

## **CRIMINAL PROCEDURE NOTE**

### **CHAPTER ONE**

#### **GENERAL OVERVIEW**

##### **1.1. Definition, Nature, Purpose, and Development of Criminal Procedure**

###### **Definition**

The rules governing the mechanisms, under which crimes are investigated, prosecuted, adjudicated, and punished. It includes the protection of accused persons' constitutional rights.

###### **Substantive Due Process**

Substantive due process refers to the content or subject matter of a law. It protects people against unreasonable, arbitrary, or capricious laws or acts of government.

An interesting area of law that has raised questions of substantive due process involves the rape shield statutes that exist in most jurisdictions in the United States. Rape shield statutes are laws that protect alleged rape victims from questioning in Court (and depositions) about evidence of past sexual experiences that are not relevant to the case and that be prejudicial...

###### **Procedural Due Process**

Procedural due process is concerned with the notice, hearing, and other procedures

that are required before the life, liberty, or property of a person may be taken by the government. In general, procedural due process requires the following:

1. Notice of the proceedings
2. A hearing
3. Opportunity to present a defense
4. An impartial tribunal
5. An atmosphere of fairness

**“cold line,”**

###### **Summary**

Crimes endanger the harmonious socio-economic and political relationship in any society. Maintaining law and order requires the perpetrators of offences to be detected and brought to justice. Otherwise, individuals could take the law into their own hands to revenge. But, the enforcement of the criminal law has to respect the human rights of suspected or accused persons.

Law is broadly divided into substantive and adjective. The latter is also divided into procedural and evidence. The substantive law defines rights, duties, and liabilities. But, its implementation calls for the adjective laws. Procedure and evidence laws

are corollaries of substantive rules. Hence, criminal procedure is part of adjective laws.

Criminal procedure regulates the whole process of detection, investigation, prosecution, and punishment of offenders. It also contains rules protecting the constitutional rights those apprehended for violating the criminal law. It has double functions. It applies the criminal law. At the same time, it helps to preserve the rights of a suspect or accused person. Hence, it is all about striking a balance between these two interests.

Handling criminal cases is a sensitive matter as it is highly connected with human rights. For example, arrest and investigation limit the right to privacy, movement, bodily integrity, work, etc. The attitude of the public towards crime also leads to psychological embarrassment. Thus, it could lead to socio-economic and psychological problems. Moreover, unlike civil cases, criminal proceedings could result in deprivation of life, and liberty. Upon conviction, death penalty and imprisonment could be imposed. There could also be confiscation and fine. This loss of property is accompanied by social stigma. The situation is different for civil liability. The

latter has predominantly pecuniary effect. So, criminal procedure is very much related with human rights.

Human rights are birth rights of every person. A state has the responsibility to respect and protect them. Limitations are permitted only for the sake of protecting the rights of others and public life in accordance with the law.

Given the value attached to human rights, they have constitutional significance in any society. That is why it is common to find bill of rights in most modern constitutions. They do have the nature of limiting state power. There should not be loss of life, liberty, and property without due process of law. This principle is a manifestation of rule of law. Thus, rule of law imposes upon a state the duty to respect and protect human rights.

Due process of law has two major components. These are substantive and procedural. The former refers to the laws governing rights, duties, and liabilities. The legal provisions set a limit for their application. Their substance can also be subject to dispute. For instance, vague, ambiguous, discriminatory, or unreasonable criminal laws may be challenged on the

grounds of their constitutionality. On the other hand, the latter pertains to the means of implementing them. It does not concern with the essence of the laws enforced. Rather the issue surrounds their mode of application. The substantive justice is more of an end. But, the procedural one is mainly a means to achieve that end. Nevertheless, procedural matters may be ends in themselves. Fair trial, the right to be heard, etc are rights to be upheld for their own sake besides their instrumentality in attaining a fair result. In addition, the formulation of substantive rules could affect procedural issues. For example, the penalty provided in the law is taken into account to decide bail or punishment. Thus, the distinction between substantive and procedural justice is elusive.

Criminal procedure and criminal law developed side by side. The primitive society relied on self-help. This was changed to compensating victims through public process. Then there was a shift in the perception of crimes. They have been viewed as wrongs against the public instead of the person affected. This has made government to take the responsibility to have those in contravention of the criminal law to be judged through the efforts of

government institutions. The protection of the rights of a suspect or accused has got attention through time. Thus, the development of criminal procedure rules is inseparable from the growth of substantive criminal law.

Therefore, criminal procedure rules govern the process of detecting, arrest, investigation, adjudication, punishment, and execution. It is connected with the enjoyment of human rights. Consequently, it is prohibited to restrict human rights without due process of law. For the promotion of rule of law, constitutional and other legal limitations have to be respected.

## **1.2. Sources of Criminal Procedure Rules**

### **The English System, the Sources of Law**

The major current source of English criminal procedure is Acts of parliament, of which some 150 bear upon the subject. Some of these have what might be called in a loose sense 'constitutional status', notably Magna Carta 1215, the Bill of Rights Act 1688, and more recently the Human Rights Act 1998, incorporating most of the European Convention on Human Rights. But this special status, in so far as it exists, means no more than that these statutes are well known and particularly revered.

## **The French System, Legal Sources**

### **Constitutional Sources**

The ‘constitutionalisation’ of the law mainly dates back to the *loi constitutionnelle* of 29 October 1974, which allowed not only the president of the Republic, the prime minister or the presidents of the *Assemblée Nationale* and the *Senat* to invoke the *Conseil constitutionnel*, but also sixty deputies or senators.

### **Legislative Sources**

Only a statute may create rules of criminal procedure (article 34, Constitution).

## **The German System, the Sources of Law (Rechtsquellen)**

Germany is a Federal Republic consisting of sixteen *Länder*: these are territorial units endowed with wide powers and their own decision-making bodies. Such a structure leads to a superimposition of the various sources of law: at the top is the *Grundgesetz* (the German Constitution); then Federal law and regulations; and finally the constitutions, the laws and the regulations of the *Länder*.

## **Sources of Criminal Procedure Rules in Ethiopia**

Federal constitution,

As regards Ethiopia, the FDRE Constitution, regional constitutions, and other relevant laws have to be analysed so as to have a comprehensive view of the sources of criminal procedure rules in the country.

To sum up, identifying the sources of criminal procedure rules is not an easy task. The matter is more complicated in a federal set up where there are different jurisdictions having the mandate over the running of the criminal justice system. Ethiopia follows a federal system. The sources of criminal procedure rules found at the federal, regional, and the two cities level may not be the same.

### **Summary**

A source of law could refer to the legally competent authorities to enact it or the formal sources into which the provisions of the law are found. They are two sides of the same coin. The legal instruments can not be valid without enactment by the proper government organ. In this section, we have seen the sources of criminal procedure laws of other countries and Ethiopia.

The extracted writings deal with the sources of criminal procedure in Britannia, France, Germany, and the United States, respectively. The materials show that sources of criminal procedure rules are inseparable from the political and legal system of a country. Thus, the sources of criminal procedure laws have to be seen in the context of the political and legal set up of nations.

In the United Kingdom, the sovereignty of parliament has an impact over criminal procedure. There is no formally adopted written constitution known in other parts of the world. Parliament can enact any law limiting the constitutional protection of suspected or accused persons. However, this does not mean that the country does not have criminal procedure principles and rules having constitutional significance. In the absence of a formal constitutional document, principles and rules of criminal procedure have developed over a long period of time. For example, the Magna Carta incorporates the constitutional principle of due process of law. Thus, in Britannia, there are criminal procedure principles and rules dispersed in various laws. They are comparable to those found in modern constitutions.

