DEFENSES IN CRIMINAL PROCEEDING WITH PARTICULAR REFERENCES TO INSANITY AND INTOXICATION

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Introduction

The criminal law is a social tool that is employed in seeking wide variety of goals. To attain it's variety of goals the criminal law imposes sanctions that would be the expression of society disapproval, disappointment towards the act committed. In so doing, the criminal law is not like the Ten Commandments which imposes absolute rule with no exception. Punishment can only be effective with men who can understand the signals directed at them by the criminal code, who can respond to the warnings, who can feel the significance of sanctions imposed up on violation. As a result, in order not to strive to attain in attainable goals the criminal law permits exceptions to its rules and avoids the use of criminal sanctions in many situations. It provide defense for the commission of prohibited act and also stipulate that responsibility is a prerequisite to criminal liability.

The concept of criminal responsibility is, by its very nature, an expression of the moral sense of the community. In western society, the concept has been shaped by two dominant value judgment that punishment must be morally legitimate, and that it must not unduly threaten the librates and dignity of individuals in its relationship to society. Thus, there is strong conviction that punishment should be imposed against those whose act is the product of free will and evil intent.

The paper gives emphasis to defense in general terms by making its particular reference to the defense of insanity and intoxication. The term insanity as used in modern science has not really a definite meaning which indicates exactly the state of mind or psychological set up of a particular person; it is still vague term and does not indicate a particular
state of mind and condition. This partly emanates from the dependency of the law up on terms of another discipline, whose members are in profound disagreement about what these terms mean. Another cause is that the definition given by the law and the expert on the field is different. The difference resulted in inability to develop harmonies relationship. As a result, the test used in different jurisdiction to the task of selecting out certain persons who should not be subjected to criminal sanction differ in scope of application and efficiency.

As the doctrine of *mensrea* become more refined, it was also realized that the fact of defendant intoxication has implication on defendant responsibility. Criminal responsibility can only assessed when a man through free will a man elects to do evil, if he is not a free a gent, or is unable to those or to act voluntarily, or to avoid conduct which constitutes the crime, he is out side the postulate of punishment. However, the responsibility of offenders in state of intoxication is the most controversial issue. This is so because the position that intoxication can negative the required mental state has been admitted. Intoxication impairs perception, release inhabiting. That being the case, should intoxication be a defense to violation of prohibited act? The issue presents a choice of individual right to a void punishment for his un-intended act or from society perspective, if individual intoxication jeopardize the society.

Taking these as a basis of study, the paper attempts to probe the legal regime governing these conditions in Ethiopia perspective. As a general objective the paper emphasize on the position taken by the criminal code and the newly included aspects of the above discussed concepts will be given more emphasis.
Chapter one begins with the very concept of defense in general and tries to see defense from different angles. To this end, it starts with the premise underlying the concept defense and gives definition to the term defense; it also discusses the conceptual distinction between defenses by classifying acts in to excusable and justifiable acts.

Chapter two is devoted to the defense of insanity. The chapter discusses insanity in legal sense, the rational and purpose of the defense. In order to have a clear understanding of the test of the code, it also discusses the tests in common law, as they shade insight to the experience of others and as they are the most debated tests in criminal law. Then it tries to discuss the test of insanity in the criminal code by emphasizing on the newly included aspects. To this and, it starts form it's antecedents.

Chapter three deals with the defense of intoxication. It discusses the conceptual difficulty of the criminal responsibility of offenders who commit an act while in state of intoxication. It also tries to see the issue by classifying it in to voluntary and involuntary intoxication by emphasizing the approach taken to resolve the problem. Further it discusses the stand of the criminal code with regard to responsibility of such offenders.

The last chapter deals with the administration of the defense and disposition of the defendant. In this respect, it attempts to address issues like burden of proof, confinement and treatment. It also discusses the standard of release and the effect of expert evidence, which raises the defense.

Finally, the study will be completed with concluding remarks and recommend actions.
CHAPTER ONE

1. DEFENSE IN GENERAL

The broad purpose of the criminal law is to make people do what society regards as desirable and to prevent them from doing what society considers undesirable. Since the criminal law is formed in terms of imposing punishment for bad conduct, rather than granting reward for good conduct, the emphasis is more on prevention of undesirable than encouragement of the desirable. When the criminal law regards such deed as sufficiently harmful it prohibits it and seeks to prevent its occurrence by imposing penalties. Again it is only such event as the law has chosen to forbid, that are the basis of criminal liability; a deed may consist of harm and destruction of property and even life, but it is not a crime unless a circumstance is such that it is legally prohibited. The criminal law forbid acts by defining them but the commandment of the criminal law are not absolute. So in certain cases conventional law ceases to operate and gives a way to its rule to be broken, that is, the law permits exception to its rule.

The exceptions are justified on different grounds as it will be seen in the next sections. If a man is justified in breaking the law in self defense, defense of some one else, in defense of property or arrest of felon that is because we think on balance it is better. If we think he is excused because he is insane, of diminished capacity or subject to provocation that is because he is the victim of extraordinary pressure internal or external.

This position has been taken because the purpose of punishment will not be served by punishing such offenders. For example take the defense of self defense. For ‘A’ intentionally to kill ‘B’ is murder and the various purpose of the criminal law will be served by convicting and punishing for his crime of taking life. But if ‘A’ killed ‘B’ to prevent ‘B’ from killing him, then the defense of self defense come to play because the purpose of criminal law best served by ‘A’s acquittal: “authorizing a potential victim to kill his assailant constitutes a sanction which may be assumed to fulfill punitive,
restraining, and deterrent function in to the service of the community’s objectives to safeguard human life.

Having said so, in order to have a clear understanding of the exceptions to the prohibition of the criminal law it is important to define these exceptions. In criminal case guilt of the defendant must be proved in order that a given offense may be imputed to a given person, certain personal and internal requirement must be satisfied so that a given person can be held criminally liable for a given criminal act. When the prosecution tries to prove guilt the defendant can assert his own defense showing his actual innocence or other justifications.

A defense can be defined as an opposing or denying of the truth, validity or sufficiency of the plaintiff’s compliant; also what ever is alleged pleaded, or offered in evidence as sufficient to defeat an action wholly or in party. The definition implies that a defense may be a denial of the allegation of the plaintiff. The denial of the commission the act with which the accused charged. The above definition also envisages that defense can be a new factual allegation. Black’s law Dictionary defines defense in more precise term:

“That which is offered and alleged by the party proceeded against in action or suit as a reason in law or fact why the plaintiff should not recovered or establish what he seeks”

The definition implies a defense can be substantive law defense when it provides as a reason in law. It also implies factual denial as the case where one element of the offense is missing or denial of the commission of an act.

Defenses in general have the effect to exculpation from criminal liblity. They have the effect of defusing the allegation of the plaintiff. A defense therefore, is any reason having the effect of defeating the allegation made by the plaintiff. In this sense a success- fully interposed defense would result in exoneration from normal consequence that would follow the commission of prohibited act.
In order to have a clear understanding of defense it is important to draw tight demarcation between defenses. Defenses either deny the commission of an act or accept the allegation to be true but assert new factual allegation to avoid liability. At this instance, it is important to note that lawful acts are not defenses because they are not crime at all, as they are not contrary to the law. A lawful act is an act which a person in legally obliged or authorized to do. Because of the existence of this duty or right the act, which would other wise be criminal, is legitimate one for which the doer is not punishable since it does not constitute an offence.

The first category of defense involves denial of an act when the defendant claims actual innocence. In addition to these defense of general applicability, there are substantive law defense which are applicable to individual crime, in which case it is common for the statute defining the crime to contain exception or proviso setting forth the defense. For example an abortion statute punishing the use of instruments or drugs on women to procure miscarriage may contain a provision exempting one who does the act on doctor’s order to save a women life. In a sense too it is a defense to a crime that one or more required element of the crime is missing as where the defense to murder prosecution is the victim died accidentally or of natural causes or by suicide.

Here we are going to deal with the second type of defense which is same times called defense proper. Some of these are substantive law defenses which negative guilt by canceling out the existence of some required mental elements of the offence. For example certain kinds of mistake of fact, mistake of law, intoxication, or insanity are properly viewed as proof that the defendants, hasn’t the mental state required for crime charged. Certain other defense such as self defense, necessity do not negative any of the element of the crime but instead go to show some matter of justification which is a bar to imposition of criminal liability. These are defenses which are called an affirmative defense. The supreme court of Florida in the 1990 case of state Vs colon defines an affirmative defense. It states that ".....an affirmative defense is any defense that assumes the compliant to be correct but raises other facts if true, would establish a valid excuse or justification or a right to engage in the conduct in questions."
The definition implies affirmative defenses are defense which acknowledge the act alleged to have committed to be true, but provide reason for the commission of an act. It involves new factual allegation with out denying the allegation of the plaintiff. Such defense does not concern with the element of the offense at all, it concedes the compliant to be true but provide a valid excuse or justification. For example if the defendant interposed the defense of self defense to a charge of murder he is not contending that the victim is died other than as a result of his actions or he lacked the mental state which suffices for the crime of murder, rather he is claiming the existence of circumstance which in the eyes of the law, make a killing a justifiable one on policy grounds.

A fundamental distinction between affirmative defenses and other defense lies in accepting or denying the allegation of the prosecution. In either case if successfully interposed the defense would result in acquittal of the defendant. However this may not be necessarily true in case of affirmative defense like insanity. The actual consequence of a successful insanity defense is quite different from any other defense, in every other case, a successful defense result in acquittal and out right release of the defendant, but with insanity defense the probable result is commitment of the defendant to a mental institution until he has recovered his sanity. In case of an affirmative defense the actus rea is committed, but for one or another reason moral blame cannot be attached. The objective of the criminal law cannot be served by punishing such offenders. Therefore, even though affirmative defense concedes the act to be true, it set forth a reason why the compliant should not be granted.

Though the above features are common to all forms of affirmative defenses it is important to note the existence of classification between affirmative defenses based on the perception of the society to the acts. Defenses can be broadly classified in to excusable and justifiable act. To justify is to show that same overriding interest makes what was done right full, good, desirable, or at least tolerable. Excuse express compassion. Does the difference matter? Is important that we know whether we acquit someone on the basis of one or another? In either way the defendant will be acquitted, of course, but it may be important. So it
is important to note some basic features of excusable and justifiable act in order to have a clear understanding of affirmative defense. However, to make exhaustive classification is unimaginable on the part of the writer. This so because it would be out of the scope of the paper and there is also resource limitation. As a result the writer limits himself to some basic features of the acts.

2. Excusable Acts

A wrong doing may be attributed to a particular person and once a crime is attributed to a particular person the person will be accountable or responsible for his act. Nevertheless, even where the commission of the crime is attributable to a particular person there remains a question to be answered; can one fairly be blamed in particular situation he acted?

A factor that negate responsibility and attribution in these broader sense enjoy a particular labels: they are called excuse. Excuse can be defined as the act which is offered as a reason for being excused or a plea offered in extenuation of fault or irregular deportment. The definition implies that excuse conduct rest on the assumption the actor did wrong but the actor should be excused for that particular circumstance.

When a defense operates as excuse the culpability of the accused conduct is negated and he is excused from the normal consequence of conviction and sentencing that would follow the commission of the prohibited act with the requisite mensrea. Criminal culpability requires showing an act is committed knowingly or negligently. In
this sense excuse negates the mental element which is necessary for the crime and avoids blame worthless. German theorist have been careful to treat excuse as a basis for subjective or personal immunity, namely, for denial of attribution to a particular subject who claims the personal immunity. According to them excuse conduct is still contrary to law or it is wrongful but not properly subject to punishment, So the conduct alleged to have committed remains wrongfully but such offenders can not fairly be held criminally responsible.

Excuse conduct considered as an act which is deplored, but psychological state of the agent rules out public condemnation and punishment. The conduct considered as wrong full but the particular condition in which the actor was acting avoids social blame. Excuse focus on the actor not on the act alleged to have committed. They do not constitute exception or modification to the prohibition norms, but a judgment in particular case that an individual can not fairly be held accountable for violating the norm.

