

## ON INTERPRETING THE ETHIOPIAN PENAL CODE

by Peter L. Strauss\*

### I. INTRODUCTION<sup>1</sup>

The aim of this article is to set out and discuss some general principles of interpreting the Ethiopian Penal Code—that is to say, of using it. Even now, ten years after it came into effect, many people have difficulty in understanding and using the Penal Code in a straightforward way. It seems complex, and many of its fundamental conceptions are unfamiliar to Ethiopian lawyers. This article, discussing at length how the code is built, may help reduce its apparent complexity and thus facilitate its day-to-day application.

Since the article is about interpretation in general, it does not attempt to discuss in detail particular concepts, such as “negligence,” or crimes, such as “homicide.” The one exception is the “Principle of Legality,” embodied in Article 55 of the Revised Constitution as well as in Article 2 of the Penal Code. This principle places restraints on the form and manner of interpretation of the Code, and thus has obvious relevance to our theme. For the other doctrines of the General Part, the first place for an Ethiopian lawyer to turn is the commentary of Dr. Philippe Graven, *An Introduction to Ethiopian Penal Law (Articles 1-84 Penal Code)*, published

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\* Faculty of Law, HSIU 1966—1968.

1. Works of general interest on the subject of penal law interpretation:

J. Andenaes, *The General Part of the Criminal Law of Norway*, (Sweet & Maxwell, London, 1965), p. 96 ff.

J. Graven, “Les principes de la légalité, de l’analogie . . .,” *Revue pénal suisse*, 1951, p. 377. Hart & Sachs, *The Legal Process* (Tenth ed., Harvard University, 1958), Ch. VII.

Legal, “Les pouvoirs d’interprétation du juge pénal en France,” *Revue pénal suisse*, 1959, p. 94.

Legros, “Considérations sur les lacunes et l’interprétation en droit pénal,” *Revue du droit pénal et criminologie*, Vol. 47 (1966), p. 3.

S. Mahsoub, *La force obligatoire de la loi pénale pour le juge*, (Librairie générale de droit . . ., Paris, 1952).

Radin, “Statutory Interpretation,” *Harv. L. Rev.*, Vol. 43 (1930), p. 653.

G. Williams, “Language and the Law,” *Law Quarterly Review*, (1945-46), Vol. 61, pp. 71, 179, 293, and 384; Vol. 62, p. 387.

Works especially relevant to interpretation of the Ethiopian Penal Code:

J. Graven, “The Penal Code of the Empire of Ethiopia,” *J. Eth. L.*, Vol. 1 (1964), p. 267.

J. Graven, “L’Ethiopie moderne et la codification du nouveau droit,” *Revue pénal suisse*, 1957, p. 398.

J. Graven, “De l’antique au nouveau droit pénal éthiopien,” *La vie judiciaire* (Paris), Nos. 445-446 (Oct., 1954).

J. Graven, “Vers un nouveau droit pénal éthiopien,” *Revue internationale de criminologie et police technique* 1954, p. 250.

P. Graven, *An Introduction to Ethiopian Penal Law (Arts. 1-84 Penal Code)*, (Faculty of Law, Addis Ababa, 1965).

A collection of unpublished documents relating to the Ethiopian Penal Code of 1957, including an *exposé de motifs*, minutes of the meetings of the Codification Commission, and preliminary drafts, in the Archives of the Faculty of Law, Haile Sellassie I University, Addis Ababa.

in English by the Faculty of Law in 1965; an Amharic version of the commentary is now in the course of preparation at the Faculty. Dr. Graven is the son of the Code's principal draftsman and was for a long time employed at the Ministry of Justice.

What follows is not as heavily laced with footnotes as many of the articles which have previously appeared in these pages. It seemed that frequent references to the sources consulted might be more confusing than helpful, and that all discussion or explanation belonged in the text. Except for a few special cases, such as attribution of direct quotations, the sources used have been indicated as a group at the beginning of each subdivision of the article.

The problem of interpretation only arises when a lawyer or judge has a problem before him. Certain facts have come to his attention, and he wants to know what the legal consequences or implications of them might be. Given a code system such as Ethiopia now enjoys, his first reaction will be to look in the relevant code(s) for some indication of the answer to his problem. He may find that the language of the statute seems perfectly clear, and appears to give an exact answer to his problem. Then, he need go no further. But if the language is not clear or directly on point, he will have to go farther and attempt to reason out, using such aids as are available to him, what is the law applicable to his case.

This article is about all three stages of the process: looking for the relevant law in the Code (*and* how to tell what *is* relevant); deciding whether or not the meaning is "clear"; and some of the means which can be used to reason out a sensible answer if it is not. The organization of the article stresses the last two questions - what is "clear," and what can be done where a provision is not clear. Thus, it may seem to pass lightly over the vital question of finding the possibly relevant law. Once the reader understands how the Code is put together, however, and how that structure can be used in solving any particular problem, he will also have a much better sense of how and where to find the possibly relevant law. That is, in learning about interpretation, the reader will at the same time be improving his skill at finding and identifying the provisions which he has to interpret.

There are a number of special factors working in Ethiopia which limit and shape the direction of this inquiry. Perhaps the most important is the severe limitation on the resources available to the lawyer or judge who wants to find out about the law. Ideally, research tools would include the following: versions of the Penal Code in each of its three languages—Amharic, English and French, the language in which it was drafted; historical materials explanatory of the purpose of the enactors or the expected function of code provisions—such as preparatory drafts, explanations written by the drafter for the Codification Commission, and records of the debates in the Codification Commission and the Parliament; cases decided by the Supreme and High Courts on questions which have arisen in the past; commentary on the Penal Code by persons familiar with Ethiopian justice and/or the sources which were relied upon in drafting it; and materials and commentary from foreign jurisdictions explaining either relevant concepts new to Ethiopian justice or the code provisions from which Ethiopian Penal Code provisions were drawn.

Some of the most important of these materials are simply unavailable. Others are available only at the University Law Library in Addis Ababa, or require thorough knowledge of a foreign language to be understood. With the exception of

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the codes, and cases and articles appearing in the Journal of Ethiopian Law, there are virtually no Amharic-language materials. With the same exceptions, there are no legal materials which one could expect to find in most or all courts in the Empire. The significance of this limitation of resources is that one must expect that, at least for the present, lawyers and judges will have to rely almost entirely on the language and structure of the Penal Code itself, without being able to obtain substantial help from other sources. For this reason, this article will concentrate on how Code language and structure can be used in interpretation. It will not discuss such important and difficult questions as: What weight is to be given to historical materials in the interpretation of statutes? Are previous decisions interpreting a Code provision binding upon a court which is later asked to interpret the same provision? What importance should be attached to scholarly commentaries on Code provisions or on the laws of other countries from which Code provisions were drawn?

A particularly regrettable limitation flows from the likelihood that the English and French versions of the Code are not widely available and would not be widely understood. In most cases, Amharic code provisions will have been produced by translation from an English or French draft, or perhaps both. Inevitably, there are discrepancies. Although the Amharic version controls, both by law and because this is the language which most judges and lawyers best understand, our law students assure us that the English and the French versions are often more precise and more readily understood. In many cases, this may be because Amharic as a language lacks a settled and precise body of legal terminology. As a result, translators may have to use vague terminology, or long descriptive phrases which lose the exact meaning of the original text. Thus, it is not surprising that a comparison of provisions in their three different linguistic versions will often assist greatly in understanding them.

Such a comparison might also suggest intended limitations of application which had not been incorporated clearly into the Amharic text, as for example, in the case of Penal Code Article 472. The English text of Article 472(1) states:

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

*"For the purposes of this Article, 'serious offences' are offences which are punishable with rigorous imprisonment for five years or more."*

The italicized portions are omitted in the Amharic. The French text is similar to the English text, and there is no available record to show that the Amharic version reflects a Parliamentary amendment of the original draft. How a judge might or must deal with such discrepancies is again, however, something best put aside until a later time.

We must also take into account another factor, which is that at the present time most of the judges and advocates who must administer the Penal Code have not had any formal legal education. The drafters of the Code have taken the difficulties this situation creates into account, for what they have written is very full in explanation and clear in its organization. Still, there must be some understanding of how to approach these explanations, of how the organization works, of

how the drafters of the Code expected that their work would be understood by those responsible for applying it. And it is important not only to set out appropriate means of interpretation, but also to avoid reliance upon techniques of interpretation — however accepted they may be in countries where legal education is widespread — which are complex or sophisticated. Indeed, it may be doubly important to restrict ourselves to simple techniques of interpretation when dealing with the criminal law. In the criminal law, the common man, too, must understand what is permitted and what is forbidden; he may go to jail if he makes a mistake.

There is a final limitation, perhaps the most severe. It should be clearly understood that there are no such things as "rules" of interpretation, and that it is not the goal of this article to help judges and lawyers reason to what is "the proper" or "the correct" result in the cases they may have to deal with. Fringe areas of uncertainty, as we will shortly see, exist in virtually every statute. In these areas, the legislature has not clearly decided or perhaps even considered the appropriate meaning of the law; consequently, in these fringe areas, *any answer would be permissible and therefore technically "correct."* Certainly, in making the choice a lawyer may find one or another interpretation better for reasons of social policy or the like. But the point is that the choice is open for him to make and, whether he makes it intelligently or not, one cannot say *a priori* that his choice is impermissible or wrong. Thus, it would be more accurate to state the goal of this article as the following: to help judges and lawyers avoid *improper* or unjustified results, by suggesting guides for determining where legislative solutions really are uncertain, and what considerations might be helpful in making the necessary choice. It can do no more. Common sense and a feeling for "justice" are the ultimate tools on which a lawyer must rely, and, indeed, the criteria by which he and the results his decisions produce will themselves be judged.

## II. FINDING THE POSSIBLY RELEVANT LAW<sup>2</sup>

For the moment, we concern ourselves with the limited question, how to find within the Penal Code the law which might possibly bear on a problem. It requires a preliminary investigation of the principles on which the Code is organized; we will return to a more detailed investigation of these principles when we consider the question of interpretation as such. What we are looking for now is a way of determining by their language or placing, what provisions of the Code might be relevant to a legal problem.

We could take as an example the following factual situation, to which we will frequently return later on. Certain people of Ethiopia, such as the Afar, are nomadic. Their dwellings are constructed of sticks and mats which can easily be removed from one site, packed on the back of a camel, and carried to a new place. Suppose that during daylight hours an Afar is in the course of removing the parts of his dwelling from his camel's back and putting them up, when a thief emerges from the scrub and tries to carry them away. The thief is unarmed, and does not threaten the Afar personally; he simply tries to take the unconstructed pieces from the camel's back and run off with them. Seeking to protect his property, the Afar grabs up his spear and uses it to pierce the thief. The thief dies. How would one find the penal law relevant to the question of what, if any, crime the Afar has committed?

2. J. Graven, "The Penal Code of the Empire of Ethiopia," *J. Eth. L.*, Vol. 1 (1964), p. 281 ff.

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Although the process of finding law depends a good deal on knowing, in the first place, what facts the law is likely to consider significant, knowledge of the structural principles of the Penal Code is also important. The Code is, in fact, very carefully and logically organized. This organization consists of a series of subdivisions of increasing specificity. The first subdivision of the Code, into three Parts, is probably already familiar: Part I, the General Part, contains principles which apply generally to a large number of penal offences; Part II, the Special Part, gives the specific definition of relatively serious offences — the ones we are most likely to think of as “crimes”; Part III, the Code of Petty Offences, describes criminal offences of little importance, very often violation of ministerial regulations or the like and attended with very slight penalty. Part III also states some general principles specifically applicable to these petty crimes. Each of these Parts is itself subdivided, its subdivisions are subdivided, and so forth until one gets to what is generally speaking the smallest subdivision, the individual article. Each subdivision of the Code — articles included — has a title, which reflects the place of that subdivision within the overall statutory scheme. There is thus a formal structure of relationships within the Code, which is explained or indicated to a substantial degree by the naming of its various subdivisions. This formal structure was intentionally created, and created for just this purpose — to help illustrate the meaning, purpose, and interrelationships of various Code provisions. Understanding this important fact will help to identify the provisions relevant to any legal situation; later we will see how it should also help to understand the possible purposes and meanings of those provisions when they are at issue.

The Penal Code's Table of Contents is the first place to look in seeking possibly relevant Code provisions, for it clearly sets out the organization of the Penal Code and the titles of its various subdivisions. Often, the best first step will be to look for the specific offence(s) which may be involved. Thus, we can immediately eliminate the 247 articles of the General Part from the first stages of our search, since specific offences are not described in Part I. In the problem case of the Afar, set out above, we can also eliminate Part III, the Code of *Petty Offences*; if killing the thief was an offence, it very likely is treated as a rather serious matter. The search is thus narrowed to Part II of the Code — only 442 of the Code's 820 articles.

Part II is itself divided into four “Books” each with a title indicating a broad kind of specific crime. In the case of the Afar, the only Book likely to apply is Book V, “Offences Against Individuals and the Family”; the thief was an individual, not “the State” (Book III), “Public Interest or the Community” (Book IV), or “Property” (Book VI). Now only 126 potentially eligible articles remain. Book V is itself subdivided into four “Titles”; Title I, “Offences against life or person,” seems the most promising. The thirty-one offences of Title I are further divided among three “Chapters”; Chapter I, “Offences against life,” immediately suggests itself as most relevant. Chapter I is comprised of two sections: I, “Homicide and its forms” and II, “Offences against life unborn — Abortion”; Section II can thus be put aside, leaving seven possibly relevant articles. Of these, two can quickly be eliminated simply by glancing at their titles: Article 525, “Instigating or aiding another to commit suicide” and Article 527, “Infanticide.” The other five must be read.

On reading them, one can quickly eliminate Article 522, “Aggravated Homicide”; in the facts given, one could hardly think the Afar had premeditated the killing, or that there was anything else to show that he is “exceptionally cruel or danger-

ous." But from reading Article 521, "Principle," and Articles 523, 524 and 526 — each dealing with a particular form of homicide — several questions arise: What is "cause"? "intention"? "negligence"? Is the crime defined in Article 523 a crime of intention? negligence? neither? What is a "state of necessity"? "legitimate self-defence"? At the time of the killing, was the Afar's dwelling his "house"? To some extent, these are questions of interpretation, which we will deal with shortly. But the existence of so many questions suggests that there may still be other possibly relevant provisions to be found and considered, before the task of interpretation as such begins.

It is at this point that an understanding of Part I, the General Part, becomes important. As already stated, this part contains rules of general application throughout the Code, and so one might think that it would suggest the answers to some if not all of the questions raised above.

The General Part is itself carefully organized. It is divided into two Books. The first deals with questions influencing the question of guilt — "Offences and the Offender" — and the second, with the question of punishment. Each of these books is then subdivided, in a logical way, into Titles, Chapters, Sections, Paragraphs and Articles. To illustrate how this organization can be used for law-finding, the structure of two of the Titles of Book I is set out below: The parenthetical questions are intended to show the material dealt with.

#### **Title II: The Offence and its Commission**

- Chapter I — The Criminal Offence (In what circumstances, where and when is an offence committed?)
- Chapter II — Degrees in the Commission of the Offence (When is an offence begun to be committed, and can it then be withdrawn from?)
- Chapter III — Participation in an Offence (What persons are participants in — guilty of — offences?)
- Chapter IV — Participation in Offences Relative to Publications (What are the special rules of personal liability for illegal acts of publication?)

#### **Title III: Conditions of Liability to Punishment in Respect of Offences**

- Chapter I — Criminal Responsibility (What persons are excused, and to what extent, from criminal liability on account of their physical or mental condition?)
  - Section I — Ordinary Responsibility (Adults)
  - Section II — Infants and Juvenile Delinquents
- Chapter II — Criminal Guilt (What state of mind renders one guilty of, justifies, or excuses in part apparently criminal conduct?)
  - Section I — Intention, Negligence and Accident (What state of mind is necessary for criminal guilt to exist?)
  - Section II — Lawful Acts, Justifiable Acts and Excuses (What conditions permit, justify or excuse otherwise unlawful conduct?)
  - Section III — Extenuating and Aggravating Circumstances (What conditions call for partial reduction or increase of the penalty for unlawful conduct?)

Title II, then, deals with relatively objective questions of criminal liability — what acts, committed by whom, in what circumstances, are necessary to a finding of

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guilt; Title III deals with the more subjective question of blameworthiness: was the state of mind of the individual when he acted such that he deserves to be punished, and if so, to what extent?

In looking, then, to see if possibly there is more law in the Code on the issues noted in the Afar's case, one can make some prediction where it is likely to be found. The relationship of "cause" apparently required by Article 522 seems an objective condition of liability, hence likely to be described in Title II rather than Title III. Indeed, one finds in Chapter I of Title II Article 24, "Relationship of Cause and Effect." Questions of negligence, intention, necessity and self-defense — having to do with state of mind and, possibly, excuse — one could expect to find dealt with in Title III, Chapter II. Looking at the titles of the articles in that Chapter, it is easy to mark the following ones as likely to be relevant: Article 57, Principle; Criminal Fault and Accident; Article 58, Criminal Intention; Article 59, Criminal Negligence; Article 64, Acts Required or Authorized by Law; Article 71, Necessity; Article 72, Excess of Necessity; Article 74, Self-Defence; Article 75, Excess in Self-Defence.

Finally, one can guess that a definition of the term "house," which might be important for applying Article 524 in the Afar's case, is unlikely to be found in the General Part. Although the word might appear in several places in the Code, and a uniform definition could be of substantial importance as will shortly appear, what is involved is hardly a general principle of penal law. A definition of "house" will not help us to determine, in general, the subjective or objective conditions for guilt in penal cases, nor will it be of general use in determining the degree of measure of punishment. Accordingly, it has no place in the General Part.

It remains to take this body of "possibly relevant law," four Special Part articles and a number of General Part articles, and interpret them — use them — in the case at hand. One would have to ask whether the meaning of each of the articles, or all of them together, is entirely clear; what the relationships between them are; what is the appropriate legal outcome. What follows is addressed to these interpretational tasks, first as regards individual Code articles, and then in the larger context of the Code as a whole.

### III. THE VERBAL LIMITS OF A LEGISLATIVE RULE<sup>3</sup>

Once he has found a possibly relevant provision, the first question a judge is likely to ask is, "What meaning could the words of this statute have?" In a parti-

3. The principal work drawn on for this section was:  
G. Williams, "Language and the Law," *Law Quarterly Review*, (1945-46), Vol. 61, pp. 71, 179, 293, and 384; Vol. 62, p. 387.  
See also:  
Andenaes, work cited above at note 1, pp. 102-103 and 110.  
J. Frank, *Courts on Trial* (Princeton University, 1949), p. 295 ff.  
E. Freund, *Legislative Regulation* (Boston, 1932), Ch. III, esp. pp. 160-171, 240-260.  
Hart & Sachs, work cited above at note 1, pp. 1156-58, 219-21.  
E. Levi, "An Introduction to Legal Reasoning," *U. Chi. L. Rev.*, Vol. 15 (1949), p. 501, 503, 520.  
Payne, "The Intention of the Legislature in the Interpretation of Statutes," *Current Legal Problems*, 1956, pp. 96, 99-100, 105.  
Radin, work cited above at note 1, p. 866.  
J. Stone, *Legal System and Lawyers' Reasonings* (Stanford University Press, 1964), pp. 31-34.

cular case, this determination will commonly take the form of the question, "Could the words of this statute apply to this case?"

The answer to this question may often seem easy. The legislature may have spoken clearly, or the case may be one of those which would come within any reasonable meaning of the words of the statute. Still, the question is one which confronts a lawyer or judge every time he seeks to discover what legal rule to apply to the question before him. The law is a profession of words. Words are an essential means of human communication, and the only means commonly used in legislation. Whether he is conscious of it or not, the first step a lawyer takes to ascertain the meaning of some statutory rule is to read it and ask himself what the words mean.

One may ask, of course, whether and to what extent the words of a statute matter. Under some governments, the whim of an official matters more than any words written in laws. The world has known systems in which legal issues were settled by reference to custom, previous court decisions, or what the judge believed to be just. This is less arbitrary than the first case, but is still a situation where written rules are not paramount. Even if one were to agree that, in general, written rules govern, there would be the question how far one can reason with the statutes enacted. For example, if a statute forbids threatening someone with "a knife," can one apply it to a case where someone is threatened with a gun? Both are dangerous weapons which could cause a person severe fright; can one use this analogy to apply the statute to a case the wording of the statute overlooks?

The Ethiopian Constitution makes it very clear that neither whim nor judges are, in the first instance, the proper source of law. It chooses a legislative system in which the primary responsibility for stating rules rests in the Emperor and Parliament. The enactment of the code system, in which all laws are put in writing, is a natural outgrowth of that choice. One can say that in Ethiopia the words of statutes are at least the starting point for any discussion of a legal issue.

This leaves the question whether the words of statutes, by their possible meaning, also limit the discussion of a legal issue—whether "a knife" can also include "a gun," if the purpose of the statute seems to require or permit this. In the case of the Ethiopian Penal Code, words do impose such limits on courts, for reasons that will be examined in detail later on.<sup>4</sup> The application of a penal statute is, in general, limited to the cases indicated by its words, given a meaning which they will bear. Since this is the case, it is obviously quite important to know what the meaning of any given word or collection of words might be.

This will often be a much harder question than might at first appear. For it is generally recognized that words are often if not always an imprecise means of communication. They may mean one thing to the person who speaks them, something else to one who hears them, and have still a third meaning in common usage. Yet the law may make sharp differences; freedom or years in jail may turn on the meaning they are given. The imprecision exists because most words describe general concepts, at varying levels of abstraction. There is a "core meaning" of clear instances to which most men would agree that particular abstraction

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4. The discussion begins at Section IX within, p. 415 ff.



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applies; a "fringe" area, where there might be substantial disagreement whether it applies or not; and another clear area where most would agree it did not apply.

As an example, one could take the word "house," which could be significant for the application of Penal Code provisions, for example Article 524(a). This Article applies to a person who "kills another . . . in resisting the violation, by force or trickery, of the privacy of his *house* or outbuildings, there being no true state of necessity or legitimate self-defence. . . ." "House" is a fairly precise word, and there will be a large measure of agreement as to what is a "house" and what is not. A permanent, one-room chicha building, in which a family is living, is within the core meaning of "house." That is, almost everyone, if not everyone, would agree that such a structure could be called a "house." And almost everyone would agree that a fenced compound, without a roof, in which animals were kept for the night is not a "house." One begins to encounter uncertainty, however, in considering whether a flat in a large apartment building in the city is a "house." Plainly one is in the fringe area of disagreement when the issue is whether an Afar's dwelling, or a tent, or a building in the course of construction is a "house." Certainly, there would be room for disagreement on this issue, if more than one man was asked for his opinion. Parliament would doubtless have discovered such disagreement among its members if it had stopped to consider the issue—which it almost certainly did not—and lawyers will discover that they disagree on the issue if it ever becomes important in court, which it may not.