The other major sources of criminal procedure rules are a myriad of statutes enacted by parliament and delegated legislations. The role of court rulings based on common law power and interpretation of legislations can not also be undermined.

In France, the sources of criminal procedure rules are mainly the constitution, legislations and decisions of the constitutional court. As United Kingdom and France are unitary state, the criminal procedure rules tend to be uniform. The situation is quite different in Germany and the United States. These countries have adopted a federal arrangement. In a federation, there are two or more sovereign orders of government sharing legislative and executive power with the federal government. Each tier of government has to exercise the powers delimited in a federal constitution. Accordingly, in a federation, one has to identify the role of the different orders of government over the functioning of the criminal justice system. Thus, the political system has an implication over the nature and application of criminal procedure.

In Germany, the sources of criminal procedure are the basic law (constitution of Germany), decisions of the constitutional

court, federal statutes, and Lander laws. The federal arrangement is also well reflected in the United States criminal justice system. At the federal level, the federal Constitution, federal legislations and case laws are the primary sources of criminal procedure. At the state level, the federal constitution, federal laws, state constitution, state legislations and case laws of both Federal Supreme Court as well as state courts regulate the criminal justice system.

When we come to our country, the FDRE Constitution has formally adopted a federal system. The level of government having the responsibility of enforcing the criminal law has to be distinguished. The FDRE Constitution lacks clarity in this regard. Enacting a criminal law is the mandate of the Federal government pursuant to Art 55/5 of the FDRE Constitution. But, regions can enact criminal law on matters not covered by federal criminal law. However, the constitution is not clear about the jurisdiction of the two tiers of government over the implementation of the criminal law. Different arguments are forwarded. Some argue that the federal government should have the mandate to apply the criminal law it has enacted. Others say that even though the federal government enacted it, the

regions have the responsibility to apply it. According to Art 52/2/g of the FDRE Constitution, the regions have the power to organize police force and maintain law and order. These functions are highly connected with the application of the criminal law.

Unlike the criminal law, the FDRE Constitution is silent about the layer of government having the mandate to enact criminal procedure rules. It might be argued that the level of government responsible for the enforcement of the criminal law should have also the mandate to proclaim criminal procedure rules.

Like other federations, criminal procedure rules are found in regional constitutions. Some regions have also enacted criminal procedure rules. For example, Tigray Regional State has issued a proclamation empowering social courts to entertain petty offences. Addis Ababa City Administration has also enacted a similar proclamation.

At the federal level, the sources of criminal procedure rules are the FDRE constitution, federal legislations, sentencing guideline to be enacted by the Federal Supreme Court, Federal Supreme Court cassation division decisions, criminal justice and prosecution

policies to be enacted, etc. At state level, besides the federal sources mentioned, the sources include regional constitutions, policies and legislations.

To sum up, the sources of criminal procedure principles and rules have to be seen the overall political, constitutional, and legal system of a country. In every nation, the constitution is the first legal document to be referred to. In many countries, there has been a trend of constitutionalisation of criminal procedure rules. Legislations also play a crucial role. The statutory sources of criminal procedure rules come next to constitutional criminal procedure rules. There may also be case laws. These are dependent upon the legal tradition of a state. In a federal set up, there is a proliferation of criminal procedure rules due to the presence of two or more orders of government. There may also be regional constitutions governing the criminal justice system. The situation found in Ethiopia has to be viewed from these perspectives.

### **1.3. Models of Criminal Justice Systems: the 'Due Process' and the 'Crime Control' Models**

#### **Models of Criminal Justice**

#### **The Due Process Model**

In the 1960s, **Warren Court**-the Supreme Court under the leadership of Chief Justice Earl Warren- announced a large number of decisions that were in accord with the **due process model** of the criminal justice system. This model stresses the possibility of error in the stages leading to trial. It therefore emphasizes the need to protect procedural rights even if this prevents the legal system from operating with maximum efficiency.

#### **The Crime Control Model**

Whereas the Warren Court clearly was attuned to the due process model of criminal justice, the **Burger Court** -the Supreme Court under the leadership of Chief Justice Warren Burger-appeared to support an alternative model of the legal process-the **crime control model**. This model emphasizes efficiency and is based on the view that the most important function of the criminal process is repression of criminal conduct.

#### **Models of Criminal Justice Systems**

In order to judge the effectiveness of a criminal justice system (or anything else for that matter}, you need first to know what that system sets out to do. The academic

Herbert Packer {1968} has identified two quite different potential aims for criminal justice systems: the “due process” model; and “crime control” model. The former gives priority to fairness of procedure and to protecting the innocent from wrongful conviction, accepting that a high level of protection for suspects makes it more difficult to convict the guilty, and that some guilty people will therefore go free. The latter places most importance on convicting the guilty, taking the risk that occasionally some innocent people will be convicted. Obviously, criminal justice systems tend not to fall completely within one model or the other: most seek to strike a balance between the two.

### **Summary**

A criminal justice system has dual purposes. These are protection of the public against criminal harm and suspects or accused against unfair treatment along the process. It is not easy to reconcile these two competing and, at times, conflicting values. A state is expected to strike a balance between the two. But, it is unthinkable to achieve absolute balance. The balance could tilt towards one over the other. Consequently, depending upon the approach of the state towards the two interests, two

models of criminal justice system have been developed. These are the due process model and crime control model.

The due process model is distinguished for its emphasis on the avoidance of convicting innocent. It tolerates the escape of criminals for the sake of not harming innocents. This may affect the public interest as offenders are sent free. On the contrary, the policy of the crime control model, as its name implies, is the prevention of crime. It gives lesser emphasis to the protection of the rights of a suspect or accused. There is a possibility to convict innocent persons since the major target is repressing crime.

Determining the orientation of a jurisdiction is not an easy task. Comprehensive understanding requires the examination of a constitution, statutes, case laws, and law enforcement activities. The approach can not be static amidst the dynamism of socio-economic and political reality. Thus, the policy of the criminal justice system has to be seen in light of the overall arrangement and operation of the justice system.

#### **1.4. Systems of Criminal Procedure: the Adversarial/Accusatorial, the Inquisitorial, and the Mixed Systems**

##### **Adjudicatory Processes**

The process of adjudication is typically either *adversarial* (also called accusatorial) or *inquisitorial* in nature... Both systems have the finding of truth as a fundamental aim, and each is guided by the principle that the guilty should be punished and the innocent left alone... The differences between the two are in their assumptions about the best way to find the truth.

In general terms, the common legal tradition uses the adversarial process, whereas the civil legal tradition follows one of inquisition. Because of its civil roots, the socialist tradition also exemplifies the inquisitorial process. The Islamic legal tradition offers a unique combination relying on the private accusation in an inquisitorial-type setting.

##### **The Adversarial System**

The **adversarial system** is often compared to a game or contest in which both sides are trying to win and a neutral umpire decides two things: (1) whether they are playing by

the rules and (2) which side wins. Often, the judge acts as umpire for both these aspects of the contest. In some cases, the judge's chief responsibility is to make decisions that ensure a fair contest, while a jury declares the actual winner.

