

# Sentencing and Execution

Teaching Material

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# **Chapter One**

## **Rationales of Sentencing**

### **Objective of the Chapter**

At the end of this Chapter, the students will be able to:

- Discuss the main rationales behind punishment;
- Identify conflict among different theories;
- Evaluate the Ethiopian Criminal Code in terms of these theories.

### **1.1 Introduction**

Sentencing may be defined as the imposition of penalty upon a person convicted of a crime. When we talk of sentencing, one thing that comes to our mind is the person found guilty of the violation of the criminal law.

Sentencing is the most difficult decision made by judge or jury. Not only does it involve the future, and perhaps the very life of the defendant, but also society looks to sentencing to achieve a diversity of goals some of which may not be fully compatible with one another

This chapter will examine different theories of punishment. It also addresses the conflict and compromise among different theories.

### **1.2 Theories of Sentencing**

Although punishment has been a crucial feature of every legal system, a widespread disagreement exists over the moral principles that can justify its imposition.

One fundamental question is why and whether the social institution of punishment is warranted. The second question concerns the necessary conditions for punishment in

particular cases. The third relates to the degree of severity that is appropriate for particular offenses and offenders.

Since punishment involves pain or deprivation that people wish to avoid, its intentional imposition by the state requires justification. The difficulties of justification cannot be avoided by the view that punishment is an inevitable adjunct of a system of criminal law.

The question: "what are the rationales behind punishment?" remains unanswered. This question will soon take us to the theories of punishment. Generally, punishment contributes to the preservation of public order through inflicting the wrong doer who is expected to behave in the future to become a good citizen and to inspire fear in any one "who witness the punishment of wrong doer, and to make them prudent." This is the primary rational of punishment.

There are theories of punishment of which the following are generally been regarded as the most important

### **1.2.1 Retribution**

It is the oldest of the rationales for punishment tracing its root to the Bible. For instance Leviticus 24:17-22 reads:

*" when one man strikes another and kills him ,he shall be put to death ... when one injures and disfigures his fellow country man, it shall be done to him as he has done; fracture for fracture, eye for eye, tooth for tooth."*

Retribution is often assimilated to revenge, but a public rather than a private one. Retribution is based on the principle that people who commit crimes deserve punishment. In that sense, the theory is backward looking: the justification for punishment is found in the prior wrong doing.



Retribution theory punishes the offenders because they are deserving of punishment. It says to the offenders: "*you have caused harm to society; now you must pay back society for that harm. You must atone for your misdeeds.*"

Implicit in retribution is the condemnation or denunciation of both the offender and the offending behavior.

Retribution, however, is not in a kind. Society cannot rape rapist or steal from thief, although in some countries death penalty is exacted for murder.

Instead, the law tries to convert the offence into a common currency to impose a sentence which is proportional to the harm caused.

In this regard, it might be observed that retribution, with its emphasis on proportional punishment, provides a basis for the grading of offences.

### **1.2.2 Deterrence**

Deterrence is one of the several rationales of sentence. It is described as 'consequentialist' in the sense that it looks into the preventive consequence of sentence. It relies on the threats and fear through sentencing. Deterrence is based on the belief that crime is rational and can be prevented if people are afraid of penalties.

There are two types of deterrence; namely General deterrence and specific deterrence.

#### **General Deterrence**

Knowledge that punishment will follow crime deters people from committing crime, thus reducing future violations of right and the unhappiness and insecurity they would cause.

It aims at deterring other people who witness punishment and like minded with the offender, from committing this kind of offence.

It makes other people prudent by inducing the public to refrain from criminal conduct by using the defendant as an example of what will befall a person who violated the law.

J. Bentham, the main proponent of this theory argues that all punishment is pain, and should therefore be avoided, however, it might be justified if the benefit in terms of general deterrence would outweigh the pain inflicted on the offender punished and if the same benefits could not be achieved by non-punitive methods

Sentence should therefore be calculated to be sufficient to deter other from committing this kind of offence, no more no less.

### **Specific Deterrence**

A goal of criminal sentencing that seeks to prevent a particular offender from engaging in repeated criminality. The actual imposition of punishment creates fear in the offender that if he repeats his act, he will be punished again.

Adults are more able than small children to draw conclusions from the punishment of others, but having a harm befall oneself is almost always a sharper lesson than seeing the harm occur to others. To deter an offender from repeating his actions, a penalty should be severer enough to outweigh in his mind the benefits of the crime.

For the utilitarian, more severe punishment of repeat offenders is warranted partly because the first penalty has shown itself ineffective from the stand point of individual deterrence.

### **1.2.3 Incapacitation**

Incapacitation is the use of imprisonment or other means to reduce the likelihood that an offender will be capable of committing future offenses.

It makes the offender incapable of offending for substantial period of time. It is popular form of "public protection" and sometimes advanced as general aim.

This pragmatic theory argues that offenders need to be separated from the rest of the society in order to protect ordinary citizens from their committing other offences. The implicit premise is that, if not incarcerated, offender will continue in their criminal way.

In ancient times, mutilation and amputation of the extremities were sometimes used to prevent offenders from repeating their crimes.

Modern incapacitation strategies separate offenders from the community to reduce opportunities for further criminality. Incapacitation is sometimes called the "*lock' em up approach*" and forms the basis for the movement toward prison "warehousing."

It is confined to particular groups, such as "dangerous" offenders, career criminals or other persistent offenders.

Capital punishments and severing of limbs could be included as incapacitation punishment. But there are formidable humanitarian arguments against such irreversible measures.

What has been claimed for incapacitating sentencing is the imposition of long, incapacitating custodial sentences on the offender deemed to be dangerous. The proponents of this theory argue that one can identify certain offenders as dangerous who are likely to commit serious offences if released into the community in the near future and the risk to victims is so great that it is justifiable to detain such offenders for long periods.

Opponents of this theory have a chief objection: *over prediction*. They say that incapacitating sentencing draws into its net more non-dangerous than dangerous offenders. For instance, a UK study indicates that only 9 of 48 offenders predicted as dangerous committed dangerous offences within five years of release from prison.

An equal number of dangerous offences were committed by offenders not classified as dangerous.

This indicates that there are hundreds of offenders serving discretionary sentence of life imprisonment in the UK and Wales, imposed on the ground of predicted dangerousness, and there is no way of telling, whether the predictions on which these sentences rest are not over caution in ratio of two – to – one.

#### **1.2.4 Rehabilitation**

Rehabilitation seeks to bring about fundamental changes in offenders and their behavior. As in the case of deterrence, the ultimate goal of rehabilitation is a reduction in the number of criminal offenses. Whereas deterrence depends upon a fear of the law and the consequences of violating it, rehabilitation generally works through education and psychological treatment to reduce the likelihood of future criminality. This theory argues that too much alternation was given for crime, and little was given to the criminals

This theory rests upon the belief that human behavior is the product of antecedent causes that these causes can be identified, and that on these basis therapeutic measures can be employed to effect changes in the behavior of the person treated.

This requires modification of attitudes & behavioral problem through education and skill training. The belief is that these might enable offenders to find occupation other than crime

If a dangerous offender needs to be located until he/she is no longer dangerous, it is the duty of the state to rehabilitate the offenders so that they can be released. That is why rehabilitation is termed as the other side of restraint coin.

This theory closely related with forms of positivist criminology which locates the causes of criminality in individual pathology or individual maladjustment whether psychiatric, psychological or social.

This theory tends to regard the offender as a person in need of help and support. It says that criminals are socially sick people who need some kinds of treatment.

### **1.3 Social theories of Sentencing.**

They are contemporary theories. It is a dissatisfied response to the four "traditional" theories of punishment which deal with sentencing in isolation from its wider social and political setting. These theories attempt to make sentencing principles more responsive to social condition and community expectation. Three of these tendencies are:

#### **1/ *Barbara Hudson.***

According to Barbara, priority should be given to crime prevention and to reducing the use of custody by the penal system. Hence, changes in social policy (employment, education, housing, leisure facilities) are more important to justice than debate about proportionality of sentence.

When coming to sentencing, there should be greater concern with the problems of whole human being than particular pieces of behavior. More emphasis should be given to "rehabilitative" opportunities.

#### **2/ *Nicola Lacey***

The first thing must be the states recognition of its duty to foster a sense of community by providing proper facilities and fair opportunities for all citizens. Once this is achieved in a community, punishment is justified as re-enforcing the value that has been decided to protect through criminal law.

#### **3/ *John Braitwaite & Phillip Petit*: Republican Theory of Criminal Justice.**

The central value of this theory is dominion, defined in terms of each citizen's ability to make life choices with a social and political framework which each citizen has participated & then to be protected in those choices.

#### **1.4. *Conflict among Different Theories***

For many years, most of the literatures on the subject of punishment were devoted to advocacy of a particular theory to the exclusion of others.

Those who espoused the rehabilitation theory condemned the other theories, while, those who favored the deterrence theory denied the validity of all the others, and so on.

For instance, if criminals are sent to prison in order to be transformed to good citizen by physical, intellectual, and moral training, prison must be turning into dwelling house far too comfortable to serve as any effective deterrent to those classes from which criminals are chiefly drawn.

In the cases of incorrigible offenders, there are people incurably bad, or some men who by some vice of nature, are even in their youth beyond the reach of reformatory influence.

The application of purely reformatory theory therefore, would lead to astonishing and inadmissible result. The perfect system of criminal justice is based on neither the reformatory nor the deterrent principle exclusively, but *the result of compromise* between them.

In this compromise, it is the deterrent principle which would possess predominate influence, and its advocates who have the last word. This is the primary and essential end of punishment. All others are merely secondary and accidental.

It is necessary, then, in view of modern theories and tendencies, to insist on the primary importance of deterrent element in criminal justice. The reformatory element must not be overlooked.

For instance, in case of youth criminals and first offenders, chances of effective reformation are greater than that of adults who have fallen into offences.

Finally' let us evaluate the Federal Criminal Code (2004) inline with these theories. Article of the code declares the object and purpose of the Criminal Code and it reads: *The purpose of the Criminal Code of the Federal Democratic Republic of Ethiopia is to ensure order, peace and 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 , by providing for their reform and measures to prevent the commission of further crimes.( Emphasis added by the writer)*

The first paragraph of the above Article talks about the overall purpose of the Criminal Code, whereas the second paragraph states how that purpose can be attained, As it is clearly stated , the Criminal Code has been designed to attain it by preventing the commission of the crime. Prevention of the crime in turn is intended to be attained by giving due notice of the crime and penalties prescribing in the Code Due notice the public may be given to the public through publication of the Criminal Law and this may in turn gives access to all citizens and inhabitants to be aware of what acts or omissions are crimes and the respective penalties.

This does not mean that all those who are aware of the crime and penalties may always respect the law always. It is true that people may disregard and transgress the law. It is this situation the criminal Law in advance predicts and provides penalties when saying: "...should this be ineffective, providing for the punishment of criminals..."

The very Provision states the prime purpose of punishment. As it is clearly stated under this Article, the vital purpose of punishment is to deter the offender from committing fresh crime and also to deter other withinclination to commit a crime .This conclusion can be inferred from the phrases of the provision which says : *...in order to deter them from committing another and make them a lesson to others....*

This is also emphasized in the Preface of the Code on page IV, and it reads: *Punishment can deter wrongdoers from committing other crimes; it can also serve as a warning to prospective wrongdoers.*

Hence, the words *lesson* used in Art.1 and *warning* used in the Preface address the general deterrence, while the Code directly intendes to deter the wrongdoers.

One can also understand the fact that the Code has also incorporated a rehabilitation theory for the Code clearly states this when it says: *...by providing for their reform and measure ...*

The rehabilitative approach of the Code is further elaborated in the Preface page IV and it reads: *...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 with out the pronouncement of sentence or without enforcement of sentence pronounced. This helps wrongdoer to lead a peaceful life and it indicates the major place with the Criminal Law has allocated for their rehabilitation.* (Emphasis supplied)

The Preface further reads: *The fact that the 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.* (Emphasis supplied)



Different kinds of punishments are devised in the Code to attain the purposes. Just to mention some, simple imprisonment and pecuniary penalties have deterrent value. The same holds true for warning, reprimand, admonishment and apology from secondary penalties. (Art.122) It may also give a chance to an offender for rehabilitation.

Neither Art.1 nor the Preface makes reference to incapacitation theory. However, does not mean that the Code has not adopted this theory, because this can be inferred from the following kinds of punishment: rigorous imprisonment that may be imposed on offenders committed serious offence. As it is provided for as per Art. 108 of the Code, besides punishment rigorous imprisonment is intended to separate the offender from the community by applying strict confinement of the criminal for special protection to society. But the law tried to attain trio of purpose by rigorous imprisonment: incarceration, rehabilitation, and deterrence.

Death penalty is another typical example of incapacitation incorporated in the Code. Furthermore it has deterrence value to others with similar potential to commit a crime.

To mention secondary penalties of incapacitate nature, suspension and withdrawal of license, Art. 142; prohibition and closing of undertaking, Art.143; Measures entailing a Restriction on personal liberty, Arts.145ff and etc.

One can rightly say that the Ethiopian Criminal Code has followed the modern approach because it has incorporated different types of theories and different kinds of penalties are incorporated to serve these purposes. However, no single punishment is devised just to serve a single function of punishment.

### **Unit Summary**

Theories of punishment try to justify the imposition of punishment. Different theories of punishment tried to answer the question of punishment differently. For instance, retribution theory argues that the function of punishment is revenge. On the other hand,

supporters of deterrent theory advocate that the prime objective of punishment is to deter the offender and other individual of similar inclination. Proponents of incapacitation theory say that the purpose of punishment is to separate the offender from community to reduce the chance of committing a crime against the community. On the other hand, rehabilitation theory, as opposed to other theories, focused on the offender rather than the offence. Hence it tries to identify factors contributing the commission of the crime and to treat the offender so that he will to be good and productive citizen upon his release.

On the other hand, some scholars have nowadays come up with new theories of sentencing as they are not satisfied with the above old theories of punishment.

It has to be noted that there are potential conflict among these theories and each has its own strength and weakness .So the best approach in the modern criminal justice system is to incorporate all theories as the Ethiopia Criminal Code does.

### **Learning Activities**

1. Discuss the conflict between deterrent theory and rehabilitation theory.
2. Among the theories you have seen so far, which theories of punishment are incorporated into the Criminal Code of Ethiopia?

## **CHAPTER TWO: Principles & Policies of Sentencing**

### **2.1 Introduction**

Justifying sentencing and the sentencing system is not merely a matter of considering overall or ultimate aims. Sentencing also involves (should take into consideration) policies, principles of norms for determining a specific form of punishment

Principles and policies of sentencing are as important as purposes in governing sentencing practice. Some of them may be identified as: Legality; Equality; Respect for human dignity; Rule of law and Due process of law; Consistency; Proportionality, Transparency & the Policy of public expenditure.

### **Principles and Policies of Sentencing**

#### *Objectives of the Chapter*

At the end of this Chapter, the students will be able to:

1. identify important principles and policies of sentencing;
2. discuss how these principles and policies are incorporated into the national laws of Ethiopia;
3. apply them in their actual occupation;
4. use custodial measure as a sanction of last resort.

### **2.2 The *Principle of law being legitimate & lawful: legality***

Under the system of absolute retribution, any act or omission contrary to the interest of the community (generally accepted moral standard) ought to be punished whether or not it is expressly declared by law to be criminal offence.

But history would supply numerous illustrations of the fact that abuses and arbitrary actions take place when the power of the courts restricted only by their own conception of what is right and what is wrong.

It is desirable that those who are entrusted with the administration of justice carry out their duties within well defined limits.

Principle of legality aims at protecting individuals from such arbitrary action as they must be exposed to, should it not be provided that the written law is the only source of criminal law. It is deep-rooted in Latin maxim: "*nulla poena sine lege*" or "*no crime with out pre-existent law, no punishment with out pre - existent law ( crime).*"

In its modern form, it means that criminal liability and punishment can be based only on prior legislative enactment of a prohibition that is expressed with adequate precision and clarity.

The same principle is incorporated under Article 2 of the FDRE Criminal Code of 2005. Hence, the principle of legality stated under Article 2 prohibits the court from treating as a crime and punishes any act or omission which is not prohibited by law. Criminal law within the meaning of Articles 2 and 3 includes the very Criminal Code of 2005, and any other penal legislation (regulations and special laws of criminal nature).

Therefore, any act or omission which is not prohibited as a crime either by Criminal Code of 2005, or other penal legislation is not a crime no matter what the act (omission) is repellent.

The principle of legality under Article 2 also clearly prohibits the court from imposing penalties or measures other than those prescribed by law.

This means that the person who committed a crime may not be subject to punishment other than which is provided for by law with respect to the offence committed.

Any judgment given in accordance with the law must be enforced in the manner provided for by law, since failure to do so amount to creating new penalties.

The principle also prohibits the creation of crimes by analogy. The view that any act deserving punishment ought to be punished even in the absence of legal provision to this effect resulted in formulating the so called principles of analogy, which is directly contrary to the principle of legality.

Pursuant to this principle of analogy, the penal provision in force may apply to any similar or analogous act, which is not the offence under the law. Otherwise, the legal provision may be extended to cases which were not contemplated by law maker. Nevertheless, compliance with the principle of legality does not result in the courts being, so to speak, enslaved by the provisions of the law. In other words, principle of legality does not preclude a court from interpreting the law in cases of need. In order not to misuse such power, the court should observe rules of interpretation.

### **2.3 The Principle of Equality**

Sentencing decision should treat offenders equally irrespective of their wealth, race color, sex, or family status.

In English law precedent there is a principle like this: '*offenders with wealth should not be allowed to buy themselves out of prison by playing large fine or compensation*' & there is some statutory recognition of the principle of non discrimination.

This principle demands some degree of uniformity of treatment for those who commit a crime against society, i.e., same punishment and treatment for offenders committed the same crime under similar circumstances.

This principle needs no justification for it is unjust that people should be penalized at the sentencing stage for any of these reasons.

The principle of Equality before law is also tailored in the FDRE Constitution as: "*All persons are equal before the law and are entitled without any discrimination to the equal*

*protection of the law. In this respect the law shall guarantee to all persons equal and effective protection with out discrimination on grounds of race, nation, nationality, or other social origin, colure, sex, language, religion, political or other opinion , property birth, or other status.” Art. 25.*

Art. 4 of Criminal Code embodies the same principle with similar tone. It also goes far to prohibit difference in treatment of criminals, except as provided by the Code which are derived from immunities sanctioned by international and constitutional law ,or relate to the gravity of the crime or the degree of guilt ,the age circumstances or special personal characteristics of the criminal ,and the legal danger which he represents .

#### **2.4 The Principle of Respect for Human Dignity**

This principle focuses on the type of sentences which ought to be permitted /excluded. To that end, the UDHR of 1948 under Art.5 declares that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Similar prohibitions are incorporated into binding international and local conventions. To cite some: ICCPR, Art.7, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Africa Charter, Art.5; European Convention on Human Rights, Art. 3. [The American Constitution and England Bill of Right are in similar terms.](#) Likewise, Art.18 of FDRE Constitution declares the prohibition of cruel, inhuman, degrading treatment or punishment .This provision not only prohibits inhuman treatment but also stated the exceptions for which the prohibition is not applicable. Similarly, Art.87 of the FDRE Criminal Code stipulates that the penalties and measures shall always be in keeping with the respect due to human dignity.

The main practical application has been argument against amputation, corporal punishment, and death penalty. Accordingly, individuals have a right not to be stripped of their essential human dignity. This argument is quite independent of the proportion

between the offence and punishment, but whether certain types of sentences should be excluded absolutely

There is historical change in the acceptance of some of the punishment like the above, tunicas are regarded as barbaric, and unacceptable in a humanitarian sense, as things which is wrong to do deliberately to human being in the name of the state. Nevertheless, there is no objective or times less benchmark of what is inhuman or degrading; it is culturally specific.

## **2.5 The Principle of Rule of Law and Due Process of Law**

Rule of law, sometimes the 'supremacy of law' provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application.

As it is discussed under the principle of legality, for a person to be condemned for his/her act/omission, there must be a law that prescribes it to be a crime. Any act or omission which is not made a crime by the law, even if it seems to be immoral or repellent, is not punishable.

By the same token, any organ of the government should observe the law and act as the law stipulates, without over riding it. When we come to the criminal justice process, the rule of law should be respected starting from the time the police arrest the suspected to the stage of condemnation and sentencing of the offender by the court.

Due process of law is law in its regular course of administration through courts of justice. Due process of law in each particular case means such an exercise of the power of government as the settled maxim of law permits and sanctions and under such safeguards for the protection of individual right as those maxims prescribe for the classes of cases to which they are in question belong.

Due process of law is simply a procedural safeguards stipulated in favors of individuals. It implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty and property in its most comprehensive sense; to be heard, by testimony or other wise, and to have the right of controvert, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact/ liability be conclusively presumed against him, it is not due process of law.

Due process of law is an orderly proceeding wherein a person is served with notice, actual or constructive, and has an opportunity to be heard and to enforced and protects his right before a court having power to hear and determine the case.

This phrase ensures that no person shall be deprived of life, liberty, property or any other right granted to him by state, unless mater involved first shall have been adjudicated against him upon trial conducted according to established rules regulating judicial proceeding, and prohibits condemnation without hearing.

Similar principle is incorporated into the FDRE Constitution of 1994 in favor of persons arrested and persons accused as per Articles 19 & 20 respectively.

Due process of law is intended to ensure that innocent people are not convicted of crimes.

The due importance of due process of law even at the stage of sentencing is emphasized by the Criminal Procedure Code of 1961 under Art .149

If the accused is found guilty of the crime he is accused of both the accused and the prosecutor have the right to present evidence to mitigate or aggravate sentence

The accused is not only given the chance to call character witness in his favor to have the sentence mitigated, but also has the right to challenge any evidence or witnesses called by the prosecution against him to aggravate the sentence.



## **2.6 Consistency, Proportionality, and Transparency**

Consistency in sentencing is clearly an important objective or grounds of intrinsic fairness and because inconsistency is a major source of public criticism.

However, consistency is a slippery concept and it is in fact no guarantor of rationality or fairness. Cases which appear to be superficially similar often turn out to contain important differences, and sentencing policy should be flexible enough to reflect. There has traditionally been an argument in favour of broad judicial discretion and this is one of the reasons for which the rigid US style numerical guidelines have been so widely criticized.

Offenders who committed similar crime with similar circumstance must get similar penalty. The court should justify (give reasons) the facts of the case before them necessitate the sentence they have selected.

The principle of consistency should be taken into account when the case is of co-offenders. However, there is no general rule that same sentence must be passed on co-accused. So the court must take into account the sentence imposed on co-offender so that there is no justifiable sense of grievance arising from sentence disparity.

Where matters such as age, background and previous criminal history (and all other subjective characteristics of the offender) differ significantly between co-offenders, the court is not required to equate the sentence though it should articulate the reasons for any disparity in the sentence.

As between offenders generally, the principle of consistency remains an issue of general objective in sentencing. Since unanimity is a matter of importance, court should look for the previous sentencing when they come across with similar case with similar circumstance but where circumstance around the present and the previous case differ, the court is duty bound to impose different sentencing.

Proportionality of sentencing, on the other hand, deals with the prohibition of excessive, arbitrary and capricious punishment by requiring the punishment to be proportionate to or not exceed the gravity of the offence.

Proportionality has become a buzzword with the advent of the human right act, making it important to consider both the traditional "just deserts" meaning of the term & its specific "human rights" meaning.

The former traditionally entails that the severity of a sentence should be commensurate with the seriousness of the offence and the culpability of the offenders.

The latter requires that, the ends pursued must be legitimate, i.e., necessary in democratic society, and the means used to achieve those ends must be the least restrictive possible, and must not be applied in a discriminatory way.

The recommendation that severity of sentence should be proportionate, not only to the seriousness of offence under sentence and the culpability of the offender, but also to the offender's antecedent criminal conduct, has been proved(...) to lead to unfairness, discrimination, and unnecessary increases in prison population.

For instance, in 2000, the Australian government was strongly criticized by the UN Committee on Racial Discrimination for the discriminatory effects on the Aboriginal population of its policy of increasing sentence for persistent offenders.

Hence, Law Reform Commission of New South Wales (Australia) once recommended that proportionality of a sentence should only consider the seriousness of the offence in question.

## **Transparency**

Transparency is one of the elements of good governance. It plays an important role in combating arbitrary disparities in sentencing. It is also a human rights requirement. Judges must not only give reasons for their choice of sentence, they must also explain the purpose of the sentence imposed and state why it is the least restrictive means of achieving that purpose.

This type of information is crucial for the public to be sufficiently informed and to be able to contribute to meaningful debate on the purpose of sentencing.

By the same token Art.12 of the FDRE Constitution imposes the obligation on the organs of the government to make their action transparent. Hence this will ensure the right of the accused to have his case heard and decided in public trial.

## **2.7 The Policy of Public Expenditure**

There is an increasing influence of economic consideration on the shape of legal system. There has also been a wide spread of formal acceptance that imprisonment should be used with restraint.

Draft Resolution VIII on the Eighth UN Congress on the Prevention of Crime & the Treatment of the Offenders recommend that imprisonment should be used as a sanction of last resort. The Council of Europe had also adopted similar policy.

The end of 20<sup>th</sup> century marked the rise of prison population. Large sum of money spent on penal system in general and prison in particular. It is an expensive way of making *bad people worse*.

For instance, a study in the USA indicates that the total spending on state and federal prison in fiscal year 1994 was approximately \$22.2 billion, of 2.4 billion of and about this

was spent on capital improvements. The average per day cost of incarceration per inmate in 1994 was 53.38(19, 118. 70 per inmate per year). As of January 1.1994, the average cost of new prison construction was 28,194 per bed for minimum security facilities, 58,509 per bed for medium security facilities, and 80,004 per prison bed for maximum security.

Local jail throughout the US spent slightly more than 9.6 billion dollars of the end of 1993. About 2.2 billion of this money was spent for capital improvement. The average year of jail incarceration per in mate was 14,667.

It is a time to look for some equally, effective and cheaper way. That is why imprisonment is recommended to be sanction of last resort.

There is also a development of new or altered non custodial measure of correcting the offender, i.e., community -based-correction. The court should exhaust all the possible and cost effective means of correction before it takes incarceration as a solution. Imprisonment should be applied only when there is no other effective way of correcting the offender.

### **Unit Summary**

Justification of punishment is not the only thing the judge should consider during sentencing process as principles and policies of sentencing are equally important in sentencing stage. For example, principle of legality is a shield for individual against arbitrary decision of the judge. The core message of this principle is that the written law is the only source for crime and punishment, and no crime and punishment with out prior written law however repulsive the act may be.

Principle of equality, on the other hand, guarantees individual offender not to be discriminated against on the ground of sex, race, and color. This principle demands the

court to treat offenders in a similar way if they commit similar offence under similarly like circumstances.

On the other hand, the principle of respect for human dignity prohibits the imposition of cruel, inhuman and degrading treatment and punishment. This principle is incorporated both in international and regional human rights instruments. Likewise, this principle is adopted both in FDRE Constitution and Criminal Code.

The principle of rule of law dictates that organs of the government should give any decision only by the application of known principle. It is intended to fight an arbitrary decision of the government.

Due process of law imposes the obligation to observe or follow certain procedure in the stage of sentencing. Since it is a procedural safeguard for the convicted, the court has to strictly respect those procedural laws during sentencing. Other principles are equally important for sentencing.

### **Learning Activities**

1. Discuss the principle of legality
2. Discuss how principle of respect for human dignity is adopted in the FDRE Constitution and the Criminal Code of Ethiopia.
3. "Due process of law is a procedural safeguard for individual against the arbitrary action of the government." Evaluate the statement.

## **CHAPTER THREE**

### **The Roles of the Wings of the Government in Determination of Sentencing**

#### **Objectives of the Chapter**

At the end of the Chapter, the students will be able to:

1. discuss the roles played by the three organs of the government in individualization of punishment;
2. discuss circumstances the law makers take into account in individualization of the penalties;

#### **3.1 Introduction**

In modern criminal justice system, the determination of sentence for a particular offence is shared among the three organs of the government. This chapter, therefore, deals with the role of the organs of the government in determining sentence

#### **3.2 The Role of Legislature**

To reiterate, the principle of legality demands that for a person to be punished for his act or forbearance, there should be a law that prohibits the act or omission in question. To this end, it is first of all the duty of the legislature to enact the law which prescribes certain behavior as offensive and punishable and basic penalties. This scheme guarantees against the arbitrary action by judges, at least in the sense that the judge cannot sentence beyond the maximum penalty provided by law.

Such a scheme also allows deterrence by providing, when necessary, very severe penalties. In establishing the scale of penalties, the legislator tries to set the penalty according to the seriousness of the offence.

Of course the legislator can establish this scale only in an abstract way; the law, because of its general application, cannot take into account all of the particular circumstance of individual offenders. It, exceptionally, takes into account certain given facts; for instance, it increases the penalty of all habitual criminals and, on the contrary, mitigates the penalty of minors. This is called "*legislative individualization of the penalty*". However, the individualization operates only in relation to objective criteria really directed to what is particular in the individual offender.

### **3.3The Role of Judiciary**

Determination of sentencing is arguably a judge's most difficult responsibility since a Judge cannot impose (determine) just any sentence. A Judge is confronted not by an abstract and nameless individual, but by actual criminal conscious of his crime and its significance.

But the true individualization of penalty, no matter how difficult, it is, is made by the judge. By individualization of the penalty, the judge, first, differentiates the particular offender from other offenders in personality, character, socio cultural background, the motivations of his crime, and his particular possibilities for reform or recidivism, and secondly, determines which, among a range of punitive, corrective psychiatric and social measures, is best adapted to solve the special set of problems presented by that offender in such a way as materially to reduce the probability of his committing crime in the future.

### **3.4The Role of the Executive.**

Literally speaking, one may say that the executive does have nothing to do with determination of sentence. But that is far from reality. The role of executive in determination of sentence comes into fore especially after the convicted is sent to the prison to serve the sentence of imprisonment.

In other words, when penalty is being applied, the executive authority may vary the implementation of the penalty within the bound established by the judge. There is a guarantee against arbitrary action on the part of the executive authority that is it cannot increase the maximum penalty.

