have been difficult to take the same position based on Article 665 of the Ethiopian Criminal Code. One may argue that taking the car without paying for the work satisfies the *mens rea* element of intending to obtain unlawful enrichment to oneself, and that a movable object has been abstracted and appropriated. However, Article 665 expressly requires that the object be "a property of another" person. The core issue would thus be whether the words "a property of another" can apply to the possessor of the car at the time its owner took it. Under Ethiopian law, the victim needs to look for other remedies rather than invoking theft because the defendant can argue saying that he has *right in rem* (right over the object) while the garage only has *right in personam* over him (based on their contract) for the services rendered.

5.2 Sentencing in Theft

Theft is punishable "according to the circumstances of the case, with simple imprisonment, or with rigorous imprisonment not exceeding five years."[68] The punishment for theft under Article 665 can be 10 days to three years of simple imprisonment,[69] or a rigorous imprisonment from one year[70] to five years. The punishment stipulated under Article 666 (abstracting energy such as gas, steam or electrical) is similar to the one imposed on theft of a movable object (Article 665).

The punishment imposed on offences committed in violation of Articles 667 (abstraction of things jointly owned) and Article 668 (abstraction to the detriment of the deceased person) are relatively lower (in range) than the ones stipulated in Articles 665 and 666. And, aggravated theft which is committed under the circumstances stated in Article 669 is punishable with a graver range of sentences which may be one to three years of simple imprisonment or one to 15 years of rigorous imprisonment.

5.2.1 Offence Levels, Penalty Category and Sentencing Range

Article 16(2) of the Revised Sentencing Guidelines provides that the pecuniary or property benefit obtained or intended to be obtained from the offence is taken into account in determining eight offence levels for acts of theft that fall under Article 665 of the Criminal Code. According to Article 10(3) of the former Guidelines (issued in 2010), abstraction of property that involves an amount up to Birr 100 did not constitute an offence of theft, but was rather left to the category of petty offences. This monetary figure was apparently expressed in the Sentencing Guidelines in order to clarify the phrase "of such minor importance" embodied in Article 662(1) which relegates certain infringements to the Code of Petty Offences. However, the Revised Guidelines have rather opted to classify such theft (i.e. theft that involves an amount up to Birr 100) to Offence Level 1.

The first table under Article 15 of the Revised Guidelines states the offence levels and the corresponding penalty categories of theft (Article 655(1)). Moreover, Annex I of the Revised Sentencing Guidelines states the tentative penalty for the eight offence levels (based on the value that is stolen as shown in the following table), after which it can be increased or reduced depending upon the aggravating and mitigating circumstances submitted thereof.

Table 9- Offence Levels, Penalty Categories and Tentative Range for Sentencing in Theft

Offence level	Amount stolen or value of stolen property (Birr)	Penalty category	Tentative Sentence Range before Aggravation and/or Mitigation
1	Upto 100	**6**	8 months - 1 year and 2 moths
2	101 – 500	**8**	1 year & 2 months - 1 year & 8 months
3	501 – 1,000	**10**	1 year & 6 months - 2 years
4	1,001 – 10,000	**12**	2 years - 2 years & 6 months
5	10,001 – 100,000	**14**	2 years & 6 months - 3 years
6	100,001 – 500,000	**16**	3 years - 3 years & 7 months
7	500,001 – 1,000,000	**18**	3 years & 7 months - 4 yrs & 4 months
8	Over Birr 1,000,000	**20**	4 years & 5 months - 5 yrs & 4 months

Article 10(4)(a) of the Sentencing Guidelines further stipulates that the offence levels stated above (that are based on the amounts stolen) shall be raised by two levels where the daily living or the business activity of the victim is jeopardized. Likewise, Article 10(4)(b) provides for raise of the offence level by two levels where the theft involves dangerous objects such as explosives or inflammables.

5.2.2 Issues Raised in the Draft Sentencing Guidelines

Chapter 1 (Section 1) of the Draft Sentencing Guidelines for Theft[71] states the findings of the survey conducted on sentences imposed on 50 convictions of theft. Twenty-seven of the cases involved aggravated theft (Article 669) while the remaining 21 were cases of theft (Article 665), and the two cases involved abstraction of jointly owned objects (Article 667).

The grounds of aggravation stated in the sentences for aggravated theft (Article 669) include the following:

- greed
- breach of confidence (e.g. while employed as a guard)
- commission of the offence in collaboration with one or two co-offenders
- theft during darkness
- injuring the victim
- nonrepentance
- using instruments such as jemmy (መሰርሰሪያ) to break in
- concurrent offences
- escaping arrest

On the other hand, the grounds of mitigation stated in the sentences generally include

- previous good character of the accused
- assisting a parent
- youth

- low standard of living
- level of education
- responsibility in supporting family

Similar aggravating and mitigating grounds are said to have been stated in sentences against theft (Article 665) with minor variation. The Draft Guidelines indicate that there were sentences which used general statements rather than specific grounds of mitigation and aggravation. Such statements include phrases such as "in recognition of the defendant's situation, after having examined both sides, because punishment mainly aims at reform, considering that the sentence will reform the accused in accordance with Article 88", and similar statements.

Chapter 1, Section 2 of the Draft Sentencing Guidelines indicates the disparity and inconsistency in the sentences among courts whereby relatively comparable commissions and circumstances are sentenced differently. After some discussion of good practices of different countries the Draft Sentencing Guidelines for Theft suggest the following:[72]

It is suggested that the court should first determine a tentative sentence without taking mitigating and aggravating grounds into account. The following tentative levels are suggested:

Level 1—Theft or attempted theft of an object worth less than Birr 500: simple imprisonment of one year
Level 2—Birr 501–2,000: one and a half years simple imprisonment
Level 3—Birr 2,001–5,000: two years simple imprisonment
Level 4—Birr 5,001–10,000: three and a half years simple imprisonment
Level 5—Birr 10,001–50,000: three and a half years rigorous imprisonment
Level 6—Birr 50,001–100,000: four years rigorous imprisonment
Level 7—Birr 100,001 and above: four and a half years rigorous imprisonment

The levels that were suggested in the Draft Sentencing Guidelines have clearly influenced the approach that is pursued in the Revised Drafting Guidelines even if there some variation has been made. The Draft Guidelines had also suggested that the tentative sentence for theft and aggravated theft can be aggravated by:

- three to six months in the presence of an aggravating condition stated under Article 84(1)(a)
- six months to one year in the presence of an aggravating condition stated under Article 84(1)(b)

In case of the aggravation envisaged under Article 84(1)(c), the following suggestions were submitted in the Draft Guidelines:

- one previous conviction: aggravation by one year
- two records of conviction: aggravation by two to three years
- three convictions: aggravation by three to four years
- more than three convictions: aggravation by adding three months for every additional record of conviction

Moreover, the Draft Sentencing Guidelines had forwarded suggestions as to how special grounds of aggravation (such as recidivism) can be aggravated, and the possibility of computing sentences based on grounds that may be considered for aggravation based on Article 86. The Draft Sentencing Guidelines suggested that Sub-Articles (a), (b), (c), (d) and (e) of Article 82(1) should each entitle the defendant to get a mitigation of 20 percent of the tentative sentence. For example, it was suggested that "a state of great material or moral distress"[73] can allow mitigation of 20 percent of the tentative penalty.

The basis of the determination of offence levels in the Draft Sentencing Guidelines and the Revised Guidelines may evoke the issue of whether it is reasonable to determine the different levels solely based upon the amount of money (or value of property) stolen and whether the margin of one Birr (for example between Birr 10,000 and Birr 10,001) can justify variation of two categories (i.e. Categories 12 and 14) in offence levels. This problem is addressed in the Revised Sentencing Guidelines because the amount of money stolen is used to merely determine the offence level and tentative penalty category. Moreover, the ranges in consecutive penalty categories stated in the Sentencing Guidelines have overlapping figures which can facilitate the solution of such problems.

6. Robbery

6.1 Definition and Elements

Robbery[74] shares the constitutive ingredients of theft (stated above under Section 5.1), i.e. the intention of unlawful enrichment coupled with the abstraction and appropriation of property which belongs to another person, in addition to which it includes violence or threat. Article 636 of the 1957 Penal Code defined robbery as an offence committed when a person "with intent to commit theft, or taken in the act of committing theft, uses violence or direct and grave intimidation towards [the victim] or otherwise renders such person incapable of resisting." In short, it defined robbery as theft plus violence.

However, the *exposé des motifs* (*Hateta Zemiknyat)* of Article 670[75] of the 2004 Criminal Code states that using the term 'theft' as an element of the provision on robbery can be inconvenient because a thief nonviolently abstracts what belongs to another person (usually without the latter knowing

it), while the robber does it with violence or under the threat of violence. It was thus found necessary to list down the ingredients of robbery under Article 670 rather than using theft as its element as was the case in Article 636 of the 1957 Penal Code.

The constitutive elements of robbery as stipulated under Article 670 of the Criminal Code are:

- intention to obtain for oneself or to procure to another an unlawful enrichment
- having the objective of facilitating the abstraction of a movable object which belongs to another person
- use of violence or grave intimidation towards a person against any resistance during or after the act of abstraction; or rendering such person incapable of resisting

The *mens rea* of intending "to obtain for oneself or to procure to another an unlawful enrichment" is identical with that of theft, but there is the intention to commit violence and intimidation with a view to "facilitating the abstraction of a movable object which belongs to another person." Although many writers treat the *mens rea* in theft and robbery as identical, the latter includes an additional *mens rea* element of violence or intimidation. One may, of course, consider the *mens rea* of violence or intimidation as instrumental to the *mens rea* of theft. However, motive and intention have distinct subjective particularities despite their interrelation, duly requiring an independent *mens rea* for robbery which can combine the dual attributes of *intent for unlawful enrichment* and *violence*.

The *actus reus* of the offence of robbery involves abstraction of a movable object which belongs to another person, and the use of violence, grave intimidation or other means as stated in Article 670. The phrase "abstraction of a movable object" is meant to distinctly show that the things that are susceptible to theft or robbery are items that can be moved and taken by a thief or a robber. Even where intrinsic elements of an immovable (as envisaged under Article 1132 of the Civil Code) are stolen or robbed, the item separated and stolen from the building becomes a movable object that falls under Article 670 of the Criminal Code. This is substantiated by the inclusion of "a thing detached from an immovable" in the provision that defines theft (i.e. Article 665). We can argue that there cannot be legislative intent to exclude the abstraction of such objects from the *actus reus* in the offence of robbery. And needless-to-say the issues of theft and robbery do not apply to another major domain of property, i.e. intellectual property as its violation is covered by other laws.

One may raise the question as to how imminent and serious the violence or threat should be. The words "use of violence", "grave intimidation", and

"rendering such person incapable of resisting by any other means" (in Article 670) indicate the need for strict interpretation regarding the degree and imminence of the violence or threat. "Violence" is not qualified, and it seems to have been left to the determination of courts. But the qualification "grave" shows the level of the magnitude where the offender uses intimidation or threat.

The last phrase which reads "otherwise [በማናቸውም ሌላ መንገድ] renders such person incapable of resisting" can be interpreted as a threshold for both "violence" and "grave intimidation." Accordingly, the level of violence and grave intimidation should be of such magnitude and degree to render the victim incapable of resisting without risk to his (or another person's) life, person or health. This interpretation resolves the issue of imminence as well because any threat which is not imminent does not deny the victim an opportunity to use various means of resisting the threat.

In *R. v. Hale*[76] the two defendants entered into the house of the victim. "Hale covered the victim's mouth to prevent her screaming while McGuire went upstairs and took a jewellery box. They then tied her up before leaving the house." The issue that arose on appeal was related with the relationship between the act of theft and violence. Hale argued that violence was used to enable him to escape. The court, however, considered the elements of theft and violence in the offence of robbery as continuing.

Similarly, in *R. v. Lockley* (1995), "the appellant and two others took cans of beer from an off-licence and when the shopkeeper approached they used violence." Although it was submitted on appeal that "the theft was complete before force was used"[77] the appeal was dismissed. This issue cannot arise under Ethiopian criminal law because the words "use of violence or grave intimidation . . . during or after the act of abstraction" in Article 670 cover all forms of force during the commission of the offence or thereafter to facilitate escape.

The *material circumstances* and the type of *actus reus* in the commission of the offence may render the offence an aggravated robbery. According to Article 671(1), *aggravated robbery* is said to exist if the offender "has committed the act specified under Article [670][78]" as a member of a gang, threatening the victim to death, by inflicting suffering or grave bodily injury on the victim or any other circumstance which shows the offender's dangerous disposition.

Article 671(2) further defines the two tiers of most serious cases of aggravated robbery which may be punishable with imprisonment for life (under the conditions in paragraph 1) and with the death penalty where the armed robbery stated under paragraph 1 is "committed habitually by a gang". The aggravated cases which are punishable with life sentence exist where "the

offender "has acted together with a gang, [has] used arms or other dangerous weapons, means imperilling collective security or means of particular cruelty or where the acts of violence committed have resulted in permanent disability or death."

6.2 Sentencing in Robbery

Robbery (Article 670) is punishable with rigorous imprisonment not exceeding 15 years. The minimum, i.e. one year, is determined by the general minimum for rigorous imprisonment. Aggravated robbery as defined under Article 671 is punishable with rigorous imprisonment from five years to 25 years[79] or in most serious cases,[80] life sentence or the death penalty may be imposed.

6.2.1 Offence Levels and Penalty Categories for Robbery

Article 17(2) of the Revised Sentencing Guidelines states that the offence levels in robbery are determined by the amount of the money (or property) robbed or intended to be robbed, the gravity of the harm inflicted or intended to be inflicted, and the gravity of the violence. For example, the use of fire arms puts the offence at a higher level while possession of other weapons and violence without arms respectively warrant classification into middle and lower levels. The Revised Sentencing Guidelines provide nine offence levels and their corresponding penalty categories. Annex I of the Revised Sentencing Guidelines also shows the tentative penalty range for the penalty categories of the offence of robbery (Article 670).

The first table under Article 17 states nine offence levels for robbery that fall under Article 670 of the Criminal Code, description of the elements in each level and the corresponding penalty categories:

Offence level	Description of the offence levels for robbery under Article 670	Penalty category
1	• Violence or grave intimidation without weapons, and gain up to Birr 2,000	**11**
2	• Possession of harmful weapons; and violence or grave intimidation and gain up to Birr 2,000; or • Offence level 1 and robbery of Birr 2,001–10,000	**13**
3	• Possession of firearms; and violence or grave intimidation and gain up to Birr 2,000; or • Offence level 1 and robbery of Birr 10,001–30,000; or • Offence level 2 and robbery of Birr 2,001–10,000	**15**
4	• Offence level 1 and robbery of Birr 30,001–100,000; or • Offence level 2 and robbery of Birr 10,001–30,000; or • Offence level 3 and robbery of Birr 2,001–10,000	**17**
5	• Offence level 1 and robbery of Birr [100,000–300,000];[1] or • Offence level 2 and robbery of Birr 30,000–100,000; or • Offence level 3 and robbery of Birr [10,000–30,000][2]	**19**
6	• Offence level 1 and robbery of Birr 301,000–1,000,000; or • Offence level 2 and robbery of Birr 100,001–300,000; or • Offence level 3 and robbery of Birr 30,001–100,000	**21**
7	• Offence level 1 and robbery over Birr 1.000,000; or • Offence level 2 and robbery of Birr 300,001–1,000,000; or • Offence level 3 and robbery of Birr 100,001–300,000	**23**
8	• Offence level 2 and robbery over Birr 1.000,000; or • Offence level 3 and robbery of Birr 300,001–1,000,000	**25**
9	• Offence level 3 and robbery over Birr 1.000,000	**29**

According to Annex 1 of the Revised Sentencing Guidelines, the tentative sentence ranges for the nine offence levels before aggravation or mitigation are as follows:

[1] The range 10,001 to 30,000 is clearly a typing error because the amount cannot be less than the range under Offence Level 4.

[2] The range 100,001 to 300,000 is clearly a typing error because the amount cannot be more than the range under Offence Level 6

Table 10- Offence Levels, Penalty Categories and Tentative Range for Sentencing in Robbery

Offence Level	Penalty Category	Tentative Sentence Range before Aggravation and/or Mitigation
1	11	1 year and 8 months - 2 years and 2 months
2	13	2 years and 3 months - 2 years and 9 months
3	15	2 years and 9 months - 3 years and 3 months
4	17	3 years and 3 months - 3 years and 11 months
5	19	4 years - 4 years and 10 months
6	21	5 years - 6 years
7	23	6 years - 6 years and 10 months
8	25	7 years - 8 years and 4 months
9	29	10 years - 12 years

The determination of offence levels is thus based on the core elements of robbery, i.e. abstraction of property and violence. The factors that determine the offence levels clearly show a rationale thereby making it easy for the court to determine the level which is appropriate for a conviction under consideration. Thereupon, the tentative penalty range and are identified and the ultimate sentence rendered based on the aggravation and mitigating circumstances that are submitted to the court.

With regard to aggravated robbery (embodied in Article 671), the second and third tables under Article 17 state *nine levels* of aggravated robbery that satisfy the elements of Article 671(1) and *two levels* of aggravated robbery that fall under Article 671(2). The nine offence levels that refer to aggravated robbery under Article 671(1) are based on the elements of the provision such as membership of a gang, serious threats with death, etc. in addition to which the amount of money or value of property is taken into account. The penalty category levels for offences under Article 671(1) indicated in the Revised Guidelines are 21, 23, 25, 27, 29, 30, 32, 34, and 36. These penalty categories range from 5-6 years (penalty category 21) to the maximum sentence under Article 671(1), i.e. 25 years of rigorous imprisonment.

Article 671(2) of the Criminal Code states that the sentence may be "rigorous imprisonment for life, or in most serious cases, the death penalty" where offenders have "acted together with a gang, used arms or other dangerous weapons, means imperilling collective security or means of particular cruelty or where the acts of violence resulted in permanent disability or death." The same provision stipulates that habitual armed robbery "by a gang is punishable with death".

The third table under Article 17 of the Revised Guidelines classifies the *actus reus,* the *material circumstances* and the *resultant harm* that constitute

aggravated robbery under Article 671(2)) into two offence levels:

Offence level	Description of the offence levels under Article 6712)	Penalty category
1	• Acting together with a gang; or • Using arms or other dangerous weapons imperiling collective (public) security; or • Using means of particular cruelty ; or • Where the acts of violence committed have resulted in permanent disability or death	38
2	Armed robbery committed habitually by a gang using means of particular cruelty that causes death	39

6.2.2 Issues Discussed in the Draft Guidelines

Section III(2) of the Draft Sentencing Guidelines for Robbery[81] states the need to examine various issues related to sentencing, and particularly

- the *proportionality* of a sentence with the commission of the offence and the previous character of the offender
- *consistency* of sentences among cases of similar gravity, offenders of similar previous records and cases that share similar circumstances of commission
- *predictability* of sentences
- *impartiality* in sentencing
- *transparency* in the determination of punishment
- the schemes of *accountability* of judges

The Draft Guidelines[82] have surveyed sentences in 60 cases of robbery. In the 26 of the cases no ground of aggravation was submitted by the public prosecutor. Aggravated sentence was requested on the ground of recidivism in 16 cases. In four cases the public prosecutor merely requested that proportionate punishment be imposed. Technically, the latter can be assimilated to the category of no aggravation. The grounds of mitigation invoked by defendants in the cases covered in the survey included the following:

- responsibility in supporting members of the family, elder parents, and dependent relatives
- AIDS or HIV-positive status
- student status in college or high school
- having children of tender age
- lack of supporting family or relatives
- repentance
- education and reform while in prison

The sentences surveyed indicate the following:

- thirty sentences generally include positive statements about the previous character of the defendants
- few files state that the offenders are recidivists
- some sentences state that the sentence is aggravated because
    - offenders have entered into the victims' house and threatened the victim
    - the offence was committed in darkness
- various sentences state the following as grounds of mitigation:
    - youth of the offender
    - low level of education
    - other grounds

The survey analyzes five themes related with the grounds of mitigation and aggravation:

1. previous character
2. gravity of the offence
3. impartiality, predictability, transparency of the sentence
4. level of aggravation of sentences
5. the validity of considering the defendants' reform while in prison.

The Draft Guidelines concluded that the sentences surveyed lacked proportionality and consistency. Section IV of the survey suggested preliminary schedules that are indicative in the determination of sentences. The Draft Guidelines suggested an indicative schedule that states six tiers of tentative sentences with a difference of one year between them based on the gravity of the offence. The Draft had also recommended four penalty categories of three months per level so that they can be used to increase or reduce the tentative sentence on the basis of aggravating and mitigating circumstances:

Level 1—grave intimidation and violence: one to two years;

Level 2—possession of dangerous weapons and grave intimidation: two to three years;

Level 3—possession of dangerous weapons and violence: two to three years;

Level 4—possession of dangerous weapons and grave violence: three to four years;

Level 5—minor bodily injury and/or moral harm without possessing dangerous weapons: four to five years;

Level 6—possession of dangerous weapons and inflicting light bodily injury and/or moral harm: five to six years.

The schedule in the Draft Sentencing Guidelines had suggested that aggravated robbery that falls under Article 671(1)(b) can be classified into Levels 7 (punishable with six to seven years) or various levels that may extend up to Level 16 (punishable with 18–19 years). According to the Draft, this variation can depend on the level of gravity of the *actus reus* and material circumstances as envisaged under the provision that ranges from possession of arms and inflicting minor bodily injury and/or moral harm (Level 7), to the possession of arms and inflicting grave bodily injury and/or moral harm (Level 16).

The schedule then recommended four penalty categories of increased sentence within each level based on the following:

Penalty Category 1 (within each level)—punishment from the base penalty up to an increase of three months in case of no criminal record;

Penalty Category 2 (within each level)—increase of three to six months from the base penalty where the offender has a single nongrave criminal record;

Penalty Category 3 (within each level)—base penalty plus six to nine months where the offender has two records of nongrave offences;

Penalty Category 4 (within each level)—base penalty plus nine to 12 months where the offender has a record of more than two offences.

According to the Draft Guidelines, aggravated robbery which satisfies the elements of Article 671(2), first paragraph can be classified as Level 17 punishable with life sentence, and aggravated robbery committed in violation of Article 671(2), second paragraph as Level 18 punishable with death.

After the determination of the specific level (in the suggested schedule) which is appropriate to the gravity of the criminal offence, the Draft Guidelines [83] suggest that the court can resort to the computation of aggravating and mitigating circumstances submitted respectively by the prosecution, the defence and the ones that are recognized by the court.

Review Exercises

1. In *R. v. Robinson* (1977), "The defendant threatened his victim with a knife in order to obtain payment of money he was owed. He was convicted of robbery, but the conviction was quashed by the Court of Appeal because the defendant lacked dishonesty according to the Theft Act; he fell within section 2(1)(a) of the Act because he honestly believed he had a legal right to the money, even though he may have known that his mode of seeking repayment was dishonest."[84] Assume that this happened in Ethiopia, and give your opinion whether the defendant could have been acquitted under the Ethiopian Criminal Code.

2. Can stealing part of the human body from a hospital be regarded theft under Article 665? Compare your opinion with the following case: "In *R. v. Kelly and Lindsay* (1998), the first defendant was an artist who had been granted access to the Royal College of Surgeons so that he could draw anatomical specimens. Aided by the second defendant, a junior technician at the College, he had removed approximately 35 human body parts from the Royal College Surgeons. They were convicted of theft and their appeals were dismissed."[85]
3. X lends a book to B and the latter refuses to return it. Is there theft under Article 665?
4. In *Lawrence v. Metropolitan Police Commissioner* (1971), "an Italian student who spoke little English" took a taxi after his arrival in London. He showed "the driver a piece of paper bearing the address of the family with whom he was going to stay. This was not far from the airport, and the fare should have been about 50p. When they arrived, the student tendered a £1 note, but the taxi-driver said that it was not enough. Being unfamiliar with the British currency, the student held out his wallet for the taxi-driver to take the correct fare, upon which the driver helped himself to a further £6. The driver was convicted of theft, and appealed on the basis that he had not appropriated the money because the student had consented to the taking of it. This argument was rejected by the House of Lords and his conviction upheld."[86] Would the same position be taken under Article 665?
5. *In R. v. Morris* (1983), the defendant "took goods from the shelves of a supermarket, and switched their price labels with those of cheaper products. He then took them to the checkout and was charged with lower price on the new labels, which he paid. . . ."[87] Is there theft under Art 665?
6. In *R. v. Marshal* (1998), "the defendants had obtained used tickets from the underground from members of the public and resold them. The activity was causing London Underground to lose revenue".[88] Is there theft under Article 665?
7. "In one case the victim gave an acquaintance [a] wallet to hold temporarily because [his] arms were full of shopping bags. The acquaintance then refused to return the wallet and this constituted an appropriation."[89] Is there theft under Article 665 of the Criminal Code?
8. H and W are wearing white traditional dresses. They are going to a relative's wedding. While they were walking on the pavement, D who was driving splashed muddy water over their clothing thereby seriously soiling the dresses of the couple. Has an offence or petty offence been committed if D had seen the likelihood of the event but believed that they would run to the corner of the pavement before his arrival at the spot?

Case 16[90]

Addis Ababa High Court (Third Division)

Criminal Case No. 87/57

Judges: Ato Techola Wolde Kidan, Ato Haile Wolde Giorgis, Ato Tibebu Abraham

Public Prosecutor v. Assefa B.

Penal Law—Homicide—Causal relationship between act of accused and death—Elements of aggravated homicide— . . . Arts. 24, 522, 523 [of the 1957 Penal Code].

Trial on a charge of aggravated homicide under Article 522 of the Penal Code, which alleged that defendant caused the death of the deceased by beating him on the head.

Held: Defendant found not guilty of violating Article 522; found guilty of violating Article 523.

1. There is a causal relationship under Article 24 of the Penal Code where the bodily condition that resulted in the death of the deceased was caused by the act of the defendant.
2. It is the normal course of things for a head injury caused by the defendant to produce a flow of blood into the brain.
3. Where death is concurrently caused by tetanus germs, the germs will not constitute an intervening cause interrupting the relationship between the act of the defendant and the death of the deceased when the germs were caused by the defendant's act and the deceased could not have suffered from such germs had it not been for the injury inflicted by the defendant.
4. A necessary element [of aggravated homicide] under Article 522 of the Penal Code is premeditation to kill.
5. Where there is no evidence of premeditation to kill, defendant cannot to found guilty of aggravated homicide under Article 522 of the Penal Code, but will be convicted [for ordinary homicide] under Article 523 of the Penal Code.

Judgment

In the charge brought under Article 522 of the Penal Code, it is alleged that on September 13, 1964, at about 4 p.m., the defendant started a quarrel with the deceased, Yasin Yusuf. The place was near Miazia Twenty-Seventh Square in Addis Ababa. The defendant is said to have thrown a stone at the deceased thereby injuring him on the forehead. Then he knocked him down and beat him with his fist after which he tried to escape. But he was apprehended by neighboring people. Yasin died on September 23 of the same year, allegedly from the effect of the above beating.

Since the defendant denied committing the crime, the public prosecutor was instructed to produce witnesses. Two prosecution witnesses appeared in court and the following is a summary of their statement.

The first public witness testified that on September 13, at 5 p.m. she saw defendant running, followed by the deceased. The latter was injured on his head.

After deceased caught the defendant, who was trying to escape, he (deceased) fell down. Then the defendant hit deceased repeatedly with his fist on the back of the neck. After people took them apart defendant tried to escape but was arrested by a policeman.

The second witness said she did not know what the cause of the fight was. She heard the deceased crying as a result of which she walked out of her house and saw the two persons fighting. The deceased carried on his arm a new piece of cloth which was for sale. He was crying for help. Then she took the cloth from him. A little later he was knocked down by the defendant who also beat him repeatedly on the back of the neck. The deceased was bleeding from his forehead even earlier. Thereafter they were separated by bystanders.

Since the third public witness is said to have died, the public prosecutor requested the Court to record the statement she had made at the police station.

The defendant was told to name his witnesses but said he had none.

Following this the doctor who had performed a post mortem examination, Doctor Codoleowoncini of Menelik II Hospital, was summoned to court. He said he examined the corpse on September 23, 1964. His findings included a wound on the left side of the head, caused about two weeks before the examination; the tongue of the deceased showed a black stain, and the corpse was bent at the back. The latter was caused by germs called tetanus which blocked the blood vessels. The lungs were also infected by the same germs. Moreover, blood had run into his brain. To sum up, he said that the tetanus germs, which disrupted the normal circulation of blood and the functioning of the lungs, were the result of the injury the deceased sustained on his head. The flow of blood into the brain also contributed to the death. The injury to his head could have been caused by a stone or stick. The doctor could not exactly say what the chances of survival would have been had the deceased been treated immediately after he was injured.

Subsequently, both parties concluded their arguments.

It has been testified by the two prosecution witnesses that the defendant beat up the deceased. Nevertheless, the former did not make any defence. According to the said witnesses the defendant beat the deceased repeatedly and this is further strengthened by the testimony of the doctor who stated that the injury was caused by a stone or stick and that the injury was the cause of death.

Considering the statement of the doctor and the circumstances of the case the court is confronted with the following questions:

1. Is the cause of the death the criminal act of the defendant or an extraneous event?
2. Was there an interruption in the effect caused by the defendant?

To find answers to the above, one should turn to the Penal Code Article 24 which states:

> "In cases where the commission of an offence requires the achievement of a given result, the offence shall be deemed to have been committed

> only if the result achieved is the consequence of the act or commission with which the accused person is charged.
>
> This relationship of cause and effect shall be presumed to exist when the act or omission within the provisions of the law, would in the normal course of things produce the result charged."