Although even a fairly precise word like "house" has a fringe of uncertainty, it is not hard to find other words, also significant for some Penal Code purposes, where the fringe of uncertainty is quite large. These more abstract words, such as "gang," "numerous," and "begin," evoke very indefinite responses in the person who hears them. It may be very significant to know whether a person was a member of a "gang" or not, or acted together with "numerous" other persons. But how many are "numerous" or a "gang"? One is not. Eighteen certainly are. But what about two? three? four? five? six? seven? It can confidently be expected that among the readers of this article will be people who choose each of the above figures as "the point" at which the abstractions "gang" or "numerous" begin to apply.

Finally, there are some words which are so abstract as to be almost all fringe, to present no areas of certain agreement. These are words which call on our emotions, such as "unjust," "immoral," "reasonable," "good," and "evil." The history of mankind has been a history of often violent and rarely rational disagreement about what such words mean. Thankfully, such words do not appear often in the Penal Code, and when they do, they find some explanation in the words around them. We shall have reason later to ask whether it is ever permissible to use them in penal legislation.<sup>5</sup>

The conclusion to be drawn for now is that whenever legislation uses words, as it must, it necessarily creates these fringe areas, in which different men will understand its words in different ways. In many, perhaps most, cases, there will be agreement that the statute does or does not apply. But for every statute there will be cases to which that statute could be applied or not, depending entirely upon how the words which compose it are understood. In such a case, no meaning

5. The discussion is at Section X-B within, p. 433 ff.

which is logically consistent with what the legislature has said can be out of the question. The judge has a choice among the several meanings which the statute permissibly has. He has to decide which best fits the context, the jobs the statute was meant to do, the expectations of the parties or the like. Of course, if the judge does not understand that he is choosing, what choices are open to him, and what may be the consequences of each, it cannot be said that he is doing his job very well, for he will be doing it blindly.

Thus, one of the first tasks of interpretation is to be sensitive to the fringes of uncertainty which a statute always has—to be aware of the range of permissible choice within the possible meanings of the statutory words. Suppose that the Afar of the previous hypothetical was charged with homicide and argued that he should be charged under Article 524 rather than some more serious provision, because he was defending the privacy of his "house." One judge might say, "This *is* a house!"; another, "This is *not* a house." They would simply be shouting at each other if they did not realise that the word "house" itself gave no answer in this case—that either choice was open to them, and that they would have to find some basis other than the word "house" to decide what meaning the statute should be given, that is, whether or not it should be applied to the Afar's case.

These "fringe areas" of uncertainty in the meaning of words provide one source of uncertainty in statutes, but not the only one. We have been assuming that one word, like "house" or "numerous," represents only one abstraction, and have said that uncertainty comes at the edges of this abstraction, where not all men will agree whether it applies. But one word frequently represents more than one abstraction, or core meaning, and in such a case the interpreter is faced with the additional difficult task of determining which or how many of these several meanings should be given to the word. The abstract concepts of the law, such as "intent" or "act," are very often such words, just because there has been so much argument and disagreement about what they ought to mean. In the context of a criminal code, the word "intent" might mean a wish to accomplish a certain forbidden result, a willingness to do so, a wish to violate the law, a willingness to do so, a wish to do "evil" or inflict "harm," a willingness to do so, and so forth. The interpreter must decide—that is to say, *choose*—how many and which of the accepted definitions are to be used. Where the word is an important one, the statute will very often help him in this by seeking to define it. Definitions of "intent," for example, are given in Article 58. Still, the judge will often be faced with a choice of possible meanings. Even if he is unaware that he has a choice, the fact that he decides the case in a certain way necessarily implies that he accepted any definition that is logically necessary for his result, and rejected any definition that is logically inconsistent with it. He cannot decide without attributing some meaning to the statute before him.

In concentrating on the inherent vagueness of language, we should not lose sight of the fact that we often do manage to communicate with each other rather well. We believe in and act on the premise that clarity of expression usually is possible. Most cases will probably involve the "core" of statutory meaning, where there will be little disagreement about what the legislature has said regarding the case at hand. The fact that this article concentrates, as it must, on cases where the law is unclear should not make us lose sight of this truth.

Moreover, not all cases of imprecision in statutes is caused by unavoidable imprecision of language. There may be cases where the legislature simply has not

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adopted the clearest possible mode of expression. It may not have been able to agree precisely on some issue—for example, whether three, four, five, or six constituted a “gang”—and decided to pass its disagreement on to the courts in the form of an uncertain word. It may not have been aware that the wording it adopted was ambiguous or vague, and could have been made more precise by a definition or more careful wording. It may have engaged in careless thinking about the dimensions of the problem before it. It may have decided consciously to make its rule vague and uncertain, perhaps to frighten people into obeying it, or to leave room for the courts to adapt the rule as society changes. For any of these reasons, the legislature may have passed on to the courts more work than, in the abstract, it was required or wise to do.

There is substantial agreement in modern thought, however, that some legislative imprecision is unavoidable. In the first place, if words by their nature are imprecise, sentences constructed out of words will also, necessarily, have areas of imprecision. A legislature can to a certain extent eliminate these areas of imprecision by preferring precise words over imprecise ones, or by adopting definitions which point in the direction of its thinking. It can never completely eliminate imprecision, however, and at some point the job of explaining what it meant would begin to take too many words. Such explanations would take time perhaps better given to other tasks, and could themselves be a source of confusion. Secondly, a legislature necessarily works in the abstract. It does not have the advantage of the concrete cases which come before the judge, but deals with the general problems of society that are called to its attention. It would be unreasonable to expect the legislature to consider and decide in advance every hypothetical case that might arise under its enactment; it is hard work enough to frame language which will deal satisfactorily with the major problems with which it is concerned. Statutes which attempted to do more would be unmanageably large, and might introduce more difficulties than they solved.

One comes to the conclusion, then, that not only do difficult problems of interpretation arise more often than one might think, but that this job is an entirely natural one for courts to perform. At one point, political theorists were fond of saying that “The courts should be only the mouth that speaks the law,” and that judicial creation of law was an abuse of power to be sternly avoided;<sup>6</sup> the legislature determined the law, and the courts merely applied it to the facts of cases which came before them. We see now that this cannot always be the case. The legislature’s pronouncements, necessarily, will leave areas of choice, often substantial, in which the judge must decide what the law is to mean. The inability and undesirability of the legislature to perceive and settle every conceivable case in advance, the necessity that it frame its enactments to fit a few clearly seen “main cases,” also imply that there will be many cases in which the judge must choose what is to be the law. In some cases—most, if the legislature has done its job well—it will be clear that the law does or does not apply, that a particular structure is or is not a “house.” In others, however, the law will be unclear—the judge will

6. Glaser, “Principe de la légalité en matière, notamment en droit codifié et en droit coutumier,” *Revue du droit pénal et criminologie*, Vol. 46 (1966), p. 899.  
See also the works cited within at Section IX-B, p. 421 ff., notably:  
Mahsoub, work cited above at note 1, historical introduction and p. 50.  
Thornstedt, “The Principle of Legality and Teleological Construction of Statutes in Criminal Law,” *Scandinavian Studies in Law*, 1960, p. 211, 213 ff.

be free, so far as statutory language is concerned, to choose either for application or against it. By his choice, by sending a man to jail for more or fewer years or by freeing him, he makes the law.

If this is true, then it would seem that the judge who seeks to find in statutory language a rigid, single answer to every case is closing his eyes to reality. There may be cases for which the statute provides answers but there are also cases for which it does not. When one of the latter cases is presented, it is useless to think that the answer will be found in the "true" definition of a disputed word, unless the legislature has provided one; rather, the job of the judge is to ask, How shall I define this word? That is, as stated above, he first seeks not the one and only true meaning of the statute, but to discover what is the range of possible meanings in the case before him. He then has to choose one, to decide the case. Before making the choice, he may ask, in the words of a Swedish jurist, "Where do I go for guidance?"<sup>7</sup>

#### IV. LEGISLATIVE PURPOSE AS AN AID TO UNDERSTANDING STATUTES AND MAKING CHOICES<sup>8</sup>

Almost instinctively, the interpreter's first response will be to ask "What is this statute all about? What was it meant to do?" That is, he will make several important assumptions: (1) that legislative activity is purposeful, that is, undertaken to accomplish some social ends or goals; (2) that the language and form of legislation are chosen to reflect these purposes; and (3) that application of a statute should be limited to the cases indicated by its purposes, so that, in connection with our earlier assumption, for a statute to apply, its words and purposes should both bear on the case at issue. These assumptions are important enough to merit examination.

The first, that legislative activity is purposeful, reflects a commonly shared attitude towards life in general. We believe that there is some reason in what we do—some goal towards which our activity is directed. Legislatures, in particular, are constituted to formulate directives—laws—on important issues of social policy. It is

7. Schmidt, "Construction of Statutes," *Scandinavian Studies in Law*, 1957, p. 157.

8. That legislative purpose should be consulted in determining statutory meaning is now a commonplace observation, which would be made or assumed by any reputable commentator. The argument today is over how this should be done. The following works give an introduction to some of the techniques more commonly proposed:

Ekelöf, "Teleological Construction of Statutes," *Scandinavian Studies in Law*, 1958, p. 77.

Frankfurter, "Some Reflections on the Reading of Statutes," *Colum. L. Rev.*, Vol. 47 (1947), p. 526.

Geny, *Methode d'interprétation et sources en droit privé positif* (Librairie Générale . . . Paris, 1932), 2 vols., *passim*.

J. Graven, "L'analogie en droit pénal suisse," *Revue de science criminelle*, 1954, p. 653.

Hart & Sachs, work cited above at note 1, Ch. VII, *passim*.

Kantorowicz & Patterson "Legal Science—A Summary of Its Methodology," *Colum. L. Rev.* Vol. 28 (1928), p. 679.

Mahsoub, work cited above at note 1, pp. 54-66.

Payne, work cited above at note 3, *passim*.

Radin, "A Short Way With Statutes," *Harv. L. Rev.*, Vol. 56(1942), p. 388.

Schmidt, work cited above at note 7, *passim*.

Stone, work cited above at note 3, pp. 31-34.

Thornstedt, work cited above at note 6, *passim*.

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what we expect them to do; it would be ground for serious criticism of a legislature if it were found doing something else. Almost as soon as we see a statute, we ask "What is this for? What purpose does it have?"

The second assumption, that the words and form of legislation are chosen to reflect its purposes, is subject to the objection — as indeed is the first — that sometimes legislatures are devious, or even irrational. If the assumption were not generally true, however, the legislature, and not the assumption, would be generally held to blame. Again, this is part of what we expect a legislature *ought* to do. Indeed, when courts consistently act on this assumption, and treat the words and form of statutes as if they embody its purposes, they help to make the assumption valid. The legislature will quickly learn to make the words and form of its statutes conform to its purposes if it is aware of this court practice and wishes its purposes to be enforced.

The third assumption, that legislative purposes are binding on courts, like the assumption that legislative words are binding on courts, reflects a certain attitude on the proper relationship between courts and legislature in the Ethiopian governmental structure. Since it is in the nature of a limitation on judicial freedom, we postpone examination of it until later in this piece. For the moment, it will simply be accepted as a necessary element of interpretational choices.

Before seeing how one might discover legislative "purposes," it is important to define the term as it is to be used in this article. By "purpose" is meant the end or goal which the legislation in question has in sight — the overall regulatory impact which it appears the legislature meant the statute to have. Thus, Article 1 of the Penal Code states that the "purpose of the criminal law," using the word in this sense, "is to insure order, peace and the security of the State and its inhabitants for the public good." This use of the word purpose, and any discussion of legislative purpose, is to be distinguished from what one sometimes hears referred to as "legislative intent." Very often one hears what may be a permissible question, such as "What would the legislature have done about this problem if it had thought of it?" turn into a very dubious one, "What did the legislature intend to do about the problem before us?" In the last question, the speaker is implying that on some specific question whose answer is unclear from the statute itself, the legislative body actually intended to provide an answer, which, if only it could be found, would solve the case. This notion that there is some preordained answer which has only to be found is a very appealing one, for judges do not like to admit that sometimes they make law by their decisions. Nonetheless, it must be rejected. We have already seen that legislatures very frequently do not even think of, much less solve, specific problems which may present themselves to judges but find no clear answer in legislative words. Whether, indeed, one can ever speak of a large body of men, or a majority of them, as having an "intent" on a specific question not clearly settled by a statute's words is very dubious. It will be hard enough for the judge to determine the regulatory policies and goals of an enactment in the large, without his trying to pretend to himself that the enactment provides only one answer to a problem which his research has already shown could be answered in several different ways without departing from permissible meanings of the statute's words.

Indeed, an inquiry into legislative purposes will often do no more than help the interpreter to identify the clear cases of application and non-application, and indicate some considerations which may be helpful for resolving the cases in between.

This is so, first, because purposes will often be stated or revealed at a level of generality so great that they will not be very helpful in solving any particular problem. To say, for example, that the purpose of the Penal Code is to control objectionable social behavior, or even that the purpose of the provisions regarding homicide is to distinguish on a rational basis varying degrees of culpability regarding the killing of a human being, is not very helpful for solving the particular problem of the relationship between Articles 523 and 524. Only as purposes of considerable specificity can be inferred from a statute will these purposes help materially to resolve the possibilities which face the interpreter.

Second, just as words are imprecise and may permit a wide variety of meanings, so are purposes likely to be uncertain in their formulation and scope. Very often, if not always, a legislature will be seeking multiple and partially conflicting goals; or members may have been forced to compromise or obscure the policies they prefer as individuals in order to reach agreement; or the legislature simply may not have considered the relationships and consequences of the various policies it enacted. In the Penal Code, for example, the purpose of insuring "the security of the State" may often conflict with that of assuring "the security of . . . its inhabitants." Among the events which the latter would wish to be secure from are unwarranted punishments, or the risk of being put on trial although innocent of wrong-doing. In the short run, at least, measures to insure the security of the State might substantially infringe on these interests. Thus, there is an almost necessary inexactness and ambiguity about legislative policy, which should make the interpreter hesitant to formulate purposes too precisely, or to extend any one purpose he may find in a statute to its maximum possible extent.

These cautions, however, should not be permitted to obscure the basic point — that within the limits of common sense and justice, those who are engaged in the business of interpretation instinctively and universally find it meaningful to ask "Now what is this law all about? What policy was it enacted to enforce? What problem was it addressed to? What change or result was it to bring about?" In a case where statutory language alone is insufficient to answer the question whether a particular statute is to be applied or not, an investigation of statutory purpose carefully considered, may at least serve to narrow the areas of doubt; if it does not produce a single, "correct" answer, it may at least assist the judge to avoid an objectionable result and provide some hints as to how he may exercise his freedom to choose among the permissible ones.

To take a concrete example, suppose again the case of the Afar who killed another man when he found the other taking parts of his dwelling from the back of his camel. The Afar has been charged under Article 523, but insists he can be convicted only under Article 524, because he was "resisting the violation, by force or trickery, of the privacy of his house . . . ." Let us suppose also that you agree that the words of the statute could be given the meaning the Afar urges, and are wondering whether they *should* be given that meaning.

A reading of the two statutes informs you that both Article 523 and Article 524 deal with homicide, and that Article 523 will apply in "circumstances other . . . than those specified in Article 524." The penalty provided by Article 524 is quite a bit lower than that stated in Article 523 (although you know from your search for possibly relevant law that the latter penalty might be mitigated under the provisions relating to legitimate self-defence, A clear case in which Article 524 would apply might be if the Afar had erected his dwelling and was living in it when the deceased tried to

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intrude. A clear case in which Article 524 would not apply, and Article 523 would, might be if the deceased was trying to take the Afar's unloaded camel. What purpose might the legislature have had in making this distinction? What characteristics does a "house" have in Ethiopian society, as distinct from a camel, which would lead the legislature to require that violent acts in its defence must be excused to a considerable degree, while the degree of excuse for violent acts in the defence of other property is left much less certain?

Here are only a few of the possible answers to these questions: There may have been a rash of murders in connection with house-breakings which had come to the attention of the legislature; they were dealing with a problem of general occurrence. The legislature might have considered that a "house" was the kind of property having the greatest monetary value to Ethiopians, and that a killing in defence of it was therefore substantially excusable. Or, it may have considered that Ethiopians had a deep emotional need for privacy, and would consider any intrusion into the place where they were dwelling as provoking; a killing thus provoked should be substantially excused. Or, the legislature may have been aware, because of one or more of the above considerations, that many Ethiopians considered such killings completely justified, and they have wished to make it clear by a special enactment that this was not true; thus, by enacting Article 524, it may have been announcing special limits on the application of the doctrine of legitimate defence to the defence of property — it may have been emphasizing that such acts were to be punished, rather than that they were to be punished only lightly.

In order to make wise choices among these or other possible policies, any of which might be embodied in the provision, it is necessary to know something both about the general characteristics of Ethiopian society and about the framework and assumptions of a code. The author knows far less about the former than his Ethiopian readers will. It is to the latter considerations, which may prove helpful in determining both purpose and meaning, that the article now turns.

### V. SOME CONSIDERATIONS OF STRUCTURE<sup>9</sup>

#### A. The Penal Code Was Enacted in Code Form.

The statement that the Penal Code was enacted in code form might not seem to have much significance for interpretation of any particular provision. In fact it does, because of what is implied by the use of "code" form. As used in Ethiopia and Europe, this form is usually reserved for a body of laws which are drafted at one time, by one person or a closely cooperating body of draftsmen, with the intention of stating clearly and systematically all the rules applicable in a given area of law — for example, penal law. This description certainly fits the Ethiopian Penal Code, and may be contrasted with the situation reflected in the Consolidated Laws

9. Specific justification for the positions taken in this section *vis à vis* the Ethiopian Penal Code may be found in:

Graven, work cited above at note 2, p. 281 ff.

Exposé de motifs, collection cited above at note 1.

See also:

Mahsoub, work cited above at note 1, p. 57 ff.

Sereni, "The Code and the Case Law, in Schwartz (ed.), *The Code Napoleon* (University Press, New York, 1956), p. 55.

Stone, work cited above at note 3, p. 212 ff.

of Ethiopia. The statutes in the Consolidated Laws were drafted at many different times, by different bodies of draftsmen, to cover a very diverse body of subjects in an essentially random manner. That is, the legislator in these laws was dealing with small problems, as they arose, and was making no particular effort to achieve unity, consistency, or thorough coverage in a broad area of law. The contrast, between the characteristics of a code and the characteristics of an amorphous body of statutes such as the Consolidated Laws reveals a number of helpful assumptions which may be made in interpreting a code.

**1. It is fair to attribute consistency to the Penal Code, and thus to seek consistency in results under the Code.**

The Penal Code was drafted in one effort by a body of draftsmen, principally one man, in an attempt to state clearly and concisely the complete system of penal law which was to be applied in Ethiopia. This effort suggests, further, that the draftsmen would have attempted to construct a rational framework for their code. One would expect that this framework would produce answers for the major problems of criminal law, and that these answers would accord with Ethiopian notions of justice and fair play. One would expect that the framework would not produce contradictory or conflicting answers for the same problem, and that cases which Ethiopians regarded as similar would not be treated in conflicting ways or lead to contradictory results. That is to say, given our knowledge of the circumstances which produced the Code, we feel justified in treating it as a rational system, one which will lead to results which are not contradictory and which can be explained in a manner conformable to Ethiopian notions of justice. If we could not do this, we would think the drafters had done a poor job indeed. It is what they were asked to do.

If consistency is one of the characteristics of the Penal Code — or, to put it another way, *if the achievement of a consistent system of law is one of the purposes behind enactment of the Penal Code* — then in interpreting the Penal Code one should both reason from an assumption of consistency in its provisions and seek consistency in applying it. This means, first, that one should never try to interpret a Penal Code provision in the abstract. It must always be examined in its relationship to the other provisions of the Code, in order to see what part it might play in the overall scheme. We have already seen this process, in part, in our discussion of the relationship of Articles 523 and 524 in connection with the case of the Afar. That is, we assumed that Article 523 and Article 524, both of which are concerned with a form of "homicide," are concerned with different types of homicide, and that there should be an understandable and ascertainable basis for deciding what homicide falls under which provision. A second implication which may be drawn from the Code's internal consistency is that if the meaning of one provision of the Code has been established or is clear, one can reason from the meaning of that provision to what ought to be the meaning of another. Thus, knowing the meaning of the word "house" in Article 524 and the relationship of Article 524 to Article 523 may help to establish the meaning of the word "house" in Article 542 and the relationship of Article 542 to Articles 538 and 539. Thus, one can properly look for patterns, for a structural framework, or for common features which may help to elucidate the Code's meaning. Article 524, an extenuated form of homicide, refers to resisting the violation of the privacy of a house, as does Article 542, an extenuated form of the injury. There is a strong suggestion in this fact that the provisions should be given the same meaning — that they should be interpreted consistently.



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The same conclusions could not be reached under the Consolidated Laws. If a Proclamation of 1956 had a provision similar to a provision in another Proclamation, say of 1963, one would have to be very careful about reasoning from one to the other, even if the two Proclamations dealt with the same subject. Were they drafted by the same persons? Was consistency an object? Is there a common structural framework or social context? The answer to each of these questions is likely to be in the negative, and thus to refute any hypothesis of common meaning. If we find that the hypothesis of consistency is valid and helpful in the case of the Penal Code, it is because of the peculiar and important process which gave it birth.

This suggests that any case where unity of effort was lacking may be an important exception to the hypothesis of consistency in the Penal Code. For example, if one knew that there had been legislative amendments to the Code, either at the time of the draft or thereafter, one could not be certain of consistency in the areas affected by the amendments, unless a serious and thorough effort to produce it had been made. Unfortunately, the Penal Code bears evidence that in the past such efforts have been lacking. The draftsman originally provided in the General Part that the consent of an injured person was a defence to a criminal prosecution, except in certain specified cases. Other provisions of the Special Part, for example Article 542(1) (c), were written to reflect these exceptions. It was subsequently decided to change the General Part provision to make consent *no* defence; this decision is reflected in Article 66, which states that "the consent of an injured party ... does not relieve the offender of criminal liability." It appears, however, that Special Part provisions such as Article 542(1) (c) were never rewritten to reflect this change. In such a case, where the legislature has apparently abandoned the effort to produce consistency, it would be foolhardy for an interpreter to assume he can find it. Of course, he may still find reason to attempt to minimize the legislative error by seeking to produce consistency, if he can, through his interpretations. But this will be an entirely creative role.