However, there are ways, to reduce it and thus further individualizing the penalty. This administrative individualization operates in many ways:

***Administrative Individualization through pardon:***

All penalties may, through pardon by the Head of the State, be reduced or even fully pardoned. This is an act of mercy and is not always inspired by considerations related to the possibility of rehabilitation of the offender. The pardon may serve this purpose now ever, such as in case of conditional pardon, depending upon good conduct, to the performance of certain reeducating obligation such as not frequenting certain amusement places or attending lectures on professional training. The pardon, however, is often imbued with different motives which are of a political nature( collective pardon on the occasion of national feast or instance) or ( instance) or humanitarian nature (commutation of death penalty which has created a strong public opinion). Read Arts.229-231of Criminal Code.

***Administrative Individualization through the penitentiary system.*** The executive authority which is in charge of the execution of penalties involving loss of freedom has here also vast power bearing on the term of sentence. It has at its disposal a tangible way of calibrating the severity of the sentence by affection the method of execution which may perceptibly modify the judge's sentence. There is for instance, a considerable difference between assigning a prisoner to an agricultural farm (prison with out bars) and a formal prison, between granting certain privileges such as outings, outside work, semi-freedom.



*Administrative Individualization through conditional release:* Again the executive agency has great power at its disposal – power bearing on the length of the sentence- since it may reduced the term of imprisonment by granting a conditional release.

While a judge imposes a certain prison on the offender, the actual time the offender remains behind bars may often be reduced by earning of what are called 'good time credits.'

With good time credits, the prisoner's sentence is reduced by prescribed amount of time for the everyday or month that the inmate refrains from violating prisoners' rules or regulation.

In recent years, there has been a movement towards what is called 'earned time'. With 'earned time' the inmate must do something other just refraining from misconduct to earn credit. They must work, go to school, and participate in other programs that will make it more likely that will refrain from committing crimes after release from prison.

Hence, conditional release is the suspension of penalty of incarceration for good conduct where these are possibilities of rehabilitation. This presupposes that part of the sentence has been served in accordance with the seriousness of the offence (Conditional release is to be discussed in detail in Chapter 9).

### **Unit Summary**

Each organ of the government has its own share to play in determination of a sentence for a particular offence. Legislature is the custodian of the principle of legality for it is this branch of the government that defines the offence and the respective penalty. In addition to this, this branch of government has the role to play with respect to individualization of punishment: it sets the lower and higher limit for each offence according to the seriousness of the offence.

However, the true individualization of punishment is made by judiciary in the sentencing stage as it faces actual criminal. The court individualizes penalty by differentiating particular offender from other offender in personality, character, socio-cultural background, etc.

The role of the executive becomes visible after the offender is condemned to imprisonment. This organ of the government varies the application of sentence by reducing and individualizing the punishment through pardon, penitentiary system, and conditional release.

### **Learning Activities**

1. How do you think the legislature may individualize punishment in the law making process?
2. Discuss the difference between earned time and good time credit.

## **CHAPTER FOUR: Sentencing Statues**

### **Objectives of the Chapter**

At the end of the Chapter, the students will be able to:

1. enumerate different types of sentencing statutes;
2. discuss how different types of sentencing statutes are devised to attain different goals of sentencing;
3. discuss the strengths and weaknesses of different sentencing statutes

### **4.1 Introduction**

While the philosophy of criminal sentence is reflected in the goals of sentencing we have just discussed, different sentencing statutes were devised with the view to attain the goal of sentencing.

Hence sentencing statutes are generally divided into two categories, i.e., indeterminate and determinate sentencing statute.

### **4.2 Indeterminate Sentencing statute**

The offender does not know how much time he/she actually spends in prison. The legislature alone or the legislature in conjunction with the sentencing judge will define the minimum period of incarceration, if there is one, and the maximum term of confinement.

A parole board will actually decide when the inmate should be released from prison.

In practice, here is how an indeterminate sentencing scheme might work. Assume that a legislature authorizes a sentence from one to thirty years for particular crime. The

sentencing judge then imposes a sentencing falling within this range, sentencing the defendant to maximum of thirty.

Indeterminate sentencing is a model of criminal punishment that encourages rehabilitation via the use of general and relatively unspecific sentences such as term of imprisonment of from one to ten years.

During most of twentieth century, for example, the rehabilitative goal has been influential, since rehabilitation required that individual offenders' personal characteristics be closely considered in defining effective treatment strategies, judges were generally permitted wide discretion in choosing from among sentencing option.

Indeterminate sentencing has both a historical and a philosophical basis in the belief that convicted offenders are more likely to participate in their own rehabilitation if they can reduce the amount of time they have spend in prison. Inmates of good behavior will be released early, while recalcitrant inmates will remain in prison until the end of their terms.

This is the way sentencing was done for hundreds of years in American history, until dissatisfaction surfaced in 1971 and determinate sentencing become popular.

#### **Advantages of parole system:**

- The parole board, drawing on the advice of correctional officials, who are able to closely observe prisoners during their confinement, can best determine when a prisoner is ready to be safely released back to the community.
- They can help to relieve crowding in prison. When a state's prisons become too crowded, the parole board can ease population pressures by releasing additional prisoners on parole.

### **The other two major problems:**

1. However, the premature release of prisoners may jeopardize the safety of the public safety and undermines the other penological goal of incarceration.
2. The uncertainty spawned indeterminate sentences as to exactly how long inmates will be imprisoned. This causes stress and tension in prisoners that in turn interferes with rehabilitation efforts and compounds the already difficult problem of managing prisoners.
3. It results in enormous amount of disparity in sentencing as discretion to determine how much time a person will spend in prison is remitted to parole board.

Indeterminate sentencing is still the rule in many jurisdictions in the USA, including Georgia, Hawaii, Iowa, Kentucky, Massachusetts, Michigan, Nevada, New York, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Vermont, West Virginia, Wyoming, and North & South Dakota.

### **4.3 Determinate Sentencing Statute**

It has different terminologies such as definite sentence; definitive sentence; fixed sentence; flat sentence; straight sentence. Determinate is a model of criminal punishment in which an offender is given a fixed term that may be reduced by good time or earned time. Under the model, for example, all offenders convicted of the same degree of burglary would be sentenced to the same length of time behind bars.

In other words, determinate sentence is a sentence in that, offenders, after receiving determinate sentence, generally knows how much time they will spend in prison. It avoids some of the problems of the indeterminate sentencing, but do have its own draw back.

As opposed to the indeterminate sentencing, it is the judge not a parole board, defines the amount of time that a person will be confined behind bars.

For instance, a range fixed by legislature for a rape is say, from 5 (minimum) to 25 (maximum) years. The sentencing judge picks a number within a range, such as 5 years, 8 years, etc.

Although such statutes delineate the range from which a judge will select a finite prison sentence for a particular crime, other statutes often authorized the judge to impose community-based- sanction if imprisonment is considered unnecessary.

Second, while a judge imposes a finite prison term on an offender, the actual time that the offender remains behind bars may often be reduced by the earning of what are called *good time credit*.

Nevertheless, in recent years, there has been a movement in some jurisdictions towards what is called *earned time*. (The detail is discussed under Ch.3 sec.3.3)

Determinate sentence offers the advantage of certainty. They avoid the tension from the offender of uncertainty as to how much time they will have to be confined in prison.

It, however, is characterized by sentencing disparity, and sometimes gross sentencing disparity, as judges pick and choose number within the imprisonment range defined by the legislature.

In the USA, the report (1996) that traced historical development of determinate sentencing observed that "the term 'determinate sentencing' is generally used to refer to the sentencing reforms of the late 1970s. In those reforms, the legislature of California, Illinois, Indiana, and Maine abolished the parole released decision and replaced the indeterminate penalty structure with a fixed (flat) sentence that could be reduced by a significant good time provision. The only state that has adopted " a true determinate sentencing system since 1980 is Arizona, which enacted a " truth sentencing law" on January 1, 1994. The Five states have retained their determinate sentencing models, although no other states have adopted such structured sentencing scheme.

The report continued to state that in three of the states (California, Illinois, and, Indiana) the legislatures provided presumptive ranges of confinement. But those in Illinois and Indiana were so wide they provided the court with extensive discretion sentencing length. For many offenses, there was no presumptive lead as to whether the sentence should be for, or against incarceration. Thus, Courts were left with extensive discretion in deciding both whether to incarcerate and the length of incarceration

Generally speaking, under the category of determinate sentencing statute fall three subtypes of determinate sentences: determinate discretions presumptive sentencing; and mandatory sentencing statute.

#### **4.3.1 Determinate Discretionary sentence**

The minimum and maximum sentence is set by the statute from which the judge may pick and choose the amount of imprisonment for a particular offender. The Federal Criminal Code adopts this approach. For example, Art. 543(1) of the Code reads: *Whoever negligently causes the death of another in circumstances other than those specified in sub-article (2) and (3) of this Article, is punishable with simple imprisonment from **six months to three years**, or with fine from two thousand to four thousand Birr.*(Emphasis supplied )

Can you see the discretion for a sentencing judge? This Article grants a wide discretion for a judge to pick a sentence from the wide range provided by the law- starting from the minimum six months to the maximum three years!

#### **4.3.2 Mandatory Sentences**

The Statues require that an offender serve at least a certain specified amount of time in prison for particular crime regardless of any mitigating circumstances surrounding the crime or the criminal. For instance, a statute against drug offenders requires prison

sentence of five years, ten years, fifteen years, sometimes life in prison depending on the amount of drug involved.

The aim is to appear to an un informed public to send *a tough message* to prospective criminals: *If you commit this crime, you'll spend this amount of time in prison no matter what.*

They are very prone to avoidance. For instance, the study conducted by the United States Sentencing Commission in 1995 revealed that about 40% of the federal offenders whose crimes should have triggered mandatory minimum sentence were able to avoid these penalties.

It has also racial and ethnic overtones. White defendants are much more likely to avoid mandatory sentence than blacks and Hispanic defendants are.

Their rigidity can lead to the imposition of unjust sentence. While a particular penalty may generally be appropriate for most individuals who commit a particular crime, there will always be some individual who do not fit the prototype. For instance, a mother who is arrested for growing marijuana to be used to ease the suffering of her terminally ill son differs from the typical defendant who grows marijuana for personal use or to make profit.

#### **Examples of mandatory sentencing:**

- (1) *"A person who carries or has in his/her possession a firearm when he/she commits or attempts to commit a felony.... is guilty of felony, and shall be imprisoned for two years, upon second conviction, for five years, upon third or subsequent conviction under this section, for ten years."*
- (2) *" A term of imprisonment under this section shall not be suspended... not eligible for parole or probation during the mandatory term imposed pursuant to s. (1)."*



### **4.3.3 Presumptive Sentencing**

This sentencing may cure the disparity drawback of the discretionary sentence. It is an average sentence for a particular crime (specially provided under sentencing guidelines) that can be raised or lowered based on the presence of mitigating and aggravating circumstances. In other words, it defines the presumptive sentence that the legislature wants to be imposed for particular crime.

If there are aggravating factors in case, the statute generally outlines how far the judge may go beyond the presumptive sentence in imposing a sentence, and the judge's discretion is similarly circumscribed when a sentence is more lenient than the presumptive sentence is imposed because of mitigating factors.

For instance, in Indiana Code, a person who commits murder shall be imposed a fixed term of 55 years, with not more than 10 years added for aggravating circumstances, or not more than ten (10) years subtracted for mitigating circumstance, in addition the person fined not more than ten thousand dollars.

Class A Felony

A person who commits a class A felony shall be imprisoned for a fixed term of thirty (30) years, not more than twenty(20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances (with the possibility to impose fine not more than ten thousand dollars

#### **Rationales of presumptive sentence**

- ☞ It aims at fixing terms proportionate to seriousness of the offense.
- ☞ It is to bring uniformity by giving similar sentencing to the offenders committing the same offence under similar circumstance.

#### **4.4 How Should Discretion be narrowed?**

Discretion is having more than one legal choices or solutions for a particular problem.

Law is naturally of open texture. It will be finite to answer or address every problem before the court. It is conceivable that a dispute will arise in which no norm satisfy the problem. Even if there is binding legal norms, discretion may still be required. Legal norms, after all, are expressed in general terms. General terms have a core of accepted meaning and the shadow of uncertainty and controversial meaning.

In all these cases, discretion vitalizes courts infusing them with energy, direction, mobility and capacity for change. It enables them exercise sound judgment when they confront new problems. It also helps to reconcile value of law and equity, of justice in the aggregate and justice in the individual case.

It has also dark sides. For instance it discretion enables and even invites court officials to overreach, to discriminate invidiously, and to subordinate public interest to private ones. i.e., it paves the way to abuse the power. In the process of sentencing, in particular, it creates disparity in sentencing

In the process of sentencing discretion is not the only factor that contributes to disparity. For example, personal characteristics of the judge may influence the decision. Although extra judicial factors are not supposed to influence judges sentencing decision, studies show that they invariably do. Judges, after all, are human being with all of human frailties and prejudices of other human beings. Among the personal characteristics, of judge that have been found to affect their sentencing decision are the following: 1) their economic background; 2) the law school that they attend; 3) their prior experiences both in and out the courtroom; 4) the number of offenders they have defended earlier in their careers; 5) their biases toward various crimes; 6) their emotional reaction and prejudices toward defendants; 7) their own personality; and, 8) their marital and sexual relations.

Among the techniques to narrow discretion in sentencing are: "confine" discretion (i.e., keep it within the designated boundaries.), "structure" it (i.e., control how it is exercised within the boundaries), and "check" it (i.e., how discretionary decisions reviewed by higher courts)

In the process of sentencing, among the many principles to be observed, tension exists between mandate of uniformity ( treat similar cases alike) and mandate of proportionality (treat different cases differently). In situation like this the discretion of judge's discretion becomes apparent. Thus a convicted bank robber, for instance, with no prior criminal record might get probation before one judge and twenty years in prison before another. That means that the fate of criminal defendant depends to an extraordinary degree not on an objective assessment of what sentence would achieve but rather an the subjective approach of whichever judge a given defendant happened to draw his case.

Another technique to limit judicial discretion in sentencing is to provide sentencing guidelines. Sentencing guidelines are guidelines that provide a range of sentences for offences based on the seriousness of the crime and the criminal history of the offender.

The USA is known for the adoption of sentencing guidelines in different areas of penal legislation both in Federal and states level. Hence Federal Sentencing Guidelines are rules that set out a uniform policy for convicted defendant in the United States federal court system. The guidelines are product of the United States Sentencing Commission and are part of an overall federal sentencing reform package that took effect in the mid-1980s.

The main objective behind sentencing guidelines is to alleviate sentencing disparities that research had indicated was prevalent in the existing sentencing system and the guidelines reform was specifically intended to provide for determinate sentencing. This refers to whose actual limits are determined at the time the sentence is imposed, as opposed to indeterminate sentencing.

Though the federal sentencing guidelines were styled as mandatory, the Supreme Court's 2005 decision in *United States v. Booker* found that the Guidelines, as originally constituted, violated Sixth Amendment right to trial by jury, and the remedy chosen was excision of those provisions of the law establishing the Guidelines as mandatory. In the aftermath of *Booker* and other Supreme Court cases, such as *Blackely v. Washington* (2004), Guidelines are now considered advisory only on both the federal and the state levels. Judges must calculate the guidelines and consider them when determining a sentence but are not required to issue sentences within the guidelines. The sentences are, however is subject to appellate review.

### **Guidelines Basics**

The guidelines determine sentences based primarily on two factors: (1) the conduct associated with the offence (the offence conduct, which produces the "offence level"), and (2) the defendant's criminal history (the "criminal history category"). The sentencing Table the guideline Manual shows the relationship these two factors; for each pairing of offense level and criminal history category, the Table specifies a sentencing range, in months, within which the court may sentence a defendant. For example, for a defendant convicted on an offence with a total offence level 22 and a criminal history category I, the Guidelines recommend a sentence of 41-51 months, considering the year of offence to be the same as the year of the guidelines. It, however, a person with an extensive criminal history (Category VI) committed the same offence in the same manner in the same modern timeline and not during the older guideline periods, the Guideline would recommend a sentence of 105 months.

Guidelines can be both indeterminate or determinate and depend on the year of offence. Simply observing the top column on the sentencing table would lead one to believe that the guideline would apply directly. However, they are divided into 5 sections depending on the year of the first offence and may be applied selectively. The Guidelines manual, therefore, needs to be read in the context of the previous guideline manuals in order to

arrive at a sentencing determination .Conduct is irrelevant in the context of determinate guidelines while criminal history is irrelevant in the case of indeterminate guidelines.

### **Unit Summary**

Different types of sentencing are devised to attain different goals of sentencing. Sentencing statues are generally divided into two: indeterminate sentencing statutes and indeterminate sentencing statutes. In indeterminate statute, the offender does not know how much time he/she will spend in prison. The executive branch, especially the parole board decides the actual time the offender will serve in a prison.

This sentencing model is intended to rehabilitate the offender by giving a chance for a Parole board to decide how much time is needed to rehabilitate the offender. The other advantage of this model is that it gives the chance to the parole board to ease mass crowding in prison, though this may create a problem of releasing premature prisoners.

Determinate sentencing on the other hand, fixes a term the offender will spend behind bar. Thus the offenders generally know how much time they will spend in prison. In this regard, it is a sentencing judge not the parole board that fixes the length of time the convicted serves. However, the time fixed by the judge is subject to earned time and good time credit

Determinate sentencing statute further is divided into three discretionary, mandatory, and presumptive sentencing. In a discretionary sentencing model the law fixes the lower limit from which the judge may pick. In mandatory sentencing model, the judge imposes a sentence fixed for a particular offence without considering any aggravating and itigating circumstances

Rigidity, susceptibility for avoidance can be mentioned as drawbacks of this model.

On the other hand, presumptive sentencing model tries to cure the short coming of discretionary sentence . The average sentence for a particular offence that can be lowered or raised depending on the circumstances surrounding the case is fixed by the legislature. This model also provides how much the judge may go above the presumptive sentence in imposing the sentence

Both determinate and indeterminate sentencing model have their own drawbacks. Indeterminate sentence gives discretion for the parole board whereas determinate sentence gives discretionary power for a judge.

Discretion indicates the availability of more choices for a case at hand. Hence it helps a judge to be flexible ,though it may pave the room to abuse power.

The solution is to limit the use of a discretionary power. Sentencing guidelines are one solution devised to minimize the use of discretionary power. Sentencing guidelines are guidelines that provide a range of sentences for offences based on the seriousness of the crime and the criminal history .

### **Learning Activities**

1. What are the two classifications of sentencing statutes?
2. What main goal of punishment do you think is behind indeterminate sentencing?
3. Discuss the strengths and weaknesses of determinate sentencing.

## **CHAPTER FIVE**

### **Kinds of Punishment**

#### **5.1 Introduction**

This chapter deals with the type of punishment for the person found guilty of the criminal action against him. Depending upon the gravity of the crime, the law often provides the type of punishments for a particular offence, ranging from simple imprisonment to the capital punishment. Sometimes the law may provide different kinds of punishment for a single crime to be applied all together, or alternatively.

The kinds of punishment discussed here are divided into two, i.e., principal punishment, and secondary punishment.

#### **Objectives of the Chapter**

At the end of the Chapter, the students will be able to:

1. discuss the kinds of punishment available for criminal bench;
2. identify the difference between primary punishment and secondary punishment;
3. explain the historical reason behind retaining death penalty in Ethiopian Criminal law.
4. identify available kinds of punishment in Criminal Code of Ethiopia;

#### **5.2 Principal Punishments**

Principal punishments are those punishments designed mainly to attain the very objective of the criminal law. As compared to the secondary punishment, the very objective and purpose of the criminal law is heavily shouldered upon these principal punishments. That doesn't, however, does not mean that secondary punishment does not have anything to contribute to the objective of criminal law.

Under this category fall the following types of punishment: fine, imprisonment, and death penalty.

### **5.2.1 Fines**

The fine is one of the oldest forms of punishment, predating the code of Hammurabi. Until recently, however, the use of fines as criminal sanctions suffered from built – in inequities and a widespread failure to collect them.

Inequalities arose when offenders with vastly different financial resources were fined similar amount. A fine of 100 birr, for example, can place a painful economic burden upon a poor defendant but is only laughable when imposed on a wealthy offender.

Today fines are once again receiving attention as serious sentencing alternatives. One reason for the renewed interest is the stress placed upon state resources by burgeoning prison population. The extensive imposing of fines not only results in less crowded prisons, but can contribute to state and local coffers and lower the tax burden of law – abiding citizens. Other advantages of the use of fines as criminal functions include the following.

- \* Fine can deprive offenders of the proceeds of criminal activity.
- \* Fines can promote rehabilitation by enforcing economic responsibility.
- \* Fines can be collected by existing criminal justice agencies and are relatively inexpensive to administer.
- \* Fines can be made proportionate to both the severity of the offense and the ability of the offender to pay.

Opposition to the use of fines is based upon the following arguments.

- \* Fines may result in the release of the convicted offenders into the community but do impose stringent controls on their behavior.
- \* Fines are a relatively mild form of punishment and are not consistent with ‘just deserts’ philosophy.
- \* Fines discriminate against the poor and favor the wealthy.



\* Indigent offenders are especially subject to discrimination since they lack the financial resource with which to pay.

\* Fines are difficult to collect.

A number of these objections can be answered by procedure which make complete financial information available to judges. Studies in the UAS have found, however that the courts of limited jurisdiction, which are the most likely to impose fines, are also the least likely to have a adequate information on offenders economic status. Perhaps as a consequence, judges themselves are often reluctant to impose fines. Two of the most widely cited objections by judges to the use of fine are (1) fines allow more affluent offenders to 'buy their way out', and (2) poor offenders cannot pay fines.

A solution to both objections can be found in the Scandinavian system of day fines. The day fine system is based upon the idea that fines should be proportionate to the severity of the offence but also need to take into account the financial resource of the offender. Day fines are computed by first assessing the seriousness of the offense, the defendant degree of culpability, and his or her prior record as measured the in 'days '. The use of days as benchmark of seriousness is related to the fact that, with out fines, the offender could be sentenced to a number of days (or months or years) in jail or prison. The number of days assessed is then multiplied by the daily wages that person earns. Hence, if two persons were sentenced to a five – day fine, but one earned only\$ 20 per day, and the other 200 per days the first would pay a \$ 100 fine, and the second \$ 1,000.

### **5.2.2. Imprisonment**

The identity of the world's first true prison may never be known, but we do know that at some point, penalties for crime came to include incarceration. During the middle ages, "punitive imprisonment" appears to have been introduced in Europe by the Christian church in the incarceration of certain offenders against canon law. Similarly, debtor's prisons existed through out Europe during the 1400s&1500s, although they housed inmates who had violated the civil law rather than criminals.

John Howard, an early prison reformer, mentions prison housing criminal offenders in Hamburg, Germany; Bern, Switzerland; and Florence, Italy in his 1777 book *State of Prisons*.

Some early efforts to imprison offenders can be found in the Hospice of San Michele, a papal prison which opened in 1704, and the Maison de Force, begun at Ghent, Belgium, in 1773. The Hospice was actually a residential school for delinquent boys and housed 60 youngsters at its opening. Both facilities stressed reformation over punishment and became early alternatives to the use of physical and public punishments.

In modern criminal justice imprisonment is imposed as a means of specific deterrence on the offender who thought by the court to pose a sufficient threat to public order or safety, that is giving the offender such an unpleasant experience that she/he wish to avoid .

Moreover, an offender who is locked up cannot prey on the public, and in this sense, is unable to victimize free persons. Of course the offender can, and may, continue to victimize others while in prison.

Professionals or career offenders consider a period of incarceration as temporary inconvenience and often are model prisoners because their first priority is to be released as quickly as possible to return to their chosen profession, crime. For the real professional, prison serves as an incapacitation function, albeit temporary, but there is no specific deterrence, only at best a time of forced behavioral restriction which, if nothing more, removes the offenders from an environment that contributes to criminality and gives an opportunity to reform.

Sanctions imposed on incapacitation are not intended to reduce an offender inclination to future criminal act but to preclude opportunities for criminal behavior at least while the offender is under state control.

*Imprisonment and conservative crime control model:* conservative believes that large amount of crime is committed by small number of chronic offenders and that crime can be reduced by locking up those few chronic offenders. They say that those chronic offenders should be identified and selectively incapacitated in secure institution by providing self help programs for those who wish to take advantage of them, but maximize the deterrence benefit of "tough but fair" prison environment.

Rehabilitation programs are largely rejected by conservative as ineffective for most criminals an waste of tax payer's money. They believe that prisons have been too soft, too comfortable, and that the prisoners' right of movement have given prisoners' benefits which many poor, law abiding citizens do not have.

They further point out that since mandatory sentences began in mid 1970s crime rates have been declined as the prison population increased.

*Imprisonment and Liberal Crime Control Model:* They reject the notion that crime rates have come down as a result of increased use of imprisonment, they point rather to demonstrate to demographics, to the recent decrease in the number of males in the 14 to 24 age group.

They also reject the idea that society can accurately predict and identify a chronic offender. They further point out the huge monetary costs of increased prison population & the political costs of reducing prison term for low-risk offender in the prison system.

Their response to the conservative proposal about the prison system is that it is a threat to constitutional principles; they are more suited to authoritarian regime. Unless restraint is either permanent (life imprisonment without possibility of parole) or coupled with meaningful rehabilitative program) imprisonment will not restrain criminal conduct, but merely postpones it.

### 5.3.3 Death Penalty

It is judicially ordered execution of a convicted criminal and an ultimate sanction against a criminal. Death penalty is one of the most ancient forms of punishment and has been imposed through out history in most cultures.

In the early provision such as the code of Hummurabi (1750 BC) about 25 offences were punishable by death penalty. Some of these were corruption, theft and sexual offenses. Drowning, burning and impaling were used to carry out the punishment.

In the early Greek and Rome it was provided for the death penalty upon conviction for a wide range of offenses. In England it is speculated that during the reign of Henry VIII, (1491 – 1541), 72,000 persons were executed - approximately 1531 people per year. In 1500s, in England, crimes subject for death penalty were eight: murder, robbery, rape, burglary larceny, arson & petty treason.

A good example of excessive use of capital punishment occurred in the 1800s in England. There were 350 crimes (ranging from petty theft to murder) that are punishable by death.

When the first European settlers arrived in America, they brought from their native countries the legal systems, which included the penalty of death for a variety of offences. For example, the English Penal Code that was adopted by British colonies listed 14 capital offences, but actual practice varied from colony to colony. In the Massachusetts Bay colony, 12 crimes carried death penalty.

In the statute, each crime was accompanied by an approximate Biblical quotation justifying the capital punishment.

The earliest recorded lawful execution in America was in 1608 in the colony of Virginia. Captain George Kendall, a councilor for the colony, was executed for being a spy for

Spain. Since then, more than 19,000 legal executions have been performed in the US under civil authority.

However, only about 2.5 percent of those people executed since 1608 have been women .In addition, about 2 percent of those executed in the United States since 1608 have been juveniles, those whose offense was committed prior to their eighteenth birthday

In Ethiopia, capital punishment was viewed historically as an important instrument for the protection of society. The imposition was to deter potential offenders. The society accepts that capital punishment is the most appropriate requital of (retribution for) those who committe what a considered to be great sin. These include homicide, incest, blasphemy, kidnapping of a betrothed girl or widow, and the stealing of children and of beasts (horses, oxen).

Capital punishment for homicide serves two significant aims:

1. By sentencing the murderer to death, the society hoped to recompense psychologically the bereaved relatives of the victim. For instance, in the Fetha Negast it is provided:

*"They shall be put ( to death) in the place they sinned, so that they may serve as a lesson to others who desire to be ( involved) in this deed, and so that the relatives of the person murdered may be pleased."*

2. It was imposed on the murderer with the view to helping him expiate his sin, the penalty was believed to be condition for his obtaining in the world to come.

In reference to the argument for retention of capital punishment, in the 1957 draft Penal Code, Jean Graven wrote:

*"It is not only necessary for social protection; it is based on the very deepest feelings of the Ethiopian people for justice and 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."*

The new Federal Criminal Code has retained death penalty for certain categories these are. crimes against the state; crimes in violation of international laws; military crime; and crime against life (homicide)

### **5.3 Secondary Punishments**

Secondary punishment is a kind of punishment the court may apply to supplement the primary punishments.

Therefore it can be understood that the court may apply secondary punishment only when there is a primary punishment. For instance the Federal Criminal Code Art.122 stipulates that secondary punishment shall not be applied except together with and subject to a principal punishment. This provision further stipulates that any such punishments shall apply only when the court has expressly so directed. As per this provision any type of secondary punishment may be applied whenever the general provisions of law have been fulfilled even though there in no provision is specifically made for the application of such punishment in any particular case.

In other words, the absence of one of the secondary punishments for a particular case may not impede the court from applying such a secondary punishment for the case at hand.

In deciding the application of secondary penalties, the court shall be guided by their aim and the result they would achieve on the safety and the rehabilitation of the criminal.

Arts.123-128 deal with secondary punishment. They are the following: Art.122, Caution, Reprimand, Admonishment and Apology; Art. 123, Deprivation of rights; Art. 127, Dismissal from the defense forces & reduction in rank.

Likewise, warning and reproof (Art.756) is an applicable secondary penalty for petty offences. And the court may order it in lieu of primary penalty for petty offence when the offence is a minor one or when there is extenuating circumstance.

As opposed to secondary penalty for ordinary offence, forfeiture of civic or family rights or rights to discharge an office or exercise of professional rights may not be ordered. In short, Art. 123 of the Code is not applicable for the case of petty offence.

### **Unit Summary**

Punishment can be classified as primary and secondary depending upon their contribution to the attainment of the objective and purpose of criminal law.

Principal punishment is designed to attain the very objective of the criminal law. Primary punishment is further classified as fine, imprisonment, and death penalty

Fine is one of the oldest forms of punishment dating back to Hammurabi and it is a financial sanction against the offender. Care must be taken not to discriminate the wealthy and the poor by imposing similar amount.

Today, fine is used as an alternative to imprisonment. The imposition of extensive fine may contribute to the reduction of the number of the prison population to be less and lowering the tax burden of law abiding society.