In view of this, we see that the beating was the cause that resulted in the death of deceased. This is supported by the fact that blood ran into the brain of deceased because of the head injury that was caused by defendant. This in the opinion of the court is a normal course of things. Although it may be said that the tetanus germs were concurrent causes, it cannot be a valid argument since the germs themselves were brought about by the act of the defendant.

One could say that there was no causal relationship between the act of the defendant and the death of Yasin only if the germs were the result of an extraneous cause—i.e. a cause other than the act of the defendant. If that were true, one could have validly concluded that the death was caused by the extraneous event because then there would be an interruption in the relationship between the act and the death of Yasin.

Nevertheless, since the germs were caused by the defendant's act and since he could not have suffered from such germs, had it not been for the injury that he sustained, there was no intervening cause.

Nor did the concurrent effect by itself cause the death since it has been proved that the flow of blood into the brain and the germs that resulted from the injury caused the death.

Moreover, it was not clear from the statement of the doctor, whether the deceased could have survived had he been treated early.

We, therefore, conclude that the cause of death was the criminal act of the defendant.

However, the defendant is charged under Article 522, a necessary element of which is premeditation to kill. But the charge does not say anything as to whether the defendant killed the deceased after premeditation to do so.

From the testimony of the witnesses it has been ascertained that the defendant was running and the deceased was chasing him. It was after the latter caught him that the defendant beat the deceased. This shows that the fight was only accidental and it has not been proved that the defendant had any revengeful motives. Therefore, we find the defendant guilty of [ordinary homicide] violating a different provision, Article 523 of the Penal Code.

The public prosecutor requested the court that his right to appeal be reserved on the ground that the Court changed the charge, and asked that sentence be passed.

The defendant, on the other hand, prayed that the court consider the circumstances of the case and do him mercy.

Sentence

The deceased is proved to have died from the criminal act of defendant. On the other hand, it has not been shown that there was a prior quarrel between the two

and thus we find no ground for aggravation. We, therefore, sentence the defendant to seven years imprisonment from the date he was arrested, September 13, 1964.

December 26, 1967

Questions

1. Analyze causation in the case.
2. Comment on the court's reasoning and decision in classifying the case into ordinary homicide and not aggravated homicide.

Case 17[91]

Addis Ababa High Court, First Division

Criminal Case No. 359/60

Judges: Ato Yeshewawork H., Ato Goitom Beyen, Major Tadesse Abdi

Public Prosecutor v. Yeshigeta A.[3]

Criminal law—Offences committed by police officer in discharge of duties—Penal Code Art. 422(b) [of the 1957 Penal Code]

Defendant was charged with retaining possession of the private complainant's pistol, seized in the course of his police duties, with intent to obtain unlawful enrichment thereby.

Held: Defendant convicted.

1. Defendant has violated Pen. Code Art. 422(b) if he as a public servant, commits the act with intent to obtain an unlawful enrichment for himself or another, and the object retained by him came into his possession in the discharge of his official duties.
2. Even if it could be argued that he is not a public servant, Art. 422 applies to him pursuant to Pen. Code Art. 410.
3. As a policeman the defendant had a duty to deliver to the authorities any object seized on duty.
4. Defendant's use of the pistol as a pledge to borrow money showed his intent to obtain unlawful enrichment.
5. Under Art. 13(2) of the Police Proclamation of 1942, policemen are deemed to be on duty at all times.
6. Regardless of the propriety of seizing the pistol by force, the defendant gained possession of the pistol in the discharge of his duties.

Judgment

The defendant, Private Yeshigeta, was charged with the offence under Article 422 of the Penal Code. The charge stated that defendant in order to obtain for himself an undue material advantage misappropriated the pistol of Bedase

[3] Affirmed, Criminal Appeal No. 1032/60, Supreme Imperial Court, Div. No. 2.

Temesgen, the private complainant, which came into his hand, while he (the defendant) was executing his duty as a policeman, on August 30, 1967, around 1 a.m.

The defendant pleaded not guilty to the charge. Witnesses for the prosecution were heard.

The witnesses testified that they saw the defendant and the private complainant leaving a bar together on the night of the alleged crime. The private complainant testified to the effect that he left the bar with the defendant on the night in question and shortly afterwards the defendant asked him to show him his permit for the pistol which he (the private complainant) was carrying at the time. He then asked the defendant not to report the matter to the authorities, but the defendant insisted on reporting it. When they came near the private complainant's house, he tried to escape. But the defendant caught him and while they were struggling the pistol fell down. At this point two policemen arrived at the scene and caught the private complainant. The defendant picked the pistol up and showed it to the policemen. The private complainant reported the incident to the police. After a few days the defendant sent him [Birr] 300.00 through mediators, and he dropped the charge against the defendant.

This was the testimony of the private complainant. The third witness testified that he heard the private complainant shouting that some people were trying to take away his pistol. He said he saw the private complainant struggling with a man in a police uniform. According to Witness No. 3, two other policemen then arrived at the scene and went away with the private complainant. The person who was struggling with the complainant returned to the place of the fight with a light and, after searching for some time, picked up a pistol from the ground. Witness No. 4 identified the pistol which was produced as an exhibit by the prosecution, as the one which the defendant has shown him. He testified that the defendant has asked him to find him a loan of [Birr] 100.00 using the pistol as a pledge. He said that the defendant told him that the pistol belonged to him. He testified that he gave the pistol as a pledge and borrowed some money for the defendant. Witness No. 2 testified that on the date of the commission of the alleged crime the defendant and the private complainant had gone to the police station and, when the defendant complained that the private complainant fired a shot at him, the private complainant reported that the defendant together with his friend took his pistol from him. He further testified that the defendant disappeared from the police station. After the case for the prosecution was concluded, the accused was called upon to proffer his defence. But the accused stated that he had no evidence to put forth.

Article 422, the violation of which the defendant is charged with, states:

(a) Any public servant who, with intent to procure for himself or another an undue material advantage:

(b) Misappropriates such objects or securities which have been entrusted to him or which come into his hands by virtue of or in the course of his course of his duties, is punishable with rigorous imprisonment not exceeding ten years, and fine not exceeding ten thousand dollars.

We have seen the charge and the law cited as well as the case of the prosecution. The court should now answer the question of whether or not the

defendant misappropriated an object which had been entrusted to him or which had come into his hands in the course of his duties, with intent to provide for himself an undue material advantage.

In order to answer this question, one has to examine the requirements of the law.

A [person] is guilty of the offence under Article 422 only if the following requirements are satisfied:

(1) the defendant must be a public servant;
(2) the defendant must have committed the alleged crime with intent to procure for himself or another undue material advantage;
(3) the misappropriated object must have come into the hands of the defendant or must have been entrusted to him by virtue of or in the course of his duties.

In examining the first requirement one has to refer to Article 410 (1) of the Penal Code which says, " . . . members of the armed or police forces are subject to the punitive provisions which follow where, in the discharge of their office, duties or employment, they commit any of the offences under this chapter." Therefore, since the defendant is a member of the police force, the law applies to him . . . . Second, the charge against the defendant is that he misappropriated the pistol of the private complainant. The testimony of witness No. 1 and the other prosecution witnesses show that the defendant took the pistol from the private complainant. The pistol was seized by force and was given as a pledge by the defendant for the loan he took. The facts that the defendant took a pistol which did not belong to him and that he gave the pistol as a pledge for the loan show that he committed the offence with intent to procure for himself an undue advantage.

The defendant, as a member of the police force, has the duty to hand over to the authorities every object which he finds, let alone an object which he has seized from another person. The fact that he ignored his duty and that he used the object for his own purposes shows that he has acted with intent to procure for himself an undue material advantage and thereby committed an offence. Thirdly, we must examine the issue of whether or not the object was entrusted to the defendant (a public servant), or came into his hands by virtue of or in the course of his duties.

The defendant is not accused of misappropriating an object which has been entrusted to him; no evidence was produced to this effect. So, let us look at the second requirement. Did the pistol come into the hands of the defendant by virtue of or in the course of his duty? The fact the defendant asked the private complainant to show him his license to carry the pistol shows us that the defendant knew that carrying a pistol without authorization is illegal and that it was his duty as a member of the police force to enforce the law. At this point a question may be posed as to whether or not the defendant was on duty at that particular time. Article 13 (2) of the Police Proclamation, No 6 of 1942 states that "every police officer shall be deemed to be on duty at all times . . ." Therefore, since the defendant is a member of the police force and since he is on duty at all times, he is deemed to be on duty when he committed the offence with which he is charged.

Therefore, since the defendant was on duty at the time of the commission of the crime, and the private complaint had no license to carry the pistol and since the defendant believed that he was exercising his duty as a policeman when he took the pistol by force from the private complainant, we conclude that the pistol came into his hands in the course of his duty irrespective of the fact that use of force by the defendant to obtain the pistol may or may not be legal.

The defendant failed to hand over to the authorities the pistol he took from the private complainant. Instead he took the pistol home and afterwards gave it to a creditor as a pledge for the money he borrowed. This shows that the defendant committed an offence in that he misappropriated the pistol with intent to procure for himself an undue material advantage. We have, therefore, found him guilty of the offence under Article 422 (b) of the Penal Code.

Sentence

It has been proved that the defendant, with intent to procure for himself an undue material advantage, misappropriated an object which came into his hands in the course of his duty. After considering the provisions of Articles 83 and 422 (b), we hereby sentence the defendant to 5 years rigorous imprisonment staring form the day of his arrest, December 7, 1967 and to a pay fine in the sum of [Birr] 2000. If the defendant fails to pay the fine he shall serve two more years of rigorous imprisonment instead, which brings the total to seven years of rigorous imprisonment.

April 1, 1969.

Questions

1. State the provisions of the 2004 Criminal Code that have substituted the provisions of the 1957 Penal Code that are stated in the decision of the case. Explain the differences between the provisions, if any.
2. Determine the punishment in light of the Sentencing Guidelines issued by the Federal Supreme Court.

Case 18[92]

Federal Supreme Court of Ethiopia

Criminal Appeal File No. 35768, November 7, 2008

Judges: Dagne Melaku, Amare Amonge, Kedir Ali

Appellants: 1. Demissew Z., 2. Yakob H.

Respondent: Federal Public Prosecutor

Criminal law—participation in the commission of crime, grave wilful injury, an attempt to commit aggravated homicide, and sentencing:—Arts. 27, 23(1), 64, 88(2), 184, 539, and 555 Criminal Procedure—conviction of an appellant for an offence not charged:—Art. 113(2) Criminal Procedure Code

Held: Judgment of the Federal High Court as relating to the first appellant modified; judgment of the Federal High Court relating to the second appellant reversed.

Summary of the Judgment

The Public Prosecutor charged both appellants jointly for two offences, namely an attempt to commit aggravated homicide (arts. 32(1)(a), 27(1), and 539(1) (a) of the Cr. Code) and grave willful bodily injury (arts. 32(1) (a) and 555(a) of the Cr. Code). Particulars of the first charge indicate that Demissew Z., who had been threatening and intimidating W/t Kamilat M., for not being willing to continue to be his lover, conspired with Yakob H. to murder her. According to their agreement, the latter was to approach the victim, at the agreed time, by pretending to have been intoxicated with a view to divert her attention at which time the former was to attack her with sulfuric acid. They executed their plan at 10 p.m. on the 28th of [Tahsas]1998 E.C. when the victim was going home with Zubeyda M. and Zeyneba M. (her sisters). As stated on the charge, Yakob approached them and acted as agreed when Demissew came from somewhere threw the sulfuric acid at the victim's face causing serious injury on her head, left ear, her nose, and chest endangering her life. Particulars of the second charge indicate that the appellants, in violation of Arts. 32(1)(a) and 555(a) of the Criminal Code, caused serious bodily injuries on Zubeda M. and Zeyneba M. by the acts referred and at the time and place indicated in the first charge.

The trial court convicted the accused persons under both charges and sentenced the first appellant with death penalty and the second with 20 (twenty) years of rigorous imprisonment. Both appealed to the Federal Supreme Court (hereafter to be referred as the court) seeking for reversal of conviction and sentence passed by the trial court. The court ordered their applications, which were filed separately, to be [joined] for the issues raised in both appeals are related and are from the same judgments.

During the appeal hearing Demissew stated that the lower court wrongly convicted and sentenced him with death penalty for an offence he has not committed. He was suspected for having committed the offence he has not committed. He was suspected for having committed the offence merely because of the misunderstanding he has had with the victim's family. Also, he brought to the attention of the court that his defense of alibi was not considered by the lower court. Furthermore, he stated that Kamilat did not testify against him and that Zubeda and Zeyneba, after stating that they do not know who did the criminal act, changed their mind and testified against him before court of law; that the trial court did not allow the statement they made about the matter on a Television to be introduced as his evidence; and that he was arrested when he went to Hayat Hospital where Kamilat was admitted. . . .

The court identified the following issues as calling its attention:

1. Whether the prosecution's evidence proves the accusation regarding Demissew's acid attack on the victims in both charges?
2. Whether the evidence produced by Demissew was capable of casting a doubt on the prosecutor's case?
3. [If it was] Demissew … who did the wrongful act on the victims:
   3.1. Whether his act on Kamilat would be an attempt for aggravated homicide? If not so, under which law does his act fall?
   3.2. Whether his act on Zubeda and Zeyneba would be an act of grave willful bodily injury?

3.3. If found guilty under both charges, what should be the appropriate punishment?

4. Whether the prosecution's evidence show that Yakob H. was involved in the commission of the crimes and whether there is a law under which he is to be convicted for the wrongful act committed against the victims?

The court entertained the first issue as follows. The prosecutor produced both documentary and oral evidence to prove that Demissew committed the alleged act. Whereas several witnesses were produced by the prosecutor, only the victims are eye witnesses, whose testimony the court considered. As can be understood from Kamilat's testimony made during the preliminary inquiry, she could not identify who committed the act and evidence did not testify against Demissew. The other two victims, Zubeyda and Zeyneba, after taking oaths, testified that Demissew, whom they knew before, splashed the chemical over their face. One of them testified that she followed him raising a cry for help. Both testified uniformly as to what he wore at the time of the commission of the crime. The medical certificates issued by Yekatit 12 Hospital indicate that the three victims were seriously damaged at different parts of their body and Kamilat's face is totally disfigured by a chemical having strong acidic nature. Based on these items of evidence of the prosecutor, the court is convinced that the eye witnesses and the medical evidence [have] established that it is Demissew who [threw the acid on the face of the victim].

Next, the court considered the second issue: whether Demissew had rebutted the case of the prosecutor established as above. In support of his defense of alibi, Demissew called his sister, Yelushal Z. who testified that he and she, with other persons, were at Madingo's Night Club at the time when the crime was allegedly committed. . . . That the appellant called his sister as his witness but not others who are said to be at the Night Club; and his sister's statement that she received the message via another person, where he could directly communicate her and that they met within an hour after she got his message made the court to doubt the credibility . . .

The court considered two facts that seemingly militate against the prosecutor's case if they could cast doubt on the prosecutor's case. The first one [relates to] where the three victims were walking together at the time of the commission of the crime [and] how two of them can [see] the doer of the act but not the other one. For the court, in the light of the fact that the injury on Kamilat was more severe than the injuries on the two, it is possible for the former not to be able to see and recognize the doer while the other two who suffered from a lighter injury [could] be able to focus on and identify the doer. There would have been a contradiction had Kamilat testified that someone else did the act [while] her sisters testify against Demissew.

Hence, the court could not [find] this fact to be helpful to the appellant. The second fact that appears to support the appellant but rejected by the court is that he went to the Hospital where Kamilat was admitted to visit her. As alleged by the appellant, he went there when he heard about the accident that occurred to her [and this shows that] he was not involved in the commission of the crime. Though it is logical to think that he would not have gone there had he been involved in the commission of the crime, the court does not accept this fact, . . . and by itself, to

be adequate to cast a doubt on the prosecution's case [which is] proved by strong eye witness testimony.

The court treated the third issue, which is whether Demissew's wrongful act can be treated as an attempt to kill Kamilat, as follows. As can be understood from its judgment, the lower court convicted the appellant for attempted homicide for he had been threatening her life at different times before the commission of the crime, which was considered by the lower court to indicate the intention of the doer, and that experts testified the chemical thrown at her face has the ability to kill a human person, which made the court to consider the same as a means being used by the actor to kill the victim.

Although the prosecutor produced a written document prepared by the Ethiopian Drug Administration and Control Authority which indicates that the chemical splashed over the face of Kamilat is capable of causing death, the chemical about the property of which the Authority wrote is not a sample taken directly from what was thrown at Kamilat's face. Rather it was taken from a chemical in a container which was found, as testified by one of the prosecutor's witnesses, near the place where the crime was committed on the morrow of the commission of crime. That the chemical found in the said container is a sulfuric acid has been proved. What is questionable is whether the chemical examined by the Authority and found to be sulfuric acid is the same as what Demissew used to attack Kamilat; how can one know whether the container and the chemical in it from which the sample was taken was left behind by Demissew? Prosecutor's evidence [does not show that] Demissew was in possession of the container [or that] he left the container there. The Prosecutor's witness who is said to have got the container with the chemical in it does not know whose container it is. Nor does he know who left the container there. Furthermore, the two eye witnesses of the prosecutor testified that Demissew carried the chemical that he splashed over them by a container different from that said to have been found near the place of the commission of the crime.

In the light of these facts, to say that the chemical examined by the Authority is the same as that Demissew used to commit the crime, the prosecutor should establish the fact that the chemical used to attack the victim was taken from the container said to have been found by the prosecutor's witness. That a container which contained a sulfuric acid was found near the place where the crime was committed in and by itself does not conclusively indicate that the chemical Demissew threw at Kamilat's face was taken from that container. In so far as the fact that the chemical examined by the Ethiopian Drug Administration and Control Authority is the same as that Demissew used to attack the victim is not proved, the document issued by the Authority attesting that the chemical examined is sulfuric acid and that it has the ability to cause death could not be used as evidence against Demissew. The relevant evidence is the certificate issued from Yekatit 12 Hospital which indicates that the damage on Kamilat's face is caused by a chemical having strong acidic property. The document, however, does not indicate that the said chemical is capable of causing death where poured on the outside part of the body. Hence, the appellate court found the lower court's finding that the chemical used to attack Kamilat has the ability to cause death . . . as erroneous.

The court considered the issue of intention as follows. The lower court concluded that Demissew had an intention to kill Kamilat from the fact that he had been threatening her life repeatedly as testified by some four witnesses of the prosecutor. The first two witnesses, Kamilat's sisters testified before the trial court that Demissew had been threatening Kamilat repeatedly for refusing to continue to be his lover. The court observed that the reality as regards the relation between Kamilat and Demissew is quite different from what is testified by Kamilat's sisters. Kamilat herself testified during the preliminary inquiry that they had [a love relationship] for some five years which, she stated, was terminated one year [ago]. Yenemebrat, Demissew's witness, testified that Demissew and Kamilat rented her house and were living as husband and wife form February 2004 to 2006; that she, upon their request, handed over Birr forty thousand (40,000) to Kamilat's family introducing herself as Demissew's mother; that the two were living peacefully; and that Kamilat's brother knew their relation. Tezerash W., Demissew's witness, testified that she knew the two as lovers and that Kamilat had been providing care to Demissew when he was admitted to a hospital. Furthermore, several pictures produced by Demissew clearly established that the two had been living [in a love relationship] peacefully. In the face of this ample evidence showing the peaceful relation between Demissew and Kamilat, the court could not find the testimony made by Kamilat's sisters trustworthy.

Another reason for the court not to consider their testimony convincing is the way they acquired the knowledge about the fact they testified. One of the two stated that she heard Demissew stating . . . threatening words to Kamilat during their telephone conversation. She heard these words for Kamilat used to put her telephone into a loud speaker mode so that she could listen what was being said to Kamilat. The court did not accept this testimony for the witness, apart from having heard the words, could not certainly know that Demissew was speaking and stating these words to Kamilat. The second one did not testify that she directly heard Demissew while threatening Kamilat's life. Rather she stated Kamilat informed her that Demissew was threatening her which the court rejected being a hearsay.

Bezawit W., a friend of Kamilat and witness of the prosecutor after stating that she does not know Demissew nor does she know that Demissew and Kamilat had been lovers, told to the lower court that she received a call from someone sometime in 1998 E.C., who identified himself by the name Demissew and told her that he would kill Kamilat. The court did not accept her testimony noting that as she had never seen him physically or heard his voice before he called her, she could not tell that the one who called and spoke to her was Demissew Z. . Also, she testified before the trial court that she met Demissew at Hilton hotel upon his request at which time he told her that he would kill Kamilat. The court found it difficult to believe her testimony for it doubts the fact that she met him at Hilton hotel in the face of the facts that he is a stranger to her; that it is not likely for her to be willing to meet one who called and told her that he would kill Kamilat; and she does not know his relation with Kamilat. She stated before the trial court that she did not communicate to Kamilat what he, through a telephone and in person, told her, which [renders] the court's doubt on her testimony stronger. Moreover, it is at the time when Kamilat and Demissew were living peacefully as lovers that

the witness said to have received the call from Demissew which shows the inaccuracy of her testimony. For these reasons, the court concluded that Bezawit's testimony did not show that Demissew had the intention to kill Kamilat.

The court analyzed the testimony given by Kamilat at the preliminary inquiry stage of the case. Her testimony shows that she had been with him not voluntarily. Rather, it was because he forced her and threatened her to take measures on her family if she refused. She stated that he called a week before the incident and told her that he would go to prison because of her. To the court, her testimony does not clearly show that he threatened her life. It shows only that he was thinking of committing a crime, which need not necessarily be homicide. Had he intended to kill her, he would have added the chemical in a drink or food with a view to cause her consume it instead of throwing the chemical on the outside part of her body (as there is no evidence that shows doing so has the ability to result in her death) or he would have used another means of killing. His threatening words and what he actually did—throwing acidic chemical at her face—would only lead one to conclude that what he had in mind while threatening Kamilat was to cause a bodily injury with a view to disfigure and damage her beauty. That the chemical caused a grave injury on her face alone does not suffice to say that Demissew did the act with an intention to kill. The medical evidence apart from indicating that the injury on her face is serious does not show that there is a risk of death.

Finally, the court concluded for neither the state of mind nor the circumstances of the commission of the act does satisfy the requirements under Article 539(1)(a) of the Criminal Code; [and] what Demissew did cannot be treated as an attempt to commit aggravated homicide. Nor is there a factual or legal element to conclude that ordinary homicide envisaged under Article 540 of the Criminal Code is attempted. The court found that Demissew's act falls under Article 555(a) and (b) of the Criminal Code, the provision that punishes causing a grave bodily injury, and convicted him under the same by virtue of Article 113(2) of the Criminal Procedure Code.

As regards the second charge—causing grave willful injury on Kamilat's sisters—, the court confirmed the finding by the lower court as it is persuaded by the prosecution's evidence.

The court assessed the sentence against the appellant as follows. Article 555 of the Criminal Code, the legal provision under which the appellant is found guilty, provides for punishment ranging from one year simple imprisonment to fifteen years rigorous imprisonment based on the circumstances of the case and gravity of the injury. To determine the appropriate sentence among the several options available, the court began from the principle under Article 88(2) of the Criminal Code which states the penalty to be assessed according to the degree of individual guilt taking into account the dangerous disposition of the criminal, his antecedents, motive and purpose, his personal circumstances and standard of education, as well as the gravity of the crime and the circumstances of its commission. The court noted that aggravating and mitigating circumstances should be taken into consideration as well.

The concurrent nature of the crime for which the appellant is found guilty is an aggravating factor as provided under Articles 64 and 184 of the Criminal Code.

The court derived the dangerous disposition of the criminal from his selection of such a dangerous chemical having strong acidic property which resulted in a permanent disfigurement on Kamilat's face. His attack on her innocent sisters without having any reason to do so is another aggravating factor. His calculated act to disfigure Kamilat, who had been his lover, and spoil her attractiveness is considered by the court to show his cruelty. The court found the aforementioned [as] aggravating circumstances under Article 84(1) (a) of the Criminal Code. The court could not see any mitigating circumstance.

Because the appellant is found guilty for two crimes under two charges the court, based on Article 184(1) (b) of the Criminal Code, decided to first determine the sentences appropriate to each crimes and then sum up. The court indicated that the ceiling of the punishment to be imposed for the two crimes is 25 years— . . . . Accordingly, the court by considering the above mentioned aggravating factors sentenced the appellant with 15 years—the maximum punishment under article 555 of the Criminal Code—for the crime he committed against Kamilat. As regards the punishment for the crime under the second charge, the court observed that the injury caused on the victims is not as severe as that on Kamilat and decided five years rigorous imprisonment as appropriate for the crime committed. Thereafter, the court added up the two sentences and decided Demissew to be punished with twenty years of rigorous imprisonment. . . .

Questions

1. The decision of the court on the second appellant has been omitted. Give your opinion on the possible judgment which you assume has been rendered against the second appellant, Yakob H. State your reasons.
2. Do you support the High Court's or the Supreme Court's decision? State your reasons.
3. If you were (a) the public prosecutor or (b) the defence counsel, would you protest against the legal analysis of the Supreme Court and lodge a petition to the Cassation Division of the Federal Supreme Court?

7. Petty Offences: Overview

Part III of the Criminal Code titled "Code of Petty Offences" embodies two Books. The General Part of the Code of Petty Offences (Book VII) deals with liability to punishment (which substantiates Book I of the Criminal Code, i.e. Articles 1–86, regarding general principles about crimes and offenders), and rules that govern penalties.[93]

7.1 Applicable Provisions among Articles 1–86

Title I of Book VII embodies six provisions (Articles 734–739) regarding the applicability of the various legal provisions in the General Part of the Criminal Code (Articles 1–25). The provisions under Title II (i.e. Articles 740–745) state that

- Preparatory acts (Article 26) and attempts (Article 27) are not punishable in petty offences (Article 740(1)).
- Secondary participation (incitement and complicity) and being accessory after the fact are not punishable in petty offences (Article 740(2)) thereby restricting liability to principal participation (Article 32).
- Juridical persons are not punishable for incitement or complicity unless "the official or employee violates laws, regulations or directives as a petty offender in accordance with Article 32" of the Criminal Code.[94]
- The provisions regarding the young (Articles 52–55), mass media (Articles 42–47), absolute irresponsibility and diminished responsibility (Articles 48–50), and expert evidence (Articles 51, 54) shall apply in petty offences.
- The rules laid down regarding *mens rea* (intention and negligence) under Articles 57 to 59 are applicable to petty offences subject to the qualification stated under Article 741(2) last clause.[95]
- The principle of individual responsibility and the nontransferability of individual guilt (Articles 41 and 88) shall be applicable.
- Affirmative defences can be invoked in petty offences based on lawful acts (Article 68), professional duty (Article 69), consent of the victim (Article 70), absolute coercion (Article 71), necessity (Article 75), self-defence (Article 78) or mistake of fact (Article 80).[96]
- The principles laid down with regard to extenuating circumstances, aggravating circumstances and their combination (Articles 82–86, 189 and others) shall be applicable to petty offences to determine penalties as provided in the Code of Petty Offences (Articles 766–770).

7.2 Penalties, Measures and Prosecution Procedures

The Code of Petty Offences embodies two principal penalties and various secondary penalties and safety measures. It also deals with the institution of proceedings and issues related with the suspension and extinction of the prosecution and penalty.

The principal penalties imposed on petty offences are *arrest* (Articles 746–751) and payment of *fine* (Articles 752–755). The punishments of rigorous imprisonment and simple imprisonment shall not apply to petty offences (Article 746). Subject to the "special forms of punishment applicable to military petty offenders and young persons,"[97] the penalty that can be imposed is arrest[98] from one day to a maximum of three months. This general maximum, may however, be extended to double the legal maximum[99] in the case of recidivism, and to the maximum of one year if the aggravation of the penalty on the ground of concurrence[100] of petty offences warrant such aggravation. Moreover, the combination of concurrence of petty offences and recidivism (Art 770) may raise the term of arrest to a maximum of two years.

The arrest shall be undergone "in special premises for detention attached to courts or police stations" and not in penitentiary or corrective institutions.[101] It may also be undergone "in the home of the sentenced person, or in the home of a reliable person or in a lay [ዓለማዊ] or religious community designed for the purpose" subject to "adequate control or safeguards."[102] While a person sentenced with simple imprisonment or rigorous imprisonment may be "under an obligation to do work" as an essential element of the sentence,[103] the sentence of arrest does not include such obligation to work[104] unless the court, where justified, replaces the sentence of arrest "by a term of compulsory labour of equivalent duration, with or without restriction upon liberty, coupled with a deduction from the petty offender's earnings for the benefit of the State"[105] as envisaged under Articles 103 and 104.

Such conversion to compulsory labour can also be made where the petty offender fails to pay the fine imposed as penalty within the time fixed in the sentence[106] or as a substitute of "such part of the fine" that has remained unpaid. The period of such compulsory labour shall be determined by the court pursuant to Articles 96 to 106 of the Criminal Code. The amount of fine that may be imposed and other related issues are stipulated under Articles 752–755.

Secondary penalties imposed on petty offences in addition to the principal penalties stated above cannot include forfeiture of civic or family rights, reduction in rank, exclusion from the armed forces, etc,[107] and can (pursuant to Article 756) only include warning, reproof, reprimand or the making of amends as envisaged under Article 122.