The principle of duress is fundamentally different from the principle of necessity, although often confused with it because cases of duress resemble cases of necessity. Why are they fundamentally different? To acquit someone on grounds of necessity is to approve, support, and applaud what he did. It is to find his action justified. To acquit him on ground of duress is merely to sympathize, understand, and commiserate with what he did. It is to find his actions excused.
Whether a conduct falls on the category of an excusable or justifiable conduct from the point of the accused it is irrelevant. Regardless that the conduct is considered excusable or justifiable the accused will be acquitted. However, when one looks from different angle the classification is important. In the first place it is thought that conduct which is merely excusable may be resisted by a person threatened by it whereas if the conduct is justifiable it is thought, in some circumstance it may not be resisted. Since those defenses which fall under the category of excusable conduct remains wrongful, one who resists the defense is justified. For instance, one who defends himself from the aggressor of insane person is justified by way of self-defense. Further it is possible to be convicted of aiding and abetting an accused who is acquitted by reason of excuse but not one who is acquitted by reason of justification.

Thus one who encourage or accomplice with the aggressor of excusable conduct may be held criminally liable even though the actual aggressor is excused. In general excusable conduct serves as a shield protecting the accused from conviction and sentencing which would follow as a normal consequence of committing prohibited act.

Excusable defense comprises defense such as insanity, intoxication, mistake and duress. The actors in such cases are not in a situation society can attach blame. The guilt of offenses against any law whatsoever necessarily supposing willful disobedience, can never justly being imputed to those who are
incapable of understanding it, or conforming themselves to it. For example, when insanity stem from and are the product of mental disease or defect, moral blame shall not attach and hence there will not be criminal responsibility.

In our criminal code insanity and intoxication are discussed in relation to criminal responsibility. Mistake and coercion are dealt in a relation to criminal guilt under the title justifiable and excusable act. In relation to coercion the assumption is that person who is compelled to act in violation of the law know that he does wrong but the compulsion deprives him a freedom of choice. In this sense he is in incapable at the time of his act of regulating his conduct according to his understanding, form psychological point of view he in the same position as an irresponsible person and this, incidentally, explains why the French penal code deals at the same time with insanity and coercion. In our case, since insanity requires biological defect it is impossible to deal coercion with insanity. This indicates that it is for convenience the code treats excusable defense under different title.

3. Justifiable acts

The reference made hereinbefore to the case of excusable defenses throw some light to the case of justifiable acts. Justification as a defense in criminal law, means , maintaining or showing a sufficient reason in court why the defendant did what he is called up on to answer or just cause on or law full excuse for the act, reasonable excuse.
Where the defense operates as justification the wrongfulness of the accused conduct is negated as his conduct considered to have been an appropriate course of conduct in circumstance in which he found himself. 33Wrong fullness consists in no more than absence of claim of justification. 34 Successfully interposed justificatory defenses operate to cancel the unlawfulness of the accused conduct. Claims of justification represent conflicting norms that collide with the prohibition of the offence and under the circumstance prevail over the prohibition. 35 Conducts is wrongful if it violates the rule defining on offence and there is no applicable conflicting principle that generate a justification for the conduct. 36 Accordingly, defense operate as a justification when it override or defeat the definition of an offence under the circumstance in which it is committed. Justification converts the nominal wrong fullness of an act in to one which is compatible with the legal norm. 37 The conduct negative the definition of the offence.

The nature of justification is that the claim is grounded in an implicit exception to the prohibitory norm. 38 That is the definition of an offence involve implicitly within it exceptions to the prohibitory norm. For instance, the implicit rule governing homicide includes absence of self defense and other possible justification. 39 Unlike excusable defense which does not involve exception or modification to the prohibitory norm justifiable defense involve exception to the prohibitory norm. In other word justification defense create conflict with the prohibitory norm and the conflict is resolved by the defeat of the prohibitory norm.
There is controversy regarding the norm of justification. That is whether one who acts in justifying circumstance needs to have acted with view of performing justificatory act or the objective circumstance of the aggressor is sufficient to constitute justification. One view hold hat claims of justification should apply regardless of whether the defendant knows of justifying circumstance or not. The holders of the view insist that norm of justification is purely objective, it does not require the subjective state of mind for it’s rationale to hold.

Accordingly the determinative factor of justification is whether the aggressor is under objective circumstance that would trigger a response of justified conduct. The subjective belief of the actor of justified conduct is irrelevant. The position has been criticized on ground that, it is tempting to deny the distinction between offence and defenses and treat defenses simply as negative element of the prohibition. In such a case the doer of justified conduct and also the aggressor would be justified or sufficient to block convections. Further it is criticized on ground that such analysis leads to a conclusion that both sides are justified and neither side are acting unlawfully, but if neither sides are acting unlawfully, neither side could be justified.

On the other hand, the subjective view of justification hold that the determinative fact or of justification is what the actor believes. What should be taken in to consideration is the belief of the actor at the time of committing justifying conduct. According to the defender of this views justification over rides the offence because it
represents a good reason for inflicting the harm that the offence represents. This reason must be a reason those which act under justifying circumstance possess. The subjective view of justification seems plausible and it has both statutory and legal support. For instance, necessity and self defense are classified as justifiable defenses. The doer of necessary act is justified if he acts with view to averting serious danger. The criminal code employs a subjective view of justification. A person is not justified in ground of necessity merely because he is objectively in a situation involving serious and imminent danger: whatever he does in such situation is not justifiable unless he does it with view to avoid this danger.

In sum, when the defendant's act is justified it is worthy of approval, when the defendant's act is excused worthily of sympathy but not approval. That being the case the difference between justification and excuse is not the hard and fast, cut and dried open and shut issue, as one writer noted their difference isn't quite like water versus wine more like water versus ice.

The classification and treatment of defense differs in different jurisdictions. In France, for example, the only distinction is between justification and excuse. The first one comprises acts required or authorized by law, legitimate defense and, though this is disputed, necessary act and acts done with the consent of the injured party, while the second ones, are similar to the circumstance which the Ethiopia code regards as a general and special extenuating circumstance. Under the Swiss law, acts
ordered or authorized by law, acts done in legitimate defense and necessary acts, all fall under the category of lawful acts. 49

The criminal code takes the position that justifiable and excusable acts are not punishable. Accordingly, it prescribes under article 58 (2), a person who intentionally commits an offence is always punishable except where he acts in circumstance providing him with justification or an excuse. 50 The circumstance providing justification or excuse is defined by law. As a result the said question is always to be decided with reference to the law for there is no justification or excuse, what ever their reason, other than those provided by law which ever this law may be.

The existing criminal code provides three classes of acts namely, lawful acts, justifiable acts and excusable acts. In the previous code all of them were treated under the same title. The existing criminal coder separate out lawful acts and treat excusable and justifiable acts under the same heading. The separation is appropriate because lawful acts should not be dealt in the part of the code concerning criminal guilt as they do not involve any guilt.
End notes for chapter one

1. Wayne R. Lafava and Austin W. Scott (jr), Criminal Law. (West publishing co. st. paul. Minnesota, 1972) P.27

2. Ibid

3. Id. 47


5. Ibid

6. Wayne R. Lafava and Austin W. Scott, supra note 1 p. 269.


10. Wayne R. Lafaya and Austin W.Scott (jr), supra note 1 P.46

11. Ibid

12. Ibid

13. Ibid


15. Wayne R. Lafava and Austin W.Scott, supra note 1, p. 269.


17. Leo katz, supra note 2, p.29

18. George p. Fletcher, supra note 9.p.83


21. George p. Fletcher, supra note 9.p.84
23. Ibid
24. Michael J. Allen, supra note 21, p. 345
25. Leo Katz, supra note 2 p. 65
27. Ibid
28. Ibid
29. Howkins, plea of the crown, Quoted in Steven Lownstein, *Material for the Study of Ethiopian Penal Law*, (Faculty of Law, Haileslassie I University, 1965) P. 165
30. Graven Phillippe, *An Introduction to Ethiopian Penal Law*, (Faculty of Law, Haileslassie I University, 1965) p.193
32. Michael J. Allen, supra note 21. P.346
33. George P. Fletcher, supra note 9.p.79
34. Id 80
35. Gerhard O.W Mueller and William S. Laufter, supra note 23. p. 104
36. George P. Fletcher, supra note 9. p.103
37. Ibid
38. Id. 104
39. Id 103
40. Ibid
41. Ibid
42. Ibid
43. Ibid
44. Ibid
45. Graven Phillippe, supra note 31, p 178
46. Leo Katz, supra note 2. p 66
47. Graven Philippe, supra note 31. p. 178
48. Ibid

CHAPTER TWO
INSANITY DEFENSE

1. Definition, Rationale and purpose

There is no comprehensive definition that would be applicable to all legal tests used in different jurisdictions. This emanates from the nature of the subject, which can not be defined in general terms.

Insanity can be defined as a severe mental disease or disorder that makes a person not responsible for his or her actions. The definition is inadequate in that it simply state insanity as a severe mental disease. It will not have applicability in those jurisdictions in which insanity may emanate from organic disease having the effect of deprivation of mental soundness. It can also be defined as any degree of mental unsoundness resulting inability to distinguish between right and wrong, to control the will, foresee the consequence of an act, make a valid contract and manage one's own affairs. Though the definition is more precise than the former, it still attaches more emphasis on mental aspect. Balk's law dictionary defines it in general terms: It states that.

"....... insanity means such a perverted and deranged conditions of the mental and moral faculties as to render the person incapable of distinguishing between right and wrong, or to render him at the time unconscious of the nature of the act he is committing, or such that, though he may be conscious of it and also of its normal quality, so as to know that the act in question is wrong, yet his will or volition has been so completely destroyed that his actions are not subject to it but beyond his control. The first rationale forwarded for the defense of insanity is that insanity negates mensrea required for an act to be criminal one. This is to say
that a person who is insane can not form the requisite mensrae required
for the offense. The rationale is criticized on the basis of even without the
defense; a defendant can argue that he is not liable from the beginning
because he did not have the requested mensrae. This would mean that
an element of the crime has not been fulfilled and therefore the
defendant is not liable. It has been suggested if the rationale of the
defense is this, it should be abolished and the defendant should simply
argue that the defense is mensrea. 5 The second reason is that the
defense is available even in strict liability offenses where no mensrae is
required. This is observed from the fact that" ..... Substitution of a
mensrea inquiry for insanity defense would not result in exoneration for
a defendant charged with crimes requiring no specific mental element. 6
The second and generally accepted rationale of the defense is that the
defendant is blameless and that punishing such a person would be
contrary to the purpose of punishment envisaged under criminal law.7

The purpose of the defense is that the defense makes it possible to
separate out for special treatment certain persons who would other wise
be subjected to the usual sanction that may follow. This purpose goes
together with the blamelessness rationale. The defense is there to
"discriminate between the cases where punitive correctional disposition
is appropriate and in which medical custodial disposition is the only is
kind that the law should allow. 9This purpose is embodied in criminal
law because the defense of insanity under the criminal law does not
result in out right acquittal.

2. TESTS OF INSANITY IN COMMON LAW

The question what degree of insanity, mental defect, and mental disease
renders a person blameless for acts or omission and what tests should
be used in determining legal and moral liability has been debated for
years. Despite the debate no comprehensive rule which would be applicable to all jurisdictions has been adopted. For these reason states differ in tests to be applied to determine insane offenders which would be out of the purview of criminal sanction. Insanity as a subject can be studied by classifying tests in different jurisdiction from different angles. But making exhaustive discussion is impossible due to source limitation. So this section study only tests in common law as they shade in sight to tests in different jurisdictions and as they are the most debated tests.

2.1 THE M. NAGHTEN OR RIGHT WORONG TEST

The right and wrong test which is the oldest and most widely used to determine the question of insanity was formulated by judges in England in answer to question for worded by the House of Lords. The right and wrong test that emerged from the M.Naghten case become the prevailing standard and test for insanity. It states that.

"...defendants are not legally responsible for their acts if at the time of the act they were laboring under such a defect of reason, from disease of mind as not to know the nature and quality of the act he was doing, if he did know it he did not know he was doing wrong."

Under the test a defendant is irresponsible if as a result of a mental disease he lacks cognitive capacity to know right from wrong. The test has been criticized. It is claimed that the rule over emphasize on intellectual aspect of mental activity and its failure to recognize the role played by volition, the emotion and the conscious. So it is criticized on ground that it does not consider individuals capacity to control their act. The other criticism is that it is based on an entirely obsolete and misleading conception of the nature of insanity since insanity does not only or
primarily affects cognitive or intellectual faculties but affects the whole personality of the patient including both the will and the emotions. 12 The third criticism relates to the term “wrong” found in the test. It is claimed that the term wrong is not defined and it is not known whether it refers to legal or moral wrong. 13. Another reason is that disease of mind has not been defined, which created problem as to the type of disease to be includes in the test. 14 Despite the M.Naghten test is consistently criticized, it remains the most widely accepted and standard of insanity in common law.