Imprisonment is also one of the oldest types of punishment. In the middle age it was used in Europe by Christian church against offenders violated canon law. Similarly it was persons failed to fulfill civil obligation.

In modern criminal justice system, it is imposed as a specific deference on offenders who the court thinks pose danger to society. But professional offenders consider imprisonment

as a place of temporary hindrance, and they will commit a fresh crime upon their release. In order to attain the desired effect imprisonment has to be complimented with rehabilitation program.

Death penalty is the ultimate sanction that has been passed through out human history. The scope of its application in early society was wide compared with its scope of application in the present day

Secondary punishment is a kind of punishment the court may impose to supplement primary punishment. Therefore it cannot be imposed if no primary punishment is imposed.

### **Learning Activities**

1. What are the two big categories of penalty?
2. Explain the strengths and weaknesses of fine as kind of punishment.
3. What kinds of primary punishments are adopted in Ethiopian Criminal Code?
4. "Secondary penalties can be used as a substitute of primary ones." Do you agree? Why? Why not?
5. "No secondary penalty may be imposed where there is no provision to that effect." Evaluate the statement in terms of the spirit of the Criminal Code of Ethiopia.



## **CHAPTER SIX**

### **Determination of Sentence**

#### **Objectives of the Chapter**

At the end of the Chapter, the students will be able to:

1. determine a kind of punishment for a particular offence;
2. discuss the main controversies surrounding death penalty;
3. determine which category of criminals will be subject to simple imprisonment or rigorous imprisonment;
4. treat offenders differently according to the seriousness of the offence and the danger they pose to the community.

#### **6.1 Introduction**

In the previous chapter, dealt with the types of punishments. Once the accused is found guilty, the next step for the court is to impose punishment. At that particular stage, the court may select a kind or kinds of punishment or punishments

.

The law may provide a single punishment for a crime or more than one penalty for a single offence. Now the question is how the court determines a kind of punishment for a particular offense where the law – sometimes leaves the choice for the judge?

Determination of sentence is the most difficult job of the court in dealing with the criminal cases. The objective of sentence is the most difficult job of the court in dealing with the criminal cases.

## **6.2 Capital Punishment**

In chapter 5, we have discussed about capital punishment in detail. We said that death penalty is the most ancient form of punishment that has been précised through out history in most cultures and continues to exist nowadays.

As opposition against death penalty grows faster from time to time, some legal systems have abolished the death penalty from their penal law. On the other hand, receptionists strongly support the application of death penalty for cretin crimes, and, therefore, certain legal systems continue to retain death penalty for criminals found guilty of the crimes punishable by death.

Many issues are to be addressed under this sub – section. They are: Controversies around death penalty; Subjects of death penalty; prerequisites, and cruel, degrading, in human treatment or punishment.

### **6.2,1 Controversies**

By controversies we mean arguments for and against death penalty. Proponents (receptionists) are in favor of imposing death sentence, where as abolitionists argue for the abolition of death penalty.

#### **6.2.1.1 Proponents (Receptionists view)**

They are not necessarily cruel or vengeful or lack of mercy. They simply advocate what they think is for the common good and for the benefit of society as whole.

They say that capital punishment, more than any other penalty, is effective in deterring others from committing a crime. They argue that it is more economical than imprisonment (economic argument) , It means that the cost of execution of death penalty is cheap as opposed to cost of imprisonment which requires the state to allocate high budget for prison facilities

It prevents the lynching of criminals. This means that the public may take the law to their hand and put the offender to death (by hanging) without due process of law. On the other hand, it rids society of dangerous criminals. This is so because death penalty is an ultimate sanction without the possibility to go back to the community.

Unlike sentences of imprisonment, for which pardon may be obtained, punishment is the only absolute punishment.

Any individual who kills another human being must pay for his crime. (Retribution argument)

### 6.2.1.2 Opponents (Abolitionists) view

- They are used that if imprisonment is more effective deterrent than the death penalty.
- Death penalty is an inadequate method for dealing with defective criminals, for if this logic were to be followed, it would also apply to the mentally defective criminals and feebleminded.
- The use of capital punishment has an adverse effect on the prisoners and staff in the institutions in which it is inflicted.
- There is no connection between deterrence and murder rate. They further argue that the murder rate has not increased in the countries that have abolished capital punishment whereas the murder rate in the countries with capital punishment remains to be constant or increasing.
- *Mistake argument*: some erroneous convictions are inevitable in the course of the enforcement of the penal law and errors sometimes cannot be established until time has passed. Such errors cannot be corrected after execution. An injustice of this kind destroys the moral force of the entire penal law.
- Far from being deterrent, capital punishment encourages violent crime. Execution by state gives social approval to killing. This contention is based on the social approach to executions (i.e., if the state believes in killing people, killing cannot be totally wrong.)

- Because of this possibility, more procedural safeguards are employed in capital cases than in non-capital cases, and thereby rendering them longer and more costly (cost-benefit argument)
- *Arbitrary use argument* : With over 2,600 inmates on death row (USA), the process by which an inmate is selected to die is entirely arbitrary. It is not determined by the seriousness of the crime committed or any other objective measures. This is most of the time due to lack of knowledge or legal council, racism and etc.

*Discrimination argument*: in the early 1950s in the USA researchers identified a problem in the use of the death penalty.

Since 1950s, it has become clear that death sentence in some southern states fell disproportionately on blacks who had been convicted of rape of white women. They noted, " of the 3,859 persons executed for all crimes since 1930, 54.6% have been black or members of other racial minority groups .Of the 455 executed for rape alone, 89.5 percent have been non white."

## 6.2.2 Subjects

This sub – topic triggers the two interrelated questions: What crimes are punishable by death? What categories of criminals may (not) be subject to death penalty?

There is no unanimity with respect to offences punishable by death. Take for instance, the drug trafficking case. In China, or Saudi Arabia, a person found guilty of drug trafficking may be condemned to death, whereas in Ethiopia, this is punishable with rigorous imprisonment and fine.

Art.6 of the International Convention on Civil & Political Rights (1976), Art 6 stipulates that in countries which have not abolished the death penalty, sentence may be imposed for the most serious crimes in accordance with the law in force at the time of the commission of the crime.

The Covenant does not tell us what the most serious offence is. Seriousness of the offence depends up on the background of the legal system of particular society. There is no hard and fast rule to test the seriousness of certain crime.

With respect to the classes of offenders subject to death penalty, the ICCPR as per Article 6(5) prohibits the imposition of death penalty on the offender who has not yet attained the age of 18 years on the day of the commission of the crime, and on pregnant women. Furthermore, Convention on the Rights of the Child re-enforces the prohibition of death penalty on child, Art.37 (a).

The Africa Charter on the Rights & Welfare of the Child also declares the prohibition of death penalty in favor of the child who has not yet attained the age of majority during the commission of the offence in question.

However, the American Convention on Human Rights has moved farther in identifying the offenses and offenders that are punishable and subject to death penalty. This Convention under Article 4(4) has excluded the following offenses and offenders from the list of death sentence.

- ✧ political offenses or related common crimes,
- ✧ Offenders below the age of 18 (when the crime was committed).
- ✧ Pregnant women.

Art 117 of the Federal Criminal Code provides that sentence of death shall be passed only in cases of grave crimes and on exceptionally dangerous criminals, in the cases specifically laid down by law as a punishment for completed crimes and in the absence of any extenuating circumstances.

It further declares that a sentence shall not be passed on criminal who, at the time of the commission of the crime, does not attain the age of majority.

From the wording of Art.117 (1), one can infer the following. With respect to the offence, death sentence may be imposed only when:

- ✧ The offence committed must be a completed one – no death penalty for an attempted offence no matter how grave it might have been.
- ✧ The crime committed must be grave one;
- ✧ The death sentence is specifically stipulated for that crime.

With respect to the offender, he/she:

- ✧ must be of dangerous disposition
- ✧ Must have attained the age of majority at the time of the commission of the crime.
- ✧ does not have any extenuating circumstance in his/her favor.

As opposed to the ICCPR which clearly prohibits the imposition of capital punishment on pregnant women, the Federal Criminal Code has provided the probability of the imposition of death penalty on pregnant women, or in other words, it does not expressly prohibit the imposition of death penalty on pregnant women. However, capital punishment on pregnant may be suspended until she gives birth to a child alive and viable, and may ultimately be commuted to life imprisonment if she is to nurse such child.

Execution of death penalty on totally or partially irresponsible person may be suspended as long as the criminal continues to be in such a condition. Does that mean that the court may impose death sentence on irresponsible (be it total or partial), criminals? The answer is definitely no! The reasons being that totally irresponsible persons Art.(48) are not subject to any punishment, leave alone the death sentence, rather, they may be send to places where suitable measure or treatment are give to them. With regard to offenders partially responsible (Art 49), the fact that they don't fully appreciate the nature and consequences of their act is an extenuating circumstance. The presence of extenuating circumstances – no matter now the offence is grave – give rise to the inapplicability death sentence.

By suspension of death penalty it seems that Article 119 is dealing with criminals who become partially or totally irresponsible after the crime was committed.

### **6.2.3 Cruel, Degrading, and Inhuman Treatment or Punishment**

Another issue to be addressed with respect to the capital punishment is cruelty, degrading and inhumane treatment or punishment.

The UDHR, Art.5 and ICCPR, Art.7 declares that no one shall be subjected to torture or cruel inhuman or degrading treatment or punishment.

The ICCPR under the mentioned provision goes far to include the prohibition of medical or scientific experiment upon any one with out his free consent.

Like wise, Art 18(1) of the FDRE Constitution stipulates that every one has the right to protection against cruel inhuman or degrading treatment or punishment.

However, the above mentioned instruments did not define 'torture' or 'cruel', 'inhuman' or 'degrading' treatment or punishment. Hence, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force on June 26,1987, having regard to Art 5 of the UDHR and Article 7 of the ICCPR, defines the term 'torture' as :

*" any act by which extreme pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent or incidental to lawful sanction."*

This Convention has clearly excluded the pain or suffering arising from the very nature or incidental to lawful sanction. Pain or suffering no matter how differs in degree, is inherent or incidental to the execution of death penalty so long as it is not more than necessary, i.e., excessive.

But in 1972, the *Furman* case necessitated the reconsideration of Eighth Amendment. In a 5 to 4 ruling, the *Furman* decision invalidated Georgia's death penalty statute on the basis that it allowed a jury unguided discretion in the imposition of capital sentence.

Many other states with similar to Georgia's were affected by the *Furman* ruling but moved quickly to modify their procedures. What evolved was a two step procedure to be used in capital cases. As a consequence, death penalty trials today involve two stages. In the first stage, guilt or innocence is decided. If the defendant is convicted of a crime for which execution is possible, a second, or penalty, ensues. The phases generally permits the introduction of new evidence that may have penalty been irrelevant to the question of guilt, but which may be relevant to punishment, such as drug use or childhood abuse.

While in most jurisdictions, juries determine the punishment, the trial judge set the sentence in the second phases of capital murder trials in Arizona, Idaho, Montana & Nebraska.

Alabaman, Delaware, Florida, and Indiana allow juries only to recommend a sentence to the judge.

The two – step trial procedure was specifically approved by the Court in *Gregg v. Georgia* (1976). In this case the Court upheld the two – stage procedural requirement of Georges's new capital punishment law as necessary for ensuring the separation of highly personal information needed in a sentencing decision from the kind of information reasonably permissible in jury trial where issues of guilt or innocence alone are being decided.



Post - *Gregg* decisions set limits upon the use of death as penalty for all but the most serious crimes. In 1977, in the cases *Coker V. Georgia*, the Court struck down a Georgia law imposing the death penalty for the rape of an adult woman. The court concluded that capital punishment under such circumstance would be grossly disproportionate to the crime.

The majority of high court seem largely convinced of the constitutionality of a sentence of death. Open to debate, however, is the constitutionality of questionable method for its imposition. In a 1993 hearing, *Poyner v. Murray* the US Supreme Court hinted at the possibility of reopening question first raised in *Kemmler*. The cases challenged Virginia's use of the electric chair as a form of cruel & unusual punishment, but the defendant lost his case & electrocuted in March 1993.

Question about the constitutionality of electrocution as a means of execution again came into the fore in 1997, when flames shot from the head and the leather mask covering the face of Pedro Medina during his Florida execution.

Such a constitutional challenge against the imposition of death penalty has never been the cases in Ethiopian courts.

As discussed previously, death penalty may be imposed on the accused committed serious crime. Contextually serious crimes are those crimes prescribed in the new Federal Criminal Code for which death penalty may be imposed.

### **6.3 Imprisonment**

As discussed in detail under chapter five, imprisoned offender is no longer free to move as he likes. In short imprisonment is a restriction on freedom of movement. Depending on the seriousness of the crime committed and the behavior of the offender, imprisonment is divided into two main categories in the new Criminal Code: simple imprisonment and rigorous imprisonment

### 6.3.1 Simple imprisonment: Art 106

As per the above mentioned Article, sub article 1, simple imprisonment is a sentence applicable to crime of a not very serious nature committed by person who is not a serious danger to society.

Here, two things must be cumulatively fulfilled: the non seriousness of the crime committed and a non serious dangerousness of the offender to the society. If one criterion does miss, simple imprisonment may not be applicable. For instance, a person who commits a crime that is not as such serious may be sentenced not be simple imprisonment - but to rigorous imprisonment if he is dangerous to the society.

With regard to the length of the simple imprisonment, the same sub – article under paragraph 2 stipulates: "*without prejudice to conditional release, simple imprisonment may extend for a period of from ten days to three years.*

*However, simple imprisonment may extend up to five year's where, owing to the gravity of the crime, if it is prescribed in the Special Part of this Code, or where there are concurrent crimes punishable with simple imprisonment , or where the criminal has been punished repeatedly.*

As it is stipulated under paragraph 3 of the same sub – article, simple imprisonment may be extended to five years where one of the following conditions met.

- ☞ Owing to gravity of the crime, were it is prescribed in the special part of the code.
- ☞ When there are concurrent crimes.
- ☞ When the criminal has been punished repeatedly.

The place where sentence of imprisonment shall be served is in such prison or in such prison or in such section thereof as is provided for the purpose.

There may be a case whereby simple imprisonment may be substituted by compulsory labor where the conditions under Article 107 met

### **6.3.2 Rigorous imprisonment: Art. 108**

As opposed to simple imprisonment, rigorous imprisonment is a sentence applicable only to crimes of grave nature committed by criminals who are particularly dangerous to society.

For rigorous imprisonment to be imposed, two conditions should be met cumulatively.

- ☞ The gravity of the crime.
- ☞ The dangerous disposition of the criminal to a society.

Sentence of rigorous imprisonment is supposed to be executed by strict confinement of the offender in prisons that are dedicated for such purpose. But there may be rehabilitative treatment for the criminal while serving rigorous imprisonment.

Without prejudice to conditional release, the sentence of rigorous imprisonment is normally for a period of one to twenty five years, but where it is expressly laid down by law, it may be for life. The law also stipulates that the conditions of enforcement of rigorous imprisonment are more severe than those of simple imprisonment

### **6.2.3. Life Imprisonment**

The meaning to life imprisonment varies from one legal system to another one. However, life imprisonment is a sentence of imprisonment for serious crime, normally for the entire remaining life of the prisoner, but in fact for a period which varies between jurisdictions.

In almost all jurisdictions without capital punishment, life imprisonment (especially without the possibility of parole) constitutes the most severe form of criminal punishment.

Let us see the interpretations given to life imprisonment in some countries of Europe and North America, In Austria, for instance, life imprisonment theoretically means imprisonment until the prisoner dies. After 15 years parole is possible, if and when it can be assumed that the inmate will not re – offend. This is subject to the discretion of a

criminal court panel, and possible appeal to the high court. Alternatively, the President may grant a pardon upon motion of the minister of justice. Prisoners who committed a crime when below the age of 21 can be sentenced to a maximum of 20 years imprisonment.

In Germany the minimum time served for a sentence of life imprisonment is 15 years, after which the prisoner can apply for parole. The average time a person serving a life sentence has to remain in prison also may depend on the state in which the person is serving. In the more conservative southern states such as Bavaria or Baden Württemberg, the time is significantly longer than in northern German states. Around 20% of all people serving life imprisonment stay in prison until their natural death.

The German Constitutional Court has found life imprisonment without the mere possibility of parole to be anti ethical to human dignity, the most fundamental concept of the present German Constitution. That does not mean that every convict has to be released, but that every convict must have a realistic (chance for eventual release, provided that he is not considered dangerous any more.)

In Canada, life imprisonment means that the offender will be under supervision, whether in prison or in the community, for the rest of his or her life. The maximum sentence is life imprisonment without the possibility of parole for 25 years, but this number can range formally a few years up to the maximum. There is no guarantee that parole will be granted if the National Parole Board determines that the offender still poses a risk to society.

In the US, the definition varies from one US state to another. Life imprisonment often lasts until the prisoner dies, particularly in cases where life imprisonment is imposed as alternative to the death penalty. It is also usual that life terms are given in sentence that are internationally longer than how long the prisoner is expected to live, e.g., a 200 year sentence for multiple counts of murder.

In Ethiopia too, life imprisonment is imposed on the offender who commits a grave crime, and who poses danger to the society. Likewise life imprisonment meant that the offender may serve the rest of his life in prison in absence of being reformed which enables him to be released conditionally after 20 years. (Art .202).

#### **6.2.4. Arrest**

Arrest is the everyday duty of the police when they suspects some one of committing an offense. Arrest has a different connotation in this context. The arrest we are dealing with under this sub – topic is not that by police for investigation. Moreover, the person arrested is not the one suspected of committing a crime, but condemned of committing a crime. Arrest by police is for the purpose of investigation whereas in this case, it is for the purpose of punishment.

Hence, arrest in this regard is the penalty stipulated by the Federal Criminal Code for petty offences on part III of the Code Articles 734 through 865. Art 735 of the Code stipulates that a person commits a petty offence when he infringes the mandatory or prohibitive provisions of a law or regulation issued by a competent authority or when he commits minor offence which is not punishable under the Criminal Law, and such infringement or minor offence is subject to punishment under the provision below (Arts. 746 – 775).

And in this case, ordinary penalty is excluded from being applicable for petty offences. Article 746 of the Code has expressly prohibited the application of rigorous or simple imprisonment prescribed for ordinary crimes. And it also states the difference between the two. "*Petty offences differ from ordinary crimes by reason of the different penalty they merit.*"

Article 747 stipulates that arrest is the only penalty involving deprivation of liberty which may be imposed in the case of petty offences.

Arrest ranges from one day at least to three months maximum, subject to cases of recidivism (Art. 769) and cases where special provisions of the law provides a higher maximum.

In determining the arrest the court shall consider the degree of individual guilt (Art 88), with out going beyond or below the range provided in the law.

As per Art. 748, the Code provides that ordinary arrest shall be under gone in a special premises or detention attached to courts or police station. Convicts shall be separated according to sex.

This provision expressly prohibits the detention of a person sentenced to arrest in penitentiary or corrective institution, or confinement with prisoners sentenced for crimes to imprisonment.

A person sentenced to arrest shall not be compelled to work nor be entitled to remuneration (Art.111)

But he may receive food, mail and visitors from out side to the extent compatible with the tranquility and general good order of the place of detention.

With regard to the place of arrest, the Code has provided for an exception to Art. 748. The court may order that arrest shall be undergone either in the home of the persons sentenced or in the home of reliable person or a lay or religious community designed for the purpose, when personal or local conditional justify such a measure.

In this case, permission to leave home may, apart from cases of force majeure, be granted exceptionally and by the decision of the Court only for the performance of religious duties, the consultation of physician, or for receiving indispensable medical care or appearing before a judicial authority, and then only for such time as is strictly necessary.

Persons found guilty of committing petty offence may exceptionally be sentenced to compulsory labor in lieu of arrest when conditions under Art.751 are met.

#### **6.4 Fine and other Pecuniary Penalties**

It has already been discussed that fine is one of the oldest forms of punishment, which continues to get acceptance for various reasons. This part is mainly dedicated to examine how the court may determine fine as a penalty. This will be dealt in line with the Criminal Code.\

Art.90 of the Code, under sub – article (1) stipulates that fine is paid in money, and is forfeited to the state. This is to mean that no one can relieve himself of the fine by paying equivalent amount in kind.

If the offender is a natural person, fine may extend from ten birr to ten thousand birr. But there may be the case where the provisions of other laws may set the minimum and maximum greater than the one provided for by the Code under this Article. The other exception is the one under Art.92. However, in cases of juridical person fine may extend from one hundred up to five hundred thousand birr.

In fixing the amount of fine, the court shall consider the following circumstances: the degree of guilt, the financial condition, the means, the family responsibilities the occupation and earning there form, the age and health of the criminal (Art.90 (2))

According to Art 34 of the Code, juridical person will be held liable when it involves in a criminal act as principal, an instigator or an accomplice.

As per this article judicial person other than the state administrative bodies deems to have committed a crime and punished as such where one of its officials or employees commits a crime as a principal criminals an instigator or an accomplice in connection with the activity of the juridical person with the intent of promoting its interest by an unlawful means or by violating its legal duty or by unduly using the juridical person as a means.

Since imprisonment of juridical person other than its officials for their personal criminal liability is impractical, the Code provides fine in lieu of imprisonment.

In this case, fine may be calculated as per art 90 (3) of the code. Art 90 (3) reads:

*When the penalty provided for by the Special Part of this Code is only imprisonment and the criminal is a juridical person ,the punishment shall be a fine not exceeding ten thousand birr for a crime punishable with simple imprisonment not exceeding five years ,a fine up to twenty thousand birr for a crime punishable with rigorous imprisonment more than five years but not exceeding ten years ,a fine of up to the general maximum laid down in sub-article (1)for a crime punishable with rigorous imprisonment exceeding ten years .*

In some instances fine may be the only penalty for a crime .In this case if the offender is a juridical person the fine shall be five times greater than that for a natural person.

The court may impose fine in addition to imprisonment when the offender is a natural person. (Art .91) This is so when the Code provides for a fine or imprisonment as an alternative punishment for crime, and when it appears to the court that having regard to the degree of guilt and the circumstances of the criminal, it is expedient to do so. This is one way of aggravating the penalty.

The other condition to aggravate penalty of fine is where the court found the convicted to have committed a crime motivated by the gain he derives there from. Sub-article (1) of Article 92 reads: *Without prejudice to any special provision prescribing a higher maximum where the criminal acted with a motive of gain or where he makes a business of a crime in a way that he acquires or tries to acquire gain whenever a favorable opportunity presents itself ,and where it appears to the course that ,having regard to the financial condition of and the profit made by the crime ,it is expedient so to do ,it may impose a fine which shall not exceed on hundred thousand birr .*

In order to aggravate the penalty of fine, the court must assure either of the following conditions.



- ☞ whether the offender is motivated by the gain ,or
- ☞ whether he has made a crime business for gain

Then the court shall consider the following conditions,

- ☞ the financial condition of the offender and
- ☞ the profit made there from ,and
- ☞ its expediency for the court to aggravate the sentences.

As is in the second paragraph of Art 92 (1), the fine shall always be in addition to the confiscation of the profit made.

However, the court may impose both fine and imprisonment or any other measure provided by law in addition to fine when the criminal was motivated by gain in commission of such crime, even though gain is not an essential element of a crime committed

When the fine is provided for petty offence, it may be from one Birr to three hundred Birr except in case of recidivism and where the law provides a higher maximum.

If the petty offender is a juridical person only fine will be the only penalty, and may range from, subject to the provision of Articles 768 and 770, ten Birr to one thousand and two hundred Birr.

A point worth mentioning with respect to fine is the imposition of fine or imprisonment/ arrest when the law provides both as alternatives. In this case, the discretion to select fine or imprisonment/ arrest is exclusively granted to the court. However practices in some courts are far from the intention of the law makers. Some courts are found to have shifted this discretionary power to the criminal by ordering the criminal to pay fine or in default of this to serve a sentence of imprisonment/arrest.

This line of interpretation is quite a far cry from the purpose of criminal law. It is exclusively the affair of the judge to pick a kind of penalty by taking into account the purpose and goal of the Criminal Law as envisaged in Art.1 of the Code. Other wise this

may sow the seed of discrimination between the haves and have-nots; the rich will simply buy their freedom out while the poor languish in prison for the mere fact that they do not have money to pay.

Confiscation of property is another kind of pecuniary penalty the court may impose on the convicted. It is a judicial order against the property of accused when the property is the fruit of the crime. To this effect, Art.98 (2) reads: "*Any property which the criminal has acquired, directly or indirectly, by the commission of the crime for which he was convicted shall be confiscated.*"

However, an order to confiscate property may apply to the property lawfully acquired by the criminal.

As is clearly enumerated in Art.98 (3) (a) \_ (d), some properties are not subject of court's order for confiscation

Sequestration of property is another pecuniary penalty. Similar to confiscation, it is a judicial order against the property of the criminal. But the difference can be inferred from the wording of Article 99 which reads: "*Where the criminal has been convicted and sentenced in his absence for conspiring or engaging in hostile acts against the constitutional order or the internal and external security of the State, the Court may in addition to any other penalty order the sequestration of his property.*"

Hence, sequestration differs from confiscation in that sequestration is applicable when;

- ▶ the criminal must have conspired against the constitutional order or the internal or external security of the State; and,
- ▶ the court convicted and sentenced the criminal on his absence

Generally speaking, the severity of the offence committed and the absence of the offender while the court pronounces the judgment (conviction and sentence) are the determinant factors for the order of sequestration.

### **Unit Summary**

Determination of sentence is selecting a particular kind of punishment for the offence committed. One of the available kinds of punishment for a particular offence is death penalty. There is no unanimity with respect to offences punishable with death penalty. But practices of most jurisdictions show that it is imposed for most serious offences. Yet there is no common yardstick to measure the seriousness of the offence. It is a relative concept.

The ICCPR prohibits the imposition of death penalty on persons below the age of 18 years at the time of the commission of the crime, and on pregnant women.

In Ethiopian Criminal Code, death penalty is imposed for completed and most serious offence. It has also adopted the prohibition of the ICCPR.

Imprisonment is another type of penalty entailing loss of liberty. Depending on the seriousness of the crime and the danger the offender may pose to the society, the Federal Criminal Code has divided imprisonment as simple imprisonment and rigorous imprisonment.

Simple imprisonment is a sentence applicable for a crime of not very serious nature committed by a person who is not dangerous to society. The opposite holds true for rigorous imprisonment.

Life imprisonment is also another kind of penalty entailing loss of liberty. There is no uniformly agreed upon definition of life imprisonment. However, it is imposed for most

serious offence normally for the remaining life time. It is the most serious penalty in countries where there is no capital punishment. In these jurisdictions the offender serves the whole life in a prison without possibility to parole. In another jurisdictions, life imprisonment doesn't mean that the offender will serve the whole life behind bar but can be released if rehabilitated.

In Ethiopia, life imprisonment is harsh penalty that may be imposed for serious offence. But the offender can be released if rehabilitated.

the other kind of punishment is arrest which entail loss of liberty. In Ethiopia, arrest may be imposed upon person committed petty offence. Ordinary penalty may not be imposed for petty offence

Fine is a kind of pecuniary penalty. It has to be paid in money but not in kind and has to be forfeited to the state. Imprisonment of juridical person other than its officials for their personal criminal liability is impractical. Hence the Code provides for commensurate fine if imprisonment is the only penalty for a particular offence.

### **Learning Activities**

1. Do you think that death penalty is cruel and inhumane in the eyes of FDRE Constitution Art.18 (1)? Why? Why not?
2. One of the grounds abolitionists have against death penalty is mistake argument. What is all about mistake argument?
3. Imprisonment is classified as simple and rigorous. What makes it either simple or rigorous?
4. " In Ethiopia, life imprisonment is imprisonment for life without a chance for release on parole if the offender is not rehabilitated." Do you agree? Why? Why not?
5. What is the main difference between penalties imposed for ordinary offences and that imposed for petty offences?

## CHAPTER SEVEN

### Fixing Exact Punishment

#### 7.1 Introduction

##### Objectives of the Chapter

At the end of the Chapter, the students will be able to:

1. Identify circumstances that may aggravate or mitigate sentencing;
2. follow the right steps in fixing exact punishment;
3. fix exact punishment by taking into account circumstances surrounding the case at hand;

This chapter is the continuation of the previous one in the sense that once the court picks a kind of penalty for the offence committed, the next step is to fix a deserved punishment. If, for instance, the court thinks that rigorous penalty is the appropriate one, the next step is to decide the length of the sentence, should it be 3 years, 5 years, or 7 years.

In fixing the exact punishment the court shall observe steps. In the process of fixing the punishment, the court is expected to make a double estimation. It should firstly decide which punishment it would have ordered in the absence of aggravating and mitigating circumstances, and then increases and eventually decreases the punishment.

By doing so, the court says to the offender: "*you should have been sentenced to this amount, but due to aggravating and/or mitigating circumstances, you are now sentenced to this amount.*"

However, the practices in almost all Ethiopian courts do not like this; once the court has found the guilty, the usual step is to ask the public prosecutor and the accused to present on their own part circumstances that may aggravate or mitigate the penalty.

Logically there should be a penalty that may be aggravated or mitigated. But in the absence of that, what penalty may the court aggravate or mitigate? What sentence is to be aggravated or mitigated?

The late Mesfine G/Hiywot, judge of Fed.Sup.Court, and scholars like Phillippe Graven and Tsehay Wodda are strongly arguing in favor of this style of calculating sentence.

Particularly the late Mesfine G/Hiywot and Tsehay Wodda argue that in calculating a sentence the court should first fix the degree of individual guilt, i.e., the penalty that may be aggravated or mitigated. But what is the degree of individual guilt? What factors are to be taken into account to fix the degree of individual guilt?

If factors mentioned under Art.88( 2) are to be taken into account to calculate the degree of individual guilt, it is not clear whether these factors ( antecedents, motives, purposes, personal circumstances, education, etc.) are different from aggravating and mitigating circumstances.

Though the need to first fix a penalty that may be either aggravated or mitigated depending upon the circumstances surrounding the commission of the crime is logical, it is not clear what factors are to be taken into account to estimate the penalty. Moreover, it is not clear whether Art.88(2) is applicable in this regard. Though this line of argument is convincing, it remains to be controversial and subject to many lines of interpretation.