### 2. It is fair to assume that language usage is consistent throughout the Code.

The assumption that language usage will be consistent throughout a code is only a particular example of the overall assumption of consistency, but deserves special mention because of its importance. What the assumption means is that if a particular word — say, "house" — can be established to have a certain meaning when it is used at one point in a code, it is at least likely to have the same meaning at any other point in that code.

We saw before that most if not all words have a fringe of uncertainty about their meaning. Different men will understand them in different ways. It is at least likely, however, that any one man — or group of men working closely together on a rigidly drafted legal document — will attribute a fairly fixed meaning to any particular word; each time he uses that word, he will use it in the same way. Knowing that statutory draftsmen strive for consistency of expression and word usage, as they do, increases the confidence that can be put in this assumption. Again, the assumption could not be made about a word appearing in different items of the Consolidated Laws; in this case it will have been written at different times by different men for different purposes, so that there is no reason to attribute a uniformity of meaning.

It should be pointed out that this assumption has double consequences. One, already seen, is that if the meaning of a word is uncertain in a particular context

in the Code, its meaning can be discovered from the meaning which the same word has elsewhere in the Code, if its meaning is better established by these other uses. The second consequence is that once a meaning is given to a word appearing at one point in the Code, that meaning is likely to be carried over in following cases to other points in the Code where the same word appears. Thus, the principle of consistency not only helps one draw assistance from past interpretations; it also warns that one's own interpretation is likely to be extended to other parts of the Code. Thus, interpretations should not be made in view of one provision only, but should take account of the principle of consistency by considering all appearances of the point in issue throughout the Code. What effect one must ask, will an interpretation have *elsewhere* in the Code?

It cannot be too often repeated that, as is the case for every other suggestion made in this article, the correctness of this assumption in any particular case is only probable. It is not certain. Draftsmen, like the rest of us, are human. They make mistakes. Even though they work hard for consistency, so that it is usually appropriate to assume that words are consistently used, they sometimes fail, and lapse into inconsistency. This danger is particularly great for certain words expressing legal conclusions, such as "property," "act" and "intent." These words have a great variety of accepted meanings, which depend heavily on the context in which they are used. One should always be very careful to see whether the draftsmen have succeeded at the very difficult job of using such words clearly and consistently. Moreover, in Ethiopia there is the special consideration that the Amharic codes on which the courts rely are translations from an English or French original. The draftsman's hard work to obtain consistency in using language can easily be lost if the translator or translators are not sensitive to this problem and do not themselves work hard for the same goal.

**3. At least initially, one may seek solutions to all problems within the framework of the Code.**

Since a Code is intended to be a complete statement of the law on a particular subject, one may assume, at least initially, that there are no large gaps or holes in it — that every problem in the area of law to which the code relates can find some solution within its framework. As an attempt to set down a comprehensive body of rules, a code is likely to take account of all the major problems on that subject, at least if it is as well drafted as the Ethiopian Penal Code was. It follows that in solving a legal problem on that subject, one can start on the assumption that a solution may be reasoned out or found within the framework of the code.

This assumption is particularly strong in the case of the Ethiopian Penal Code, in which the drafter has essayed a complete statement of doctrine in the General Part, along with the catalogue of crimes in the Special Part. Thus, while certain European Codes leave a variety of doctrinal issues to courts for elaboration — for example, the defences of necessity and responsibility — the Ethiopian Code seeks to elaborate a rule on all issues which might arise regarding guilt or degree of punishment.

It would be a mistake to take this observation so far as to deny that judges have any creative role, to state that the Code excludes judicial creativeness. As already has been noted, the legislature is working with an imperfect medium of communication, language. The legislature does not foresee, and could not be required to foresee, every possible case to which its product might apply. It is the judge

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who will get such cases, and will have to decide them. All that can and should be said is that the attempt at comprehensiveness and coherency offers an incentive and rationale for seeking results within its terms.

### 4. It is fair to interpret the code to avoid redundancies between provisions.

In a simple collection of statutes passed at many different times and for many different reasons, such as the Consolidated Laws, one might almost expect there to be a certain amount of redundancy between provisions. The legislature passing one statute might not be aware of another, passed many years before to deal with a slightly different problem. Even if they were aware of it, they might not see how someone from the outside would think the two could conflict. In the presence of such a conflict, one might have to consider whether one statute was meant to repeal the other in part or in whole; it could be very difficult to determine what the legislature intended their relationship to be, if it had any intent on that issue at all. The bulk of the work on the Consolidated Laws has been in determining just such difficult questions.

Unlike a collection of statutes, a code is written all at one time. The draftsman, who intends to be clear and concise, will have intended each provision he wrote to have some unique function. He would not knowingly include some superfluous provision or repeat something already provided for, since the only effect of this would be to confuse. Thus, just as the unitary character of a Code and the effort its authors have made to achieve consistency justify an assumption that words are used in the same way throughout, these same factors justify the assumption that apparent redundancies between provisions are unintended and may be eliminated by interpretation. Thus, when one finds two articles which seem to govern the same facts, one may look for an interpretation which will give to each a separate area of application.

For example, Article 594(2) authorizes rigorous imprisonment for the person who "*deliberately* performs (an indecent) act in (the) presence (of an infant or young person)." Article 608(2) provides only for simple imprisonment for the person who "*knowingly* performed (an obscene) act ... in the presence of infants or young persons." It would seem that these provisions were redundant, or almost so, since in ordinary usage the words "*deliberately*" and "*knowingly*," which mark the only real verbal difference between the two provisions, have approximately the same meaning. By hypothesis, however, we must assume that these articles were meant to have separate functions — as, indeed, the differing penalties also suggest. We must look for those functions someplace other than the language itself.

One must, however, distinguish this case, where apparent redundancy should be avoided by interpretation, from cases of intentional partial overlap among closely related provisions. The language of Articles 594(2) and 608(2) is so similar that one fails to see any element which might be required for the offence under the one, but not the other; moreover, the two articles are somewhat separated from each other in the Code's organization, which implies that they are not clearly related in function. This apparent, inexplicable redundancy should be avoided by interpretation if it is at all possible to do so. On the other hand, Articles 630 and 635, describing ordinary and aggravated theft, are a good example of the kind of partial overlap which the draftsman has often intentionally introduced into the Code's structure. He has foreseen that theft may occasionally be committed under such circumstances as to merit unusually severe punishment. It is still theft—that is, all the elements of

Article 630 must be satisfied — but it is aggravated by the presence of one or more of the additional elements described by Article 635. Thus, any person who could be convicted for aggravated theft under Article 635 could also be convicted for ordinary theft under Article 630, if the prosecutor for some reason chose to charge him with the ordinary offence. There is an overlap here, in the sense that two provisions, with differing penalties, could be applied to the same criminal acts. This, however, is not a case of complete redundancy, where two statutes seem to match identically in their coverage; there is an obvious relationship between the two provisions to explain the overlap which seems to exist. Indeed, even though the prosecutor could bring under Article 630 a prosecution which properly falls under Article 635, we might consider that he was abusing his powers if he often followed this practice. Where this partial overlap among closely related provisions appears, there will always be some unique element, such as the aggravating circumstances of Article 635, to show the intended distinction.

## **B. The Organization of the Code**

### **1. The formal structure**

As we have seen in Part II, in drafting the Code the draftsmen created a structural framework, or organization, within which to express their conclusions regarding criminal policy. This organization consists of a series of subdivisions of increasing specificity, each with a title reflecting the place of that subdivision within the Code's structure. In Part II, we saw how to use this structure to find possibly relevant law; here, we will see how it can be used to help understand—interpret—the law.

The organization can be used in this way because the place of any article in the structure of the Penal Code gives important indications of its purposes, through the titles of the subdivisions to which it belongs. As an example of how these indications can be used, let us consider further the apparent conflict between Article 594(2) and Article 618(2). A full description of the place of each of these articles in the Penal Code could be given as follows:

#### **Article 594(2) Penal Code**

##### **Part II, Special Part**

Book V, Offences Against Individuals and the Family

Title IV, Offences against morals and the family

Chapter I, Offences against morals

Section I, Injury to sexual liberty and chastity

Article 594, Sexual outrages on infants or young persons.

#### **Article 608(2) Penal Code**

##### **Part II, Special Part**

Book V, Offences against Individuals and the Family

Title IV, Offences against morals and the family

Chapter I, Offences against morals

Section IV, Offences tending to corrupt morals

Article 608, Public indecency and outrages against morals.

From this description, one might conclude that the two articles share certain purposes: to identify and prohibit specific offences against individuals and the family,

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in particular, offences against morals. In their more particular purposes, however, the articles seem to be distinct: the function of Article 594 appears to be to deal with acts which are injurious to sexual liberty and chastity of individuals, in particular, the sexual liberty and chastity of infants or young persons; the function of Article 608 appears to be to deal with acts which *may be* injurious to the morals of the public at large — that is, which tend to corrupt them — in particular, public indecency and acts offending public morals. One provision is quite specific and deals with what the legislature characterizes as an *actual* injury to the sexual interests of particular individuals; the other is much less specific, and deals with the *possibility* of injury to the diffuse sexual interests of the public as a whole.

This analysis suggests at least a possible distinction between the language of Article 594(2), relating to one who “deliberately performs,” and the language of Article 608(2), relating to one who “knowingly performs,” an indecent act in the presence of a minor. From the language of the articles one would deduce that it would be necessary in both cases for the offender to be intentionally performing some sexual act on himself or a third person, in the presence of an infant or young person, knowing that that person is there. Can one go further and say that, in some cases, this activity involves a direct injury to the sexual interests of the infant or young person, (Article 594), whereas in others it will only threaten to corrupt him (Article 608)? There might be some cases where the infant was forced or enticed to be present — where the sexual acts were performed “for his benefit,” or with the intention of involving him or affecting him. In other cases, the presence of the infant or young person may have been accidental so far as the offender was concerned; he may have had no desire to have the infant or young person present, or to involve him in any way, but merely failed to desist from his activity when he became aware of the other’s presence. The purposes of Article 594, as indicated by its place in the Code’s table of organization, suggest that it should apply to the first kind of case; those of Article 608 suggest that it should apply to the second.

### 2. The Relationship of the General and Special Parts

#### a. In general

Perhaps the single great omission of the Ethiopian Penal Code is its failure to state expressly the relationship between its General Part, Part I, and its Special Part, Part II. Article 3, al. 2 states “that the general principles embodied in this Code are applicable to (Police regulations and special laws of a penal nature) except as otherwise expressly provided therein”; and Article 690, the first article of Part III of the Code, the Code of Petty Offences, states that “In all cases where the provisions of this Book (the General Part of the Code of Petty Offences) are either silent or contain no contrary indications or do not provide exceptions, the principles and rules of the General Part of the Penal Code shall apply to petty offences . . . due regard being had to the nature of the case, as well as to the spirit and purposes of the law.” One is left to infer the obvious, as indeed Ethiopian courts have almost uniformly done, that the “principles and rules of the General Part of the Penal Code” *also* apply to all offences defined in the Special Part.

The full implications of this rule are not uniformly respected, however, so that it may be helpful to illustrate them by means of a common example. Article 523, seen before in another context, states that “whosoever commits homicide in circumstances other than (aggravated or extenuated circumstances, dealt with in Articles 522 and 524) is punishable with rigorous imprisonment from five to twenty years.”

Does this article state an intentional offence? Must the intent to commit the offence include an intent to produce death? What does "intent" mean in this case?

The answer to the first question is "Yes, the article *does* state an intentional offence, even though it does not use the word intent." The General Part, which we have said applied to this and any other article in the Special Part, states, Article 57(1), that an offence must be either intentional or negligent. Article 59(2) of the General Part adds that a negligent act is punishable as an offence "only if the law so expressly provides." This suggests that the word "negligence" must be used someplace in a statute if negligent offences are to be punished under it, and indeed Article 526 uses this word in connection with homicide. Both because Article 523 does not use the word "negligence" and because that word appears in another article dealing with homicide, which we would presume Article 523 was not meant to duplicate, it must be concluded that Article 523 does not deal with negligent offences. It therefore must state an intentional offence; that is to say, intent is a necessary element of the offence. The General Part requires this, even though the Special Part provision makes no direct reference to it.

According to the official Amharic version of Article 58(1) and the French draft, the answer to the second question is also "Yes, the notion of intention includes the attitude of intention towards the specific result, in this case death." The answer under the English version is less certain, because of a discrepancy; but as stated at the beginning of this article, we will assume that the Amharic controls. (Indeed, one would argue it should, where it faithfully reflects the French draft, as here.) Thus, the General Part requires not only that there be "intention"—whatever that may be—for a violation of Article 523, but that this "intention" must include the happening of a specific result, death. It is possible to cite many cases in which there appears to have been no awareness of this effect of the General Part upon a frequently used provision of the Special Part.<sup>10</sup>

10. The following examples can all be found at the Haile Sellassie I University Faculty of Law Library, and in Strauss, *Supplementary Materials for Penal Law 1967-68* (unpublished, Faculty of Law, Haile Sellassie I University):
- Crown v. Osman Omar, A.A.H.Ct., Cr. C. 255-58 (accused pushed deceased after drinking with him; "it is evident that (accused) was only relaxing and was not trying to harm the deceased. . . . The Court finds the accused guilty of violating Article 523 . . . since he has caused the death of his friend through his carelessness.")
  - Crown v. Ibrahim Adams Abatiku, Fed. H.Ct. (Assab), Cr. C. 1-51 (accused struck assailant with a "not large" stick; court concluded that the blow caused death, that "the accused did not commit the act of striking with intention," but acted in excess of self-defence, and therefore was guilty under Art. 523).
  - Crown v. X, Asmara H. Ct., Cr. C. 238-57 (accused struck deceased with stick under provocation; no indication of intent to kill; court convicted, apparently under Art. 523).
  - Public Prosecutor v. Fikru Birru, H.Ct.A.A., Cr. C. 762-56 (accused hit and then kicked deceased after allegedly being insulted; no indication of intent to kill; conviction under Art. 523).
  - Crown v. Bekele Kidane, Jimma H.Ct., Cr. C. 7-57 (accused and deceased, both youths, were fighting with small sticks at deceased's instigation; no indication of intent to kill; because of deceased's provocation, charge reduced to Art. 524).
  - Haddis Gebre Igziabher v. Public Prosecutor, Sup. Imp. Ct., Cr. Ap. 28-58 (accused hit deceased with a stick on the back of his neck while trying to recover some grass which deceased allegedly had stolen; deceased apparently hit his head on a stone while falling; no evidence of intent; "in view of the fact that there has been proof as to appellant's killing the deceased (i.e., causing his death,)" conviction under Art. 523 affirmed).

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The final question was, "What does the word 'intention' mean in this case?" This is not a question that can be briefly answered, or that will be answered in this article; it is one of those questions on which P. Graven's commentary can be most helpful as a starting point for learning or analysis.<sup>11</sup> But several important points can be made. First, the drafter has made a start at a definition in Article 58. This definition will not convey the same meaning to everyone who reads it, and will have to be interpreted in the cases. The author is not yet aware of any case in which this task of interpretation has been undertaken. Second, because the definition of intention appears in the General Part, and given our assumption of consistency, whatever "intention" means for the purposes of Article 523, it will also mean for any other article of the Special Part to which it is relevant. The "intended result" may vary with the crime — death for Article 523, injury for Article 539, etc. — as may other particulars; but the general formula or criteria will have to be the same. This is the second edge of the consistency sword, that the judge must interpret with an eye to the results his interpretation would produce in other cases; he must take account of the demands of consistency as well as use the inferences it makes available to him. Finally, any judge who does undertake to interpret this important concept will find that the words of the definition offer him a fairly wide range of choices of possible meaning. If the techniques suggested by this article are relevant at all, they are as relevant to this task as any other.

**b. "In case of conflict, the provision of the Special Part prevails over that of the General Part."**

The above phrase, or something like it, is frequently referred to as a maxim of code interpretation. It is, indeed, perhaps the most frequently referred to maxim. This fact tends to reinforce the validity of the maxim, since it means that draftsmen, too, are likely to be aware of it. Knowing that the maxim is likely to be applied, they will put the exceptions to their general rules into more specific provisions, confident that when judges find these exceptions they will say, "The specific prevails over the general," and thus interpret the statute as the draftsmen expected. This fact, in turn, should make judges more confident of the rule.

The rule thus has convenience to recommend it. It also reflects a common sense notion of draftsmanship. Any general rule is likely to have a few special exceptions. But if, as in the Penal Code, a statute is divided into General and Special Parts, it may be quite unwise to list the exceptions in the General Part. Referring to specific cases there will detract from the organization of the whole, and may tend to obscure the purport of the general rule behind the exceptions; the reader will be unable to judge how universal these exceptions are.

The rule is also a sensible accommodation to the likelihood that the drafters will not be able to avoid inconsistencies completely in their work, however hard they try for consistency. In choosing the specific provision over the general one in such a case, one is making the common sense judgment that the drafters were likely to have been thinking more precisely about the narrower issue.

It is very important, however, to hesitate before concluding that there is some inconsistency between the General Part and a provision of the Special Part, and

11. P. Graven, work cited above at note 1, pp. 152-63.

thus leaping to application of the maxim. The overriding assumption frequently mentioned above is that the provisions of the Code are internally consistent. Unless a Special Part provision expressly refers to its exceptional status, this assumption requires that every effort be made to achieve consistency before an "inconsistency" is found. For example, the silence of a Special Part provision should rarely if ever be taken to indicate inconsistency with the General Part. Thus, the fact that Article 523 is silent about "intention" is not in itself reason to conclude that the article is inconsistent with Articles 57-59 and should be applied without reference to intention, despite them. The article can be interpreted consistently with the General Part without distorting its language, and there is no reason to suppose a contrary legislative purpose. Consequently, consistency must be favoured; Article 523 must be construed as embodying an intentional offence.

It is sometimes possible to consider an apparently superfluous or inconsistent Special Part article as in fact explanatory of the General Part provisions it seems to contradict. That is, the Special Part article may serve to illustrate or limit the operation of the General Part provision in an instructive way. One possible example of this may be seen in Article 524, which was discussed at some length above in connection with the "house" of an Afar tribesman. We may now be in a better position to suggest answers to some of the questions put there.

The General Part of the Penal Code includes provisions on legitimate defence and excess of legitimate defence, Articles 74 and 75. These articles recognize that defense of property may be "legitimate defence," entailing no punishment, or "excess of legitimate defence," entailing apparently complete freedom on the part of the judge to reduce penalty. Whether it will be one or the other depends on a judgment whether the person "exceeded the limits of self-defense by using disproportionate means or going beyond the acts necessary for averting the danger." Acts within these "limits" are not punished at all; acts outside them are punished to a degree which appears to be entirely at the discretion of the judge.

Dr. Graven, in his commentary on the Penal Code, has complained that Article 524 unnecessarily duplicates Articles 74 and 75, and by providing a specific range of penalties, is inconsistent with them. One readily sees that the crime defined by Article 524, killing "in resisting the violation, by force or trickery, of the privacy of his house . . .," could as easily be characterized as an act of legitimate defence, or perhaps in excess of it; the individual kills while defending property against the unlawful assault of another. Thus, it would appear that the Afar in our hypothetical could as easily be prosecuted under Article 523, and then raise the issue of legitimate defence. If he did this, a judge interpreting Articles 74 and 75 might decide that he had not "exceeded the limits," and so could not be punished at all; or that he had "exceeded the limits," and so could be punished by any penalty from a \$ 1.00 fine to 20 years rigorous imprisonment. Since the General Part provisions seem adequately to cover the case, Dr. Graven concluded that Article 524 was unnecessary; it is inconsistent with the General Part to the extent that it provides a more restricted range of penal alternatives.<sup>12</sup>

A more helpful approach, in the author's view, is to look at Articles 74 and 75 and ask if it is very clear what they mean. Where are the "limits" of legitimate

12. *Id.*, pp. 216-17, 229-30.



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defence? How is a judge to exercise his discretion if he finds they have been exceeded? Have they been exceeded if an Afar kills a man who is trying to steal his house from the back of his camel? If he kills a man who is trying to enter his erected house? If he kills a man who is trying to steal his camel? It should be apparent that if these questions were to be answered by reference to Articles 74 and 75 alone, there might be a great deal of disagreement as to what the answers should be. With this in mind, look again at Article 524. Is it accurate to say that this describes a case or cases in which many Ethiopians—possibly including judges—would feel that killing in retaliation was completely justified? In the author's judgment, such a statement would be accurate. That being so, it appears to him that the function of Article 524, and other articles like it, is not to contradict Articles 74 and 75, *but to explain them*. The rather abstract language of the General Part provisions—"exceeded the limits," "disproportional means," "beyond the acts necessary"—could easily be understood in different ways by different persons or in different parts of the country. As was mentioned at the beginning of this article there is no settled and widely available body of cases, commentary, or other source material which might help to produce uniform results in cases decided at different times and places. To make the language of the General Part more concrete, what the legislature has done is to fix a reference point. It has taken a very common case, and has decided it. It has decided that this case represents an excess of self-defence, and that it deserves the stated range of punishment. This both fixes and emphasizes a moral norm—that killing in the defence merely of property is not justified; it also serves to explain the general articles about legitimate defence in a way that should help a judge to make decisions under them.

As an example, consider the case of an Afar who kills a man who is trying to steal his camel, *not* his house. He is prosecuted under Article 523, and pleads legitimate defence. Has he "exceeded the limits"? A judge can look at Article 524 and reason from it that the legislature has concluded that someone who killed another in defence of his house exceeded the limits of legitimate defence. He might then conclude that, from an Ethiopian and probably the legislature's point of view, killing someone while defending your house is more excusable than any other killing in the defence of property. If killing in defence of a house is more excusable than killing in defence of a camel, and still is punishable as an exceeding of the "limits," then the Afar's act in killing someone who was stealing his camel must have exceeded the "limits." One limit is known: the taking of life in defence of property exceeds it. If the judge wants to know, "How severely shall I punish him?" Article 524 again serves as a guide. Here is a case where, by hypothesis, the killing is rather understandable; the legislature has provided a penalty of up to five years simple imprisonment. If there were no extenuating circumstance, on the other hand, the judge would condemn the Afar to five to twenty years rigorous imprisonment. It would be reasonable, would it not, to find a penalty in between—calculated by some kind of comparison, however difficult, among social attitudes towards killing over a house, killing over a camel, and killing without excuse?