In the adversarial system, most of the procedural advantages are on the side of the accused. The right to an attorney, the right to remain silent, the right to be free of unwarranted searches and arrests, the right to compel witnesses to appear for the defense, the right to confront one's accuser, the right to appeal-these and other rules of criminal process help keep the prosecutor from automatically winning a case.

##### **The Inquisitorial System**

U.S. Supreme Court Justice Warren Burger once remarked that "if he were innocent, he would prefer to be tried by a civil law court, but...if he were guilty, he would prefer to be tried by a common law court" (Burger, 1968). This remark is in some ways an indictment of the Common Law procedure in its suggestion that it is less likely than the civil law procedure to arrive at the truth of a case. We can weigh the validity of this statement as we examine some of the details of civil law procedure.

Criminal procedure in civil law countries is characterized as inquisitorial, as opposed to adversarial, in nature. This characterization evokes unfortunate images of the inquisition, that notorious and cruel institution that persecuted alleged heretics during the sixteenth and subsequent centuries in Spain and other Catholic countries, extorting confessions through brutal tortures and executing its victims, often by burning. In fact, however, confessions resulting from torture were the norm in both England and Continental Europe for secular as well as religious crimes until the right to remain silent becomes the distinguishing characteristic of the adversarial system of procedure.

In modern civil law systems, the inquisitorial system refers not to any legacy of the inquisition but to the extensive pretrial investigation and interrogations that are designed to ensure that no innocent person is brought to trial. Even to this extent, inquisitorial is a misleading term that does not truly describe the rather hybrid procedure that developed in civil law systems, often in emulation of common law procedural rights, during the nineteenth and twentieth centuries.

### **The Mixed Court**

The **mixed court** is another variation of criminal procedure that is used primarily in civil law countries but that is also found in Socialist and Common Law legal systems. It is a method of adjudication in which one or more lay judges help the professional judge come to a decision. Lay judges are typical citizens, not professional legal personnel. They are usually elected (on the local level) or chosen by the government agency responsible for monitoring the courts. The lay judges either work as volunteers a certain number of days each year or serve a term prescribed by law. Their numbers vary depending on the seriousness of the case, the court level, and the laws of the country; they range from at least two to six. In effect, the lay judges replace the jury system, providing the balance between the state acting against the accused and the peers of the accused in considering the interests of justice and the community at large. It is possible in many systems for the lay judges to overrule the professional judge. However, in practice, lay judges often defer to the professional judge's knowledge and rarely muster a majority that overrides the professional judge's vote. Their main function seems to be a restraining one, to keep the judge from

acting in an arbitrary or unreasonable manner.

### **Contrasting Adversarial and Inquisitorial Processes**

1. The inquisitorial systems emphasize the screening phase of the criminal process with the idea that a careful investigation will determine factual guilt. The adversarial systems emphasize the trial phase, where the idea that complex rules of evidence to produce substantive results will ensure the defendant a fair trial.
2. The adversarial systems are much more likely to restrict the involvement of the judiciary in both the investigatory and adjudicatory process. The direct involvement of the judge in inquisitorial systems contrasts with his or her more indirect involvement in adversarial systems.
3. Because the inquisitorial system assumes that all involved persons are seeking the truth, the defendant is expected (though not required) to be cooperative. That cooperation includes supplying information to investigators and answering questions at trial. The adversarial

systems, on the other hand, neither expect nor require the defendant to assist investigators. The burden of proof is on the prosecutor, who assumes that the defendant will maintain silence.

4. The role of the judge in adversarial proceedings is primarily one of referee. The attorneys develop and present their respective cases, and then a jury decides between the two versions of the facts. The court in an inquisitorial system is another investigator with the added power of being able to decide the case. The judges ask most of the questions and develop the facts while the attorneys exist more to argue the interpretation that the court should give those facts...

### **A Mixed System**

Islamic procedural law is a mixed system combining adversarial and inquisitorial aspects. Because the Shari'a is a religious law based on divine command and revelation, it did not develop through judicial precedent or legislative codification. Furthermore, it does not require administration of justice to be a combined office (for example, the inquisitorial judge) or divide in to many (for example, the

adversarial attorney, judge, and jury). Identifying Islamic procedural law is not so easy. Though the sacred law prescribes penalties for criminal acts, it does not specify the means used to apprehend the offender and bring him to justice. The matter is left to the discretion of the state...

### **Summary**

Every state wants to apprehend and adjudicate those who violated the criminal law. However, the procedures and processes utilized may not be the same. There are two major criminal procedure systems, i.e., adversarial (accusatorial) and inquisitorial. Their difference lies in the selection of the appropriate procedures and processes for effectively detecting and prosecuting criminals. They are two paths to filter out the guilty from the innocents. The adoption of these systems is influenced by legal tradition. Generally, common law systems follow the accusatorial system and civil law countries adopt the inquisitorial approach.

In the adversarial system, a judge plays the role of a referee in the contest between the prosecution and defense. This is thought to be the ideal system to arrive at a fact. On the contrary, in the inquisitorial system, the judge is supposed to inquire in to the case to

arrive at the truth. In the former, the court is passive, whereas in the latter, the judge plays a key role in examining the parties and evidence. Hence, the adversarial approach focuses on the existence of fair process which is considered to have an inbuilt method of finding facts. In the inquisitorial system, the criminal justice system is inclined towards finding the truth.

However, in the actual world, there is no clear cut demarcation between the two systems. It is common to find an element of both in the functioning a criminal justice system. There are also variations in their implementation within jurisdictions following the same system. Some countries have adopted a mixed system combining the features of both. Besides, it is mistaken to conclude that one is apt to favor suspects or accused and the other society. Each system has mechanisms to strike a balance between the interest of individuals and the public. The efficiency and effectiveness of a system has to be seen on a case by case basis.

Ascertaining the system opted by a country is not simple. The laws and practices of the justice sectors have to be explored. For instance, to determine the system of our

country, we have to see the laws regulating the justice system and their application.

To sum up, the adversarial and inquisitorial systems are the procedures and processes utilized for adjudicating criminal cases. The former is characterized by limited judicial intervention and the latter is identified for its active involvement of the judiciary.

### **1.5. Structure and Fundamental Principles of Modern Criminal Procedure**

#### **Relevant Laws**

Art 1, 2, 3, 5, 7, 8, 9, 10, 11, 12, UDHR

Art 2, 4, 6, 9, 10, 11, 14, 15, 17, ICCPR

Art 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 28, 37, FDRE Constitution

Art, 2, 4, CC

Office of the Central Attorney General of the Transitional Government of Ethiopia Establishment Proclamation No. 39/1993

Definition of Powers and Duties of the Central and Regional Organs of the Transitional Government of Ethiopia Proclamation No. 41/1993

Definition of Powers and Duties of the Central and Regional Organs of the Transitional Government of Ethiopia (Amendment) Proclamation No. 73/1993

Attorneys Proclamation No. 74/1993

The Federal Courts Proclamation No. 25/1996 (as amended)

The Re-Establishment and Modernization of Customs Authority Proclamation No. 60/97 (as amended)

The Federal Police Commission Proclamation No. 313/2003

The Federal Prisons Commission Establishment Proclamation No. 365/2003

Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation No. 433/2005

Definition of Powers and Duties of the Executive Organs of the FDRE Proclamation No. 471/2005

Ethiopian Revenues and Customs Authority Establishment Proclamation No. 587/2008

#### **Summary**

The materials in this section deal with the institutional set up of the criminal justice sectors and fundamental principles of criminal procedure. The main actors in the criminal justice system discussed are the police, prosecution, and courts. The organization of the organs of government is affected by the legal tradition of a country. The role of victims also varies from jurisdiction to jurisdiction.