The *safety measures* that may be imposed based on Articles 758–762 include guarantee of good conduct (Article 134), confiscation and forfeiture of the objects or material means stated under Article 759 (Article 141), the prohibition or suspension of undertakings under the conditions stipulated under Articles 760–761, and prohibitions and restrictions upon liberty of the petty offender (Article 762). The latter measure applies to the "prohibition from resorting to certain places conducive to the commission of an offence or further petty offences (Article 145)".[108] However, Article 762(2) does not allow such safety measures to include the ones stipulated under Articles 146–150 such as "prohibition to reside in a place, obligatory residence, placing under supervision, withdrawal of official papers or expulsion."

Where secondary penalties or safety measures are pronounced, the Court shall in accordance with Article 763 notify "the administrative, civil, military or police authority" [109] for the purposes of enforcement, control and observation. Moreover, the court may order publicity according to Article 155 (where public or private interest requires), and it shall order entry into the judgment register as stipulated under Article 156.[110]

Prosecution of petty offences against the person or property[111] can be made only upon complaint lodged by "the injured party, his representative or those having rights form him duly authorized by law"[112] In the case of "breaches of laws, orders, regulations and directives of administrative or executive authorities" [113] prosecution and punishment requires complaint by the "authority concerned." And the public prosecutor shall prosecute other breaches[114] (other than military petty offences)[115] as stipulated under the Criminal Procedure Code. And finally, Articles 773 to 775 deal with reinstatement[116] and the conditions under which prosecution and penalties are suspended or extinguished through periods of limitation[117] or pardon and amnesty.[118]

7.3 Sample Petty Offences

The first or second petty offence (under a provision or sub-article) embodied in each chapter under Title I and in each section under Title II (of Book VIII) are introduced as sample petty offences. This would enable us to highlight one petty offence from each of the following chapters under Title I:

1. Petty offences against state or public interests (Articles 778–791)
2. Breaches of military duties and contraventions against the defence of police forces (Articles 792–795)
3. Petty offences against the duties of a public office or a public authority (Articles 796–807)
4. Petty offences against public safety, peace and security (Articles 808–829)

5. Petty offences against public health and hygiene (Articles 830–839).

Table 11 introduces the elements and the sentencing range of the sample petty offences embodied in the first or second provision of each chapter under Title I:

Table 11:
Sample Petty Offences against Public Interests and the Community

Petty Offence	Elements	Punishment
Refusal of legal tender (Article 778)	a) absence of lawful excuse b) refusal to accept lawful money or currency (which may be in coins or notes) c) at the value which they are legal tender	Fine[119] or arrest[120]
Military [petty offence] (Article 793)	a) membership in the defence forces of any rank b) being guilty of a military petty offence c) punishment by the authority under which he serves	Disciplinary penalties provided by the relevant Defence Forces Regulations
Misuse of authority in the discharge of a public office (Article 796)	a) status as public servant b) noncoverage of the case under Article 407 of the Criminal Code (Abuse of power) c) exceeding authority conferred upon the person accused, or misusing such authority	Fine or arrest not exceeding three months
Control of arms and ammunitions Art. 808(b)	a) noncoverage of the case under Article 481(i.e. prohibited traffic in arms) b) knowingly selling or delivering arms or ammunition or allowing to dispose them without supervision c) to persons not entitled to receive them (and in particular to infants or young persons)	Fine or arrest
Control of public health and salubrity/ ጤናማነት (Article 830)	a) noncoverage of the act under Articles 514–524 of the Criminal Code b) Contravention of the directives or regulations stated under Sub-Articles (a) or (b) or (c) of Article 830.	Fine or arrest

Five petty offences are introduced in the following table from each section of Title II, i.e. from the sections titled**:**

1. Petty offences relating to the protection of persons (Articles 840–844)
2. Petty offences against morality (Articles 845–848)

3. Protection of national wealth (Articles 849–850)
4. Petty offences against property (Articles 851–857)
5. Petty offences against property in general (Articles 858–862)

Table 12: Sample Petty Offences against Persons and Property

Petty Offence	**Elements**	**Punishment**
Assault and minor acts of violence (Article 840(a))	a) Non-coverage of the case under Article 560(1) of the Criminal Code (Assaults) b) assaults or minor act of violence c) against another person d) without striking or wounding	Fine or arrest
Petty offences against decency and morality (Article 846(c))	a) being engaged in prostitution or debauchery b) in the street or in a public place or in a place accessible to the public c) being a nuisance to the occupiers of the dwelling or the inhabitants of the neighbourhood	Fine or arrest not exceeding one month
Protection of historical, artistic and natural riches (Article 849)	a) noncoverage of the case under another provision of the Criminal Code or other laws b) contravention of the laws, directives or regulations stated under Sub-Articles (a) or (b) or (c) of Article 830.	Fine or arrest
Petty theft (Article 852(1))	a) being prompted by need or desire or by lack of conscience b) taking a thing of small value c) belonging to another b) for the immediate consumption or use by the accused	Fine not exceeding 50 Birr or arrest not exceeding 15 days
Malicious injury of another person's interests (Article 858)	a) absence of intent to secure an illicit enrichment b) causing another person to do acts detrimental to his proprietary interests or those of a third party c) by resorting to deceptive or fraudulent methods d) out of malice, or intent to injure, or for any other reason	Fine or arrest not exceeding one month

Review Exercises

1. Article 741(2) reads: "Any person shall be punishable whether he contravened the law intentionally or negligently (Articles 57–59) save in cases where the law expressly exempts from liability to punishment in respect of an act committed by negligence." Does this provision vary from the stipulation under Article 59(2) which renders offences committed by negligence punishable "only if the law so expressly provides by reason of their nature, gravity or the danger they constitute for society." Explain the difference, if any; and illustrate the variation if you think that the provisions have different stipulations.

2. Identify the provisions that are relevant to the following hypothetical problems and:
   - Identify the *elements* of the provisions.
   - State whether the hypothetical facts fulfil the elements.

   a) A is fully healthy and he earns his living by begging on the streets of Addis Ababa. He sends part of his earnings to his relatives in the countryside, and he is recently spending nearly half of his daily earnings in *tej bets* during the evening.

   b) D_1, D_2, D_3 and D_4 come to a residential neighbourhood in Bole during the evenings for street prostitution. They are obscenely dressed and they wave their hands when cars come along. The residents feel morally uncomfortable.

   c) C is drunk and is standing in the middle of a road. He is insulting individuals who are passing by.

   d) E does not have adequate money in his pocket. Hoping that he can get away with it, he entered into a crowded hotel and had lunch. He thought that he would not be recognized if he leaves the hotel in the midst of the crowd, but was caught at the gate.

   e) B assumes a fictitious name to evade control by an administrative authority.

3. Read the following two cases that involve petty theft and state your reflections on questions that follow:

   > "A minor boy from a poor family, who turned into a thief in order to arrange food and medicine for his mother, was given ration, cloth and other essentials by a local court on Sunday (April 19 [2020]) and allowed to walk free. While passing the 'unique' verdict, the judge said that he is giving the boy a chance to improve. The boy identified as Narendra Rao belonged to Nalanda in Bihar. The boy confessed to his

crime before the court and said that he decided to steal things as his mother was sick and they had no food."

"… Judges overturned a theft conviction against R. Ostriakov after he stole cheese and sausages worth €4.07 (£3; $4.50) from a supermarket. Mr Ostriakov, a homeless man…, had taken the food 'in the face of the immediate and essential need for nourishment', the court of cassation decided. Therefore it was not a crime, it said. A fellow customer informed the store's security in 2011, when Mr Ostriakov attempted to leave a Genoa supermarket with two pieces of cheese and a packet of sausages in his pocket but paid only for breadsticks. In 2015, Mr Ostriakov was convicted of theft and sentenced to six months in jail and a €100 fine."

a) State your opinion on both decisions.

b) Would your opinion be different in locations with different objective realities in terms of level of economic development and settings where such decisions can encourage petty theft?

Endnotes, Chapter 9

[1] Pennsylvania Statutes, Section 1.06 (b)(2-4), Classes of Offences.
[2] Crim Code, Art. 539.
[3] Crim. Code, Art. 540.
[4] Crim. Code, Art. 541.
[5] Crim. Code, Arts. 734–865.
[6] Crim. Code, Art. 555.
[7] Crim. Code, Art. 556.
[8] Crim. Code, Art. 669.
[9] Crim. Code, Art. 665.
[10] Crim. Code, Art. 665(3).
[11] C.R. Snyman (3rd edn, 1995), *Criminal Law* (Durban: Butterworths), pp. 289–517.
[12] Crim. Code, Arts. 776–837.
[13] Crim. Code, Arts. 776–865.
[14] Jeremy Bentham (1789), *An Introduction to the Principles of Morals and Legislation*, Chapter I § IV.
[15] The preparation of the manuals for the Draft Sentencing Guidelines (2009) was sponsored by the Federal Supreme Court and Prison Fellowship Justice for All.
[16] *Sentencing Guidelines* No. 1/2002 (Eth. Cal), Federal Supreme Court, Gibot 9th 2002 (Eth. Cal)(17 May, 2010), Introduction.
[17] United States v. Booker, 543 U.S. 220 (2005).
[18] Crim. Code, Art. 539(1).
[19] Joshua Dressler (1995), *Understanding Criminal Law*, 2nd edn. (New York: Lexis Publishing), p. 499.
[20] Crim. Code, Art. 544(3).
[21] Crim. Code, Art. 544(1).
[22] Smith v. Smith, 317 S. W. 2d 275.278 (Ark. 1958), in Dressler, *supra* note 19, p. 500.
[23] *Ibid.*, pp. 500–501.
[24] *Ibid.*, p. 501 (footnotes omitted).
[25] *Revised Sentencing Guidelines* No. 2/2006 (Eth. Cal), Federal Supreme Court, Tikimt 1st 2006 Eth. Cal (October, 2013), Art. 12(5).
[26] *Ibid.*, See the fifth table under Art. 12.
[27] *Ibid.*, Art. 12(5).
[28] Crim. Code, Art. 540.
[29] Revised Sentencing Guidelines, *supra* note 25, Annex I.
[30] *Ibid.*, Art. 22(1). Article 22(2) further states the method of aggravation in the case of recidivism.
[31] E.g. Treachery, perfidy, base motive (such as envy, hatred, greed), deliberate intent to injure or do wrong or special perversity or cruelty (Article 84(1)(a)); Abuse of powers, functions, confidence or authority (Article 84(1)(b)); Criminal agreement

as a member of a gang organized to commit offences, particularly "as chief, organizer or ringleader" (Article 84(1)(d)).

[32] Revised Sentencing Guidelines, *supra* note 25, Arts. 21(4), 22(2).

[33] Draft Sentencing Guidelines for Ordinary Homicide (Criminal Code, Art. 540), Amharic Draft (Sene 2001 Eth. Cal: June 2009), Federal Supreme Court in collaboration with Justice For All Prison Fellowship Ethiopia.

[34] Crim. Code, Art. 840(2).

[35] Crim. Code, Art. 555.

[36] Crim. Code, Art. 106.

[37] Crim. Code, Art. 108.

[38] Revised Sentencing Guidelines, *supra* note 25.

[39] Draft Sentencing Guidelines for Offences against Person and Health (Criminal Code, Arts. 555 and 558), Amharic Draft (Sene 2001 Eth. Cal: June 2009), Federal Supreme Court in collaboration with Justice For All Prison Fellowship.

[40] *Ibid.*, Section 3.3.

[41] As discussed earlier, ordinary homicide is punishable with a rigorous imprisonment ranging from five to 20 years. The range between these limits is 15 years (20 years minus five years).

[42] Crim. Code, Art. 620(4).

[43] Catherine Elliott and Francis Quinn (5th edn, 2004), *Criminal Law* (Harlow: Pearson Education Ltd.), p. 129.

[44] People v. Cicero, 204 Cal. Rptr. 582, 590 (Cal. Ct. App. 1984), in Dressler, *supra* note 18, p. 582.

[45] *Ibid.*

[46] *Ibid.*

[47] Dressler, *supra* note 19, page 582.

[48] *Ibid.*

[49] *Ibid.*, p. 585.

[50] *Regina v. Dee*, 15 Cox Crim. Cas. 579 (Ir. Cr. Cas. Res. 1884).

[51] Crim. Code, Art. 620(2).

[52] Crim. Code, Art. 620(1).

[53] Draft Sentencing Guidelines for Rape (Criminal Code, Arts. 620), Amharic Draft (Sene 2001 Eth. Cal: June 2009), Federal Supreme Court in collaboration with Justice For All Prison Fellowship.

[54] Crim. Code, Art. 665.

[55] Crim. Code, Art. 669.

[56] Catherine Elliott (2001), *French Criminal Law* (Devon, UK & Oregon, USA: William Publishing), p. 179.

[57] *Ibid.*

[58] CA Grenoble, 11 juill. 1896, S. 1897, 2, p. 269.; in Elliott, *ibid.*, p. 185.

[59] Elliott, *supra* note 56, p. 185 (citing Cass. Civ. 7 juill. 1953, R.S.C. 1953.671; Trib. Correct. Nantes, 31 Oct. 1930, S. 1931.2.83).

[60] *Ibid.*
[61] *Ibid.*, p. 183.
[62] *Ibid.*
[63] Elliott and Quinn, *supra* note 43, p. 150.
[64] Crim., 24 novembre 1983, D. 1984. 465, note Lucas de Leyssac, cited in Elliott, *supra* note 56, p. 181.
[65] *Ibid.*
[66] Crim. Code, Art. 679.
[67] Elliott and Quinn, *supra* note 43, p. 154.
[68] Crim. Code, Art. 665.
[69] Crim. Code, Art. 106, 2nd paragraph.
[70] Crim. Code, Art. 108(1).
[71] Draft Sentencing Guidelines for Theft (Criminal Code, Arts. 665, 669), Amharic Draft (Sene 2001 Eth. Cal: June 2009), Federal Supreme Court in collaboration with Justice for All Prison Fellowship.
[72] *Ibid.*, Chapter 3, Section 2.
[73] Crim. Code, Art. 82(1)(c).
[74] Crim. Code, Arts. 670, 671.
[75] The provision was designated as Art. 669 when the *Hateta Zemiknyat* was under preparation.
[76] R. v. Hale (1979), 88 Cr. App R 475 (CA).
[77] Elliott and Quinn, *supra* note 43, p. 162.
[78] The English version erroneously reads "Article 669" while the Amharic version duly refers to Article 670.
[79] Crim. Code, Art. 671(1).
[80] Crim. Code, Art. 671(2).
[81] *Draft Sentencing Guidelines for Robbery* (Criminal Code, Arts. 670, 671), Amharic Draft (Sene 2001 Eth. Cal: June 2009), Federal Supreme Court in collaboration with Justice for All Prison Fellowship.
[82] *Ibid.*
[83] *Ibid.*, Section V.
[84] Elliott and Quinn, *supra* note 43, p. 162.
[85] *Ibid.*, p. 149.
[86] *Ibid.*, 151.
[87] *Ibid.*
[88] *Ibid.*, 154.
[89] Elliott, *supra* note 56, p. 180 citing Crim. 21 avril 1964, B. no. 121.
[90] *Journal of Ethiopian Law*, Volume V, No. 3. (December 1968), pp. 466–468.
[91] *Journal of Ethiopian Law*, Volume VI, No. 1. (June 1969), pp. 67–69.
[92] *Journal of Ethiopian Law*, Vol. XXII, No. 8 (December 2008), pp. 23–30 (with omissions).
[93] Arts. 87–237 do not apply for petty offences.

[94] This stipulation under Article 740(3) relieves juridical persons from liability where the petty offence committed by an official or employee is in the capacity of an accomplice or instigator.

[95] The last clause of Article 741 (2) reads "save in cases where the law expressly exempts from liability to punishment in respect of an act committed by negligence" which seems to have some variation from Article (59(2)) which renders offences committed by negligence punishable "only if the law so expressly provides by reason of their nature, gravity or the danger they constitute for society."

[96] According to Article 743 (2), Resistible coercion and excess in necessity or self-defence shall not apply as an affirmative defence in petty offences, "but the Court shall reduce the penalty within the limits authorized" under 766.

[97] Crim. Code, Arts. 746(2) & 750.

[98] Crim. Code, Art. 747.

[99] Crim. Code, Art. 769.

[100] In cases of notional concurrence of petty offences the aggravation will pursue the stipulations under Article 187 (Article 768(2)).

[101] Crim. Code, Art. 746.

[102] Crim. Code, Art. 749(2).

[103] Crim. Code, Art. 111(1).

[104] Crim. Code, Art. 748(2).

[105] Crim. Code, Art. 751.

[106] Crim. Code, Art. 753(1).

[107] Crim. Code, Art. 757.

[108] Crim. Code, Art. 762(1).

[109] Crim. Code, Art. 154.

[110] Crim. Code, Arts. 763, 764.

[111] Crim. Code, Arts. 838–852.

[112] Crim. Code, Art. 771(1)(a).

[113] Crim. Code, Art. 771(1)(b).

[114] Crim. Code, Art. 771(1)(c).

[115] Military petty offences are prosecuted in accordance with Military Law (Article 771(2)).

[116] Crim. Code, Art. 775.

[117] Crim. Code, Art. 773.

[118] Crim. Code, Art. 774.

[119] The amount of fine may be between Birr 1 and Birr 300, except in cases of recidivism (Article 769) and where the law provides a higher maximum (Article 752).

[120] See Section 3.2 above regarding the minimum and maximum duration of arrest.

Chapter 10

Elements of Selected Offences in Special Legislation

Article 3 of the 2004 Criminal Code envisages the enactment of "special laws of a criminal nature" subject to the condition that "the general principles embodied in the Code are applicable" in the special laws unless there is express provision (in these laws) that stipulates otherwise. A similar provision was stipulated under Article 3 of the 1957 Penal Code. As stated in the *exposé des motifs* (Hateta Zemikniyat)[1] of the 2004 Criminal Code, the substantive themes in the former provision have been retained other than some editing to enhance clarity.

This chapter highlights the elements of three offences whose background documents have been discussed under the Ethiopian Law Reform Background Documents Synopsis published by the Federal Attorney General[2]. These offences are terrorism, hate speech and human trafficking.

1. Terrorism

The Prevention and Suppression of Terrorism Crimes Proclamation No. 1176/2020 was enacted on March 25th, 2020; and it has substituted the previous Anti-Terrorism Proclamation No. 652/2009 as part of the post 2018 law reform pursuits in Ethiopia. As indicated in the first paragraph of the preamble, the purpose of the Proclamation is the maintenance of peace and security of Ethiopia and the international community so that severe harm shall not be inflicted against human beings and property. The second preambular paragraph states the responsibility of the Government to prevent terrorism and considers the enactment of the Proclamation as a precautionary and preparatory response commensurate with the nature of the crime, with a view to ensuring deterrent penalty that is proportional to acts of terrorism.

The third paragraph of the preamble states Ethiopia's commitment to the international community's efforts to prevent and suppress terrorism. The fourth paragraph notes the substantive and enforcement gaps that were observed in the previous Anti-Terrorism Proclamation No. 652/2009, "which produced a negative effect on the rights and freedoms of citizens". It promises adequate protection to the "rights and freedoms of individuals and prevalence of accountability of law enforcement." The fifth preambular paragraph expresses the need "to create a system which would enable to provide medical care, rehabilitative and other related support to victims of terrorist acts".

Article 2(2) of the Proclamation defines terrorism as “acts provided under Articles 3, 5 to 11, 29, and 30 of this Proclamation”. These provisions deal with terrorist acts (Art. 3), intimidation and false threat (Arts. 5 & 8), planning and preparation (Art. 6), conspiracy (Art. 7), rendering support and incitement (Arts. 9 & 10), property associated with terrorism (Art. 11), heading terrorist organization (Art. 29) and membership in a terrorist organization (Art. 30).

It is to be noted that the gaps that were observed in the previous Anti-Terrorism Proclamation No. 652/2009 indicated in the preamble of Proclamation No. 1176/2020, i.e., “negative effect on the rights and freedoms of citizens” and the need to adequately protect the “rights and freedoms of individuals and prevalence of accountability of law enforcement” deserve utmost attention in the definition of terrorism, proscription and criminalization of membership in a terrorist organization. As Wondwossen Demissie noted, broad definitions “ultimately render the definition to be constitutionally, and from human rights perspective, suspicious”.[3]

1.1 Principal offence

According to Article 3(1) of the Proclamation:

> Whosoever, with the intention of advancing political, religious or ideological causes for terrorizing, or spreading fear among the public or section of the public or coercing or compelling the Government, Foreign Government or International Organization:
> a) Causes serious bodily injury to person;
> b) Endangers the life of a person;
> c) Commits hostage taking or kidnapping;
> d) Causes damage to property, natural resource or environment; or
> e) Seriously obstructs public or social service;
> is punishable with rigorous imprisonment from ten years to eighteen years.

The elements stated in this provision require intention to advance “political, religious or ideological” cause that aims at:
- terrorizing or spreading fear among the public or section of the public, or
- coercing or compelling the Government, Foreign Government or International Organization.

The provision intends to protect the public, the Ethiopian government, foreign governments and international organizations. The English version of Article 2(8) of the Proclamation defines Government as “… Regional States specified under Article 47(1) of the Constitution of the Federal Democratic Republic of Ethiopia and includes the Addis Ababa and Dire Dawa Cities Administrations.” The definition of ‘government’ in the English version

solely refers to 'regional governments' apparently due to mistranslation from the Amharic version that prevails over the English version. The Amharic version duly defines government as the federal government or regional state government.

A terrorist act is said to be committed where a person's act committed with the purpose of advancing the causes stated above brings about any of the harms enumerated under 'a' to 'e'. However with regard to the harm caused under Article 3(1)(e) –i.e., seriously obstructing public or social service– Article 4 provides an exception which renders an act outside the ambit of terrorism. This exception applies if obstruction of public service is "caused by a strike and the obstruction is related to the institution or profession of the strikers or exercising rights recognized by law such as demonstration, assembly and similar rights."

> … [T]he Explanatory Memorandum …clarifies the elements that constitute terrorist act under Article 3, and the rationale for the exception stated under Article 4 (p. 5). The changes made in Articles 5 to 7 regarding the differentiation in ranges of penalty commensurate with the gravity of terrorist acts –such as the act of commission vis-à-vis threat, planning, preparation, conspiracy, etc,– are stated (p. 6) thereby indicating a significant departure from Proclamation No. 652/2009. The need to clearly distinguish between rendering support (Article 9) and incitement (Article 10) are indicated on pages 6 and 7.[4]

The sentence that is imposed upon conviction –under Article 3(1) of the Proclamation– is from ten years to eighteen years of rigorous imprisonment. However, according to Article 3(2), the penalty shall be rigorous imprisonment from fifteen years to life or death if the act is committed to achieve the causes mentioned under Article 3(1) through "causing death of person or causing serious damage to historical or cultural heritages or infrastructure or property or natural resource environment".

OECD International Platform on Terrorism Risk Insurance compares the intention to terrorist act that is embodied in the laws of OECD countries. The intention to terrorist act in Australia and the Netherlands is relatively close to the elements in Article 3(1) of Proclamation No. 1176/2020. The definition of intention to terrorist act in Germany and Switzerland further include ethnic cause. The second column (Intention of terrorist act) of the OECD's comparison table[5] includes the following synopsis on intention:

> Australia
>
> > Action done or threat made, with the intention of advancing a political, religious or ideological cause, with the intention of coercing or influencing by intimidation the government

of Australia or the Australian States or Territories, or a foreign country, or intimidating the public.

The Netherlands

Attacks or series of attacks likely to have been planned or carried out with a view to serve certain political and/or religious and/or ideological purposes.

Germany

Acts committed for political, religious, ethnic or ideological purposes suitable to create fear in the population or any section of the population and thus to influence a government or public body.

Switzerland

In pursuit of political, religious, ethnic, ideological or similar purpose which may result in putting the public or any section of the public in fear or influencing any government or governmental organization.

As indicated by Hardy and Williams, "The Australian definition of a terrorist act was inserted into Part 5.3 of the Australian 'Criminal Code Act 1995 (Cth) (Criminal Code)' by Schedule 1 to the 'Security Legislation Amendment (Terrorism) Act 2002 (Cth) (SLAT Act)'."[6] The article cites the following text of 221 Section 100.1 of the Australian Criminal Code which states:

(1) terrorist act means an action or threat of action where:

(a) the action falls within subsection (2) and does not fall within subsection (3); and

(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

(c) the action is done or the threat is made with the intention of: (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or (ii) intimidating the public or a section of the public.[7]

The comparison Table cited above at note 3 (OECD International Platform on Terrorism Risk Insurance) shows that German and Swiss criminal laws expressly state ethnic purpose in terrorist acts while it is subsumed within political purpose under the criminal laws of Ethiopia, Australia and the Netherlands. As we can observe from the comparison table, however, omission of certain words such as political, ethnic, religious, ideological, etc. merely calls for interpretation because there are various countries that use general statements such as: "[t]o influence the government or put the public

or any section of the public in fear" (Austria); and "[s]eriously and intentionally disrupt law and order" (France). [8]

The elements in the intention of terrorism may also be relatively elaborate as in the case of South Africa's Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 which provides:

> Notwithstanding any provision in any other law, and subject to subsection (4), a political, philosophical, ideological, racial, ethnic, religious or any similar motive, shall not be considered for any reason, including for purposes of prosecution or extradition, to be a justifiable defense in respect of an offence of which the definition of terrorist activity forms an integral part.[9]

The omission of the word 'racial' in the criminal laws of any country does not thus imply the non-inclusion of race-motivated purpose as an element in the intention of a terrorist act.

1.2 Intimidation and false threat

Article 5 of Proclamation No. 1176/2020 deals with intimidation to commit a terrorist act. The word 'intimidation' has not been defined under Article 2, because such clear terms do not need definitions in a statute.

> Intimidation means to make fearful or to put into fear. Generally, proof of actual fear is not required in order to establish intimidation. It may be inferred from conduct, words or circumstances reasonably calculated to produce fear.[10]

A person who "intimidates to commit any of the terrorist acts provided for under Article 3" shall be considered as having violated Article Art 5(1) of the Proclamation, and the range of the sentence (from one to five years) shall, according to Art. 5(2) be determined "by taking into consideration the condition or opportunity under which the intimidator intends to carry out or cause to carry out or the terror that he has created among the public or sections of the public."

The motive behind intimidation is to create fear by threatening to commit one of the acts stated under Article 3. Even if the act has not yet been committed, the law intervenes in the protection of intimidated victims. There can also be false threat of a terrorist act which falls under Article 8 of the Proclamation which provides that:

> Whosoever while knowing that it is false, causes shock, fear, anxiety, or worry in the public or in the society or certain section of the society by expressing through any means or performing false act that a terrorist act has been or is being or will be committed shall be

> punishable with simple imprisonment or if the act caused damage rigorous imprisonment from three years to ten years.

1.3 Planning, preparation and conspiracy

As discussed in Chapter 2, Section 4.1, Article 26 of the 2004 Criminal Code does not render preparatory acts punishable unless "in themselves they constitute a crime defined by law"; or "they expressly constitute a special crime by law owing to their gravity or the general danger they entail." The offence of terrorism requires preventive intervention before it is attempted. To this end, Article 6(1) deals with the *planning* stage of terrorism and it provides: "[w]hosoever undertakes act of plans to commit any of the terrorist acts provided for under Article 3 of this Proclamation shall be punishable with rigorous imprisonment from three years to seven years". If the act goes beyond the phase of planning and involves *preparation*, Article 6(2) raises the sentence of "rigorous imprisonment from five years to twelve years."

Article 7 deals with conspiracy, and provides that "Whosoever commits conspiracy to carry out or cause to carry out terrorist acts provided for under Article 3 of this Proclamation shall be punishable with rigorous imprisonment from five years to twelve years." This shows that the commission of the material element of any of the acts stated under Article 3 can entail criminal liability against persons who have committed conspiracy to carry out or cause the occurrence of the acts stated under Article 3.

1.4 Secondary participation: Incitement and complicity

As discussed in Chapter 5, the commission of an offence might involve participation at *primary* or *secondary* levels. Two types of secondary participation, i.e. *incitement* (Art. 35) and *complicity* (Art. 36) are punishable under the 2004 Criminal Code. Likewise, Proclamation No. 1176/2020 deals with incitement (Art. 10), and intentional support (Art. 9).

As stipulated under Article 10(1), any person who "intentionally incites another person" in order "to cause the commission of one of the crimes provided for in Article 3" by "inducing, promises, money, gift, threat or any other similar means shall be punishable . . . provided that the crime was attempted or committed." Sub-articles 2 and 3 of the provision impose specific ranges of sentence depending upon the nature of the acts of incitement. According to Article 10(2):

> Notwithstanding [Article 10 (1)], whosoever in clear manner incites by statement, writing, using image or by any other conduct to cause the commission of any of the acts provided for under Article 3 of this Proclamation or publish, produce, communicate, distribute,

store, sell, or make available to the public through any means anything with substance of such kind shall be punishable with rigorous imprisonment from three year to seven years, provided that the crime was attempted or committed.

Moreover, Article 10(3) provides that "where the act mentioned has been committed as provided for in Sub-article (1) or (2) of [Article 10] but the intended crime has not materialized or attempted, the person who commits the acts mentioned in the sub-articles shall be punished with rigorous imprisonment from one year to five years."

With regard to complicity, Article 9(1) of the Proclamation No. 1176/2020 titled '*Rendering Support*' lists down the acts that are punishable. It provides:

> Whosoever knowingly supports or assists directly or indirectly the commission of a terrorist act or with the intent to support a terrorist Organization:
> a) Prepares, provides or hands over documents or information;
> b) Provides technical, counseling or professional support;
> c) Prepares, makes available, provides, or sales any explosive, dynamite, inflammable substances, firearms or other lethal weapons or poisonous substances; or
> d) Provides training or recruits members;
> is punishable with rigorous imprisonment from seven years to fifteen years.