It is interesting to note that in adopting this interpretive approach, of treating Article 524 as simply an example of a highly flexible general provision, any practical consequence of the questions raised about the meaning of the word "house" in Article 524 has disappeared. Even if the rolled-up dwelling on the camel's back is not a "house" for the purposes of Article 524, the same result can be obtained—i.e., a sentence to the same number of years of simple imprisonment can be imposed—by using Article 523 and the applicable general principle of excess of legitimate

self-defence. Indeed, by seeing Article 524 as having as one purpose the indication of a terminal point for the exercise of sentencing discretion under Article 75, it becomes possible to put the question in a much more meaningful form than "Was this a house?" It becomes, "To what extent does the importance of this property to this man excuse his criminal act?" The law often seems to embody distinctions much sharper than those which occur in life, on which substantial questions of liberty depend. When it is possible, as it may be here, to turn a legal question from one of sharp distinctions — "house" or "not house" — into one of how much punishment should be imposed, one makes possible a more meaningful correspondence between the law and the facts of life to which it applies.

### 3. Interrelationships of provisions regarding particular crimes

There are other, unexpressed organizing principles which can be deduced from a study of the Code, and which may also be helpful in solving particular problems. Only some of them will be mentioned here, and the most important point to be noted about them is this: like almost all of the suggestions of this article, they proceed from assumptions about the rationality and consistency of code drafting — assumptions which were shared by and acted upon by the drafters of the Code. The ultimate and overriding principle of code interpretation is that one always be aware of the context in which a code provision appears, and ready to use that context to illumine the provision in any consistent and rational way.

One such principle is that particular types of common crimes, such as "homicide," "injury," or "theft," are often grouped together in such a way that it will be helpful in determining the meaning of any one article to study the whole group. Even in dealing with as limited a subject as homicide, the legislature is faced with a continuum of possibilities. One person kills out of revenge, another in a barroom fight, a third in response to an insult, a fourth while driving his automobile, and so forth. A reading of all the provisions may suggest the general principles by which the legislature tried to divide this continuum into particular crimes, and thus help in placing a doubtful case or determining the meaning of a doubtful provision. There may be a general article — Article 521, in the case of homicide — which will provide common definitions and help to indicate the legislative approach. One can expect that the individual provisions will be arranged in some logical order, such as from the more serious offence to the less serious; from the most common offence of the given type to the less common; from the general offence to particular varieties of it.

The organization of "homicide" offences, for example, tends to reinforce the conclusion already reached, that although no mention of intent is made in its words, Article 523 deals only with *intentional* homicides. The penalties provided in the articles beginning with 522 and ending with 527 generally go from the more to the less severe; as we shall see in more detail shortly, this gives some reason to believe that the offences are listed in an order which generally goes from the more to the less serious, in the legislature's view. The succession of titles of these articles gives the same impression: "Aggravated Homicide — Homicide in the First Degree"; "Homicide in the Second Degree"; "Extenuated Homicide"; "Instigating or Aiding another to commit Suicide"; "Homicide by Negligence"; "Infanticide." Article 521, which professes to state the "principle" regarding homicide, defines homicide as causing the death of a human being intentionally or by negligence and adds that "the nature and extent of the punishment awarded to him who commits intentional

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homicide shall be determined according to whether the homicide is simple, or aggravated or extenuated by the circumstances specified in the following Articles." This tells us, first, that our inference that homicide must be either intentional or negligent is correct; second, that our inference that the degree of punishment represents the seriousness of the crime is correct; and third, that the legislature has dealt with three kinds of intentional homicide: simple, aggravated, and extenuated. Article 522 deals with "Aggravated Homicide"; Article 524 deals with "Extenuated Homicide"; Article 523 comes between these articles and imposes a penalty which is less than that of Article 522 but more than that of Article 524. The inference is strong that this is the missing case of "intentional homicide" which "is simple."

### 4. Cross-references within the Code

Another occasionally helpful organizational feature is the use of parenthetical references to other articles in the Code's text. These references may be taken as an indication by the legislature that these other articles are relevant to the article in which the references are made, so that a reading of the articles it refers to may help one to understand it. Not infrequently, these references are to an entirely different part of the Penal Code, and thus may help reveal relationships which the organizational structure of the Code would otherwise obscure. In other cases, the references may be to a series of provisions for which the article making the reference serves in some respect as a general article.

An example of the latter type of provision is Article 598. This article, entitled "Aggravations to the Offence," comes at the end of the section relating to "Injury to Sexual Liberty and Chastity," comprising Articles 589-598. Article 598 states that "in all cases involving a charge of sexual outrage" the punishment is to be quite severe in the presence of enumerated circumstances, including "(a) where the offender uses violence, intimidation or coercion or in any other way renders the victim incapable of resisting (Articles 591-595) or subjects his victim to acts of cruelty or sadism." Rape, Article 589, and forced abnormal heterosexual sexual behavior, Article 590, are both "cases involving a charge of sexual outrage," since both fall in the the section to which Article 598 applies. Both Articles 589 and Article 590 require as an element that the offender use violence, intimidation, or coercion to require a victim to submit to the sexual act described against his will. The questions which might then arise are whether violations of Articles 589 and 590 are subject to the special penalties of Article 598, because of the quoted language of Article 598(a); or whether, on the other hand, the parenthetical reference to Articles 591-595 is meant to exclude application of Article 598(a) to Article 589 and Article 590, insofar as it refers to violence.

The penalties provided in Articles 589 and 590 are different from those stated in Article 598. The parenthetical reference to Articles 591-595 in Article 598(a) would seem to support an interpretation that the penalties of Article 598 do not apply in cases of ordinary violation of Articles 589 and 590. The use of violence, intimidation, or coercion to render a victim incapable of resisting is a necessary element of both offences; it would not seem consistent to treat it also as an aggravating element. A reading of Articles 591-595, to which Article 598(a) refers, shows that violence, etc., is not a necessary element of any of these offences; it would therefore be appropriate to treat it as an aggravating element. On the other hand, the use of cruelty or sadism is no more an element of Article 589 and Article 590 than of Articles 591-595; it would thus be appropriate to consider such use as aggravating for *any* case of sexual outrage. The parenthetical reference to Articles 591-595 applies only to the question of violence; it does not limit the application of Article 598 where cruelty

or sadism has been employed. It thus avoids the apparent conflict in penalty provisions in the case where only violence is employed, forwarding the goal of consistency, while allowing the court to apply the penalties of Article 598 to violations of Articles 589 or 590 in the other cases, such as use of cruelty or sadism, which do not seem to be restricted by the parenthetical reference.

**5. Where more than one Special Part provision applies to a particular criminal act**

The meaning of the Penal Code's provisions relating to concurrence of offences, chiefly Articles 60-63, 82, and 189-192 of the General Part, is much too complex to be set out in this article. However, it is important to note that these articles, in particular Articles 63 and 189, indicate that in some cases a particular act or result will involve not one, but two or more crimes, and that in such cases, the punishment may be increased over that which could be imposed for any one of the crimes. In considering the purpose, scope or meaning of any one article of the Special Part this possibility that it can be joined with another article to warrant a greater penalty should be kept in mind.

A very common case in which considerations of this sort might be relevant is the following: A and B get into a fight. A hits B, who falls to the ground and hits his head on a rock. The result of this is that his skull is fractured and he dies. A is charged with homicide under Article 523. In such cases, it is very doubtful that A has actually foreseen that B's death would result from his blow, and desired or at least was willing to accept that result. That is, A appears not to have "intended" to kill B within the meaning of Article 58(1). But as has already been noted, Ethiopian courts fairly frequently have overlooked the requirement of intention under Article 523, and have convicted persons such as A and sentenced them to long terms in jail.<sup>13</sup> This no doubt reflects the strong feeling which Ethiopians have against any killing. Nonetheless, one must seriously doubt that the word "intent" can be given a meaning which is consistent both with the definition given in Article 58 and with conviction under Article 523 in such cases. Thus, any Ethiopian judge who agrees that "intent" is a necessary element under Article 523 (and Article 524, for that matter,) either will be unable to use Article 523 in such cases, or else will risk giving the word "intent" a meaning which the words of Article 58 will not support.

The concurrence of offences might come into play in such a case in the following way: Even though the judge may not be satisfied that the accused "intended" to kill the deceased, because he is convinced that accused did not foresee that the deceased might die as a result of their fight, he may be able to find that the accused "intended" to injure the deceased, so that he could be convicted under Article 538 or Article 539. He may also be able to find that the accused was "negligent" in failing to foresee that the fight might result in the deceased's death, so that he could also be convicted under Article 526. Article 63(1) (b) and Article 189(1) (b) may then permit him to convict the accused of both offences, and sentence him accordingly. The possibility that this alternative will be available should itself encourage interpreters to refrain from stretching the notion of "intent" too far; there is this other way to deal with the case which troubles them.

13. See the cases cited in note 10, above.

**VI. PENALTY PROVISIONS AND THEIR RELATIONSHIP TO STATUTORY MEANING.<sup>14</sup>**

We have already had occasion to mention the apparent relationship between the penalty provided by the Code for a particular offence and the seriousness with which that offence was viewed by the legislature. There are countless indications in the Code that this relationship is an intentional one, that the range of punishments provided accurately reflects the legislature's estimate of the seriousness of the crime to which it applies. Thus, in the presence of aggravating circumstances—circumstances which make the crime seem worse—the court is instructed to increase the penalty; in the presence of extenuating circumstances—circumstances which in part excuse or justify the crime or the criminal—the court is instructed to lower the penalty. Simple imprisonment is “applicable to offences of a not very serious nature committed by persons who are not a serious danger to society” (Article 105); rigorous imprisonment is “applicable only to offences of a very grave nature committed by offenders who are particularly dangerous to society” (Article 107); and for “minor offences” the court may simply appeal to the honour of the accused or apply the very slight penalties of the Code of Petty Offences (Articles 87, 121). It is not hard to deduce from this pattern that a crime subject to sentence ranging from five to twenty years rigorous imprisonment (Article 523) was considered by the legislature as more deserving of punishment than another crime which it made punishable by one to five years rigorous imprisonment (Article 530).

It can be observed that in almost every case the legislature has provided for a range of sentencing alternatives, rather than imposing a single mandatory punishment. The explanation for this is that the legislature is attempting in the Penal Code to compromise between two different points of view regarding criminal policy. On the one hand, it wishes the penalty to reflect the repugnancy of the offence and the measure of harm which has been done or threatened to public or private interests. On the other hand, as reflected in many other parts of the Code, especially Article 86, it wishes the penalty to suit the individual who committed the crime: his personal circumstances, the opportunity for his reform, the dangerousness of his disposition, etc. If only the former consideration were important, one might expect fixed penalties to be imposed for each offence. If only the latter were important, one might expect the judge to be given complete discretion in deciding how to treat a criminal, once convicted. By way of compromise, the legislature has set upper and lower limits on the measure of punishment in accordance with its view of the ugliness of the abstract crime, and delegated to the judge the task of setting a particular disposition within these limits, according to the concrete circumstances of the particular criminal.

If, then, one is faced with a case in which it is uncertain which of several possibly applicable statutes might apply, one line of inquiry which may be very helpful is to consider how seriously Ethiopian society views the type of act with which the defendant is charged. If the choice is between provisions imposing different penalties, one can fairly infer that the provision carrying the most serious penalty was meant to apply to the most heinous offense, and so forth. For example, let us look again at the problem raised earlier about the relationship between Articles 594(2) and 608(2). Article 594 authorizes rigorous imprisonment; Article 608 does not. This tends to indicate that in the former the legislature's purpose was to deal with a more serious offence than in the latter. In the earlier discussion two

14. J. Graven, work cited above at note 2, p. 288 ff.

hypotheticals were developed: (a) a young child is brought to a public place for the purpose of having him witness sexual activity, in the expectation that his watching it may soon entice him to participation; (2) a young child comes across a person engaging in sexual activity in a public place; the person becomes aware of the child's presence, but does not stop. Both hypothetical (1) and hypothetical (2) can be brought within the linguistic meaning of both statutes, Articles 594(2) and 608(2). But in view of the assumption that the legislature meant each provision of the Code to have a unique function, we should seek an interpretation that will give each of these provisions a different function.

It would seem that most Ethiopians would view the act in hypothetical (1) as being of "a very grave nature" and the person who committed it as being "particularly dangerous to society." Here is a person who has deliberately sought to involve a young person in sexual activity. On the other hand, Ethiopians might be more likely to view the act in hypothetical (2) — at least in so far as it concerned the young eye witness — as "not very serious" and the individual who committed it as "not a serious danger to society." The involvement of the young person is almost accidental; the sexual activity of the accused was not "for the benefit" of the young person, or meant to affect him in any way. That is, the rigorous imprisonment of Article 594(2) is appropriate in the case of hypothetical (1), but only simple imprisonment, as in Article 608(2), is appropriate in the case of hypothetical (2).

We have thus interpreted Article 594(2) as implicitly requiring as one of its elements that the accused have the purpose of working a specific sexual injury on a specific young person or persons. This was done in order to reconcile it with Article 608(2) and to give each article a sensible role in the overall structure of the Code. This is the same result we reached before by considering the relative placement of these two articles in the formal structure of the Code. The fact that two or more interpretive techniques lead to the same result can increase our confidence that the result is a good one.

Careful attention to penalty provisions may also help the judge arrive at a sound result in a particular case, even where he cannot be sure of the proper interpretation of conflicting statutes in the case before him. This may be particularly helpful in those cases where the facts are not easily brought within the sharp distinctions of legal definitions. For example, one can readily imagine cases less clear than the two hypotheticals we posed in discussing Articles 594(2) and 608(2). In such a case it could be very difficult, even with the distinction we have made, to decide which of the two articles should apply. But that is perhaps like saying, that such cases will involve either a less important violation of Article 594(2), or a more important violation of Article 608(2). Less important violations of Article 594(2) can be punished by "simple imprisonment for not less than three months"; violations of Article 608(2) are punishable by any term of simple imprisonment. The judge who is aware of this overlap avoids any practical necessity of choosing between the two articles by imposing a sentence which falls within the overlap — simple imprisonment from three months to three years — when in a particular case he finds it hard to decide which of the two provisions to apply. When he would reach the same result — the same penalty — under either provision he applied, the job of deciding which of two possibly applicable provisions actually provides the legal basis for his decision is obviously less important than it would be if his choice had practical consequences.

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Thus far we have been considering the relevance of the duration or type of punishment to interpretation of the Penal Code. It is also relevant to take instruction from the degree of freedom given to judges in particular circumstances to decide on what measure of punishment to impose. As has already been noted, provisions of the Special Part commonly afford judges a range of punishments from which to choose. Comparison of the punishments provided for in various Special Part provisions gives some indication of the relative importance attached by the legislature to the crimes concerned. Now, one may also note that there are many provisions of the General Part which serve to increase the range of punishments available, or to guide the judge in making his choice over that range. Thus, Article 79, "General Extenuating Circumstances," and other articles of the General Part authorize judges to reduce punishment by one step, according to a scale set out in Article 184. Article 81, "General Aggravating Circumstances," deals with cases in which the judge is to apply a relatively high penalty within the scale provided for by the Special Part definition of the offence. Articles 67, 68, 70, 72, 73, 75, and 78, among others, specify circumstances in which the judge may "freely mitigate" the punishment, reducing it without limit.

A common sense judgment which might immediately be made is that the greater the freedom Parliament has given the judge to reduce a sentence, the less blameworthy it considers the situation described; conversely, the more Parliament has indicated that a sentence is to be increased, the more blameworthy it considers the case. This rather simple observation is likely to be significant in a case where the statutes present a range of alternatives as to how a given act might be characterized. For example, Article 67 completely exempts from punishment someone who committed an offence under "an absolute physical coercion" and authorizes such exemption "when the coercion was of a moral kind." Under Article 68, the court may freely reduce the punishment (Article 185) according to the circumstances "if the coercion was not irresistible." Under Article 79(1) (c), the court may reduce the punishment by one step (Article 184) if an offender "acted in a state of great material or moral distress or under the apprehension of a grave threat or a justified fear, or, under the influence of a person to whom he owes obedience or upon whom he depends." What is "coercion"? What is the line between "absolute moral coercion" (Article 67) and "resistible moral coercion" (Article 68)? "Resistible moral coercion" and the circumstances described in Article 79(1) (c)? The circumstances of Article 79(1) (c) and simple commission of the offence?

We are again in a situation where the words used will convey different meanings to different people reading them. But looking at them as a whole, one can readily see a legislative purpose to cover the whole scale of blameworthiness regarding coercion, and to direct the judge to impose sentence in accordance with the position of the particular offender on that scale. In such a case, it may be less important as a practical matter to decide upon an exact meaning of the particular words or phrases involved than to note their relationship to the determination of punishment. Confronted by the facts of a particular case and aware that the purpose of these provisions is to enable him to reduce sentence in proportion to the degree of excuse shown by these facts, the judge may be acting in a more straightforward manner if he sets the sentence first and makes the characterization of the facts after.

This, of course, is not to advocate complete freedom on the part of the judge to set sentences, independent of the statutory scheme. On the contrary, he must be aware of the legislature's purpose - that a consideration such as "coercion" is to

serve as a complete or partial excuse, depending on the circumstances—and must be guided by this awareness. The point is, rather, that the words used by the legislature to characterize this purpose create what are, in themselves, rather artificial and imprecise distinctions. It is not a fruitful use of judicial time to attempt to determine into which of several arbitrary word formulas particular facts fit. The important job, and the job which one may be confident the legislature was primarily interested to have done, is to determine, *given the legislative attitude toward "coercion,"* how much if any punishment the particular facts call for. The answer to this question will suggest the proper category, rather than *vice versa*.

As one might expect, Article 79 can be read to provide an intermediate step not only for Articles 67 and 68, dealing with "coercion," but for virtually all of the "Justifiable Acts and Excuses" discussed in Articles 66–78. Similar series can also be found in the Chapters on Attempt, Articles 26–31, and on Participation, Articles 32–40. The gradations in punishment indicated by these articles, again, are a measure of Parliament's view of culpability; in a case where the language of the articles does not make the proper category clear, a judge could rely on the relationship between culpability and punishment to determine the article to be applied if he finds the judgment as to culpability more easy to make.

Finally, it may be appropriate to remind the reader that the relationship between penalty provisions not only may help the interpreter to determine the meaning of substantive provisions of the Penal Code, but may also be of assistance in reaching a decision in a particular case on the penalty to be applied. Thus, where an article involving free mitigation under Article 185 is invoked in preference to one involving limited mitigation under Article 184, it will in most cases be appropriate to reflect the greater degree of mitigation—the lesser degree of culpability—by imposing a sentence less than might have been imposed using Article 184. Thus, unmitigated second degree homicide, Article 523, is punishable with a term of from five to twenty years rigorous imprisonment; using Article 184, a sentence as low as one year rigorous imprisonment is possible (Article 184(c)); this would suggest that in cases where Article 185 is to be applied, a sentence to some term of simple imprisonment will be appropriate. Of course, it is true that the legislature has rarely *required* that sentence be mitigated to any particular degree; it has merely permitted it. But if it is valid to view the various alternatives for mitigation as establishing a continuous scale of punishment, as the author believes it is, it should also be generally valid to regard a particular alternative as suggesting a sentence within the comparatively narrow range which is its particular contribution to the whole scale.

Another example of the usefulness of penalty provisions in interpretation, already discussed, is the case where an extenuated crime specifically defined in the Special Part can be used as a guide to sentencing similar crimes extenuated under some provision of the General Part. The example of this kind of reasoning given was that of Article 524, which fixes a range of punishment—up to five years simple imprisonment—for a killing in defence of a particular property interest, the privacy of a house. It was suggested that this range could be used as a reference point in cases involving killing in defence of other property interests which, because not specifically mentioned in Article 524, would have to be dealt with in the general context of Articles 74 and 75.



VII. PURPOSE AND COMMON SENSE — ELIMINATING ABSURDITIES<sup>15</sup>

One of the important tests of any interpretation is the simple question, "Does it make sense?" We have been reluctant to ascribe caprice or purposelessness to the legislature. Everything it enacts, we assume, has some purpose, reflected in its words, which the judge is to ascertain. The same assumption should also make the interpreter reluctant to adopt an interpretation which embodies some feature, some distinction for which there appears to be no reason, or which appears to contradict common sense. If the legislature acts purposefully, then in interpreting a statute well, to reflect its purpose, the interpreter should always be able to explain his interpretation and any distinctions it may embody in terms of a believable legislative purpose. If he cannot explain some feature of his interpretation in this way, it is at least an indication that he has done his job poorly.

As an example, consider another aspect of Article 524, not yet discussed. The Article refers to one who kills "in resisting the violation . . . of *his* house or out-buildings." (Emphasis supplied) What does the word "his" mean? Does it include a woman defending *her* property? A woman defending *her husband's* property? A man defending *his father's* property? A tenant defending *his landlord's* property? A guard defending *his employer's* property? A dinner guest defending *his host's* property? What sensible distinction might the word embody? The possible distinctions suggested by the questions above are the following: a distinction between persons of different sex; a distinction between persons owning a house and persons living in the house with the owner; a distinction between persons owning a house and persons hired to protect it; a distinction between persons owning a house and persons merely living in it with the right to use it; a distinction between persons owning a house and persons present by invitation. Are any of these distinctions which the legislature might have wished to adopt, had it considered the issue? (It is good to remember, in passing, that it almost certainly did *not* consider this exact issue; consequently, inquiry into what the legislature might have intended on this particular issue is quite likely to be meaningless.) Are any of the distinctions consistent with the "purpose" of the statute we earlier hypothesized: to identify an extreme and common case of killing in the defence of property, and solve it, in order to provide a guide for judges confronted with other, less justified killings?

A distinction between "his house" and "her house" could hardly find a legislative purpose to support it. One must assume that a woman values her property and her privacy as highly as a man. One cannot imagine any basis for considering one killing less justified than the other. Grammatically, "his" can include the meaning "her." A distinction which would eliminate this possible meaning has no sense. Therefore, one would reason, the distinction should not be made. "His house" should be interpreted to mean also "her house."