It is worth considering the approach of different countries towards fundamental principles of criminal procedure. The countries selected, i.e. Britannia, France, and Germany, follow different legal system. But, all of them share the basic principles of criminal procedure. The fundamental criminal procedure principles encountered in a modern criminal justice system include presumption of innocence, freedom from self-incrimination, fair trial, speedy trial, public trial, the right to defence counsel, equality, legality, rule of law, due process of law, etc. These are universal values to be incorporated in any modern criminal justice system. They are also part of the UDHR and ICCPR.

In Ethiopia, the justice sectors are organized at the federal and regional level. The main actors in the criminal justice system are separately organized. But, the police and the prosecution act together on judicial matters of handling criminal cases. They are differentiated for administrative affairs of the institutions like budget, training, salary, discipline, etc. There are also specialized institutions like ethics and anti-corruption and revenues and customs involved in the criminal justice. These institutions are

unique as they are accorded both police and prosecution powers.

Our country also shares the fundamental principles of criminal procedure. The FDRE Constitution and other laws have directly or indirectly incorporated these basic principles of modern criminal justice system.

In short, the major institutions that are involved in the criminal justice system include the police, prosecution, and courts. Their organization varies from jurisdiction to jurisdiction. The role of victims can not also be undermined. Irrespective of variation in the legal systems of states, all share fundamental values of criminal procedure. Our country is not also exception to that.

## **1.6. History of Ethiopian Criminal Procedure**

### **Criminal Investigation and Models of Litigation**

Criminal investigation devices

In criminal cases, court proceedings were often preceded by the investigation of the commission of the alleged crime.

There were three types of devices of crime investigation or detection under the old

procedural law of Ethiopia. These were known as *leba shay*, *afarsata*, and the investigations undertaken by the “market guards” (*arada zabagna*) and secret guards (*mist’ir zabagna*).

### **Summary**

In Ethiopia, the procedural laws had been developed before the substantive laws. Before the enactment of the CPC, the criminal procedure was guided by traditional rules. There were mechanisms to detect and judge criminals. The methods include *leba shay* and *afarsata*. But, these techniques were exposed to abuse. Their value for that stage of development can not be underestimated.

Modern criminal justice has appeared with the enactment of the CPC. The code has been mainly influenced by common law legal system. But, it has also civil law inclination. It is a precise code. As a result it is open to interpretation. It is up to legal scholars and practitioners to interpret it in light of acceptable criminal procedure principles and rules. The lacunas can be observed with the detail discussion of the different subject matters covered in the code. Nevertheless, the code remains a significant input for the development of

modern criminal procedure principles and rules in the country.

To sum up, the major trend of criminal procedure in Ethiopia is not quite different from the rest of the world. Modern criminal procedure principles and rules have been brought with the first codified law on the area. The size of the code definitely affects its coverage of requisite criminal procedure principles and rules. The gap has to be filled by lawyers through interpretation.

## **CHAPTER TWO**

### **SETTING JUSTICE IN MOTION: IN TAKE PROCEDURES AND INVESTIGATIVE ACTIVITIES**

#### **2.1. Complaint, Accusation, and Flagrant Offences**

##### **Relevant Laws**

Art 11-21, 50, 150-153, 165-166, CPC

Art 101-102, 211-213, 254, 255, 443, 447, 448, CC

Art 2027-2065, Civil Code

##### **Prosecuting Criminal Offences Punishable only upon Complaint**

Article 1 of the PC states that “the purpose of criminal law is to ensure order, peace and the security of the state and its inhabitants

for the public good.” The code achieves this purpose by laying down prohibitions from acting or act whenever it is in the general interest that one should act or refrain from acting. Whosoever commits a criminal offence by disregarding these prohibitions or obligations is answerable, therefore, to the community. Hence the principle that criminal offences are prosecuted and punished, on behalf of the public, by the state acting as the agent of the citizens. There are offences, however, which do not jeopardize the order, peace and security of the state and its inhabitants but are contrary solely to the rights of a given individual. There are offences of a purely private or personal character, the effect of which does not extend beyond the individual there by injured. In such cases, the state, though it is generally responsible for instituting criminal proceedings whether or not the victim of the offence agrees thereto, will not carry out this duty unless the victim indicates affirmatively that he wants the offender to be prosecuted.

The prior consent of the injured party is required, firstly, because public interests are not at risk as the offence does not endanger the society at large, and secondly, because the institution of proceedings, against the

will of the injured party, might often be more harmful to him than the commission of the offence, for it might draw the attention of society to certain facts, such as his spouse’s unfaithfulness or his child’s dishonesty, which are precisely what he does not want known publicly. In these situations, the institution of criminal proceedings is conditional upon a complaint first being made by the individual concerned. Where he makes a request to this effect, the state then acts, not on behalf of the public, but as the custodian of his rights for the purpose of prosecution and punishment insofar as this is possible. This raises two questions: which are these offences so punishable on complaint and what are the effects of such a complaint being made.

Crimes punishable upon complaint: (Art. 388(2), 407, 409, 539(1), 543(3), 544, 552, 552, 555, 563(1), 570, 573, 587, 596, 612, 614, 618, 625, 629, 632, 643, 644, 645, 649, 650(1), 653, 661, 665, 666, 671- 676, 680, 681, 721(1)a of criminal code)

Regarding the manner in which offences punishable on complaint are to be prosecuted, the PC and CPC must be read together. Thus, the person or persons against

whom an offence punishable on complaint has been committed may set justice in motion by making a complaint in accordance with Article 220 of the PC and 13 ff. of the CPC unless the offender is a juvenile, in which case the provisions of Article 172 of the CPC will apply. The question as to who is qualified to file a complaint is resolved by Articles 218 and 219 of the PC. It must be noted, however, that the general rules contained in the latter Articles are sometimes departed from in the special part of the PC. In cases of adultery for instance, the right of complaint does not pass to the next of kin (Article 619), contrary to what is provided for by Article 218.

The complaint must be made within three months of the injured party's knowledge of the offence (as a complaint may, according to Article 15 of the CPC be, made against an unknown offender) or that of the offender (Article 220 of the PC), unless the law itself makes it clear that this period of three months begins to run from a different date, as is the case under Articles 599 and 614 (2) of the PC. After a complaint has been made, a police investigation will be held as provided for by Article 22 ff. of the CPC. After considering the findings of the police,

the public prosecutor, ordering further investigations in questionable cases, will either close the police investigation file with an unappealable decision (Article 39 of the CPC) or institute proceedings unless there are reasons why proceeding may not or cannot be instituted (Article 42 of the same code).

When the public prosecutor institutes proceedings with respect to an offence punishable on complaint, the ordinary provisions regarding the charge and the trial will apply (Articles 94 ff. of the CPC) or, where appropriate, those regarding petty offences. (Article 67-170 of the same code).

However, as the public prosecutor prosecutes only because the injured party has expressly requested him to do so, it follows that, where the complainant declares that he no longer wants the offender to be prosecuted, i.e., where he withdraws his complaint as he entitled to do under Article 221 of the PC, the public prosecutor is compelled to withdraw the charge. The accused may not, as a rule, object to such withdrawal and demand that the case should be carried forward.