2.2 THE “IRRESISTIBLE IMPULSE” TEST

The second test is developed by the state of Alabama, in 1886 in person V, state case. 15 The irresistible impulse has never been viewed as a substitute for the M.Naghten but only as additional defense in case of mental disorder. 16 The test states that

“If the defendant is found to have had a mental disease that prevents control of personal conducts, even where knowing the difference between right and wrong, the defendant should be found not guilty because of insanity.”17

Under the test a person is irresponsible though he knows that a given act is wrong he irresistibly driven to commit. It takes in to account the volitional capacity of the offender, that is, whether one control his act or not, the test played a gap filling role to M.Naghten test as to capacity to regulate a given conduct. The test is has been criticized on ground that it is described as applicable to those crimes which have been suddenly and impulsively committed after a sharp internal conflict” and is said to give no recognition to mental illness characterized by brooding and reflection. 18 The second criticism relates to the term “irresistible.” It is claimed that the test is too restrictive because it requires a total impairments of
volitional capacity. Other feel that the supplementing of M.Nahgten with the "irresistible impulse test broadens the insanity defense too much. 19.

2.3 THE PRODUCT OR DURHAM TEST

The product test was formulated with the assumption that the M.Naghten and the irresistible impulse were inadequate tests. 20 The product rule, on the other hand, would give psychiatrists greater leeway to put a fact finder all relevant information concerning the character of the defendant's disease or defect, while leaving the jury free to perform its traditional function of applying "our inherited ideas of moral responsibility to the circumstance of individual case.21 The test states that

"an accused is not criminally responsible if his unlawful act is the products of mental disease or defect" 22.

Under the test where acts which violate the law stem from and are the product of a mental disease, or defect moral blame shall not attach and hence there will not be criminal responsibly. The test is a broader test than the previous test. 23Since the term disease and defect is not defined, these terms mean in any given case whatever the expert witnesses say they mean. 24 In the test there should be causal relations hip between the mental abnormality and the act. Individuals will be held liable if there was no causal relationship between the unlawful act and a mental disease defect as the phase "products of a mental disease or defect indicate.

The critics of Durham saw it as "non rule" in that it provided the jury with no standard by which to judge the evidence and left the jury entirely dependent up on the testimony of the experts. 25 The criticism is based on the ground that it is too broad and places too much discretion in psychiatrists, rather than in the jury, for determining the legal issue of
insanity. The problem was as a result of lack of clear guidance as to what constitute mental disease and mental defect. Latter on the problem was solved by giving of definition as to what is included in the term mental disease or defect and by giving guidance to words like “mental disease and product.” 26

2.4 THE A.L.I: SUBSTANTIAL CAPACITY TEST

The substantial capacity test is a test proposed by the American law institutes (ALI) model penal code. 27 The institute formulated a test which constitutes the improved version of the M.Naghten and irresistible impulse test. It state that:

“A person is not responsible for criminal conduct if at the time of such a conducts as a result of mental disease or defect he lacks Substantial capacity either to appreciate the criminality or Wrongfulness of his conduct or to conform his conduct to the requirement of the law.”28.

As used in the article, the terms mental disease or defect do not include an abnormality manifested only by repeated criminal or other wise anti social conduct.

The article requires only lack of substantial capacity. This is clearly a departure from the usual interpretation of M.Naghten and irresistible impulse where by a complete impairment of cognitive capacity and capacity of self control is necessary. Under the substantial capacity test, even if defendants ‘knew’ what they had done, the defendants are permitted to attempt to show that they did not have the “substantial capacity to conform his or his conduct to the requirement of the law. 29

As to paragraph (2) of the A.L.I test the drafter man explained that it” is designed to exclude from concept of “mental disease or defect, the case of
the so called "psychopathic personality." They noted that the psychopath differs from the normal person only quantitatively and not qualitatively and that there is considerable difference of opinion on whether psychopath should be called disease.

The test is not without criticism. It is claimed that the A.L.I test is only a refurbishing of the two traditional rules and it has failed to bridge a gap that now exists between legal and psychiatric thinking. The other relates to the use of the words substantial capacity and appreciate do not have a common absolute meaning.

The above tests are tests which are used in common law to screen out individual who are irresponsible for their acts. In this day and age with great advancement in medical science as enlightening influence on this subject, the tests which the courts apply to determine whether a defendant is sane enough to be held responsible for his misdeeds is not uniform in different jurisdiction. The term insanity as used in modern science has not really a definite meaning which indicate exactly the state of mind or psychological set up of a particular person, it still vague term and does not indicate particular state of mind and condition. Modern science has made a progress and distinguished between abnormality of mind, mental responsibility, emotional instability, gross personality disorder and so forth. With this development in the study of human mind clarification of the issue involved remain impossible. This is so because the concept is not an issue that concerns lawyer only. It involves a Variety of extra legal elements.

This is not simply a matter of expert's disagreement on opinions or on diagnosis, which is often occurs but disagreement at threshold on what their own critical terms mean. As a result criminal law in different countries use different test to identify insane offenders. The above tests in common did not escape criticism. Despite wide geographical
distribution numerous other similar articles in various codes has overwhelming similarity. In general such analysis helps us to have a clear understanding of our code’s test. And the next section will discuss the legal test of insanity in our criminal code in detailed fashion starting from its antecedents.

3. INSANITY DEFENSE IN ETHIOPIA

3.1 THE HISTORY OF INSANITY DEFENSE IN ETHIOPIA

The insanity defense in Ethiopia has shown different stages of development. Long before the existing criminal law, the insanity defense has been incorporated, in Fetha Negest. Since Fetha Negest, which was in use for along time, the legislature of Ethiopia adopted different codes. In each code substantive rules of criminal law governing insanity has been subjected to change and improvement. The change and improvements are important in order to go with the development of legal science. Under Fetha Negest the issue of insanity was discussed along with intoxication in part that deals with those who don’t deserve punishment. The Fetha Negest mentions insanity when it stipulates punishment for homicide, under the part those who do not deserve punishment drunkard, the demented and feeble minded are included and considered as those who do not have the use of reason. Despite the fact that the Fetha Negest considered insane as an individual who do not have the use of reason, it did not exonerate criminals under such condition from punishment, rather it prescribed a lighter punishment than punishment that would have been applicable on those who had the use of reason. Further the application of this rule is limited to cases of homicide.

23
The 1930 penal code, on the other hand, views insane criminals in different way. It provides that

"a man who is unable to know properly the edicts of the law of the government by reason of his being mentally deficient through illness or any other cause shall have seven tenth of the sentence remitted," \(^{36}\)

Under the code insane individuals are persons who do not know the law of government as a result of mental deficiency caused by illness. The code also provides punishment in another article. But the standard of punishment in the two articles is different. In the first article it provides the remission of seven tenth of the sentence and in the second article it provides a lighter punishment. \(^{37}\) In this regard it used objective and subjective standard of punishment which might created a problem to deal with offenders.

However, the 1930 penal code is more precise and broader than the Fetha Negest. But the shared feature between the two is that, in either case, insane criminals even if considered as individuals who do not have use of reason and mentally deficient they were not completely exonerated from punishment. They prescribe lighter punishment than that would have been applicable on sane criminals. The 1930 penal code also provides cause and effect relationship when it provide "mentally deficient person through illness."

This is a deviation from the Fetha Negest because the Fetha Negest only provides the effect. Another remarkable development of the 1930 penal code is that the test is applicable to all kind of offences without discrimination. As earlier noted under Fetha Negest the provision was applicable only with respect to homicide case. Under the 1957 penal code
the test of insanity is the bio psychological method. The code implies that the offender is presumed to be responsible as long as they do not show any of the signs of partial or total irresponsibility enumerated by law. According to bio-psychological method a person is regarded as irresponsible if at the time of the offence he was deprived of his mental faculties in consequence of certain biological defects. The biological defect that could have the effect of deprivation of mental faculty is enumerated under the code.

In the code cause and effect relationship has to be established between the biological and psychological problem. The biological causes enumerated under the code are similar to the biological causes under the existing code. As indicated earlier, the previous codes did not exonerate completely from punishment offenders in such conditions. In this regards the principle of complete exoneration from punishment was incorporated on the 1957 penal code for the first time.

The existing criminal code with more precision and board application of the test adopts similar test with the 1967 penal code. The code adopted the bio psychological test, in which case, the criminal is considered to be irresponsible, if at the time of the act, due to certain biological defect he was deprived of his mental faculties. In similar way to the 1957 penal code the existing criminal code test of insanity do not incorporate words like, disease of mind or defect. Since there is no clear and comprehensive determination of this terms the incorporation of such terms create no more than ambiguity. The code enumerates conditions which should be considered for the existence of irresponsibility.

3.2 TOTAL IRRESPONSIBILITY

The heading of the article does not expressly say total irresponsibility it simply states criminal responsibility and irresponsibility. However, since
Art 48 stipulates that criminals who are responsible are only liable to
punishment. Unless irresponsibility is proved individual offenders are
liable to punishment. Criminal justice inherently views individuals as
responsible. The article enumerates biological causes which render a
person in capable of understanding the nature or the consequence of his
acts or regulating his conduct according to his understanding. The
biological causes enumerated under these article are, age, illness,
abnormal delay in development, deterioration of mental faculties. Further
it cross refer the biological causes under article 49 (partial responsibility)
and it lies a general criteria by which any other biological causes having
the psychological effect prescribed in the article could be included.

Under the previous code, that is the 1957, the biological cause which
renders a person incapable was rigidly classified between total and
partial is irresponsibility. The code enumerated the biological causes
with the assumption that they are less severe and consequently the effect
of such biological causes is not severe as to render criminals totally
irresponsible. Such classification of biological causes is not advisable
because the biological causes enumerated under partial responsibility
may have the effect of total irresponsibility. So too; the biological causes
enumerated under total irresponsibility may have the effect of partial responsibility. Therefore, what distinguish total irresponsibility from partial responsibility is not the biological causes rather the psychological effect which can be proved only through expert evidence.

The present code have taken into consideration the above fact, as a result the biological cause enumerated under partial responsibility namely, derangement or abnormal or deficient condition can have the effect of total irresponsibility as long as the psychological effect is of a kind prescribed under total irresponsibility. Under the present code what distinguishes total irresponsibility from partial responsibility is psychological effect, that is, whether the criminal is totally or partially deprived his mental faculties as a result of a biological cause. No distinction is drawn in respect of biological cause.

In addition, the present code provides a general criterion by which similar biological cause having the psychological effect may be included. In previous code, though the article is an advanced one, the biological causes enumerated were exhaustive. It is too restrictive in that it did not open a hole by which new findings may be included under the code and it was impossible to deal with new finding. Modern science is on progress immense research are on going in different fields, there fore, there should be a place to accommodate new findings. In this respect the legislature of the present code seems to have in mind not only the present conditions but also prospective scientific findings in the medical part that may full fill the condition prescribed under the code when it include the phrase “.. Similar biological causes.” 39 The phrase was inexistent in previous code but it is of immense significance.
3.3 BIOLOGICAL ELEMENTS

3.3.1) AGE: the code provides age as one of biological elements, but it doesn’t make clear whether the age refers to miners or old age. However, since minors are treated under different article here the reference is to old age. 40 Old ages in itself is not sufficient to the biological element that would fulfill the requirement of the article. There should be a certain mental problems that affect people in old age. This often referred to us senility.

People with such a problem exhibit symptoms of senility. The symptoms associated with this problem include serious memory lose; they may fail to recall common facts and forget people at all. The two most important brain diseases that causes permanent brain damage are multi infract dementia (a more accurate term for what was called cerebral anterior sclerosis) and Alzheimer’s disease. 41 As a result of the former the victim suffers serious stroke that destroy much brain tissues.42The latter destroy brain cells. The symptoms associated with senility may be produced by such disease. As a result old age in it self is not sufficient to be raised as a defense.

3.3.2 ILLNESS: - As it was under the previous code, the presence code provides illness as one of biological element of the article. 43 It does not made distinction between mental and psychological illness. As a result, the import of the code is that whether the illness is mental or physical, if it produces the psychological effect prescribed in the code it can be raised as defense.

3.3.3) ABNORMAL DELAY IN DEVELOPMENT:-- here the reference is to cases where a person shows delay in development, such cases as includes mental retardation. The most common symptoms of mental
retardation is delay in development. The factors that cause of mental retardation may be grouped as genetic and environmental factors. One common cause of retardation is a disorder called Down syndrome in which people have an entire extra chromosome for a total of 47. Another common genetic factor is called the fragile X syndrome. These are among factors that cause mental retardation. Abnormal delay in development includes cases such as idiotism cretinism, the consequence of deafness, dumbness, dimness, sleeping sickness and the like.