The case where the killing is done by a person living with the owner — his son or his wife — or a person living in the house by consent of the owner — such as his tenant — also seems indistinguishable, in any meaningful way, from the case in which the owner himself has killed. The word "his" is frequently used to indicate the house where a person dwells, regardless whether he owns it. The statute refers to the violation of "privacy"; in doing so, it seems to refer to that special

15. Hart & Sachs, work cited above at n. 1, p. 1156 ff.  
See also, in general, the works cited above at note 8.

sense of security which persons may feel about the places where they dwell, and which may have motivated the apparent legislative conclusion that killing in defence of the privacy of "his house" is more justifiable than other kinds of killing regarding property. Indeed, since the word "privacy" is used, one might have more reason to doubt whether Article 524 applied to a landlord who killed another who was seeking to enter one of the houses rented to his tenants. It is the tenant's privacy, not the landlord's, which is being intruded upon. No sensible reason for excluding the tenant, wife, or son of the owner from coverage of the statute suggests itself. Therefore, this distinction should not be made. The house is "his" for whoever dwells in it.

The relationship to a house of a person who neither dwells in it nor owns it, such as a guard or a dinner guest, is more remote. One might speak of the house a guard guarded or a dinner guest came to as "his house," but this would be a considerable extension of the characterization, not ordinarily used. And the very remoteness of the relationship suggests a basis on which a distinction could be made: this person will not be defending his own privacy or sense of security so much as the privacy or security of another. The legislature could readily have concluded that a killing by such a person would not be as excusable as a killing by a person directly protecting his own interests, or, at least, that in *some* cases the degree of excuse would not be as great. This therefore appears as a more appropriate case for decision in accordance with the general principles of Article 75, which applies if Article 524 does not; the judge will decide the degree of excusability in the particular case and reflect it in the sentence imposed.

Since Article 75 refers to Article 185, "Free Mitigation," it would be theoretically possible for the judge to reduce the sentence of the guard or dinner guest below the range suggested by Article 524. Plainly, however, the sentence should be at least as heavy, and often heavier, than that which would be imposed under Article 524. Since the guard or dinner guest do not have as strong an interest in privacy as the owner, they are not as greatly excused. Perhaps it will be responded that the guard has his duty to the owner, and is hired exactly for the purpose of defending the property concerned. But since Article 524 establishes that the owner himself is not legally entitled to kill a mere trespasser; it is clear that he cannot order or authorize another to do this for him. At best, the limited mitigation of Article 79(1) (c) would apply to such a case.

In sum, the element of "privacy" provides a rational basis for deciding what is "his" property and what is not "his." Since failure to make any distinction would involve an unnatural extension of the meaning of "his," the distinction probably *should* be made.

#### VIII. A RECAPITULATION: ARSON AND DAMAGE TO PROPERTY

The complex relationships between Article 488, Arson, and Articles 653-655, Damage to Property, provide a vehicle for review of many of the points which have been discussed above. The problem is presented here only in outline form.

##### A. The Statutory Framework

###### 1. Article 488, Arson

###### Part II, Special Part

###### Book IV, Offences Against the Public Interest or the Community

###### Title VII, Offences Against Public Safety and the Security of Communications

###### Chapter I, Offences Against Public Safety

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“Article 488 — Arson.

(1) Whosoever maliciously or with the intention of causing danger of collective injury to persons or property, sets fire to his own property or to that of another whether it be buildings or structures of any kind, crops or agricultural products, forests, timber or any other object, is punishable with rigorous imprisonment not exceeding ten years.

(2) Within these limits, a severe sentence may be passed where the offence creates substantial danger, or where the risk of injury to persons or property is widespread, especially where public buildings or buildings used by a public service, inhabited houses or houses used for living in, contractors yards or stock yards, stores or provisions or inflammable or explosive substances, forests, mines, oil wells or refineries, ships, aircraft, or any other objects particularly susceptible to fire, are affected.”

**2. Articles 653–655, Damage to Property**

Part II, Special Part

Book VI, Offences Against Property

Title I. Offences Against Rights in Property

Chapter II, Offences Against Property

Section III, Damage to Property

“Article 653 — General Provisions.

Whosoever, apart from (cases not relevant here), intentionally destroys, damages, depreciates or renders useless the property of another, whether objects, implements, animals, trees, crops, or any things whatsoever, or landed or immovable property, is punishable, upon complaint, with simple imprisonment or fine

Article 654 — Aggravated Cases.

Proceedings shall be instituted by the Attorney General and the punishment may be rigorous imprisonment not exceeding five years and fine:

- (a) Where the offender has acted through malice or with intent to cause harm and has so caused considerable damage, or where even without that particular intent, he has intentionally caused considerable damage to private objects, undertakings, installations or plantations, or
- (b) where he has destroyed or seriously damaged (an object important to the public) . . . .

Article 655 — Aggravated Means.

Where the offender, with particular intent to destroy, damage, depreciate or render useless the property of another, has employed means endangering public security, such as landslide, flooding, explosion or fire, the punishment provided in the relevant provision shall apply concurrently (Article 63).”

**3. Excerpts from the General Part relating to concurrence**

“Article 63 — Guilt in case of a Combination of Offences.

(1) When a given offence implying an injury to persons or property, or the use of . . . dangerous means, fire or explosives . . . entails an injury whereby the elements constituting a second offence are materialized . . . the Court shall apply the following principles for determining the guilt and the penalty:

- (a) if the result was intended, or foreseen and accepted by the offender, (Article 58 (1)), he shall be charged with both . . . and aggravation shall apply in accordance with

the relevant provisions (Articles 189 and 192), due regard being had to the combination of the elements constituting the two intentional offences;

...

(2) Aggravation shall apply in particular where the criminal result was achieved by means endangering public security, such as arson ...."

"Article 189 — Circumstantiated Aggravation in case of Concurrent Offences.

(1) ... (b) in case of several penalties entailing loss of liberty being concurrently applicable the court shall ... impose the penalty deserved for the most serious offence and shall increase its length taking into account the provisions of the law or the concurrent offences; it may...impose a penalty exceeding by half the basic penalty..."

"Article 192 — Simultaneous Breach of Several Provisions. Where by one and the same act the offender committed a breach of several criminal provisions...the Court may aggravate the penalty according to the provisions of Article 189...; it shall be bound to do so in cases of aggravation expressly provided by law (Article 63(2) )..."

#### B. Putting the Problem

A review of the penalty provisions of these articles reveals the following possibilities, in order of severity of punishment:

Article 653 alone — simple imprisonment up to three years (Article 105).

Article 654 alone — rigorous imprisonment up to five years.

Article 488 alone — rigorous imprisonment up to ten years.

Article 653 + Article 488 (Article 655) — rigorous imprisonment up to ten years plus simple imprisonment up to three years.

Article 654 + Article 488 (Article 655) — rigorous imprisonment up to fifteen years.

Article 488 + Article 653 or 654 (Article 192) — rigorous imprisonment for more than ten years but less than thirteen or fifteen, respectively (that is, if "it shall be found to do so" in Article 192 means that the court *must* impose a higher penalty than it could for one offence alone).

Suppose the following cases. For each, consider which statutes or group of statutes could be said to apply, insofar as the language of the provisions is concerned. What is the result (penalty) for each statute or group of statutes which might be applied? Next, try to discover, by considering all relevant factors, what the function or purpose of each provision or group of provisions might be. Does this reduce the number of alternatives available? Does it give each provision a unique and rational function? Does it result in an overall distribution of results (penalties) which is consistent with the probable legislative evaluation of the seriousness of the various criminal acts involved?

**Case 1:** A person intentionally sets fire to a book, which he knows is the property of another, in his fireplace and destroys it. The book was worth \$2.50.

**Case 2:** A person sets fire to the shed in which his neighbor has just stored his entire Maskel teff crop. The person intended only to destroy the teff crop. Because the shed is isolated, the fire does not spread. No other damage is done or risk created.

**Case 3:** A person sets fire to a building in town. The fire is discovered and put out before any substantial damage is done. He meant by this to destroy the town.

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**Case 4:** Same as Case 3, but the fire destroys ten homes and threatens the rest of the town before it dies down.

### C. Case 1

This case is plainly within the meaning of Article 653, since the person has intentionally destroyed the property of another. Depending on the meaning of the word "maliciously," and the phrase "any other object," it might also come within the meaning of Article 488. Since the person has employed "fire" "with particular intent to destroy the property of another," application of Article 655 will depend on the meaning of the phrase "means endangering public security": must the means employed actually endanger public security in the particular case? Must the means be so substantial (a fire of such size) that it ordinarily would endanger public security in such cases? Or has the legislature simply determined that fire is a "means endangering public security," so that the judge does not have to determine whether public security was or ordinarily would have been endangered, but is required to determine only that fire was in fact used?

If Article 653 applies, the penalty will be up to three years simple imprisonment; for Article 488, up to ten years rigorous imprisonment. If the act was "arson" as well as property damage, Articles 63(2), 189, and 192 appear to *require* the judge to impose an aggregate penalty longer than that which might have been imposed for arson, Article 488, alone.

The size of the penalties employed in Articles 488, 655, etc., should already make us extremely doubtful that dealing with such trivial incidents as the one described in Case 1 is within their purposes. If one thinks of the clear case of "arson" or of the use of means which could fairly be called "aggravated," one immediately pictures, not the small fire of a fireplace, but a raging blaze that no one man could control. An examination of the placing of Article 488 in the structure of the Penal Code reinforces this view, that the Parliament here was concerned with offences against the public—serious threats to a community or public safety as a whole. Moreover, attributing this purpose of dealing with public rather than private harm to Article 488 allows us to give a distinct function to it *vis à vis* Articles 653–655, and thus avoid redundancy.

If it is agreed that the function of Article 488 is to deal with threats to public safety, two conclusions should follow: first, that it should be interpreted to reflect this function; second, that Article 655, which on occasion joins Article 488 to either Article 653 or Article 654, should be interpreted to apply only when both motivating situations—damage to property *and* threats to public safety—are present.

Article 488 can be thus limited if the rather indefinite word "maliciously" is understood as referring to the principal concern of the article—the creation of danger of *collective* injury. "Maliciously" is generally taken in the sense of "evilly," or "with the specific desire of doing harm," or "mischievously"; since the article already refers to "the intention of causing danger of collective injury," the word adds little but uncertainty. In view of the purpose of the article to deal with the creation of *public* danger, however, one would be justified in limiting the scope of this word to attitudes of the offender towards public danger. Another possible limitation, unnecessary to this case but worthy of mention, is of the phrase "any other object." Plainly, this phrase could include a book. However, from the other objects described—buildings, crops, etc.—and our understanding of the function of Article 488, one could probably conclude that the phrase applies only to "any other

object so substantial as to support a fire creating a risk of public harm." There is, indeed, a well accepted canon that when a statute includes a list of things and then ends with words such as "or any other," the words "any other" are to be understood as referring only to things which have important characteristics in common with the things specifically referred to — here, perhaps, a certain size.

Article 655, also, can readily be limited in the indicated manner. One might say, first, that since it uses the word "fire" where Article 63(2), otherwise similar, uses the word "arson," "fire" in Article 655 should be interpreted to refer to those out-of-control blazes which constitute a danger to public security, that is to say, "arson." The second technique — basically similar and by no means excluded by the first — refers to the phrase "means endangering public security," which appears in both Article 655 and Article 63(2). While this phrase can be read simply as a legislative declaration that "fire" is a "means endangering public security," it can also be read as a description of the *kind* of fire with which the legislature was concerned, a fire which actually did endanger public security, or which by its size could ordinarily be expected to do so. The second interpretation is made more likely by the other "means" mentioned — landslide, explosion, etc. — and helps us to avoid the questionable severity of the sentence which might be imposed if Article 655 were found to apply. It is consistent with our reading of Article 488 and our understanding that public security was not even remotely threatened in this case.

#### D. Case 2

Case 1 was an easy case, in the sense that it was quite clearly beyond the rationale of Articles 488 and 655. Case 2 is less easy in this sense; probably many Ethiopians would say that the person involved was guilty of "arson," because this is the common name given to such crimes and hence they are more likely to think of Article 488 than Article 654 in this context. But, it is suggested, if the solution to Case 1. was correct, Case 2 should probably be solved in the same way — as a violation of Article 654, but not of Article 488 and not involving Articles 655 and 63. In fact, the one Ethiopian court decision of which the author is aware reached exactly this conclusion. In *Ketema Tesfamichael Lidjam v. The Prosecutor*, Criminal Case Number 5 of 1958 in the Asmara division of the Supreme Imperial Court (unpublished, Haile Sellassie I University Law Library), the appellant had burned another's crops, and was charged and convicted of arson in the High Court. The Supreme Court held that the charge was mistaken, "because, although this article is about arson it does not provide specifically for crimes committed against the property of an individual, but rather for crimes committed against collective security. The present charge should be based on Articles 653-654 . . . ." Although the reasoning thus expressed is brief, it is to the point and, in the author's view, eminently correct.

The case is within the meaning of either Article 653 or Article 654, since the accused has intentionally damaged private objects. Whether he has "caused considerable damage" (Article 654) could depend on the objective value of the teff crop, or on its value relative to the total value of the injured party's goods, or perhaps on some other measure. The fire in this case was large enough to create a public danger, but was not intended to and in fact did not create such a danger. Thus, if when Article 655 speaks of a "means endangering public safety," it is referring only to a fire of a certain size, that might ordinarily present a public danger irrespective whether it actually does present such a danger in a particular case, then Article 655, and through it Article 488, would apply. If on the other hand, the

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reference is to a conflagration which actually endangers public safety, it would seem that Article 655 could not apply in this case. Article 488 could apply without the aid of Article 655 if "maliciously" includes the facts of this case.

Article 653 would lead to up to three years simple imprisonment; Article 654, up to five years rigorous imprisonment; Article 488, up to ten years rigorous imprisonment; Articles 63 and 655, if they applied, would extend the maximum imprisonment to fifteen years.

We are again in the position of seeing how unhelpful the words of a statute, taken alone, will sometimes be. The standard of "considerable damage" embodied in Article 654 is so unspecific that it is virtually inconceivable that any two men would agree on exactly how much damage was "considerable," or by what standard this should be measured. If the decision were simply one to be made by the judge, it might be expected that he would make it in the inverse manner we have described before — that is, first determine how much punishment the facts of the case before him seemed to warrant, and then characterize the amount of damage accordingly. But the decision is one which determines whether the government can bring a prosecution without the necessity of a complaint by the injured party, and hence must be one which is capable of being made in *advance* of trial. Indeed, the standard may ultimately be no more precise than "those cases which the Attorney General thinks are important enough for him to prosecute, whether or not he has received a formal complaint."

In the particular case of destruction of property *by fire*, it may be possible to use our search for consistency and rationality to provide an auxiliary standard. As a matter of historical fact, it can be asserted that the burning of crops or houses has for a long time been considered a quite serious offence in Ethiopia; even though the value of the crops or house burned might be, objectively, quite small. This is because the economic harm done to the small farmer by even a small fire could be quite serious. This suggests, first, that the considerableness of damages should not be measured by a money standard — so many dollars lost — so much as by the relative injury suffered by the injured party. A substantial proportion of a harvest — whatever its dollar value or the size of the total harvest — is "considerable" to the injured party, and hence may be to the law. This approach is supported by the structural relationship of Article 654, within the Code. The damage to property with which the Code is concerned at this point is, generally speaking, damage to an individual's interest in goods; hence, it is appropriate to consider that where provisions are concerned with the degree of harm, they refer to the degree of harm done to the particular individual concerned, and not an absolute standard.

An additional, related reason for reaching this conclusion appears if we anticipate our reasoning on Article 488, and hypothesize that there will be cases where the burning of crops or houses is not to be considered arson. Yet, the expectation of most Ethiopians is that such activities will lead to relatively severe punishment. Even though cases such as Case 2 ought preferably to be excluded from the coverage of Article 488, the use of a fire which *could* endanger public safety, even though in a particular case it is not intended to and does not, is a serious matter which deserves serious punishment. One can honour the reasonable expectation of severe punishment by adopting the construction that use of such a fire necessarily involves either the causing or at least the attempting of "considerable damage." Such punishment will then be available. The contrary construction, which could exclude any such punishment, might threaten to bring the judiciary into disrepute.

It remains only to state that there *are* substantial reasons for excluding Case 2 from the coverage of Articles 488, 63 and 655. One may start with the proposition that while Case 2 is a case which would and should be regarded by the legislature and judges as a serious crime, it is still less serious than Cases 3 and 4, in which substantial *public* danger — and the intent to produce such danger — are involved. The difference is sufficiently marked that one would expect a lesser range of punishment to result. Yet, because Case 2 surely comes under Article 654 (putting aside Article 653 for the moment), the choice is not one between applying *either* Article 654 or 488; rather, it is between applying either Article 654 alone, or *both* Article 654 and Article 488 together. The second alternative is objectionable for two reasons: first, because it results in there being no distinction in punishment regarding Cases 2, 3 and 4; second, because it disregards the considerations proposed as the basis for our solution of Case 1, and thereby calls that solution into doubt.

The second objection merits further explanation. The basis for our solution to Case 1 was our determination, principally from the place of Article 488 in the Code's table organization, that the purpose of Article 488 related to the public danger presented by certain kinds of fires. Therefore, the references to "malice" in that article should be understood to refer to an attitude toward such a danger. Since Article 488 simply refers to setting a fire with malice or the intent to cause collective injury, and not to the size of the fire set or the damage it has done, the only way Article 488 could be made to apply to Case 2 would be by undoing the limitations on the word "maliciously" which we felt bound to impose in Case 1. The requirement of consistency prevents us from adopting one meaning of "maliciously" for cases like Case 1 and another for cases such as Case 2.

Articles 655 and 63 refer, not to a state of mind, but to "means endangering the public safety." As it relates to "fire," this phrase could be understood to mean "any fire," "any fire of a certain size," or "any fire endangering public safety." We eliminated the possibility "any fire" in discussing Case 1, because this meaning would not be consonant with the evident purpose of the provisions — to permit or require an aggravated penalty to be imposed where two distinct interests, public safety and property, were prejudiced by the same act. It can now be seen that the same consideration requires elimination of the possible meaning "any fire of a certain size." Not all such fires will have been intended to endanger public safety or will have done so; hence, not all such fires will prejudice the two distinct interests which justify an aggregate penalty. Moreover, as in Case 3, a *small* fire *may* endanger public safety. One can reach the same result in a slightly different fashion, by viewing Articles 655 and 63(2) as essentially auxiliary to Articles 488 and 653-654. It would offend common sense to apply Article 655 to a case in which Article 488 had not been violated. Since we have concluded that Article 488 should not be applied in this case, it follows that Article 655 is not to be applied, either.

#### E. Case 3

Case 3 is in a sense the obverse of Case 2. For the first time, we have the state of mind required, under our interpretation, for a violation of Article 488. On the other hand, no substantial damage has been done; do any of the articles relating to Damage to Property apply?

The application of Article 488 is clear enough from the facts. As was noted, the words of the article require only that a fire be set in a particular frame of mind; they do not require successful destruction or even, apparently, successful



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endangering. One may wonder, of course, whether the necessary frame of mind could easily be demonstrated in the absence of either; but the gravamen of the offence is an act undertaken with a particular purpose, and both the act and purpose are present in this case.

The application of Articles 653-654-655 appears more doubtful. It might seem from the wording of Articles 653 and 654 that only successful acts of property destruction could be prosecuted under those articles; Article 655 refers to "particular intent to destroy . . . the property of another," and it might be thought that these words exclude the case where property destruction is merely an accepted consequence of the creation of public danger, and not the primary motive. The consequences of these decisions have been mentioned often enough — what may be a ten-year sentence for violation of Article 488 can and possibly must be extended to up to thirteen or fifteen years if Article 653 or Article 654 applies concurrently through Articles 655 and 63.

Considerations of symmetry might also be found to suggest that Article 488 alone should apply in a case such as Case 3. If each provision of the Special Part is to be deemed to have its own specific and unique function, as we have so often suggested, then there ought to be fairly common cases to which each alone applies. Cases where an offender sets fire to his own property or to wasteland will be too rare, one might think, to constitute the "clear case" for which Article 488 was designed. The distinction must be one of intent: where the intent is to harm the public-at-large alone, only Article 488 should apply; where it is to harm individual property, Articles 653 or 654 should apply; only where both intents are present should both sets of provisions be applicable and the penalty aggravated. One to ten years rigorous imprisonment provides ample enough range for punishment of the facts of cases such as Case 3. The reference to "particular intent" in Article 655 is a further indication of the correctness of this reading.

The answers to this line of argument are also strong, however. To the author, if not to all, they are persuasive. Article 488 does have a specific and unique function — so often repeated — of dealing with intentional threats to public safety made with fire. Articles 653 and 654 also have a specific and unique function — of dealing with intentional damage to individual property. We have already seen that one can fairly easily damage individual property, using fire, without imposing a threat to public safety. But the converse is not true. One can rarely threaten public safety with fire without also destroying private property. Even if this consequence is not the primary purpose of setting the fire, it seems to the author that it will inevitably be an "intended" consequence within the meaning of Article 58. Even without reference to the concept of *dolus eventualis*, Article 58(1) al. 2, one is universally held to have intended whatever is a necessary consequence of an act principally designed for some other criminal purpose; for example, destruction of property by fire if this is necessary to endanger a community by arson.<sup>16</sup> Thus, both intents are present. Since both Article 653 and Article 654 describe intentional offences, one can be prosecuted for attempt under either, even in the case where no actual damage is done.

The remaining difficulty is the reference in Article 655 to a "particular intent" to destroy property. This does seem to suggest that purpose must be uppermost for

16. On this point, see P. Graven, work cited above at note 1, p. 156.

Article 655 to apply. But consider the consequences of accepting the suggestion: one person intended only to destroy the home of his enemy, but threatened the whole town — Article 655 and, consequently, a long jail term, will apply to him; another person “intended” only to cause public commotion and alarm in order to revenge himself on the community, but accepted the destruction of property as a necessary consequence of his plan — this man, who appears to have contemplated the grosser crime, is to be convicted only under Article 488. The result is unsupportable to common sense. It creates a distinction which is either without a difference, or in which the difference suggests exactly the opposite result. It should not be accepted.