Hence, the forthcoming parts of this chapter will deal with those factors that affect punishment.

## 7.2 Factors that affect Punishment

As stated above, once the has court fixed the deserved punishment, the next step is to see if there are factors that may affect the deserved punishment. Factors that affect punishment have two big categories, i.e., aggravating and mitigating circumstances.

They are elements of a material and/or personal nature which do not affect the offender's liability to punishment but may or must be taken into consideration at the time when sentence is passed.

### 7.2.1 Aggravating Circumstances:

Are circumstances relating to the commission of crimes which cause its gravity to be greater than that of the average instance of the given type of offence.

According to the Federal Criminal Code, aggravating circumstances are divided into two: general and special.

#### 7.2.1.1 General Aggravating Circumstances: Art.84

1) *The court shall increase the penalty as provided by law ( Art.183) in the following cases:*

*a) When the criminal acted with treachery, with perfidy, with base motive such as envy hatred, greed, with deliberate intent to injure or do wrong , or with special perversity or cruelty,*

*b/ When he abused his powers, or functions or the confidence, or authority vested in him,*

*c/ When he is particularly dangerous on account of his antecedents, the habitual or professional nature of his crime or the means, time, place and circumstance of its*

*perpetration, in particular of his crime or the means, time, place and circumstance of its perpetration in particular if he acted by night or under cover of disturbance catastrophes or by using weapons, dangerous instrument or violence,*

*d/when he acted in pursuance of a criminal agreement, together with others or as a member of a gang organized to commit crimes and, more particularly, as chief, organizer or ringleader,*

*e/ When he internationally assaulted a victim deserving special protection by reason of his age, state of health, position or function, in particular a defenseless, feeble minded or invalid person, a prisoner, a relative, a superior or inferior, a minister of religion, a representative of a duly constituted authority, or a public servant in the discharge of his duties.*

*2/ When the law, in a special provision of the Special Part, has taken one of the same circumstances into consideration as a constituent element or as a factor of aggravation of a crime, the court may not take this aggravation into account again.*

The accused is liable to an aggravated punishment when his dangerous disposition can be inferred from his motives (e.g. envy, hatred or greed note that agreed to the extent that it affects pecuniary penalties ( Art.90(1) is mentioned here by mistake),his state of mind at the time of the act ( deliberate intent to injure or do wrong, and illustration of which may be found in Art. 586(1)(c) ), conditions in which he acts ( with treachery, perfidy, special perversity, which may be symptomatic of a derangement of the mind, may be considered in aggravation even though the accused is not fully responsible for his act.

What these aggravating factors actually consist of and whether they are present is a matter to be decided from cases to case. It should be clear, however, that they do not bear upon the punishment whenever they are present, but only when they denote the offender's dangerous disposition. Therefore, the comments made in connection to general extenuating circumstances apply *mutatis mutandis* with respect to general aggravating



circumstances. If this were not so, the penalty to be ordered for intentional offence should always be aggravated on the ground that the accused acted with deliberate intent to do wrong: the fact that a person was shot in the back should always warrant aggravation on the ground that the murder acted with treachery or perfidy; the fact of maiming some one would always be a sign of cruelty. Yet in all cases, the court should not confine itself to ascertaining whether any of the circumstances described by Art. 84(1) is present; it must also explain why it considers that pertinent circumstance should affect punishment.

The actor's personal position may also be considered in aggravation when there clearly exists a relation between his position and the offence he commits. The reasons behind sub – art (1) are objective as well as subjective. Firstly, one is entitled to be very demanding with respect to persons who, by reason of their particular status, are in a position of trust ( e.g. bankers, tutors, managers, advocates, etc) , or in one which enables them to deal with public affairs, to give orders or to require obedience ( civil servants, commanding officers, judges, etc.) As often as not, society at large is concerned with the manner in which these persons exercise their powers or carry out their duties. Therefore, the consequences of any offence which the said person may commit in the performance of their function are as a rule objectively greater. Secondly, a person who commits an offence by taking advantage of " his powers or functions or the confidence or authority vested in him" acts in disregard not only the harm he causes, but also of the powers or confidence placed in him by the government, the public or any particular person.

The circumstances pertaining to the actor's antecedents apply when the requirements governing recidivism as defined in Art 67 are not fulfilled either because " limitation of recidivism" has occurred( i.e., the new offence is not committed within the period of time laid down in the said Article), or because the new offence is committed by negligence.

It does not suffice, however, that the accused should have one or more previous conditions and the pertinent circumstance does not operate unless the court, often considering his past and present behavior, is of the opinion that he creates serious danger to the community.

Even though it does not necessarily imply that the accused has antecedents or a recidivist, the fact that the offence is committed habitually raises a very strong presumption that he has a particularly perverse mentality and will continue to break the law unless drastic action is taken against him.

This circumstance is meant to apply with respect to a person who *"makes a business of crime in a way that he acquires or tries to acquire a gain whenever a favorable opportunity presents itself"*.

The conditions in which the offence is perpetrated are also a ground for increasing the penalty when they betray the actor's dangerous disposition. What this circumstance implies is not that the offence is dangerous, but that the offender, should be particularly dangerous. This may be so for example when he acts right, takes advantage of disturbances or disasters of any kind (riot, flood, earth quake, or fire) or uses weapon, dangerous instruments, or violence.

The accused is also liable to an increased penalty when he acts in consequence of a conspiracy, in group or as a member of group formed to commit offences.

By providing for aggravation when one acts in pursuance of criminal agreement, Art 84(1) (d) merely gives effect to the principle set out in Art. 38 which states that a conspiracy is considered in aggravation whenever it is not an independent offence according to the special part of the Code.

Whether or not there has been a conspiracy, the accused is presumed to be particularly dangerous when he acts "together with others". This form of collective action may be purely spontaneous and does not necessarily imply the existence of a prior agreement. The only difficulty which this provision involves consists of knowing whether the accused should have acted with at least two persons ("together with others"), or whether this he is acting together with only one or more person would be sufficient.

When a person acts in the circumstances defined in sub – Art.84 (1) (d), there is a very strong presumption that he is dangerous if his capacity is that of a 'chief, 'organizer' or 'ring leader.' It is not required, however, that he should be involved in the actual perpetration of the offence, for, as has been noted in relation to article 32(1) (b), a moral offender may well create a greater menace to society than a material offender. Whether he merely pulls the strings, behind the stage or is physically present when the offence is committed and leads or encourages the other participant is, therefore, irrelevant for the purpose of Art. 84(1) (d).

The last general aggravating circumstance laid down in Art.84 pertains to the special position of the victim of the offence. The accused is presumed to be dangerous when he intentionally causes harm to a person "deserving a special protection." The word "intentionally" implies that this circumstance is inapplicable not only when the offence is committed by negligence, but also in cases of mistake where the doer is unaware of the fact that his defenseless, feeble-minded or invalid, or a prisoner, relative, superior, inferior, clergymen or civil servant.

When any one of the above circumstances is present and the court is satisfied that it denotes the offender's dangerous dispositions, the penalty must be increased in accordance with Art. 183. This, however, is subject to the same restrictions as those which govern the effects of general extenuating circumstances.

As is stated in Article 84(2), the court is not allowed to increase the penalty twice for the same reason. Therefore, when a person commits an offence of which one of the circumstances laid down in Art 84 is an ingredient, or an offence carrying an increased penalty owing to the presence of one of the said circumstances, the penalty to be ordered for the said offence or the said increased penalty, as the case may be, may not be increased again on the ground that the pertinent special circumstance is also a general aggravating circumstances.

A general aggravating circumstance may not be applied concurrently with general aggravating circumstance of the same nature (e.g. the fact of causing harm to person deserving special protection such as minor, an inferior or a prisoner, necessarily implies in many cases, an abuse of powers, functions, confidence or authority). Identical aggravating factors, like identical extenuating factors, may not be cumulated whether they appear in the same or in different parts of the Code.

Subject to these restrictions, the court must assess sentence having regard to all the aggravating circumstances which show that the accused is dangerous. The punishment will vary, therefore, depending on which and how many of these circumstances are present in any given case yet, although Art 84(1), first line, states that the said circumstance lead to increasing the penalty, it must be clear that the court may not exceed the limits of punishment prescribed by law for the offence committed (while it may exceed them when special aggravating circumstances are present.)

These circumstances are aggravating, and the deserved penalty is increased, in the sense that the accused is to be punished more severely than he would have been, had he not acted in a said circumstance.

#### **7.2.1.2 Special aggravating circumstances: Concurrence and Recidivism. Art.85**

Art. 85 stipulates that in case of concurrence and recidivism, the penalty shall be aggravated according to the provisions of Arts. 184 -188 of the Code.

Since concurrence of crimes is to be dealt in sub – section 7.2, we will be discussing here only recidivism, Hence Art 67 of the Code defines recidivism as the commission of fresh intentional crime the minimum penalty of which is six months of simple imprisonment has been committed within whole or in part or having been remitted by pardon.

From morality perspective, the fresh crime must be intentional: any crime committed negligently is excluded from the preview of recidivism. Even though it is intentional, the minimum punishment should not be less than six month simple imprisonment.

Period of limitation must also be considered. If the fresh intentional crime is committed after the offender's serving a sentence for 5 year for previous offence in part or in whole or having been remitted by pardon, the person is no more recidivism.

Sentence for previous crime must be served in whole in part, or remitted by pardon. Generally speaking, recidivism is a person who relapses into crime and who is conclusively presumed to be more dangerous than a first offender because he has not, in the preface to the Code, "become prudent" despite his earlier despite his earlier contact with the law.

Hence the principle is that he must be treated more severely than an offender who has no previous conviction. The term "treatment" here indicates not only the imposition of penalty for the previous offence, but also its execution. It is the harsh condition (execution of penalty) that may make the person prudent. In absence of the execution of penalty, one must not conclusively presume an offender to be dangerous, and bring him under the recidivist category.

Different from these cases are those where the previous sentence was not served because suspension was ordered under Arts. 190ff. A person convicted of a previous offence who is placed on probation and is of good behavior through out the probation period is not to be treated as a recidivist if he relapses into crime upon the expiry of this period, as the previous sentence has not been enforced at all.

But when an offender is released on probation, and if a fresh crime has meanwhile been committed, subject to the provisions regarding recidivism (Art.67&188), the penalty to be pronounced for the new crime and shall be added to the remaining penalty and enforced. (Art.206 (2))

### **7.2.2. Mitigating Circumstances**

Circumstances relating to the commission of a crime which does not in law justify or excuse the act but which, in fairness, be considered as reducing the blameworthiness of the defendant.

As is the cases for aggravating circumstances, the Federal Criminal Code divides mitigating circumstances into two, i.e., general mitigating circumstances and special mitigating circumstances

#### **7.2.2.1 General Mitigating Circumstances**

Art. 82

(1) *The Court shall reduce the penalty, within the limits allowed by law (Art.179), in the following cases:*

*a) When the criminal who previously of good character acted with out thought or by reason of lack of intelligence, ignorance or simplicity of mind;*

*b) When the criminal was promoted by an honorable and disinterested motive or by a high religious moral or civil conviction;*

*c) When he acted in a state of great material or moral distress or under the apprehension of a grave threat or a justified fear, or under the influence of a person to whom he owes obedience or upon whom he depend;*

*d) when he was led into grave temptation by the conduct of the victim or was carried a way by wrath, pain or revolt caused by a serious provocation or an unjust insult or was the time of the act in justifiable state of violent emotion or mental distress*

*e) When he manifested a sincere repentance for his acts after the crime, in particular by affording succor to his victim, recognizing his fault or delivering him self up to the authorities, or by repairing, as far as possible, the injury caused by his crime, or when he on being charged, admits every ingredient of the crime stated on the criminal charge.*

*(2) When the law, in a special provision of the Special Part, has taken one of these circumstances into consideration as constituent element or as a factor of extenuation of a privileged crime, the Court may not at the same time allow for the same circumstances to reduce the penalty applicable thereto.*

Art 82 of the Code supplies detailed list of the reasons why the court may reduced punishment (System of legal circumstance).

The said circumstances, some of which are similar to, though they do not affect the offender's liability or degree of guilt in the same manner as, the justifications and excuses laid down in the foregoing articles may, depending on the test used in classifying them, be divided into material (or external, or objective), personal (or internal, or subjective) and mixed circumstance, or into circumstances which precede, accompany or follow the commission of the offence. Most of them, however, pertain to the subjective element of the offence and are centered on the question whether the accused has a dangerous disposition.

Mitigation on the ground stated in Art. 82(1)(a) is permissible when provisions such as those concerning limited responsibility, mistake of fact or ignorance of the law are inapplicable and Art, 82(2), the accused is not liable to punishment reduced on similar grounds pursuant to any of the specific articles of the law which he violated.

The principle behind Art, 82 (1) (a) is not that a thoughtless, stupid or ignorant man is not dangerous .The additional requirement is that, the accused should previously to be dangerous. This should not narrowly be interpreted to mean that the accused should have

no previous to means that the accused should have no previous convictions at all. Yet it rather seems that an accused who acted out of lack of intelligence should not be deprived of benefits of Art 82(1)(a) even though he is not a first offender, provided that his antecedent are not such as to convince that court that he is dangerous.

The punishment may be mitigated when the accused was promoted by high motives. This circumstance does not apply unless these motives are high or ordinary moral standards and not necessarily by those of the accused.

Thus if A strikes B who scoffs at an authorized religious ceremony (Art 492), he may be punished for assault by a mitigated punishment since he acts out of a " high religious conviction.

The disposition of person who violates the law with motives of this kind is not truly dangerous or anti - social. The same may be said of offences inspired by high civic or political ideal.

Distress, whether material or moral, operates in mitigation when it falls short of necessity. This may be the case, for example, when a poor man, after exhausting all possibilities of finding honest work for himself and/ or his wife, induces his wife to prostitute herself and lives on her earnings (Art 634), when a released convict who cannot find employment because he cannot produce a certificate of work or similar recommendation forges such a certificate (Art 386)

The circumstance pertaining to the apprehension of a grave threat or the existence of a state of justified fear is taken from Swiss Code where it serves some purpose as the said code makes no specific provision regarding coercion. In the context of Ethiopian code, however, it does not seem to add much to Arts. 71 and 72, which prevail over Art. 82.

The fact of having acted out of a so called reverential fear may be considered in mitigation whenever Arts. 71, 72 or 74 are inapplicable.



A Convicted person may be punished by mitigated penalty, if he has been led into temptation by the conduct of the victim or has acted under provocation or in a state of violent emotion.

The first circumstances, which basically consists, like the second one, of serious provocation but differs from provocation in its strict sense because the doer is not "carried away by wrath, pain or revolt " is present when " the victim provokes the offender in such a serious manner that the blame for the offence does not rest exclusively upon the actor but is shared by his victim. Yet it is not sufficient that the victim should in what ever way behave himself in a repressible manner towards the offender. On the other hand, the court may take into account any conduct (barring instigation) where by the victim leads the offender into temptation. Such conduct, for example in the case of sexual offences, may warrant mitigation. So too, the consent of the victim may be taken into account if it does not constitute a justification.

It is necessary that the temptation should be grave i.e., of such a nature and degree as to partially subdue the offender's will make it understandable why he failed in his duty to resist provocation. Regard must be had, therefore, to the personal position of the offender and the victim, including their respective age, for, particularly in the cases of sexual outrages (in which this circumstance is usually invoked).

It is also necessary, , that the offender himself should have been provoked, by the victim himself. This condition is not fulfilled when, there being no provocation on the victims part or there being provocation not intended for the offender, the latter is moved only by his own immorality or sexual instinct or is tempted in the sense that a favorable opportunity to commit the offence presents itself ; nor is the condition fulfilled when offender is tempted by the behavior of third parties ( e.g. when the parents of a minor girl do not object to the offender having sexual intercourse with her), even though they are legally or morally bound to watch over the victim.

A provocation in its strict sense an insult may be considered in mitigation on the following conditions. The provocation must be serious or the insult must be unjust, without the actor being, however, in either instance in the state of legitimate defense.

It is not necessary that the actor should personally be provoked or that the unjust insult should be addressed to himself ( e.g. *A* publicly gives his wife or child a severe, coarse and unwarranted reprimand and *B*, an indignant witness, slaps him; the assault is committed under provocation even though *B* is not personally insulted.)

The manner in which the offender behaves after the offence may be a ground for mitigating the penalty. Any conduct showing that he is sincerely repentant and truly regrets what he has done may be taken into consideration, provided, however, that this repentance manifests itself by act. Mere contrition and platonic regrets, therefore, will not suffice; what is expected is not " a purely passive attitude, but behavior indicating the offender's desire to repair the harm he has done.

By way of illustration, Art.82 (1) (e) mentions four cases in which the punishment may be reduced on the ground of sincere repentance.

- a/ The offender came to victim's assistance,
- b/ The offender admitted having committed the offence. The said circumstance is not present when the accused, knowing from the findings of the police that he has not chance of getting away with the offence, confines himself to pleading guilt at the trial;
- c/ The offender delivers himself up to the authority. This case was also provided by the 1930 Code, Art. 24 of which prescribed that if a man after committing a crime surrenders of his own free will before the crime is discovered and is the first to speak about the matter, the punishment will be light. Although this circumstance may well be present together with the preceding one, the law does not require that the offender should surrender and make a confession; either circumstance may, therefore, be invoked even though the other one is not realized;

d/ The offender repairs to the best of his ability the damage caused by the offence. Contrary to what might be inferred from Art. 82(1) (e), this reparation need not always be in form of monetary compensation and may be of any kind whatsoever. There is a sincere repentance when *A* gives back to *B* the property he has stolen from him, when, in absence of court order, he pays *B*'s hospital expenses after causing him physical harm; when he apologizes to *B* after insulting him, etc.

What is decisive in these cases, like in the preceding ones, is whether the offender's behavior is actually indicative of repentance not whether he has repaired all the damage he caused since in any event he is expected to repair it only "*as far as possible.*"

When any of the above circumstances is present, the court may mitigate the penalty in the manner provided for by Art. 188 on the condition that the circumstance under consideration is not, according to the Special Part of the Code, an ingredient or extenuating factor of the offence with respect to the question of mitigation arise.

The extent of reduction within the limit allowed by law is to be decided from case to case and it may vary depending in particular on whether one or more, or which extenuating circumstances are present. It must be clear, however, that the punishment to be mitigated is the one which the court would have ordered (to be executed) in the absence of extenuating circumstances.

#### **7.2.2.2 Special Mitigating Circumstances: Family and Affection Relationships, Art.83.**

(1) *In addition to the case specified under various provisions of this Code to be special mitigating circumstances under Article 180, the Court shall without restriction, reduce the punishment ( Art,180) when the criminal acted in manner contrary to the law and in particular failed in his duty to report to the authority or afford it assistance, made a false statement or disposition or supplied false information or assisted a criminal in escaping prosecution or the enforcement of penalty, for purpose of not exposing himself,*

*one of his near relative by blood or marriage or a person with whom he is connected by specially close ties of affection, to a criminal penalty, dishonor grave injury.*

*The court shall examine and determine the extent and adequate nature of the relationship invoked.*

*(2) If the act with which the accused person is charged was not very grave and if the ties in question were so close & the circumstance so impelling that they placed him in a amoral dilemma of a particularly harrowing nature the Court may exempt him from punishment other than reprimand or warning. (Art.122).*

*(3)Nothing in this Article shall affect the provision of Arts.254 (4), 335(3) and 682(4).*

According to Art.83(1), the court may reduce the punishment when a person commits an offence with a view to saving himself, a relative by blood or marriage or a close friend from prosecution, punishment, dishonor or grave injury.

By way of illustration, the said Article mentions a number of cases in which such a reduction permissible.

- a) A person fails to report a relative or friend to the authorities. Thus A may invoke Art 83 if, knowing that his brother B has committed homicide in the first degree, he has not informed the police thereof as he ought to, Art.443
- b) A person fails to assist the authorities in apprehending a relative or friend. Thus A may invoke Art.83 (see Arts 440&806) if, on being ordered by policeman to participate in the arrest of his brother B, he refuses to do so in contravention of the mentioned articles.

- c) A person makes a false statement or disposition or gives the authorities false information concerning an offence committed by relative or friend. Thus A may invoke Art.83 if, on being asked by the investigating police officer whether his brother B, who is suspected of homicide, was in Addis Ababa on a certain day, falsely states that his brother was in Jimma on that day Art. 446(b) or testifies in the court that his brother was in Jimma, Art.( 453).
- d) A person helps a relative or friend to escape prosecution. Thus A may invoke Art 82 if , after his brother confesses to him to have killed C, and tells him that he forgot his hat, with his name on it, in C's house, he goes to C's house and takes the hat before it is found by the police (Art 445)
- e) A person helps a relative or friend to escape the enforcement of a sentence. Thus A may invoke Art 83,if, while his brother B is taken to prison by a policeman after being sentenced to one year imprisonment, he attacks the policeman and sets his brother free ,( Art.561)

As is apparent, all the above cases are cases where the actor commits an offence against the administration of justice.

For Art 83 to be invoked, the following conditions must be fulfilled.

Firstly, the person commits an offence against the administration of justice with view to help in an offender connected with:

I/ by blood or marriage: Art 83 does not state how far this relationship extends. Art 411(4) (b) defines ' relative' as: "*Relative means a person who is related to the criminal, in accordance with the relevant law, by consanguinity or by affinity.*" Since even this one is too precise to know the degree of extension, Arts. 550 through554 of the Civil Code would have been the solution, had they not been replaced by the new family laws in different regional states, with view to compromise the previous family law in the 1960 Civil Code with the sprit of the FDRE Constitution. Since family laws of different regions would reflect political, social, economic and cultural as well as religious diversity (conditions) of the particular region, there may be the difference among regional family laws with respect to the degree of relationship.

II/by close ties of affection: this condition is not capable of being defined in general manner as is mentioned in the second paragraph of Art. 83(1), it is for the court to determine what kind of relationship exists in any particular case, and whether it is adequate.

Secondly, the person who helps the offender may be so either in his own interest or in that of the offender. In either case, however, the interest must consist of avoiding a criminal penalty, dishonor or grave injury and not, for instance, the institution of civil suit.

Thirdly whatever the kind of assistance given by a person to a diligent relative or, friend, it is clear that this person may not avail himself of the provision unless this assistance is given after such relative or friend has committed an offence. Thus Art.83 obviously does not apply when *A* helps his brother *B* in the perpetration of a theft because he thinks that *B* so stupid that he will inevitably be caught unless he (*A*) assists him.

When the above requirements are satisfied the court may reduce the punishment with out restriction (Art.83 (1)) or confine itself to reprimanding or warning the accessed (Art. 83(2)).

Unlike the general circumstances laid down in 84 Art. which warrant only a so called ordinary mitigation (Art. 183), and never exemption from punishment, the special circumstances laid down in Art 83 gives rise to the so called free mitigation.

The court may mitigate the penalty with out restriction on the following occasions. General part: Art. 28 (Renunciation and active repentance); Art.29 (crime impossible of completion); Art.49 (Partial Irresponsibility); Art. 72(Resistible coercion); Art. 74(2)(Responsibility of the subordinate); Art.75 ( Necessity); Art.76 (Excess of Necessity); Art. 77 (Military state of Necessity); Art. 79 (Excess in legitimate defence); Art. 81 (Mistake of Law &Ignorance of law); Special Part: Arts. 371&372 (Falsification); Art.549 cum 29(Attempt to procure an abortion on non pregnant woman); Art.550 (Abortion on

account of extreme poverty); Art.454 (Correction or with drawl); Art .544 (infanticide); Art. 652(2)(adultery).

When one of the following above conditions is satisfied, the court is empowered to mitigate the penalty with out restriction. In doing so, the court shall not be bound by the kind of penalty provided in the Special Part of the Code for the crime to be tried, nor by the minimum which the provision provides.

It may without restriction impose a sentence for a term shorter than the minimum period prescribed in Art.179 or substitute a less severe sentence for the sentence provided.

However the court shall be bound solely by the general minimum provided in the General Part, (Arts.90, 106&108) as regards the penalty it imposes, whatever its nature may be.

But in case of mitigation, be it ordinary (Art.179) or free (Art.180), reparation of the damage caused (Art. 101) may always be ordered. The fact that an offender is totally exempted from penalty cannot be a ground for the court not to order him to make good the damage he has done to the victim. He shall civilly be held responsible.

The same holds true to secondary penalties (Arts.121-128) and to the various preventive, corrective and safety measures (Arts 134-153).

### **7.3. Determination of Sentence in Concurrence of crimes.**

Concurrence of crime is the other special aggravating circumstance, in addition to recidivism are the conclusive presumptions that the offender is of dangerous disposition. As has been said before, a general aggravating circumstance does not of its own force justify the passing of more sever sentence & the court must ask whether the accused is really dangerous; it may. Therefore, disregard the fact that such a circumstance is present when it is satisfied that the accused is not dangerous despite the said facts.

In cases of concurrence or recidivism, on the other hand, there is a conclusive presumption that the accused is dangerous ; the court may not disregard the fact that he committed several unlawful act, contravened several legal provisions or relapsed into crime and it is in any event bound to increase the penalty.

Since recidivism is already discussed, this part is primarily dealt with the concurrence of offence as a special aggravating circumstance.

Concurrence of offence comes into being either when several unlawful acts are done in contravention of one or more article of the law, or when one unlawful act is done in contravention of several articles the law.

Concurrence of crime may be either material or notional.

### **7.3.1 Notional Concurrence**

In pursuant to Art.60 (b) (c) of the Code, concurrent criminal act is committed when the same criminal act simultaneously contravenes several criminal provisions or results in crimes with various materials consequence, or in case of 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.

In short, there is notional concurrence of offence when a person, though he performs only one act, violates several provisions of the law.

If A, a married man, rapes his sister in view of the public, the case is one of the notional concurrence, (rape, incest, adultery, public indecency). Here only one act, rape is done which contravenes several penal provisions, & the offender is subject to several provisions (penalties). Art 620(rape) covers sexual outrage, but not the relationship between the actor & the victim, (incest, Art.654) nor the marital status of neither the act,



(adultery, Art.652) nor the fact that the offence was committed in the view of the public (public indecency, Art. 639)

The phrase "... material consequence..." implies the materialization of several acts due to the first implied criminal act. For instance, if A deliberately sets fire to B's house when he knows B to be at home, and he does so either with a view to causing B's death (direct intention) or after foreseeing and accepted the possibility that B may die (indirect intention), and if B dies, A is in either instance guilty of two concurrent offences with various material consequences, death and destruction of property.

Furthermore, this situation can be envisaged when the act is done negligently. Thus, if A by negligence, causes an explosion (Art.497) in consequence of which property is damaged and/or life lost, the sentence to be passed with respect to all these offences will be calculated in accordance with the ruling governing notional concurrence, Arts. 60(1) (b) and 67.

The distinction between notional crime resulting in *violation of several legal provisions* and that of resulting in *various material consequences* is not as such clear, as violation of several legal provisions may result in various material consequences.

On the other hand, Art.60(c) is addressing about the violation of single criminal provision (be it intentionally or negligently) that results in the entailing of the same harm against the rights and interests of more than one person.

This happens, when, for instance, a person by one the same insulting statement offends several persons, or throws a bomb which kills or injures several persons.

### **7.3.2 Material concurrence**

As is under Art.60 (a), material concurrent crime is committed when a criminal successively commits two or more similar or different crimes,

Thus, if A breaks C's house, kills C, rapes C's wife, takes all the property, and sets fire on C's house, there is successive different criminal acts, i.e., aggravated robbery, (Art. 671), homicide, ( Art, 540), rape (Art,620)and arson,(Art.494,)

In case of concurrent crimes, the sentence is to be aggravated. Hence, the rules governing aggravation of penalty in case of concurrent crimes are provided for by the Code under Art.184, which will be the topic of discussion on the next part.

The principle of concurrence of crime applies in conditions in the following conditions: renewal of guilt entailing a fresh penalty, (Art.62); and guilt in case of related offences, (Art.63)

The remaining articles (Arts.64, 65, and 66) add nothing to Art.60. These provisions simply emphasize the sub –articles (1) (a) and (b) of Art.60 respectively

Art. 61 is an exception to Art.60 in the sense that the provision of Art.60 is not applicable for the conditions enumerated under Art.61.

The first of such situation is the one usually referred to as imperfect concurrence offence, which actually is not a cause of concurrence at all. This means that when the act is done in contravention of several legal provisions but only one of these provisions fully covers this act, the one provision is applicable to the exclusion of others under which the act apparently also falls. Thus a person ,who with the intention of killing someone, inflicts upon him an injury so serious that the victim dies some days later , is punishable exclusively for completed homicide, but not for attempted homicide or injury. This is so because bodily injury is a necessary element of offence murder with out which the offence murder may not be materialized, unless the offender uses other means to kill.

The same is true for the following cases: the offence rape (Art.620) consists of sexual outrage (Art.622) or bodily injury (Art.555/556) is the necessary element offences such as such as homicide (Art.539/540) and abortion (Art.547)

Thus a person who rapes is punishable exclusively for rape and not for sexual outrage; a person who procures abortion is punishable for abortion but not for bodily injury.

Another instance where Art. 60 is not applicable is the one envisaged under sub- article (2) of Art.61. As per this sub- article, a person commits a so called successive offence, and punishable for only one offence and not each of the acts he repeatedly does.

This sub -article implies repetition unlawful acts of the same nature which is punishable in itself either as an attempted or as a complete offence. For instance a person who raped a kidnapped woman every hour repeatedly did the same act and infringed the same protected right. But if he slapped another woman who tries to help a kidnapped woman, he committed a separate crime. A cashier who misappropriates ten birr a day over a period of one year commits a successive offence of breach of trust since the act which he repeatedly does are the same legally protected interest(property)

This Article also implies the presence of the same initial criminal state of mind . Acts can be done in furtherance of a single criminal intention, as in the case where A, who decides to steal three cubic meters of wood from B, finds that the cart he has taken with him for the purpose of removing the wood holds only one cubic meter and he accordingly makes three trips to take all the wood away.