3.3.4) DETERIORATION OF MENTAL FACULTIES

Deterioration includes cases where a person's mental development is normal but due to some factor his mind is so affected as to no longer understand the nature or the consequence of his act or to act according to his understanding. It may include a result of poisons, intoxication by alcohol or drugs, hypnosis or somnambulism. It is difficult to identify such offender because such causes are not permanent rather they temporary in nature.

3.4 PSYCHOLOGICAL CAUSES

As it was mentioned earlier the biological causes must had the psychological consequences that is, deprivation of mental faculties. The casual relationship between the two requirements has to be established. The psychological effects that may follow the biological causes are of two kinds incapable of understanding the nature or consequence of an act, or regulating an act according to understanding.

3.4.1 THE NATURE OR CONSEQUENCES OF AN ACT

The term the nature of an act is imprecise. The expression used by the code is similar with the expression used in M.Naghten test. The latter
test states “as not to know the nature and the quality of the act”. But the criminal code expresses the same meaning in another way, which is “incapable of understanding the nature or the consequence of an act. Under the M.Naghten test many courts feel that knowledge of the nature and quality of the act is the mere equivalence of ability to know that the act was wrong. 49 The same holds true to the expression used in the criminal code that is, the expression may be taken to refer to the physical nature of an act and it should not be taken to refer to the moral quality of an act. Therefore nature of an act should be considered in light of defendant ability to distinguish right from wrong.

The terms nature and consequence of the act should not be taken as cumulative requirement. The defendant is not liable to punishment if he was incapable of understanding either of the two. The consequence of the act refers to the result of the act. The result that wouldn't it have came but for the act done. However, one thing to be noted is that the consequence of an act doesn't refer to the legal consequence of the act done, it simply refers to the harm that follows the act. Further the article used the terms ‘understanding’ instead of the term knows. The word knows refers to intellectual awareness and that the test is phrased merely in terms of cognition is unduly restrictive. 50 In this regard it can be said that the criminal code is better worded in that it avoids the restrictive term know.

3.4.2 In capacity to regulate one’s conduct

This is a situation where a person knows that he does wrong but he can not refrain from doing as he does. Although the notion of irresistible impulse is not admitted in many countries there is no doubt that the expression “regulating his conduct includes the case where the offender is deprived by disease the power of controlling his conduct”. 51 Under the
irresistible impulse which means before it will justify a verdict of acquittal that his reasoning power was so dethroned by his diseased mental condition as to deprive him of the will power to resist the insane to perpetrate the deeds, though knowing it to be wrong. The same holds true to the expression used by the criminal code, which is regulating his conduct, although the wording of the code is much better and broader than the notion of irresistible impulse. Therefore, the phrase regulating his conduct includes with in the notion of irresistible impulse. By so doing the code avoids the criticism against the irresistible impulse.

The test is based on the theory that there are individuals who knows that they do wrong but internal coercion deprives them the power to choose between right and wrong. Accordingly one who understands the nature and the consequence of his act but fails to regulate his conduct according to his understanding falls in this category, their act is within their physical control but out of their mental control.

Generally speaking the psychological elements in the code are not worded in restrictive manner. By so doing it avoids the criticism that would have been directed against it. It suffices if the defendant lack of understanding goes to one of the psychological element enumerated under the code. It is not a requirement that both of the psychological element present together.

**3.5 LIMITED RESPONSIBILITY**

A person who is not totally incapable of understanding the nature or the consequence of his act can form a mensrea, but the fact that the defendant is not totally incapable at the time of the act should not be taken to mean that he is totally responsible. A defendant in criminal case when he performs the act giving rise to a prosecution may have been in
condition if raised as a defense may not amount to legal insanity. Between the domain of complete abnormality which renders one irresponsible and the domain if the normal, there is an intermediate zone which concerns mental health and perception and includes so called “defectives” for which treatment must differ from persons considered “normal”. 53 A common law countries refer it as diminished capacity that is the defendant capacity is a reduced one.

If a successful insanity is interposed the result is a finding of not guilty by reason of insanity and confinement to mental institutions. By contrast an appropriate showing of partial responsibility will result a finding of not guilty of the offence charged, although the circumstance will usually be such that conviction of some lesser offence is possible. 52 In United States the majority of courts which have held evidence of an abnormal condition admissible on issue of mental state have been concerned with the admission of the evidence for the purpose of negating the premeditation or deliberation required to first degree murder. 55

Article 49 of the criminal code deal with partial responsibility. It is a condition in which due to certain biological reason defendants understanding capacity is diminished partially.

As for complete irresponsibility, the biological and psychological causes must present together and causes and effect relationship has to be established.

Under article 49 references is being made to biological causes under article 48. No distinction is made between biological causes so long as they had the requested psychological consequence. The defendants are distinguished as complete or partially irresponsible based on their psychological set up at the time of the act. That is, whether the biological causes had the consequence of total or partial deprivation of their mental faculties at the time of the act.
Moreover, among the biological causes enumerated under article 49 of the 1957 penal code, the present code exclude one of the biological cause namely, an arrested mental development. This is because of an arrested mental development embodies similar idea with abnormal delay in development. In writer's opinion an arrested mental development was in cooperated in previous code because of the rigidity of classification of biological causes. As both article cross refer each other the inclusion of an arrested mental development would be a mere repetition of the idea incorporated under article 48 which would create a problem.

Another peculiar feature of partial responsibility under the present code, as it was in the previous code, is that the notion of partial responsibility is applicable to all offences, but in diminished responsibility it is applicable to murder case only. Further in diminished capacity the reduction is not punishment but the offence namely, from first degree to manslaughter.

3.5.1) BIOLOGICAL ELEMENTS

As earlier noted the biological causes enumerated under this article can be raised in article 48, if they have the psychological effect required under the article. The code provides derangement of mind and abnormal or deficient condition as biological cause of limited responsibility.  

Derangement of mind is a situation where a mind is not working properly. It includes a broad situation. Abnormal and deficient condition refers to not only mental but physical abnormalities having the effect of psychological element required by the code.

3.5.2) PSYCHOLOGICAL EFFECT
The difference of psychological element between partial and complete irresponsibility is one of degree. The code states the same psychological element under article 49 inserting "the term partially". It suffices if due to one of the biological reason the defendant capacity of understanding or will power is diminished. The person is not partially responsible for the sole reason that he is of a week character or morally perverted nor is he of low intelligence or poor education. The court must reduce the penalty only with regard to an offender who suffers from mental disease or whose mental development is incomplete, but not with regard to weak person who is aware of unlawful nature of his act and who commits an offence out of dishonesty. 57
End notes for chapter two

7. Id, p 738
9. United state v. currens. quoted in id. P. 860
11. Hennery weihofen, Mental Disorder as a Criminal Defense, (Dennis of Co. Inc Buffalo, Newyok)p. 174
13. Id, p. 278
15. Cited above at note 10, p.86
16. Cited above at note 12, p.284
17. Cited above at note 10, p.86
18. Cited above at note 12, p.285
20. Cited above at note 10, p.87
21. Cited above at note 10, p.287
22. Durham v. United State, Court of Appeal (District of Colombia Circuit, 1959 US), Quoted in Steven Lownestien, Material for the Study of Ethiopian Penal Law, p. 171
23. Ibid
24. Cited above at note 12, p.288
25. Ibid
27. Cited above at note 10, p.288
28. Ibid
29. Ibid
30. Cited above at note 12, p.289
31. Ibid
32. Henry Weihofen, supra note 11, p. 100
33. Wayne R. Lafaya and Austin W. cott (jr), Criminal Law, (West publishing co, St. Paul, Minnesota, 1972), p. 289
34. Ibid
35. Ibid
36. See Abba Paulos Tezadua, The Fetha Negest; The Law of The kings, (Faculty of Law, Haileselasies I University, 1998), p. 289
37. Ibid
38. Art. 19, The 1930 penal code of Ethiopia, Proclamation No 4 of 1941
39. Ibid Art. 22
41. The world Book Encyclopedia, infra note 44, p. 276
42. Ibid
43. Article 48, supra note 40.
44. The world Book Encyclopedia, Vol. 17 (A scott Fetcher company, Chicago, 2001) p. 278
45. Ibid
46. Graven, philipe, An Introduction to Ethiopia penal law, (Faculty of Law, Haileselassie I university, 1965) p.134
47. Ibid
50. Ibid
51. cited above at note 47, p. 135
52. Durham v. united states court of Appeal, (District of Colombia circuit) 1954 united states quoted in Steven Lowenstein, supra note 22, p. 171
53. Cited above at note 12, p 178
54. Ibid
55. Id, p 327
57. Cited above at note 47, p
CHAPTER THREE
1. INTOXICATION AS A DEFENSE IN CRIMINAL CHARGE

Perhaps no other legal issues have posed a problem to criminal law as that of the legal responsibility of intoxicated offenders. The question contrasts the individual right to avoid punishment for unintended consequence of the acts with individual responsibility to stay sober if his intoxication will jeopardize the lives and safety of others. The issue presents the choice of whether the magnitude of an offense should be measured from the objective perspective of the community or the subjective perspective of the offender. That being the case intoxication has been defined as:

“Disturbance of mental or physical capacities resulting from the introduction of substance in the body.”

Although the word “intoxicate” is same times limited to the result of drinking alcohol, it has also been more broadly defined as to excite or stupefy by alcoholic drinking's or narcotic. The above definition is broad enough to include intoxication as a result of alcohol or drugs. In a legal sense intoxication refers to intoxication as a result of alcohol or drugs. Many offences are committed by a person who are intoxicated by alcohol or drug many of these offense wouldn’t have been committed, if the offender had not been intoxicated. Drinking alcohol impairs judgment, release inhibitions and thus permits the drinker to engage in behavior quite different from the normal pattern. Drinking stimulate the drinker, but do so by loosing his brakes; not by stepping on the gas. There fore alcohol weakness the restraints and inhabitation which normally govern individuals conduct. It also impairs perception and judgment so that drunken person contraves the law which he would not have, if he were
not intoxicated. The question here is, one who commits a crime under the influence of alcohol or drug should be held liable to the crime or not. On its face the question seems easy but it is difficult for it involvement of different interests.

In general terms what is described as an intoxication defense in the criminal law was not a defense either by excuse or exculpation. It is more usually considered as an aggravating factor that increases social disapproval reflected in the sentence imposed by the court. It has never been a defense simply to say however truthfully, that he wouldn't have committed the offence if he had not been drunk that it was the drink that did it. In early year the common law punished sober and intoxicated offenders equally. The assumption is that even if when a person drinks looses his perception the harm was occasioned by his own fault, and he might have avoided it, he should be punished equally with the normal person. Such analysis resulted from the "harm oriented framework which considered harm the prema-facie case of guilty. A valid defense which intoxication was not, could negate the prema-facie case."

A different problem arises when the definition of the offence includes a mental element and the defendant claims that he lacks the mental element because he was intoxicated. In contrary to the above harm oriented framework which considered harms as a prema-facie case of guilt, the modern "act oriented framework' first considers the mental state of the defendant. As the doctrines of mensrae become clearer it was realized that the fact of defendant's intoxication has an implication on his mental state. Any situation which renders a person incapable of forming intent frees him from responsibility of his acts. Thus the absence of mensrae is not an affirmative defense but the absence of an essential element of the crime charged.

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The shift from harm oriented framework to act oriented framework affected the law's structure towards crimes committed by intoxication. Defendants begun to argue that they should not be held criminally liable for actions which contravene the law, because their intellectual capacity has been reduced by the amount of alcohol or drug they had consumed and they could not form the mensrea required to constitute the offence.

The *mensrea* requirement of an offence as regards a person so intoxicated has been viewed on different way by different authorities. The explanation is that drunkenness is not incompatible with mens-rea in a sense of ordinary culpable intentionality mere recklessness is sufficient to satisfy the definition of mensrea, and drunkenness in itself an act recklessness. The law therefore establishes conclusive presumption against a mensrea in ordinary crime. 10 They assumed that it is necessary to exclude the plea of drunkenness because of the possibility of abuse, where such plea is admitted, "the pretence would be constantly resorted to as a cloak for committing the most horrible outrage with impunity; what is worse, the reality would be incurred not only to ensure safety to the most notorious offenders, but for enabling them to inflict atrocious injuries with the greater confidence and the very excessive brutality of outrage would afford such evidence of the total absence of reason and human feeling as would tend to the acquittal of the most heinous criminals. 11 The argument takes in to consideration the possibility of subterfuge on the part of the offenders. The fear is that a person who intended to commit a crime would actually get drunk before committing it, if intoxication were a complete defense.