It might have been sensible to provide that when a conviction for arson is obtained, concurrent convictions can be had for damage to property only to the extent that such damage actually occurs — that is, that a concurrent conviction for an *attempt* to damage property could not be obtained. The author does not see, however, how the reference to “particular intent” can be construed to embody such a rule. It follows that, given his construction of Article 654 in Case 2, the accused in Case 3 could be convicted of an attempt at aggravated damage to property, Article 654, concurrently with arson, Article 488. He concedes, however, that the contrary interpretation is a possible one.

If a concurrent conviction is possible in this case, that fact is, to the author, persuasive on the question whether Articles 655–63–192 *require* imposition of a sentence greater than the maximum for arson (ten years) in cases of concurrence, or merely permit it. The former reading, that imposition of a sentence longer than ten years is *required*, might be thought to be a consequence of the statement in Article 192 that “(the court) *shall be bound* to (aggravate the punishment according to Article 189) in cases of aggravation expressly provided by law (Article 63(2)).” The reference to aggravating the punishment could be understood to mean either (1) increasing the punishment above what the judge would have applied for the single offence; or, (2) increasing the penalty above the maximum limit which the judge would have been required to observe in the case of a single offence, but which he is permitted to exceed by Article 189. The interpretation that the sentence *must* exceed the maximum for the more serious offence is a very harsh one. Mandatory minimum sentences always threaten injustice, by preventing the judge from tempering his decisions to the particular facts of the case. Here, the mandatory minimum sentence would be very high indeed. It would be unusual to ascribe the purpose of adopting such a provision to Parliament, when the Code as a whole shows a consistent tendency to free the judge for the exercise of sentencing discretion. Moreover, Article 189, to which Article 192 refers, speaks only of the “penalty *deserved* for the most serious offence” (emphasis supplied), and does not seem to envision any cases in which the maximum penalty possible for the most serious offence is automatically to be imposed. If Case 3 is the occasion for application of concurrent punishments under Article 655, it would seem that many would not think it a case which “deserved” a sentence of more than ten years. The alternative interpretation in no way hinders the judge from imposing a high sentence; it simply permits him to go lower, as the circumstances warrant. Thus, Article 192 should be understood to read that the judge’s obligation is only to impose a sentence higher than he would have imposed for the most serious offence had it been committed alone; it need not be as high as the maximum for that offence, if the case does not call for it.

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### F. Case 4.

If the author's interpretation is accepted, this case is no different in legal analysis — although warranting a higher sentence — than Case 3. Those who do not agree with his interpretation of Case 3 will surely agree, in any event, that this case is an appropriate one for concurrent application of the penalties regarding Arson and Aggravated Damage to Property.

### IX. ARTICLE 2 OF THE PENAL CODE — A LIMITATION ON INTERPRETATION?<sup>17</sup>

Thus far, we have been discussing interpretation without explicitly considering whether there are any legal limitations on the process. There are such limits. They are set by Article 55 of the Revised Constitution of 1955 and Article 2 of the Penal Code. Much of the remainder of this article will be devoted to a discussion of the principle they embody, which is known as the principle of legality. We can start this discussion by using some of the techniques developed earlier in this article, but we will find that they do not take us very far. In dealing with the fundamental doctrines of the General Part, Book I, it is almost always essential to have some understanding of the sources of the doctrine and the other interpretations it has received, in order to obtain a clear understanding of its functions. Since the principle of legality is of central importance to interpretation of criminal law, we will in this one case abandon some of the limitations mentioned at the beginning of this article. Through an examination of its history, development, and present status, we may be better able to understand just what job it is that the principle is to perform, and what modifications or cautions, if any, are therefore necessary regarding the techniques discussed above.

One limitation which does continue to apply is that brought about by the general unavailability of legislative materials. This denies us knowledge of the specific histories of Revised Constitution Article 55 and Penal Code Article 2. It also means that we have no opportunity to discuss certain questions about the use of legislative materials in the interpretation of penal statutes — for example, whether they may be used to correct an "obvious mistake" in the official version of a statute, consistently with the principle of legality. Discussion of those questions has involved European jurists in heated debate. Our discussion would be much more complex if they were here; the problem is one which would have to be resolved in Ethiopia should legislative materials ever be published.

#### A. A First View of the Principle of Legality

Revised Constitution of Ethiopia (1955)

Chapter III: Rights and Duties of the People, Article 55

"No one shall be punished for any offence which has not been declared by law to be punishable before the commission of such offence, or shall suffer any

17. Works extensively treating the principle of legality:  
Ancel, "L'Analogie en droit pénal," *Revue Internationale du droit pénal*, 1955, p. 277.  
Glaser, work cited above at note 6.  
J. Graven, "Les principes de la légalité . . .," cited above at note 1.  
J. Hall, *General Principles of Criminal Law* (2d ed., Bobbs-Merrill, Indianapolis, 1960), Ch. 2.  
Mahsoub, work cited above at note 1.  
Thornstedt, work cited above at note 6.  
G. Williams, *Criminal Law, The General Part*, (Stevens, London, 1961), Ch. 12.  
Exposé de motifs, collection cited above at note 1.

punishment greater than that which was provided by the law in force at the time of the commission of the offence."

Penal Code of Ethiopia (1957)

Part I: GENERAL PART

Book I: Offences and the Offender

Title I: Criminal Law and its Scope

Chapter I: Scope of the Law

"Article 1 — Object and Purpose.

The purpose of criminal law is to ensure order, peace and the security of the State and its inhabitants for the public good.

It aims at the prevention of offences by giving due notice of the offences and penalties prescribed by law and should this be ineffective by providing for the punishment and reform of offenders and measures to prevent the commission of further offences."

"Article 2 — Principle of Legality.

(1) Criminal law specifies the various offences which are liable to punishment and the penalties and measures applicable to offenders.

The court may not treat as a breach of the law and punish any act or omission which is not prohibited by law. It may not impose penalties or measures other than those prescribed by law.

The Court may not create offences by analogy.

(2) Nothing in this Article shall prevent interpretation of the law.

In cases of doubt the court shall interpret the law according to its spirit, in accordance with the meaning intended by the legislature so as to achieve the purpose it has in view.

(3) Nobody shall be punished twice for the same act."

One could justifiably infer a number of helpful propositions from the language and context of the above provisions.

Taking Article 55 of the Revised Constitution of 1955 first: This provision appears in that part of the Constitution which deals with the rights and duties of the citizen. Its language does not relate to a duty, something which a citizen is legally required to do. Quite clearly, rather, it is meant to describe some right of the citizen, something in which he is to be protected. Since the requirement stated can only be satisfied by government action, one would infer that he is to be protected against government action of some kind. Presumably it was concluded that the action could be unfair to him or endanger him in some way. The particular government action prohibited is that of convicting a person and/or punishing him for a crime without statutory authority. Then, it must have been considered that convicting or imprisoning a person for crime without statutory authority was unfair, or that the power to do so was dangerous. It is unlikely that this judgment was one made from the perspective of purely criminal policy. "Citizens' rights" and constitutions both relate to politics and political concepts, that is, to the rules and structure of government generally. The principle announced is one of constitutional, not criminal, law. We may suppose its purpose to be political, even though its particular effects will be felt in the administration of criminal law.

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The second and third sentences of Article 2(1) of the Penal Code seem to contain the same instruction as Article 55 of the Revised Constitution. Since the Penal Code was adopted after the constitutional provision came into force, it is appropriate to believe that these sentences refer to the same principle. At least, they should be interpreted to conform with the constitutional principle, since the constitutional rule is a superior one. But Article 2 goes further than the Constitution in that it appears to explain what the legislature considered to be conviction or punishment in the absence of statutory authority. It says that the court "may not impose penalties or measures other than those prescribed by law" and "may not create offences by analogy," but that the court is not forbidden to engage in "interpretation of the law," and that interpretation of the law is to be "according to its spirit, in accordance with the meaning intended by the legislature so as to achieve the purpose it has in view." While these phrases have no single necessary meaning, they appear to be attempts to define the limits of the "authority" conferred by any particular statute. Interpretation of the statute, in accordance with its spirit, intended meaning and purpose, is within these limits; judicial creation of offences "by analogy" is not.

One possible purpose for Article 55 of the Revised Constitution and Penal Code Article 2 which thus emerges is subordination of the judiciary to the legislature in formulating Ethiopian society's rules of conduct. The judiciary is not to create offences. It is to observe the spirit, intended meaning, and purpose with which the legislature has endowed a statute. This subordination must be considered as politically important, for the protection of citizens' rights. Since one can observe from the overall structure of the Constitution of 1955 that legislative authority is principally confined to Parliament acting together with the Emperor and that the courts are principally restricted to the adjudication of cases under the law, it is also possible to state that the courts are generally subordinated to legislative authority. This general subordination is also a matter of political structure, reflecting decisions about the type of jobs various institutions of government are best fit to do: the legislative institutions, to make general rules; the judicial institutions, to decide particular disputes in accordance with these rules. Since a special rule for subordination of the judiciary appears in the case of criminal law, it must have been considered that this division of authority was particularly important here.

What is it about criminal law which makes division of authority between legislatures and courts particularly important? Article 1 of the Penal Code appears to supply at least a partial answer to this question. It states, "(Criminal law) aims at the prevention of offences by giving due notice of the offences and penalties prescribed by law and should this be ineffective by providing for the punishment and reform of offenders and measures to prevent the commission of further offences." This states a particular theory of criminal law — that prevention of offences is the primary role, and punishment and reform in case of failure only secondary. In order to prevent offences, one must make it known in advance what constitutes an offence, and what the punishment for each offence will be. Courts, deciding particular cases after particular events have already occurred, could not expect to do an efficient job of prevention in advance. This job requires a concise and systematic body of written rules, uniformly available and applicable throughout the Empire — namely, a code. The special emphasis of criminal law on prevention, indicated by Article 1, is one reason for putting a special emphasis on the subordination of courts to legislatures in the area of criminal law.

A second rationale for requiring legislative definition of crimes and punishments is to safeguard the citizen against arbitrariness by the government as a whole and,

in particular, by its judges. When the government is required to announce in advance what are the rules of conduct, it is not possible to condemn after the fact what seemed to be innocent behaviour at the time; judges are not free to follow their whims or personal dislikes, as they might be if they were permitted to define the offences of which they convicted accused persons. The protection afforded by a requirement of prior notice is especially important in the case of criminal law, because of the special impact which a criminal case has on the citizen. In a civil suit, one citizen is most likely to be engaged in legal conflict with another citizen. The government participates chiefly as a referee; it does not directly threaten his liberty. In a criminal suit, however, the individual is most often pitted against the government, and the issue is always whether the government may deprive him of his life, liberty, or property on account of some act he is alleged to have done. May one not infer the judgment that to deprive an individual of life, liberty, or property for an act without first warning him that this act will be so treated, is unfair in itself, and involves the risk of further unfairness through judicial arbitrariness at trial? An eminent English scholar of criminal law has written:

“That there must be no crime or punishment except in accordance with fixed, predetermined law — this has been regarded by most thinkers as a self-evident principle of justice ever since the French Revolution. The citizen must be able to ascertain beforehand how he stands with regard to the criminal law; otherwise to punish him for a breach of that law is purposeless cruelty. Punishment in all its forms is a loss of rights or advantages consequent on a breach of law. When it loses this quality it degenerates into an arbitrary act of violence that can produce nothing but bad social effects.”<sup>18</sup>

It could easily be inferred that the author of the Ethiopian Constitution has reached the same judgment.

If “prior notice” is important both for effectuation of the criminal law and for protection of the citizen against unfairness by his government, then it is possible to suggest tentative meanings for the “interpretation” which is permitted and the “(creation) of offences by analogy” which is forbidden by Article 2. When a criminal statute provides a warning that a certain act is considered criminal and may be visited with a certain punishment, then that statute may be applied to punish that act in that way. When no statute provides a warning, either by direct statement or by wording which the reader would think might apply, then the court may not punish that act. “(Creation of) offences by analogy” would then be the finding of an offence where a person, reading the statutes, would think none existed. The right to interpret is the right to give a statute any meaning which the reader would think it reasonably might have, even if this is not the most obvious meaning, as long as the meaning given is in accordance with legislative purpose and spirit and in this sense is what the court believes to have been the intended meaning.

It is not hard to see that this “interpretation” is very much the same as the process discussed at length above. Article 2 thus appears to have the effect of reinforcing some of the self-imposed limits of the previous discussion: that interpretation should respect the limits set by the possible meanings of statutory words;

18. Williams, work cited above at note 17, pp. 575-76.

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that interpretation should respect the limits set by ascertainable statutory purposes; that purposes are to be ascertained from the words, context and formal structure of the Code, as illumined by an understanding of modern Ethiopian values. It is now time for a more detailed examination of Article 2, against the background of its historical development abroad.

### B. A Brief History of the Principle of Legality

#### 1. Origins<sup>19</sup>

The principle that there should be neither crime nor punishment except in accordance with written law first became prominent at the time of the French Revolution, towards the end of the eighteenth century. A statement of the principle was included in the French Declaration of the Rights of Man. Then, as in Ethiopia today, the principle was viewed as one of political rights, as a protection of the citizen against his government, more than as a rule of criminal policy only. Under the *ancien régime*, the pre-Revolution government of France, judges were closely tied to the king or feudal lords, and were thought to exercise an arbitrary power to define crimes and punishments in a way which benefited the political power of the ruler. That is, the king and the nobility were able to oppress their enemies and use the criminal law as an instrument of politics through the capacity of their judges to invent crimes and punishments as the need arose. The judges had a tool for repression and arbitrariness which, apparently, they were willing to use. The principle of legality was a specific reaction against this repressive device, intended to end its use by requiring the government to announce in advance the rules of conduct it would enforce by criminal law.

As in Ethiopia today, the principle also reflected a general view of the proper distribution of powers within government. The same political philosophers who gave voice to the specific demand that judges should be denied the power to create crimes at will also developed the general theory known today as "separation of powers." For protection of the citizen and efficiency in government, they insisted that the roles of judiciary, legislature, and executive be carefully distinguished, and that the bodies responsible for each of these functions be made independent of the others. Thus, while a specific statement of principle was made in the case of criminal law that courts could act only on the basis of statutory authority, in fact this principle was believed to apply and was generally acted on in other areas as well. Courts were to be courts (deciders) not legislatures (rule-makers) whether the matter before them was civil or criminal. Civil codes as well as criminal codes were adopted, and it was generally accepted that court decisions required the authority of the civil code as much as that of the criminal code. In their opinions, courts expressed unwillingness to depart from or even extend any statutory text. They insisted that they could act and were acting only as the "mouth that speaks the law."

At the same time there developed a view of criminal policy, apparently independent of political considerations, which tended to reinforce the legality notion.

19. Glaser, work cited above at note 6, p. 899 ff.  
J. Graven, "Les principes de la légalité . . ." cited above at note 1, p. 383 ff.  
Hall, work cited above at note 17, p. 30 ff.  
Mahsoub, work cited above at note 1, historical introduction and p. 50 ff.  
Thornstedt, work cited above at note 6, p. 213 ff.

This view, reflected to some degree in Article 1 of the Ethiopian Penal Code, identified the prevention of offences as the first goal of criminal law. It assumed that men were rational, and could be induced to obey the law by a threat of sufficient penalty for disobeying it. If a potential criminal was clearly warned what acts would violate the law, and what penalty would be imposed for violation, it was believed that he could and would calculate whether he could expect to achieve a net gain of pleasure over the pain of punishment for his act. If penalties were properly set, it was thought that he would always calculate that he could not expect to gain; therefore, he would be dissuaded even from attempting the crime. Of course, it is essential for such a theory that crimes be defined and penalties set in advance of the potential criminal's decision to act. Only then can the criminal *know* that he will not profit. If one leaves definition of the crime and its penalty until after the event, one has only the general terror of arbitrariness — a terror felt by the good citizen as well as the potentially bad — and not the precise warning that will leave the former unperturbed and dissuade the latter.

There was also a general body of belief that the task of complete and effective codification could be accomplished. These doctrines had their inception before the massive impact of industrial change and the urban society it brought about in Europe. Change was still relatively slow, and social structures and standards were relatively simple. It still seemed possible to draft codes, civil and criminal, to order human existence in a comprehensive way. Because common values were shared, or at least thought to be shared, throughout a particular society, it was thought that a small body of carefully drafted rules could completely express the conditions of social existence. In the particular case of the criminal law, there was an assumption that the moral values underlying its prohibitions would be shared by all; in a stable and relatively simple society, few "crimes" needed definition; and careful use of language, it was believed, could succeed in making each case clear.

In the legal system as a whole, then, there was considerable emphasis on the division of authority between legislature and court. The legislature was only to make rules; the court was only to apply them. As a result, the early codes, both civil and criminal, were looked upon as the only source of law, which judges were bound to respect; there must be the authority of a written rule for *any* decision. This attitude was emphasized for criminal law by the principle of legality, which sought to protect the citizen from arbitrary or repressive action by the courts in matters affecting his liberty, and by a view of criminal policy which stressed the need to deter potential criminals by the threat of definite punishment. The result was a system which today appears overly rigid and naive. Crimes were defined in very careful and precise detail. Penalty provisions specified a fixed penalty for each crime which was invariably to be imposed, rather than a range from which the judge might choose according to the facts of the case. When the necessity for interpretation was recognized at all, which was rarely, interpretation was carried out in accordance with strict logical rules. Not the least important of these rules was one requiring that any doubt regarding interpretation was to be resolved in favour of the accused. The judge was, indeed, "only the mouth that speaks the law."



2. Growth of the doctrine <sup>20</sup>

The seeds of destruction of this rigidly legalistic view of codes in general, and the criminal code in particular, could be found in the French Civil Code itself. Portalis, one of the drafters of that code, had stressed his view that legislatures

20. Regarding the development of civil law interpretation:
- Ekelöf, work cited above at note 8.
- Franklin, "M. Geny and Juristic Ideals and Method in the United States," *Recueil d'études sur les sources du droit en l'honneur de Geny*, Vol. II, p. 30.
- Geny, work cited above at note 20.
- Schmidt, work cited above at note 7.
- Sereni, work cited above at note 9.
- Stone, work cited above at note 3, p. 212 ff.
- Because so many works were consulted in connection with the development of penal law interpretation, an effort is made below to characterize the exact contribution made by each:
- M. Ancel, "Creation des infractions par le juge," *Bull. Société Legis. Comp.*, 1931, p. 91 (shows that in 1931, role of European judges in interpreting penal statutes was much more active than traditional view of legality principle suggested).
- Ancel, work cited above at note 17 (a contemporary review of the doctrine in Europe; shows general relaxation of restrictions on penal law interpretation, and that the policy basis of the doctrine today is entirely political).
- M. Ancel, *Social Defence* (Routledge & Kegan Paul, London, 1965) pp. 115-16, 133-34 (in the context of a general discussion of modern European views of penal policy, indicates that "legality" is to be retained because of its political importance — protection of the individual against government — rather than for any reasons of strictly criminal policy).
- Andenaes, work cited above at note 1, p. 105 ff. (contemporary Scandinavian view of legality, emphasizing the need for sufficient warning to the citizen).
- J. Andenaes, "The General Preventive Effects of Punishment," *U. Pa. L. Rev.*, Vol. 114(1966), p. 949 (discusses the present vitality of deterrence notions in criminal policy).
- Dalloz, *Encyclopédie Juridique, Droit Criminel* (Paris, 1953), "Droit Criminel," ss. 13-22, and "Infraction," ss. 2-22 (current French jurisprudence on permissible breadth of penal law interpretation).
- Declerq, "L'analogie en droit pénal," *Revue de droit international et de droit comparé*, Special Issue, 1954, p. 294 (brief review of the current Belgian position).
- Gegout, "L'interprétation littérale des lois pénales," *Recueil d'études sur les sources du droit en l'honneur de Geny*, Vol. III, p. 305 (contrasts neutrality of judge in civil case with role in criminal cases; finds correspondingly less freedom of interpretation; but still, considerable scope for Geny's techniques).
- Giäser, work cited above at note 6 (demonstrates basis of rule in political rather than criminal policy, legislative trends away from the precision of expression inherent in "legality," and permissibility of fairly wide judicial latitude in interpretation of penal laws).
- J. Graven, work cited above at note 8 (an extensive review of current Swiss doctrine, showing its flexible approach).
- J. Graven, "Les principes de la légalité..." cited above at note 1 (showing how attitudes toward interpretation have changed, so that a limited use of analogy and flexible statutes are now acceptable).
- P. Graven, work cited above at note 1, pp. 9-12 (brief review of the Ethiopian provision in light of contemporary Swiss views).
- Hall, work cited above at note 17, p. 27 ff. (a skeptical approach, viewing the principle as a means of limiting the generality of legislative and judicial expression).
- Legal, work cited above at note 1 (shows political theory sources of legality; admits necessity of flexible interpretation; but compares legislative attitudes in civil law, where intention is to be comprehensive and government is "neutral" to the parties, with the exceptional nature of penal law).
- Legros, work cited above at note 1 (argues against any distinction between penal and civil law interpretation; "free scientific research" for their current sense, within objective limits, should be the rule for each).
- Mahsoub, work cited above at note 1 (extensive review of history and development; among the matters discussed: p. 34 ff., speedy growth of legislative and judicial flexibility in penal aspects of criminal law; p. 54 ff., modern methods of penal interpretation; p. 57 ff.,

could not foresee or answer all questions.<sup>21</sup> Accordingly, he called upon judges to recognize that there would be unprovided cases and to deal with them in the spirit of the code. Judges must decide a case which comes before them, whether or not the legislature has provided for it. It was more honest and necessary, in his view, to recognize the cases that were not provided for and deal with them as such, rather than pretend that they came within the explicit provisions of the code. But judges of the time apparently could not see how this innovating or rule-making role could be reconciled with the doctrine of separation of powers which, they were taught, set the limits to their proper function. Accordingly, they turned their faces from this advice, and set for themselves the task of finding direct legal authority for each decision in the code.

Toward the end of the nineteenth century, a number of French scholars, notably Geny,<sup>22</sup> provoked a swift and successful revolution against this very legalistic approach. They pointed out what we discussed at some length much earlier in this article — that judges inevitably “make law.” This was so, they said, both because language is inevitably imprecise, so that in choosing a meaning the judge affects the content of a rule, and because the legislature, being human, can neither foretell the problems which future developments may bring, nor take account of all the concrete cases which might arise even under present circumstances. It was more realistic, they argued, to consider that the legislature had in effect delegated authority to handle these unforeseen issues to the courts, than to pretend that the legislature had definitively answered questions which in fact had never occurred to it. They still considered courts to be subordinate to the legislature in rule-making: a court could not refuse to adopt the legislative solution to a problem when that solution existed, and should not decide cases against ascertainable legislative purpose. But when the answer was not expressly provided for, they argued that it was the court’s express function to “make law” for that case.