Conclusion

These are the general rules to be followed when an offence is committed that cannot be tried except upon the request of the person whose rights or interests have been affected by the offence. Similar rules will seldom be found in other countries for, although many foreign laws provide for offences punishable on complaint, few of them authorize the institution of private proceedings, as this is deemed contrary to the principle that prosecution and punishment are not an individual but a collective concern and that a person who commits a criminal offence is answerable to the community, regardless of the fact that only one member thereof has been injured.

The system laid down in the CPC is much more restrictive, and rightfully so, than the one which existed previously, according to Section 9 of the Public Prosecutors Proclamation No. 29 of 1942, impliedly repealed by the CPC, when a criminal case was not conducted by the public prosecutor, the court was bound to permit the injured party to conduct the prosecution either personally or by an advocate, irrespective of the nature or seriousness of the offence or of the reasons why the public prosecutor did not prosecute. This provision, which so emphatically stressed the importance of the

part traditionally played by the injured party in criminal proceedings, resulted in disregarding the fundamental differences that exist between civil and criminal liability and procedure, as did also the now abolished practice of avoiding certain criminal prosecutions by paying blood money. It is only proper that this difference should be clearly made today in the provisions of the respective penal and criminal procedure codes relating to offences punishable on complaint.

### **Summary**

The criminal justices process has a beginning and end. The condition precedents for setting the criminal justice in motion are complaint, accusation and flagrant offences. These intake mechanisms are related to the nature of crimes. In many jurisdictions, it is common to find classification of crimes in to felonies, misdemeanors, and contraventions. Some jurisdictions also distinguish between consensual and non-consensual offences.

In Ethiopia, offenses are grouped into crimes and contraventions as well as complaint and accusation. Both distinctions are made based on the gravity of offences. But, the latter is particularly identifiable in

relation to the intake system to trigger criminal justice.

Under the Ethiopian criminal justice system, in principle, every crime concerns the public and is the responsibility of law enforcement organs to investigate and prosecute whenever they received information indicating the commission of offenses. However, exceptionally, some crimes are investigated or prosecuted only when the injured person requests criminal proceeding to start. In addition, providing information concerning the commission of a crime is a right. But, in exceptional cases provided in the law, it is a duty to inform the commission of such kind of offenses to the authorities.

Complaint refers to the information presented to law enforcement organs by the injured persons or their legal representatives to set criminal justice in motion. Unless this condition precedent is satisfied, a criminal proceeding cannot ensue. As a result, withdrawal of the complaint is also reserved to the victims or their legal representatives.

The criminal justice is also set in motion whenever there is a flagrant offense. Normally, an offence is said to be flagrant

when the perpetrator is red handed while committing the crime. It is easy to apprehend the offender in such cases. Under the new CC, detailed provisions pertaining to complaint have been left. They are made part of the draft Criminal Procedure Code.

To prevent unfounded accusation or complaint against innocent persons, the law has criminalized the act of false denunciation to the authorities about the commission of a crime. It might also result in civil or administrative sanctions in appropriate cases.

Thus, the beginning of the criminal justice process demands complaint, accusation, and flagrant offense. The law has also mechanisms to prevent false accusation and complaint against innocent persons.

## **2.2. Summons and Arrest**

### **Relevant Laws**

Art 3, 5, 8, 9, 11, and 12, UDHR

Art 9 and 14, ICCPR

Art 16-21, 26, 32, FDRE Constitution

Art 19-21, 49-59, CPC

Art 420, 423, 425-426, CC

Art 2027-2065, Civil Code

## **Warrant or Summons Issued on the Complaint**

Once the magistrate has determined from the complaint and accompanying affidavits that there is probable cause to believe that an offense has been committed and that the defendant committed it, the magistrate issues either a summons or an arrest warrant for the defendant's appearance in court. If the defendant is already before the court, no summons or warrant is necessary.

### **Arrest**

Where there is good ground for supposing as, for instance, from the gravity of the charge that a summons would not suffice to secure the attendance of an accused person, he should be arrested, in order to bring him before a magistrate.

#### **(a) By warrant**

Special authorization for arrest always takes in modern times the form of a written warrant. This may be issued in cases of political crime by a secretary of state or any other privy Councillor, or, in any criminal case whatever, by a judge of the queen's Bench Division or (as usually happens) by a justice of the peace.

#### **(b) Without warrant: (1) By a private person**

At common law. Even when no warrant has been issued, the common law often permits an arrest to be effected, a permission accorded not only to a constable but even to private persons.

Firstly, at common law a private person, without any warrant, may arrest any person who, in his presence, commits a treason or felony or dangerous wounding. The law does not merely permit, but requires, the citizen to do his best to arrest such a criminal. And as he is thus acting not only by a right but under an imperative duty, he may break outer doors in pursuit of the criminal. And for a treason or a violent felony he may use whatever force is necessary for capturing the offender, as, for instance, shooting at him, if he cannot otherwise be prevented from escaping, so that if the felon's death results, the case will be one of justifiable homicide. Besides this power to arrest, with a view to permanent detention, a person who has actually committed a view to permanent detention, a person who has actually committed a grave crime, every private citizen has also the right to prevent such crimes, by seizing any man who is about to commit a treason or felony or even a breach of the peace, and detaining him temporarily, until the danger is over.

Strangely enough what constitutes a 'breach of the peace' has not been authoritatively laid down. But, as it seems to mean a 'breach of the Queen's peace', it should include every crime. It has been held in Scotland that a person who peered into lighted windows after nightfall had properly been found guilty of a breach of the peace.

Secondly, at common law a private person may arrest without warrant any person whom he reasonably suspects of having committed a treason or felony or dangerous wounding, provided that this very crime has been actually committed by someone (whether by the arrested person or not). But in this case, as also in all the statutory ones about to be mentioned, law, though permitting a private person to make an arrest (and so making it a felonious homicide for a guilty man to kill him by resisting it), does not command him to do so, and hence confers no general right to effect it by breaking in to a house or by using blows or other violence.

Statutory powers of arrest. In addition to these two common law powers, modern statutes permit any private person to arrest anyone whom he 'finds' signaling to a smuggling vessel; or committing any

offence under the Vagrancy Act, the Larceny Act, 1916, or the Coinage Offences Act, 1936, c.16; or committing by night any indictable offence whatever; or, if the arrest be authorized by the owner of the property concerned, anyone whom he finds committing any offence against the Malicious Damage Act, 1861, the Night Poaching Act, 1828, the Town Police Clauses Act, 1847, or the Metropolitan Police Act, 1839.

(ii) By a police constable

A police constable, even when acting without a warrant, has powers still more extensive than those of a private person. Moreover, as his official position renders it in all these cases a duty for him to make the arrest, it will, in any of them, be a duty, even for an innocent person, to submit to him and not resist arrest. He is entitled to call for the assistance of any able-bodied bystander if necessary, *R. v. Brown* (1841), and it is an offence at common law for a person so called upon to refuse to assist when reasonably able to do so. It is doubtful whether in the case of all crimes for which arrest without warrant is permissible a police officer may enter premises in search of material evidence. In *Thomas v. Sawkins* (1935), it was held that a police officer may

enter private premises to prevent a breach of the peace, and per Lord Hewart, C. J., to prevent the commission of any offence that he believes to be imminent or likely to be committed.