Repeated act of the same nature infringing upon the same protected right may be also be done by negligence. Thus if a shepherd, who is in a habit of washing his flocks in a river , over looking the fact that the water is rendered unfit for consumption for people down stream who drink it, he negligently commits a successive offence of contamination of water contrary to Art.517

But there are several instances of negligence where the provisions of sub-article (2) do not apply For example A drives recklessly and runs B down; he stops and finding that B is only slightly injured, drives away and within five minutes runs C down . In such a case A may not be deemed to have committed a successive offence; what had happened

with B should have made him careful and there is no doubt that his running C down originates from a new act of negligence (renewal of guilt entailing fresh penalty, Art.62)

Sub- article (3) of Art.61 deals with the problem of so called non- punishable acts of execution preceding or following an offence. In the course of carrying out of a given design, a person may do several unlawful acts some of which, however, appear to be ancillary to the others in the sense that they must be performed if the design is to be fruitful at all. Thus a person who counterfeits currency does something which is purposeless unless and until the currency is put into circulation; assuring that he utters as a genuine currency which he counterfeited, the question is whether he should be punished for both counterfeiting and the uttering or for only one of these offences. If he is punishable only for one offence, another question is which of either unlawful act should be treated as an act of execution. Under sub-article the answers are as follows when a person with single end in view, commits several offences closely related with one another, guilty mind is deemed to have existed with respect to the main offence and not with respect to the acts done thereafter in furtherance of the initial criminal scheme.

In the above illustration, therefore, the doer is punishable for the counterfeiting, which is the main offence; the uttering is to be regarded as an act of execution merged by the unit of intention and purpose.

#### **7.4 Methods of Assessment of Sentence in Concurrent Crimes, Art.184**

As the methods of calculating sentence in concurrent crimes is quite different from that for general aggravating circumstance, Art.184 of the Code has adopted three methods of calculating sentence for concurrent crimes, viz., cumulating, assimilation, and aggravation.

### 7.4.1 Cumulating

Cumulating means addition of penalties. This is provided for by the Code, in Art.184 (1) (b) and it reads:

*" In case of two or more concurrent crimes entailing loss of liberty the appropriate penalty for each crime shall be determined and added. However, the duration of the total penalty may not go beyond the general maximum fixed in the General Part of this Code for the kind of penalty applied."*

Let us see the above example given under 7.2.2. If the court punishes A for 10 years rigorous imprisonment for aggravated robber, 8 years rigorous imprisonment for homicide, 5 years rigorous imprisonment for rape, and 4 years for arson, all the penalties shall be added, i.e.,  $10+8+5+4=27$ .

However, the duration of total imprisonment shall not exceed the maximum provided by the Code in General Part, Art.108, that is 25 years rigorous imprisonment, therefore, this 27 years penalty shall be reduced to 25 ( the maximum).

Art. 184 (1) (b) second paragraph is addressing the method of calculation when concurrent crimes entailing both simple imprisonment and rigorous imprisonment at the same time.

In this case, addition is also applicable, but simple imprisonment of two years shall be deemed to equivalent to rigorous imprisonment of one year

By way of illustration:

If, for instance, it is established that A kills C, and hits with a stick C's aged mother on the back, the court may calculate the sentence as follows: 10 years rigorous imprisonment for ordinary homicide Art.540: 2 years simple imprisonment for common willful injury, Art.

556(2)(c). When it is added it doesn't mean that A will be sentenced to 12 years rigorous imprisonment, but to 11 years rigorous imprisonment.

Cumulating is also applicable when an offender is found guilty of two or more concurrent crimes the punishment of which is fine. In this case, the appropriate penalty for each crime shall be determined and then added. However, unless the criminal is acted for gain (Art.92), the total amount may not exceed the general maximum prescribed in the General Part of the Code, Art.90.

#### **7.4.2. Assimilation**

Assimilation is the absorption of one or more than one penalty to another maximum penalty deserved for one of the concurrent crimes. Art.184 (1) (a) first paragraph is about assimilation, and it reads as:

*" Where capital punishment or life imprisonment is determined for one of the concurrent crimes punishable with deprivation of life or liberty or where the maximum term of imprisonment provided under the General Part ( Arts.106 and 108) is imposed for one of the concurrent crimes punishable with imprisonment of the same kind, this penalty shall, subject to the provisions of sub - article 1(c) and (e) of this Article override any other penalties that would have been imposed on the other concurrent crimes."*

For the sake of clarification, let's again see the example under 7.2.2. If the court condemns the offender to 25 years rigorous imprisonment for aggravated robbery, 10 years for homicide, and 5 years for rape, and 4 years for arson, the first 25 years rigorous imprisonment, which is maximum both in Special Part 671(1) and in General Part, (Art.108), will absorb all the penalties, therefore, the accused shall serve only twenty five years rigorous imprisonments. The same will hold true if the convicted is condemned to death penalty.

### 7.4.3 Aggravation

Contextually, aggravation is the opposite of assimilation. Aggravation, as a method of calculation in concurrent crime, is provided for by the Code in Art.184 (1) (a) second paragraph and it reads:

*" However if, instead of one of the penalties specified above, a sentence of imprisonment below the maximum laid down in the General Part of this Code has been passed for the most serious crime , the court shall aggravate the sentence on account of the other concurrent crimes in accordance with sub – article(1)(b) of this Article."*

If, for instance, in the above case, the court condemns the convicted to 20 years rigorous imprisonment for aggravated robbery, the penalty he is supposed to serve will be aggravated to the maximum ( both in Special Part and General Part of the Code) 25 years rigorous imprisonment.

### 7.5 Cumulation of Extenuating and Aggravating Circumstances

*Art.189 Cumulation of Different Extenuating and Aggravating Circumstances*

*In case of different extenuating and aggravating circumstances, the Court shall determine the penalty as provided below*

- (1) *In the event of concurrent general aggravating and extenuating circumstances the Court shall first fix the penalty having regard to the aggravating circumstances (Art.183) and then shall reduce the penalty in light of the extenuating circumstances( arts.179,180)*
- (2) *Where in case of recidivism the criminal has at the same time been convicted of concurrent crimes the Court shall first assess sentence for the concurrent crimes and then increase it having regard to recidivism*
- (3) *When there exist different types of aggravating and extenuating circumstances specified in sub-article (1) and (2) above, the Court shall fix the penalty having regard to the aggravating circumstances and then shall reduce the penalty in light of the extenuating circumstances.*

This Article governs the situation where one can possibly find the existence of different types of aggravating and mitigating circumstances. In such case the court has to fix the penalty as follows.

After the court fixes the deserved punishment, there may be both aggravating and mitigating circumstances that may vary the deserved punishment. If the court is to consider these factors, which of these factors has to be considered first? Sub-article (1) of Art.189 is an answer for the question. Therefore, the court first increases penalty by taking into account aggravating circumstances, and then reduces it in light of mitigating factors.

An offender found guilty of concurrent offence may be a recidivist at the same time. Obviously both recidivism and concurrence are special aggravating circumstances. This may happen when for instance A, who has a criminal record of attempted rape committed before 3 years, rapes his own sister X in a market place. A fresh crime constitutes a notional offence (rape, incest, and public indecency). Therefore, the court should consider both circumstances to increase penalty. In doing so, it first increases penalty for concurrent crime (Art.184) and then increases the penalty having regard to recidivism (Art 188).

The third situation envisages simply the existence of multiple aggravating and mitigating circumstances, i.e., circumstances of different type-where there is more than one aggravating and mitigating circumstances in a case.

### **Unit Summary**

Once a court picks a kind of punishment for a given offence, the next step is to fix the length of duration if it is imprisonment or the amount of fine if it is pecuniary penalty.

In fixing exact punishment, the court has to follow certain steps. A court first fixes deserved punishment that may be aggravated or mitigated depending on circumstances around the case.



One factor that may affect the deserved punishment is aggravating circumstance. Which is circumstance relating to the commission of the crime which causes the severity of punishment. There are two kinds of aggravating circumstances: general aggravating circumstances and special aggravating circumstances.

Mitigating circumstances, on the other hand are circumstances relating to the commission of the crime which do not justify or excuse the act but which may be considered as reducing the blameworthiness of the offender.

General aggravating circumstances do not of their own force the judge to aggravate the sentence. First of all the court must ask itself the accused is really dangerous to society.

However the presence of special aggravating circumstances is a conclusive presumption that the accused is dangerous and the court may not disregard these circumstances

Method of calculation of sentence in case of special aggravating circumstances is different from that of general aggravating circumstances. Hence the Code has adopted three methods of assessment of sentence for concurrent crime: assimilation, addition and aggravation.

### **Learning Activities**

1. What is aggravating circumstance?
2. What are the main differences between general aggravating circumstances and special aggravating circumstance with respect to the calculation of sentence?
3. Sincere repentance \_ Art.82 (1) (e) of the Code\_ is one of the grounds of mitigation. What do you think are the indicative of sincere repentance?
4. "The presence of aggravating circumstances is an immediate and fertile ground for the court the increase penalty." Evaluate the statement.
5. If the court condemns X to 10 years rigorous imprisonment for rape, 15 years for murder, 5 years for arson, and 3 years simple imprisonment for injury,
  - a) Which methods of assessment is an applicable one in this case?

- b) For how long X shall be sent to the prison?
- c) Would your method of assessment be different if the court condemns the criminal to life imprisonment for one of the above serious crime? Which method of assessment is applicable in this respect?

## Part II

### Execution of Criminal Sentences

#### Objective

The general objective of this part of the material is to introduce students to methods of enforcing the different penalties that have been discussed in the first Part. The specific objectives are enabling students to know, among others, how penalties such as fine, compulsory labour, imprisonment and death penalty in relation to ordinary crimes and fine and arrest in relation to petty offences are enforced in order to achieve the purposes of criminal law without affecting the fundamental constitutional and human rights principles. Moreover, this part aims at introducing students to when and how the execution of sentences can be suspended and discontinued. Further, the discussion of the execution of secondary penalties in relation to both ordinary and petty offences is another specific objective of this part of the material.

#### Introduction

The very first provision of the Criminal Code declares that punishment should be used if due notice fails to protect the State. For punishment to serve its purposes, it has to be executed appropriately. But what is *execution*? Execution is defined by Black's Law Dictionary as *an act of performing or completing*.<sup>1</sup> Hence, one can define execution of sentence as an act of *consummating* or *completing* the criminal process that is set into motion with the commission of a crime. It is an indispensable stage in the administration of criminal justice. It is the stage at which the penalties and measures imposed in accordance with any penal legislation are enforced. So, this makes the execution of sentences and measures indispensable if criminal law is to serve its lofty goal; that is, ensuring order, peace, and the security of the State, its Peoples, and inhabitants for the public good. It is also important to note from the outset that the mode of execution of different penalties is different. Some penalties are executed under severe conditions while

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<sup>1</sup> Black's Law Dictionary, p 394

others are not. Yet, the execution of any penalty should be compatible with the human dignity of the criminal.<sup>2</sup>

As soon as the offender is convicted, the court handling his case goes on to determine the appropriate penalty the convict should serve. That is to say, the second phase of court process; that is, sentencing begins. After sentencing, it is upto the law enforcement agencies to enforce the sentence provided that there is court warrant to that effect. Yet, such agencies might need some guidelines as to how to go about enforcing the sentences fixed by courts. These guidelines should be provided by courts. Hence, both the judiciary and the administration play important roles in the enforcement of sentences. The types and extents of these roles will be discussed later on in detail in relation to every penalty.

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<sup>2</sup> Article 18(1) FDRE Constitution, article 87 Criminal Code, Other international human rights documents, etc.

## **Chapter Eight: Mode of execution of penalties**

### **8.1 Execution of principal penalties for ordinary crimes**

As the discussion in the First Part has revealed, the principal penalties for ordinary crimes are pecuniary penalties (fine, confiscation and sequestration), compulsory labour, penalties entailing loss of liberty and punishment of death. This part deals with how these penalties can be enforced after they are imposed.

#### **8.1.1 Execution of fine and other pecuniary penalties**

##### **A. Execution of fine**

As discussed in the previous part, fine is one of the principal punishments courts can choose to impose, in accordance with articles 90-92, to serve the purposes of criminal law. Once it is imposed, then, it should be enforced in accordance with articles 93-97 of the Criminal Code. Generally, fine can be enforced in two ways: by exacting money from the criminal or by making the criminal work (compulsorily or otherwise). The enforcement of fine in monetary terms by making the offender pay money or by making his property (his security or surety or otherwise) seized and disposed is a rule.<sup>3</sup> If fine cannot be paid in cash, it can be enforced by allowing the criminal to render labour as provided under article 95 of the Code. This type of labour is not compulsory since there exists consensus between the court and the offender. If fine cannot be enforced as provided under articles 93-95 because the offender is either unable or unwilling to make it possible, then, the court can order compulsory labour. This opens a room for one possible argument. That is, fine can be imposed on someone who has committed a crime which entails fine as a sole penalty, or a crime that entails fine as an alternative penalty but the court entertaining his case believes that it is the imposition of fine, not imprisonment, that can serve the purposes of criminal law or by way of mitigation and

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<sup>3</sup> See article 90(1) of the Criminal Code

then convert it to labour (compulsory or otherwise) even if he lacks financial capacity. The labour can serve the purpose of criminal law and that is why the law-maker has provided for the conversion of fine to labour under articles 94 and 95. Had that not been the case, the law-maker would have provided for the conversion of fine to some other punishment such as simple imprisonment or arrest.

It is worth considering, at this point in time, that such conversion of fine to labour is not unlimited. Article 167(2) of the Code stipulates that other penalties should not be substituted for fine if the offender is young.<sup>4</sup> Hence, as one of the principal penalties, compulsory labor cannot be a substitute for fine if the young offender does not pay fine in accordance with article 93 and 94 of the Code. Rather, he/she will be subject to home or school arrest provided that the failure to pay the fine is deliberate. If it is not deliberate, the implication is that the young offender should not pay fine. For that matter, it should not be imposed without considering the capacity to pay the fine unless his/her capacity disappears after the fine is imposed such as loss of job.<sup>5</sup> Hence, the second mode of enforcing fine does not work in relation to juvenile offenders. However, the operation of the first mode of execution of fine remains intact.

As provided under article 90(1), fine should be paid in money and the payment should be made to the State.<sup>6</sup> Hence, firstly, fine should go to the State and to nobody else such as the direct victim of the criminal act. Secondly, there is no possibility of paying fine in kinds. If the offender does not have ready money, he might be given sometimes to look for the money and effect his payment. At this juncture, it is important to consider article 93, in addition to article 90(1), of the Code which provides for detailed rules applying to the recovery of fine by the State.

#### Article 93: Recovery of Fine

1. Fine shall be paid forthwith.

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<sup>4</sup> For the purpose of the Criminal Code, a young person is a person who has attained the age of nine but has not completed his fifteenth year. Read articles 53 and 56 cumulatively.

<sup>5</sup> The Labour Proclamation, Proclamation 377/2004, gives a green light that a person who has attained the age of 14 can be employed.

<sup>6</sup> The term *State* in this case seems to refer to the Federal State since the Code is a Federal Law. Hence, fine should be paid to the Federal State although Regional states might collect them in the course of exercising their delegated criminal judicial powers.

2. Where the criminal cannot pay the fine forthwith, the Court may allow a period of time for payment; such period may extend, according to the circumstances, from one to six months.
3. Where having regard to the circumstances of the criminal, it appears to the court that it is expedient so to do, it may direct the payment of the fine to be made by installments. In fixing the amount and the date for the payment of each installment, the Court shall take into consideration the actual means of the criminal. The period of payment shall not exceed three years.

Once imposed, fine need to be paid forthwith or immediately as indicated under the first sub-article. However, *immediacy* here does not necessarily mean payment *on the spot*. What it means is that there should be no delay. For example, as one can infer from the second sub-article, grace period which is less than a month can be granted. If the convict has to go to bank to withdraw money, he should be given the time necessary for that purpose and payment after the withdrawal can be regarded as *forthwith*. Similarly, if the criminal has to collect debt someone owes him, he can be allowed the time necessary for that purpose in as long as it is less than one month. The bottom-line here is the law assumes the criminal's capacity to pay fine in a short time.

On the other hand, if the convict cannot pay fine forthwith (for instance, in less than one month's time) maybe due to lack of ready money, the court that has imposed the fine can give him grace period to find money and settle his fine. Such time may extend from one month to six months. For instance, if the criminal needs to sell his property (since fine cannot be paid in kind), the time necessary for the sale of such property should be granted assuming that at least one month is required by the criminal. It should, however, be noted that such grace period is granted only if the criminal lacks the capacity to pay the fine forthwith. As a result, if he is unwilling to pay despite the fact that he has the capacity so to do, there will be other consequences (to be discussed later on) and he will not be given grace period.

The third sub-article provides for the third mode of settling fine. If the criminal cannot pay fine forthwith, although he has the capacity so to do, he will be given sometime to effect the payment. If he lacks the capacity to pay the fine, he will be given grace period of one to six months to acquire the capacity (to look for money). If, however, it is believed that he has the capacity but it is not necessary to make him pay the fine in *lump sum* or at once, the court imposing the fine may direct him to pay the fine by *installments*. For the purposes of giving such direction, the court should take into account, among others, the purposes of criminal law and the situation of the criminal. For instance, if each installment is believed to be deterrent (rehabilitative) enough, then, the criminal may be required to effect the payment by installments. This implies that fine should not be fragmented just to make its payment easier for the criminal. Its impact vis-à-vis the means of the criminal should be taken into account. At any rate, the full amount of the fine should be paid up in three years period regardless of its extent and the situation of the criminal.

Sometimes, criminals may not be willing to pay fine as provided under article 93 although they have the capacity to pay. Under such circumstances, the court that has imposed the fine can order the seizure and disposition of their properties. Article 94(1) stipulates that *whenever fine is not paid forthwith, the court may require the criminal to produce such sureties or security as is sufficient to ensure the payment of the fine within the stated period and the security or surety shall be determined having regard to the circumstances of the case, the condition of the criminal and the interests of justice*. The bottom-line is if the criminal cannot pay fine forthwith he may be given sometimes to pay it. But if the court has suspicion that he may not pay the fine, it can require him to produce guarantee for the payment of the fine. The nature and extent of such guarantee (surety or security) must be determined by taking into consideration the circumstances of the case, the condition of the criminal and the interest of justice. For instance, if the crime committed is relatively serious, the guarantee may be higher. If, on the other hand, the criminal is poor, the guarantee may be lower. All the same, in either case, the guarantee must be able to oblige the criminal to pay the fine. It should not be something that the criminal can forfeit instead of paying the fine. For instance, if property security is



produced and the value of this property is less than the amount of the fine imposed (although there are other options), the criminal can comfortably afford leaving the property to the court to order its sale. So, in the interest of justice, and whenever possible, the nature and value of the property to be seized should not be less than the amount of the fine to be paid.

Corollary to what has been said above there are two important questions that come to one's mind. If it is necessary for a court to order the seizure and disposition of an offender's property in default of payment of fine it can do so. However, the first question is whether or not it can order the seizure and disposition of a property whose value does not correspond or nearly correspond to the amount of the fine amidst other options; and the second question is whether or not the court can order the seizure and disposition of the offender's property whose value corresponds or nearly corresponds to the amount of the fine yet to which the offender has special attachment (sentimental property) in the presence of other options. For instance, can a court order the sale of someone's house instead of a car assuming that the house is more valuable to the offender than the car although the value of the car corresponds or nearly corresponds to the amount of the fine? As provided under article 87 of the Criminal Code, the imposition and application [execution] of every penalty shall be compatible with article 1 of the Code. Article 1, on the other hand, stipulates that punishment is meant to have deterrent or/and reformative effect. Hence, the application of any penalty shall be in conformity with either of the two ideals. But if the answers to the above queries are in the affirmative, then, it will be clear that the court is ordering the application of fine vindictively (retributively). Accordingly, the queries demand negative answers. That is to mean, courts should not order the seizure and disposition of offender's property whose value does not correspond or nearly correspond to the amount of fine if there are other choices. For instance, instead of ordering the seizure and sale of an offender's house, it should order the seizure and sale of his ox if the value of the ox can settle the fine. Similarly, a court should not order the seizure and disposition of an offender's property to which he has strong attachment. For example, if the property has passed to the offender through generations, seizure and disposition of such property should not take place unless there are no other choices.

But one may be tempted to argue that courts can and should be able to order the seizure and disposition of any type of property in as long as it belongs to the offender regardless of its price and the sentimental value it has to the offender.<sup>7</sup> This holds water because deterrence, which is expressly recognized under article 1 of the Code, allows over-punishment so as to give punishment a maximum deterrent effect. Nevertheless, this line of argument may not take us too far because the question here is not about over-punishment. The court may impose excessive fine if that is deemed to be in conformity with article 1; rather, the issue here is about enforcing the already imposed fine (whether it is exorbitant or not). So, to give fine a maximum deterrent effect, courts can and should reflect over-punishment in the fine they impose, not in the mode of its execution. In default of this, the order to seize and dispose an offender's property as explained above would simply amount to acting retributively. Such argument particularly fails to work when the offender is young because the clear intention of the law-maker in relation to young offenders is to reform, not to deter or retaliate against him.<sup>8</sup>

## **B. Execution of other pecuniary penalties<sup>9</sup>**

Although fine is the most important of all the pecuniary penalties, there are other pecuniary penalties recognized by the Criminal Code. The execution of these penalties will be briefly considered below.

### **Forfeiture (Confiscation)**

The concept 'forfeiture' as punishment refers to seizing the property that is used to commit a crime and the profit that is derived from such crime. This has deterrent effect as it takes away the means of committing a crime from the criminal and the benefit for which the crime is committed. Similarly, it benefits the government since the means and

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<sup>7</sup> However, regard should be had to article 98(3) of the Code that prohibits the seizure and sale of certain properties. See article 94(3) of the Code.

<sup>8</sup> See articles 53-55 of the Criminal Code

<sup>9</sup> For the discussion in this part, generally, see Dejene Girma Janka, *Commentary on the New Criminal Code of the Federal Democratic Republic of Ethiopia: A Handbook*, 2008, (Unpublished, Faculty of Law, Jimma University), p 170-172

the profits forfeited can be used or sold.<sup>10</sup> For example, by seizing contraband goods governments get much money by selling the goods. Similarly, if means like cars and ship are involved, the confiscation and sale of them will bring good income to a government. Therefore, forfeiture affect to both legally and illegally obtained properties.

Forfeiture, in its widest sense includes confiscation. But in our criminal system, forfeiture is made not to include confiscation and as such the two are separately recognized under different provisions (article 98 and article 100). In relation to confiscation, the Code stipulates that, first of all, any property that the criminal has acquired, directly or indirectly, from the commission of a crime for which he is convicted should be confiscated (Article 98(2)). No one is allowed to enjoy the fruits, direct or indirect, of his criminal act. Interestingly, the confiscation of such property should be ordered in addition to any penalty to be imposed. Besides, the court may order the confiscation of the whole or part of the other properties of the criminal if such confiscation is *expressly provided*. This refers to the confiscation of the property the criminal has acquired lawfully. For example, if a person is using his car as a means to commit crimes like transporting prohibited items the car may be confiscated. The confiscation is, nonetheless, conditional because it is possible only when certain conditions, which are listed under article 98(3), are satisfied. For example, domestic articles normally in use, instruments of trade or profession, and agricultural implements, necessary for the livelihood of the criminal and his family cannot be confiscated.<sup>11</sup> In the past, while such penalty could be imposed, no such conditions were attached.<sup>12</sup> Accordingly, criminals could be deprived of all their belongings if the crimes they committed would entail such penalty. So, the penalty had the effect of impoverishing criminals so that they would start owning property from the scratch. But one may question whether such penalty can be used today in the light of the duty to respect the human dignity of criminals.

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<sup>10</sup> Thomas J. Gardner and Terry M. Anderson, P.171-172

<sup>11</sup> For the rest of the conditions attached to confiscation, read article 98.

<sup>12</sup> This is one of the oldest penalties in our criminal system that the Criminal Code has retained. See Aberra Jambere, *The Legal History of Ethiopia (1434-1974)*, p 199

In relation to forfeiture, the Code, under article 100, provides that all benefits, material or financial, given or to be given to the criminal should go to the state. If the material benefits derived from the commission of a crime do not exist in kind, the receivers will be made to refund the values thereof. But if the victim from whom the benefits are derived is known, the benefits returned will not go to the state but to him. Therefore, ultimately, forfeiture as one of the pecuniary measures to be taken against criminals has a victim rehabilitation impact whenever possible; that is, there is going to be restorative or reparative justice.

### **Sequestration of Property**

Sequestration refers to the act of taking control of the property of a criminal. In our criminal system, such penalty can be imposed and executed only for serious crimes.<sup>13</sup> The Code stipulates that the property of a criminal who is convicted and sentenced in his absence for conspiring or engaging in hostile acts against the constitutional order or the internal or external security of the state may be sequestered in addition to any other penalty. Trial in absentia, on the other hand, is possible only if the crime committed entails rigorous imprisonment not less than twelve years or the criminal committed an offence against the fiscal and economic interest of the State and that entails rigorous imprisonment or fine exceeding five thousand [Ethiopian] dollars.<sup>14</sup> If these requirements are met, sequestration can be used as one of the pecuniary penalties. Then it should be effected in accordance with the conditions provided for confiscation<sup>15</sup>

#### **8.1.2 Execution of Sentence of Compulsory Labour**

As the discussion in Part I has revealed, there are different grounds on which the imposition of the sentence of compulsory labour can be justified. Firstly, it can be a substitute for fine;<sup>16</sup> secondly, it can be a substitute for simple imprisonment at

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<sup>13</sup> Article 99, Criminal Code

<sup>14</sup> See article 161(2) of the 1961 Criminal Procedure Code of the Empire of Ethiopia.

<sup>15</sup> See the discussion made before in relation to article 98(3)

<sup>16</sup> See articles 95 and 96 of the Code

sentencing stage;<sup>17</sup> and, thirdly, it can be a substitute for simple imprisonment at execution stage.<sup>18</sup> As far as the mode of enforcement of compulsory labour is concerned, there are somewhat different forms depending on why (and how?) it is imposed. For instance, if the sentence is imposed in accordance with article 95 and 96 of the Code, then, the enforcement takes the form of making the criminal work for the *State* or for *any other public authority*.<sup>19</sup> As far as the type of work is concerned, it is upto the court to determine in as long as the criminal is capable of performing it. For instance, the court may order a person to serve as a guard of a given kebele administration if it thinks that this can serve the purposes of punishment. On the other hand, if the criminal is a professional in a given field, then the court may order him to render service to any public authority in his field of specialization without payment therefor. This is so because one of the justifications behind the sentence of compulsory labour is using the skill of the criminal than locking him up in a prison. However, such labour should still take the form of punishment so as to achieve the purpose of punishment. In any case, although the duration of such labour can be fixed by having regard to the amount of the fine converted to compulsory labour, articles 95 and 96 stipulate that it should not last more than two years; otherwise, the criminal may be reduced to a mere slave.<sup>20</sup>

Interestingly, article 97 of the Code stipulates that the enforcement of the sentence of compulsory labor *may* be suspended<sup>21</sup> if the criminal is unable to serve the sentence due to illness (article 105), his poverty, his family obligation, his state of health or for any other good cause. Article 105 stipulates that a criminal who falls ill during the period of his sentence of compulsory labor should not be required to work until he recovers. After

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<sup>17</sup> See articles 103 and 104 of the Code

<sup>18</sup> See article 107 of the Code

<sup>19</sup> Article 167(2) of the Code prohibits the substitution the sentence of compulsory labour for fine in relation to young criminals. Hence, it is not possible to discuss how such labour will be enforced on them.

<sup>20</sup> See article 18(2) of the Constitution which prohibits enslaving persons by any person.

<sup>21</sup> It must be borne in mind that suspension here is different from suspension in the form probation or parole (to be discussed later on). In the former case, sentence is suspended because there are problems which make its enforcement either impossible or difficult. So, the enforcement of the sentence will resume upon the disappearance of the problem necessitating the suspension. In the later case, suspension aims at providing for the chance of rehabilitation and the punishment to which a criminal is sentenced will not be executed if the suspension period is effectively undergone.

his recovery, he will be required to resume doing the same work provided that he can perform the work. If he cannot do the same job, he should be given another work which is compatible with his state of health and personal circumstance. However, the provision states that the criminal may be exempted from doing any other work if it is impossible to require him to work any type of work.

Similarly, if the criminal is poor and he has to support himself, then, the court may suspend the execution of the labour. If the criminal's family obligation makes him unable to do compulsory labour the court may once again suspend his sentence of compulsory labour. At this juncture, it should be noted that scope of *family obligation* is broad and may include not only providing financial support but also other kinds of supports. For instance, if due to the sickness of her husband who was taking care of her little baby, the criminal has to attend her little baby and she cannot find a substitute for her husband, the court may suspend her sentence of compulsory labour for sometimes. The other ground of suspension article 97 explicitly states is the state of health of the criminal. If the criminal's state of health warrants the suspension of the enforcement of the sentence of compulsory labour, the execution of the sentence can be suspended so long as the criminal continues to be in that state. For example, if the criminal sustains employment injury that has incapacitated him from serving his sentence of compulsory labour, the enforcement of his sentence can be suspended.<sup>22</sup>

At this point in time, it is necessary to ponder about few points. Firstly, the list under article 97 is not exhaustive in relation to the grounds for suspension of the enforcement of the sentence of compulsory labour. The provision states that *any other good cause* can be used to issue order of suspension. Such *good causes* may include pregnancy, old age and national call.<sup>23</sup> If the criminal is a pregnant woman and she is about to delivery, then, the court may grant an order requiring the suspension of the enforcement of the sentence of compulsory labour. Similarly, if the criminal is old and becomes unable to perform the

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<sup>22</sup> Such injury can be employment injury that can be sustained while the criminal, for example, is working in a factory for the State. It can be temporary or permanent, or partial or total.

<sup>23</sup> One may argue that disablement can be embraced by the term *state of health* the article has used. But it must be known that this term does not refer to illness because that part is covered under article 105 to which article 97 makes cross-reference.

compulsory labour sometimes later, the sentence can be suspended. Further, if there is a national call and the criminal has accepted such call, the court that has ordered the enforcement of the sentence of compulsory labour can issue an order requiring the suspension of its the execution.<sup>24</sup> Therefore, it is possible to come up with as many good causes as possible to have an order requiring the suspension of the execution of the sentence of compulsory labour.