According to Article 9(2) of the Proclamation, the law that shall be applicable for rendering support that involves property (የተደረገው ድጋፍ የንብረት የሆነ እንደሆነ), the offence shall be charged under the Prevention and Control of Money Laundering and Financing of Terrorism Proclamation No. 780/2013. As stipulated under Article 9(3), there shall be criminal liability for the offence of complicity (rendering support) in terrorism even "though the principal offence was not committed or the support has no relationship with the preparation of the specific terrorist act or with the offender." Article 9(4) reduces the sentence that shall be imposed "where the acts provided for under [Article 9(1)] are committed by negligence".

It is to be noted that due caution is made to avoid the risk of restricting humanitarian interventions. To this end, Article 9(5) provides that:

> Notwithstanding to Sub Article 1 to 4 [of Article 9] a humanitarian aid given by Organizations engaged in humanitarian activities or a support made by a person who has legal duty to support others is not punishable for the support made only to undertake [one's] function and duty.

1.5 Possession of property associated with terrorism

Article 2(5) of Proclamation No. 1176/2020 defines "Property Associated with Terrorism Crime" as "property used for committing terrorism crime, direct or indirect proceeds of the crime, property produced from proceeds of the crime, and includes, when the property obtained through these conditions is not found, equivalent property of the offender". The former proclamation had embodied two provisions (relating to this theme) titled "Possessing or Using Property for Terrorist Act" (Article 8) and "Possessing and Dealing with Proceeds of Terrorist Act" (Article 9). The current law (Proclamation No. 1176/2020), however, has a single provision on possession that is associated with a terrorist act. Article 11(1) provides:

> Whosoever, knowing that the property is associated with terrorism crime, is found in possession of such property or makes use of it shall, without prejudice to the confiscation of the property, be punishable with rigorous imprisonment from three years to ten years.

If the act is committed by negligence, the penalty is reduced in accordance with Article 11(2).

1.6 Participation by a juridical person

The criminal liability for terrorism may involve juridical persons. Article 34(1), para 2 of the 2004 Criminal Code provides:

> 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, or an instigator or an accomplice in connection with the activity of the juridical person with the intent of promoting its interest by unlawful means or by violating its legal duty or by unduly using the juridical person as a means.

As stated under Article 34(2) of the Criminal Code, the punishment against a juridical person may be fine in accordance with Article 90 of the 2004 Criminal Code, and "where necessary, an additional penalty may be imposed to suspend, close or wind up the juridical person". Sub-Articles 1 and 2 of Article 17 of Proclamation No. 1176/2020, titled "Participation of Juridical Person in the Commission of a Crime" thus indicate the range of penalties imposed on juridical persons:

> 1/ Notwithstanding Sub-article (1), (3) and (4) of Article 90 of the Criminal Code, where the crime . . . is committed by a juridical person the punishment shall be:
>
> a) From Birr one hundred thousand to two hundred thousand birr for simple imprisonment or rigorous imprisonment up to five years;

b) From Birr two hundred thousand to five hundred thousand birr for rigorous imprisonment from five to ten years;
c) From Birr five hundred thousand to one million birr for rigorous imprisonment from ten year to twenty years;
d) From Birr one million to one million five hundred thousand birr for rigorous imprisonment above twenty years or life imprisonment or death;

2/ In addition to the punishment provided for in sub-article (1) of this Article, the court may order the dissolution of the juridical person or confiscation of its property upon request by the public prosecutor or on its own motion.

. . .

Article 34(3) of the Criminal Code provides that "[t]he punishment of the juridical person shall not exclude the penalty to be imposed on its officials or employees for their criminal guilt". As juridical persons act through natural (physical) persons, the criminal liability has two tiers, i.e. the juridical person's liability and the participation of its officials and employees. Even if imprisonment cannot apply to the juridical person, this punishment applies to the officials and employees who have participated in the commission of the offence. Accordingly, Article 17(3) of Proclamation No. 1176/2020 provides that "[t]he punishment imposed on the juridical person in accordance with [Sub-articles 1 and 2 of Article 17] shall not discharge the officials or employees of the juridical person from punishment to be imposed on the individual for the crime committed**.**"

1.7 Proscription as a terrorist organization

According to Article 2(4) of Proclamation No. 1176/2020, an organization may be proscribed as Terrorist Organization in accordance with the Proclamation. Article 18 allows the House of Peoples Representatives to proscribe an organization as a terrorist organization by a two-thirds majority upon the fulfilment of the conditions stipulated under Article 19(1) which provides the following:

1/ Without prejudice to Article 17 of this Proclamation, an Organization may be proscribed as a terrorist where:
a) It operates by carrying terrorist crimes as its objective; or
b) The management or the decision making body of the Organization practices or officially accepts the Crime or leads its operation; or
c) The crime defines the Organization through its operation and conduct or most of its employees carry out its activities with knowledge of the Crime.

2/ Where the United Nations Security Council proscribes any Organization as Terrorist Organization and the Council of Ministers officially announces the decision through media, such proscription will be enforceable in Ethiopia.

Sub-articles 1, 2 and 3 of Article 20 of Proclamation No. 1176/2020 further embody the procedures that relate to:

- the submission of recommendation and detailed reasons for the proscription by the Federal Attorney General (currently Ministry of Justice) "to the Council of Ministers for the proscription of the Organization as a Terrorist Organization" if "it believes that an Organization has committed or is in the act of committing a terrorist crime which fulfills one of the conditions provided for under Sub-article (1) of Article 19 of [Proclamation No. 1176/2020]; and
- referral of the recommendation and the detailed reasons thereof to the House of Peoples' Representatives "[w]here the Council of Ministers approves the recommendation submitted by the Federal Attorney General'.

Sub-articles 4 to 5 of Article 20 deal with the manner in which confidential matters are handled, and Article 20(6) states that "information shall be deemed to be confidential . . . where the Council of Ministers believes that the releasing of the information will bring damage to the national security, public security and peace, sources of information or Foreign Relations." With regard to the procedures of hearing and the issuance of HoPR's resolution, Article 21 provides:

1/ Where a recommendation for proscription of an Organization as a Terrorist Organization is submitted to the House of Peoples' Representatives, it shall invite the Organization through the appropriate media providing sufficient time and stating a specific period of time to give its opinion.

2/ The Organization shall have the right to know and access evidence, with the exception of confidential information, and may submit to the House any evidence in objection to the recommendation.

3/ Where the Organization fails to appear or submit its evidence within the specified period of time, the House shall pass a resolution in [its] absence or without the submission of any evidence.

4/ The House may accept or reject the recommendation by scrutinizing the recommendations presented by the Council of Minister, evidence submitted by the Organization and evidence obtained on its own initiative.

Article 22 states the effects of proscription of an organization as terrorist such as the nullity of all transactions and dealings of the organization, dissolution through judicial means, and confiscation of its property "by Government upon a court order." Other issues covered in the Proclamation with regard to terrorist organizations include the effects of change of name, division, amalgamation or merger (Art. 23) and various issues related with the revocation of an organization's proscription as terrorist (Articles 24-26).

The FDRE House of Peoples' Representatives has proscribed two organizations as terrorist under Proclamation No. 1176/2020. The Press Release on May 10, 2021 reads:

> Pursuant to Proclamation No. 1176/2012, the House of People's Representatives has the authority to proscribe organizations as terrorist. Procedurally, a group will be proscribed as a terrorist organization when a resolution to this effect is presented to the Council of Ministers by the Federal Attorney General and approved by a two-thirds majority of the members of the House of Representatives. An organization can be designated as a terrorist organization if it fulfills the alternative conditions set out under Article 19 of the Proclamation.
>
> - The first condition is that when a terrorist organization operates by carrying terrorist activities as its objective, or
> - The second condition is if the management or the decision-making body of an organization practices or officially accepts the crime of terrorism or leads its operation, or
> - The crime defines the organization's nature through its operation and conduct or most of its employees carry out its activities with knowledge of the crime.
>
> Although meeting just one above-mentioned requirement suffices to proscribe an organization as a terrorist, TPLF and Shene met all the three conditions. Therefore, they have been duly designated as terrorist organizations by the House of Peoples Representatives and are hereby considered proscribed organizations.[1]

1.8 Participation in a terrorist organization

The participation of individuals in an organization that is proscribed as terrorist is defined based on the level of participation, i.e. heading the organization (Article 29) and participation as member in the organization (Art. 30). According to Article 29(1) of Proclamation No. 1176/2020, "[w]hoever

[1] *See*: https://ethiopianembassy.org/press-release-issued-on-the-proscription-of-tplf-and-shene-as-terrorist-organizations-may-10-2021/

heads an Organization proscribed as a Terrorist Organization as a whole or a part there of shall be punished with rigorous imprisonment from seven to fifteen years, for the mere fact of heading the Organization."

A person engaged in "overseeing the administration of the Organization in whole or in part, or preparing plans and follow up its implementation or has authority to mak[e] decision or whose management position is ascertained by the rules of the Organization or performs acts, which under normal circumstances are performed by a manager" is considered as having headed the organization (Art. 29(2)). Sub-articles 3 & 4 of Article 29 shall apply to a person "who headed an Organization and has resigned prior to its proscription as a Terrorist Organization by the House of Peoples' Representatives" subject to liability ("for other offences, if any, that he has committed" and that are punishable under the "Proclamation or any other relevant law."

Although the range of punishment (one to five years of rigorous imprisonment) is lower than the range applicable to persons who have headed organizations that are proscribed as terrorist, a person who "knowing that the Organization is a Terrorist Organization or should have known such fact, joins the Organization as member or took training shall be punished" (Art. 30(1). The grounds for considering a person as member (Art. 30(2)) of an organization that is proscribed terrorist include:

- making "contribution as member based on the rules and practices of the organization", or
- accepting "the objective and operation of the Organization", or
- participating "in action to realize the objective of the Organization", or
- making "known his membership on his own free will" or
- performing "a task for the Organization which under normal circumstance a member is expected or obliged to perform."

The exceptions regarding persons who have resigned prior to the proscription of the organization as terrorist that are embodied in Article 29 are also included under Article 30 with regard to a person who is a member or has taken training. However, this exception only applies to the offence of membership or training embodied in Article 30, and shall be subject to the condition that such persons shall be liable for any other punishable offence under Proclamation No. 1176/2020 or any other relevant law.

1.9 Prevention, education and rehabilitation

The Proclamation further addresses the issues of prevention of terrorism, institutions and investigation of terrorist acts. As indicated in the Explanatory Memorandum of the Draft Proclamation, (pp. 9-11) "unlike the evidentiary

and procedural rules (such as Part IV, Articles 23 and 24) of Proclamation No. 652/2009), the new Draft Proclamation –enacted as Prevention and Suppression of Terrorism Crimes Proc. No. 1176/2020– focuses on prevention (Articles 31-35), the role and accountability of various institutions (Arts 36-41) and conditions and standards in the investigation of terrorist acts (Arts 42 & 43)".[11]

Part IV of the Proclamation (Articles 31-35) deals with:

- the power of the police to "exercise its Power of surprise search to prevent terrorism offences upon permission by the Commissioner General of the Federal Police Commission or a person delegated by him" (Article 31(1)) and the procedures of preparation of the list of property or thing that is seized during surprise search (Article 31(2));
- measures that may be taken by the police to rescue persons exposed to terrorist acts where the "police officer has sufficient reason to suspect that a crime has been committed or is being committed or is about to be committed in a given place" (Article 32);
- obligation of a lessor "who rents house, premises, buildings, Organization facilities, vehicles or any other equipment and facilities" or accommodation provider to a foreigner (Article 33);
- obligation to provide information to police with court order (Article 34(1)), without court order in urgent cases (Article 34(2)), and the confidentiality of the information (Article 34(3));and
- the responsibility of the Government "to prevent the recruitment of children and youth for terrorist causes, prevent the inculcation of terrorist ideas or notions of extremism and educate them" (Article 35(1)), and to, inter alia, take appropriate measures of educating "children and young offenders in whom the idea of terrorism and extremism is inculcated" in cooperation with non-Governmental Organizations (Article 35(2)),
- the Government's duty to educate "persons or sections of a community exposed to ideas of terrorism and extremism" and, "where necessary, provide them with medical support" (Article 35(3)), and to provide rehabilitative measures in prison "for convicted and sentenced prisoners" in manner that they can be free from extremism (Article 35(4)).

Review Exercises

1. As discussed in Section 1.1, the list of purposes for the acts that are regarded as terrorist have some variation in various countries. Discuss how 'racial' or 'ethnic' purposes can be accommodated through interpretation even if they are not included in the list expressly stated in a given legislation.
2. Under Article 9(5) of the Prevention and Suppression of Terrorism Crimes Proclamation No. 1176/2020, a humanitarian aid given by organizations that are "engaged in humanitarian activities or a support made by a person who has legal duty to support others is not punishable for the support made only to undertake [one's] function and duty." Give examples that can fall under this exception.
3. According to Article 17(3) of Proclamation No. 1176/2020, the punishment imposed on the juridical person based on Sub-articles 1 and 2 of Article 17 "shall not discharge the officials or employees of the juridical person from punishment to be imposed on the individual for the crime committed." Does this violate the principle of prohibition of double jeopardy? State your reasons.
4. Section 1.9 indicates the need for due attention to rehabilitation and proactive measures that can protect children from extremist perceptions that enable terrorist organizations to recruit young citizens by misinformation and misrepresentation. In this regard, Article 35(1) of Proclamation No. 1176/2020 states the responsibility of the Government "to prevent the recruitment of children and youth for terrorist causes, prevent the inculcation of terrorist ideas or notions of extremism and educate them". Moreover, Article 35(1), inter alia, states the need for appropriate measures of educating "children and young offenders in whom the idea of terrorism and extremism is inculcated" in cooperation with non-Governmental Organizations. Relate these concerns with elements of curriculum at elementary, high school and university levels of formal education.
5. Article 35(3) of Proclamation No. 1176/2020 states the Government's duty to educate "persons or sections of a community exposed to ideas of terrorism and extremism" and, "where necessary, provide them with medical support", and Article 35(4) requires the Government to provide rehabilitative measures in prison "for convicted and sentenced prisoners" so that they can be free from extremism. Discuss the rationale behind the focus on rehabilitation in these provisions.
6. Browse scholarly publications online on the controversy relating to the gaps and challenges in defining 'terrorism' in broad terms *vis-à-vis* the other extreme of an unduly narrow scope in its definition. State your reflections.

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2. Hate Speech and Disinformation

2.1 Objectives and prohibitions

The preamble of the Hate Speech and Disinformation Prevention and Suppression Proclamation No. 1185/2020 states the need "to prevent and suppress by law the deliberate dissemination of hate speech and disinformation" (para 1), and the threat that hate speech poses "to social harmony, political stability, national unity, human dignity, diversity and equality" (para 2). The third paragraph gives recognition to the need for due caution against "limitations on fundamental rights" and requires these limitations to "be proportionate, narrowly tailored and prescribed by law in pursuit of aims that are legitimate in a democratic society".

Article 2(1) defines *speech* as "the act of disseminating [] information verbally, textually, graphically or by other means" and Article 2(2) defines *hate speech* as "speech that deliberately promotes hatred, discrimination or attack against a person or [a] discernable group of identity, based on ethnicity, religion, race, gender or disability". The Proclamation further deals with disinformation which, according to Article 2(3) means "speech that is false, is disseminated by a person who knew or should reasonably have known the falsity of the information and is highly likely to cause a public disturbance, riot, violence or conflict".

Article 3 of the Proclamation states the following objectives that have necessitated the enactment of a law against hate speech and disinformation:

1/ Ensure that in their exercise of freedom of expression, individuals will not engage in speech that incites violence, is likely to cause public disturbance or promotes hatred and discrimination against a person or an identifiable group or community based on ethnicity, religion, race, gender or disability;

2/ Promote tolerance, civil discourse and dialogue, mutual respect and understanding and strengthening democratic governance;

3/ Control and suppress the dissemination and proliferation of hate speech, disinformation and other related false and misleading information.

Based on these objectives, Articles 4 and 5 respectively prohibit "hate speech by means of broadcasting, print or social media using text, image, audio or video" and the dissemination "of any disinformation on public meeting by means of broadcasting, print or social media using text, image, audio or video".

2.2 Exceptions and ambiguities in interpretation

The Explanatory Memorandum of the Draft Hate Speech Proclamation (p. 5) indicates the need for minimizing the adverse impact that Articles 4 and 5 may have on freedom of expression. It reads "ይህን ዓይነት ልዩ ሁኔታዎች መደንገግ የሚያስፈልገው ሕጉ ሓሳብን በነፃነት የመግለጽ መብት ላይ ሊኖረው የሚችለውን አሉታዊ ተጽዕኖ ለመቀነስ ነው::"/ "such exceptions are necessary so that the adverse impact that the law can entail against freedom of expression can be minimized". Accordingly, the prohibitions against hate speech and disinformation are subject to the following exceptions embodied under Article 6:

1/ Notwithstanding Articles 4 and 5 of this Proclamation, a speech will not be considered hate speech or disinformation and its dissemination is not prohibited if it is part of:
   a) An academic study or scientific inquiry,
   b) A news report, analysis or political critique,
   c) Artistic creativity, performance or other form of expression,
   d) Religious teaching.

2/ Notwithstanding [] Article 5 of this Proclamation, a speech will not be considered as disinformation and prohibited if a reasonable effort has been made under the circumstances by the person making the speech to ensure the veracity of the speech or if the speech is more inclined to political commentary and critique instead of being a factual or news report.

The element of this provision with regard to 'reasonable effort' is relatively clear in the Amharic version of Article 6(2). It reads:

> የዚህ አዋጅ አንቀፅ ፭ እንደተጠበቀ ሆኖ አንድ ንግግር እንደ ሐሰተኛ መረጃ ተወስዶ የማይከለከለው ንግግሩን ያሰራጨው ወይም ያደረገው ሰው የመረጃውን እውነተኛነት ለማረጋገጥ በሱ ሁኔታ ካለ ሰው የሚጠበቀውን ምክንያታዊ ጥረት ያደረገ እንደሆነ ወይም ንግግሩ የጥሬ ሐቅ ዘገባ ወይም ዜና ከመሆን ይልቅ ወደ ፖለቲካ አስተያየትና ትችትነት ያጋደለ ከሆነ ነው።

The standard of 'reasonable effort' that is required of a person who makes or disseminates the speech is to satisfy the threshold of effort commensurate with what another person under similar circumstances would be reasonably expected to do to ensure the veracity of the speech. The second alternative element that can be exception to the offence of disinformation is the inclination of the speech "to political commentary and critique instead of being a factual or news report". Yet, there are levels of courtesy and social values (commensurate with ethical standards and social responsibility) that are required of such political comments and critique that are expected to be observed even if they may not violate the literal readings of the law.

Issues of concern in the interpretation of Articles 3 to 6 of the Proclamation include the level of professionalism and ethical standards that are necessary to ensure that the exceptions are not abused in a manner that promotes hate speech under the pretexts of academic study or scientific inquiry, news report, analysis or political critique, artistic creativity, performance or other form of expression, and religious teaching. Freedom of action and freedom of expression are indeed intrinsic elements of basic human rights, and meanwhile these rights envisage rational choice, decisions and actions so that the exercise of these rights is not abused.

As Aron and Bebizuh noted, there are ambiguities in certain provisions. For example, even if the Proclamation defines 'hate speech', Article 4, unlike the initial draft, does not make reference to hate speech but only makes express reference to dissemination. This, according the Aron and Bebizuh creates ambiguity[12] whether it is only persons who disseminate hate speech who are liable as offenders. They also note the ambiguities in the interpretation of Article 6 which states the exceptions because, in the absence of clarity, there can be hate speech under the pretext of artistic expression,[13] academic or scientific inquiry,[14] or religious teaching.[15]

2.3 Criminal liability

According to Article 7(1), dissemination of hate speech in violation of Article 4 is punishable "with simple imprisonment not exceeding two years or a fine not exceeding 100,000 Birr". However, Article 7(2) raises the range of simple imprisonment if "an attack against a person or a group has been committed as a result of a hate speech". The punishment that is imposed against acts of dissemination of disinformation in violation of Article 5 is stipulated under Article 7(3).

Sub-Articles 4 and 5 of Article 7 respectively deal with the range of penalties:

- against the commission of hate speech or disinformation "through a social media account having more than 5,000 followers or through a broadcast service or print media", and
- "[i]f violence or public disturbance occurs due to the dissemination of disinformation".

As stipulated under Article 7(3), however, "[i]f no violence or public disturbance has resulted due to the commission of the offence of hate speech or disinformation and if a court of law is convinced that the correction of the convict will be better served through alternatives other than fine or imprisonment, the court could sentence the convict to render mandatory

community service." The Explanatory Memorandum of the Draft Proclamation states[16] the following with regard to the focus of the range of penalties:

> **በአጠቃላይ ሲታይ በአንቀጹ የተ[ገለፁ]ትን ቅጣቶች በዚህ መጠን ማስቀመጥ ያስፈለገ[ው] በተጠቀሱት ወንጀሎች የሚሳተፉ አካላትን ለማስተማር በቂ እና ተመጣጣኝ ናቸው የሚል እሳቤ በመያዝ ሲሆን ወንጀሉን ቅጣት በማግዘፍ ብቻ ከማስወገድ ይልቅ ትምህርት እና ሥልጠና በመስጠት የሚቀንስ ብሎም የሚወገድበት አግባብ በሂደት መቀየስ አስፈላጊነትን ታሳቢ በማድረግ ነው።**
>
> Generally the penalties in the provision are stipulated within such range because they are found to be adequate and proportional to educate participants in these offences, and it has been found necessary to pursue a process that takes into account the reduction and ultimate control of offence rather than aggravation of penalty.

2.4 Duties of institutions and service providers

The following institutions and service providers have the duties that are stipulated under Article 8 of the Proclamation. They include:-

- the duty of any "enterprise that provides social media service" to "endeavor to suppress and prevent the dissemination of disinformation and hate speech through its platform" (Article 8(1)),
- the duty of social media service providers to "act within twenty four hours to remove or take out of circulation disinformation or hate speech upon receiving notifications about such communication or post" (Article 8(2)),
- the duty of social media enterprises to "have policies and procedures to discharge their duty under sub article (1) and (2) of Article 8 (Art. 8(3)),
- the duty of the Ethiopian Broadcast Authority to "prepare a report which is notify to the public on social media enterprises whether they discharge their duty properly . . . (Article 8(4)),
- the duty of the Ethiopian Broadcast Authority to "conduct public awareness and media literacy campaigns to combat disinformation" (Article 8(5)), and
- the duty of the Ethiopian Human Rights Commission to conduct public awareness campaigns to combat hate speech. (Article 8(6)),

To this end, Article 8(7) provides that "the Council of Ministers may issue a Regulation to provide for the detail responsibilities of service providers and relevant Governmental Institutions".

> With regard to the duties of institutions and service providers, the Explanatory Memorandum notes that Article 8 is not merely confined to articulation of measures that entail criminal or civil liability. The provision also provides for processes of transparency such as the duty of the Ethiopian Broadcasting Authority to provide periodic reports accessible to the public every two years regarding

> the proper discharge of functions by social media enterprises in accordance with Article 8.[17]

2.5 Repealed provision of the Criminal Code

Article 9 of the Proclamation states that Article 486 of the 2004 Criminal Code has been repealed. The following summary of the Explanatory Memorandum explains the purpose of repeal:

> Section 3(e) of the Explanatory Memorandum (p. 7) states the rationale for the repeal of Article 486 of the 2004 Criminal Code. The repealed provision titled "Inciting the Public through False Rumours" criminalizes the act of starting or spreading "false rumours, suspicions or false charges against the Government or the public authorities or their activities, thereby, disturbing or inflaming public opinion, or creating a danger of public disturbances" (Art. 486/a). The Explanatory Memorandum (p. 7) states that this provision protects the government and public officials from disinformation and false rumours, and it notes that such exclusive protection is not acceptable in a democratic setting while in fact public officials and the government have better opportunities and competence than ordinary citizens to respond to disinformation.
>
> It indicates that public officials envisage reasonable or unreasonable, truthful or fallacious criticisms when they accept their positions; and such restrictions can seriously overshadow political critique and dialogue. The Explanatory Memorandum further notes that Article 486 of the Criminal Code, not only has the gaps indicated above, but also lacks the necessary details to prevent hate speech and disinformation.[18]

The reading here-below is (with some omission and changes) taken from the text prepared by the author and published in the Ethiopian Law Reform Background Documents' Synopsis[19].

Reading on Section 2[20]

Overview of the diagnostic study on hate speech

The diagnostic study on hate speech (November 2018)[21] provides baseline information relating to the initiation of Proclamation No. 1185/2020. It highlights the background that necessitated the enactment of legislation on hate speech, comparative experience and the empirical findings that call for the prohibition of hate speech.

1. Features, background and the need for legislation

Section 1.2 of the diagnostic study report of the Legal Study, Drafting and Dissemination Directorate (LSDDD)[22] of the Federal Attorney General titled "የጥላቻ ንግግር በኢትዮጵያ፤ የዳሰሳ ጥናት (Hate Speech in Ethiopia), *inter alia*, deals with the definition of hate speech citing an international NGO –ARTICLE 19 Free World Centre which defines the element of hate speech,[23] i.e. 'Hate' and 'Speech' as follows:

> *Hate*: the intense and irrational emotion of opprobrium, enmity and detestation towards an individual or group, targeted because of their having certain –actual or perceived– protected characteristics (recognised under international law). [FN 8] 'Hate' is more than mere bias, and must be discriminatory. Hate is an indication of an emotional state or opinion, and therefore distinct from any manifested action.
> [FN 8: The Camden Principles on Freedom of Expression and Equality, ARTICLE 19 (2009), Principle 12.1.]
>
> *Speech*: any expression imparting opinions or ideas – bringing an internal opinion or idea to an external audience. It can take many forms: written, non-verbal, visual or artistic, and can be disseminated through any media, including internet, print, radio, or television.

The diagnostic report cites definitions of 'hate speech' based on various formulations that cite ARTICLE 19, US law, EU Ministerial Council, The Committee on the Elimination of Racial Discrimination (CERD), Human Rights Watch, and a dictionary (pp. 3, 4). It indicates the difficulty in arriving at a uniform definition and summarizes Woubishet Mulat's definition of hate speech. Woubishet's definition is the following:

> There is no definite and consistent definition of hate speech. However, there are several points that are shared by many definitions. Thus hate speech refers to verbal descriptions, texts, images, pictures, drawings and sculptures that promote, propagate, inspire, encourage, and justify racism, xenophobia, and promote ethnic discrimination against minorities by using various pretexts. The word 'speech' does not only refer to sound. All sculptures are hate speech. Therefore, the word 'speech' does not refer only to audio … [it] also includes audio, text, images, sculptures, sound and image settings, and cartoons. [2]

[2] https://www.ethiopianreporter.com/content/መጥላት-ላለብን-የጥላቻ-ንግግር-የተጨማሪ-ሕግ-አስፈላጊነት (11 September 2016). The original Amharic version reads:

Based on various sources, the diagnostic study (p. 5) identifies three factors that should be considered as features of hate speech:

> The *firs*t element requires speech, expression or an act of communication. The *second* element requires that the speech expression or communication must … degrade, demoralize and insult, or it should enhance, incite, encourage or justify hatred and disharmony targeting at individuals or groups. The *third* factor requires that the content and effect of the speech, expression or communication must be related with any one of the undesired elements against the identity of the victim who may be an individual or group.[3]

Section 1.3 of the introduction deals with the problem statement of the diagnostic study (pp. 5-7). It states the multi-national setting that has necessitated federalism with the objectives of freedom, equality and harmony. The diagnostic study notes the occurrence of hate speech which undermine the equality and freedom of individuals and ethno-cultural or religious groups. It indicates the existence of a considerable number of groups who particularly use social media in disseminating texts against the dignity of ethno-cultural entities and religions that can lead to ethnic and religious conflicts. Section 1.3 further states the need to draw lessons from the genocide in Rwanda and it indicates the adverse impact of hate speech in the relations among diverse ethno-cultural and national development.

The section also shows that the features of hate speech are graver than libel and defamation embodied in Articles 613, 615 and 486 of the Criminal Code. It indicates the elements of hate speech that are not covered under these provisions and states that penalties under these provisions are not commensurate with the features and consequential gravity of hate speech at national/country level. The particular features of hate speech which represent the demarcation line in the course of exercising freedom of expression are noted thereby necessitating clarity on the scope of freedom of expression and the corresponding rights of citizens and groups to be protected from expressions that cause anger, threat, disgust and insult.