### **Fresh Pursuit**

Under the common law and most statutes, law enforcement officer may make a lawful arrest without a warrant beyond the border of their jurisdiction in cases of fresh pursuit. Fresh pursuit means an officer's immediate pursuit of a criminal suspect in to another jurisdiction after the officer has attempted to arrest the suspect in the officer's jurisdiction. The common law allowed a warrantless arrest in fresh pursuit only in felony cases, but to day most states allow warrantless arrests for both felonies and misdemeanors. For a warrantless arrest in fresh pursuit to be legal, all of the following conditions must be met:

- The officer must have authority to arrest for the crime in the first place.
- The pursuit must be of a fleeing criminal attempting to avoid immediate capture.

- The pursuit must begin promptly and be maintained continuously.

- **“On-scene” Arrests**

A substantial percentage of arrests for a wide variety of crimes are of the “on-scene” variety. These are arrests made during the course of the crime or immediately thereafter either at the place where the crime occurred or in its immediate vicinity. Ordinarily on-scene arrests will be based on the officer's own observation (leading to the alternative description of such arrests as “on view”), although they will sometimes be based on the directive of a witness who has just viewed the crime. For some offenses, on-scene arrests typically are the product of proactive prearrest investigative activities designed to place the police in a position where they will be able to view the crime as it is committed. That usually is the case, for example, with so called “victimless” crimes (i.e., crimes which do not involve an interaction with another person, such as possession of a weapon, and crimes which ordinarily involve willing participants, such as vice crimes or narcotics-transfer offenses). For many other offenses, most on scene arrests occur, with basically no patrol responds to an event that calls the crime to his attention (e.g., a victim's call for

assistance, a burglar alarm, or an observation). Thus, one study concluded that 42% of all arrests for nonviolent property crimes (basically theft and burglary) were such on-scene arrests, made within 5 minutes of the commission of the offense.

### **Articles: Some Aspects of Ethiopian Arrest Law: the Eclectic Approach to Codification**

#### **Arrest by court warrant**

The ordinary procedure for issuing warrants is prescribed by Article 53 and 54. Recognizing the extreme gravity of the decision to order the arrest of an individual, the code has strictly limited that power. Although any court may issue a warrant, its power may be exercised only upon the application of an investigating police officer. And then the warrant may issue only if the police officer is able to demonstrate two facts to the court: [1] that it is absolutely necessary that the person whose arrest is desired appear before the court and [2] that his attendance before the court cannot be obtained in any other way.

“Cannot otherwise be obtained” - The second requirement of Art 54

We have mentioned a second criterion which must be satisfied before the court may issue an arrest warrant: that the presence of the accused before the court cannot be obtained in any other way. The apparent basis of this reluctance to authorize arrest when there is some alternative way to get the accused before the court is that arrest, involving as it does the possible use before, is a drastic procedure, to be avoided if possible. Among the inherent disadvantages of arrest are (a) the use of time and energy on the part of the police who must physically go find the accused and bring him to court under supervision; (b) possible embarrassment to an innocent accused in being publicly arrested and escorted by the police; and (c) the possibility of resistance to arrest with attendant injuries to the accused and others. For these reasons the Code prefers that the accused’s presence in court be obtained by “polite” means, reserving the use of arrest for those cases where it is the only practicable alternative. The preferred method is for the police to summon the accused “voluntarily” to appear at the police station, a method which has none of the cited disadvantages of arrest.

As a general rule, then, the court may not issue a warrant of arrest unless the accused

has already been summoned without success.

Like an arrest is issued by the courts, in Ethiopia the power is given to the police themselves. The only limitation imposed by Article 25 is that the investigating police officer should have “reason to believe,” that the accused has committed an offence. While that standard is not precise it can at least be said that Article 25 prohibits the summoning of an accused where the evidence is of very questionable reliability such as anonymous or ambiguous information, hearsay or un sustained by factual investigation, etc.

### **The Code: flagrant offences**

Code Art 19-21 and 50 define flagrant offences and declare that any person may arrest a flagrant offender. A comparison of these provisions with Article 53, 67 and 73 of the French Criminal Procedure Code demonstrates unquestionably the continental source of this portion of Ethiopian arrest law. We may approach the comparison by first noting the differences between the two sets of rules.

#### **(i) Definition**

Having in Art 19 and 20 established the definition of “flagrant offence” the code goes on in Articles 21 and 50 to state the procedural consequences thereof: in the case

of ordinary flagrant offences proceedings may be instituted without an accusation being lodged; and, both ordinary and compliant offences, if flagrant, subject the offender to arrest without warrant by any police officer or private citizen if the offence carries a possible maximum punishment of three months simple imprisonment or a more severe penalty...

The obvious advantages of arrest without warrant over arrest by warrant is that the former allows prompt action by avoiding that delay involved in traveling to the court and applying for a warrant. According to continental writers, flagrant offences require or permit the omission of such time consuming formalities on three grounds: prevention, detection and certainty. Prevention applies where immediate arrest is the only way to prevent the offender from carrying off the fruits of his crime. Detection refers to the need for arrest in order to stop the offender from escaping, and to preserve evidence. Certainty refers to the fact where an offender is found “red handed” there is no possibility that he is innocent, so there is no need for such judicial safeguards as a warrant.

A law enforcement officer may be subject to civil liability for false arrest or false imprisonment if an arrest is illegal or is made with excessive or unreasonable force.

## Summary

The setting in motion of the criminal justice may result in the summons or the arrest of the suspect. However, this does not mean that whenever the police receive information about the commission of a crime, they should summon or arrest the suspect. The responsibility for the protection of innocent persons begins from the police. Before proceeding to summons or arrest, the police have to make sure that there is a prima facie case against the suspect. This is a judicial or at least quasi-judicial activity. Under the CPC, too, the police must have reasonable grounds to resort to summons or as the case may be to arrest.

Once the police are convinced that the process should continue, then the police have to contemplate the mode of bringing the suspect to the police station. The two commonly used mechanisms are summons and arrest. The effect of the two is the same. But, the means utilized in both cases is completely different. Summons is a peaceful system of taking a person into custody. On the contrary, arrest involves force. It brings psychological embarrassment on the part of the detainee. It may result in bodily injury or even death, in particular, if the suspect refuses to surrender. The extent of force

utilized depends upon the gravity of the offense. For example, it does not seem rational to injure or kill a person for escaping from prosecution for minor offenses. It is difficult to state a clear rule to be applied all the time. Nevertheless, it is appropriate to set the upper limits.

Arrest might be with a warrant or without a warrant. In principle, it should be done with court order. But, in exceptional justifiable circumstances, it is legal to resort to arrest without a warrant. The clearest case is flagrant offense. It is not wise to wait for arrest warrant while a person is publicly committing a crime justifying arrest. It defeats the purpose of the criminal law. The danger for human rights, too, is less in such kinds of situations. Thus, arrest without warrant should be applied for certain justifiable cases. Private persons are also entitled to make arrest without warrant in such circumstances.

Violating the rules pertaining to summons and arrest might result in criminal, civil, and administrative sanctions. For instance, a police officer who acted illegally while effecting the summons and arrest may face criminal charge and civil suit. Disciplinary measure might also be taken against him.

The administrative penalty may go up to dismissal.

The mere act of illegality in the arrest of a person can not be a ground to drop the criminal case on the suspect. The case has to continue. But, the illegality might affect the admissibility of evidence acquired in the process. The inadmissibility might crucially affect the case. It might lead to the closing of the file or acquittal.