In contrary to the above, others insist that if a man is punished for doing something while intoxicated in plain truth he is punished for getting intoxicated. The position has been taken on ground that a person can not be convicted by crime unless mensrea is proved. 12 Any situation
which renders a person incapable of forming intent frees him from the responsibility of his act. Where there is no mental element there is no punishable wrong. It has been suggested that it is unlikely that criminals would choose to get drunk before a crime, because his drunkenness may lead him to forget the purpose, it will render him more clumsy in carrying out his purpose, and increase the risk that his intention miscarries, it will increase the possibility of being find out.  

Simulation of intoxication to avoid liability for a crime presupposes high intelligence, histrionic ability and careful calculation. Even superficial survey of the reported cases shows that inebriate offenders have the very opposite qualities. They are weak, impulsive, and frequently abnormal.

The responsibility offenders who commit an act while in the state of intoxication have been debated, still there is dispute. In almost all cases the position that intoxication will not be a complete defense has statutory support. As a result states opt to classify on the yard stick of condition of intoxication. Accordingly intoxication can be classified as voluntary and involuntary intoxication. Involuntary intoxication is a complete defense to crimes. However, the fact that whether voluntary intoxication is a defense to crimes committed is a controversial issue and is treated in different way. Since the potential effectiveness of the defense depends on the type of intoxication it is important to see intoxication by way of classification. Therefore the next section will discuss voluntary and involuntary intoxication.
2. SELF INDUCED INTOXICATION

Self induced intoxication has been defined as intoxication caused by substance which the actor knowingly introduce in to his body the tendency of which is to cause intoxication he knows or ought to know. Where the actor knows the effect of taking or introduction of certain substance the effect of which is intoxication his intoxication is regarded as voluntary intoxication. That is the knowledgeable acceptance of the effect of the substance is regarded as voluntary. Here the reference is to the willing and intelligence of offender and acceptance of the natural consequence of that act.

Whether voluntary or self induced intoxication should be a defense to an act committed while in that state is a debatable issue. This is so because the condition of the defendant at the time when the act is committed and the essential requirement that in order to be held responsible the defendant should commit the act with the requisite mental element. One view held that intoxication should be a defense to an act committed while in that state. It has been suggested by various writers in explanation of the doctrine respecting voluntary drunkenness as an excuse for crime, that the effect is to make drunkenness it self an offence which is punishable with a degree of punishment varying as consequence of the act done. The argument is that, if intoxication negatives the mental element required to an offence the defendant should be acquitted. If he defendant is punished while he lacked the mental element necessary for the offence in effect the punishment is for drunkenness. In fact the argument is correct, if a mental element is the essential requirement and if be cause of intoxication one lacks the required mental elements he should be acquitted.
On the other hand, others hold that drunkenness is not compatible with mensrea, in a sense of ordinary culpable intentionality, because mere recklessness is sufficient to satisfy the definition of mensrea, and drunkenness in itself is an act of recklessness. \(^{17}\) Here the law establishes a presumption of negligence and no proof of intoxication to disprove the requisite mental element. The justification is that where this presumption applies, it does not make drunkenness itself a crime but drunkenness itself is an integral part of the crime as forming, together with the unlawful conduct charged against the defendant a complex act of criminal recklessness. \(^{18}\) Intoxication is an intrinsic element of the offence thus intoxication can not be pleaded by way of showing absence of full intent or mensrea essential to constitute a crime. Generally speaking such analysis can not be justified in strict logic.

That being the argument that underlies the issue of self induced intoxication, different approach has been adopted to deal with voluntary intoxication even if the issue can not be resolved in complete and satisfactory way.

### 2.1 OFFENCE SPECIFIC AND BASIC INTENT

Voluntary intoxication of the defendant may be taken in to consideration in relation to the type of intention required to constitute an offence. A distinction is made between offence requiring specific intent and offence of basic intent. Intoxication negating specific intent is an answer to the charge, intoxication negative any lesser from the mensrea usually referred to as basic intent is not. \(^{19}\)Such distinction is made after a leading case of Majewki. \(^{20}\)

Where a specific intent is an essential element in the offence, evidence of state of drunkenness rendering the accused incapable of forming such
intent should be taken in to consideration in order to determine whether he had in fact formed the intent necessary to constitute a particular crime. 21 In short, where a crime is one of specific intent the prosecution must in general prove that the purpose for the commission of the act extends to the intent expected or implied in the definition of the crime. 22 The \textit{mens rea} required for crimes of specific intent requires proof of purposive element. 23 Mere for sight or contemplation is not enough to constitute specific intent, with out this intent there is insufficient evidence that the accused is the clear danger as feared, because at any time before the commission an of offence the accused may change his mind not to continue. 24 Therefore, in case of offence requiring specific intent the accused voluntary intoxication is taken as a defense.

On the other hand some offences are based on basic intent where the mensrea is no more than the intentional or reckless commission of the actsreus. If a man of his own volition takes a substance which causes to cast off the restraints or reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition supplies the evidence of mensrea, of guilty mind certainly sufficient for conduct and recklessness is enough to constitute the necessary mensrea. 25 It establishes a presumption of negligence. In effect the defendant is punished for his act of intoxication.

Such approach of making a distinction as to a type of intention required for commission of an offence has been criticized. It is claimed that it is illogical and therefore inconsistent with the legal principle to treat a person who of his own volition has taken a drug or drink, any differentially from a man suffering from some bodily or mental disorder whose beverage had, without his connivance been lacked with intoxication. 26 The argument is that if a man does not knows what he is
doing he should be acquitted not only offense of specific intent but also
offences of basic intent. It is also said that it is morally wrong to convict
of a crime of involving a certain state of mind even where it is established
that the charge is based on men behavior when the lacked that guilty
mind. 27 That is, it is criticized as unethical. Further it is criticized on
ground that of becoming intoxicated is reckless, this recklessness arises
at the time prior to the commission of the actsreus of the offence and
thus there is no coincidence of actsreus and mensrea. Therefore it is
claimed that the approach is not one which is based on logic but was one
which accords with justice, ethics and common sense as it sought to
preserve individual liberty an important aspect of which is the protection
of citizens against psychical violence.

This is of little value to the defendants, since there are always offences of
basic intent that can be charged. The basic intent offences are lesser
included offences and an alternative verdict can be delivered by judges or
jury with out a need for separate charge. 28 For example, if he is charged
with murder, he may be convicted of mans laughter. Since there is also a
presumption of recklessness the prosecution is not expected to prove
negligence.

2.2. FORESEEABILITY TEST

The presence or absence of liability may be sometimes is said to depend
on foreseeability test. It is a matter of common knowledge that drinking
alcohol or ingestion of drugs impairs judgment, release in-habitation and
permits to engage in behavior quite different from the normal pattern. 29
Thus according to foreseeability test, any one who knowingly consumes
is, at a very least, reckless at possibility of loss of control. 30 If they did
not wish to lose control, they would not consume, so loss of control must
be within the scope of their intention by continuing to consume. 31 It is
based on the presumption that it is well known those who take alcohol to
excess or certain sort of drugs may be come aggressive or dangerous and
they are able to foresee the risk of causing harm to others but they
persist in their conduct. The defense would be denied to people experiencing symptoms of intoxication who continued to consume because they ought to have no what was happening to them. More specifically, individual who through his own fault become drunk should have been able to foresee that he was likely to commit a crime in such a state and, therefore, should be considered as having committed the crime with culpability even though it was not committed with express deliberation.

3. INVOLUNTARY INTOXICATION.

Where the intoxication is involuntary there is no such conflicting view as regards its operation as a defense. In most of the jurisdiction where a person with out his choice and volition takes alcohol or drugs which eventually renders him in state of intoxication as no longer to appreciate his act, it operates as a defense. The premise underlying the defense of involuntary intoxication is that a person should not be held criminally liable in absence of volitional fault, that is, conscious fault. Four different kinds of involuntary intoxication have been identified. These are coerced intoxication, pathological intoxication, intoxication by innocent mistake and intoxication resulting from the ingestion of medically prescribed drugs.

Intoxication is regarded as coerced if the intoxication is involuntary induced by reason of duress or coercion. 32This is a situation where the intoxication results from force imposed against the defendant. Some courts have in general declared that coerced intoxication may be a complete defense to all criminal conduct. 33 However the pressure required to subdue the will of the actor usually interpreted in restrictive manner. 34 The assumption here is that an accused drugged by other act and loss of consciousness is not by his fault. It is logical and compatible with the principle of criminal law that if one compelled to take intoxication substance without his volition should not be punished.
The other situation where involuntary intoxication may serve as a
defense is where the intoxication is termed as pathological intoxication.
Pathological intoxication has been defined as, “intoxication grossly
excessive in degree given the amount of the intoxication or does not know
he is susceptible. 35 under such pathological intoxication the defendant
must be deprived of his mental faculties to the extent necessary to
insanity defense. Even though pathological intoxication is self induced, it
can serve as a defense only if the defendant was unaware that he is
susceptible to typical reaction to the substance. 36

The third situation where involuntary intoxication may be regarded as a
defense is where it results from innocent mistake. This is an intoxication
which resulted from innocent mistake by the defendant as to the
character of the substances taken, as when another person has tricked
him in to taking the liquor or drugs 37. However, the mistake must be
such that to trick a reasonable person. Such innocent mistake constitute
involuntary intoxication.

The last situation where individual intoxication is assimilated to
involuntary intoxication is when the defendant is intoxicated as a result
of medically prescribed drugs. Involuntary intoxication may arise from
taking drug which have been medically prescribed, provided he has
taken the drugs in accordance with the instruction. 38 Such intoxication
has been strictly construed. The defendant should not know the
intoxicating effect of the drug. The drug must be the one prescribed by
the medical professional and there should be cause and effect relation
ship between the drug prescribed and the intoxication.

The above tests are mostly used in determination of whether the
intoxication is voluntary or involuntary. Involuntary intoxication as
opposed to voluntary intoxication serve as defense to the crime charged.
Given the stringent requirement of the above tests, intoxication which satisfy these requirements are unlikely, whatever it may be involuntary intoxication serves as a defense.

**THE DEFENSE OF INTOXICATION IN CRIMINAL CODE**

Article 50 is concerned with state of irresponsibility caused by the defendant own fault and without fault. The provision has been amended to include border concept of intoxication and the amendment start from the caption of the provision. The caption provides crimes committed in state of irresponsibility caused by intoxication or other similar conditions. This clearly indicates what the article is all about in precise terms. The caption clearly stipulates the provision is about irresponsibility caused by intoxication and the application of the provision to irresponsibility caused by other similar conditions. The circumstance surrounding the creation of irresponsibility would deprive the defendant the benefit of article 48 and 49, if the creation of the condition was occasioned by the defendant fault. Article 50 provides that:

1. The provision excluding or reducing liability to punishment shall not apply to any person who, in order to commit a crime or knowing that he could commit a crime, intentionally put himself in to a condition of absolute irresponsibility or of limited responsibility by means of alcohol or drugs or any other means.

2. If a criminal by his own fault has put him self in to a condition of absolute irresponsibility or of limited responsibility while he was a ware or could or should have been aware, that he was exposing himself in such condition to the risk of committing a crime, he shall be tried and punished under the ordinary provision governing negligence,
if the crime committed is punishable on such a charge (Art, 59)

(3) In case of crime which was neither contemplated nor intended and was committed in state of absolute irresponsibility into which the criminal put himself by his own fault, the provision of article 491 of the special part this code relating to crimes against public safety shall apply.

(4) No person shall be liable to punishment where he commit a crime while in state of absolute irresponsibility into which he was been coerced or for which he has no fault on his part. 39

The article set out the principle that voluntary intoxication is no defense. So one who reduce himself in state of irresponsibility by his own fault can not invoke his voluntary intoxication as a defense to be exonerated from criminal liability on the basis of inability to entertain the request mental element at the time of the offence. But the offender's criminal responsibility hinge on the mental state they had while they reduce themselves in state of irresponsibility or when they begun to reduce themselves.