As indicated in the diagnostic study (p. 10), identity, opinion and shared elements of group identity are features which should be protected, and hate

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የጥላቻ ንግግርን ምንነት በተመለከተ ቁርጥ ያለና ወጥ ብያኔ የለም፡፡ ይሁን እንጂ በርካታ ብያኔዎች የሚጋሯቸው ነጥቦች አሉ፡፡ በመሆኑም ማንኛውም የዘር ጥላቻን፣ የሌላ አገር ዜጋን ወይንም ስደተኛን በጭፍኑ መጥላትን፣ ፀረ ሴማዊነትን፣ ትዕግሥት አልባና አግላይ የሆነ ብሔርተኝነትን፣ ቁጥራቸው አነስተኛ የሆኑ ብሔረሰቦችን ሰበብ እየፈለጉ መገለል እንዲደርስባቸው የሚሰብኩ፣ የሚያሠራጩ፣ የሚያነሳሱ፣ የሚያበረታቱና ትክክል እንደሆኑ ለማስረዳት የሚደረጉ ጥረቶች የያዙ ቃላዊ ገለጻዎች፣ ጽሑፎች፣ ምሥሎችና ሥዕሎች፣ ቅርጻ ቅርጾች በሙሉ የጥላቻ ንግግር ይሰኛሉ፡፡ ስለሆነም ንግግር (ሰpeech) የሚለው ቃል ድምፅን ብቻ የሚያመለክት አይደለም፡፡ … የጥላቻ ንግግር ሲባል ድምፅን፣ ጽሑፍን፣ ምሥልን፣ ቅርፃ ቅርፅን፣ የድምፅና ምሥል ቅንብሮች፣ ካርቱኖችን ያካትታል፡፡

[3] አንደኛው ነጥብ የጥላቻ ንግግር ለማለት ንግግር፣ ገለፃ ወይም የተግባቦት ድርጊት መኖር አለበት፣ ሁለተኛው ነጥብ ይህ ንግግር፣ ገለፃ ወይም የተግባቦት ድርጊት ግለሰብን ወይም ቡድንን የሚያንቋሽሽ፣ ተስፋ የሚያስቆርጥ፣ የሚዘልፍ ወይም ግለሰብ ወይም ቡድን ላይ ያነጣጠረ ጥላቻን ወይም አለመቻቻልን የሚያስፋፋ፣ የሚያነሳሳ፣ የሚያበረታታ፣ ወይም ተገቢ ነው የሚል አንዳንድ ወይም የተወሰነ መጥፎ ውጤት ያለው መሆን አለበት፡ ሦስተኛው ነጥብ ንግግሩ፣ ገለፃው ወይም የተግባቦት ድርጊቱ ይዘትና ውጤት ከላይ ከማይፈለጉ ነጥቦች መካከል የግለሰብ ወይም የቡድን የማንነት፣ ደረጃ ትይይዝ ሊኖረው ይገባል የሚሉ ናቸው፡፡

speech violates the rights enshrined in international instruments against discrimination based on nationality, gender, religion, views, ethnicity and other similar features of identity. These instruments recognize the equality, honour and freedom of all human beings without discrimination. Every person is thus free to hold opinion, hold the identity of his/her choice, and share the elements of naturally endowed aspects of personhood and the honour thereof. (p. 10).

The study (p. 11) recalls that these natural rights of human beings have been grossly violated merely because of identity during the genocide in Rwanda, Hitler's holocaust against millions of Jews, attacks against Muslims in Burma, tragic xenophobic attacks against foreigners (including Ethiopians) in South Africa. As indicated in the study (p. 11), these tragedies were directly or indirectly related with failure to accommodate identity, beliefs and opinion. The study (p. 11) notes that these tragedies are attributable to the quest for supremacy or hatred to the other group and unwillingness to live together; and what starts as group hatred can eventually lead towards perpetrators and victims of genocide. The diagnostic study underlines the responsibility of governments to have a legal framework and tools of enforcement that can prevent such occurrences.

The study further discusses:

- conceptual overview of hate speech (Section 2.2, pp. 11-13),
- the criminal nature of hate speech (Section 2.3, pp. 13-15),
- causes of hate speech (Section 2.4, pp. 15-16),
- medium of transmission (Section 2.5, p. 16),
- dangers that accompany hate speech (Section 2.6, pp. 17, 18),
- arguments regarding the criminalization of hate speech (Section 2.7, pp. 18, 19), and
- hate speech under the international legal framework (Section 2.8, pp. 19-22).

Section 2.2 (pp. 11-13) which deals with the concept of hate speech (የጥላቻ ንግግር ጽንሰ ሐሳብ) highlights various definitions of hate speech and it notes the co-existence of principles that are widely acceptable and controversial. It thus calls for a legal framework on hate speech (p. 13) in the absence of which (i) various expressions may erroneously be classified into hate speech, or (ii) hate speech may unduly be perceived as freedom of expression.

In Section 2.3 (titled 'the Criminal Nature of Hate Speech'/ 'የጥላቻ ንግግር የወንጀልነት ባህሪ'), the study presents three dimensions of hate speech (*intention*, *incitement* and *result*) so that an act can constitute the crime of hate speech based on Article 23 of the Ethiopian Criminal Code. According to Article 23(2), the three elements of a criminal office under the Ethiopian Criminal Code are the legal element (i.e. its prohibition by the law), its moral element (i.e. criminal intention or criminal negligence as defined under Articles 57-59), and the material element of the crime as indicated in each criminal offence. The words '*intention*, *incitement* and *prohibited result*' stated in the study are thus expected to be interpreted in the context of Article 23, other relevant provisions of the Criminal Code and the special legislation on hate speech which is at present part of Ethiopian criminal law as envisaged under Article 3 of the Criminal Code.

The study indicates that hate speech requires the *intention* to incite hatred (p. 14), and it notes the need for caveats in identifying such intention so that freedom of expression would not be unduly restricted. It also notes that –in the

jurisprudence of international tribunals– the element of *incitement* refers to the causal link between the disseminated expression and the result that is forbidden (p. 14). According to the study, this is expected to be identified by examining the causal relationship between the act of incitement and its result in the society. The fulfillment of *intention* and the *incitement's causation* brings about the third element, i.e., *subsequent result*. (pp. 14, 15).

Section 2.7 highlights arguments that are forwarded in favour of and against the criminalization of hate speech (pp. 18, 19). The last part of Section 2 of the study (i.e. Section 2.8) indicates the need to examine the international framework on hate speech based on international instruments and customary international law; and it highlights the balance embodied in the following instruments between freedom of expression and the restrictions thereof:

- Article 19 the Universal Declaration of Human Rights,
- Article 19 of the ICCPR (International Covenant on Civil and Political Rights),
- Article 9 of the African Charter on Human and Peoples' Rights (Banjul Charter), and
- International Convention on the Elimination of all Forms of Racial Discrimination (ICERD).

The study indicates that the fourth instrument, i.e., the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) expressly refers to hate speech as ground of restrictions to freedom of expression. The study (p. 21) states Ethiopia's ratification of the Convention, and cites *Article 4* which requires parties to the Convention to enact legislation against hate speech. The provision reads:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination …"

Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), cited in the study states that:

> to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial

discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

The diagnostic study (pp. 21, 22) indicates the obligations of states to enact laws that prohibit racial discrimination if their criminal codes do not include such provisions. The study (p. 22) states the concluding observations of the Committee on the Elimination of Racial Discrimination which indicates that Ethiopia should enact legislation that criminalizes all forms of racial discrimination based on identity.

2. Comparative experience on hate speech

In the absence of a special law on hate speech, the diagnostic study (p. 23) notes the risks of unduly classifying free expression of opinion into hate speech, and the other extreme of violating the rights of others in the guise of freedom of expression. In order to avoid these extremes (and to harmonize the nexus between ensuring freedom of expression and articulating the restrictions against hate speech), the third section of the study highlights the comparative experience of South Africa, Kenya, USA, Canada, and some European countries (Germany, UK, Sweden and Ireland).

The study highlights South Africa's Constitution (p. 24) that balances freedom of expression and restrictions to this freedom. Moreover, the study notes the enactment of Prevention and Combating Hate Crimes and Hate Speech.[24] Section 16 of South Africa's Constitution that ensures freedom of expression reads:

1. Everyone has the right to freedom of expression, which includes
    a. freedom of the press and other media;
    b. freedom to receive or impart information or ideas;
    c. freedom of artistic creativity; and
    d. academic freedom and freedom of scientific research.
2. The right in subsection (1) does not extend to
    a. propaganda for war;
    b. incitement of imminent violence; or
    c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Freedom of expression under Article 33(2) of the Kenyan Constitution and the enactment of a law in Kenya that prohibits hate speech (i.e. Prohibition of the Hate Speech Bill) are indicated in the study (pp. 24, 25). Article 33 of the Constitution of Kenya stipulates the following:

(1) Every person has the right to freedom of expression, which includes—
(*a*) freedom to seek, receive or impart information or ideas;
(*b*) freedom of artistic creativity; and
(*c*) academic freedom and freedom of scientific research.

(2) The right to freedom of expression does not extend to—
(*a*) propaganda for war;
(*b*) incitement to violence;

(*c*) hate speech; or
(*d*) advocacy of hatred that-
(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
(ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

As indicated above, the study further highlights the comparative experience in legal regimes against hate speech in USA (pp. 25, 26), Canada (p. 25), Germany (p. 27), UK, Sweden and Ireland (p. 28). The study (pp. 28-30) further highlights some lines of interpretation at the European Court of Human Rights with regard to the line of demarcation between freedom of expression and hate speech.

3. Gaps that necessitated the law on hate speech

The fourth section of the diagnostic study (pp. 31-41) deals with Ethiopia's legal regime on freedom of expression and hate speech. Citing Gedion Timothewos, Section 4.2 (pp. 31, 32), it states *three* main justifications for freedom of expression, i.e., as pre-requisite in the search for *truth*, *self-governance* and *personal development*.[25]

Section 4.2 (pp. 32-34) and Section 4.3 (pp. 34, 35) respectively address the legal regimes relevant to freedom of expression and gaps relating to hate speech. The study recalls various realities such as the labels of 'timkietegna' (ethnic chauvinism), and 'tebab (narrow ethnicism)' in various documents (including trainings) that had restricted free expression thereby nurturing stereotypes, suspicion and hatred among ethnic identities.

With regard to the scope of freedom of expression, Section 4.4.1 (pp. 35, 36) cites Sub-articles 6 and 7 of Article 29 of the FDRE Constitution (which state the limits to freedom of expression and liability under the law (Art. 29(7)) where any citizen violates the legal limitations under Article 29(6). In Section 4.4.2 (pp. 36, 37), the study indicates the provisions under the Ethiopian Criminal Code which relate to crimes against honour (Articles 606-619); and it notes that the international instruments ratified by Ethiopia are binding. The study shows that the provisions of the Criminal Code are not adequately specific (p. 37) because hate speech directly aims at creating and aggravating hatred based on identity, religion, race or other similar factors.

Sections 4.4.3 (pp. 38, 39), 4.4.4 (pp. 39, 40), Section 4.4.5 (pp. 40, 41) and Section 4.4.6 (pp. 41, 42) respectively indicate that the elements of hate speech are not specifically articulated under:

- Computer Crime Proclamation No. 958/ 2016;
- Freedom of the Mass Media and Access to Information Proclamation No. 590/2008;
- Advertisement Proclamation No. 759/2012; and
- Peaceful Demonstration and Public Political Meeting Procedure Proclamation No. 3/1991.

4. Empirical findings of the diagnostic study the need for law against hate speech

The fifth section of the diagnostic study (pp. 42-53) presents the findings of the field research. The field research was conducted in six regional states (Tigray, Amhara, Oromia, SNNP, Somali, Harari) and two cities (Addis Ababa and Dire Dawa). After indication of the number of respondents and their profile (pp. 43, 44) and the data that is gathered from respondents (pp. 45, 46), the study, inter alia, states the following findings:

a) *Prevalence of hate speech in Ethiopia* (Section 5.5, page 46):
   - Hate speech that targets at individual or group identity exists in Ethiopia (296 out of 314 respondents), i.e. 92.2%
   - Hate speech that targets at individual or group identity exists in the regional state where the respondent resides (251 out of 314 respondents), i.e. 79.9%

b) *Factors and causes of hate speech in the Ethiopian context* (Section 5.6, page (pp. 46, 47):
   Over 95% of the respondents considered ethnicity among the factors and 80% of the respondents considered political opinion and religion among the factors and causes of hate speech.

c) *Means of hate speech dissemination* (Section 5.7, pp. 47, 48):
   Over 92 % of the respondents stated Internet (such as social media: Facebook, YouTube, Viber, etc.) as one of the means of dissemination of hate speech.[4] Moreover, views of respondents regarding the organs that are engaged in hate speech and their objectives (Section 5.8, pp. 48, 49) and the factors that aggravate hate speech (Section 5.10, pp. 50, 51) are highlighted in the diagnostic study.

d) *Harm caused by hate speech* (Section 5.9, p. 50):
   314 out of 324 respondents (i.e. 97%) stated that hate speech causes harm, and the types of harm indicated by the respondents include the threat it can cause against: sustaining nation-statehood, community harmony, moral decline, isolation from society, physical and moral harm, economic isolation, hatred, feelings of revenge, erosion in feelings of citizenship, civil wars, disorder, inter-generational tension, disruption of unity, nation-state disintegration, and in general, economic, political and social harm that adversely affects citizens and our country.

e) *Means of prevention against hate speech* (Section 5.11, p. 51):

[4] "በተለይም ሁሉም መልስ ሰጪዎች በሚባል ደረጃ ከ92% በላይ የሚሆኑት በኢንተርኔት መልዕክት (ማህበራዊ ድህረ-ገፅ ፌስ ቡክ፣ ዩትዩብ፣ ቫይበር እና በማሳሰሉት) ብለው መልስ የሰጡ ሲሆን፣ 87% የሚሆኑት በአፍ ንግግር (በአደባባይ የተቃውሞ/ የድጋፍ ንግግር በማድረግ)፣ 80% የሚሆኑት በወረቀት ፅሁፍ (ስዕልን በመሳል፣ ፖስተርን ፣ ብሮሹሮችን በመጠቀም)፣ 60% የሚሆኑት በመገናኛ ብዙሃን (ሬዲዮ፣ ቴሌቪዥን፣ ጋዜጣ፣ መፅሔት) እና ሌሎቹም የስነጥበብ ስራዎች (በሙዚቃ፣ ፊልሞች፣ ቲያትር፣ ሥዕል)፣ በስልክ፣ በምልክት መግለፅ በቅድመ ተከተል አስቀምጧል፡
ከላይ የተጠቀሱት መተላለፍያ መንገዶች እንዳሉ ሆነው በተጨማሪም በተለያዩ ድርጊቶች የሚተላለፍ መሆኑን ወይም የሚገለፅ መሆኑን መልስ ሰጪዎች ጠቁመዋል፤፡ እነዚህም ዱላ የመያዝ ሰዎችን ወደ ሀገራቸው ይመለሱ ይውጡልን በማለት፣ በመደብደብ እና ንብረት በማቃጠል ጥላቻን ከማስተላለፍ ባሻገር ሰዎች ላይ ጥቃት የሚፈፀምባቸው ሁኔታዎች መኖራቸውን ገልፀዋል፡፡

300 out of 314 respondents (95.5%) generally believe that there should be prevention of hate speech against individuals or groups. The respondents have also suggested various means of prevention in the Ethiopian context.

f) *The need for enacting a law against hate speech* (Section 5.12, pp. 52, 53): 268 out of 307 respondents (87%) stated that there is the need to enact a law against hate speech in addition to the pursuits of public awareness enhancement. The remaining 13% stated that awareness creation and addressing the factors that cause hate speech should be pursued rather than enactment of a law against hate speech.

The diagnostic study cites international instruments and the FDRE Constitution which ensure equality and require equal protection of the law without discrimination based on race, ethnicity, colour, language, religion or social origin. It states the duty of government to respect these rights and to protect and control any attack based on group identity.

To this end, the conclusion of the study reiterates the need for restrictions on freedom of expression in the event of hate speech (pp. 54-56). The conclusion (Section 6.2, pp. 56, 58) summarizes the findings of the field study highlighted above and it, inter alia, states (p. 60) the need for a law that criminalizes hate speech that targets at groups or individuals subject to variation in the level of measures based on the gravity of the act, and with due exceptions in light of the objectives of the speech such as academic engagements.

Review Exercises

1. Discuss the balance between the prohibition of hate speech and disinformation and the caution against the adverse impact of such prohibition on human rights and freedom of expression, while at the same time indicating the caution against abuse in such a manner that the exceptions such as academic study or scientific inquiry, news report, analysis or political critique, artistic creativity, performance or other form of expression, and religious teaching are used to promote hate speech.
2. Article 7(3) of Proclamation No. 1185/2020 provides that "[i]f no violence or public disturbance has resulted due to the commission of the offence of hate speech or disinformation and if a court of law is convinced that the correction of the convict will be better served through alternatives other than fine or imprisonment, the court could sentence the convict to render mandatory community service." Define 'community service' and state the difference (in any) between 'community service' and 'compulsory labour' stipulated under Article 103 of the 2004 Criminal Code.
3. The reasons for the repeal of Article 486 of the Criminal Code highlighted in Section 2.5 focus on Article 486(a). State your observations on the extent to which the Provisions in Proclamation No. 1186/2020 have addressed the themes that were covered under Article 486(b) of the 2004 Criminal Code.

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3. Human Trafficking and Smuggling of Persons

Human trafficking and smuggling in persons are among the key challenges in Ethiopia. The hardships that are being encountered by Ethiopian citizens (that are victims of human trafficking) in countries such as Saudi Arabia[5] illustrates the challenges.

The Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proclamation No. 1178/2020 was enacted in April 2020. The realities and the ends-in-view that are expressed in the Proclamation's preamble include:

- the serious harm that is being caused by "trafficking in persons, the smuggling of persons and illegal oversea employment crimes" … to " physical, life and safety of citizens and exposing to grave violations of human rights;" (para 1)
- the need to revise the former proclamation enacted in 2015 and enact a comprehensive legal framework because it lacks clarity and consistency with "with other laws and does not provide adequate responses to the problem;" (para 2);
- the need for the enactment of detailed law for the implementation of Article 18(b) of the FDRE Constitution that prohibits trafficking in human beings in any manner and "the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children and the Protocol Against the Smuggling of Migrants by Land, Sea and Air issued by the United Nations;" (para 3); and
- the government's duty to "respect and protect rights and benefits of persons conferred by nature and law" which necessitate the enactment of a legal framework and the creation "a system that enable crime prevention, holding perpetrator accountable, protecting and rehabilitating victims specially to undertake activities that reaches section of the society vulnerable to the crimes and in taking into consideration the age, sex and special needs of the victims and facilitating international cooperation".

3.1 Trafficking in persons

Articles 3 and 4 of the Proclamation respectively deal with the elements of the offence of human trafficking and the aggravating circumstances. Article 3(1) renders the following acts criminally punishable:

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[5] *See* for example, Human Rights Watch, *Ethiopians Abused on Gulf Migration Route: Trafficking, Exploitation, Torture,* Abusive Prison Conditions. Available at: https://www.hrw.org/news/2019/08/15/ethiopians-abused-gulf-migration-route Last accessed, January 25, 2022

- holding “another person in slavery or practices similar to slavery, servitude or debt bondages” or
- exploiting another person by “removing organs or prostitution or other forms of sexual activities”, or
- engaging “another person in forced labor or service, begging or criminal act, forced marriage, surrogacy”; or
- exploiting children in labor, or
- committing “exploitation similar to these acts”.

According to Article 2(2), ‘slavery’ refers to “the status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised”. And under Article 2(3), ‘servitude’ is defined as “the conditions or the obligations to work or to render services from which the person cannot escape, prevent or alter”. In spite of various laws including the FDRE Constitution and international human rights instruments ratified by Ethiopia, these states of human degradation are conducted in the course of human trafficking and smuggling of persons.

Clarity is also given to the scope of acts that are regarded as exploitation of another person’s prostitution. The term defined under the Amharic version of Article 2(3) “በዝሙት አዳሪነትና መሰል የወሲብ ተግባር ብዝበዛ/ Exploitation of prostitution and other similar forms of sexual activities” is clearer than the English version which reads “sexual or other forms of sexual activities”. According to Article 2(3) such exploitation refers to “pimping out, using or deploying a person for prostitution, or causing a person to engage in immoral acts, especially by exhibiting one’s nakedness or sexual parts for the view of others, including the recording of these acts through the use of a photograph, video, audio or any other means for the purpose of distribution.”

Specific reference is made to benefitting from the prostitution of other persons under Article 7 of the Proclamation which provides that:

> Apart from the circumstances stipulated under Articles 3 and 4 of this Proclamation, any person for the purpose of benefiting from the prostitution or immorality of another or to gratify the sexual passions of another, causes another to engage in prostitution, acts as go between, procures, keeps in a brothel, uses or rents out his residence or place of business for this purpose in whole or in part or uses the prostitution or immorality of another in any other manner shall be punishable. . . .

Unlike various criminal offences that involve single acts, the exploitation that arises from these offences involves continuous acts. Persons who commit the acts of exploitation by removing organs, prostitution, other sexual activities, or similar exploitative acts (and their collaborators) are punishable under Article 3(2) whether the exploitation has merely started or is completed.

Article 3(5) clarifies the means that are used in human trafficking which involve "threat or use of force or other means of coercion, or abduction, fraud, [o]r deception, abuse of power or of a position of vulnerability, or by the giving or receiving of payments or benefits to achieve the consent of a person having control over the person." The intention of exploitation is presumed in accordance with Article 6 if through the means stated under Article 3(2) [and 3(5)], the acts of recruiting, transport, harboring, hiding or receiving another person is proved. In the case of children, however, such presumption does not require the means mentioned in Article 3 because Article 6 only requires circumstantial evidence regarding the purpose of exploitation. According to Article 3(4) the victim's consent to or knowledge of the exploitation "shall not relie[ve] the perpetrator from criminal liability.

Where the exploitation involves children, Article 3(3) does not even require the beginning of exploitation because the "recruitment, transportation, transferring, harboring, hiding or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons'." Article 2(5) defines the term 'labor exploitation of children' as "causing a child to work or provide a service in a manner other than those permitted by law or contrary to the age or physical strength of the child". According to Article 2(1), persons under the age of eighteen years are regarded as children and the words 'other than those permitted by law' (in Article 2(5)) refer to young workers –who according to the Labour Proclamation No. 1156/2019– have "attained the age of 15 but [are] below the age of 18 years".[26] Articles 89 to 91 of the Labour Proclamation deals with the working conditions of young workers that should be fulfilled.

Aggravation of punishment

Various aggravating circumstances for the offences committed in violation of Sub-articles 1 and 2 of Article 3 are stipulated under Article 4 of the Proclamation. These circumstances that aggravate punishment include trafficking of persons committed:

- "against a child or [a person who is] mentally ill or physically disabled;" (Art. 4(1)(a)), or
- "by using drugs, medicine or weapons;" (Art. 4(1)(b)), or
- "by a public official or civil servant" through abuse of power; (Art. 4(1)(c)); or
- "by an organization licensed to conduct domestic or foreign employment services by abusing its license;" (Art. 4(1)(c)).

Other aggravating circumstances (Art. 4(2) a to c) include circumstances whereby the offence:

- is committed by "a member, a leader or coordinator of an organized criminal group;" (subject to the exception stated under Article 4(3)), or

- has caused “chronic disease on the victim;” or “endangered the life or safety of the victim or [has] caused grave bodily injury to the victim or [if the victim is] subjected [to] inhuman treatment;”

Article 2(6) makes reference to Article 555 of the 2004 Criminal Code with regard to the definition of ‘grave wilful injury’. And, according Article 4(2)(d), the punishment can be aggravated to the maximum tiers for the sentence “[w]here the offence causes the death of the victim, depending on the circumstances of the case”.

Complicity

Article 5 of the Proclamation deals with participation as accomplice in the offence. Subject to the provisions of the 2004 Criminal Code regarding an accomplice, a punishable act of complicity in the offence of human trafficking and smuggling in persons is committed, if “any person knowing that it is to be used for purpose of human trafficking”:-

- permits or rents a “house, building or premises of his own or in his control” or “provide transport service or transport the victims;” (Art. 5(1)), or
- “produce[s], give[s], provide[s] or holds fraudulent, falsified or illegal identity card or travel document” (Art. 5(2)).

3.2 Smuggling of persons

The Proclamation further deals with smuggling of persons (Articles 8 to 10) and crimes committed in the course of overseas employment (Articles 11 and 12). Article 8(1) renders smuggling of persons punishable. It applies to “[a]ny person who, for direct or indirect financial or material gain for himself or for another person”:

- “enables a person to illegally enter into the territory of Ethiopia, exit the territory of Ethiopia, transit through the territory of Ethiopia ”; or
- makes preparation, is found in the process, transports or receives in order “to cause exit of another person from Ethiopian territory” (“ሰውን ከኢትዮጵያ ግዛት ለማስወጣት ዝግጅት ያደረገ፣ በሂደት ላይ የተገኘ፣ ያጓጓዘ ወይም የተቀበለ እንደሆነ”).

Sub-articles (2) and (3) of Article 8 state the circumstances of the commission of the offence that aggravate punishment. With regard to complicity in this offence, Article 9(1) provides that “[w]hosoever, for direct or indirect financial or material gain for himself or for another person, assists a foreigner to stay or live in Ethiopia knowing that the foreigner does not have a valid residence permit by producing or procuring forged documents, or in any other illegal manner is punishable . . . .” This provision applies in the cases of complicity for gain, and according to Article 9(2), “the appropriate provisions of criminal law shall be applicable” if the complicity was not committed for gain.

Where the offence of smuggling in persons involves forgery of documents, Article 10 provides that "[w]hosoever, for direct or indirect financial or material gain for himself or for another person, prepares, is found in possession of, provides or transfers forged or a falsified travel document or identity card for use in the commission of smuggling of persons shall be punishable. . . ."

3.3 Unlawful overseas employment

The Explanatory Memorandum of the Draft Proclamation recalls that "Ethiopia's Overseas Employment Proclamation No. 923/2016 [did] not include a legal provision on criminal penalty after having substituted and repealed a former Proclamation (Employment Exchange Services Proclamation No. 632/2009) that had a criminal penalty provision based on Article 598 of the Criminal Code."[27] It also recalls that "Article 40(1)(b) of Proclamation No. 632/2009 had embodied a penalty provision which reads "Any person who, without having obtained a license in accordance with [the] Proclamation, sends any Ethiopian abroad shall be punishable in accordance with Article 598 of the 2004 Criminal Code of the Federal Democratic Republic of Ethiopia".[28] The Explanatory Memorandum further notes "the argument that was forwarded against the inclusion of the criminal penalty provisions on unlawful sending of persons abroad for work", and it "states that this argument was not accepted because unlawful overseas employment is a means towards trafficking in persons and smuggling of persons."[29]

Article 11 of Proclamation No. 1178/2020 is titled "Unlawful sending of person abroad for work". Article 11(1) criminalizes sending a person abroad for work:-

- "without having obtained a license or while the license has been suspended or canceled" , or
- sending to a country which is not covered in the license ("እንዲልክ ፈቃድ ወዳልተሰጠው አገር ሰውን ለሥራ የላከ እንደሆነ").

Article 11(2) of the Proclamation shall apply with regard to the punishment of the offence if the act "is committed with the pretext of visit, medical, educational or similar visas". According to Article 11(3), the range of punishment (provided under Sub-Articles 1 and 2 of Article 11) becomes relatively higher where the person sent abroad "suffers harm to his human rights, life, body or psychological makeup."

Article 12 of the Proclamation deals with offences that are committed in connection with overseas employment services. Employment agencies receive service charges from employers, and they should not charge employees. Thus the provision punishes a persons who "having a license to

provide oversea[s] employment services":-

- "receives money or materials from the worker in consideration of the employment services;"
- "withholds or refuses identity card, passport, travel documents or any other document of the worker without his consent either before or after the worker engaged in work;"
- "causes the worker to abandon[n] benefits he is entitled to through deceit or other means", or
- "withholds, even with permission of the worker, the salary or property of the worker or monies transferred by the worker …".

3.4 Related offences and juridical persons

The occurrence of the offences highlighted above, i.e. trafficking in persons (Articles 3-7), smuggling in persons (Articles 8-10) and crimes of overseas employment (Articles 11 & 12) may involve acts that are related to these offences. As discussed in Chapter 5 (Sections 3.1 and 3.2), the 2004 Criminal Code envisages criminal liability relating to accessory after the fact (Article 40), failure to report (Article 39) and other offences that are related to a given offence.

Articles 13 to 17 of Proclamation No. No. 1178/2020 deal with the following related offences:

- without justifiable cause, *failure to report* "immediately to the police or appropriate law enforcement organ knowing that any act provided for in Articles 3,4, 8, or 11 of [the] Proclamation is committed or being committed or knowing the identity of the suspect or provides false information" (Article 13);
- offences against whistleblowers or witnesses (Article 14);
- destruction, damaging or hiding evidence (Article 15);
- aiding support not to be prosecuted (Article 16); and
- concealing, damaging or disguising "a property associated with the crime" with "the intention of preventing forfeiture" (Art. 17(1)) subject to the applicability of the relevant law if the act "was committed for the purpose of money laundering" (Art. 17(2)).

If any of the offences highlighted in Sections 3.1 to 3.4 involve juridical persons, Article 18(1) states the range of penalties that shall be imposed. The court may also "at the request of the prosecution or on its own initiative, decide to dissolve the organization or confiscation of its properties" (Art. 18(2)). Moreover, Article 18(3) renders "the owner, manager, employee or other person [who has] participated in the commission of the crime on behalf

and for the benefit of the organization" shall be subject to individual criminal liability.

3.5 Other themes

The other themes that are embodied in the Proclamation include:

- Crime prevention, investigation and appropriation of property (Articles 19-22),
- Protection of victims and rehabilitation and compensation (Articles 23-26),
- Establishment of fund (Articles 27-32),
- The National Council in charge of coordinating and preventing and controlling the offences (Articles 33,34), he National Partnership Coalition (Arts. 35-37), institutional roles of various organs (Arts 35-41), judicial powers (Art. 42) and international cooperation (Art. 43)
- and cooperation (Arts. 33-43), and
- Miscellaneous provisions (Articles 44-47).