In case of flagrant offenses, the criminal proceeding is made faster and trial could start forthwith. In such cases, it is often unnecessary to find other evidence than that acquired on the scene of the crime. It is not prudent to delay the case. The possibility of pleading guilty is expected to be higher when the case is tried speedily. It is easy to get witnesses.

The procedure is called “next day justice” in Britannia and “real time dispatch” in France. It is not a special procedure as such. It is rather a technique. The police and the prosecution office have to exchange information from the moment of reporting of a crime. The two should act as one. The court has to be also ready to hear the case whenever the prosecution files a charge.

There has to be a coordinated effort on the part of the stake holders. One should not hinder the efficient and effective performance of the other. The legal procedure followed is ordinary. The crucial factor is the attitudinal change towards implementation of the criminal procedure. It is a kind of differentiated case management technique adopted to tackle flagrant offences taking into consideration their particular nature.

In Ethiopia, the procedure had been limited to the Christian religious ceremony at *Qulibi Gebriel* by establishing temporary police, prosecution and court to speedily handle flagrant offenses. Now, beginning from the eve of Ethiopian Millennium in Addis Ababa, different specialized benches entertaining flagrant offenses have been set up. The regions have also started applying the system. Practice has proved that pleading guilty is the norm. The prosecution and defence witnesses are made ready on the moment of pleading guilty or not guilty. The accused will be forced to plead guilty as the possibility to hear the case and decide is nearer. Even pleading guilty is one of the major mitigating factors under Art 82/1/e of the CC.

Now, it is even possible to have a criminal case decided on the very date of the crime committed using the real time dispatch technique. Within hours, the victim could hear the final determination of the criminal case in a court of law. Here, it should be underlined that the constitutional and legal guarantees for the suspect or accused remain in tact. For instance, the accused can ask adjournment to prepare and bring defense. Indeed, Art 94/2/b does not require a justification for not bringing evidence on the first day of appearance in court. Art 94/2/a clarifies the interpretation adopted. The prosecutor (public or private) or the accused should have good cause not to attend a court session. For the case of evidence on the first appearance, the mere failure of the party supposed to present evidence is enough to get adjournment. The court should give adjournment for at least one reasonable time. It may order the police to help the accused in bringing defence in case bail is denied or unable to obtain.

Therefore, the police have to take the necessary precaution before deciding to have the body of a person and the means used has to also be carefully evaluated. As much as possible the use of summons should be given precedence over arrest. In case of

flagrant offence, institutions involved in the criminal justice system have to act in a coordinated manner to ensure speedy trial.

### **2.3. Police Investigation**

#### **Relevant Laws**

Art 3, 5, 8, 9, 11, and 12, UDHR  
Art 9 and 14, ICCPR  
Art 16-21, 26, 32 FDRE Constitution  
Art 12, 22-31, CPC  
Art 420, 424, CC  
Art 2027-2065, Civil Code

#### **Pre Arrest Investigation**

### **2.3. Police Investigation**

#### **Relevant Laws**

Art 3, 5, 8, 9, 11, and 12, UDHR  
Art 9 and 14, ICCPR  
Art 16-21, 26, 32 FDRE Constitution  
Art 12, 22-31, CPC  
Art 420, 424, CC  
Art 2027-2065, Civil Code

#### **Pre Arrest Investigation**

### **2.3. Police Investigation**

#### **Relevant Laws**

Art 3, 5, 8, 9, 11, and 12, UDHR  
Art 9 and 14, ICCPR

Art 16-21, 26, 32 FDRE Constitution

Art 12, 22-31, CPC

Art 420, 424, CC

Art 2027-2065, Civil Code

## **Pre Arrest Investigation**

### **Summary**

Investigation is required to substantiate the information pertaining to the commission of crime. The police have to undertake interrogation to the suspect as well as witnesses; gather real evidence, such as exhibit, finger print, etc. In the process, the police have to refrain from illegal activities leading to the rebuttal of the evidence in court. It has to avoid the use of the “third degree” to elicit information from the suspect and witnesses. Otherwise, the fate of evidence collected violating the rights of persons might be rejection. In addition, the police could face administrative, civil, and criminal sanctions.

While taking information as well as examination of witnesses, the police have to act in such a way that it is possible to protect the rights of innocent persons. To the extent possible, the informant or the witness has to explain the facts taking any kind of responsibility that might follow. To achieve this purpose, the police have to register the

facts known to the informant or the witness acquired through the five senses. Unless the witness is expert, it is wrong to take the mere opinion of a witness. For example, the informant or the witness should not be allowed to say that I know the commission of a crime and who did it. One has to state the facts as they are acquired through the five senses. Arriving at a conclusion based on the facts obtained is the business of the competent authorities.

Thus, the police have to handle criminal investigation with due care not to bypass legal restrictions in place to protect the rights of innocent persons and suspects. Attention has to be given for both the means and the end of the criminal justice system.

## **2.4. Confession**

### **Relevant Laws**

Art 3, 5, 8, 11, and 12, UDHR

Art 7, 9, 14, ICCPR

Art 18-19, FDRE Constitution

Art 27, 34 and 35, CPC

Art 424, CC

Art 20 and 22, 2027-2065, Civil Code

### **Police Interrogation**

... false confessions do not only occur where the suspects are physically threatened. A study by psychologist G.H Gudjonsson (The psychology of interrogations, confessions and testimony, 1992) found that there were four situations in which people were likely to confess to crimes they did not commit. First, a minority may make confessions quite voluntarily, out of a disturbed desire for publicity, to relieve general feelings of guilt or because they can not distinguish between reality and fantasy. Secondly, they may want to protect someone else, perhaps a friend or relative, from interrogation and prosecution. Thirdly, they may be unable to see further than a desire to put the questioning to an end and get away from the police station, which can, after all, be a frightening place for those who are not accustomed to it. A psychologist giving evidence to the 1993 Royal Commission commented that: "some children are brought up in such a way that confession always seems to produce forgiveness, in which case a false confession may be one way of bringing an unpleasant situation (the interrogation) to an end." Among this group there may also be a feeling that, once they get out of the police station, they will be able to make everyone see sense, and realize

their innocence: unfortunately this does not always happen.

Finally, the pressure of questioning, and the fact that the police seem convinced of their case, may temporarily persuade the suspect that they must have done the act in question. Obviously the young and the mentally ill are likely to be particularly vulnerable to this last situation, but Gudjonsson's research found that its effects were not confined to those who might be considered abnormally suggestible. Their subjects included people of reasonable intelligence who scored highly in tests on suggestibility, showing that they were particularly prepared to go along with what someone in authority was saying. Under hostile interrogation in the psychologically intimidating environment of police station, even non-vulnerable people are likely to make admissions which are not true, failing to realize that once a statement has been made, it will be extremely difficult to retract.

The prosecution may not use in court evidence obtained directly or indirectly from an unconstitutional search. The prohibition against using this derivative or secondary evidence is often called the rule against admission of "fruit of the poisonous tree." The tree being the illegal search and the fruit being the evidence obtained

as an indirect result of that search. The fruit or the evidence indirectly obtained is sometimes referred to as tainted evidence. Although the rule against the admission of fruit of the poisonous tree was originally developed in applying the exclusionary rule to unconstitutional searches it has been applied equally to evidence obtained as the indirect result of other constitutional violations. Thus evidence may be inadmissible if it is acquired indirectly as a result of an illegal stop an illegal arrest an illegal identification procedure or an involuntary confession.