These scholars evolved their own body of interpretive doctrine to reflect their views. This technique, known as “free scientific research,” reflects the continued theoretical subordination of courts to legislatures by its high degree of emphasis on

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traditional methods of interpretation; p. 60 ff., teleological (goal oriented) interpretation; p. 64 ff., the current Swiss position; p. 75 ff., a discussion of “creation of offences by analogy,” including the German, Soviet, and Danish experience).

Mannheim, *Criminal Justice and Social Reconstruction*, (K. Paul, London, 1946),

p. 204 ff. (takes position that in a modern world, more flexible rules are a necessity, as society becomes more complex and social obligations rather than individual rights predominate).

Marchal & Jasper, *Droit Criminel* (Brussels, 1965) ss. 4-11 (current Belgian jurisprudence on legality and the permissible breadth of statutory interpretation).

Schwartz & Orleans, “On Legal Sanctions,” *U. Chi. L. Rev.*, Vol. 34(1966), (sociological research into the deterrent effect of sanctions, as compared to other modes of obtaining compliance with law).

Thornstedt, work cited above at note 6 (shows how criminal policy aspect of legality — deterrence — has reduced in importance; flexible legislative drafting negates the remaining, political considerations; argues for relatively narrow scope of interpretation, conceding that this is not the modern view).

Williams, work cited above at note 17 (political basis of legality implies legislature must work for certainty in drafting; but the principle does not require strict construction so long as judge stays within permissible meaning of the provision).

21. Quoted, *inter alia*, in Sereni, work cited above at note 9, p. 62.

22. Work cited above at note 8.

considerations of legislative policy and purpose. Courts are to use existing legislation, and other materials where relevant and available, to infer the legislative purposes or goals in dealing with problems similar to the one presented to the court. They are then to decide the case by considering whether, in light of the existing practical consequences, the legislature would have been likely to have extended one or another purpose to that case, had it considered the issue. The technique was not one to be used only to decide cases where the meaning of statutory language was unclear. It could also be used to extend a legislative solution to a case which the statutory words did not cover, by "analogy," where there was a congruence of purposes and the result of the decision would be practical and just in view of present-day realities and the overall legislative scheme.

It can be observed that this system of "free scientific research" is in many respects similar to the methods of interpretation described in the previous sections of this article. But the scholars who proposed it assumed — indeed stated — that it would be inapplicable in the area of criminal law. Civil codes contain explicit instructions for judges that they may not refuse to decide a case on the ground that it is not provided for in the code.<sup>23</sup> This is tantamount to an express requirement that they make law when they cannot "find" it ready-made. Criminal codes contain another instruction: the principle of legality, that a judge can neither convict nor punish another without statutory authority. Here is an instruction that if the case is not provided for in the code, it must be decided in favour of the accused. There is a special subordination of court to legislature in criminal cases, motivated by the special political considerations already discussed. In a civil case, the court is likely to be deciding between private litigants; plaintiff and defendant each must either win or lose; no principle of justice or citizens' rights seems to command that the plaintiff must always lose in cases the legislature has not been foresighted enough to provide for. In a criminal case, the court will be deciding a claim of the government against the life, liberty, or property of the accused. The principle of legality embodies the view that it is unjust to deprive the accused of these rights in the case which has not been provided for.

It did not take long, however, for scholars of criminal law to note that this differentiation between civil and criminal code interpretation concealed an important question: What is the unprovided case? The language used in the writing of criminal law statutes is no more precise than the language used to write civil law statutes, although the latter may tend to use more abstractions. Legislatures passing criminal laws are neither less fallible nor better able to foresee the future than legislatures passing civil laws. Was it necessary or wise still to choose the construction of penal statutes most favourable to the accused? If this was not *always* required, then within what limits was the court free to find that a case *had* been decided by the legislature, and that therefore penal sanctions could be applied?

The historical climate provided many impulses toward recognition of a broader scope of discretion for judges in the interpretation of criminal law. One, of course, was that already mentioned: the realization that, for a variety of reasons, judges

23. The Ethiopian Civil Code contains no such article, although a similar legislative attitude could be inferred. The contrast made in the text is best brought out in: Gegout, work cited above at note 20.  
Legal, work cited above at note 1.  
Stone, work cited above at note 3, p. 212 ff.

inevitably have a hand in the making of law. A second was the consequent recasting of the "separation of powers" doctrine in civil cases to include the notion of legislative delegation to the judiciary of authority to decide the unprovided case. A third influence was a slackening of the fervor with which the principle of legality was viewed as protection of the citizen from abuse by government. Finally, there were striking changes in criminal policy and the "style" of criminal statutes which made precise warning of specific punishments seem less important to the battle against crime.

The principle of legality came to appear somewhat less important as a safeguard to the citizen as it succeeded in regularizing the courts and, at the same time, the legislature began to seem the more likely source of oppression through its hegemony of the rulemaking function and the explosion of statutes consequent upon the Industrial Revolution. Courts came to be looked upon as the protectors of the citizen rather than his potential oppressors, and while this may have been due in large measure to rules such as the principle of legality it nonetheless resulted in a lessened emphasis on the need for the rule. This lessened emphasis also resulted from a realization that the political or constitutional aspects of the rule in protecting the citizen from arbitrariness are of limited importance so far as ordinary crimes, such as murder, rape and theft are concerned. Prosecutions for such acts, whether rigidly defined by written law or not, are unlikely to have political overtones, and will be expected whether or not the law provides expressly for them. In the area of political crimes, legality may have its effect; simple publication of repressive laws may lead citizens into better knowledge of them and, accordingly, may lead them to bring pressure against the regime which has adopted them. Even here, however, it has come to be recognized that it is the character of the men who govern, as much as any restrictions on what they may do, which safeguards the citizen's liberty. The doctrine is readily and effectively circumvented, in any but a technical sense, in a number of ways: proliferation of statutes to such an extent that no citizen can expect to know his rights or be aware of what his government is doing; enactment of statutes embodying sweeping and vague language which leaves courts free to do more or less as they please; and labelling various political measures, such as "preventive detention" laws, as not "penal" in character.<sup>24</sup> Finally, the relation between respect for the principle by a government and political justice in that government has been shown to be, at best, imperfect. Of the two fascist powers, Nazi Germany abandoned legality while Mussolini's Italy retained it; on the other hand, one has the example of a politically "just" state such as Denmark, which permits its judges to create offences "by analogy" in criminal cases where statutory policy appears to justify such a step.

The criminal theory of the early nineteenth century viewed the criminal as a rational man, measuring pains and pleasures and therefore to be influenced by a

24. Article 77 of the Ethiopian Penal Code seems to be a good example of this last kind of provision. Although someone who mistakenly believes he is violating the Penal Code (when there is no provision making his conduct illegal) is not a criminal and can not be punished, Article 77 states that he can be required to give a security for his future good behaviour — at pain of imprisonment if he refuses or forfeiture if he later breaks his bond — and can be required to give up any "dangerous objects" in his possession. These are "measures," not "punishments," and so do not formally violate the requirements of Article 2. But it should be clear that the liberty and property of the person involved are being interfered with in a manner not usual with citizens, and rather like the processes of the criminal law.

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statute which described what was forbidden and imposed a penalty in excess of any reward to be obtained from the crime. Theorists today take a different view. The predominance of warning in criminal theory has been undercut, first of all, by a proliferation of criminal statutes so vast that no citizen could be expected to have notice of them. Thus, the first assumption, that the potential criminal could obtain the information he needed for calculation of his pains and pleasures, is no longer valid. The ordinary man can obtain such information today only with great difficulty, and even then at substantial peril of its being incomplete, or of misreading what he finds. Second, there are those who take issue with the proposition that a warning must be exact to have effect. Precise definition of crimes, they argue, may simply lead criminals to seek a way to evade the definition while accomplishing what is substantially the same objectionable result. General wording will also have a warning effect, as long as the putative criminal can reasonably understand from it that his conduct is likely to come within the words used. Indeed, the effect may be greater if it induces him to avoid what is forbidden by a wide margin, rather than to calculate what is forbidden and then tread the verge.

The major change which has occurred in criminal theory, however, is even more sweeping: it has been the rejection of the assumption that the ordinary criminal is a rational, calculating man, and that his crime creates a calculable "debt" which must be repaid. Increasingly, one finds the criminal viewed as a weak or abnormal person, subject to greater or lesser degree to influences from his environment which warp his ability to make rational judgments, or appreciate or conform to social norms. Rather than calculate what may happen to him in the future, he is more likely to respond to the pressure of his past and present, to genetic or environmental defects and to wants, their product, which "normal" society may not share. Correspondingly, there is a growing focus on the "dangerousness" of the particular criminal, rather than the repugnancy of his acts, as the appropriate basis for deciding how he is to be dealt with. That is, one no longer is concerned with the question how much punishment must be inflicted to redress the abstract concept, rape; rather, one asks, how shall we deal with *this* man who committed *this* rape. And in answering this last question, the inquiry again is recast. It is not "How much punishment does he deserve?" but, "How can he be re-educated to observe social values in the future?" or, if that be impossible, "How can he be prevented from violating them again?"

The effect of this last change is particularly observable in provisions regarding penalty. Instead of imposing a fixed penalty for a particular offence, as was initially contemplated, legislation soon began to define ranges of penalty which might be imposed, depending on the facts of the case. The provision of Article 524 allowing the judge to impose any sentence from five to twenty years rigorous imprisonment is a good example of such a provision; the rules regarding extenuation and aggravation of punishments may be similarly explained. The criteria by which judges were instructed to make decisions in imposing sentences came to be phrased in terms of the criminal and his "dangerousness" or prospects for reform. (The corresponding provision in the Ethiopian Penal Code is Article 86.) Special dispositions were provided for special classes of criminals as to whom the legislature concluded there were greater or lesser chances of rehabilitation as useful members of society. Thus, on the one hand, the dispositions regarding juveniles, the possibility of suspension of sentence, and a preference for medical treatment over prison treatment for those whose acts were explained in part by mental defect or disease; on the other hand, internment, and severe aggravation of punishment for the recidivist. All

in all, the judge is given a very wide discretion on the question of disposition. The principle of legality has been reduced to the proposition that any measure imposed by the judge must be one which has been authorized by the legislature. This no longer reflects any uniquely *penal* policy; it is, rather, only a weak statement of the political policy that, to protect the citizen, the authority of the judge to act in any penal matter must be drawn from a legislative enactment.

Insofar as substantive criminal law is concerned, however, the notion of deterrence—and thus, the need for notice—has not yet been abandoned by the majority of theorists. First, while the theory of dangerousness may help to explain why some commit crimes despite the law, it does not prove that others would lead lives free of crime regardless of the law. While we can observe that some are not deterred, we have no proof that none are. Second, there are reasons for insisting that the proponents of this new theory demonstrate that it can be applied with precision and certainty. The concept of “dangerousness” seems so broad and malleable that one must have substantial fears for the liberty of the citizen if he can be confined or compelled to undergo treatment on the basis that he is “dangerous.” The administration of such a concept would inevitably depend to a tremendous degree on the character and aims of its administrators; it could easily be put to political or personal uses. The demonstration that these dangers can be avoided has not been made. Finally, one of the assumptions of the “dangerousness” theory seems to be that “punishment” as opposed to rehabilitative “treatment” is no longer to be considered a valid purpose of criminal law. It is extremely doubtful whether society could or should give up entirely the notion that a disposition in a criminal case helps to retribute or repay for the harm which has been done. The theory of deterrence, on the other hand, carries with it the notion that at least some of those who are not deterred are responsible for their acts and may be punished for them.

Most jurists continue to opt, then, for a system of “crimes” in which the citizen is given warning that certain acts will lead to imposition of a stated range of penalties. But the effect of the considerations discussed above has been to modify their view of how precise a warning must be given. First, there is somewhat less insistence on precision in the formulation of statutes than there was in the past: the statutes must be definite enough to make the citizen aware that his conduct is of questionable legality, but they may also be general enough to permit judges to adjust them to changing circumstances in accordance with their purpose. Second, it is no longer necessary, if it ever was, to require interpretation of criminal statutes invariably to be favourable to the accused in cases of doubt. In place of this rule, the rule of Article 2 has been generally accepted. “Interpretation” of the law is permissible, but “(creation of) offences by analogy” is not.

### 3. The limitations on interpretation, as presently understood<sup>25</sup>

The distinction between “interpretation” and “(creation of) offences by analogy” has been formulated, generally speaking, in one of two ways. The earlier formulation characterized “interpretation” as the application of a statute to a situation to which, it is found, the legislature meant the statute to apply; and “analogy” as the application of a statute to a situation to which, it is found, the legislature

25. Works cited in note 20, above.

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did not foresee the statute would apply, but to which the policies of the statute do apply. The second formulation characterizes as "interpretation" any application of the statute which can be brought within the meaning of the words used in the statute (as illuminated by context, purpose, etc.); and as "analogy" any other application of the statute, for example one based on the conclusion that its purposes apply although its words do not.

It can be seen that these two formulations differ in the criteria they refer to. The first relies on a judicially derived catalogue of the cases a provision was "intended" to cover, that is on its purposes. It is interpretation, not analogy, to apply the statute to those cases whether or not the words of the statute have a meaning which could include them. On the other hand, it is analogy to apply the statute to a case within the meaning of its words, but which was not or could not have been foreseen by the legislature. For example, statutes passed before the invention of the automobile often used the word "vehicle," to refer to wagons and the like. Under the first formulation, an automobile would come under such statutes only by "analogy," since the legislature could not have foreseen that such a thing as an automobile might come into existence.

The second formulation, on the other hand, uses words rather than purposes as the criterion. If the words of a statute can apply to a fact situation, it is "interpretation," not "analogy," to apply the statute to those facts, even if the legislature did not or could not foresee those particular facts. In the case given, an automobile could come under old statutes referring to "vehicle" by interpretation, if "automobile" was within the accepted meaning of "vehicle." Of course, this interpretation would not be *required*.

To the author, the second formulation seems preferable. The "interpretation"-  
"analogy" distinction is important because of its relationship to the principle of legality. The principle of legality, we have seen, rests on political and criminal policies stressing the importance of prior notice by government of the criminal law. To be meaningful, the distinction should reflect these policies. That is, it should have some relationship to the giving of notice, and the concomitant prevention of large-scale judicial innovation. By relying on the possible meaning of statutory words as its criterion, the second formulation would permit application of a statute where warning had been given, and forbid it where it had not. This does not mean a judge *should* apply a statute to every case its words might reach: the decision to apply or not within word boundaries rests on considerations of purpose, rationality and consistency, discussed at such length above. But by enforcing word boundaries as the outer limit of interpretation, one ensures that the functions of the principle of legality have been respected. The first formulation permits no such assurance. Perhaps for this reason, the second formulation is finding increasing favour.

The limitations imposed even by this formulation are less than might at first appear. First, it is necessary to distinguish between the creation of offences "by analogy" and other uses of analogy in the criminal law. Only the former is forbidden by the principle of legality. To the extent the principle of legality requires more caution in applying criminal law than is ordinarily observed in applying other types of law, such as the Civil Code, it does so, as we have seen, to protect the accused. If an application of the Code will work to the advantage of the accused—as, for example, if the accused wishes to argue by analogy that some situation not mentioned in Article 79 should nonetheless be considered a mitigating circumstance in his case—it can be made, if justified, without regard to the principle of legality.

In this case, warning to the accused and protection of him from arbitrary or repressive government action are not at stake. An offence is not being created. The provision may be interpreted as freely as any other provision of law, without any special limitation imposed because it is concerned with criminal law.

Second, one must distinguish between the formal reasoning process called "analogy" and the prohibition of Article 2 against the "(creation of) offences by analogy." The formal process called "analogy" is a process of reasoning from like to like. As scholars have noted, it is probably the central pillar of legal reasoning, and reflects fundamental democratic values. A prominent situation in which the Penal Code actually *requires* reasoning by analogy can be found in those statutes which list circumstances and then close with a phrase such as "or any similar circumstances" or "or any other object." Article 488, already discussed, is one such provision, since it refers to "buildings or structures of any kind, crops or agricultural products, forests, timber or any other object." It was suggested that the italicized phrase should be interpreted to mean only objects *like* those specifically described, in order to avoid application of the article to such cases as the burning of a book. The process by which one would choose what objects are like those described is the process of "analogy"—a process of deriving relevant general characteristics and then using them as a criterion for application. This formal reasoning process is not forbidden; here indeed the statute gives warning that it will be used. What is forbidden is the "(creation of) offences by analogy"; we now see that this does not mean using the process of analogy, as such, but using the process to find that an offence has been committed under a statute, although the citizen would not reasonably have expected this decision from reading the statute's words.

As presently understood, the principle goes no farther than this. It does not require that a particular punishment be specified for each crime; only that available punishments and the conditions for their availability be established. It does not require a narrow or artificial method of interpretation; only that in defining offences the limitations of the language used by the legislature, as well as its purposes, be respected. If it is understood that the principle today as at its birth reflects, principally political policy, not criminal policy, these limitations on its scope should be readily perceived. So far as the "war against crime" is concerned, courts should be and are free to interpret legislative directives as fully as language and purpose *together* suggest. It is only where the scope of the authority delegated or of the interpretation sought has negative implications for the structure of government or the political life of the citizen that caution is called for.

### C. Application of the Principle in Ethiopia<sup>26</sup>

The principle of legality was first introduced into Ethiopian law in the Revised Constitution of 1955. The Constitution of 1931 had already made clear, however, that the principal legislative authority lay with the Emperor and His Parliament. While the Penal Code of 1930 included a provision to the effect that cases not provided for under the Code should be decided by analogy, it also controlled the use of this technique by restricting it to the Supreme Imperial Court. If it is

26. J. Graven, work cited above at note 2.  
 P. Graven, work cited above at note 1, pp. 9-12.  
 Exposé de motifs, collection cited above at note 1.  
 Ethiopian Penal Code of 1930, Arts. 11-12.



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reasonable to suppose that this court had ready access to the views of the principal legislative force under that constitution, His Imperial Majesty, one might surmise that even here the division of authority between legislature and court was in the main respected; the Supreme Imperial Court would not have acted on such a question without first seeking the legislature's views. Regardless of this, the provision of the 1930 Code appears designed as a smooth transition from the era of the Fetha Negast, when many cases were decided through extrapolation of principles more than interpretation of fixed rules, to a future state of "legality." Indeed, the 1930 Code as a whole provides such a transition. While it is not nearly so detailed or precise as most European codes, it acquainted Ethiopian lawyers with the code form and provided them with an initial basis for code reasoning.

As further explained by the Penal Code of 1957, Article 2, the principle of legality adopted in Ethiopia appears to have been the principle as it is presently understood, rather than the principle as it might have been in the early nineteenth century. Thus, Article 2 is at pains to distinguish between interpretation, which is permitted, and creation of offences by analogy, which is not. "Interpretation" is to be in accordance with the "spirit" and "purpose" of the legislation, in accordance with the "meaning intended by the legislature." That is to say, one may legitimately give the words of a provision any meaning they will bear, if that meaning will tend to effectuate the apparent purpose of Parliament in enacting the particular provision in issue. While the Code does not define "(creation of) offences by analogy," perhaps a regrettable omission, one may understand by this word the current view of most European commentators: a process by which a statute is extended to a case not fairly within the meaning of its words, but thought to be within its purposes. It follows that the answer to the question posed at the head of this section is essentially negative: the principle of legality does not require any substantial modifications or cautions in the techniques discussed above, so long as the limits assumed in connection with those techniques are carefully observed; an interpreter has the power to use any of these techniques he finds helpful.

### X. THE PRINCIPLE OF LEGALITY — A LIMITATION ON LEGISLATIVE ACTION?<sup>27</sup>

The principle of legality, particularly in the version of it which appears in Penal Code Article 2, appears to be directed particularly to judges. Its history shows that it was adopted at a time when judges were feared as potential wielders of an arbitrary power over citizens' lives. It was meant to enforce their subjugation to the legislature, in particular by requiring that there be a definite legislative "warning" to justify each criminal conviction and criminal sentence. But, historically, this relationship has turned into a form of partnership, in which it is recognized that courts have the function of applying the general principles announced by the legislature to specific cases, and in the process, shaping them somewhat to fit modern circumstances. In criminal cases, the only prohibition forbids them to apply a

27. See, regarding the existence of varying degrees of specificity in legislative expression: Ancel, work cited above at note 17.  
Glaser, work cited above at note 6, pp. 902, 910-912.  
Hall, work cited above at note 17, pp. 27-28.  
Mahsoub, work cited above at note 1, pp. 34 ff., 47 ff.  
Mannheim, work cited above at note 20, p. 206.  
Thornstedt, work cited above at note 6, pp. 211 ff., 224.

statute in a manner not predictable from its wording; we have seen that the legislature has worded some statutes so as not only to permit, but to require the courts to use their partnership role to apply statutes to cases it has not explicitly mentioned. Since legislation necessarily involves the delegation of some legislative, or rule-making, authority to judges, one question which arises is "Are there any constitutional limits on legislative delegation of rule-making power to courts?" Are there limits to what legislatures can do as well as to what judges may do?

In asking these questions, the author does not mean to discuss the related question whether Ethiopian courts are ever empowered to declare legislation unconstitutional. That is a difficult and important question, which cannot concern us here. If Ethiopian courts have this power generally, they will be in a position to enforce any limits on legislative action which may appear from the following discussion. Even if they lack power to declare legislation unconstitutional for delegating too much authority to them, they could control such legislative acts by refusing to exercise the discretion given them, or construing the grant as narrowly as possible. In this way, they might be able to force the legislature to be more explicit or detailed without actually declaring null and void what the legislature has already done. Finally, one may rely on the good intentions of Parliament and the Emperor to observe for themselves any limits which the constitution imposes. If this discussion prompts legislative awareness of any limits, and consequent self-restraint, it will have served an ample purpose whether or not Ethiopian courts are in a position to make the limits meaningful through enforcement.

#### A. Retroactivity <sup>28</sup>

The most universally accepted limit on legislative action regarding crimes is often, as in Article 55 of the Revised Constitution, included in the wording of the principle of legality itself: a legislature cannot make its rule retroactive in time, to make criminal an act which was not criminal at the time it was performed. Obviously, such a rule is implicit in the notion that the citizen must be warned what conduct will be considered criminal, so that he can decide how he will behave. In the absence of such a rule, legislatures could play the arbitrary role it was thought judges once took, and define some act which had already been committed as a criminal offence. Someone whom the government wished to see put away, a political opponent, for example, could be quickly dispatched if this expedient were possible.