Article 50 (1) deals with a person who intoxicated himself in order to commit a crime. Intoxicating one self to a degree relevant to raise it as a defense is a rare occurrence. It is highly unlikely that an offender would put himself in a position where he does not have control of his act. This is so because if a person is so intoxicated as to have a psychological effect of total irresponsibility under article 48(1) he would not be in state where he can act according to what he intended to do in the first place. If the person did not understand the nature or the consequence of his act, this means that he was not acting according to his plan, at least intentionally, since he does not know what he is doing. Also it was
incapable of regulating his conduct, this means he was not acting according to his plan. Intoxicating oneself to commit a crime is more plausible where the effect of intoxication is limited responsibility. This is because the person has not lost all of his control or understanding.

Article 50(2) deals with a more common situation. Under it the offender is punished for negligent conduct. The offender intoxicated himself either he was aware or while he could or should have been aware that he was exposing himself to the risk of committing an offence. In such a case the offender is punished under negligence and not intent.

In both article the offenders are punished for their culpable conduct even though they may not have the required mental state at the actual time. The rationale behind this is such act is morally wrong. And the protection the law affords to the society violated by such offenders under the guise of lack of mental state.

4.1 ELEMENTS OF THE ARTICLE

The first situation envisaged by the code is a situation where a person intoxicates himself in order to commit a crime. The provisions excluding or reducing liability shall not apply to a person who puts himself in condition of irresponsibility or limited responsibly. In such cases a person formed intent prior to his intoxication and at the time of the act the offender does not have the requisite mental state. The code states that such offender can not escape criminal liability on ground of lack of the request mental state. It has been suggested that, one who having already formed the intention to commit a crime, drink in order to work up his nerve to commit a crime can not avail him self of the defense of intoxication even though by the time he does commit a crime, he has too intoxicated to entertain intent which the crime require.
The same idea is incorporated under the article. The justification is that subjectively speaking, his condition at the time of the act is immaterial and only the reason to his condition is relevant, not only he voluntary places himself in abnormal condition but he did so in order to carry out a decision which he had freely made. The argument is that the fact that the defendant was unable to entertain the intent required should be disregarded. His intent before his intoxication is sufficient to be held liable. This is justified because if one who reduces himself in state of irresponsibility to escape liability on ground that he lacks the mental state required, the protection which the law affords to society will be disregarded. As a result the law attaches equal condemnations to such offenders with normal offenders. The general provision of the code is applicable.

**4.2) KNOWING THAT HE COULD COMMIT A CRIME**

The reference here is to offender who aware that his act may result in harmful consequence but persist in his act in disregards of the consequence that follows. It applies to offender before reducing himself by intoxication in to the state of irresponsibility foresee and measure the consequence of his act but accept the possibility of committing the crime. What distinguish them from previous offenders is that in the previous case the criminal is taking the substance with view to implementing his criminal goal but in this case the criminal holds the result as possibility. The code states that the offender who reduces himself in state of irresponsibility or limited responsibility accepting the possibility of committing a crime will be held criminally fully. As regards their criminal liability no distinction is made from those who reduce themselves in order to commit crime. The justification seems that in both case the offender exhibit certain degree of dangerousness, even though the
degree various, and needs much more condemnation than other offender who without foreseen the possibility of committing but persist on his act.

One thing to be noted is that those criminals who falls under this category has overwhelming similarity with those falling under sub article (2). Such offender stand in half way between offenders who drinks or take a drug in order to commit a crime and those who foresee the consequence but reject the possibility. In such a case the court should take extra care in placing offenders in either of the two. Particularly where the crime is not punishable by negligence in which case if placed under sub article (1) it would be fatal for the criminal. For one thing if the criminal is categorized under sub (2) where the crime is not punishable in case where the offender acts negligently he would fall under sub (3) in which case he would be liable only for one year. Secondly, if the offender acts negligently and placed under sub (1) he would be liable for the crime committed intentionally. Therefore the court should take extra care in placing offenders. But doubt should be interpreted in favor of the offender.

In the previous code such offenders was not expressly included or excluded. The article only dealt with offenders who reduced themselves in state of total or partial irresponsibility with a view of committing a crime. This might have created a problem as to category of individuals who commit a crime in such state. The existing code by inclusion of the phrase "knowing that he could commit a crime," 45 expressly dealt with such offenders. The provision excluding and reducing liability shall not apply.

The second case envisaged by article 50 is that where an offender due to introduction of intoxicating substance reduce himself in state of total or partial irresponsibility not to commit a crime but he was aware, or could
or should have been aware he may tempts to do wrong in his state of intoxication. The rule consist of two distinctive cases of criminal negligence.

4.3) INTOXICATION WITH AWRNESS

It refers to offenders who foresee the possibility of engaging in criminal conduct but reduce themselves in state of total or partial irresponsibility in disregard of such facts. It applies to criminal who intoxicate him self while conscious of the possibility of causing harm with mental state of rejecting the result. To this category fall all those offenders who reduce themselves in state of total or partial irresponsibility in disregard of the possible consequence. The difference between the sub articles does not lie, however, in the circumstance in which the accused was deprived of his mental faculties (advertently or in advertently) but in the state of mind at the time when, for instance he began drinking.

The code states that offenders who commit a crime while under such states are governed under the rule governing negligence. If the act is punishable when the offender acts negligently he would be tried accordingly. However, when it is not punishable the fate of the offender will be sub article (3). The criminal liability of such offenders should be decided in light of the special part of the code.

4.4) INTOXICATION WHILE THE OFFENDER COULD OR SHOULD HAVE BEEN AWARE

The forth situation incorporated in the article is where the criminal has not foreseen and acts without consideration of the possible consequence of his act. It applies to individuals who takes intoxicating substance and render themselves in state of complete or partial irresponsibility while
they should and could have been aware of the consequence of their act. In this case subjectively speaking the offender is not aware or foresees the consequence of his putting himself into partial or complete irresponsibility. However when his conduct is seen in light of objective standard a reasonable person in that circumstance would not intoxicate himself. So he fails to take a care a reasonable person would take in that place.

The criminal liability of such offender is similar with those who intoxicate themselves while they foresee the possibility of doing wrong but persist on it. They would be held criminally liable where the offence is punishable when the actors act negligently. This, however, must be distinguished from intoxicated offenders in case of America and England, in these jurisdictions if the only reason the defendant did not realize the riskness of his conduct is he is too intoxicated to realize it he is guilty of recklessness. One of the justification is that unawareness of potential consequence of excessive drinking in capacity of human being to gauge the risk incident to the conduct is by now so dispersed in our culture that we believe it fair to postulate a general benevolence between risk created by the conduct of the drunken actor and the risk created by his conduct in becoming drunk. 49 so unawareness of the risk involved is not a defense. It establishes a presumption of recklessness. The code does not establish such presumption. If the intoxication seen in light of a reasonable man standard and failure to foresee is in fact justified in the circumstance in which the actor engaged, he will not be held liable for crime of negligence. There is no such presumption of negligence. This is the logical and compatible approach with the criminal responsibility of individual for the wrong done.
4.5) INTOXICATION WITH NO CONTEMPLATION OR INTENT

The other situation envisaged by the code is different from the cases discussed above. Here the reference is to offenders before their intoxication did not form a guilty mind. That is offender who neither contemplated nor intended to commit a crime but puts himself in state of irresponsibility by his fault. 50

The application of article 50 (3) is limited to the case of absolute irresponsibility. The assumption here is that intoxicated offenders with limited responsibility, even though they were deprived of their mental faculties but the deprivation is partial one, and as a result can form a guilty mind. So it applies to offenders who are in state of absolute irresponsibility and commits an act with no contemplation or intent.

In such case the code provides an alternative offence other than the offence actually committed. The consideration is that if the safety of the citizens is not to depend on drunkards whims, the need to ensure the tranquility of the public would justify that the offender should be punished and should not be permitted to exculpate on the ground that he did not mean to do any harm prior to getting drunk. 51 The argument is one of moral rather than legal. The principle set out in this article can not in any plausibility be consistent with the criminal liability of offenders. The code sets a self contradictory principle. In the one hand the code considers the offender as one who lacks the request mental state. On the other hand it established special offence for which the person will be liable. In effect, the punishment is for the fact of intoxication.

In case of the offence neither contemplated nor intended and was committed in state of irresponsibility the offender is not guilty of the
offence actually committed but by the offense against public safety (At 491). Art 491 provided that:

"Who so ever being deliberately or through criminal negligence in state of complete irresponsibility due to drunkenness, intoxication or any other cause, commits while in such states an act normally punishable for at least one year, is punishable with fine or with simple imprisonment not exceeding one year according to the degree of the danger or gravity of the act committed. 52

The import of the article is that if an offence is committed while in sate of irresponsibility by the offender who neither contemplated nor intended to commit an offense and if such offence would have entailed more than one year imprisonment, had it been committed by responsible offender, then the offender will be liable to fine or simple imprisonments not exceeding one year. What ever the punishment prescribed for the offence actually committed the court can only decide within the limit set by article 491, according to the danger and gravity of the offence. So the seriousness of the offence is taken in to consideration in assessment of sentence with in one year limit.

The article seems to take a compromise position between full exoneration and full punishment. In the one hand the offender is in state of absolute irresponsibility as to no longer understand the nature and the consequence of his act in which case he would not be liable to punishment. On the other hand, by his own fault the offender place himself in state of irresponsibility at least deserve certain condemnation for his fault, even though the offence was neither contemplated nor intended. The punishment prescribed by the code seems educational rather than punitive.

4.6 COERCED INTOXICATION OR FOR WHICH THERE WAS NO FAULT.
Thus far we have been considering the usual case where the defendant voluntary intoxicated that is, where the intoxication is self induced. The implication of the code on this regard is that voluntary intoxication is no defense, even in case of neither contemplated nor intended acts the criminal is liable to an alternative offence. Here the reference is to involuntary intoxication.

This is a situation where one found himself in state of irresponsibility due to extraneous factor other than his fault. That is what is termed as voluntary intoxication. The previous penal code did not dealt with the issue of involuntary intoxication, so when the issue of involuntary intoxication rose, it was interpreted to be included under article 48, and 49. Under article 48 it was said involuntary intoxication would fall under deterioration of his mental faculties”, since deterioration may result from external factor. Under article it would have come under “derangement of his mental faculties or abnormal or deficient condition. However, it is inappropriate to deal involuntary intoxication with insanity. For one thing, intoxication up to insanity is unusual as the term is used the article. Secondly, if the condition is such that it wears off and stops when the person becomes sober this may not qualify for insanity. Therefore, the inclusion of the issue of involuntary under article 48 and 49 is inappropriate, because of the above reason involuntary intoxication, even if they have a common feature, their characteristics is different.

The existing code seems to consider such facts and under article 50 (4) dealt about the issue of involuntary intoxication. It states that where a crime is committed by the offender who is in absolute state of irresponsibility in which he found himself with out fault in his part or where he is forced or coerced to enter in that situation no liability is incurred by such offenders. Involuntary intoxication therefore, is a complete defense to criminal liability. It applies to individuals who
commit a crime while in state of absolute irresponsibility for which there
was no intention, negligence, and fault or where one is forced to enter in
such situation. Here also those who reduced in to partial irresponsibility
by force or what ever means out of their volition is excluded from raising
the article as a defense. The assumption here seems individual with
partial responsibility can form guilty mind and can act accordingly. So
the application of the provision is limited to offenders who are in state of
absolute irresponsibility.

The instance recognized by the article as instance where by the accused
may avail himself of the defense of involuntary intoxication are coercion
and intoxication for which there is no fault on defendant part. Here
coercion must be distinguished from a situation where a person is forced
to commit a crime by another, as there is independent article which
applies in such case. Coerced intoxication is intoxication involuntary, in
this sense, refers to a situation where an accused is dragged in to a state
of irresponsibility by others and commits a crime which he wouldn’t
have, but for intoxication. If an accused compelled to drink against his
will and his mental faculty is deprived so that he did not understand the
nature and the consequence of his act he can avail himself of the defense
of intoxication. Though it is unusual situation where one is compelled to
get in to state of absolute irresponsibility. However, the court should not
adopt objective standard in determination of the pressure required to
subdue the offenders will. It should be decide case by case approach.

The code does not mention another instance where by involuntary
intoxication may be considered, rather it opts to use the phrase “for
which he has no fault on his part”. The inclusion of such sentence imply
that the legislature wants to put open the way other situation may be
considered by providing illustrative conditions which render the offender
intoxication involuntary. Thus the enumeration of the code is not exhaustive rather it is illustrative.