The readings here-below are taken (with omissions) from Part Two, Section 6 of the Ethiopian Law Reform Background Documents Synopsis (2018-2020) prepared by the author. [30]

Readings on Section 3

Reading 1

Assessment Report on the Implementation of Laws against Human Trafficking and Smuggling of Persons

The *Assessment on the Implementation of Laws Enacted to Prevent and Control Human Trafficking and Smuggling of Persons in Ethiopia*,[31] 78 pages, was conducted in March 2018 (Megabit 2010 Ethiopian calendar) by the Legal Affairs Directorate General at the Council of Ministers.[32] The study contains five chapters. The first chapter embodies an *introduction* which states background of the study (pp. 5-6), statement of the problems that necessitated the study (pp. 6-7), objectives of the study (pp. 8-9), significance of the study (p. 9), methodology (pp. 10-12), scope, delimitation and structure of the study (pp. 12-13).

1- Definition of human trafficking and smuggling of persons

Section 2.1.2.1 (in the second chapter of the Assessment Report), pp. 17-19, inter alia, defines human trafficking[33] and smuggling of persons. The study cites the definition of human trafficking embodied in the Palermo Protocol of 2000 (the

Protocol to Prevent, Suppress and Punish Trafficking in Persons).[6] The definition of human trafficking provided under Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons [34] is the following:

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) "Child" shall mean any person under eighteen years of age

The Assessment Report uses the definition in Annex III (The Protocol against Smuggling of Persons) of the UN Convention against Transnational Organized Crime and the Protocols Thereto. Art. 3(a) of the Protocol against Smuggling of Persons [35] defines "Smuggling of migrants" as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident." According to Article 3(b) of the Protocol, *illegal entry* shall mean "crossing borders without complying with the necessary requirements for legal entry into the receiving State".

2- Literature and legal framework reviewed in the study

The following three themes are addressed in the *second chapter* of the assessment:

a) *Review of relevant literature* on basic concepts and legal frameworks relating to:

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[6] "The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, was adopted by General Assembly resolution 55/25. It entered into force on 25 December 2003. It is the first global legally binding instrument with an agreed definition on trafficking in persons. The intention behind this definition is to facilitate convergence in national approaches with regard to the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in persons cases. An additional objective of the Protocol is to protect and assist the victims of trafficking in persons with full respect for their human rights." (United Nations Office on Drugs and Crime): https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html

- the background of Ethiopia's anti-human trafficking laws (pp. 15-17),
- definition of the offences of human trafficking and smuggling of persons (pp. 17-18),
- overlapping features of and differences between human trafficking and smuggling of persons (p. 19),
- features of the criminal offences from the dimension of human rights violation (p. 20),
- the major causes of the criminal offences of human trafficking and smuggling of persons (pp. 20, 21),
- persons engaged in trafficking or smuggling of persons (pp. 21-22) and victims (pp. 22-23),
- problems encountered by victims that need legal protection (pp. 23, 24),
- the need for concerted international efforts in the combat against human trafficking and smuggling of persons (p. 24, 25),
- the need for processes and structure in the prevention and control of the offences (p. 25), and
- adverse effects of trafficking and smuggling of persons (p. 26).

b) *International legal framework*:
- international instruments ratified by Ethiopia (pp. 26-27),
- the level of attention accorded to the criminal offences in international human rights instruments and by the International Labour Organization (pp. 28-30), and
- application of international instruments relating to the right of women and children (pp. 30-31),

c) *Domestic legal framework* in the prevention and control of the criminal offences of trafficking and smuggling of persons:
- the FDRE Constitution which recognizes international instruments ratified by Ethiopia, and Article 18(2) of the Constitution which provides that "No one shall be held in slavery or servitude. Trafficking in human beings for whatever purpose is prohibited" (p. 31),
- gaps in the legal provisions under Articles 580 to 600 of the 2004 Criminal Code and the Prevention and Suppression of Trafficking in Persons and Smuggling of Migrants Proclamation *No. 909*/2015 (pp. 32, 33).

3- Comparative experience examined in the study

The third chapter of the study (pp. 35-46) examines comparative experience in the application of laws against human trafficking and smuggling of persons. The countries are:

- UK (pp. 35-37),
- USA (pp. 37-38),
- Philippines: the legal regime and institutional framework (pp. 39-41),
- Australia: institutional framework (p. 42),
- South Africa: the legal regime and institutional framework (pp. 42-43), and
- Kenya: the legal regime and institutional framework (pp. 43-46).

4- Data analysis on the application of Ethiopia's laws on human trafficking and smuggling of persons

The assessment report (in Chapter 4, pp. 47-69) discusses and analyzes the data of the field research regarding the level of implementation of the laws in Ethiopia that prohibit and control human trafficking and smuggling of persons. The introduction of Chapter 4 states that trafficking and smuggling of persons may be domestic or trans-border. It cites World Bank Study which shows that trans-border human trafficking and smuggling of persons in Ethiopia mainly involves persons with lower educational background who seek physical labour jobs particularly in the Middle East, while 52% of the educated immigrants go to countries in Western Europe and North America (p. 47). The Assessment Report (pp. 48, 49) states that most victims are from rural areas and they are usually misinformed by brokers who influence them through fake promises of bright prospects in a foreign country.

One of the sources cited (in the Assessment Report, p. 48) is *About Migration: 7 Researches of 5 Ethiopian Universities on the roots causes* (supported by Italian Agency for Development Cooperation).[36] This source states the following:

> The reports of the Ministry of Labor and Social Affairs (MoLSA) registered 460,000 legal migrants between September 2008 and August 2013 of whom 94% were women domestic workers, 79% travelling to Saudi Arabia, 20% to Kuwait and the rest to Dubai and other countries. A number of 60-70% of Ethiopian migrants were estimated as irregular, either trafficked or smuggled (MoLSA, 201310 cited in Kelemework et al., 2017). Later, 1,5 million irregular migrants who left the country between the year 2008 and 2014 has been calculated (MoLSA), and the US Department of State reports confirms that around "*200,000 regular labor migrants who travelled in 2012 represent just 30- 40% of all Ethiopians migrating to the Gulf States and Middle East, implying that the remaining 60-70% (between 300,000- 350,000) are either trafficked or smuggled with the facilitation of illegal brokers*' (US Department of State, 2013, cited in RMMS, 2014, p. 3511).[37]

5 Recommendations of the Assessment Report

The fifth chapter of the Assessment Report titled "Summary and Recommendations" embodies a brief summary and recommendations. The summary of the findings (Section 5.1) notes that the laws enacted to prevent human trafficking and smuggling of persons have not adequately controlled the criminal offences due to gaps in the laws and inadequate implementation of the laws. With regard to institutional structure and processes, the problems include gaps in coordination and strategic engagements beyond the current reliance on the activities of committees. The level of corruption in law enforcement and judicial organs and the gaps caused due to the failure to extend the power of investigation and prosecution to lower levels –rather than its restriction to the federal level– have also been noted. The factors for the level of human trafficking and smuggling of persons (indicated in the summary of findings) include poverty, violation of rights, border security, gaps in the law and its application, high level of youth unemployment, and various other factors.

The recommendations in Section 5.2.1 suggest:

- formulation of policy and roadmap;
- due attention to prevention and control;
- addressing the gaps in Proclamation No. 909/2015;
- rehabilitation fund to victims of human trafficking and smuggling of persons;
- establishment of a commission accountable to the Prime Minister's Office with specific mandates (and corresponding accountability) to coordinate the tasks of prevention and control against the criminal offences;
- policy direction to periodically monitor the employment and recruitment activities of employment agencies;
- awareness creation and enhancement;
- concerted efforts among the relevant federal and regional state organs towards strong inspection at borders and routes of human trafficking;
- and other measures.

The recommendations under Section 5.2.2 are related with Proclamation No. 909/2015, and they identify the problems and gaps in the Proclamation along with suggestions of revision. *Twelve* recommendations are forwarded relating to problems in the definition of certain terms, the need for stronger schemes of prevention and control, the need to distinguish the penalties that can be imposed on principal offenders and accomplices, the need for specificity in lieu of general and ambiguous phrases, the need to further clarify the accountability of the police during investigation, enhanced recognition of incentives to witnesses and informants, and other suggestions of revision.

Reading 2

Explanatory Memorandum of the Draft Proclamation

As indicated in the Explanatory Memorandum (pp. 3, 4), the process towards the preparation of the Draft Proclamation involved an assessment on the problems; and there were consultations on the study with stakeholders: public prosecutors, the police, judges, and other stakeholders. Based on the assessment and the inputs from public consultations, a drafting team was formed to prepare the Draft Proclamation which was discussed with the National Taskforce against Trafficking in Persons and Smuggling of Migrants formed under Proclamation No. 909/2015. The Explanatory Memorandum further states the comparative experience of other countries, documents and literature that have been examined in view of the Ethiopian context.

It highlights the structure of the Draft Proclamation (p. 4) and explains the following themes in the substantive content of the Draft (pp. 4-20):

a) rationale (p. 4);
b) various options that were considered before the current title of Proclamation was adopted (pp. 4, 5);
c) definition of terms in Proclamation No. 909/2015 that are retained, omitted, revised, and new terms that are included in the Draft Proclamation (pp. 5,6);
d) the criminal offence of trafficking in persons, Articles 3-6 in the Draft Proclamation[38] (pp. 6-9);

e) the criminal offence of smuggling of persons, Articles 7-9 of the Draft Proclamation[39] (pp. 9, 10);
f) crimes of overseas employment (p. 10), Articles 10, 11 of the Draft Proclamation [40] that fills the gap in Ethiopia's Overseas Employment Proclamation No. 923/2016;
g) offences related with the criminal offences (pp. 10, 11) of trafficking in persons, smuggling of persons or unlawful sending of persons for work abroad (i.e., failure to report, crimes against whistle blowers and witnesses, destroying evidence, aiding a suspect not to be prosecuted, concealing property, and criminal liability of a juridical person) that are stated under Articles 12-17 of the Draft Proclamation;[41]
h) brief statements (pp. 11-14) on the themes embodied in the third section of the Draft Proclamation (Articles 18-27) [42] that deal with prevention of vulnerable persons, investigation and appropriation of property;
i) protection, rehabilitation and compensation to victims (pp. 14, 15) under Articles 28-32 of the Draft Proclamation[43] ;
j) brief statements on Establishment of Fund under Articles 33-38 of the Draft Proclamation [44] (p. 15);
k) establishment of the National Council, its functions, the establishment of the National Partnership Coalition, the role of various institutions and international cooperation (pp. 15-18); and
l) miscellaneous provisions (pp. 18, 19).

The conclusion of the Explanatory Memorandum (pp. 19, 20) briefly notes the magnitude of trafficking in persons and smuggling of persons that have not been controlled in spite of various laws enacted in Ethiopia. It states the significance of the Draft Proclamation in addressing the gaps in the legal regime, and it envisages that the new law will positively contribute to the efforts of the government and the society at large towards preventing and controlling the criminal offences so that citizens can go abroad only through lawful means with due attention to the protection of their rights and dignity.

Review Exercises

1. A defendant is convicted of smuggling in persons and he has also committed forgery of documents. According to Article 10 , “[w]hosoever, for direct or indirect financial or material gain for himself or for another person, prepares, is found in possession of, provides or transfers forged or a falsified travel document or identity card for use in the commission of smuggling of persons shall be punishable. . . .” Discuss whether the defendant is punishable under both charges of smuggling of persons and forgery for use in smuggling of persons.
2. An employment agency is accused of having received expensive gifts from persons who seek overseas employment while Article 12 of Proclamation No. 1178/2020 renders service charges from workers punishable because the charges should only be borne by overseas employers. Does this render expensive gift received from a person who seeks overseas work punishable? State your reason/s. Give an example of gift which you consider expensive.
3. Reflect upon the factors for the high level of human trafficking and smuggling of persons in Ethiopia (indicated in the summary of findings) of the Assessment Report highlighted in Reading 1. It states that the factors “include poverty, violation of rights, border security, gaps in the law and its application, high level of youth unemployment, and various other factors.”

Endnotes, Chapter 10

[1] *Hateta Zemiknyat* (*Exposé des Motifs*) of the FDRE 2004 Criminal Code, June 2004 (Sene, 1996 EC), p. 5.
[2] *Ethiopian Law Reform Background Documents Synopsis: 2018-2020*, Legal Study, Drafting and Consolidation Directorate General (LSDCDG), FDRE Attorney General, October 2020, Addis Ababa, Ethiopia
[3] Wondwossen Demissie Kassa (2014), 'The Scope of Definition of a Terrorist Act under Ethiopian Law: Appraisal of its Compatibility with Regional and International Counterterrorism Instruments', Mizan Law Review, Vol. 8, No. 2, p. 405.
[4] *Id.*, pp. 15, 16.
[5] https://www.oecd.org/daf/fin/insurance/TerrorismDefinition-Table.pdf Accessed: 24 October 2021
[6] Keiran Hardy and George Williams (2011), "What is 'Terrorism'?: Assessing Domestic Legal Definitions", *UCLA Journal of International Law and Foreign Affairs*, Vol. 16, No. 1 (Spring 2011), pp. 77-162 at 130.
[7] *Id*. at 130-131.
[8] *Supra* note 3.
[9] *Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004* § l(l)(xxvi)(5)
[10] *See* for example: https://definitions.uslegal.com/i/intimidation/ Accessed 23 Oct. 2021
[11] Id. p. 16.
[12] Aron Degol & Bebizuh Mulugeta (2021), 'Freedom of Expression and Hate Speech in Ethiopia: Observations' (in Amharic), 15 *Mizan Law Review* 1: 195-226 (at 210-211); DOI http://dx.doi.org/10.4314/mlr.v15i1.7
[13] Id. at 217
[14] Id. at 217-219
[15] Id. at 219
[16] Explanatory Memorandum of the Draft Proclamation, Section 3(c), p. 6.
[17] Ethiopian Law Reform Background Documents Synopsis*, supra* note 2, p. 67.
[18] Id., pp. 67, 68.
[19] Ethiopian Law Reform Background Documents Synopsis*, supra* note 2
[20] *Id*., pp. 54-68
[21] *የጥላቻ ንግግር በኢትዮጵያ፣ በፌዴራል ጠቅላይ ዓቃቤ ሕግ፣ የሕግ ጥናት፣ ማርቀቅና ማስረጽ ዳይሬክቶሬት* (ኅዳር 2011 ዓ.ም.)
[22] Currently: The Legal Study, Drafting and Consolidation Directorate General (LSDCDG)
[23] ARTICLE 19 (2015), '*Hate Speech' Explained: A Tool Kit*, 2015 Edition, p. 10
[24] https://www.justice.gov.za/legislation/hcbill/B9-2018-HateCrimesBill.pdf
[25] Gedion Timothewos (2010), "Freedom of Expression in Ethiopia: the Jurisprudential Dearth", *Mizan Law Review*, Volume 4, No. 2, pp. 202-204.
[26] Labour Proclamation No. 1156/2019, Article 89
[27] Summarized in Background Documents Synopsis, *supra* note 2.
[28] *Ibid*.
[29] *Ibid*.

[30] Id., *supra* note 2, pp.75-88.

[31] 'በኢትዮጵያ ሕገ ወጥ የሰዎች ዝውውርና ስደተኞችን በሕገወጥ መንገድ ድንበር ማሻገር ወንጀል ለመከላከልና ለመቆጣጠር የወጡ ሕጎች አፈጻጸም ውጤት ላይ የተደረገ ጥናት'፤ በሚኒስትሮች ምክር ቤት ጽ/ቤት፣ የሕግ ጉዳዮች ዳይሬክቶሬት ጀነራል፣ የሕጎች አፈጻጸም ውጤት ጥናትና ክትትል ዳይሬክቶሬት፣ መጋቢት 2010

[32] Research team: Dilnesaw Israel (coordinator), Seid Ibrahim, Adamu Mengistie, Fasil Tadesse, Tsehay Kelbessa.

[33] "Trafficking in persons' and 'human trafficking' are interchangeable terms …": <https://www.unodc.org/e4j/en/tip-and-som/module-6/key-issues/crime-of-trafficking-in-persons.html>

[34] UN Convention against Transnational Organized Crime and the Protocols Thereto, Annex II: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Available at: https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf

[35] Id., Annex III, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime

[36] Available at: <https://www.aics.gov.it/wp-content/uploads/2017/11/ABOUT-MIGRATION_2017_AICS.pdf> Accessed August 28, 2020

[37] Id., page 3

[38] Articles 3-7 of Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proclamation No. 1178/2020.

[39] Id., Articles 8-10.

[40] Id., Articles 11 and 12.

[41] Id., Articles 13-18.

[42] Id., Articles 19-22.

[43] Id., Articles 23-26.

[44] Id., Articles 27-32.

Chapter 11

Social Evolution and Criminal Law

1. Social Progress and the Law

The concept of 'social progress' has been subject to academic discourse for many centuries. Ancient Greece and Rome regarded social change as a perpetually cyclic motion analogous to the rhythmic cycles of days and nights, seasons, life and death, and various natural phenomena. Post-Enlightenment conception of development, however, regards social change as progressively linear. Fontenelle (1657–1757), for example, "believed in the progress of reason and the enlightenment through history".[1] Hegel (1770–1831) took this further and contributed to the idea of progress that implied "a linear unfolding of the universal potential for human improvement" which "need not be finite and reversible."[2]

Saint-Simonians made a distinction between *organic* societies and *critical* societies in transition. Organic societies are stable societies with shared value systems, whereas critical societies are in the process of undergoing radical changes.[3] One of the prominent Saint-Simonians, Auguste Comte, attempted to "provide the science upon which progress should be based." His message was that "'Progress is the development of Order under the influence of Love'," and his intention "was to attempt to reconcile the moral, intellectual and material qualities of progress with social order" so that social evolution can bring about "development, which brings after it improvement."[4]

Marx and Engels forwarded the concept of *historical materialism*, which states that a steady development in production forces is inevitably accompanied by corresponding 'production relations,' which determine changes in socioeconomic formations, including laws. Marx believed that "being" determines "consciousness" and he posited that material factors determine production relations, ideas and social change.

For Max Weber, however, ideas and attitudes precede social change. Weber (1864–1920) disagreed with the Marxist conception of primacy of material factors as the decisive factors for social change, and he argued that the experience of the industrial revolution shows that ideas preceded social change. Weber did not entirely disagree with Marx regarding the impact of material factors, but he believed that they are preceded by radical change in ideas. He substantiates his view with the Protestant Reformation which, according to Weber, brought about the work ethic and values conducive to innovation, production and investment (such as frugality, self-sufficiency,

the conception of work as a calling, and direct relations with God without the intermediary of the priest). Weber states that these ideas and values enhanced personal autonomy, independent thinking, investment, innovation and entrepreneurship, which were crucial for the socioeconomic transformation towards capitalism and the industrial revolution. Weber relates the postindustrial work ethic and the social change that ensued with the influence of certain religions who viewed "work and the industrious pursuit of a trade as their duty to God."[5]

Unlike Marx, Weber does not regard law as a mere superstructure that follows the material basis determined by other factors. Nor does he offer a role to law that was eventually given to it by the 'law and development' thinking which was predominant during the 1960s. Weber's explanation[6] regarding the "role of the modern legal system in the emergence of Western civilization" showed that legal 'development' "occurred simultaneously with the political and economic transformation what led to the industrial system and the centralized nation-state . . . which are mutually causative."[7] Weber admits that Europe's rational legal system had positive contributions towards the development of capitalism and industrialization in Europe. However, modernizing a legal system, according to Trubek's analysis of Weber's theory, does not on its own "*produce* economic development," but "merely helps structure the free market system."[8]

Durkheim[9] relates social change with the changes in the structure of social relations (which exist as *social facts* irrespective of our cognition of them, same as we do not feel the weight of the air). He envisages changes in the normative structure (i.e. laws, norms, culture, ethical values and the corresponding sanctions) in the course of pursuits to regulate social life. According to Durkheim, homogenous societies have simple division of labour and *mechanical solidarity* ("a solidarity of similarities") while higher levels of social progress and complex division of labour require *organic solidarity* embedded in economic and political systems in which criminal law, for instance, becomes very elaborate and complex because it accommodates the various normative values of the society's members, thereby pursuing towards milder punishment.

It was during the 1960s that the role of law in development was regarded as crucial as developing countries, and it was envisaged that developing countries would go through the linear stages in the path of development[10] which had been undergone by developed countries. Daniel Haile[11] seems to have been, to some extent, influenced by this view. Daniel [first name is used for Ethiopian authors due to the prevailing practice] briefly summarizes the views of Savigny and Marx and then argues against both views:

> To Savigny, the founder of the historical school, law was something that is connected with the being and character of the people and he maintained that it 'grows with the growth of the people and strengthens with the strength of the people and finally dies away as the nation losses its nationality.' Similarly classical Marxist theory, 'regarding law as a superstructure on technology and economy considered it to be inconceivable for law to bring about changes –in the basis, [i.e.] technology and economy of society.'[12]

Daniel believes that these views are "generally out of tune with modern reality and totally inapplicable in the African arena" because social change, although revolutionary, "normally comes about in a more or less orderly manner, out of the conscious and unconscious attempts of people to solve social problems through collective action."[13] Daniel regards social change as "purposive and rational" and underlines that it "involves definition of a state of affairs as a 'problem' and an attempt to solve that problem by rational means." Daniel cites Seidman to underline that "[i]n Africa as elsewhere, rapid rational social change implies the utilization of society's most potential tool –state power. It requires that law be employed as a means of social engineering."[14] According to Daniel law plays a very big role in Africa's social progress:

> The fact that most African countries gained their independence only very recently and sectarian or tribal sentiments are still rampant is an important factor that enhances the role of law as a means of social engineering. Certainly, education may be the best solution for this, but taking the amount of time that it takes and considering the fact that these nations are trying to accomplish in the life span of one or two generations what took centuries, the appeal of this remedy becomes very low. Under these circumstances, we are of the opinion that it is essential to use the law to give legitimacy to the state action and to erode the power of groups adverse to it.[15]

Daniel was optimistic regarding the role of law in social engineering. Yet as the engineer looks into the *inputs* that are required and the *processes* involved in a given construction, the role of law in social engineering presupposes the objective and subjective setting that would determine the efficiency and effectiveness of its *proactive* instrumental function to which the power groups, values and attitudes described by Daniel are part of. The question that arises at this juncture is the extent to which reception of laws that does not take organic development into account is effective in the context of what Daniel refers to as "revamping and overhauling".

> The fact that many African counties have adopted laws based on foreign models as a means of revamping or overhauling their socio-economic systems even after attaining independence is by itself a concrete evidence of the wide acceptance and legitimacy that the law as a means of social engineering has received in these countries, negating the views of both the Historical and Marxist school of thought.[16]

Daniel not only underlines the instrumental role of the law in initiating social change "to be followed by behavioral changes", he also raises the caveat not to resort to the tautological equation of norm changes with social change and he posits that "we must accept three possible types of change – norm change followed by behavioral change, behavioral change followed by norm change or law as response to change."[17]

State interventions in developing countries have led to different outcomes in the arena of social progress and development. While the experience of the 'law and development' paradigm in many African economies did not bring about progress, the Asian experience seemed to be the opposite. The role of the state and the law in development thus took new features with the conception of the *developmental state* which emerged from northeastern Asia's model of development, which differs from the law and development notion of the 1960s.

Developmental states offer incentives for transformative investments and development. Evans cites the East Asian newly industrializing countries as examples of a developmental state.[18] Vartiainen underlines the salient features of a successful developmental state which render them different from the state interventions in postcolonial developing economies.[19] These features of a developmental state include the strength of the state to implement developmental objectives, its meritocratic policies, its insulation from "both the market and the logic of individual utility maximization", strong ties to "the economy's organized agents such as corporations, industrialists, associations and trade unions" and its ability to support and discipline economic actors.[20] These roles of the state are also reflected in criminal law in relation with avenues that facilitate the support given to and the discipline expected from economic actors. The corresponding challenge, however, lies in the potential for abuse where there are trends in overextending the bounds of criminalization under the rationale of 'economic efficiency.'

The other phenomenon which is being observed along with social change relates to the effect of transnational developments on legal regimes. For example, the European Union's criminal law regime, reflects transnational developments. After the Treaty of the European Union (TEU) was signed in

Maastricht in 1992, and entered into force in 1993, the role of the European Court of Justice (ECJ) is indeed very significant although its criminal jurisdiction cannot, in principle, be regarded as supranational. Article 249 of the Treaty of the European Union provides the following:

> In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.
>
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety upon those to whom it is addressed.
>
> Recommendations and opinions shall have no binding force.

This shows the trend towards the gradual ceding of some portion of national legislative sovereignty to the supranational body. In spite of the academic debate that has ensued, the ECJ is also gradually assuming wider jurisdiction in criminal matters:

> Recent developments regarding criminal matters within the European Union (EU) show a trend towards a supranational criminal competence. . . . The strongest indicators in this development are two judgments of the European Court of Justice (ECJ), one that extends the powers of the European Community (EC) over the protection of the environment through criminal sanctions and the other applying the principle of conforming interpretation to framework decisions. This trend is questionable though, as the Treaty of the European Union (TEU) does not confer [competence in criminal matters] upon the EC. [Part of the Treaty] containing criminal matters is intergovernmental in nature.[21]

2. Emergence and Coalescence of Criminal Law: French Experience

Criminal law was among the earliest branches of the law that emerged along with the genesis of the state. Continental legal systems (including the Ethiopian Criminal Code) have indeed benefited from the Napoleonic Codes of France and other legal regimes. An overview of the path undergone by French criminal law thus illuminates the evolutionary path shared by many

legal regimes. Elliott[22] states the development of French criminal law through different epochs. She indicates the following periods:

1. The origins of criminal law: family justice
2. Private justice
3. Public justice
4. The royal period (16th to 18th centuries)
5. The evolution of ideas in the 18th century
6. Revolutionary law
7. The Criminal Code of 1810
8. The Criminal Code of 1992

Elliott relates the urge of the person wronged to seek revenge against the aggressor as part of human nature and believes that "[i]t is from this spontaneous revengeful reaction that criminal law is born." She states that although private revenge is rudimentary and brutal, it "constituted a means of maintaining social order between clans", and that "[f]ear of revenge acted as a deterrent against anti-social behaviour, such as murder." She continues:

> The system of vendettas served to achieve respect for strangers and solidarity within each clan group, as the whole clan of the victim was ready to seek vengeance. Revenge would be sought not only against the individual aggressor but also against their family, their chief and the most important clan members. Thus the origin of criminal liability was collective rather than individual. The focus was on the harm caused, and there was no interest in establishing the guilty mind of the aggressor. No distinction was made between voluntary and involuntary homicide. . . .[23]

Private justice moved away from its predecessor and it marked an "embryo of a legal system". Although "public authorities only had a limited role," they only allowed "close relations to the victim to carry out the revenge, and eventually prohibited revenge from being carried out on anybody other than the guilty person, particularly when the clan was not showing solidarity" with the guilty person and expelled or handed over such persons to the victim's clan. Elliott states that "offences that were committed unintentionally were subjected to a less stringent regime than that of private revenge" and that proportionality between revenge and the harm inflicted was developed "particularly where the victim did not die". This law of retaliation was, according to Elliott, a significant development because "the amount of revenge was limited, repression was individualized; retaliation was limited to crimes of intention . . . frequently awarding the wronged party pecuniary compensation."[24]

Elliott further describes the period of *public justice* which occurred after the 13th century as the state became more powerful and strong enough to

"take control of the system of repression, with the aim of repairing a social wrong rather than a private wrong" by relegating the private party "to a secondary position, as a private claimant to the proceedings."[25] The practice of public justice was even strengthened in the 16th century after which "special permission from the monarch was required to approve the use of violence committed in legitimate defence."[26]

The royal period of French criminal law (16th to 18th centuries) was characterized by its systematization through the inspiration of Roman law and there was no significant change other than 'a slight reduction of sentences'.[27] There was also influence of Christianity and canon law and the general conception was that "all justice emanated from the monarch", and the period from the 17th to the 18th century was "dominated by the philosophy of retribution", which did not "try to cure criminals, and showed no interest in their personal future: the philosophy was that it was necessary to save the healthy part of the population while sacrificing the unhealthy part."[28] During this period, there were heavy sentences such as "capital punishment . . . and punishments such as flogging, and the amputation of a hand or tongue."[29]

During the 18th century there was the evolution of criminal law theories and the birth of criminology which eventually influenced criminal law policy. The classical theory of criminal law was born between 1748, date of the publication of the publication of *L'Esprits des Lois* by Montesquieu, and 1813, when the Bavarian Criminal Code was passed, directly inspired by the German lawyer Feuerbach. This classical theory was developed by the writings of Feuerbach, Montesquieu, Rousseau, the Italian Beccaria, and the Englishman Bentham. Beccaria, for example, heavily criticized the severity of the existing punishments and the use of torture. He fought against capital punishment, and argued that moderate but certain punishment would be more effective in preventing crime than a frightening but arbitrary punishment. He emphasized the need to *rehabilitate* offenders so that they could return to a normal and honorable place in society.