It should be noted that the judge, when he interprets a statute, is subject to no limitation of retroactivity. Even though it was not clear in advance of his decision whether a particular statute would apply to the conduct in a case submitted to him, if he decides the statute does apply, he will apply the statute in that case. He will apply it even though the conduct preceded his decision by some months, and even though the defendant may have acted in the mistaken belief that the conduct was not forbidden by the statute. Indeed, Article 78 of the Penal Code is quite clear about this. The Court is to reduce — but not eliminate — the punishment of "a person who in good faith believed he had a right to act *and had definite and adequate reasons for holding this erroneous belief.*" (Emphasis supplied.) A person *without* "definite and adequate reasons" for his mistake, one must assume, is entitled to no reduction at all.

28. Ancel, "Création des infractions . . .," cited above at note 20, p. 91.  
P. Graven, work cited above at note 1, p. 17.

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### B. Statutory Vagueness<sup>29</sup>

Another recognized limitation, which is enforced in the United States as a matter of constitutional doctrine, is that the legislature may not phrase its prohibitions too broadly — may not delegate too much rule-making power to the judge. This principle is obviously related to the doctrine of separation of powers, since by delegating a great deal of its rule-making authority to courts the legislature is threatening to obliterate one of the major lines of separation. It has refused to perform its function of deciding what conduct should be punished. On the other hand, constitutional analyses of the problem are most frequently made under the Due Process Clause of the American Constitution (which corresponds to Article 43 of the Ethiopian Constitution). This is no doubt because of the dangers which statutory vagueness present to the citizen: he is unsure what conduct is made illegal, and hence may desist from valuable conduct or be inadequately warned of what will be considered wrongful; to the extent vague statutory language leaves the judge free to improvise, the citizen is unprotected from the judicial whim and fiat which it was originally the function of the principle of legality to prevent.

The notion that legitimate activity may be deterred by a vague statute is particularly important to the American doctrine of vagueness. It can be understood by recalling the observation made above, that a judge is not obliged to follow the rule against retroactivity in applying his interpretations of the law. The practical effect of retroactive application of interpretation is that a citizen will fear to engage in any activity which *might* fall under the prohibition of the statute, *as interpreted*. That is, the possibility that a statute will be interpreted to apply to and forbid certain conduct will hinder that conduct, even if the interpretation is unlikely or is never made. This effect might be acceptable if only objectionable conduct were inhibited by the uncertain language of a particular statute or if the uncertainty was reduced to the minimum by careful drafting. The danger, however, is that language which is very vague may inhibit — and may even be used or designed to inhibit — activities which are legitimate or which enjoy special protection under the law, as in the case of religious worship and other freedoms protected by the Constitution. This possibility, that the threat of future interpretations of overly uncertain language may inhibit people from engaging in legitimate or specially protected activities, is a particularly unacceptable consequence of vague statutory language. Where an American court finds this possibility, it will nullify the statute under the Due Process Clause as unconstitutionally vague, unless it can quickly eliminate the uncertainty by interpretation. As might be expected, such nullification is more likely where the activities being hindered by the uncertainty of the law are highly protected, as in the case of political activities.

It may be easier to understand the rule against statutory vagueness and the reasons for it by considering a specific example. Suppose that in place of the

29. Amsterdam, "The Void-for-Vagueness Doctrine in the Supreme Court," *U. Pa. L. Rev.*, Vol. 109 (1960), p. 67.

Andenaes, work cited above at note 1, p. 110.

Glaser, work cited above at note 6, pp. 902, 910-16.

Hall, work cited above at note 17, pp. 27-28, 36 ff.

Levi, work cited above at note 3, p. 520 ff.

Mahsoub, work cited above at note 1, pp. 34 ff., 47 ff.

Thornstedt, work cited above at note 6, p. 224 ff.

Williams, work cited above at note 17, p. 578.

present Part II of the Penal Code, the Special Part, Parliament proposed to enact the following provision:

Art. 248: Whoever intentionally or negligently acts to harm the state, national or international interests, the public interest, the community, individuals, the family, or property shall be punishable with one or more of the penalties described in the General Part, Book II, in accordance with the needs of the case.

Now suppose that someone charged under this provision protests that it is unconstitutionally vague, relying on the principle of legality. If the principle of legality were applicable only to judges, and simply forbade them to go outside the written law, the principle would be inapplicable in this case; the provision does constitute written authority defining a crime, even if the definition is a very vague one. But the principle is also applicable to legislatures; it requires them to attain a certain standard of precision and detail in their instructions to judges. A provision such as the above would fail to meet any such standard. The area of uncertainty in its application is limitless. The citizen would not know what it was that he was forbidden to do; he might fear to engage in valuable social activities; he would be essentially without protection against judicial whim and fiat, since the legislature has essentially delegated to the judge broad rather than limited, judicial power to declare conduct criminal. If courts have authority to declare statutes unconstitutional, they could surely declare *this* statute unconstitutionally vague.

Let us consider another example, which is perhaps not so extreme, but which may help to understand why more precision is generally expected of penal than civil legislation. Title IX, Chapter I, of the Ethiopian Civil Code deals with the problem of "Extra-Contractual Liability." Generally speaking, this is the Civil Code analogy of the law of crimes. Article 2027(1) provides that "Irrespective of any undertaking on his part, a person shall be liable for the damage he causes to another by an offence." An "offence" is then defined in several general provisions. For example, Article 2030(1) states that "A person commits an offence where he acts or refrains from acting in a manner or in conditions which offend morality or public order"; Article 2033(1) states that "A person commits an offence where he turns to his own advantage powers conferred on him in the interest of another." Although Articles 2038-2065 then state specific examples of "offences," such as physical assault (Article 2038), an act need not fall within these particular provisions to constitute an offence. It is sufficient that it meet one of the general definitions of "offence," such as those stated in Articles 2030(1) and 2033(1).

As a matter of civil code drafting, these provisions are well constructed. If an individual can show that he has been harmed by another person, it is already established that a tangible loss has been suffered, and that the defendant is its cause. The issue in a civil trial is, who is to bear this loss? Is the loss to be borne by the person who suffered it, the plaintiff? Or are there reasons to require the person who caused the loss, the defendant, to make it good—that is, to bear the loss himself? Since the question is one of allocating a financial loss which has already occurred, since the loss *must* be borne and the question is only who is to bear it, it may be fair to state the rules of liability in a very general way. The judge then has maximum freedom to allocate responsibility according to the apparent justice of the individual case.

In a criminal case, on the other hand, it is not at all certain or necessary that any actual harm has occurred. For example, persons are punished for attempts,

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without any consideration whether damage of any sort was done. Moreover, even where harm *has* occurred, the criminal prosecution is not intended to make that harm good; any suit for reparation is to be brought separately by the injured party, although it can be joined with the criminal prosecution under Article 100 of the Penal Code. The purposes of the criminal prosecution, punishment and/or rehabilitation, are to vindicate a public interest in social order, not to redress private injuries. The government is pitted directly against the individual defendant and seeks to take away his life, liberty or property. If it succeeds in convincing the court to penalize him it will have introduced a *new* element of loss to the case: the defendant will be required to give up a life, liberty or property which no other person need have lost, and which in any event does not go to reimburse any victim who may exist for whatever damage he may have suffered. Because, first, it is the government which is involved and, second, the government is seeking to impose a *new* loss or penalty on the accused, much higher standards of certainty are appropriate in penal legislation than in civil. In the criminal area, statutes such as Articles 2030(1) and 2033(1) of the Civil Code would be much too uncertain; they do not define the limits of possible government action with a precision sufficient to warn the citizen what he may not do, and to protect him against arbitrariness.

How much uncertainty is "too much" is an extremely difficult question. Uncertainty which can be avoided by more precise use of language is more likely to be found objectionable than uncertainty which is largely unavoidable. Thus, words of infinite scope, such as "immoral" or "evil" are particularly suspect. As has already been suggested, the answer also may vary with the type of activity which is being inhibited by the peripheral vagueness of the statute. A statute inhibiting, for example, religious practice might be more closely examined than one inhibiting questionable forms of sexual conduct. More important social values may be at stake in the first case than the second; there is more to be lost if they are inhibited. One suggested guideline attempts to distinguish between permissible interpretation and an impermissibly broad statute by examining the result of the judicial process on the statute: if a court can eliminate the area of uncertainty by interpreting the statute in one case, then the statute is not "too broad." If, on the other hand, the uncertainty cannot be eliminated by interpretation, then the statute is "too broad" and should not be applied. The legislature should be required to try again, more carefully this time.<sup>30</sup>

The limits on the legislature as well as those on the court, then, respond to the same considerations: the essentially political policies of affording sufficient notice to enable the citizen to make a reasonable prediction about what action the government might take affecting his freedom, and to protect him against arbitrary infringements of his liberty. If this is a valid generalization, then one may recast the analysis of "legality" into the terms suggested by an American criminal theorist, Jerome Hall: that the question involved is one of the proper "girth" of legislative statement and of judicial application of such statements.<sup>31</sup> At what level of general-

30. Articulated by the United States Supreme Court in: *Dombrowski v. Pfister*, United States Supreme Court Reporter, Vol. 380 (1965), p. 479. *Shuttlesworth v. Birmingham*, United States Supreme Court Reporter, Vol. 382 (1965), p. 87. Compare the test for distinguishing interpretation from analogy suggested in: P. Graven, work cited above at note 1, p. 11.

31. Work cited above at note 17, p. 36.

ity can a legislature or a court operate in search of solutions impinging on the citizen's liberty? Thus seen, the principle of legality is an exhortation to both legislative and judicial attitudes. In effect, it says: "Be specific!" Particularization, concreteness, concern for methods and rules which will enable the citizen to predict where he stands and which will protect him against whim or fiat are the essential demands of the rule.

## XI. IMPLICATIONS OF THE PRINCIPLE OF LEGALITY FOR INTERPRETATION

We concluded that under the principle of legality, the judge retains the *power* to adopt any interpretation of a statute which a reader of the statute would think possible from its words (subject to the possibility that he will refuse to adopt *any* interpretation, because he finds it too vague). The question then arises what implications can be drawn from the principle to guide the interpretive process.

### A. Indispensability of Statutory Elements<sup>32</sup>

We earlier discussed at length the relationship between the General and Special Parts of the Penal Code, and remarked that the General Part would frequently define or even state elements of an offence in a way that would not be clear from the Special Part provision alone. The example used was the requirement of "intention" for a violation of Article 523, which is not mentioned in Article 523 itself but clearly must be inferred in view of Articles 57-59 of the General Part and the overall arrangement of the homicide provisions. By stressing the duty of the court to ascertain and respect legislative purposes in criminal matters, the principle of legality makes it clear that courts must find *all* elements of a crime to be present for a conviction to be justified — elements which are implied from the General Part as well as those specifically mentioned in the Special Part. If further evidence of this elementary principle were necessary, it could be found in Article 23(2): "The criminal offence is only completed when *all* its legal, material and moral ingredients are present." (Emphasis supplied.)

### B. Ordinary Usage Over Special or Technical Meanings<sup>33</sup>

Since the judge always assumes legislative regularity, he is entitled to assume that the legislature has acted, in regard to any particular statute, with the principle of legality and its purposes in mind. That is to say, he is entitled to assume that the legislature intended its enactment to give adequate warning of the circumstances in which it would apply. Of course he, too, is under an injunction to interpret and apply a criminal statute in a way which might have been expected from its language and context.

One of the criteria by which the judge chooses among the available, possible word meanings, then, should be a consideration of those meanings which were likely to occur to the persons to whom this warning was directed. If the statute

32. J. Graven, "Les principes de la légalité . . .," cited above at note 1, p. 393.

33. Freund, work cited above at note 3, pp. 180-184.

Hall, work cited above at note 17, p. 36 ff.

Hart & Sachs, work cited above at note 1, pp. 1219 ff., 1411 ff.

Radin, work cited above at note 1, p. 867 ff.

Stone, work cited above at note 3, pp. 31-34.

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is a criminal statute of general application, he may properly hesitate before giving some word a special or technical meaning, if this will operate to the prejudice of the defendant. If the legislature proposed its statute to have general application, it probably also chose words which could be used in the sense in which they are generally understood to express its purpose. It would not have meant to trick the ordinary man by using common words in some special sense. On the other hand, where a statute seems to be directed to a special group — as is the case with Article 520, "Refusal to provide Professional Services," for example — it is proper to give uncertain words a meaning which would be understood by members of that group, even if these are not the words' ordinary signification.

This criterion is not exclusive. If the judge is convinced by considerations of context, purpose, or the like, that the legislature assigned a different meaning to a word or phrase than the subject of the rule was likely to, he is free to adopt that special meaning; he does not violate the principle of legality thereby. But the purposes of the principle of legality suggest that in determining what the statute actually means it is appropriate to consider how the subject of a statute is likely to understand it.

To a certain extent this suggestion resembles the once popular doctrines that penal statutes must always be interpreted to favour the accused, or that the "plain" or "literal" meaning of criminal statutes must always be adopted. Given the law's acceptance of "warning" as an important function of criminal law, there is reason to favour the meaning a provision is likely to have to those who are governed by it over other possible meanings, in the absence of compelling considerations to the contrary. Such favoritism could be called adopting a "plain meaning," and is in a meaningful sense "favouring the accused." But the principle "*in dubio pro re*" far overstates the force which can properly be ascribed to the ordinary meaning of statutory language. The judge has the power to choose among any of the possible meanings of a statutory word or phrase, however "plain" one of them may be. The question is how he should exercise his power in order to attain justice. The meaning most likely to occur to an interested reader of the statute is an obvious choice.

### C. Ignorance of the law as an excuse<sup>34</sup>

Even though some provision of the law may give clear warning that a particular act or omission may be treated as an offence, a citizen may be totally unaware of the criminal nature of his act. This need not be due to deceitful action on the part of the government in hiding the law once passed. Indeed, if the government ever did act in such a reprehensible manner, it would seem entirely within a judge's authority to refuse to enforce the statute in question. Rather, the citizen's ignorance of the law may occur whenever the "crime" is not an act which

34. Ancel, *Social Defence*, cited above at note 20, pp. 126-28.  
Andenaes, work cited above at note 1, p. 105.  
Boni, "La mise en pratique des lois dans les nations en voie du developpement," in *Twelfth International Course in Criminology* (Hebrew University, Jerusalem, 1965), p. 88.  
Glaser, work cited above at note 6, p. 935 ff.  
Hart & Sachs, work cited above at note 1, pp. 1225-26.  
Marchal & Jasper, work cited above at note 20.  
Thornstedt, work cited above at note 6, p. 223, n. 3.

the citizen regards as immoral (and therefore likely to be a crime); criminal law today is so complex that few citizens are likely to learn of any "warning," unless it received special prominence because of newspaper stories, the advice of their lawyer, or the like. This is perhaps especially likely to be true in a country such as Ethiopia, where the complexities of modern life are new, where codes, court decisions, and legal information are not widely available, and where not all citizens understand the languages in which they are published.

A consequence of this situation is that several theorists now appear to be arguing for reconsideration of the long-standing doctrine that "ignorance of the law is no defence." If warning of the law's penalties is important, they urge, the law must be prepared to take account of the many cases where citizens do not know the law and could not be expected to surmise it, because the law is highly technical and deals with what are sometimes called formal or statutory wrongs rather than moral wrongs.

Article 623, penalizing failure to register the birth of an infant, is a good example of the kind of regulation they have in mind. Provision for registration of births may be important to a modern nation; enforcement of such a provision by a criminal penalty is commonplace. But the average citizen would not think a failure to register the birth of his child was likely to be a crime, for he would not consider it immoral; his view — whether correct or not — is that the criminal law and morality largely coincide. Nor will he know of the obligation in any real sense simply because it appears in the Penal Code. Few citizens, even lawyers, have carefully read the Code. Unless the provision has been forcefully called to his attention in some way, any punishment inflicted upon him will be punishment for an act or omission which he did not know to be wrong and, realistically speaking, which he had no way of sensing might be wrong. This consideration may explain why, although "ignorance of the law is no defense" under Article 78 of the Penal Code, there are provisions in that article and Article 79(1) (a) for liberal reduction and even limitation of sentence in cases of good faith ignorance or mistake. In the case of technical or regulatory offences, the principle of legality may not be protection enough.

Another appropriate reaction to a situation of this kind might be to prefer a relatively narrow meaning for the offence in question. Where a new offence essentially unrelated to previous criminal regulation has been created by the legislature, not only is the citizen unlikely to be aware of the offence, but the legislature, also, is unlikely to have considered as carefully as it otherwise might the extent it wishes the new regulation to have. Where the statute clearly applies to a given factual situation, of course one must assume it was meant to apply. But there is less reason to assume that the legislature meant the statute to apply in any uncertain cases, since the moral judgment made is a new one, and therefore may not have been fully explored. The suggestion that a new rule be narrowly construed is particularly appropriate for statutes touching on conduct previously accepted as legitimate, because of the considerations mentioned above in connection with the discussion of statutory vagueness. That is, legislatures as well as courts have a responsibility to be definite. This responsibility is greatest where enactments may threaten or inhibit legitimate or protected activities. By giving such a statute a narrow construction, the court at the same time assumes that the legislature has obeyed its responsibility, and acts to enforce that responsibility in case it has not.



**D. Community Moral Standards as a Supplement to Statutory Warning**<sup>35</sup>

In the case of serious crimes, sometimes described as "infamous" or "bad in themselves," one might expect the situation to be exactly opposite from the birth registration case. Here, it could be argued that no formal warning is really necessary to apprise the citizen that his act will be subject to penalties. Regarding these crimes, most citizens — certainly the great majority of those who could be deterred by a written rule — will know that they are prohibited *not* because they are included in the written law, but because they are "wrong," "evil," or "immoral" according to a shared set of moral precepts. This suggests that it is the bounds of the moral precepts, rather than the bounds of the written law, which are the more important to be observed. Accordingly, some jurists have suggested that interpretation can be very free when the law in issue is one which refers to shared morals of this sort.

A number of cautions have to be observed regarding this statement, however; it can be seen that all of these relate back to the political functions of the principle of legality in establishing and protecting relationships between courts, legislatures and the citizen. First, there may be cases where the legislature has consciously decided not to punish as criminal certain acts which many regard as immoral. Obviously, any such decision must be respected; the legislature is the primary policy-maker here. Thus, fornication and prostitution are not, generally speaking, crimes under the Code's provisions dealing with sexual relations. While there might be no serious danger of unfairness to the citizen if courts "interpreted" the law to determine that such acts were crimes, any such "interpretation" would give serious offence to the legislative decision that they should not be punished as crimes. Second, all Ethiopian citizens may not share the same set of moral standards, coming as they do from so many diverse backgrounds. Parliament, in recognition of this, seems to have been particularly careful to spell out a number of offences which might not be recognized as such by various of Ethiopia's citizens. Article 524, discussed above, seems to be a good example of such a provision. Ethiopian courts, in turn, should recognize this factor by relying on statutory language to a greater degree than some of their European counterparts might now feel it necessary to do. Finally, it may be noted that considerations of "immorality" tend at the same time to founder and to work their gravest damage in those cases describable as "political crimes." Here the danger of inhibiting valuable activity through imprecise wording of statutes is great. The threat of free interpretation in this area is equally great, particularly when one considers how ephemeral the "morality" of political acts is likely to be. Here, then, there is also a specific reason to restrain the judge's hand in interpretation, just as there is to restrain the legislature's hand in drafting.

**XII. CONCLUSION.**

It is possible to rephrase the discussion above into a series of questions which the interpreter might ask himself when facing the task of understanding any statutory provision:

35. Franklin, work cited above at note 20.  
Hart & Sachs, work cited above at note 1, pp. 1225-26.  
Glaser, work cited above at note 6, pp. 935-37.  
Mahsoub, work cited above at note 1, p. 60 ff.  
Williams, work cited above at note 17, pp. 601-602.

What could the words of this statute mean? That is, what choices does the statutory language leave open?

What job was this statute meant to do? How does it fit into the overall scheme? How might its function be different from the apparent functions of other provisions of the scheme?

How is this statute likely to be understood by the persons to whom it is directed? Will it be an entirely new standard of conduct for them, or something they more or less expect because of internal moral standards?

What are the practical effects of applying the statute to this case? Does the degree of severity in punishment seem to be about what one would expect an Ethiopian legislature to impose for this act? Will punishing this act imperil those who perform acts the legislature probably did not wish to forbid? Will it imperil acts the legislature is constitutionally forbidden to forbid? Does applying the statute to this case *require* applying the statute to another case, where its hypothetical purpose is not fulfilled?

Can the decision to apply or not to apply the statute to a particular case be rationally explained? Does it make sense in terms of its language, apparent purposes, and application or non-application to other cases?

The principle of legality requires that if the judge is deciding a case in favour of conviction, he must be able to conclude, "The language of the statute could mean this." The constitutional subordination of the judge to the legislature in statutory matters according to the separation of powers doctrine requires that in every case, civil as well as criminal, he must be able to conclude, "The language of the statutes does not require me to reach another conclusion." These are the only constitutional limitations on his interpretive power, on his freedom of choice. But a sense of his subordination to the legislature and of the policies represented by the principle of legality will make an interpreter anxious to assure that his interpretation satisfies at least some of the following criteria:

- Consistency with ascertainable statutory purposes;
- Uniqueness of function within a rational legislative scheme;
- Sensibility of punishment in the context of contemporary moral standards;
- A meaning which could be ascertained or at least expected by those who will be subject to the provision;
- A meaning which does not threaten legitimate or protected acts;
- Distinctions which can be explained in terms of believable hypotheses of legislative policy.

It should not be so surprising that the concrete limitations on judicial choice are so few. The so-called rules of interpretation are only verbal expressions, slogans which may represent useful policy but often overstate it. Choices exist, and always will exist, for judges to make. It is more honest to accept this fact and attempt to state a spirit or series of goals which might motivate choice than to attempt to conceal the fact of choice behind a camouflage of "rules." The major limitation will inevitably be found in the attitude which the judge — and the legislators — maintain towards their task. The principal role of the principle of legality is to suggest an appropriate attitude for both legislator and judge in the area of criminal law. It "can do no more than implement the attainment of the maximum possible certainty resulting from the operation of specific rules in a social milieu. It means no less."<sup>36</sup>

36. Hall, work cited above at note 17, p. 47.