In other jurisdiction other than coerced intoxication there are recognized instance of involuntary intoxication, of such instances, one is intoxication resulting from innocent mistake. This is a situation where the defendant innocently mistaken as to the character of the substance taken, as when another person tricked him in taking the liquor or drug. The other is pathological intoxication, this is caused by an amount of alcohol that would not normally be enough to intoxicate, and it manifest itself in aggressive behavior not normally characteristics of the person. Yet another situation of involuntary intoxication where the defendant intoxicated as a result of medically prescribed drugs.

Other than coerced intoxication the above are instance recognized as involuntary intoxication in another jurisdictions. The code does not expressly state such instance as causes of involuntary intoxication. However, the expression used by the code clearly refers to such instance, since these are cases where the offender may be placed in state of irresponsibility with out his fault. Further the expression used by the code is broad enough to include another instance where the offender may be put in state of irresponsibly with out his fault, if any. Therefore involuntary intoxication emanating from these conditions can be raised under the code as a defense.

The criminal liability of such person is not like that of offender’s voluntary place themselves is sate of irresponsibility. The code prescribed for such offenders’ full exoneration from criminal liability. There fore, if in voluntary intoxication is successfully interposed the result is out right acquittal of the criminal. No criminal liability can be incurred.


6. Mitchell Keiter, supra note 1, p. 2

7. Ibid

8. Ibid


10. Wayne R. Lafava and Austin W. Scott, supra note 5, p. 346

11. Quoted in Steven Lownsenstien, Material for the Study of Ethiopia Penal Law, (Faculty of Law, Haileselasse I University Press, 1965) p. 184

12. Mitchell Keiter, supra note 1, p. 2

13. Glanville Williams, supra note 11, p. 183


17. Ibid p. 393
18. Ibid
19. Smith and Hagen, supra note 4, p. 145
20. Ibid
21. Id. 146
22. Ibid
23. Id, p, 150
25. Michael J. Allen, Criminal Law, (7th ed, oxford university
26. Wayne R. Lafava, supra note 15, p, 392
27. Id p, 393
28. Wikepedia, the free encyclopedia, supra note 24, p.3
29. Ibid
30. Ibid
31. Ibid
32 Wayne R. Lafava, supra note 15. p. 400
33. Ibid
34. Ibid
35. Ibid
36. Wayne R. Lafava and Austin W. Scott, supra note 5, p. 348
37. Ibid
39. Article 50, The criminal code of the Federal Democratic
    Republic of Ethiopia, proclamation No 414/2004
40. Ibid
41. Wayne R. Lafava and Austin W. Scott, supra note 5 p. 345
42. Graven philiphe, *An Introduction to Ethiopian Penal Law* (Faculty of Law, HaileSelassie I University, 1968) p. 138

43. Ibid

44. Article 50 (1), supra note 39

45. Ibid

46. Article 50(2), supra note 39

47. Graven Philippe, supra note 42, p. 139

48. Article 50(2), supra note 39

49. Quoted in Wayne R. Lafava, supra note 5, p. 346

50. Article 50(3), supra note 39

51. Graven phillipe, supra note 42, p. 140

52. Article 491, supra note 39

53. Article 50(4), supra note 39
CHAPTER FOUR

1. ADMINISTRATION OF THE DEFENSE AND DISPOSITION OF THE DEFENDANT

1.1 WHO IS TO PROVE IT?

Before dealing with the burden of proof it is proper to ask who can raise the defense of intoxication or insanity. Regarding the defense of intoxication as it is an affirmative defense, it is a defendant who raises the defense. It can be raised by the council of the accused or the accused himself can raise it. The same applies to the defense of insanity. They can be raised under article 130 sub (g) of the criminal procedure code. However the question here is can the defense of insanity be raised by the court against the objection of the accused. The offender may plead guilty rather than raising the defense of insanity this may happen where the offense with which the accused charged carry low imprisonment in which case imprisonments is better than confinement for indefinite period. In Us, some decisions indicate that the prosecutor or the court may interject the insanity defense over the wishes of the defendant and the defense council 1. In support of this view, it is contended that the judge and prosecutor must be allowed to raise the defense as part of their general duty to see justice is done, in this instances, to see that those not responsible do not go to jail and that they are not returned to society uncured 2. The judge should not disregard evidence that could exempt the accused from liability. This is so because the accused founds to be irresponsible can not justly be punished and the criminal law can be not served by punishing such offenders. Further those who are mentally ill should not be released by being subject to short imprisonment unless they are cured. In opposition to the first argument it has been stated that
since the accused has been deemed to be competent to stand trial he is competent to submit any plea. The criminal code suggests that the court can raise the issue of insanity even if the issue is disregarded by the accused. It provides that where there exist doubt as to responsibility of the accused person, the court shall obtain expert evidence. This is justified because irresponsible person should not be subject to criminal liability and it is a mechanism of protection of the society from dangerous individuals. The court can do this by observing the behavior of the accused and the circumstance in which the alleged crime is committed.

The code states subjective and objective standard of doubt. It doesn't state how serious the doubt should be. In first case, by considering the circumstance in which the alleged crime is committed the court may order the medical examination of the accused, in which case doubt depends on the subjective appreciation of the court. Secondly, the code enumerates instances where by the court is presumed to have a doubt in which case doubt is an objective one. So, even if, the accused objects the issue of insanity the court can raise it.

Once the issue of the defense is raised there remains a question to be solved, that is, who has a burden of proof. For the purpose of convenience burden of proof has been classified as burden of going forward and burden of persuasion. As a general rule, criminal defendant may sit passively during trial, as the prosecution bears the burden of proving the governmental allegation. Burdens of proof refers to the requirement that to win a point or to have an issue decided in your favor in law suit you must show that the wait of evidence is on your side, rather than on the balance on that point.
As regards the burden of production there is general consensus that the defendant bears the burden of production. The proposition is often stated in terms of presumption of sanity, the defendant in this particular case presumed to be sane until some amount of evidence to the contrary is produced. The prosecution is not expected to prove the sanity of each and every defendant. The criminal code also requires defendant to cast a doubt in his responsibility unless the court itself raises the issue. The prevailing rule is that the evidence must raise a reasonable doubt of the defendant mental stability. The court should not order a medical examination simply because objection was made by the accused. There should be sufficient evidence that warrant medical examination, such burden on the defendant may be carried out by calling witness who can testify as to the mental condition of the accused. The accused is not expected to show his lack of responsibility by clear and convincing evidence rather he is expected only to make out the defense.

Once an accused casts a doubt in his responsibility there is a controversy as to who bears the burden of persuasion. There is a split among states. Some require the defendant to carry the burden, the other require the prosecution. In those states which require the defendant to bear the burden the justification is that if the rule were other wise it would be easy for the defendant to create doubt concerning his responsibility. However, in support of the burden on prosecution it is argued that the fundamental proposition that a state must prove the defendant guilt beyond a reasonable doubt should logically extend to the issue of criminal responsibility in that the essential element of mens rea is not proven unless it is shown that the defendant was capable of entertaining the request mensrea. Another contention is that it is more equitable to place the burden on state, which has a resource available to obtain psychiatric evidence, than on the defendant who is likely to be indigent.
The provision of the code doesn't explicitly deal with the burden of persuasion. Nor the criminal procedure code has provision dealing about the burden of persuasion. However in absence of the issue of irresponsibility the prosecutor in criminal changes has to prove guilt beyond a reasonable doubt even though, the criminal procedure doesn't explicitly provide the standard of proof. By the same token, so when doubt is created as to the responsibility of the accused the prosecutor has to prove persuade the responsibility of the accused beyond reasonable doubt. The prosecutor should convince the court the fact the accused is responsible. The prosecutor can do this by calling expert evidence or lay testimony as to the condition of the accused. So when ever the defense is raised the prosecutor should disprove the defense. The standards of proof by the prosecutor should not be equated with the standard of proof on the defendant to cast a doubt in his responsibility. This is justified since the prosecutor has available resource to prove the responsibility of the accused.

If the defendant found to be responsible by evidence produced by the prosecutor, such fact should not be taken to mean the accused is guilty of the offence committed. As the court can not proceed to see the case until the doubt is resolved, the proceeding will continue from where it was suspended. The guilt of the defendant should be proved. This so because, had it not been for the doubt created on the responsibility of the accused the guilt of the defendant would have been proven by the prosecutor. This burden on the prosecutor will not left simply because the responsibility of the accused is proven. The fulfillment of the requirement of responsibility is a condition precedent to the fulfillment of the requirement as to guilt. Therefore, the prosecutor will still have to prove the guilt of the defendant. Just because the doubt on responsibility of the defendant is resolved, it does not mean that the accused is guilty.
for the crime committed. The elements of the crime have to first been proved before he is held liable.

2. THE EFFECT OF EXPERT EVIDENCE

The presumption that the accused is responsible for his act is destroyed whenever there is doubt as to the responsibility of the accused. The doubt may arise from the objection made by the accused or the court. In some circumstance the court is presumed to have the doubt, the latter case may arise when the accused shows signs of deranged mind or epilepsy, is deaf or dumb or is suffering from chronic intoxication due to alcohol or due to drugs. In such a case the court shall obtain expert evidence.

In order to clarify the point really in issue it is mandatory to the court to obtain expert evidence. The court should not order a medical examination simply because an objection is made by the accused. On the other hand expert evidence may be obtained even where no objection is made by the accused, in which case the courts should have an objective reason to being in doubt. In such case the court is bound to obtain medical examination of the defendant.

Where the medical examination must be obtained the court will appoint an expert or experts under ordinary rules of procedure. when the courts appoint an expert, it has to define their terms of reference and the matter to be elucidated and explained by them. In effect the court should provide the test and the expert should submit the report in the form of the test. The practice of court appointed expert has been criticized because the defendant can not present his side of the case. It has been contended that the practice of court appointed experts... would deprive the defendant of the right of offering a witness as to his mental
state, which is inherent part of guilt or innocence. The practice of court appointed expert seems to be based on the principle that court appointed expert would be objective which can not be influenced by the parties. Unlike private experts who examine the issue for different consideration of his own court appointed expert would not prejudiced by such interest. Court appointed expert will not have undue interest in the outcome of the case. However, there is still objection to this conclusion since psychiatry is inexact science, psychiatrist can reach different conclusion even though the condition is the same. That being the case the Ethiopia legislature adopts court appointed expert. Given the fact that court appointed experts are objective it seems plausible to adopt court appointed expert. The balance of justification tilts towards court appointed expert.

The duty of the expert is to describe the present condition of the accused person and its effect upon his faculties of judgment and free determination. The expert is expected to explain to the court the present condition of the accused and whether the present condition of the accused has affected the mental stability of the accused during the commission of the alleged crime. Here the court is not concerned with the present status of the accused, since the point really in issue is whether the accused mental condition was affected during the commission of the offence. So the expert considering the present condition of the accused and his behavior shortly prior to the alleged offence, immediately afterward can determine the mental state of the accused at crucial time. In addition to testifying as to the mental condition of the accused the expert also determines whether the mental stability of the accused was affected totally or partially at crucial time. It is only through expert the court can ascertain whether the deprivation of mental faculty was total or partial. Further it shall, in addition offer guidance to the court as to expediency and the nature of the treatments

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or safety measure. The court expects from the expert not only psychiatric diagnosis of the accused but if the accused found to be suffering from certain biological defect it advises the curative or protective measure the court should take.

The opinion of an expert is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of judge. What concerns here is whether the court is bound to accept the opinion of the experts with out reservation or modification. Expert evidence is a perquisite of an acquittal on ground of irresponsibility. Under our code courts are to be bound by expert evidence if it is a definite scientific findings. This can be seen from the statement on the basis of export evidence the court shall make such decision as it thanks fit. This means that the court has to follow expert evidence and rule accordingly what ever it is. The court can not reject or modify the evidence of the expert. The article is formulated in such a way as to prohibit the court from adjudicating medical question in which the judge is not qualified to adjudicate. The prohibition seems absolute in that it leaves no space for the court to modify the finding of an expert.

What constitutes definite scientific finding is not easy to define with sufficient precision especially in the field of psychiatry. The justification behind binding the court with expert evidence is that if the judges are allowed to disregard scientific finding which he is not qualified to appreciate, he would be at once entitled to convict an irresponsible offender merely because the latter committed, in judges opinion, an atrocious crime demanding punishment. Even though the justification at its face seems true, such formulation may create practical problem. What it means by this is that the court should convict an irresponsible offender merely because the expert has said the offender faculty of judgment was not affected. Since there is little definite in psychiatry the
court should have been provided with some room where by the court can modify expert finding.