Secondly, article 97 gives courts discretionary power to suspend the execution of sentence of compulsory labour by using the verb *may* even when the grounds expressly listed exist. The only exception pertains to illness as stipulated under article 105. Meaning, if the ground necessitating the suspension is illness, the court does not have discretionary power but an obligation to order the suspension of the execution of sentence of compulsory labour. As far as the other grounds are concerned, the court enjoys discretionary power. But it can be argued that making, for instance, a person whose state of health is not fit for work (because he has sustained injury, for example) amounts to inhuman and degrading treatment and such treatment, on the other hand, is prohibited by the Criminal Code,<sup>25</sup> the Constitution<sup>26</sup> and other international human rights instruments ratified by Ethiopia.<sup>27</sup> The same argument applies if a person who is poor and cannot support himself save by working on daily basis is made to work compulsorily and without suspension. Hence, from this perspective, the use of the verb *may* does not seem tenable. However, philanthropically, it can be argued that the court will always grant an order of suspension of the enforcement of compulsory labour if the condition of the criminal warrants it; hence, there will not be any problem if they courts are given such discretionary power.

Thirdly, although article 97 authorizes the suspension of the sentence of compulsory labour, it does not provide for the duration of such suspension. Hence, one may wonder

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<sup>24</sup> This is true if the criminal has not requested the court to convert his work to serve the State during national call or if the requested is declined by the court.

<sup>25</sup> Article 87, second paragraph

<sup>26</sup> See article 18 of the Constitution

<sup>27</sup> See, for example, article 7 of the ICCPR, article 5 of the African Charter on Human and Peoples' Rights.

for how long the suspension can stay. Logically, the order of the suspension should last in as long as the good cause necessitating the suspension exists. For instance, if the suspension is granted because the criminal is pregnant and she is about to delivery, the suspension order can stay for about three months like maternity leave (one month ahead of delivery and two months after delivery). Similarly, if the suspension is due to family obligation, then the suspension can be ordered until such obligation is discharged. Further, if the state of health of the criminal has triggered the suspension, then the suspension should last until the state of health of the criminal becomes fit for performing the sentence of compulsory labour. However, the issue is not as easy as it sounds at first glance. Some of the good causes may not disappear once they happen. For instance, let us consider old age and disablement as good causes for obtaining order for the suspension the execution of sentence of compulsory labour. A person who has become old will never become adult again. Hence, suspension, assuming that it can be granted based on this ground and the sentence can also be imposed on such person, will have the effect of terminating the execution of the sentence of compulsory labour. Likewise, if the disablement the criminal has sustained for whatever reason is permanent and total, there is no way that the criminal will be able to resuming performing the sentence of compulsory labour. Hence, suspension on these and other similar grounds implies the total cancellation or discontinuance of the execution of the sentence of compulsory labor. Should, under such circumstances, the sentence of compulsory labour be converted to other sentences such as simple imprisonment? Can article 2 of the Code and article 22 of the FDRE Constitution be of any help here?

At times, compulsory labour may be imposed as a sentence from the very out set. As discussed before, such situations are regulated under articles 103 and 104 as discussed before. In this case, the enforcement of the sentence of compulsory labour is a bit different from the enforcement of compulsory labour that is imposed in lieu of fine. Firstly, if the criminal is not a danger to the society, article 103(1) provides that he can be sentenced to compulsory labour *without restriction of his personal liberty*. Yet, he has to be supervised since he is not innocent and the court will decide on the nature of the supervision that is required in the light of the purposes of the Criminal Code



(punishment).<sup>28</sup> In this case, article 103(2 and 3) provides that, depending on the decision of the court, he will be required to work at the place where he normally works or is employed or in a public establishment or public works. Interestingly, unlike a person performing compulsory labour in lieu of fine, such person will be entitled to at least three-fourth of his wage or the profits from his work. Hence, the limitations here are; firstly, the criminal will not be entitled to the full wage or profit accruing from his work. An amount not exceeding one-third (to be fixed in the judgement requiring the labour) of his wage or profits should be deducted and forfeited to the State. Secondly, the criminal will not be at liberty to change his place of work or employer or establishment or type of work at will unless he has authorization from the court. In any case, compulsory labour imposed in accordance with article 103 of the Code may last from one day to six months and sub-article (3) obliges the court to fix such duration in its judgment. One obvious reason why the condition of the enforcement of compulsory labour under article 103 is more lenient than it is under articles 95 and 96 is the gravity of the crime committed and the personal circumstance of the criminal. Criminals falling within the purview of article 103 are not dangerous to the society and the crimes they commit are also non-serious.

Interestingly, if the circumstance of the case so requires, article 104 provides that compulsory labour that is imposed in accordance with article 103 may be executed *with the restriction of the personal liberty* of the criminal. For example, if it is necessary to keep the criminal away from unfavourable surroundings such as drinking establishments or to isolate him from undesirable company such as a group of bad persons, the court can order the execution of compulsory labour with restriction of his personal liberty. Such restriction is particularly desirable for the rehabilitation of the criminal. Yet, the court should determine the nature and duration of such restriction having regard to the circumstances of the case. For instance, the court may require the criminal not to leave a particular place of work (say, Jimma University), or to remain with a particular employer or establishment (say, MEDROC ETHIOPIA), or without leaving his residential area (say, Bahir Dar) under the supervision of government officials. If any of these conditions

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<sup>28</sup> See article 103(3) of the Code

are not complied with, then, the compulsory labour will be replaced by imprisonment for the unfinished time of compulsory labour.<sup>29</sup>

As far as the suspension of the enforcement of the sentence compulsory labour that is imposed under articles 103 and 104 is concerned, the discussion made in relation to article 97 equally applies. That is to say, if the grounds that are mentioned under articles 97 are present, then, the execution of the sentence of compulsory labour *may* be suspended. But if the ground that is mentioned under article 105 (illness) is present, then, the execution *should* be suspended.

Finally, it is important to remember the discussion made previously on the possibility of using the sentence of compulsory labour even if it is not initially imposed. This happens, as stipulated under article 107 of the Code, when the enforcement of simple imprisonment that does not exceed six months is not possible or not conducive for the reform of the criminal. Under such circumstances, article 107 requires the execution of the compulsory labour in accordance with articles 103 and 104, not in accordance with the provisions of article 95-97. Therefore, the compulsory labour can be imposed with or without restriction of the personal liberty of the criminal but subject to supervision in both cases and it may extend from one day to six months. However, although it is recognized as one of the principal penalties for ordinary crimes, the use of compulsory labour in practice is very rare. As a result, it was not possible to observe how sentence of compulsory labour is executed in practice.<sup>30</sup>

### **8.1.3 Execution of penalty entailing loss of liberty (imprisonment)**

As stated before, criminal sanction affects not only the property of a criminal but also his liberty; and one of the ways of affecting the criminal's liberty is by sentencing him to imprisonment. Actually, imprisonment as a punishment is imposed only when the

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<sup>29</sup> See article 104 of the code

<sup>30</sup> On this point, I was able to interview many judges who come from different parts of the country such as Oromia, SNNP and Gambella Regions and who are degree students in the Faculty of Law of Jimma University. The identity of these judges remains unrevealed because they wanted to remain anonymous

physical separation of the criminal from the society is necessary for the protection of the society. In this case, the court that has convicted a person and sentenced him to prison terms should give warrant for his admission to a prison in default of which he will not be imprisoned.<sup>31</sup> Upon his admission to a prison, a criminal becomes a prisoner. Therefore, a prisoner<sup>32</sup> is a person who is convicted of committing a crime and who is serving a sentence of imprisonment passed against him by a court authorized by law.<sup>33</sup>

During the execution of sentence of imprisonment, a prisoner has, regardless of his conviction, the right to be treated with conditions of respect for human dignity.<sup>34</sup> This is a very broad right and it entitles a prisoner to more other rights. For instance, a prisoner cannot be starved because starving a person is contrary to human dignity (right to food). His health cannot be endangered because that is also contrary to human dignity (right to health). A prisoner cannot be made to spend nights outside because such treatment is contrary to human dignity (right to get accommodation). In general, a prisoner should be treated like a human being, not as a sub-human creature. That is why article 37 of the Federal Prisons Commission Establishment Proclamation explicitly and categorically states that *any treatment or act that is inhuman or that violates human dignity is forbidden*. After all, the treatment of prisoners should facilitate their post-release respect for law and rehabilitation towards self-supporting reintegration into society.<sup>35</sup> This implies that prisoners are not detained to have their human dignity violated but to make them fit to communal life by providing them with certain rehabilitative and/or deterrent treatments. Hence, the execution of sentences entailing loss of liberty should always be compatible with respect for human dignity. To this end, the following basic principles

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<sup>31</sup> Federal Prisons Commission Establishment Proclamation, Proclamation No. 365/2003, Article 23

<sup>32</sup> For the purpose of this material, the term *prisoner* does not include those who are not convicted for committing crimes even if they are detained together with others. For example, it is also possible to have some people imprisoned because they could not discharge their civil liabilities like contractual obligations. (In fact, such imprisonment or detention is prohibited under article 11 of the ICCPR which is part of our law via article 9(4) of the Constitution.) All the same, these types of *prisoners* are excluded from the scope of the term *prisoner* in this discussion.

<sup>33</sup> Federal Prisons Commission Establishment Proclamation, Proclamation No. 365/2003, Article 2(2)

<sup>34</sup> See Federal Prisons Commission Establishment Proclamation, Article 22(1), and the other legal documents mentioned before.

<sup>35</sup> Federal Prisons Commission Establishment Proclamation, Article 22(2)

should be adhered to by those who are in charge of enforcing sentences of imprisonment. Any execution of sentences of imprisonment contrary to one or more of these principles will not be appropriate.

#### A. **Place of execution**

The Criminal Code requires that criminals should be incarcerated in a ‘special’ prison for the protection of the society. Article 106(2) states that sentence of simple imprisonment shall be served in such prison or in such section thereof as is appointed for that purpose. This stipulation conveys that a person who is sentenced to simple imprisonment should be imprisoned and the imprisonment must take place in a prison. Hence, in principle, a person should not be made to serve his sentence of imprisonment elsewhere such as in his home or perhaps in hotels or religious institutions. Such other places are not suitable to serve the purpose(s) of simple imprisonment. In relation to the enforcement of the sentence of rigorous imprisonment, too, the Criminal Code envisions, under article 108(2), the use a prison though a different one. Rigorous imprisonment is a penalty that is used only when the crime committed is *very grave* and the criminal is also *particularly dangerous* to the society. As a result, this punishment is intended to provide for the *strict confinement* of the criminal to accord special protection to the society. This implies that, unlike simple imprisonment, there will be no possibility of converting rigorous imprisonment to other types of penalties such as compulsory labour or fine.<sup>36</sup> For that matter, article 108(2) of the Code expressly states that the conditions of enforcement of rigorous imprisonment are severer than those of simple imprisonment. Hence, some of the better treatments available to those criminals serving sentence of simple imprisonment may not be available to criminals serving sentences of rigorous imprisonment. For instance, if criminals who are serving sentence of simple imprisonment are allowed to have visitors three days a week, those serving the sentence of rigorous imprisonment may be allowed only once in a week. The condition of the prisons should also be more unfavourable than those provided for the enforcement of

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<sup>36</sup> Article 108(1) expressly provides that the strict confinement of a criminal who is sentenced to rigorous imprisonment does not affect the possibility of releasing him conditionally.

sentence of simple imprisonment. However, utmost care should be taken not to worsen conditions of enforcement of rigorous imprisonment so as to elevate it to the level of torture or inhuman and degrading treatment or punishment. Such treatment or punishment is strictly proscribed by the Constitution as well as different international human rights instruments Ethiopian has ratified.<sup>37</sup>

In any case, when it comes to the reality, sentences of simple imprisonment and rigorous imprisonment do not seem to be executed in different prisons or sections thereof.<sup>38</sup> At least at some places, all kinds of prisoners are incarcerated in the same sections or halls.<sup>39</sup> So, given the existing realities in our country, one may argue that it suffices if prisoners serving sentence of simple imprisonment and rigorous imprisonment are kept in different sections of the same prison since the condition of the enforcement of their sentence can still be made different.

## **B. Non-discrimination**

Article 24 of the Federal Prisons Commission Establishment Proclamation prohibits making any distinction among prisoners on grounds of gender, religion, political opinion, nation, nationality, or social origin. Making distinction on these grounds is by no means relevant to achieve any of the purposes of imprisonment and that is why the law prohibits discrimination based on these grounds. The discrimination that is envisaged by this stipulation is known as ‘unfair discrimination’. This means, the Proclamation does not proscribe discrimination at all but unfair discrimination. For instance, if two prisoners committed two crimes and the gravities of these crimes are different, then, the two prisoners may be treated differently in the course of executing their sentences of

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<sup>37</sup> See, for example, article 18(2) of the Constitution, article 7 of the ICCPR and article 5 of the ACHPR

<sup>38</sup> In relation to this, I made discussion with some judges who work in different parts of the country and some people who take part in the execution of sentences of imprisonment in Jimma town.

<sup>39</sup> At this juncture, one may argue that the current economic reality of our country does not allow the establishment of different prisons for the two categories of prisoners at all places. For that matter, those who are detained (not even sentenced) are sometimes or even commonly (depending on places) kept in the same place with those who are sentenced to jail. This fact shows how acute our problem of prison space is.

imprisonment. Hence, discrimination between the two may be inevitable and such discrimination, which is known as ‘fair discrimination’, is not prohibited under article 24 of the Proclamation. Because there is a legitimate purpose that can be served by making distinction in the course of enforcing their sentences. Incidentally, it is necessary to note that article 24 provides for an exhaustive list of grounds on which discrimination is prohibited. However, since article 25 of the Constitution prohibits (unfair) discrimination on any grounds, then, it can be argued that unless such discrimination is necessary for the achievement of the purposes of punishment, discrimination among prisoners on grounds mentioned or envisioned under article 25 of the Constitution is prohibited. For example, it is not possible to give good cells to those who are red while bad cells are given to those who are black. This is discrimination based on colour and article 25 specifically and unconditionally proscribes it.

At this point in time, it is worth considering that the UN General Assembly adopted a resolution, Resolution 45/111, on the *Basic Principles for the Treatment of Prisoners* in 1990. According to this Resolution *except those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the international Covenant on Civil and Political Rights and the Optional Protocols thereto, as well as such other rights as are set out in other UN Covenants.*<sup>40</sup> What this in effect means is that prisoners should be treated like non-prisoners as far as the enjoyment of their rights is concerned except those rights which cannot be enjoyed because their incarceration inhibits such enjoyment. For instance, the right to liberty and privacy cannot be enjoyed by prisoners like other persons. Yet, they can enjoy certain rights such as the right to life like any other innocent persons. Similarly, they can enjoy the right not to be unfairly discriminated against at least among themselves in the course of executing their sentences.

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<sup>40</sup> General Assembly Resolution, *Basic Principles for the Treatment of Prisoners*, [A/RES/45/111](#), Adopted at the 68th plenary meeting, 14 December 1990

### C. Segregation

Segregation refers to the act of separating and treatment of some people from others. Under article 110 of the Criminal Code, the segregation of some prisoners from others is authorized on certain grounds. Article 25 of the Proclamation also provides for the separate accommodation of prisoners. But the grounds for segregation under the two laws differ a little bit. The Criminal Code recognizes three grounds-two expressly and one impliedly-for the purpose of segregation. Under the Proclamation, however, the grounds seem broader because it is opened ended. According to the Code, segregation grounds are sex, type of imprisonment and age. According to the Proclamation, they include sex, age, offences and *similar factors*.

According to both laws, regardless of the type of imprisonment that is being served, prisoners of different sexes should be kept in different prisons or sections thereof.<sup>41</sup> They prohibit mixing up male prisoners with female prisoners and require their accommodation in different premises or sections thereof. The reason is self-explanatory: accommodation of persons of different sexes in the same premise or sections thereof may (will) entail problems such as rape. Hence, segregation can be used to avoid ‘in-prison’ offences.

The other ground of segregation both the Code and the Proclamation expressly recognize is *age*. These laws require the segregation of offenders serving the sentence of rigorous imprisonment or those who are sentenced to strict confinement from minors (criminals who have not attained the age of eighteen).<sup>42</sup> Moreover, article 36(3) of the Constitution stipulates that juvenile offenders admitted to corrective or rehabilitative institutions shall be kept separately from adults. The underlying reason here is the fact that the chance of rehabilitation of persons who have not attained the age of eighteen is very high while this likelihood of reform may be reduced or even eliminated if they are mixed up with other

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<sup>41</sup> One may wonder why the Code does not provide for the segregation of gays from others but the logic seems easy: homosexuality is not legal in our legal system. Hence, there is not need to take measures to protect gays by requiring their segregation from others.

<sup>42</sup> See article 110(2) of the Criminal Code and article 25(2) of the Federal Prisons Commission Establishment Proclamation

criminals who are serving sentence of rigorous imprisonment or sentenced to special confinement.

Further, the Criminal Code tacitly recognizes the type of imprisonment as a segregation ground. Under article 106(2), the Code stipulates that prisoners serving sentence of simple imprisonment shall serve the sentence in such prison or in such section thereof as is appointed for that purpose. Similarly, article 108(2) of the Code requires that prisoners serving sentence of rigorous imprisonment should serve the sentence in such prisons as are appointed for that purpose. The implication here is that there are two different prisons: for prisoners serving simple imprisonment and prisoners serving sentence of rigorous imprisonment. So, the two categories of prisoners should be separated and accommodated differently. As a result, the execution of the sentence of those prisoners serving of simple imprisonment should not take place in the same prison or sections thereof with those prisoners serving rigorous imprisonment. The rationales behind such segregation seem obvious. Firstly, those who are sentenced to rigorous imprisonment are particularly dangerous to the society while those who are sentenced to simple imprisonment are not serious dangers to the society. Hence, when the two categories of prisoners are mixed up, criminals serving sentence of rigorous imprisonment may spoil criminals serving sentence of simple imprisonment and consequently annihilate their chance of rehabilitation. Secondly, since the conditions of imprisonment of sentence of rigorous imprisonment is severer than that of simple imprisonment<sup>43</sup> those who are sentenced to sentence of simple imprisonment should not be subjected to the same conditions with those who are serving sentence of rigorous imprisonment. In fact, it may be said that different treatments can be granted to the two categories of prisoners although they are kept at the same place. But such argument does not to go too far because even the prison for particularly dangerous criminals by itself needs to be established in an environment which offers severe condition so as to deter/reform them but without affecting their rights to have their human dignity respected.

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<sup>43</sup> See article 108(2), second paragraph.



Related to segregation of prisoners based on the type of sentence is the segregation of prisoners on the basis of the types of offences they committed. The Criminal Code does not specifically mention this ground although one can argue that segregation on the basis of the type of the sentence a criminal serves can include it. For example, according to the Proclamation those prisoners who committed homicide can be segregated from those prisoners who committed theft and their sentence can be executed in different premises or sections thereof.<sup>44</sup>

Interestingly, unlike the Code, the Federal Prisons Commission Establishment Proclamation is open-ended in relation to the ground of segregation. It states that other *similar factors* can be used to segregate prisoners and enforce their sentence. The question then is what these *similar factors* include. For example, if certain prisoners are misbehaving and disturbing the tranquillity of other prisoners, then, such prisoners may be segregated from others and have their sentences executed in a different prison or sections thereof. That is a simpler example of the ground envisaged under article 25(2) of the Proclamation. But one may wonder whether such expression includes grounds like HIV/AIDS. For instance, in *Davis v Hopper case* the High Court of the State of Alabama declined to challenge the decision or policy of Alabama prison officials segregating HIV positive prisoners from others.<sup>45</sup> Hence, according to the decision of the court, it is justified to segregate HIV positive prisoners from others and enforce their sentences accordingly. However, the use of such ground to segregate prisoners is subject to serious challenge. It is argued that prisoners with HIV should not be treated as high security risk because of the HIV since, in a normal prison setting, the risk of HIV transmission is almost non-existent and hence they pose no direct threat to other inmates or staff.<sup>46</sup> When it comes to Ethiopia, one can argue that nothing in the proclamation seems to prohibit the use of HIV/AIDS as a ground for segregation in the course of executing the sentence of imprisonment. Yet, such argument can be challenged on the basis of at least two

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<sup>44</sup> However, this may not be the case at all times. For example, in accordance with articles 665 and 541 of the Criminal Code, the same type of imprisonment; that is, rigorous imprisonment, can be imposed whereas the crimes are different-theft and homicide.

<sup>45</sup> High Court Refuses Appeal by HIV-Positive Inmates Segregated in Alabama Prison, <http://www.thebody.com/content/art6954.html>, accessed on 05-07-2008

<sup>46</sup> As above

constitutional prohibitions. Firstly, article 25 of the Constitution prohibits discrimination on grounds such as race, age, and health status.<sup>47</sup> Hence, discrimination based on HIV status can be said contrary to this constitutional provision provided that the HIV-positive prisoner does not pose direct threat to other prisoners or prison staff. Secondly, treating HIV-positive prisoners as high security risk may amount to inhuman and degrading treatment and such treatment is also prohibited under article 18(2) of the Constitution. Thus, it can be argued that segregation based on HIV status cannot be sustained in our legal system. Accordingly, the execution of the sentences of both HIV positive and HIV negative prisoners should take place at the same place provided that there are no other grounds for segregating them.

#### **D. Standard of prison life**

The Proclamation provides that prison premises and compounds should not be hazardous to health; and prisoners shall have fresh air and sufficient light.<sup>48</sup> This provision imposes duty on prison administration in particular and the government in general not to jeopardize the health condition of their prisoners (to take care of their prisoners' right to health). As such, it is a necessary accompaniment to article 22 of the Proclamation which provides that sentence of imprisonment should be executed with due regard to the human dignity of the prisoners and also in such a way that their post-release rehabilitation is facilitated. In fact, this does not mean there should be no change in the treatment of prisoners. Under article 26(2), such change is authorized in as long as it is compatible with human dignity and prisoners' post-release reformation. For that matter, it is mandatory that the accommodation of prisoners is arranged with due regard to the good conducts they manifest and also their repentance for the crime committed. This is meant to motivate a positive spirit towards reform and rehabilitation and prisoners will be competing among themselves to get better treatment if such variation is possible.

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<sup>47</sup> Health status and age are not grounds expressly mentioned under article 25. However, they are embraced by the broader term *any other ground* the article uses. Hence, any discrimination based on HIV status is proscribed under article 25 if there is no direct threat the HIV-positive prisoners pose to other prisoners or prison staff.

<sup>48</sup> See article 26(1) of the Proclamation

The other stipulation in relation to the execution of sentence of imprisonment pertains to food and health care provisions. The proclamation states under article 27 that prisoners should be provided with *sufficient* food and *sufficient and necessary* medical treatment that, as much as possible, enable the maintenance of their health. This implies that the execution of sentence of imprisonment should not involve deprivation of food and health cares. Interestingly, the Proclamation states that the food provision should be *sufficient*. Of course, what is sufficient may be a matter of opinion because at times prisoners may want to eat three times per day while they (and other people, say, in their locality,) do not eat three times but twice a day before they were incarcerated. Moreover, the health care should be *sufficient* and *necessary*. This means, prisoners need to get medical attention whenever they need it and such attention should be necessary; that is, it should be pertinent to the needs of their problems. The underlying justification here is the fact that since they are deprived of their liberty they cannot provided themselves with food and health care to sustain their life. Hence, in the absence of such obligation on the government, sentence of imprisonment would have the effect of death penalty because to get rid of some prisoners the only thing the government has to do is denying prisoners sufficient food and sufficient and necessary health care.

In general, the standard of living that is provided in different laws particularly under article 11 the International Covenant on Economic, Social and Cultural Rights should be adhered to in the course of enforcing the sentence of imprisonment.<sup>49</sup>

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<sup>49</sup> Paragraph 5 of the UN General Assembly Resolution on the Basic Principles for the Treatment of Prisoners stipulates that prisoners retain the human rights and fundamental principles enunciated in the UDHR and other international human rights instruments their states have ratified. Hence, as a member of the UN, Ethiopia is required to live upto the expectation of the UN General Assembly with regard to the treatment of prisoners. Accordingly, it can be argued that our prisoners maintain their human rights and fundamental freedoms recognized in the human right treaties Ethiopia has ratified save those limitation which are demonstrably necessitated by the fact of their incarceration.

#### **E. Access to visitors**

Prisoners do have the right to access to visitors. This right is the right to communicate with spouses [or partners], close friends, friends, medical doctors, legal counsellors and religious leaders.<sup>50</sup> This implies that the execution of sentence of imprisonment should not take place in such a way that prisoners are cut off from the world outside prisons. Hence, to the extent possible, the enforcement of sentences of imprisonment should be in line with prisoners' right of access to visitors. Concomitantly, the Proclamation recognizes prisoner's right to impart information to his family or any other person about his imprisonment or transfer from one prison to another.<sup>51</sup> It may be necessary to transfer prisoners from one prisoner to another for various reasons such as administrative difficulties (like lack of enough bedrooms) or the behavioural change of prisoners (those who are misbehaving or those who are behaving themselves). Under such circumstances, those transferees should be able to tell anyone their whereabouts. Hence, the right to impart information about one's location or transfer is very important for the exercise of the right of access to visitors and the execution agent or prison administration should not deny its exercise.

#### **F. Obligation to work**

Under article 111(1) of the Criminal Code, it is stipulated that persons serving sentences involving deprivation of personal liberty are under obligation to work and such work is an essential element of the sentence. The Proclamation also makes the same stipulation under article 31. Accordingly, those prisoners serving sentence of imprisonment are under obligation to work. This means, execution of the sentence of imprisonment does not simply imply detaining criminals but also making them engage in different works. Criminals can be made to render different community services such as cleaning the environment, constructing roads, and doing other developmental activities as the director of prisons may instruct.

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<sup>50</sup> See article 29 of the Federal Prisons Commission Establishment Proclamation

<sup>51</sup> See article 30 of the Federal Prisons Commission Establishment Proclamation

Nevertheless, the enforcement of the obligation to work is not unqualified. It can only be enforced if the prisoner is in a good health. Similarly, the work must be suitable to the prisoners' ability. For instance, if a prisoner has not attained civil majority even if he has attained criminal majority, the kind of works required of adult criminals should not be required of him. Likewise, an old prisoner should not be required to perform works that are normally performed by adult prisoners. The other qualification pertains to reformation. The work to be assigned to prisoners should be capable of reforming and educating them. Further, as article 111(1) impliedly requires, the working atmosphere by itself needs to be conducive for the rehabilitation of the prisoners. If these requirements are not met, then, hard work will not be required of prisoners although it is an essential element of their sentences of imprisonment.

Article 111(2) of the Code stipulates that prisoners who are required to work may be entitled to remuneration for their works if their works and conducts are satisfactory. The amount of such entitlement and the manner of its payment upon the release of the prisoners will be regulated prisons regulations. So, probably, these entitlements may not be given to prisoners while they remain therein. Then, what is the relevance of such entitlements in respect of prisoners who are sentenced for life?

#### **G. Variation of conditions of imprisonment: Solitary Confinement and other variations**

With the view to achieve the purpose of rehabilitation and making criminals fit to normal life upon their release, the conditions under which sentences of imprisonment are executed may be changed in accordance with the regulations relating to prisons.<sup>52</sup> The changed conditions may be detrimental or beneficial to the concerned prisoner depending on the nature of the factors necessitating the variation of the conditions. For instance, under article 112, the Code provides for the following variations in the condition of

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<sup>52</sup> Article 112 of the Code; I tried to get this regulations with the Federal Prison Commission but in futile.

enforcement of sentences of imprisonment. Firstly, the prison administration may impose solitary confinement on any prisoners, if it is expedient so to do, upon his admission to prison. Similarly, it can impose such confinement on any prisoner who is already in prison if conditions so warrant. Yet, such solitary confinement should not exceed three months period.<sup>53</sup> Limiting the time of solitary confinement is normally required of states. For instance, paragraph 29(b) of the UN Standard Minimum Rules for the Treatment of Prisoners stipulates that the type and duration of punishment which may be inflicted on prisoners for disciplinary breaches shall always be determined by law or regulations of competent authority. In accordance with these Standard Minimum Rules, the Criminal Code enjoins that solitary confinement should not stay for more than three months period. The prison administration should determine the exact duration of solitary confinement, on case by case basis, within the three months limit after consultation with a medical doctor and, when necessary, a psychiatrist. The involvement of medical doctor and psychiatrist is necessary because solitary confinement should be preceded by the examination of the prisoner's condition; that is, whether he will be both physically and psychologically able to endure solitary confinement. Therefore, if the prison administration gets confirmation from medical doctor, and psychiatrist, when required, it can impose solitary confinement upto the period of three months.

At this juncture, it is indispensable to consider some issues pertaining to the use of solitary confinement. First of all, solitary confinement, which is also called 'prison within prison',<sup>54</sup> is defined as a punishment or special form of imprisonment in which a prisoner is denied contact with any other prisoners, excluding members of prison staff.<sup>55</sup> Such

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<sup>53</sup> Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council by its Resolution 663 C(XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, require states to fix such duration by law

<sup>54</sup> SOLITARY CONFINEMENT-PUNISHMENT WITHIN THE LETTER OF THE LAW, OR PSYCHOLOGICAL TORTURE? *Wisconsin Law Review*, Vol. 223, Number 1, 1972, page 224. at this point in time, it is worth considering that solitary confinement is different from segregation although both involve human isolation because, firstly, segregation can take place in ordinary cell while solitary confinement cannot and, secondly, those prisoners who are segregated can mix up with prisoners in the same situations, for example, female prisoners with females and minors with minors.