These ideas had direct influence on the laws enacted during the French Revolution in 1791, during which "criminal law moved away from being a custom-based system" and the "sentences were generally reduced, corporal punishments were abolished and capital punishment was only preserved for a few offences."[30] The French Criminal Code of 1810 had "mixed aspects of the Revolutionary law with the law that existed before the Revolution." Unlike the Acts enacted in 1791, the 1810 Criminal Code did not embody the concept of fixed sentences (which was introduced to avoid the discretion of judges), because they were found to be impractical. They were instead substituted by minimum and maximum sentences that were specified. The

Napoleonic Code was relatively harsh as compared to the laws of the 1791 Acts mainly because the "social unrest at the time had given rise to lawless behaviour and led to the imposition of a fairly harsh criminal system which reflected the severity of the pre-Revolutionary law."[31] This indicates that the grips of criminal law are influenced by the social setting of peace and order that prevails at a given time because they constitute its core purposes.

The 1992 French Criminal Code has been significantly changed in structure, clarity and substance owing to changes in social realties. In particular, "[t]he major changes made by the Code were to introduce corporate liability and to create a new offence of deliberately putting another person in danger."[32]

3. The Impact of Personal Autonomy on Criminal Law

Hall underlines that criminal law is part of the major social effort towards the elimination of serious conflict, in accordance with nonarbitrary methods and directed toward rational ends.[33] The processes of social evolution and rationalizing legal regimes have been accompanied by judicial formalism which includes criminal law. As Weber noted, this "enables the legal system to operate like a technically rational machine."[34] The formalism and predictability on the one hand restricts the horizon of judicial and law enforcement discretion and meanwhile "guarantees to individuals and groups within them the possibility of predicting legal consequences of their actions."[35] However, Weber does not envisage an unchanging and rigid judicial formalism:

> Formal justice guarantees the maximum freedom for the interested parties to represent their formal legal interests. But because of the unequal distribution of economic power, which the system of formal justice legalizes, this very freedom must time and again produce consequences which are contrary to the substantive postulates . . . of political expediency.[36]

Socioeconomic formations might thus bear tensions between the formal legal regime and the substantive postulates that are influenced by the realm of values and expediency at a given historical epoch. The path undergone from ancient and medieval versions of criminal law through the various phases has thus witnessed steadily progressive changes in the midst of the tension between conserving the *status quo* and facilitating (and nurturing) new norms and values of social change.

Dubber[37] observes the patriarchal nature of ancient and medieval criminal laws:

> Of all branches of law, criminal law historically has been the one most closely associated with sovereignty. It's useful to think of the criminal law as having emerged from the householder's virtually unlimited discretion to discipline members of his household. The Athenian *oikonomos* or the Roman *paterfamilias* enjoyed the unquestioned power to employ whatever disciplinary sanctions, against insiders and outsiders alike, were necessary to discharge his obligation to look after the welfare of his household (*oikos* or *familia*). The medieval householder wielded the same disciplinary authority, to correct and to punish, over his household (including his wife, offspring, servants, and animals) for the sake of maintaining the peace (*mund*) of his household.[38]

Dubber relates the "consolidation and centralization of power, and the eventual creation of a state" with the "expansion of this model of household governance from the family to the realm" and he states that "Criminal law served the function of protecting the 'king's peace' by means of "preventing and punishing 'breaches' of that peace, which were considered offenses against the (macro) householder –the king– himself."[39]

> Eventually, in the United States, the concept of the king's peace was replaced by that of the "public peace," as sovereignty was transferred from the king to "the people." In the United States, the intimate connection between criminal law and sovereignty nonetheless remained in place, even after the fiction of the self-governing and sovereign people had replaced the person (and fiction) of the king as sovereign.

Dubber states that the post-Enlightenment conception of personal autonomy brought about changes in the patriarchal nature of criminal law. Persons were believed to be "endowed with the capacity to govern themselves" and "royal subjects were transformed (at least in theory) into citizens, leading eventually to the establishment of democracies as the form of government most consistent with the idea of personal autonomy."[40] Dubber indicates that the central figures of the enlightenment political theory expressed the threat and infliction of punitive pain on the emerging values of personal autonomy:

> Voltaire (in France), Kant and P.J.A. Feuerbach (in Germany), Bentham (in England), and –most influentially– Beccaria (in Italy) recognized that the threat and infliction of punitive pain on the newly discovered autonomous citizen posed the most difficult, and the most important, challenge to Enlightenment political theory.[41]

4. Decriminalization, Criminalization and Moral Aversion

As briefly highlighted above, change impacts upon criminal law. The changes in the range of offences and the purposes of punishment are cases in point. For example, certain offences are decriminalized at a later stage of social development, while others which were not offences are criminalized. These phenomena are attributable to change of values and socioeconomic realities. The concept of corporate liability, for instance, is embodied in Article 34 of the 2004 Criminal Code while this provision did not exist in the 1957 Penal Code. The same holds true regarding the long-held tradition of female circumcision, which is criminalized under Article 565 of the new Criminal Code. Moreover, offences unknown during the enactment of the 1957 Penal Code (such as computer offences) are now embodied in the 2004 Criminal Code.

Gorecki believes that there is the likelihood for modern legal systems to march towards milder punishment in the course of social evolution, and he hopes that capital punishment can eventually be out of date in most legal systems. He takes note of the cultural and historical legacies of Athens, Rome, and modem Europe and argues that "social evolution brings a tendency toward decreasing severity of criminal punishments."[42] In the course of social evolution, the individual's inner moral aversion to offences "replaces fear as the main stimulus against harmful behavior"[43] thereby rendering harsh penalties superfluous, and harshness will likely be "perceived as infliction of unnecessary suffering by a group of people who have increasingly learned not to harm others."[44]

Yet, Fuller notes that the concept of rehabilitation should be given pragmatic definition and should be balanced with due process of law. He states that "[i]t has been said on very respectable authority that the main purpose of the criminal law is to give an outlet to the human instinct for revenge"[45] and he indicates that "[w]hen, for example, rehabilitation is taken as the exclusive aim of the criminal law, all concern about due process and a clear definition of what is criminal may be lost".[46]

New findings in the fields of criminology, penology, psychology and sociology are very likely to influence our present conceptions of crime and punishment in the decades and centuries to come. As the statements of the drafter of the 1957 Penal Code, Professor Jean Graven (in Chapter 8, Reading 3 above) indicate, the provision on flogging (Art. 120A) was not incorporated in the initial draft, but was later included by the legislature because of the long-held belief (during the time) that flogging will have a deterrent effect on certain crimes:

> . . . Corporal punishment (flogging), whose abolition was already envisaged by the Code of 1930, is another example of the conflict between tradition and ideas concerning punishment . . . after a great deal of hesitation and discussion, it was this traditional consideration that eventually carried the day before parliament when a majority of the commission had previously been in favor of abolition.

However, Article 120A of the 1957 Penal Code, which legalized flogging, was out of date and it was not applied by courts long before it was repealed by the 2004 Criminal Code. Accordingly, there are likely to be changes in criminal law and its enforcement schemes as society evolves into a newer arena of social, economic, political and cultural settings.

As John Rawls notes, "the purpose of the criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end."[47] Rawls further underlines the need for caveats against the use of punishments for the purposes of retribution and denunciation:

> . . . [T]he principle of responsibility is not founded on the idea that punishment is primarily retributive or denunciatory. Instead it is acknowledged for the sake of liberty itself. Unless citizens are able to know what the law is and are given a fair opportunity to take its directives into account, penal sanctions should not apply to them. This principle is simply the consequence of regarding a legal system as an order of public rules addressed to rational persons in order to regulate their cooperation, and of giving the appropriate weight to liberty.[48]

The concepts of 'moral responsibility' and 'alternatives to imprisonment' are among the topics that are being raised in this regard. In fact, various legal systems at present have put in place sentences that are alternatives to the traditional punishment of imprisonment.

One of the themes of the concept of 'moral luck' is the extent to which a person should be held morally responsible for an act which can be attributable to the social circumstances which he cannot control. This problem "springs from a discrepancy between our notion of responsibility and the actual manner in which we make moral judgments" and we usually "tend to think people are only responsible for what they can control, but we are also inclined to judge them on the basis of what they cannot."[49] The tension between the nature of criminal law which prescribes the *actus reus*, *mens rea*, punishment and other aspects of offences that are applied to a given fact situation vis-à-vis the extent to which certain defendants could

have acted otherwise is indeed a vital concern. O'Hanion observes the following:

> Determinism, in its most fundamental form, is the view that "everything we do (or for that matter think) is ultimately determined by a congeries of genetic and environmental factors over which we have no control. . . ." While the formulation of ethical principles or legal norms and any subsequent punishment that may result from failure to adhere to those norms can be assessed from either a teleological [purpose driven] or deontological [as ends in themselves] point of view, existing laws are deontological.
>
> That is, laws take the form of 'you must do this' or 'you must not do that,' and if you fail to follow the particular law in place, you are subjected to some sanction or form of punishment. Given that laws take this deontological form, it is often argued that in order to follow particular laws, people must have the requisite ability to follow those laws.[50]

This should not, however, undermine responsibility and liability relating to wrong choices, decisions and actions. For example, an attempt to attribute every offence of corruption to poverty is indeed unreasonable. Yet we cannot deny the role of a person's material circumstances in the commission of offences such as theft. This raises the issue of whether a poor person who steals food was 'free' not to do so. Thus, "legal institutions and decision makers generally accept that a strong notion of free will underlies the justification for punishment when laws are transgressed."[51]

The 2004 Criminal Code recognizes various justifiable and excusable grounds for mitigation of punishment in cases of offences that are committed under settings that vitiate the *free will* of the accused. Yet the new thinking towards punishment envisages a paradigm shift in the methods of punishment itself as social changes bring about a steadily wider and robust moral aversion against offences which can gradually render harsh punishment superfluous. This apparently envisages the socioeconomic reality that gives rise to the pervasive entrenchment of the requisite moral values conducive to such legal regimes. In such settings, what Hart calls 'general obedience' to criminal law and other legal regimes can take precedence over crime prevention and control through what he refers to as 'orders backed by threats' or 'coercive orders.'[52]

5. Alternatives to Imprisonment

Most elements of the contemporary criminal law regime in African countries was either transplanted through *reception* such as the Ethiopian experience or introduced through *colonialism* as in the case of many countries of the global south. A case in point is 'imprisonment,' which is alien to African traditions. This method of punishment was introduced at a certain stage in the development of Europe's criminal law:

> Imprisonment was not considered a true punishment: it was frequently used, but either administratively or pending a trial. The death sentence was common and applied even to offences such as theft and it was often combined with terrific tortures. Some of the methods of torture were so horrific that the judges sometimes inserted a proviso in their judgement that the convict should be secretly strangled before the end of the torture.[53]

Andargachew states that "prisons were alien to the cultural practices of Africans" and elders dealt with offenders "in accordance with customary law . . . using [t]raditional sanctions such as payment of compensation or blood money by the offender to the offended was customary in many parts of African countries."[54] He quotes Kenya's former president, the late Jomo Kenyata, as having recorded that on the basis of Kikuyu law, "Nine sheep or goats had to be paid for adultery or rape and one hundred sheep or ten cows for homicide, and this rate did not vary with the wealth and age of the victim, nor with the intention or motive of the killer."[55]

Imprisonment has now become a widespread practice in Africa, and Andargachew notes that it is "retaliatory rather than conciliatory", and as a result "courts imposed excessively severe sentences, which overcrowded prisons".[56] Increasing rate of crime and urbanization, Andargachew remarks, led to an increasingly growing reliance on prisons as the main feature of correctional administration although the prison situations deteriorated in many African countries after independence.

Needless to say, overcrowded prisons are not conducive to rehabilitation, which is crucial for crime prevention and smooth reintegration of prisoners after release. Andargachew states that in order to minimize prison overcrowding and its adverse consequences, "correctional administrators, criminologists, sociologists and concerned . . . social scientists have been advocating alternatives to imprisonment",[57] one of which is community-based rehabilitation for certain categories of offences.

> *Community-based* correction is a general term that refers to various types of non-institutional correctional programs for criminal offenders. These include, among others, such options as diversion,

> pretrial release, probation, restitution and community services, temporary release, halfway houses, furlough, and parole. These are considered useful in dealing with offenders in the community.
>
> Many criminologists argue that courts are too harsh on non-violent offenders, and usually a large majority of offenders that serve time in prisons are non-violent. . . .[58]

Andargachew highlights three factors[59] that are usually cited in favour of community-based rehabilitation:

1. Supervision by the community is considered to be cheaper than incarceration.
2. Prisons are no more effective than community-based rehabilitation "if we are to measure rehabilitation by the rate of recidivism."
3. Incarceration "is more harmful to both the individual and the society" in addition to which it leads to the "suffering of family members, particularly that of children of women offenders."

Andargachew further states the following four objectives of community-based rehabilitation:

1. Reintegration by sanctioning and controlling offenders without confining them so that they can retain minimum existing contacts and create new ones.[60]
2. Community protection is conducted so that the offender does not harm the society while he stays in the community by imposing control schemes such as "curfews, requiring the offender to attend a school, secure a job, avoid substance abuse and contact with undesirable characters engaged in illegal activities".[61]
3. Intermediate punishments refer to a range of schemes from the traditional probation to incarceration, and they include "intensive supervision, house arrest, electronic monitoring, and boot camps"[62] depending upon the severity of offence.[63] These intermediate punishments may also be used upon revocation of probation or parole because they are milder than sending the probationer or parolee back to prison.
4. Cost effectiveness is one of the factors considered in opting for community-based corrections as a better alternative to imprisonment.

Arguments are raised against community-based corrections on the ground that this mode of punishment has not brought about significant change with regard to recidivism compared to prisons and that these alternatives are costly compared to probations. Moreover, it is criticized because "it is often difficult to find neighbourhoods or communities willing to support such

programs due to [the fear that] those inmates will become involved in further crime and endanger their residents."[64] However, Andargachew indicates that the usage of community-based corrections is steadily rising in many countries such as Denmark and Japan.

6. The Way Forward in Light of Lessons from the Past

The future of criminal law depends on the factors that determine the dynamics of its change. As enshrined in Article 1 of the Criminal Code, the purpose of Ethiopian criminal law is "to ensure order, peace and security of the State, its peoples and inhabitants for the public good". The considerations of peace, order and security have always been the core concerns of criminal law. The variation in criminal law throughout human history is thus usually attributable to factors such as societal values, the nature of human association, the conceptions of order, peace and security, the norms that define conducts punishable under criminal law and the types and implementation of punishment.

Natural reason shared by all human beings had invariably led to similar, albeit identical, conceptions of punishable wrongs even in the most primitive societies. However, the same type of punishable wrong was subjected to different normative stipulations and types of punishment at varying stages of a country's history. As Andenaes observed, "[a] country's penal law . . . reflects more clearly the conditions of its society and its prevailing moral precepts,"[65] although there can be situations of mismatch when a gap occurs until criminal law keeps its pace with the objective and subjective realities of the society.

The path undergone is indicative about the way forward. The following statements of Jean Graven show some aspects of the path undergone in Ethiopia's codified laws:

> [Ethiopia], through the centuries, has retained the most ancient law and institutions in the world. . . . It is, in effect, back to Emperor Constantine and the Council of Nicaea in 325 that Ethiopian tradition dates the *Law of the Kings* [*Fetha Neguest*] which Emperor Zera Yacob, a ruler who loved justice, had translated into Ge'ez in the XVIth century and circulated in Ethiopia.
>
> . . . What I had felt should be stressed with respect to Ethiopian law, its rich past and its progressive and comprehensive codification is that it set an example by achieving a *spiritual synthesis*. The possibility had already been perceived and noted in the Imperial Preamble to the 1930 Penal Code which demonstrated

> (Articles 5, 15 and 16) how the modern Ethiopian legislator can and must adjust himself to changes and yet still be inspired by the spirit of *justice* and the purpose of *correction* which distinguish the *Fetha Neguest*. It pointed out that the principles of the European Codes that had served as a model for this first codification are still very often close to those which are found expressed in this venerable legislation. . . .[66]

The conceptions about offences and punishment change through the different epochs of history. For example the punishment imposed on theft varied over different centuries. The Code which was enacted during Hammurabi's reign in Babylon (circa 1792 to 1750 BC) provided the following regarding the crimes of theft and robbery:

- Law #8: "If any one steal[s] cattle or sheep, or an ass, or a pig or a goat, if it belong[s] to a god or to the court, the thief shall pay thirtyfold; if they belonged to a freed man of the king he shall pay tenfold; if the thief has nothing with which to pay he shall be put to death."[67]
- Law #22: "If anyone is committing a robbery and is caught, then he shall be put to death."[68]

The Justinian Code (6th century AD) imposed a milder punishment by requiring a robber caught red-handed to pay fourfold while other cases of theft entailed a penalty of paying double the value of the object stolen.[69] Moreover, an accomplice to a thief was also considered as having committed theft under Code Justinian.

Article 49, Section 1759 of the *Fetha Neguest* adopts Mosaic Law, Book II (ኦሪት ሁለተኛው መጽሐፍ) and stipulates the following:

> ላም ወይም በግ የሰረቀ ሰው ቢኖር ቢያርዳቸው ቢሸጣቸውም ስለ አንድ ላም አምስት እጅ ስለአንድ በግም አራት አጅ አድርጎ ይክፈል። የሰረቀው ገንዘብም በእጁ ባይገኝ ገንዘብም ባይኖረው ስለሰረቀው ገንዘብ ይሸጡት። የሰረቀው ገንዘብ፣ ላም ወይም አህያ ወይም በግ ቢሆን ደኅና ሁኖ በእጁ ቢገኝ ስለ አንዱ ፈንታ ሁለት አድርጎ ይስጥ። . . .
>
> A person who steals a cow or sheep and who has slaughtered or sold them shall respectively pay five cows or four sheep. If the property he has stolen is not in his possession or if he is unable to pay he shall be sold in lieu of the property stolen. Where the stolen property or cow or donkey or sheep is found in his possession and in good condition he shall pay double the property.

These examples illustrate the path undergone in social change and the corresponding changes in criminal law during the millennia between

Hammurabi's Code and modern criminal codes. The future, as well, will inevitably witness both *reactive* and *proactive* changes in criminal law. The momentum of the former depends upon the changes to come in socioeconomic conditions, values and moral precepts which will inevitably force legal regimes to adapt to change. Changes in social progress (including technology) inevitably propel new normative and institutional elements in crime prevention, and the corresponding phenomena that mark progress or regression in moral and ethical systems can loosen or tighten the grips of criminal law.

The chicken-egg paradox in this regard relates to the reciprocity in the causal link between stiff sentencing systems which usually lead to overcrowded prisons and their adverse impact on the cardinal objective of punishing offences. Such adverse effects usually lead to the enhancement of criminal behaviour among offenders rather than the attainment of the central objective of reform as articulated in the Criminal Code. The adverse effects would also include worsening of prison conditions in contravention to Article 21 of the Ethiopian Constitution, which provides that "All persons held in custody and persons imprisoned under conviction and sentencing have the right to treatments respecting their human dignity."

The law does not only reflect reality but also plays the proactive role of changing social realities. In the context of criminal law this *proactive* role unfolds whenever it becomes an instrument of putting in place new norms and sanctions that target at bringing about behavioural and social change that are expedient and essential. Change in criminal law in both contexts occurs "when the formative contexts, or at least specific portions of them, are no longer [*instrumentally*] adequate for use in accomplishing"[70] the purposes of peace, order and security, and when they are also *intrinsically* believed to be inappropriate or inadequate owing to, *inter alia*, the steady progress in various fields of study including moral philosophy, psychology, psychiatry, sociology, criminology and penology.

Review Exercises

1. State the impact of overcrowded prisons in the fulfilment of one of the purposes of punishment: i.e. reform and rehabilitation. Are the alternatives suggested by Andargachew feasible under current realities? What are the social changes that are envisaged in such schemes?
2. Assume that the following draft (to be included in Article 103 or 104 of the Criminal Code) is submitted by a subcommittee in the legislature. Give your legal opinion on the merits and shortcomings of the draft:

   > "The court may upon the request of the offender and the feasibility of supervision substitute the sentence of simple imprisonment not exceeding one year by free community service to public institutions, public enterprises or mass organizations if the convicted person has reconciled with the victim of the offence."

3. Why is it difficult to enforce the traffic regulations that prohibit pedestrian crossing in streets other than the spots that have zebra marks? And why are ring-road pedestrian crossing rules considerably violated?
4. Is the level of corruption increasing or declining in the institution(s) with which you are familiar? What are the social changes that need to accompany anticorruption laws?
5. After having gone through Readings 2 and 3, reflect upon moral development from the perspectives of an individual, the family unit, a certain neighbourhood and a juridical entity you might think of and relate the level of moral development with crime rates.
6. The following hypothetical cases were given in the Review Exercises for Chapter 9. Why is it difficult to enforce the violations, if any, you had identified in Chapter 9?
   a) A is fully healthy and he earns his living by begging on the streets of Addis Ababa. He sends part of his earnings to his relatives in the countryside, and he is recently spending nearly half of his daily earnings in tej bets during the evening.
   b) D_1, D_2, D_3 and D_4 come to a residential neighbourhood in Bole during the evenings for street prostitution. They are obscenely dressed and they wave their hands when cars come along. The residents feel morally uncomfortable.

Readings on Chapter 11

Reading 1: Norrie[71]

The Limits of [Criminal] Justice …

…. Whether it be mediation, reparation, reconciliation or diversion, non-custodial or intermediate treatment, there have been a number of attempts to break the 'penal equation' in favour of more 'relational' forms of justice. If we compare relational with criminal justice, the former might be seen as more appropriate in the light of the arguments advanced here. Relational justice involves a sense of the particularity of human life, a sense of social engagement, and a sense of responsibility that is contextualised both in terms of looking to the wrongdoer's past acts and their provenance, and to his relationship with a community that includes his victim. It returns the individual to the normative conversations out of which his agency emerged, offering the prospect of a reconciliation and a new beginning.

Criminal justice, by contrast, remains stuck with a backward-looking and desocialising view of the role of punishment, particularly in so far as it relies on imprisonment. It also has a static conception of individual responsibility, in which the individual is indubitably in control, save in very tightly circumscribed exceptional situations. . . .

Because the sense of being in control involves ambiguity, not simple illusion, the law still touches the subjective understanding of being a person. In situations involving the relationship between the individual and the state, this is extremely important. Laws which confine the liberty of the subject are precisely rules concerning the amount of control that the person has over his life vis-a-vis the police or the prison authorities. . . .

Can we move from these theoretical views directly to the kind of radical reform of the criminal justice system advocated by Blom Cooper?[b] An ambivalent view leads to caution. Liberal law gives us a conception of a rights-bearing subject at a price. The subject enjoys formal rights, to the extent that he does, in a trade-off. Formal rights exist within existing social and political arrangements. They allow subjects to speak, but in strictly limited terms. There is a political closure that relational forms of justice would begin to set loose, and it is this that I think condemns relational justice to operate in the margins of the social control system and to act only to ameliorate the main engine of social control, criminal justice and the criminal law.

But is this necessarily undesirable? In one way it is. Relational justice is less alienating, more morally expressive and developmental. Against this, criminal justice does in principle operate a system of rights, reflecting the idea of being in control of one's actions. If we were to move to a more relational approach, one that went behind the idea of the subject in control, would we not also be in danger of losing the defences relating to individual subjectivity that law in principle embodies? Nor is relational justice in any sense 'politically innocent.' Relational justice is itself an historical and social practice, a form of control in a society in which structural inequality has a profound effect on the criminal justice system. Moving beyond a formal system, it is potentially more invasive than law.

If one likes the politics, one may accept the invasion, but there is a political choice to be made with its own consequences.

The picture of reform that emerges is a nuanced one. If radical changes are sought, we need to ask what their consequences will be in the light of a broad understanding of how law operates. We need a radical theory, one that can get to the roots of law. Such a theory must come to terms with the ambivalences that we experience in thinking about the penal equation. Holding in mind the overall relationship between legal justice and the structural social injustice within which the equation operates, such a theory must criticise the absences and failures, but also recognise the positive aspects of liberal legality. There are political choices to be made. It may push for recognition of the needs of disadvantaged groups where they are barred by the law's decontextualising: this is the import of the battered women and provocation debate. But it must be conscious that this is a political task and that, in the absence of the possibility of progressive change in the broader society, liberal legality itself involves a progressive agenda: this is the import of the juridical critique of arbitrary discretion in life sentences.

The upshot of this conclusion is to argue for a necessary but uneasy relationship between theory and practice. They operate at different, irreducible levels. Theory does not lead immediately to systematic practical conclusions, but that does not mean that it is irrelevant to practice or that it cannot illuminate it. In truth, practice can never escape theory. It is only a question of how adequate and explicit theory is. The argument of this paper has been that a contradictory and ambiguous phenomenon like law needs a theory sufficiently sophisticated to capture contradiction and ambiguity within legal forms without simply surrendering to it. Such a theory would treat law dialectically, in its 'external' structural aspect, as a contradictory social phenomenon which both reflects and refracts modern historical conditions, and in its 'internal' experiential aspect, as a set of categories with some purchase on the ways in which moral and political agents live their lives under such conditions.

[Notes]

[a] Footnote omitted

[b] Blom Cooper, 'Social Control and Criminal Justice: An Unresponsive Alliance,' paper presented at the British Society of Criminology Conference 1995, 11. [Footnote 57 in the original].

Reading 2: Andenaes[72]

Crime, Punishment and Social Change

Punishment itself is old, but the list of punishable acts changes from time to time and from place to place. This is seen most vividly in the area of political crimes. After a shift in power, the whole basis for appraisal may change; what was treason and rebellion yesterday may be the highest form of patriotism today and vice versa. But the law of change is also working in other areas. The changes are rapid in some areas, such as economic legislation, where the forbidden and the permitted change according to changing economic conditions and changing views on economic policies. In more central areas of the penal law, the development proceeds somewhat more slowly, but over a period of time changes are great here as well. Old rules cease to exist, new ones are enacted, and even if the scope of punishable acts does not change, the appraisal of the gravity of the various transgressions may.

Crime against religion is an area where the development over the last hundred years has generally been in the direction of greater tolerance, with a correspondingly diminishing scope of punishable acts. Sexual offenses comprise another category which has been reduced little by little. Under the Norwegian Act of 1687, book 6, chapter 13, . . . punishment was imposed for ... every sexual relationship outside of marriage; and for adultery, the punishments were Draconian. The Norwegian Act (6-13-22) provided that "if anyone elopes with a married woman, with her consent, then both shall lose their lives." . . .

On the other hand, new rules have been enacted. A characteristic trait of the development of society during the last generation is the ever increasing care for the weak in society-women and children, the aged, the sick, and the economically underprivileged. This development is evidenced not only by the social security laws and other social legislation, but also by new penal laws for the protection of these groups, such as the laws against usury (Penal Code, §295), neglect of children (Penal Code, §219), child labor (Labor Act of December 7, 1956, chapter 5), and laws for the protection of pregnant women and nursing mothers (Penal Code, §§ 240, 241, 388, 389, and Labor Act, chapter 4).

The forms of punishment also change. Methods of punishment such as outlawry, the pillory, whipping and other corporal punishments have passed into legal history. In their place, imprisonment in various forms has become the principal punishment for the more serious offenses.

A country's penal law, therefore, reflects more clearly the conditions of its society and its prevailing moral precepts than most other areas of law. As the former Danish Attorney-General, Goll, has stated: "We need to know only that the stealing of a horse and the pollution of drinking water are the greatest crimes in Arabia, in order to be able to visualize readily its way of life and prevailing conditions."

The fact that the Norwegian Act of 1687 imposed penal servitude for life upon anyone who "curses his parents" or who "impudently addresses them," and the death penalty upon anyone who struck his parents (6-5-2 and 3), while imposing no punishment upon parents who neglected or mistreated their

children, gives us insight into patriarchal conditions alien to our time. It is also significant that in the 1930s, the Soviet Union imposed the death penalty or a minimum of ten years' imprisonment for the theft of state or collective property, while theft of private property, in the absence of especially various circumstances, was punished by six months' imprisonment at most."

The use of the provisions of the penal code as a barometric indicator of the socio-economic conditions and cultural development of a society involves two dangers, however. First, there is a certain sluggishness in legal development. A law may remain in existence long after the conditions which motivated it have vanished. Secondly, the law does not always reflect actual practice. ... Concubinage (Penal Code, § 379) is never punished, and the law prohibiting the advertisement of birth-control devices (Penal Code, § 377) may perhaps be considered as having lapsed through lack of enforcement. This possibility of a disparity between law and practice should be considered in the study of legislation from older times. Many of the laws providing for horrible methods of execution . . . in older legislation were never actually enforced.

Reading 3: Hoskisson & Biskin [73]

[Kohlberg's Theory of Moral Development]

...

Kohlberg's theory possesses two universal components: moral issues and stages of moral development. Moral issues represent the content of moral judgments. Generally a moral dilemma arises when a conflict occurs between one or more of these moral issues. The universal moral issues defined by Kohlberg[a] are obligation, responsibility, blame and approbation, punishment, contract and promise, the value of human life, property, prudence, welfare of others, and respect, justice and reciprocity. . . . [T]he list includes the most frequent and best defined issues. . . . Kohlberg has empirically validated the universal occurrence and . . . [the] sequence of the stages of moral development. [Kohlberg, 1968]. Each stage represents a distinct and qualitatively different structure upon which moral judgments are made. Kohlberg's six stages are defined below.

Stage 1: Orientation toward punishment and unquestioning deference to superior power. The physical consequences of action regardless of their human meaning or value determine its goodness or badness.

Stage 2: Right action consists of that which instrumentally satisfies one's own needs and occasionally the needs of others. Human relations are viewed in terms like those of the market-place. Elements of fairness, of reciprocity and equal sharing are present, but they are always interpreted in a physical, pragmatic way. Reciprocity becomes a matter of "you scratch my back and I'll scratch yours" not of loyalty, gratitude or justice.