3. THE LEGAL EFFECT OF CRIMINAL IRRESPONSIBILITY

As earlier noted in chapter two individuals who are found irresponsible will not be punished for the crime they committed. This is so because it is provided that criminal who is responsible for his act is alone liable to punishment. Punishment is not to be imposed on offender found to be irresponsible. After a finding of irresponsibility the criminal is not to be released freely rather the court orders to such a person suitable measure of treatment or protection. That is the court order the confinement and treatment of the offender.

3.1 CONFINEMENT OF IRRESPONSIBLE CRIMINALS

Confinement of the criminal who is acquitted on grounds of insanity is to be ordered only if it is proved that the defendant is a threat to public safety order or he proves to be dangerous to the person living with him. Confinement of the criminal in this case is a discretionary power vested on the court. Discretionary commitment has been criticized on ground that it may provide insufficient protection to society and the juries will be reluctant to acquit on ground of insanity. Some statute provides mandatory commitment procedure for defendant found to be irresponsible. Compulsory commitment has been justified on different grounds, one of such justification is that by pleading not guilty by reason of insanity the defendant has accepted commitment that follows involuntarily.

In effect the defendant, by raising the defense of insanity postpones the determination of his present mental health and acknowledge the right of
the state, upon accepting the plea, to detain him for diagnosis care and custody in mental institution until certain specified condition are met. \(^{31}\) A second ground for mandatory commitment is that there is a presumption that the insanity that existed at the time of the commission of the crime continues up to a time the court commits him. \(^{32}\) In such procedure the judge is not expected to inquire the present condition of the accused. This analysis can not work in our case. For one thing an acquittal on ground of irresponsibility does not mean that the defendant is proved to be insane. Rather it simply means that the court finds a reasonable doubt about the defendant responsibility. Examination of the defendant takes a longer time and such considerable time gap between the commission of the act and the examination of the defendant will not justify the assumption that the insanity of the defendant continue. Mandatory commitment has been challenged on different grounds. The challenge has been usually based up on the most basic due process right that an individual can not be held against his will without a hearing at which facts supporting such action are put in to evidence. \(^{33}\) The argument is that without sufficient evidence of the present status of the accused he should not be held in custody. The criticism is justified because unless it is proved that the defendant is dangerous; committing such a person appears to be punitive rather than one which is based on the rational of commitment. As a result committing such a person without inquiry of the present status of the offender, amounts to violation of due process.

Commitment is to be ordered only if it is found that the defendant is dangerous to the person living with him or is a threat to public safety order. While it is easy to identify dangerous, it is not easy to distinguish what consists threat to public safety or order. Dangerousness is usually connected with violent behavior. So psysical aggression of the person living with him constitutes dangerousness. If a person by his present
condition shows any signs of violent behavior obviously he will be dangerous to the person living with him. Therefore the court considering the present condition of the accused can commit the defendant.

Threat to public safety or order is not easy to put it in such a precise way. However it is clear that it constitutes physical aggression of persons. If by the release of the defendant the safety of the public will be disturbed the court can commit the defendant. The court can ascertain this by observing the behavior of the accused. If the accused shows any signs of violence this could be a ground to commit on ground of threat to public order or safety. In addition, if the defendant by expert testimony ascertained that the defendant is affected by disease that may with reasonable probability occasionally be active and that render a person a danger to other commitment of such a person is justified.

Beside confinement of the defendant if he is need of treatment, the court shall order the treatment of the defendant either in institution in which he is confined or be transferred to appropriate institution. 34 This is indicative of the fact that confinement of the defendant may be ordered in separate institution other than hospital.

3.2 TREATEMENT AND DURATION OF CONFINEMENT

It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. 35 That is the court should have a justified ground to commit the defendant. This could be either to treat him or to protect him and the society from potential danger. The code enumerates instances where treatment might be ordered. Where the criminal is suffering from mental disease or deficiency, deafness and dumbness, epilepsy chronic alcoholism, intoxication due to abuse of narcotics or any other pathological
deficiency and requires be treating or placing in hospital or asylum the court shall order his treatment in suitable institution or department of institution.  

Treatment is to be ordered where the condition of the accused requires. The defendant can be treated either in institution in which he is confined or in mental institution. Here the court should obtain expert opinion as to the place of treatment and need of treatment. If the conditions are those enumerated under the code it is easy to ascertain the need of treatment of the defendant.

The court can also order that an offender be treated as out patient. Out patient refers to treatment without confinement in hospital or prison. Here the court has to order custodial measures. Expert opinion should be obtained by the court before the order of treatment as out patient because it is only the expert who knows as to the mode of treatment.

As one purpose of commitment is treatment of the defendant individual committed should receive appropriate treatment confinement with out treatment violate due process.

Treatment and confinement is for indefinite period. The code also provides review of the defendant status with in two years. The court which has committed the defendant has the responsibility of releasing the defendant in the community. The code envisages an administrative authority which has the function of following up the treatment and confinement of the defendant. Further this administrative authority after having referred the matter to the court put an end to the measure. In fact this administrative authority can play a great role. This is so because judges have limited opportunity to observe the progress of the defendant condition in hospital. The administrative authority is to refer the matter
to the court when it receives expert opinion as to propriety of ending the measure. As soon as the reason for confinement disappears individual committed should be released by their own application or by medical expert in charge of the case. The standard for release is disappearance of the reason for the measure.

The code also envisage a situation in which individual may be released conditionally without the disappearance of the reason for the measure. Temporary suspension the treatment and confinement of the defendant is to be ordered where its propriety has been confirmed by the expert. 40 We would find significant correlation between diagnosis and conditional release. 41 That is the release of the defendant depends on the mental status during the hospitalization of the defendant. Further, it has been suggested that a person whose mental disease or defect with reasonable medical probability, occasionally become active and where it become active will render a person danger to other shall not be discharged conditionally. 42 So such a person will not be eligible to release since they may be danger to public. The code also places the criminal for supervision for not more than one year for selected protector. 43 Revocation of a releases order may be made by the court, revolution is to be ordered where public safety or condition of the person released requires. Where it appears that individuals released show any sings of violent behavior against others, it can be a ground for revocation of order of release. Further, if a released criminal is experiencing deterioration of his or her mental status the court can order revocation of the order.
Conclusion and Recommendations

The paper attempts to examine defense in general by making its particular reference to the defense of insanity and intoxication. In this regard, the position taken by the code is that an act is not punishable if it falls in one of the category of excusable and justifiable acts. Even though the code stipulates so, it does not provide a rigid classification of defense in to one of excusable and justifiable one. If provides three classes of acts, namely, lawful, excusable and justifiable acts. The code by separating out lawful acts in one category, and provides others under the title excusable and justifiable acts, though executable defense like insanity and intoxication are dealt in relation to criminal responsibility. The separation of lawful acts from others is appropriate as lawful acts do not involve criminal guilt.

The paper also explores the legal regime governing the defense of insanity and intoxication. In an attempt to screen out certain individuals who should not be subjected to a criminal sanction the code provides the test to be applied to determine who should be out of the purview of the consequence of the commission of prohibited act. The legal test governing the defense of insanity is a bio- psychological test. The test is a broad and comprehensive one. In the code individuals are considered as irresponsible when as a result of certain biological defect they were deprived of their mental faculties as not to know the nature and the consequence of their act or regulating their conducts according to their understanding. The code enumerates some illustrative biological cause that could have the effect of deprivation. In addition to this, by inserting the phrase “similar biological causes” having the effect of the psychological effect required, it has opened a hole that a new finding may be included. This is one of the positive aspects among the change
experienced by the code. The phrase is of immense significance since new findings will easily be accommodated. Had it not been for the insertion of the phrase, the biological cause enumerated by the code would have been too restrictive.

The other important aspect of the present code with regard to biological element is the article on total and partial irresponsibility cross refers each other. What it meant by this is that, either of the biological in total or partial irresponsibility may have the effect of total or partial irresponsibility depending on the effect on psychological make up to the criminal. As a result it is only the psychological make up of the accused at the time of the commission of the act that distinguishes total and partial irresponsible. This is advisable approach. The code disregarded the rigid classification that had been made in previous code.

The psychological elements are similar to the M. Naghten and the irresistible impulse tests. In this regard the objection raised in relation to those tests can be raised against the psychological element. The code used the term irresponsibility instead of insanity. As the term insanity does not have a clear meaning it avoids the criticism in this regard.

The paper also explores the criminal liability of a person who reduced in to state of partial or total irresponsibility by ingestion of intoxicating substance. In the code irresponsibility resulting from intoxication is based on the principle that voluntary intoxication is no defense. To that effect, the code particularly takes in to account the mental state of the accused when he starts to reduce himself in state of irresponsibility. Accordingly, one who puts himself in state of irresponsibility in order to carry out his criminal design can not escape criminal responsibility under the guise of lack of the required mental element at critical time.
This position is more plausible in relation to offence committed in state of partial responsibility for reason stated in chapter three.

Similarly if criminals fail to take reasonable care that would be expected of them because of particular circumstance they were acting and reduced them selves, in disregard of this fact, in to state of irresponsibility, will be held criminally liable for crimes of negligence. The code does not establish a conclusive presumption of negligence, rather, it is to be determined by taking in to account the mental state of the accused, for instance, when he begun drinking.

The other striking feature of the code is that when the offence was committed in state of total irresponsibility for which the offender has no intention or negligence the code establishes alternative offence. Other than the offence actually committed by the offender, individuals will be liable for the offence against public decency. Although the position taken by the code cannot in any way be compatible with criminal guilt, it can be said that the stand of the code is better than cases of American model penal code which established negligence in the mental state of accused. Because the offender liability will be assessed within one year what ever grave offence was committed. The justification seems to be education rather than punitive.

The code also deals the issue of involuntary intoxication. This is a departure from the previous code. The code puts illustrative condition which renders individuals intoxication involuntary. Accordingly intoxication by coercion is assimilated to involuntary intoxication. The other instance recognized by the code as involuntary intoxication is intoxication for which there was no fault on the part of the offender. In other jurisdictions intoxication resulting from medically prescribed drugs, pathological intoxication and intoxication by innocent mistake
is regarded as intoxication for which there is no fault on the part of the offender. The same applies to our case. Therefore such intoxication can be raised as involuntary intoxication. However, the code shouldn’t have left the issue in this way. It should have prescribed conditions governing the coming in to being of involuntary intoxication. For one thing it may be subject to abuses by the judges. On the other hand, the judges will be reluctant to recognize offender’s intoxication as involuntary. Too much discretion is vested on the court.

The code also provides for disposition of the defendants who are found irresponsible. Here the provisions of the code are more precise and there is no problem as such. However, the code or the criminal procedure code lacks provision for administration of the defense. There is no provision governing the burden of proof. The code should have provided this. Courts are also bound by expert evidence whatever the testimony of the expert would be. Here the code should have provide instances where by expert evidence may be modified or taken by reservation
END NOTES FOR CHAPTER FOUR


2. Id p, 306


5. Wayne R. Lafava and Austin W. Scott, supra note 1. p


7. Ibid

8. Wayne R. Lafava and Austin W. Scott, supra note 1.p. 313

9. Article 51, supra note 4

10. Daniel E. Hall, supra note 6, p. 222

11. Wayne R. Lafava and Austin W. Scott, supra note 1. p. 313

12. S. Sheldon Gluek; Mental Disorder and The Criminal Law; (kraus Reprint Corporation New york, 1966) p. 41

13. Wayne R. Lafava and Austin W. Scott supra note 1, p. 314

14. Graven philipe, An Introduction to Ethiopian Penal Law, ( Faculty of Law, Hailelasse I University Press, 1957) p. 133

15. Article 51, supra note 4


17. Article 51 (2), supra note 4

18. Ibid

20. Id, p.20

21. Article 51(2), second alenia, supra note 4

22. Ibid


24. Ibid


26. Article 48, supra note 4

27. Ibid

28. Article 130, supra note 4

29. Wayne R. Lafava and Austin W. Scott, supra note 1, p. 318


33. Wayne R. Lafava and Austin W. Scott (jr) supra note 1, p. 318.

34. Article 130, supra note 4,

36. Article 131 (1), supra note 4

37. Ibid

38. Ibid, art 132 (1)

39. Ibid

40. Ibid, art 132 (3)


42. Ibid

43. Article 132 (2), supra note 4
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3. The Criminal Procedure Code of the Empire of Ethiopia, Proclamation No. 185/1961, Nega, Gaz 21st year, No 7