<sup>55</sup> Solitary confinement-Wikipedia, the free encyclopaedia, [http://en.wikipedia.org/wiki/Solitary\\_confinement](http://en.wikipedia.org/wiki/Solitary_confinement), accessed on 05-07 2008

confinement can be imposed if the prisoner is dangerous to or needs special protection against other prisoners.<sup>56</sup> For instance, if the prisoner is dangerous to his fellow prisoners or he is fighting in a prison or he is capable of leading crime groups even from within, he may be subjected to solitary confinement. On the other hand, if he is at high risk of being attacked by other prisoners such as paedophiles or witnesses, he can be subjected to solitary confinement that is known as *protective custody*.<sup>57</sup> Therefore, solitary confinement has two basic purposes: controlling the behaviour of prisoners or protecting prisoners. It is argued that the first purpose works because a prisoner who is isolated from others would use his time to repent, pray and find introspection.<sup>58</sup>

But the use of solitary confinement is subject to serious challenges. It is claimed that solitary confinement is a form of cruel and unusual punishment because the lack of human contact (and the sensory deprivation that often goes with solitary confinement) has a severe negative impact on a prisoner's mental state that may lead to certain mental illness such as depression and an existential crisis.<sup>59</sup> Meaning, solitary confinement can entail psychological damage and letting such damage happen is inhuman and unusual punishment. Moreover, although it is used as a method of discipline, solitary confinement actually creates anger, hostility, aggression and, finally, mental illness and even in some cases leads to suicide or attempts thereof.<sup>60</sup> This means, the prisoner's chance of rehabilitation will be affected seriously, if not annihilated, when solitary confinement is imposed. That is actually why it is argued that solitary confinement destroys prisoners instead of rehabilitating prisoners.<sup>61</sup> Further, solitary confinement does not remove the unwanted behaviour of a prisoner but only represses it; that means, the behaviour is likely

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<sup>56</sup> As above

<sup>57</sup> As above

<sup>58</sup> Laura Sullivan, Timeline-Solitary Confinement in the U.S. Prisons, <http://www.npr.org/templates/story.phd?storyId=5579901>, accessed on 05-07-2008

<sup>59</sup> Solitary confinement-Wikipedia, mentioned above. Upon his release, the prisoner cannot adjust to society because his emotional and mental mechanisms are adjusted to deprivation circumstances; there is little tolerance for the myriad of sensory input in normal environment. The prisoner's anxiety becomes so great that he seeks a means to return to prison with its decreased input and routine existence. See Thomas B. Benjamin and Kenneth Lux, Solitary Confinement as Psychological Punishment, *California Western Law Review*, Vol. 13, 1977, p 273, 284

<sup>60</sup> Thomas B. Benjamin and Kenneth Lux, Solitary Confinement as Psychological Punishment, *California Western Law Review*, Vol. 13, 1977, p 266.

<sup>61</sup> As above, p 288

to reappear once the confinement is removed.<sup>62</sup> Consequently, the very purpose of using solitary confinement to control prisoners' behaviours will be served only temporarily. Because of these and other reasons, some people argue that the use of solitary confinement should be abandoned while others argue for its reduced use.<sup>63</sup>

The other important issue in relation to the use of solitary confinement pertains to its duration. If the duration of the confinement is longer, its impact on a prisoner will be graver. Hence, there should exist some kind of limitation on the power of prisons to use solitary confinement indefinitely. Accordingly, some legal systems have imposed absolute limitations in relation to the duration of the use of solitary confinement while others have not. The duration may extend from hours to days like two weeks, three weeks, one month and the like.<sup>64</sup>

Now, keeping in mind the above arguments against solitary confinement, how should one see the recognition of solitary confinement by the Code vis-à-vis the constitutional proscription of inhuman and degrading treatment or punishment? It is true that the Constitution does not tolerate inhuman and degrading treatment or punishment. Different international human rights regimes also take the same stand. Similarly, the Standard Minimum Rules, under paragraph 31, provide that any cruel, inhuman and degrading punishment for disciplinary offences shall be completely prohibited. Likewise, in 1990, the UN General Assembly adopted certain basic principles in relation to the treatment of prisoners to, inter alia, humanize the criminal justice and the protection of human rights. Accordingly, the very first provision of these principles stipulates that *all prisoners shall be treated with the respect due to their inherent dignity and value as human beings*.<sup>65</sup> The Federal Prisons Commission Establishment Proclamation further emphatically forbids any treatment or act that is inhuman or contrary to human dignity. Therefore, the only sane conclusion that can be drawn from the fact of the Criminal Code's recognition of solitary confinement is that it is not considered to be inhuman and degrading treatment.

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<sup>62</sup> As above, p 266.

<sup>63</sup> As above, p 284

<sup>64</sup> As above, p 282-283

<sup>65</sup> General Assembly Resolution, *Basic Principles for the Treatment of Prisoners*, mentioned before



Probably, the way it is enforced can be inhuman and degrading and that is not recognized by the Code. For that matter, the Code unconditionally requires the application of penalties to be consistent with human dignity.<sup>66</sup> Nevertheless, if one argues that it is not only the manner of its execution but also solitary confinement *per se* is inhuman and degrading, then, that part of the Criminal Code recognizing solitary confinement will become constitutionally 'suspect'.

At any rate, leaving aside the controversy revolving around solitary confinement, it is important to note that prisoners who are subjected to solitary confinement are obliged to work. This is so because the obligation to work is an integral part of sentences entailing loss of liberty. Thus, a prisoner who is sentenced to solitary confinement should be working either alone or together with others as may be necessary. For example, if the prisoner is very dangerous to others, he may be required to work alone. On the other hand, if the prisoner is not dangerous and it is believed that making him work together with others will contribute to the achievement of the purposes of punishment, then, he will be made to work with others.

Solitary confinement *mainly* represents the worsening of the conditions of enforcing sentences of imprisonment. On the other side of the fence, article 112(3) of the Code requires the improvement of the conditions of execution of sentence of imprisonment of those prisoners who are manifesting good conduct. For instance, the Code stipulates that such criminals should be given favourable treatment as regards food, access to visitors, nature of work and leisure. A prisoner who shows good conduct may be given better access to food both qualitatively and quantitatively. Likewise, his days of visits may be increased, for example, from two days per week to four day per week. He may also be given the chance to do better jobs such as intellectual work than physical work. Further, such prisoners may be allowed to have more leisure time than others. For instance, when other prisoners are required to work for six hours a day, prisoners who manifest promising rehabilitation may be required to work only for fours hours a day. Hence, the improvement in the conduct of prisoners is more rewarding than remaining unchanged or

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<sup>66</sup> See article 87 of the Code

changing negatively. Interestingly, the Code stipulates that such better treatments may be further improved if the prisoner further improves his good conduct (character) and with the approach of his release. For instance, as the result of the further improvement of his conduct, the prisoner may be allowed to have access to food at any time he wishes, or to go somewhere and come back in a given time like in few hours or to have visitors on every days of the week, or not to be required to work at all.

Nevertheless, any such better treatment can be withdrawn or suspended for a definite or indefinite period of time in the case of abuse or persistent misconduct of the prisoner. That is to say, if the favourable treatment is not contributing to the rehabilitation of the criminal, due to his conduct, and the criminal is abusing it the more freedom he is granted or misbehaving, then such better treatment can be suspended for sometimes. In grave case of abuse or misbehaviour, and if it is deemed necessary, the prison administration may even withdraw such favourable treatment and make the prisoner join the group with no such better treatment to restore his status quo.

### **Conversion of simple imprisonment to compulsory labour**

As the previous discussion has revealed, the Criminal Code classifies sentences of imprisonment into two: simple and rigorous. Both of them can be executed by incarceration. That is, by *confining a criminal in a jail or penitentiary*<sup>67</sup> for the time courts stipulate. But, unlike the sentence rigorous imprisonment, there is another way of executing the sentence of simple imprisonment. This other way of executing the sentence of simple imprisonment is converting it to compulsory labour. The mode of execution of such compulsory labour has been discussed before in relation to articles 103 and 104 of the Code. Hence, the repetition of the same discussion in this section will be otiose.

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<sup>67</sup> Black's Law Dictionary defines incarceration as an act of *confining someone in a jail or penitentiary*, p 522

## **Members of the Defence Force**

The discussion made earlier on pertains to prisoners who are not members of the armed force. As far as the prisoners who are the members of the Defence Force is concerned, article 114 of the Code stipulates that the execution of their sentences entailing loss of liberty should be enforced in accordance with the regulations governing military prisons, camps or fortifications. Yet, in as long as there is no conflict between the regulations and the Code, some of the provisions of the Code on execution of a sentence entailing loss of liberty may be applied to prisoners who are the members of the Defence Force by way of filling gaps in the regulations.

Moreover, the Defence Force Proclamation stipulates that prison terms imposed on members of the Defence Force may be served in military or civilian prisons.<sup>68</sup> Accordingly, as long as their sentences are executed in civilian prisons, the members the Defence Force can be subjected to similar mode of execution and treatment with other prisoners. That is to say, the execution of sentences of both civilians and the members of the Defence Force may take the same form.

### **8.1.4 Execution of Death Penalty**

As the discussion in Part I has revealed, the use of death penalty as a criminal punishment is one of the most divisive issue in the field of criminal law. Likewise, the mode of its execution is very divisive. As a result, it varies from state to state. For instance, Saddam Hussein, the ex-President of Iraq, was hung publicly. In some states in the USA, death penalty is executed by using electric chair. In some other legal systems, the use of lethal injection to execute death penalty is adopted. What about the stand of the Ethiopian criminal system on the mode of execution of death penalty?<sup>69</sup> Firstly of all, death penalty becomes enforceable only after it is confirmed by the head of the state; that is, the President of the country. If the criminal is the member of the Defence Force, his death

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<sup>68</sup> Article 35(1) of the Defence Force Proclamation, Proclamation No. 27/1996

<sup>69</sup> For the discussion on the execution of death penalty in Ethiopia, see generally Dejene Girma Janka, p 176-179

penalty should be first confirmed by the Commander-in-Chief of the Armed Force (the Prime Minister) and then by the President of the country.<sup>70</sup> Secondly, it has to be carried out by a humane means within the precincts of the prison. Thus, it cannot be executed by using inhuman means such as hanging and mutilation. In fact, which means is humane and which is not is to be determined by the concerned regional or federal prison administration. Moreover, unlike the old system, the Criminal Code expressly proscribes the execution of death penalty publicly. Therefore, a criminal who is sentenced to capital punishment cannot be killed at a public place.

At this juncture, one may wonder why the Code proscribes the public execution of death penalty. After all, the only reason (at least as expressly stipulated under article 1 of the Code) why death penalty is imposed is to deter potential criminals from doing similar criminal act. But if one argues that retribution is an impliedly recognized principle of punishment in the Code, then such confined execution of death penalty may be justified. On the other hand, it is possible to advance a philanthropic argument claiming that the purposes of deterrence can still be served even if death penalty is not executed publicly because telling the public that somebody is killed because of the serious crime he has committed by itself is deterrent. However, to let the public see when it is carried out is really more chilling than telling the public that it was executed. Stated differently, what is more frightening is what we see than what we hear. So, since deterrence by its very nature appeals to the fear instinct of individuals, punishments should be enforced in such a manner that their executions initiate the fear instinct of the public. Accordingly and arguably, the prohibition of the Criminal Code in relation to the public execution of death penalty may not seem tenable in the light the principle of deterrence it has recognized under article 1.

Likewise, there is no possibility of violating the other personal rights of the criminal by killing him publicly. For that matter, the loss of all his civil rights is concomitant to the imposition of death penalty (Article 124(2)). Further, if one wants to argue that public execution of death penalty is contrary to human dignity (and hence article 87 of the Code

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<sup>70</sup> See article 35(2 and 3) of the Defence Force Proclamation, Proclamation No. 27/1996

and article 18(2) of the Constitution), the counter argument will be what is contrary to human dignity should not be the public execution of death penalty but the penalty itself. Hence, when death penalty *per se* is not challenged as contrary to human dignity, its public execution may not be logically challenged as contrary to human dignity. Furthermore, it is possible to argue that the public execution of death penalty has a pernicious impact on the conscience of the public and owing to this its hidden execution is preferable. However, the main purpose of deterrent punishment is to produce such pernicious impact on the conscience of the society in order to make sure that what the criminal did to deserve death penalty will not be repeated in the future. Therefore, it seems hardly possible to justify the prohibition of the public execution of death penalty from this perspective, too.

Interestingly, according to article 119 of the Code, death penalty cannot be executed on a person who is fully or partially irresponsible or on a person who is seriously sick or on a pregnant woman in as long as they continue to be in that state. It has to be noted that the *irresponsibility* referred to here must be the one that existed before or after, but not at the time of, the commission of the crime for which the penalty is imposed. Otherwise, a fully irresponsible person at the time of committing the crime will not be punished let alone being sentenced to death. Similarly, a person who is partially irresponsible at the time of committing a crime will be entitled to a freely mitigated penalty as per article 49(1) of the Criminal Code. As far as the sickness is concerned, the time of its existence is immaterial unless it pertains to mental illness in which case it may raise the issue of full or partial irresponsibility. The same holds water in relation to pregnancy. It may happen after or before the commission of the crime but the occurrence of pregnancy while committing a crime is barely possible.<sup>71</sup>

Finally, it is important to briefly look at article 117(3), second paragraph, of the English and Amharic Versions of the Code. The two Versions provide for different things in relation to death penalty. The English Version states:

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<sup>71</sup> Actually, the chance is not zero since a woman may first rape, as part of her plan to kill, and then atrociously kill a man as envisage under article 539 of the Criminal Code.



### **Delay in executing death penalty and its ramifications**

In recent years, there have been a number of cases in which delays in carrying out sentence of death has been described as ‘unacceptable’ and the condemned person has brought proceedings based on a claim that, because of the inordinate delay, the execution of the sentence would amount to cruel and inhuman punishment and, as such, would be unconstitutional.<sup>72</sup> Therefore, if the execution of death sentence is to be human and constitutional, it should be executed in reasonable period. Such period can neither be too long nor too short. Of course, what is *reasonable period* is difficult to decide on. Yet, at times the length of the period wasted before enforcing death penalty may be manifestly unreasonable. For instance, in *Zimbabwe v Attorney-General case*<sup>73</sup> it was decided that the execution of death penalty on four criminals after 52 and 72 months was declared to be unconstitutional. It was stated that when it was proposed, the execution of the penalty had been rendered unconstitutional in that the dehumanizing factor of the prolonged delay between the date of their being sentenced and the date of proposed execution contravenes constitutional principle and this is particularly so when the delay was accompanied by the harsh and degrading conditions under which they had been confined. Under such circumstance, the court entertaining the case opted for setting aside the death penalty and substituting life imprisonment instead.<sup>74</sup> In other case, *Guerra v Babtiste*,<sup>75</sup> death penalty to be executed about five years later was declared to constitute cruel and unusual punishment as a result of which the sentence was commuted. Hence, in those countries where there are constitutional principles (or principles of international law) prohibiting cruel and unusual or degrading punishment, delay in the enforcement of death penalty has the tendency to convert or commute death penalty to life imprisonment.

Interestingly, it is argued that problems of resources in the legal system could not be allowed to excuse long delays. Regard must be had to the inhumanity of prolonged

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<sup>72</sup> 61 South African, Journal of Criminal Law, 1997, p 313

<sup>73</sup> *Zimbabwe v Attorney-General, Zimbabwe* 1993 (2) SACR 432 (ZS), 7 South African Journal of Criminal Justice, 1996, p 406

<sup>74</sup> *As above*, p 406-407

<sup>75</sup> *Guerra v Babtiste* (Trinidad and Tobago), Nov 6, 1995, Privy Council, 1 Journal of Criminal Law, 1996, p 71-72

periods awaiting execution on death row. Such delays constitute cruel and unusual punishment.<sup>76</sup>

On the other side of the fence, the time for the execution of death penalty should not be too short. For example, in *Guerra v Babtiste*, it was declared that giving short notice of the carrying out of death penalty would amount to cruel and unusual punishment. Justice and humanity requires that a man under sentence of death should be given reasonable notice of the time of his execution.<sup>77</sup> Another purpose of such a reasonable notice is to enable the criminal to exhaust the existing chances not to be killed<sup>78</sup> such as appeal, amnesty or pardon. For example, when it comes to Ethiopia, the execution of death penalty should not be ordered until the appeal time of a convict lapses provided that the right exists.<sup>79</sup>

### **Solitary confinement**

It is also worth mentioning whether solitary confinement can be used in relation to criminals who are sentenced to death, merely because of the type of their penalty, while they are awaiting the execution of their death. Since solitary confinement is a psychological punishment and this type of punishment is unacceptable, because it is cruel and unusual per se,<sup>80</sup> it should not be imposed on such criminals merely because they are condemned to death. But if the behaviour of the criminal warrants, for instance, if the criminal is committing 'in-prison' offences, he can be subjected to solitary confinement like any other prisoners.

In Ethiopia, psychological harm to a criminal awaiting the execution of death penalty is prohibited under the Criminal Code (article 117). Moreover, the Constitution prohibits cruel and unusual punishment or treatment (article 18). Hence, solitary confinement

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<sup>76</sup> As above, p 72

<sup>77</sup> As above

<sup>78</sup> As above

<sup>79</sup> Appeal right does not exist if the case is seen by the Federal or State Supreme Court unless fundamental error of law is pleaded. See also article 185ff of the 1961 Criminal Procedure Code of the Empire of Ethiopia

<sup>80</sup> Thomas B. Benjamin and Kenneth Lux, p 287



cannot be justifiably imposed on criminals condemned to death solely on the basis of the type of penalty they are serve.

## **8. 2 Execution of principal penalties for petty offences**

Petty offences are minor criminal conducts. They are criminal behaviours resulting from the infringement of mandatory or prohibitive provisions of a law or regulation issued by a competent authority.<sup>81</sup> As a result, unlike ordinary crimes, they entail very limited and lenient principal criminal sanctions. These principal sanctions, as discussed before, are arrest and fine. The following part, therefore, deals with how these two principal penalties for petty offences need to be executed. But it is essential to keep in mind at the beginning that those principles and rules governing the execution of penalties for ordinary crimes will be applicable to the execution of principal penalties for petty offences in as long as the Code of Petty Offences or any other regulations or special laws of criminal nature do not provide for contrary stipulation.<sup>82</sup> In other words, any legal gap in relation to the execution of penalties for petty offences should be filled up by resorting to the principles included in Part I of the Criminal Code in relation to the execution of similar penalties.

### **8.2.1 Execution of arrest**

As the discussion in Part I has revealed, arrest is the only principal penalty involving deprivation of personal liberty which may be imposed when petty offences are committed. Once it is imposed, it should be executed if there is court warrant to that effect like any other penalty so that the arrest can serve its purpose. But, unlike imprisonment for ordinary crimes, arrest should be executed in special premises for detention attached to courts or police stations.<sup>83</sup> Therefore, the execution of the sentence

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<sup>81</sup> See article 735 of the Criminal Code. Unlike ordinary crimes, petty offences can be created by any competent authority.

<sup>82</sup> See article 734 of the Criminal Code

<sup>83</sup> In most case, it may be unlikely that detention premises attached to courts exist. However, there are such premises attached to police stations and they can be used for the purpose of enforcing the sentence of arrest.

of arrest cannot take place at the places where criminals who are sentenced to imprisonment serve their sentences. Indeed, the Code positively prohibits the detention of a person who is sentenced to arrest for committing petty offence in penitentiary or corrective institutions or his confinement with prisoners serving sentences of imprisonment.<sup>84</sup> Such prohibition is logical because the two categories of criminals are not in the same boat. If petty offenders are detained at the same place or confined with criminals of ordinary crimes, then, their arrest will ultimately become imprisonment although they cannot be punished by imprisonment (both simple and rigorous) for petty offences.<sup>85</sup> After all, meriting lenient punishment is the basic feature of petty offence as compared to ordinary crimes.

Interestingly, article 111 of the Code provides that criminal sentence involving deprivation of personal liberty has the obligation to work as its essential element. Nonetheless, article 748(2) of the Code clearly stipulates that persons sentenced to arrest should not be obliged to work or be entitled to remuneration. This means, although it involves the loss of personal liberty like imprisonment, arrest does not involve the duty to work. Hence, a petty offender is at liberty to say no to any demand to work by those who are in charge of executing his arrest. But if he is willing to work, he can do any job he is given; yet, he will not have the right to receive remuneration therefor.

While serving his sentence of arrest, a petty offender may receive food, mail and visitors from outside to the extent compatible with the tranquillity and general good order of the place of detention.<sup>86</sup> These entitlements are not limited in as long as the tranquillity and good order of the place of detention remains unaffected. Some of these treatments are not available to prisoners serving sentence of imprisonment.

Finally, it must be noted that the principle of segregation based on sex applies to petty offenders, too.<sup>87</sup> Thus, the place of detention for females should be different from the

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<sup>84</sup> Article 748 of the Code

<sup>85</sup> See article 746

<sup>86</sup> Article 748 of the Code

<sup>87</sup> Article 748 of the Code

place of detention for males. If the detention places are not different for various reasons, then, at least the detention sections should be different.

Another stunning stipulation in relation to the execution of arrest is the possibility of its enforcement in a home or other establishment. Article 749 of the Code states that when personal or local conditions seem to justify it, the execution of arrest may take place in the home of the arrestee or of another reliable person, or in any lay (secular) or religious institution designed for that purpose subject to adequate control or safeguard.<sup>88</sup> So, unlike imprisonment which can be executed only in a prison, arrest can be executed at different places including in the offender's own house. But since the Code says such measure can be taken if the personal or local conditions so justify, one may wonder what these personal and/or local conditions are. For example, if the criminal is old or sick, he may be allowed to serve his sentence of arrest in his own home or at any other places as mentioned above. On the other hand, if there are no detention centres attached to courts or police stations in a given locality for the execution of sentences of arrest, then, the criminal can be made to serve his sentence of arrest in any of the places mentioned before. Incidentally, it is worth raising that a person who is sentenced to home arrest is required to provide for his own up-keep. In fact, one can imagine the hardship such stipulation entails under certain circumstances. For instance, if the person is someone who lives on daily earning, how can he provide for his own up-keep while he is sentenced to home arrest since he cannot leave his home or its surrounding?

The execution of sentence of arrest in one's home seems favourable to a criminal. But there are certain limitations which can still make him feel criminal or 'prisoner'. Article 749(2) instructs that such person cannot leave his home unless he secures permission to that effect or in cases of force majeure. Interestingly, such permission can be ground only exceptionally and by court. The only grounds allowed for the permission are performance of religious duties, consultation of a physician, or for receiving indispensable medical

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<sup>88</sup> What would happen if a person does not have house (built or leased) although the conditions justifying home arrest are present? For example, what if the person lives on street? Should he become street arrest by considering the street as his home? (This is relevant because at times street may be taken as places of residence for some person)

care or appearing before a judicial authority. The duration of the leave is limited to the time strictly necessary for the purpose of the permission. In the case of force majeure, the grounds can be as many as possible. For instance, if volcanic eruption is threatening the locality where the person lives, he can leave the place provided that there is reasonable fear of volcanic eruption (for instance, if it is proximate) and others are also taking similarly measure. Moreover, if there is flood threatening his life, he can leave the place of his arrest. Similarly, if civil war breaks in his locality, he can leave his home. Further, it may be said that if someone is going to kill him, the arrestee may retreat because article 78 of the Criminal Code allows him to take the law into his hands and confront with his aggressors only if he cannot avert this aggression in any other way. All these ground may be taken as force majeure as far as the criminal is concerned. The vital question then is whether such person is required to return to his home once the force majeure ends. Assuming that everybody gets back, should he be required to get back to his home and remain arrested in his previous home? Or should it be assumed that upon leaving his home due the force majeure, his place of arrest becomes his new home and he cannot leave this new home unless he secures permission from a court provided that the grounds for granting such permission to leave are fulfilled?

### **Members of Defence Force and Young Offenders**

If the person who has committed petty offence is a member of the Defence Force and he is sentenced to arrest, then, his arrest will be executed in accordance military regulations and the place of execution will also be the place designed for such persons.<sup>89</sup>

On the other hand, if the person who has committed petty offence is young (below sixteen years of age) and he is sentenced to arrest, then his arrest should be executed in school or home and, as provided under article 161, such arrest takes place during the leisure time of the young offender. Likewise, such offender should be given specific work that is adapted to his age and his circumstances. Such requirement actually aims at keeping the young person busy. If school or home arrest is not practicable, the arrest will

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<sup>89</sup> See article 750 of the Code

be enforced under the supervision of an institution, a charitable organization or reliable person appointed by the court. Interestingly, the arrest of a young petty offender does not have to be continuous. Hence, he may be required to serve it for sometimes one day and another on another day. Nevertheless, such arrest cannot be for less than three hours at a time; nor can it exceed fifteen days intotal.<sup>90</sup>

### **Substitution of Compulsory Labour for Arrest**

Like sentence of simple imprisonment, sentence of arrest can be changed to compulsory labour if the circumstances or conditions of its enforcement so justify. For instance, when there are administrative difficulties to execute sentence of arrest as mentioned under article 107 of the Code, then, compulsory labour may be ordered. Such compulsory labour may be with or without restriction of the personal liberty of the offender and it is for the duration of the arrest; that is, in principle, from one day to three months. If there is any gain to be derived from the compulsory labour, then, an amount not exceeding one-third of the gain should go to the State. Once again, the provision of the Code on the conversion of arrest to compulsory labour does not apply to members of the Defence Force who are on duty or young offenders.<sup>91</sup>

### **8.2.2 Execution of fine**

If a person is sentenced to fine for committing petty offence, he should pay his fine. Such fine should be paid in money and it should be forfeited to the authority that has created the petty offence committed.<sup>92</sup> The payment should also be forthwith although the court may allow the convict a period not exceeding three months to settle his fine if he cannot effect the payment forthwith.<sup>93</sup> Moreover, like the payment of fine for ordinary crimes,

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<sup>90</sup> See articles 750 and 161 of the Code

<sup>91</sup> See article 751 of the Code

<sup>92</sup> Read article 90 with article 752 via article 734 of the Code. If the petty offence that is committed is created by a regional government or its organs, then, the fine should be forfeited to that government. If, however, the offence is created by the Federal government or its organs, then, the fine should be forfeited to the Federal government although its collection may be made by regional governments.

<sup>93</sup> Articles 93 and 752 of the Code

fine for petty offences can be paid by installments. In fixing the amount of each installments and the date for their payment, the court should consider the actual means of the convict.<sup>94</sup> Yet, article 752 of the Code stipulates that the entire fine should be paid up in one year time.

If, on the other hand, the convict requests to settle the fine by doing jobs, the court may grant him the request and make him settle the fine by performing work of equivalent monetary value. In accepting the request, the court should consider the purpose of punishment for petty offences and see whether the work to be performed in lieu of fine can serve that purpose. This means, such substitution of labour for fine should not take place simply to make things easier for the convict but also, and primarily, to serve the purposes of punishment.<sup>95</sup>

At this juncture, one may wonder whether similar request made by a young offender should be accepted by the court. It seems logical to argue that if the young person is capable of performing a given work and he cannot pay the fine he is sentenced to, then, the request can be granted. But can fine be imposed on young offenders if they lack the capacity to pay? Is article 167(2) of the Code relevant to this question in any way?

The other possibility of executing the sentence of fine for petty offence is by converting it to compulsory labour. Article 753 instructs that whenever fine is not paid (fully or in part) either in money or by performing work of equivalent monetary value, the court should order the convict to perform compulsory labour with or without restriction of his personal liberty. But unlike similar compulsory labour for ordinary crimes (article 96), compulsory labour for petty offences entails the payment to the convict with an amount upto one-third to be deducted and forfeited to the concerned authority. The duration of this compulsory labor should be determined by the court in accordance with the relevant general provisions (articles 96 and 103). At this juncture, it is important to note that articles 96 and 103 make different stipulations in relation to the duration of compulsory

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<sup>94</sup> The fine should not be divided into smaller amounts so as to lose its effect on the criminal. See the discussion in relation the execution of fine for ordinary crimes.

<sup>95</sup> See article 752 and 95 of the Code

labour. Under article 96, the duration can extend upto two years while under article 103 it cannot go beyond six months. So, although the court can determine the duration of the compulsory labour according to the circumstances of the case such as the amount of the unpaid fine, the upper ceilings under the two provisions article 753 refers to vary. Which one of the two provisions should be used?

### **Members of the Defence Force and Young Offenders**

Once again, if the petty offender is the member of the Defence Force somewhat different method of execution of fine is followed. Firstly, like any other person, he has to pay the fine once and forthwith. If he cannot do so, then, the fine can be deducted from his pay. Yet, such deduction cannot exceed one-fourth of his pay unless he consents to more deduction. The court ordering the deduction should fix the amount in consultation with the military authority of the convict. If the petty offender is a young person, then the fine should be paid like others. But if he intentionally fails to pay the fine, it should be converted to arrest on such conditions as the court thinks fit.<sup>96</sup>

In both cases, the conversion of fine to compulsory labour is not authorized for various reasons. In relation to the members of the Defence Force, compulsory labour should not be imposed because firstly they are already at the disposal of the State and secondly they may not observe the conditions that may be attached to compulsory labour such as restriction of personal liberty. In relation to young offenders, article 167(2) specifically prohibits the substitution of fine by compulsory labour. Is it possible to seize and sell the property of a petty offender? Read article 734 of the Code.

### **8.3 Execution of Concurrent Sentences**

Before we consider the enforcement of concurrent penalties, it is necessary to understand what is meant by concurrent penalties. Some people argue that concurrent sentence refers to the sentence that is imposed for the commission of concurrent crimes in which the

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<sup>96</sup> See article 754 of the Code

period of imprisonment equals the length of the longest sentence.<sup>97</sup> In this case, the enforcement concurrent sentence does not need special consideration because it overlaps with the discussion made earlier on as the sentence remains one. But such penalty will be aggravated since the concurrence will serve as an aggravating circumstance.<sup>98</sup> On the other hand, there are people who argue that concurrent sentence refers to a sentence that is imposed [for crimes committed after conviction for one crime] while a person is serving the penalty he is already sentenced to. For the enforcement of concurrent sentence in the second sense special consideration is necessary because there seems to exist some divergence between scholars. Some argue that concurrent penalty runs concurrently with the balance of the sentence under execution.<sup>99</sup> So, if the balance of the already under execution penalty is greater than the second sentence (the concurrent sentence), the execution of the concurrent sentence runs fully and concurrently with the initial sentence. If, however, the balance is less than the concurrent sentence, then the enforcement of the concurrent penalty shall run in part concurrently with the initial sentence. Indeed, there some who argue that the running of the enforcement of concurrent sentence should not be concurrent with the unfinished prison term. According to them, if a prisoner commits a crime while serving a sentence and he is sentenced to another punishment, the enforcement of the second punishment should not commence until the expiration of the enforcement of the first sentence.<sup>100</sup> This means, the two sentences will not run concurrently but consecutively.