Stage 3: Good-boy/good-girl orientation. Good behavior pleases or helps others and receives their approval. Conformity to stereotypical images of what constitutes majority or natural behavior occurs. Intention judges behavior: "he means well" becomes important . . . . One seeks approval for being "nice".

Stage 4: Orientation toward authority, fixed rules and the maintenance of the social order. Right behavior consists of doing one's duty, showing respect for authority, and maintaining the given social order for its own sake. One earns respect by performing dutifully.

Stage 5: A social-contract orientation, generally with legalistic and utilitarian overtones. Right action tends to be defined in terms of general rights and in terms of standards critically examined and agreed upon by the whole society. There exists a clear awareness of the relativism of personal values and opinions and a corresponding emphasis upon procedural rules for teaching consensus. Aside from what is constitutionally and democratically agreed upon, right or wrong is a matter of personal values and opinion. The result emphasizes the legal point of view, but with an emphasis upon the possibility of changing law in terms of rational considerations of social utility, rather than freezing it in terms of Stage 4, "law and order." Outside the legal realm, free agreement and contract are the binding elements of obligation. . . .

Stage 6: Orientation toward the decisions of conscience and toward self-chosen ethical principles appealing to logical comprehensiveness, universality, and consistency. These principles are abstract and ethical (the Golden Rule, the categorical imperative), they are not concrete moral rules like the Ten Commandments. Instead they are universal principles of justice, of the reciprocity and equality of human rights, and of respect for the dignity of human beings as individual persons.

[Note]

[a] Lawrence Kohlberg, "The Development of Modes of Moral Thinking in the Years Ten to Sixteen," Diss. University of Chicago, 1958; L. Kohlberg, "Stage and Sequence: The Cognitive-Developmental Approach to Socialization," in Handbook of Socialization: Theory and Research, D. Goslin (ed.) (Chicago: Rand McNally and Company, 1968).

Reading 4: Sridhar & Camburn [74]

Stages of moral development

Why do individuals differ in how they respond to ethical dilemmas? Expanding on Piaget's (1965) work on cognitive development of individuals, Lawrence Kohlberg (1969) proposed a model of cognitive moral development. According to the model, the ethical justification and moral reasoning underlying individuals' actions depend on their relative moral development. Kohlberg's model posits three levels of cognitive development, with two stages nested within each level. The three levels are: pre-conventional, conventional and post conventional.

In the pre-conventional level, individuals view the dilemma in terms of rewards and punishments. What is "right" or "wrong" is judged by individuals with a concern for minimizing personal losses (punishment and obedience orientation) and maximizing gains (instrumental orientation). This corresponds to Kelman's (1958) compliance orientation.

In the conventional level, individuals shift their focus to their immediate family or social organizations. Moral judgement is based on whether the resulting behavior would be acceptable to socially important others such as members of the family, fraternity, and other social organizations. In Stage III,

individuals have as their payoff mutual interpersonal acceptance. In Stage IV, individuals display a law and order orientation. What is "right" is determined by the criteria of preserving social order. Following the rules, regulations and guidelines is equated with being moral. Kelman (1958) would have termed such behavior conformance or identification.

In post-conventional level, individuals look beyond their immediate social organizations. Ethical reasoning is predicated on recognizing of moral duty to the larger society beyond the one's own. Individuals define "right" or "wrong" by self-chosen principles which often transcend those of conventional authorities. While individuals in Stage V recognize the relativistic nature of values and norms, they are willing to reach consensus through democratic discussion and due process. Individuals in Stage VI choose carefully those ethical principles which are logically comprehensive, universal and internally consistent. Few individuals are to be found in Stage VI.

Kohlberg's model views the stages as distinct "structured wholes" within which individuals are expected to be consistent in their moral reasoning. Progress through the stages is seen as monotonic. Finally, the model specifies that the stages are hierarchically integrated. This supposes that the thought processes occurring in later stages of moral development employ intellectual tools developed in preceding stages (Rest, 1975).

Kohlberg (1978) suggested that an individual's stage of intellectual development and social and educational climate would facilitate or debilitate one's moral development. In organizational context, a social climate characterized by freedom of thought and communication that encourages discussion and tolerates dissent is expected to create a climate where moral reasoning is facilitated.

Kohlberg's model has been subjected to extensive empirical and conceptual validation (Gilligan, 1982; Kohlberg et al., 1983; Snarey, 1985) and has been recognized as a useful framework for understanding ethical development of individuals. ...

Organizational learning and moral development

Piaget (1965) defined learning as a process of creation and recreation during which an individual adds appropriate gestalts and logical structures to memory and unlearns those parts which are found to be inappropriate or dysfunctional. Each time a new structure or concept is added to memory, the individual creates a new reality. In that sense, learning is more than developing a repertoire of behaviors learned in a stimulus-response paradigm. The individual, through a process of discovery, comprehends the rational, causal linkages behind the phenomenon and commits those maps to memory for future use.

Organizational theorists have discovered several parallels between individual learning and organizational learning (Hedberg, 1981). Information processing systems of individuals and organizations are similar (Laszlo, 1972). Levitt and March (1988) proposed that organizations learn by encoding their inferences from history into routines that guide behavior. These routines may include standard operating procedures (Cyert and March, 1963; Simon, 1957), conventions, strategies and technologies. The members of the organization

collectively develop a sense of what is right and what is wrong. Organizations seek to permeate the values inherent in their meta-physical paradigm, through the socialization and reinforcement. It is this collective development of moral values which define the concept of corporate responsibility as it applies to organizational action.

Corporate learning and development are not dependent on individual actors and these processes are quite capable of surviving turnover of organizational members. In that sense, learning is by the organization, not just by the agents. Shared routines, values and paradigms are seen in vastly diversified, often widely geographically dispersed organizations. . . .

Reading 5: Cotterell

[a.] Law as the Framework of Social Life[75]

Modern forms of positivist legal theory have reacted against earlier varieties which stressed that provision of state sanctions – formally enforceable penalties such as fines, imprisonment or damages – in case of non-compliance is a vital mark of law distinguishing it from other social rules. Nevertheless, legal positivism assumes a close and vital connection between law and state sanctions. So much so that when lawyers talk about the sanctions of law they almost invariably mean those provided by the state.

It must be stressed that to include, as Austin did, the threat of availability of such sanctions among the distinguishing marks of law does not entail a belief that people actually obey law because of these elements of force built into it. Few modern positivist legal theorists would make any sweeping claims about the role of state sanctions in securing the effectiveness of law in regulating behaviour. Yet as Ehrlich understood the matter, state sanctions were virtually irrelevant in social life. It is obvious, he writes that in the mass of legal relations and social associations in which people live, with few exceptions they quite voluntarily perform the duties which those relations and associations entail. As a rule, the thought of compulsion by the courts does not even enter the minds of men (Ehrlich 1936: 21). They usually act out of habit, he notes, or else to avoid the social consequences of deviance. They seek to avoid quarrels, loss of status or loss of custom and goodwill in business dealings, or bad reputation – for example, for quarrelsomeness, dishonesty, unreliability or irresponsibility. Indeed the actual rules of conduct (for example in codes of professional ethics or mercantile custom) may be different from or more stringent than rules sanctioned by the power of the state. Ehrlich . . . concludes that one might reasonably maintain that society would not go to pieces even if the state would exert no coercion whatever. (Ehrlich 1936: 71).

... [V]arying examples should warn against wide generalisation; yet much evidence shows that extremely powerful systems of normative regulation distinct from the ‘official’ . . . law govern important areas of social life with little or no reference to the norms of decision. For Ehrlich the key to understanding this is to recognise that all human life is lived in ‘associations’ (*gesselshaftlichen Verbünde*), that is formal or informal groupings of numerous kinds. Some associations, for example, trade unions, business corporations and partnerships,

are formally defined or regulated by state law. Some have legal personality, that is, they are recognised by law as distinct entities with rights and duties. The associations of social life also, however, include voluntary societies (for example clubs), occupational groups, contractual bonds, social classes, political parties, ethnic groups, religious affiliations, the family, and the nation or state. Law is the inner ordering of these associations. It consists of the rules which assign to every member of the association his position within it and the rights and duties attaching to that position. Law is thus not something imposed externally but arises from the modes of thought that underlie the associations. So the real sanctions of the law arise from the fact that in general no one wants to be excluded from the association of life – from the ties of citizenship, family, friends, profession, church, business community etc. Refusal to conform to the norms leads to a weakening of the bonds that tie the individual to the social association.

State law –lawyer's law or norms for decision– is the law of one association, the state, within the complex social whole. Yet, as the law of what Ehrlich sees for practical purposes as the widest association, it appears to have special role. Two forms of law affect the social associations. As well as their 'internal' law fixing relations of members within them, they are protected from external attack by forms of state law, for example, providing for punishment of certain offences and crimes and defining the jurisdiction and procedures of state-controlled agencies such as courts. . . . More generally Ehrlich recognises that state coercion is necessary against those whose social deviance is particularly serious. These, however, are a minority insignificant in comparison with the law-abiding majority. . . . It would seem to follow from this that rehabilitation, whatever its difficulties and limitations, is the appropriate aim of penal policy.

. . . [Ehrlich's] . . . concept of the state as an association . . . glosses over a host of questions . . . . No coherent theory of the relationship between living law and state law emerges from his discussion. On the other hand, state law provides the external protection of systems of living law. The concept of social association is so broad and vague as to make it difficult to begin to grasp the variety of forms of social relationship and the structures of domination and co-operation within them. The great German jurist Gierke, the foremost historian of the relationship between law and forms of collective organization saw law in politically organised society as a continuous struggle between two categories association, those based on domination (*Herrschaft*) and those based on co-operation (*Genossenschaft*) . . . .

Within their limitations, however, Ehrlich's ideas offer a powerful challenge to lawyers' typical assumptions about the nature and scope of law and of its importance. . . . [L]egal problems appear as central problems of social organisation and legal thought is not merely lawyers' thought but, is some sense, part of the means of solving problems in innumerable organisatons, institutions and relationships within a society. . . .

[b.] Law as an Instrument of Social Change[76]

. . . The deliberate use of law to foster or hinder change is . . . not an exclusively modern phenomenon. Major ages of social change and mobility

almost always involve great use of law. . . . But it cannot be denied that in the twentieth century, in many societies, law's capabilities in this respect have been seen in a new, vastly more ambitious manner as compared with earlier eras. The putting of law into written form, … the accumulation of state power available for enforcement, the professionalisation of interpretation and application of legal doctrine, the institutionalisation of elaborate adjudicative processes, and the development of efficient legislative institutions have been prerequisites for establishing the most ambitious modern assumptions about the capabilities of legislation: that, given the necessary will and skill behind it and a careful selection of the most appropriate strategies, law can do anything and everything to mould societies . . . .

. . .

[c.] The Limits of Effective Legal Action [77]

Despite the climate of opinion which stresses law's capacity to mould society and which has dominated twentieth-century legal thought, some of those who have devoted carful study to the characteristics of modern law as an instrument of government have tended to the view that this capacity is severely limited. Of course, political preferences about what law should and should not do no doubt often colour perceptions of what it is practically possible for it to do. Conversely, 'the ethical limits of law often turn on empirical considerations. Thus it is important that social scientists and legal scholars study law's empirical limits (Danelski 1974: 24). One recent writer concludes a study of the 'limits of law' by remarking 'that laws are often ineffective, doomed to stultification almost at birth, doomed by the overambitions of the legislator and the under-provision of the necessary requirements for an effective law, such as adequate preliminary survey, communication, acceptance and enforcement machinery.' (Allott 1980:287).

It is not, however, true, as he suggests, that in determining the limits of law, scholars are hampered by 'the absence of appropriate in-depth field studies of effectiveness of laws.' … [T]here are numerous such studies accumulated particularly over the past twenty years. The problem is to know how to interpret their findings; to generalise from a vast number of particular instances; to find appropriate methods for isolating the effects of law from other casual factors in change; and to draw general conclusions about law when the factors determining effectiveness (however it is measured) may vary greatly from one type of law to another.

Modern studies of 'limits of effective legal action' can be traced back to a seminal article with that title published early in this century by the American jurist Roscoe Pound (Pound 1917). Pound attempts to lay down principles suggested by a consideration of basic characteristics of modern law. First, as a practical matter, law can, as he puts it, deal only with the outside, and not the inside of men and things. For many reasons, including problems of proof, law cannot attempt to control observable behaviour. For Pound this is a practical basis of the distinction between law and morals – since the latter as a system of social control intrudes into areas of the life and belief where the law dare not enter. Secondly, there are interests and demands which it might be desirable

that the law should recognise but which by their nature cannot be safeguarded or satisfied through law. Thirdly, law as an instrument of government relies on some external agency to put its machinery in motion. Legal precepts do not enforce themselves. Law which cannot be enforced, or invoked by citizens, can hardly shape behaviour. …

[d.] Legislative Strategies for Promoting Social Change [78]

. . . How the law is put into effect is clearly as important as its content. The nature of the enforcement agencies used, the degree of commitment of enforcement agents to implementation of the law, their morale and – a closely related factor – the amount of resources available to ensure compliance: all of these are shown to be extremely important factors. In addition, however, the kind of strategy of coercion or persuasion employed in the law has been claimed to be of great importance. In a widely cited article the sociologist Yeheskel Dror (1959) distinguishes between direct and indirect uses of law in promoting change. Echoing earlier writers he asserts that the direct use of law – the attempt to change behaviour and perhaps also attitudes directly by imposing on individual legal subjects legal duties requiring such change – is fraught with problems. But law, Dror argues, can and does play an important indirect role in fostering social change in many ways.

First, it shapes various social institutions which, in turn, have a direct influence on the rate or character of social change. Thus laws setting up a compulsory education system influence the scope and character of educational institutions which themselves may directly influence social change. Patent laws protecting inventors' rights may encourage invention and promote change in technological institutions which in turn may influence social change. Negatively, legal restrictions on freedom of association and discussion, on disclosure of the information necessary for the realistic assessment of present conditions and polices, or on contact with other societies, may prevent or delay the spread of new ideas favouring social change.

Secondly, law often provides the institutional framework for an agency specifically set up to exert influence for change. . . . A third legal strategy which Dror mentions is the creation of legal duties to establish situations in which change is fostered. Examples would be the numerous specific duties placed on local authorities with regard to the provision of public services of many kinds . . .

[e.] Some Prerequisites for Effective Legislation [79]

Various writers have sought to specify the conditions under which law can effectively influence behaviour and perhaps attitudes. For example, the sociologist William M. Evan . . . lists seven such conditions (Evan 1965). First, the source of the new law must be authoritative and prestigious. . . . The democratic mandate of the legislature provides a legitimacy for action by it to bring about substantial change. . . .

Secondly, the rationale of the new law must be expressed in terms of its compatibility and continuity with established cultural and legal principles. As the matter has also been put, law can be a powerful force for change 'when the change derives from a principle deeply embedded in our heritage' (Pennock and

Chapman, eds. 1974: 2). The point seems to nod a brief acknowledgment to Savigny. Law must appear compatible with cultural assumptions and with the most general accepted patterns of legal development. . . .

Thirdly, as Evan puts it, pragmatic models of compliance must be identified. It must be possible to make clear both the nature and the significance of the new patterns of behaviour required by the law by pointing to groups, societies and communities in which these patterns exist. What seems to be behind this is the insistence that law must not appear utopian but practical in its aims. . . .

Fourthly, Evan refers to a conscious use of the element of time in legislative action (cf. Allott 1980: 167), [and he suggests a shorter transition time for coming into force of the legislation] . . .

. . . [Fifth] ... enforcement agents must be committed to the behaviour required by the law even if not to the values implicit in it. Any evidence of hypocrisy or corruption from the source is likely to undermine the law. . . .

The sixth point suggests a number of important issues. Positive sanctions, Evans suggests, are as important as negative ones. . . . [W]hile legal sanctions are typically thought of as various forms of punishment, or provisions for redress of injury through compensation, positive incentives for compliance with law may also be used where the law seeks actively to promote social change. In modern legislation, provisions for grants, subsidies and tax and other fiscal concessions are important examples of such sanctions. As Grossman and Grossman suggest: "Laws . . . which seek positive societal changes of major proportions must rely as much on education and persuasion as on negative sanctions. For the carrot and stick approach to be successful, the latter must be visible and occasionally used.' (1971: 70)

More generally, other writers have stressed that the kind of sanctions used in the law may have a vital bearing on its capacity to influence attitudes. William K. Muir argues that legal coercion may force a change of behaviour, but where 'there is no sense of choice, a man acting in external conformity with the law may not be driven to change attitudes that are at odds with the law. A precondition of positive attitude change is a sense of volition (Muir: 1967: 49). If the individual is induced, not compelled, to act in a certain way, 'he will search for information to support his commitment' (1967:51) so as to remove the tensions involved in deciding to do one thing while feeling predisposed to do the opposite. Muir calls this the process of 'conversion' which may give rise to acceptance of the attitudes informing the law.

Where the individual is undecided about the appropriate conduct, legal coercion may, by removing choice and overcoming opposing social pressures, make up his mind ('liberation') but is likely to do so in a way that only superficially disguises the original ambivalence without removing it. In other circumstances where the individual is coerced by law, he may keep his original inconsistent attitude and exaggerate the coercive effects of the law which force a change in his conduct, or he may accentuate his antagonistic attitude and condemn the law which forces him to act in a manner inconsistent with it. Muir sees these and other possible responses as adaptive reactions by which the individual can integrate attitudes and conduct in a way that minimises

psychological tensions and inconsistencies.

Probably the best way to see legal strategies in this context is as part of a long-term process of negotiation of attitudes and perceptions of interests in which political and legal action constitute only one element in a complex network of influences on social change (cf. Paulos 1974: ch 3; Carson 1974). ...

Evan's [seventh] point is the one Pound stressed . ... Effective protection must be provided for the rights of those who would suffer as a result of evasion or violation of the law. They must be given the incentive to use the legislation. Significantly, many recent consumer protection laws . . . attempt to encourage consumers to make use of the law by providing . . . damages recoverable in litigation . . ., punitive damages, double or treble damages or recovery of lawyers' fees (Nadeer and Shugart 1980: 58).

Endnotes, Chapter 10

[1] Steven F. Rendall, "Fontenelle and His Public", MLN Vol. 86, No. 4 French Issue (Johns Hopkins University Press) p. 498.

[2] M. P. Cowen & R. W. Shenton (1996), *Doctrines of Development* (London: Routledge), p. 14.

[3] *Ibid.,* pp. 24, 25.

[4] *Ibid.,* pp. 27, 28.

[5] Max Weber [1906], *The Protestant Ethic and the Spirit of Capitalism (with Other Writings on the Rise of the West),* 4th edn. (2009) translated and with an introduction by Stephen Kalberg (New York & Oxford: Oxford University Press), pp. 154, 155.

[6] Max Weber (1978, Guenther Ross & Claus Wittich, eds.), *Economy and Society* (Berkeley: University of California Press).

[7] David M. Trubek (1972), "Toward a Social Theory of Law: An Essay on the Study of Law and Development" *Yale Law Journal* Vol. 82 No. 1, at 12.

[8] *Ibid.,* p. 15.

[9] Emile Durkheim (1982), *The Rules of Sociological Method*; edited and with an introduction by Steven Lukes (New York: Free Press),, p.53. See also E. Durkheim (1964), *The Division of Labour in Society* (Simpson translation) (New York: Free Press).

[10] W. W. Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (3rd edn. 1991), pp. 4 *ff.*

[11] Daniel Haile (1973), "Law and Social Change in Africa: Preliminary Look at the Ethiopian Experience", *Journal of Ethiopian Law*, Vol. IX, no. 2, pp. 380–390.

[12] *Ibid.*, p. 383 (quoting Simpson and Stone, *Law and Society* (1948), p. 243; Y. Dror, "Law and Social Change", *Tulane L. Rev.* Vol. 33 (1958–59). p. 800).

[13] *Ibid.*, pp. 383–384.

[14] *Ibid.*, p. 384 (quoting Seidman, "Research in Africa Law and Processes", Occasional Paper 4 No. 3, African Studies Center, University of California, p. 7).

[15] *Ibid.*, p. 384.

[16] *Ibid.*

[17] *Ibid.,* pp. 388–389.

[18] Peter B. Evans (1989), "Predatory, Developmental and Other Apparatuses: A Comparative Political Economy Perspective on the Third World State," *Sociological Forum*, Vol. 4, No. 4, pp. 562, 563.

[19] Juhana Vartiainen, "The Economics of Successful State Intervention in Industrial Transformation", in *The Developmental State* (1999), edited by Meredith Woo-Cumings (Cornell University Press).

[20] *Ibid.*, pp. 218–219.

[21] Verena Murschetz (2007), "The Future of Criminal Law within the European Union—Union Law or Community Law Competence?", *Victoria University of Wellington Law Review*, Vol. 38, p. 145 (case citations omitted).

[22] Catherine Elliott (2001), *French Criminal Law* (Devon, UK & Oregon, USA: William Publishing), pp. 1–10.

[23] *Ibid.*

[24] *Ibid.*

[25] Elliott states that there were still "numerous institutions of private justice . . . for a long time under the regime of public justice . . . where the public authorities were not in a position to adequately ensure the protection of its citizens". *Ibid.,* p. 3.

[26] *Ibid*.

[27] *Ibid*.

[28] *Ibid.,* p. 5.

[29] *Ibid.,* p. 6.

[30] *Ibid.,* pp. 7, 8.

[31] *Ibid.,* p. 9.

[32] *Ibid.,* p. 10.

[33] Jerome Hall (1941), "Prolegomena to a Science of Criminal Law", University of Pennsylvania Law Review, Vol. 89, No. 5 (Mar. 1941), p. 550.

[34] Max Weber (2009 [1920]), *The Protestant Ethic and Spirit of Capitalism*, 4th edn., translated and with an introduction by Stephen Kalber (New York & Oxford: Oxford University Press), p. 400.

[35] *Ibid.*

[36] *Ibid.*

[37] Markus D. Dubber (2006), *Comparative Criminal Law*. Oxford Handbook of Comparative Law, p. 1. Available at SSRN: http://ssrn.com/abstract=876110

[38] *Ibid.* Cf. the German offense of *Hausfriedensbruch* (breach of the house peace) even today. StGB § 123.

[39] *Ibid*., pp. 1, 2.

[40] Dubber, *supra*, note 37, p. 2

[41] *Ibid*.

[42] Jan Gorecki (1983), *Capital Punishment: Criminal Law and Social Evolution* (New York: Columbia University Press), p. 31.

[43] *Ibid.,* p. 75.

[44] *Ibid.,* p. 76.

[45] Lon L. Fuller (1964), *The Morality of Law*, Revised Edition (Yale University Press), p. 253.

[46] *Ibid*., p. 165.

[47] John Rawls (1999), *A Theory of Justice*, Revised Edition (Harvard University Press), p. 276.

[48] *Ibid*., p. 212.

[49] Nir Eisikovits (2005), "Moral Luck and the Criminal Law", Abstract, in *Law and Social Justice*, J. Campbell, M. O'Rourke, D. Shier, eds. (MIT Press).

[50] Stephen O'Hanlon (2009), "Towards a More Reasonable Approach to Free Will in Criminal Law", *Cardozo Public Law, Policy and Ethics Journal*, Vol. 7, No. 2 (Spring 2009), pp. 395 *ff.* (citations omitted). This is a form of Immanuel Kant's "ought implies can" restraint which is applicable to deontological ethical theories and legal codes. *See* Immanuel Kant, Critique of Pure Reason A547/B575 (Paul Geyer & Allen Wood trans., 1998) (1781).

> Regarding certain aspects of nature, it is essentially meaningless to say that things or certain nonrational people ought to do or be a certain thing when they cannot do or be that thing. Thus, in, nature the understanding can cognize only what exists, or has been, or will be. It is impossible that something in it ought to be other than what, in all of these time-relations, it in fact is; indeed the ought, if one has merely the course of nature before one's eyes, has no significance whatever. We cannot ask at all what ought to happen in nature, any more than we can ask what properties a circle ought to have; but we must ask what happens in nature, or what properties the circle has.
>
> *Id*.

[51] O'Hanlon, *supra* note 50.

[52] H.L.A. Hart (1961), *The Concept of Law*, pp. 19–24

[53] Elliott, *supra* note 22, p. 6.

[54] Andargachew Tesfaye (2004), *The Crime and Its Correction*, Volume II (Addis Ababa University Press), p. 290.

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[56] Andargachew, *supra* note 54, p. 290,

[57] *Ibid.*, p. 294.

[58] *Ibid.*

[59] *Ibid.*, p. 295.

[60] This objective "is based on the assumption that crime and delinquency are the consequences of community disorganization as well as the psychological and behavioural problem of the offenders. The community's failure are considered to have deprived "offenders of contact with the institutions that are basically responsible for assuring development of law abiding contact: sound family life, good schools, employment, recreational opportunities, and desirable companions". The psychological problems that are often manifested by offenders are viewed to be, at least partially, the influence of the environment in which offenders live". Andargachew, *supra* note 54, p. 296 in-text quotes: McCarthy & McCarthy, 1991: 2).

[61] Andargachew, *ibid.,* p. 296.

[62] "A correctional facility that uses the training techniques applied to military

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[63] McCarthy and McCarthy (1991), Community-based Corrections, 2nd edn.(Pacific Grove/California: Brooks/Cole Publishing Company), p.4 (quoted in Andargachew, p. 297).

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[78] *Ibid*., pp. 61-63

[79] *Ibid*., pp. 64-68

ANNEX I: PART I, GENERAL PART

MATCHING PROVISIONS OF THE 2004 CRIMINAL CODE AND 1957 PENAL CODE

(The table does not indicate the amendments.)

Book I- Crime and Criminals (Offence and Offenders)

2004 Criminal Code Arts.	**1957 Penal Code** Arts.		**2004 Criminal Code** Arts.	**1957 Penal Code** Arts.		**2004 Criminal Code** Arts	**1957 Penal Code** Arts.
Title I- Criminal Law and Its Scope (Articles 1-22)							
1-22	1-22	The sequence of the provisions is not changed					
Title II- The Crime and its Commission (Articles 23-47)							
Crim. C.	**Pen. C.**		**Crim. C.**	**Pen. C.**		**Crim. C.**	**Pen. C.**
23-33[1]	23-33		38	37		43	42,45
34[2]	-		39	38		44	43
35	34		40	39		45	44
36	35		41	40		46-47[3]	46-47
37	36		42	41			
Title III- Conditions of Liability to Punishment (Articles 48-86)							
Crim. C.	**Pen. C.**		**Crim. C.**	**Pen. C.**		**Crim. C.**	Pen. C.
48-53[4]	48-53		67	82(1)(b)		78	74
54	55		68	64		79	75
55	54		69	65		80	76
56-59[5]	56-59		70	66		-	77
60	82(1)(a)		71	67		81	78
61	60		72	68		82	79
62	61		73	69		83	80
63	62		74	70		84	81
64	-		75	71		85	82
65	82(1)(a)		76	72		86	83
66	63		77	73		-	84[6]

[1] The sequence of the provisions is not changed
[2] Art. 34 is a new provision on corporate liability
[3] The sequence of Arts. 46 & 47 is not changed
[4] The sequence of the provisions is not changed
[5] The sequence of the provisions is not changed
[6] The elements of Art. 84 of the 1957 Penal Code are incorporated in Art. 189 of the 2004 Crim. Code with further details and elaboration.

Book II
The Criminal, Punishment and Its Application

2004 Criminal Code Arts.	1957 Penal Code Arts.		2004 Criminal Code Arts.	1957 Penal Code Arts.		2004 Criminal Code Arts	1957 Penal Code Arts.
Title I- Punishments and Other Measures and Their Enforcement (Articles 87-177)							
87	85		119	118		149	153
88	86		120	119		150	154
89	87		121	120		151	155
90	88		Deleted	120A		152	156
91	89		122	121		153	157
92	90		123	122		154	158
93	91		124	123		155	159
94	93		125	124		156	160
95	92, 94		126	125		157	161
96	96		127	126		158	162
97	95		128	127		159	163
98	97		Deleted	128-132		160	164
99	98		129	133		161	165
100	99		130	134		162	166
101	100		131	135		163	167
102	101		132	136		164	168
103	102		133	137		165	169
104	103		134	138		166	170
105	104		135	139		167	171
106	105		136	140		Deleted	172
107	106		137	141		168	173
108	107		138	142		169	174
109	108		139	143		170	175
110	109		140	144		171	176
111	110		141	145		172	177
112	111		142	146		173	178
113	112		143	147		174	179
114	113		144	148		175	180
115	114		145	149		176	181
116	115		146	150		177	182
117	116		147	151			
118	117		148	152			

Title II- Determination, Suspension, Discontinuance and Extinction of the Penalty (Articles 178-237)							
Crim. C.	**Pen. C.**		**Crim. C.**	**Pen. C.**		**Crim. C.**	**Pen. C.**
178	183		200	204		217	226
179	184		Deleted	205		218	227
180	185		201	206		219	228
181	186		202	207		220	229
182	187		203	208		221	230
183	188		204	209		222	231
184	189		205	210		Omitted	232
185	190		206	211		223	233
186	191		207	212		224	234
187	192		208	213		225	235
188	193		209	214		226	236
189	84		210	215		227	237
190	194		211	216		228	238
191	195		212	217		229	239
192	196		Omitted	218		230	240
193	197		Omitted	219		231	241
194	198		213	220		232	242
195	199		Omitted	221		233	243
196	200		Omitted	222		234	244
197	201		214	223		235	245
198	202		215	224		236	246
199	203		216	225		237	247

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