In general, the general principles that are applicable to the enforcement of penalties apply here, too, whether concurrent penalties are enforced concurrently or consecutively. For instance, the enforcement of concurrent penalty should be in line with the respect for the human dignity of the criminal, all his rights should be respected to the extent possible as discussed before. The same conclusion will be drawn if one considers the Criminal Code. In fact, as one can observe from articles 184, penalty for concurrent crimes is one

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<sup>97</sup> Sentences (law), available at [http://en.wikipedia.org/wiki/Sentence\(law\)](http://en.wikipedia.org/wiki/Sentence(law)), accessed on 13 August 2008

<sup>98</sup> See for example articles 85 and 184ff of the Criminal Code

<sup>99</sup> Criminal Law-Punishment-Concurrent or Consecutive Terms, available at <http://www.atg.wa.gov/opinion.aspx?section=topic&id=12100>, accessed on 13 August 2008

<sup>100</sup> Criminal Law-Punishment-Concurrent or Consecutive Terms, available at <http://www.atg.wa.gov/opinion.aspx?section=topic&id=12100>, accessed on 13 August 2008



provided that the crimes committed entail penalties of the same nature. If, however, the crimes committed entail penalties of different nature such as fine and imprisonment, then the court can imposed both of them (concurrent sentences).<sup>101</sup> In this case, the enforcement of these penalties can be either concurrent or consecutive as the case may be. For example, if the court believes that the criminal can pay the fine while serving his sentence of imprisonment, then it an order the execution of the fine in accordance with article 93ff of the Criminal Code. This means, the enforcement of the two penalties can take place concurrently. However, if the court deems that such concurrent enforcement is not appropriate when it is seen in the light of the principles governing the execution of sentences as discussed before, then it can suspend the execution of the sentence of fine until the expiry of the execution of the sentence of imprisonment. For instance, if a person is sentenced to four months simple imprisonment and fine which equals 500 birr, the court may require him to pay the fine after his release from jail.<sup>102</sup> Therefore, under the Criminal Code, the enforcement of concurrent sentences may be concurrent or consecutive depending on the circumstances of the case.

#### **8.4 Execution of secondary penalties**

The criminal Code recognizes two types of penalties: principal and secondary. These secondary penalties are applicable to both ordinary and petty offences. The main reason why they are used is due to the belief that they have rehabilitative effect. In other words, courts should apply these punishments only if they believe that the penalties are required by the safety and rehabilitation of the criminal. Hence, the mode of execution of these penalties should also facilitate the rehabilitation of criminals. These penalties include caution, reprimand, admonishment, apology, temporary or permanent deprivation of rights, and reduction in rank if the criminal is a soldier.<sup>103</sup> That is to say, courts can give warning to criminals, appeal to their feelings by way of reprimand or admonishment, or require them to make apology publicly or even deprive them of certain right such as

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<sup>101</sup> This shows that in our criminal system, we can have concurrent sentences for both concurrent crimes and consecutive crimes.

<sup>102</sup> See for example article 93(2)

<sup>103</sup> Articles 122-128, Criminal Code

family rights, the right to elect, and the right to be elected. If the criminal is a juridical person, the secondary punishments may, in addition to the above ones, include its suspension, closure and winding up.<sup>104</sup> In any case, the execution of all of them must be in line with the purposes for which they are recognized; that are, rehabilitation and reformation.

### **Summary**

Dear reader, execution of criminal sentence is the last major step in the administration of criminal justice. It refers to the enforcement of punishments with the view to serving the purposes of punishment. Every punishment, principal and secondary, should be enforced. Yet, the enforcement of these sentences should among others take into account the rationales behind every type of punishment and the human dignity of the criminal. Thus, the manners of execution the law provides, as discussed before, for every type of punishment should be strictly adhered to.

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<sup>104</sup> Article 34 (2), Criminal Code

## Chapter Nine: Suspension and Discontinuance of Penalties<sup>105</sup>

### 9.1 Suspension of Penalties

#### 9.1.1 Rationales

In the past, all types of penalties were executed after they were imposed because execution is a natural step that comes after the imposition of criminal punishment. But, nowadays, it is believed that at times the interest of justice may require resorting to a different measure; that is, suspension instead of execution. The principal justification behind suspension of penalties is the need to rehabilitate criminals.<sup>106</sup> Suspension provides more rehabilitative opportunities than execution of sentences. Penalties may be suspended after their execution has commenced and part thereof is served or even before such execution commences. The following sub-sections deal with different types of suspension and the detailed rationales lying behind them.

#### 9.1.2 Conditional suspension of penalties

Conditional suspension of penalties, which is also known as *probation*, may be defined as a ‘procedure under which a defendant, found guilty of a crime upon a verdict or plea, is released by the court, without imprisonment subject to the provisions imposed by the court and subject to the supervision of the probation service.’<sup>107</sup> So, probation is simply a temporary postponement of the enforcement of a penalty but with the intimidation to incarceration if the conditions attached thereto are not met. In Ethiopia, the law sometimes allows the enforcement of simple imprisonment by warning criminals that they will be put behind bars if they do not observe this and that conditions. Such mode of enforcement of simple imprisonment has a rehabilitative effect on criminals and rehabilitation is recognized under the Criminal Code as one of the purposes of

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<sup>105</sup> For the discussion in this Chapter, generally, see Dejene Girma Janka, p 189-192

<sup>106</sup> See Aberra Jembre, p. 199

<sup>107</sup> Frederic A. Hussey and David E. Duffee, *Probation, Parole, and Community Field Service: Policy, Structure, and Process*, Harper and Row Publishers, New York, 1980, p. 35

punishment<sup>108</sup> since it can be a cornerstone of crime control.<sup>109</sup> Rehabilitation, if properly administered, is the best correctional program to achieve the purpose of rehabilitation of offenders and probation offers a variety of rehabilitative services unavailable in prison such as jobs, counseling, therapy and education in addition to being cheaper for enforcement purpose.<sup>110</sup>

At this juncture, it is necessary to keep in mind that probation remains punishment. It is a sentence to local community supervision by a probation agent<sup>111</sup> or it is a sort of imprisonment in a local community than in a narrow place (prison). This is so because at times the strict confinement of a person sentenced to simple imprisonment may not be necessary for the protection of the public and the deterrence and/or rehabilitation of the criminal. It should, however, be noted that such 'privilege' (that is, the privilege to stay out of prison but under intimidation to jail) is granted subject to certain conditions. Hence, a probationer is not free like other persons as failure to observe these conditions will entail the execution of the suspended penalty (the materialization of the intimidation). This is why probation is simply a temporary postponement of the enforcement of penalty.

Under the Criminal Code, probation is recognized in relation to sentence of simple imprisonment<sup>112</sup> if its use is found relevant in the light of the purposes of the Criminal Code. However, such suspension can only be granted if courts believe that it will promote the rehabilitation and reinstatement of criminals.<sup>113</sup> For instance, suspension of simple imprisonment cannot be granted if:

- A. the criminal, although he does not have previous conviction, is sentenced to rigorous imprisonment exceeding five years;
- B. the criminal has previously already undergone a sentence of rigorous imprisonment or a sentence of simple imprisonment exceeding three years and he is sentenced again to one

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<sup>108</sup> Article 1, Criminal Code

<sup>109</sup> Patrick R. Anderson and Donald J. Newman, *Introduction to Criminal Justice*, 5<sup>th</sup> ed, McGraw-Hill, New York and others, 1993, p 287

<sup>110</sup> As above, p 288

<sup>111</sup> As above, P 289

<sup>112</sup> Articles 190 and 191, Criminal Code

<sup>113</sup> Article 190, Criminal Code

of these penalties for the crime he is tried. However, if the previous simple imprisonment exceeding three years is the result of aggravation in accordance with articles 67 and 188, suspension can be granted.<sup>114</sup>

- C. the criminal appears to be dangerous. If after considering the relevant factors such as the antecedent, character, and attitude of the criminal, the court believes that there is a reasonable suspicion that the suspension will not produce the desired result, it will not grant suspension.<sup>115</sup> Stated differently, suspension is to be granted only if there is a reasonable prospect of rehabilitating and reinstating the criminal by granting the same.

As sated before, suspension of simple imprisonment should be subject to different conditions. Some of these conditions, and the factors to be taken into consideration to stipulate the conditions, are stated in the Criminal Code.<sup>116</sup> For example, the conditions may include prohibiting the criminal from taking alcohols, consorting with certain people, not leaving a given place, and reporting to the appropriate authorities. Thus, if the criminal has to benefit from the suspension, he must observe these conditions if attached to his probation. In default of observance of the conditions, the order granting the suspension may be revoked at any time. For example, if the court that granted the suspension deems that the suspension will no longer promote the rehabilitation and reinstatement of the criminal because the probationer is not observing the conditions of the probation, it can withdraw the suspension and order the execution of the simple imprisonment. Similarly, if grounds disallowing the suspension of penalties, as stated before, are discovered subsequently, the suspension order will be revoked. Further, if the criminal commits an intentional fresh crime during the period of probation, the order of suspension will be revoked.<sup>117</sup>

But if the order of suspension is to be revoked because the probationer has committed a fresh intentional crime, he should be given the right to be heard before the revocation. This is meant to check whether the commission of the crime was justified or not. For

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<sup>114</sup> Article 194, Criminal Code

<sup>115</sup> Articles 191, 192,195,196, Criminal Code

<sup>116</sup> Articles 197-200, Criminal Code

<sup>117</sup> Article 194(4), Criminal Code

instance, if a person commits a crime being in a state of necessity or self-defense, the suspension should not be revoked. If, on the other hand, the commission of the crime is not justified, the suspension will be revoked and he will not be entitled to second suspension; instead he might be subjected to an aggravated penalty for the fresh crime on ground of recidivism.<sup>118</sup>

### 9.1.3 Conditional release of criminals

Conditional release, which is also called *parole*, refers to the suspension of a penalty which is under execution subject to certain limitations (conditions). This implies that a person is once put in a jail for the crime he has committed does not mean that that is the end of everything. There is still a possibility to interrupt the enforcement of the penalty and release the prisoner on condition provided that certain requirements exist. Under the Criminal Code, such release of a criminal is recognized provided that:

- A. his conduct has been satisfactory; that is, if during his stay in a prison the criminal by his work and conduct gave tangible proof of his improvement;
- B. he has served two-third of the sentence of imprisonment or twenty years in case of life imprisonment;
- C. he has repaired, as far as he could reasonably be expected to do, the damage found by the court or agreed with the aggrieved party;
- D. his character and behaviour warrant the assumption that he will be of good conduct when released and that the measures will be effective; and
- E. he is not a recidivist.<sup>119</sup>

As far as the initiation of conditional release is concerned, the court may order the conditional release upon the *recommendation of the prison management* or upon the *request of the criminal*. The director of the prison has the duty to *recommend the conditional release of the prisoner where the conditions for granting it are satisfied*.

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<sup>118</sup> Article 200(2)(3), Criminal Code

<sup>119</sup> Articles 113 and 202, Criminal Code

Besides, if the prisoner petitions, he has the duty *to submit the petition to the court together with his opinion.*<sup>120</sup>

If a court permits the conditional release of the prisoner, it should fix the period for which the probation is to last. Normally, the period of probation should extend from two to five years. However, if the probationer was serving sentence of life imprisonment, the period shall extend from five to seven years.<sup>121</sup>

Similarly, if conditional release is granted, the court should state the conditions the probationer will be subjected to during the period of probation. If these conditions are not observed, the conditional release can be revoked and the probationer will be sent back to the place where he was serving his sentence. However, if the criminal completes the period of probation without disregarding the conditions attached thereto, his release will be final and his penalty will be extinguished.<sup>122</sup>

It should be noted that conditional release does not apply to petty offenders who are sentenced to arrest. See article 747(2) and explain why? Moreover, consider the different between and arrest to justify why arrest does not entail conditional release!

## **9.2 Discontinuance of the enforcement of penalties**

### **9.2.1 Rationales for discontinuance of execution of sentences**

Sentences are imposed does not necessarily mean that they will be executed. At times they may be discontinued either before execution commences or while its execution is underway. The reasons for such discontinuance of the execution of sentences include impossibility to execute or continue to execute, fairness, or other factors such as politics. In any case, the following part is devoted to the consideration of some of the grounds on which the execution of penalties will be discontinued.

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<sup>120</sup> Article 203, Criminal Code

<sup>121</sup> Article 204, Criminal Code

<sup>122</sup> Article 206, Criminal Code

## **9.2.2 Grounds for discontinuance of penalties**

### **9.2.2.1 Death of the convict**

Under article 215, the Criminal Code provides that the death of a convicted person *after* a sentence has been passed puts an end to the enforcement of the penalties and any measures pronounced. The rationale behind such stand is obvious. It is not possible to execute any penalty on a dead person. For example, if a person convicted of a crime was sentenced to death penalty but he dies before he is killed, then, his death penalty cannot be executed because a person has only one soul and he cannot die more than once. In the case of imprisonment, too, a dead person's corpus cannot be imprisoned. In relation to other penalties such as fine, it is not about impossibility as such but about the purpose of the punishment by itself that matters. If fine is executed on the property of the deceased, then, the fine cannot serve its purpose because the convict can neither be deterred nor rehabilitated.<sup>123</sup> Therefore, the death of a convict puts an end to the execution of any penalty.

### **9.2.2.2 Period of limitation**

Generally, period of limitation refers to a definite period of time within which something has to be done. Therefore, in relation the execution of penalties, period of limitation simply refers to a definite period of time within which penalties should be enforced. This implies that penalties imposed on someone need to be enforced in a given period of time. If the execution does not take place within such time framework, then, it will not be executed. But it must be noted that such period of limitation varies depending on the type and extent of penalties.

Under the Criminal Code, the running of period of limitation is recognized as one of the grounds for the discontinuance of the execution of penalties. Article 223 of the Code says that unless otherwise expressly provided by law, when for any reason whatsoever the

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<sup>123</sup> However, it may be argued that at least the purpose of general deterrence; that is, deterring the general public from committing future similar crime can be served if fine is executed on the property of the deceased.



sentence has not been enforced within the period of time stipulated for its enforcement, the right to enforce it will be extinguished and the sentences ceases to be enforceable. There are three important points to note here. Firstly, the running of period of limitation kills the right to execute penalty. Secondly, the running of the period of limitation further makes the penalty non-enforceable. Thirdly, the loss of right to enforce penalty and the non-enforceability of a given penalty after sometime works only so long as there is no contrary stipulation made by law. This means, if there is any law that expressly proscribes the barring of the execution of penalty for a given crime, then, the execution of sentence in relation to that crime will always remain possible; that is, the right to enforce the sentence will exist forever and the sentence also remains enforceable forever. So, the crime committed here is not subject to the statute of limitation. Can you think of any law that expressly prohibits the application of the statute of limitation to the execution of sentence imposed for the commission of a given crime in Ethiopia? Do you think that article 28(1) of the Constitution is one of the laws envisaged under article 223(1) of the Criminal Code?

It should be noted that the Code imposes duty under article 223(2) on appropriate judicial and administrative authorities to observe period of limitation on their own initiative. This means, the defence of period of limitation against the enforcement of penalties can (and should) be raised by courts, prosecutors or convicted persons. At this juncture, it is necessary to bear in mind that the running of period of limitation before the execution of a given penalty does not erase or prohibited the entry of the criminal's conviction into the judgement register of the criminal.<sup>124</sup> Hence, statute of limitation prohibits the execution of penalty but not the entry of the conviction into a criminal's record.

In the Criminal Code, two types of period of limitations have been recognized: ordinary and absolute. Ordinary period of limitation can be extended if its running is stopped whereas absolute period of limitation cannot be although there are stoppages. Article 224 of the Code provides for the list of ordinary period of limitations. It states that ordinary period of limitation of the penalties or measures shall be as follows:

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<sup>124</sup> See article 223(3) of the Code

- a. thirty years for death sentence or a sentence for rigorous imprisonment for life;
- b. twenty years for a sentence for rigorous imprisonment for more than ten years;
- c. Ten years for a sentence entailing loss of liberty for more than one year;
- d. Five years for all other penalties or measures.

The provision further stipulates that the execution of lighter penalties will be barred at the same time with severe penalties in the event of concurrent penalties. For example, if someone is sentenced to five years rigorous imprisonment for committing rape, in principle, this penalty will not be executed after ten years have lapsed. If, however, he committed homicide as a concurrent crime with the rape and he was sentenced to 11 years for the homicide and five years for the rape, then, the execution of the penalty for the rape will be barred only after twenty years have elapsed because the period of limitation for the severer penalty controls the duration of the execution of the penalty for the crime of rape. Not only that; with regard to those crimes in relation to which the period of limitation works, the limitation of the principal penalty entails the limitation of secondary penalties or measures. Such limitation further applies to the confiscation of property related to the fine as well.<sup>125</sup>

As far as the calculation of ordinary period of limitation is concerned, article 225 of the Code makes the following stipulation. Firstly, the period starts running from the day the sentence has, being final, become enforceable. If enforcement has already commenced but it is interrupted because the convict has evaded it, the calculation begins from the date of the evasion. If the execution of the sentence is interrupted because the convict has been granted suspension but the suspension is revoked for whatever reason, the period of limitation starts running from the time the resumption of the execution of the sentence has been ordered. In the case of concurrent crimes, the calculation of the period of limitation depends on the calculation of period of limitation for the most severe penalty.

Another relevant point worth considering pertains to the stoppage of the running of period of limitation. The operation of period of limitation may be stopped under two

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<sup>125</sup> Article 223(2) of the Code

circumstances: when there is suspension or interruption. Firstly, the limitation of penalty or measures will be suspended if:<sup>126</sup>

- a. The penalty or measure cannot be carried out or continued under the provisions of the law as long as such impediment subsists;
- b. the convict enjoys the benefit of suspension or probation or was granted time for payment;
- c. the convict is imprisoned pursuant to a penalty entailing loss of liberty or an order of measure.

For example, if penalty or measure cannot be executed because the convict is seriously sick although the illness was caused deliberately to avoid the penalty or measure, period of limitation will not run against the enforcement of such penalty or measure. If it has started running, it will be suspended until such time that the person becomes fit to serve his sentence. Moreover, the running of period of limitation will be suspended if the convict is on probation or released on condition. In this case, action has been taken against him although the type of action is not strictly speaking the same with imprisonment. Further, if the convict is already serving another sentence or is detained in accordance with law, then, his period of limitation cannot run because it may not be possible to execute another penalty or measure against him simultaneously in as long as the imprisonment continues.

Secondly, the running of the period of limitation will be stopped if it is interrupted. Article 227 instructs that limitation shall be interrupted by any act for the enforcement, or aiming at the enforcement, of the penalty performed by the authority responsible for such enforcement. In other words, if the process to execute the penalty is set into motion, then, the period of limitation that has commenced running will be interrupted. But such process will interrupt the limitation only if it is taken by the authority responsible for the enforcement of the penalty. For example, if the court that has sentenced a criminal to jail term sometimes later issues warrant of imprisonment, such measure can be taken as an appropriate order capable of interrupting limitation period. This is so because no one can be imprisoned without court warrant to that effect. Hence, to some extent courts are

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<sup>126</sup> Article 226 of the Code

also responsible for the enforcement of penalties. On the other hand, if the warrant was already given but the executive organ has not yet taken measure to enforce the penalty or measure, the limitation will be interrupted as soon as measure for or aiming at the execution of the sentence is taken. But one may question how far this measure should go to interrupt the limitation. For instance, should an act aiming at enforcing sentence of imprisonment be notified to the convict to be able to interrupt the limitation with regard to such penalty? Or, does it suffice if the responsible organ makes some sort of efforts to start enforcing the sentence?

With regard to absolute period of limitation, article 228 of the Code states that the limitation of penalty or measure shall in all circumstance be final when the ordinary period of limitation discussed before is exceeded by *one half*, save when, during this period, the criminal showed that he is dangerous by committing an intentional crime punishable with at least rigorous imprisonment. To put it differently, if a given penalty or measure is not enforced during the ordinary period of limitation, it will be barred by limitation. However, the running of ordinary period of limitation can be stopped either by suspension or by interruption. However, the running of absolute period of limitation cannot be stopped by these facts. Thus, if the ordinary period of limitation for the execution of a given penalty is ten years, its absolute period of limitation is 15 years (ordinary period of limitation plus half of this limitation) regardless of any suspension or interruption during this period and such penalty cannot be enforced after the expiry of the fifteen years since the penalty became finally non-enforceable.

Although absolute period of limitation is not subject to stoppage as a result of suspension or interruption, there still is a factor that can stop its running. Such factor is imputable to the convict himself. If the convict manifests his dangerousness by committing another crime before the absolute period of limitation becomes operative, then, the running of such period of limitation can be interrupted. But, the crime has to be intentional and it must entail rigorous imprisonment to stop the running of absolute period of limitation. Accordingly, if the convict commits while absolute period of limitation is running a crime by negligence, the running of absolute period of limitation will not be stopped.

Likewise, if the crime committed is intentional but it does not entail rigorous imprisonment or the crime is justifiable or excusable, the running of the limitation period will (and should) not be stopped. What is the ramification of not letting benefit a dangerous convict from absolute period of limitation?

### 9.2.2.3 Pardon

Pardon in relation the execution penalties or measures refers to an act of exonerating a person or group of persons from the consequence of committing crimes. The obvious consequence of committing a crime is criminal punishment and a person who is pardoned will not be punished. Or, if his punishment has begun, then, it will be interrupted or discontinued. But why is pardon given to someone convicted of committing a crime?

It is argued that pardon may be granted fully or partly and full pardon serves two purposes: remedying miscarriage of justice and removing the stigma of a conviction (and disabilities entailed).<sup>127</sup> But unlike amnesty which implies the abolition of the offence committed, pardon implies only forgiveness.<sup>128</sup> In one case, the following points were made in relation to the effect of pardon:<sup>129</sup>

Pardon restores civil rights and terminates legal consequences flowing from the conviction, but the record of guilt cannot be obliterated. Even a presidential pardon with a recital of the belief that the offender was innocent will not eradicate the judicial finding of guilt. Although pardoned, one is still a convicted criminal because the executive has no power to direct the judiciary to forget the fact of the prior conviction; it is a record of the court that cannot be erased or blotted out.

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<sup>127</sup> *Amnesty and Pardon-Clemency Powers in The Twentieth Century*, <http://law.jrak.org/pages/507/Amnesty-Pardon-Clemency-powers-in-twentieth-century.html>, accessed on 17 July 2008

<sup>128</sup> As above

<sup>129</sup> *People v Carlesi*, 154 App. Div. 481, 139 N.Y. Supp. 309, (1914), *Miami Law Quarterly*, 'Criminal Law-Pardons-Habitual Offender Laws', p 148

The bottom-line is pardon does not entail the eradication of the crime committed but it simply brings about forgiveness for the crime committed. Hence, if a convicted criminal is serving his sentence, the enforcement of the sentence will come to an end if he is fully pardoned. Then, he will be treated as though he had served his sentence fully, not as someone who has never committed a crime, whether he has started serving his sentence or not.

In Ethiopia, too, pardon can be granted and the main purpose of granting pardon is to ensure the welfare and interest of the public.<sup>130</sup> For instance, article 229 of the Criminal Code states that *unless otherwise provided by law, a sentence may be remitted in whole or in part or commuted into a penalty of a lesser nature or gravity by an act of pardon of the competent authority*. Moreover, it provides that *pardon may apply to all penalties and measures whether principal or secondary and whatever their gravity, which are enforceable*. As one can see from this stipulation, the effect of pardon in our criminal system is wide. Firstly, the Code states that it can be granted in whole or in part. Secondly, it may be granted remit or cancel penalty in whole or in part or to mitigate or commute the penalty imposed to a lesser penalty. Therefore, full pardon that is granted to remit penalty or measure has the capacity to abort the execution of the penalty or measure if it is already underway, or to prevent the commencement of the execution of penalty or measure if it has not yet begun.

Interestingly, as the above excerpt reveals pardon does not entail the abolition of the crime committed even when it is granted in full. The Criminal Code also takes the same stand. Under article 229(2), it provides that *pardon shall not cancel the sentence the entry of which shall remain in the judgement register of the criminal and continues to produce its other effects*. Accordingly, pardon does not make a pardoned criminal innocent but only relieves him of his criminal liability. As a result, if he commits another crime in the future, his record in relation the crime for which he has been pardoned can be used to assess his sentence for his new crime or to treat him like a habitual offender.

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<sup>130</sup> Article 11 of the Procedure of Pardon Proclamation, Proclamation No. 395/2004, *FEDERAL NEGARIT GAZETA OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA*, 10th Year No. 35, ADDIS ABABA-17th April, 2004

In Ethiopia, who does have pardoning power? Can the office of prime minister give pardon? What about the President? Parliament? Council of Ministers? Courts? Can pardon be granted in relation to all kinds of crimes? See article 28 of the FDRE Constitution and articles 3, 4 and 10 of the Procedure of Pardon Proclamation, Proclamation No. 395/2004.

#### 9.2.2.4 Amnesty

The term *amnesty* comes from Greek word *amnestia* which means *oblivion*. As such, it refers to a legislative or executive act by which a state restores those who may have been guilty of an offence against it to the position of innocent persons. Indeed, amnesty is more than pardon in as much as it obliterates all legal remembrances of the offence.<sup>131</sup>

In international law, amnesty refers to an act of effacing and forgetting past offenses granted by the government to persons who have been guilty of neglect or crime. The term is applied to rebellious acts against the state. Amnesty differs from pardon in that amnesty causes the crime to be forgotten, whereas pardon, given after a conviction, exempts the criminal from further punishment. Amnesty is usually granted to a class of criminals or group of persons who may have committed a crime and is offered in order to restore tranquility in the state.<sup>132</sup>

Therefore, in the expression of Blackstone, amnesty is an act that makes a criminal a 'new man'. It is an act that changes or cleans the past. Nothing in relation to the offence committed is to be remembered in the future. If there are criminal records available in relation to those who are granted amnesty, those records will be erased, rendered valueless or void. So, for all practical purposes and in the eyes of the law, a criminal who has been granted amnesty will be treated as though he had never committed the crime in respect of which the amnesty is obtained. But one may wonder why amnesty is granted to criminals. Indeed, there are different reasons why amnesty is granted. First, it may be

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<sup>131</sup> Amnesty, <http://en.wikipedia.org/wiki/Amnesty>, accessed on 17 July 2008

<sup>132</sup> Microsoft Encarta Encyclopaedia Deluxe, 2004

granted when the authority decides that bringing citizens into compliance with law is more important than punishing them for past offences. Second, amnesty avoids expansive prosecutions especially when massive numbers of violators are involved. Third, it promotes violators to come forward who might otherwise have eluded authorities. Fourth, it promotes reconciliation between violators and society. Fifth, in countries like France, amnesty may be granted to reduce prison populations.<sup>133</sup> These are some of the purposes to be served when amnesty is promulgated or granted to ‘criminals’.

The Criminal Code provides for the possibility of granting amnesty by making the following stipulations under article 230.

- (1) Unless otherwise provided by law, an amnesty may be granted in respect of certain crimes, or certain classes of criminals, either absolutely or subject to certain conditions or obligations, by the appropriate competent authority, when circumstances seem to indicate that such a measure is expedient.

.....

- (2) .....

When a sentence has been passed an amnesty cancels it as well as all its other consequences under criminal law. The conviction shall be presumed to be non-existent and the entry deleted from the judgement register of the criminal.

Pursuant to the first sub-article, in principle, amnesty can be granted by competent authority to certain criminals or in respect of certain crimes. Such grant can be conditional or unconditional. However, there are certain criminals or crimes in relation to which amnesty cannot be granted. For instance, criminals who commit crimes against humanity cannot be granted amnesty. Thus, crimes against humanity such as genocide, torture, slavery, forced disappearance, summary execution, etc are crimes in respect of which amnesty cannot be promulgated.<sup>134</sup> Who is the competent authority to grant amnesty? Can the House Peoples’ Representatives promulgate amnesty? What about the Council of Ministers?

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<sup>133</sup> *Amnesty*, mentioned before, and *Amnesty and Pardon-Clemency Powers in The Twentieth Century*, also mentioned before

<sup>134</sup> See article 28 of the Constitution



The second sub-article of article 230 regulates the effects of granting amnesty. As it can be understood from the provision, amnesty has a sweeping effect. If it is granted, amnesty turns the clock back and makes things that have happened not happened. Because, after all, the conviction of a person who is granted amnesty by itself will be presumed to be non-existent and its entry into the judgement register of the criminal will be deleted. This means, if sentence is passed against such person and its execution is underway, then, the execution of such sentence should come to an end outrightly. If its execution has not commenced hitherto, it will never commence because enforcing the sentence against a person who has been granted amnesty is as good as, in the eyes of the law, punishing an innocent person. Therefore, if a person who is granted amnesty in relation a given crime commits another crime, he will be treated as though this crime was his first crime. Hence, he will not be regarded as a recidivist since nothing exists in relation to him in the judgement register of the criminal.

#### **9.2.2.5 Parole**

As discussed before, parole can be granted to some criminals who can fulfill the requirements attached thereto. When it is operative, then, parole has the effect of discontinuing the enforcement of penalty. But at the beginning, unlike other grounds, parole discontinues the execution penalty only temporarily. Such discontinuance will become permanent only after sometimes and on condition that the parolee effectively undergoes his period of parole. Therefore, parole, if effectively undergone, has the effect of discontinuing the enforcement of penalty (imprisonment) like the other grounds discussed before such as pardon.

#### **Summary**

Dear reader, normally once penalties are imposed they should be enforced and the enforcement should take place without interruption. Nevertheless, at times, the enforcement of penalties may be suspended or interrupted for overriding reasons. The laws we have right now allow us to suspend the execution of certain penalties in relation

to certain categories of criminals with the view to facilitate their rehabilitation. Moreover, criminals who have already commenced serving their sentences may be granted conditional release if this is deemed necessary to achieve the objective(s) of the criminal law. Furthermore, the enforcement of punishment may be suspended or discontinued if, inter alia, the criminal is pardoned, granted amnesty, dies or the enforcement of the penalty is barred by limitation if limitation applies under the circumstance.

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