### **Current Issues: Involuntary Confessions and Art 35, CPC<sup>1</sup>**

Coercive interrogation: ineffective and unlawful

Improper methods of police interrogation are known to every country in the world. And everywhere, it is agreed that an accused's confession of guilt which has been procured through physical violence, psychological intimidation, or improper inducements or promises cannot be considered in evidence against him at trial. The primary reason why involuntary confessions are excluded from evidence is that they are unreliable indices of truth: men have been known to admit crimes of which

they are innocent, simply to escape the pain of torture or to obtain an irresistible benefit.

The exclusionary practice also expresses society's condemnation of police "third degree" methods, which not only violate the accused's privilege against self-incrimination, but, by inflicting harm on one merely suspected, not convicted, of crime, nullify his constitutional right to the presumption of innocence. Thus the practice serves purposes other than the mere need to decide cases upon trustworthy evidence: by removing the ultimate incentive it serves to discourage the police from using illegal questioning methods.

### **Miranda v. Arizona**

To summarize... He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these

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<sup>1</sup> \_\_\_\_\_, *Involuntary Confessions and Art 35, CPC*, 3 No. 1 J. Eth. Law.

rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

### **Summary**

One of the most controversial procedures during investigation is interrogation of the suspect. The person interrogated has the privilege against self-incrimination. However, the scope of this right is not a settled issue. It is debatable whether confession includes line up, blood test, finger printing, photographing, etc. Some jurisdictions restrict it only to information communicated verbally or by sign. It does not include real or physical evidences like blood test, etc.

In Ethiopia, the issue of confession is much more debatable. This is due to the recognition by the CPC of confession made to the police and the court without clarifying the effects of the one given to the police. The FDRE Constitution clearly outlaws any evidence acquired through coercion. This categorical approach of the Constitution raises a\the question of its scope. The scope of this protection is not clear. But, it is possible to limit it to confession or

admission acquired through the medium of communication. It does not seem applicable to real evidences like blood test, photographing, etc.

Here, it should be underlined that confession, as it implies the full acceptance of the crime alleged, often ends with conviction. But, if there is only part confession, it is merely an admission of some elements of the offense. Admission is not enough to lead to conviction though it may be helpful for the prosecution during trial.

To conclude, the right against self-incrimination is a grand constitutional right to be protected during the carrying out of criminal investigation. It would not be admissible in court unless it is obtained without any coercion from a person in authority.

## **2.5. Search and Seizure**

### **Relevant Laws**

Art 3, 5, 8, 11, and 12, UDHR

Art 17, ICCPR

Art 26, FDRE Constitution

Art 32-33, CPC

Art 58, The Re-Establishment and Modernization of Customs Authority Proclamation No. 60/97 (as amended)

Art 422, CC

Art 2027-2065, Civil Code

## **Search and Seizure**

**Search and seizure** is a legal procedure used in many civil law and common law legal systems whereby police or other authorities and their agents, who suspect that a crime has been committed, do a search of a person's property and confiscate any relevant evidence to the crime. Most countries have provisions in their constitutions that provide the public with the right to be free from "unreasonable" search and seizure. This right is generally based on the premise that everyone is entitled to a reasonable right to privacy. In practice, this constitutional right is regularly respected only in democracies.

## **Effect of Illegal Search and Seizure**

The most important effect of an illegal search or seizure is the exclusion of the evidence obtained from use in court against the person whose rights were violated... When crucial evidence is suppressed, the

prosecution's case may be lost, and the person charged with the crime may go free.

Another possible effect of an illegal search and seizure is the civil or criminal liability of the officer conducting the search and seizure. As with an illegal arrest, the consequences for the officer depend on the circumstances of each case, including the officer's good faith, the degree of care used, the seriousness of the violation, and the extent of injury or intrusion suffered by the defendant.

## **Summary**

Like the case of arrest, search and seizure have to be undertaken only by the order of the court. The mere existence of a court order is not enough to guarantee the legality of search and seizure. It has to be also executed properly. But, it is possible to effect search and seizure in certain justified circumstances with out search warrant.

In other jurisdictions, there is a developed statutory and case law regime to regulate the behavior of law enforcement organs. In our country, the rules governing search and seizure are scanty. Unlike the case of forced confession, the FDRE Constitution does not contain rules making inadmissible illegal

search and seizure. The Constitution devotes one third of its part to the protection of human rights. Given the value attached to the cause of human rights, it seems justified to seriously scrutinize and reject illegally obtained evidence. Otherwise, the protection of human rights becomes exposed to risk.

Therefore, the procedure of search and seizure has to be carried out with due care being accorded to the respect for human rights. The mechanism to enforce the rules pertaining to search and seizure is exclusionary rule. Fruit of the poisonous tree should be applicable. This might discourage the police from resorting to illegal means to secure legal end. The end should not justify the means. The police should also be liable administratively, civilly as well as criminally.

### **CHAPTER THREE**

#### **POST ARREST PROCEDURES**

After the arrest of a person, the major procedures are bail, remand and habeas corpus. There is a possibility for the individual detained to be released by the police or taken to court within the limit of time set by the law. The court may either permit or deny the bail question and order remand. Appeal lies from such a decision. In

case a person is detained unlawfully, one may request habeas corpus.

#### **3.1. Remand**

##### **Relevant Laws**

Art 3, 5, 8, 9, 11, and 12, UDHR

Art 9 and 14, ICCPR

Art 19-21, FDRE Constitution

Art 29, 59-62, CPC

##### **Initial Appearance**

Due process requirements mandate that within a reasonable (not extreme or arbitrary) time after arrest, the accused person must be brought before a magistrate and given formal notice of the charge. Such notice occurs at the initial appearance. At this time the accused is also notified of his or her legal rights, and bail is determined for those who did not receive temporary release during the booking phase. Release on recognizance (ROR), a substitute for bail, can also occur, typically at the recommendation of the magistrate, when there seems to be little risk that the accused will fail to appear for trial. The accused is released on his or her own personal recognizance, or obligation...

##### **The Judicial Decision to Release**

An arrested person must promptly be taken before a magistrate, who is a judge at the lowest level of the judicial hierarchy and who makes a determination that probable cause exists. The magistrate will use a standard of probable cause that is a bit tougher than that of the police officers. For one thing, the magistrate has more time to view the evidence, to reflect, and then to decide than the police officer had at the scene of the crime. The magistrate must also repeat the Miranda warning and then whether to release the defendant on bail or on percentage bail (the defendant deposits with the court only a certain percentage of the bail that has been set): to release on recognizance or ROR (no bail is required on condition that the defendant appears for trial and remains law-abiding in the meantime); to release the defendant in to some one's custody; or to detain the defendant in jail pending further proceedings.

### **Summary**

To protect the rights of suspected persons, it is a constitutional requirement to bring the detained individual within a reasonable time to the nearest court. The court has to ascertain the legality of the arrest. It cannot enter into the business of weighing evidence like a trial. This is an early stage. The police

usually have to gather further evidence. The court should limit itself to checking a prima-facie case against the suspect. It is difficult to formulate a clear rule for every matter. It should be seen on a case by case basis. The court must allow the detention of the person unless there are legal grounds to deny bail or it is necessary till the completion of the investigation. This demands responsible handling of each and every case. Limiting the time to finalize the investigation has the advantage of protecting the rights of the suspect. But, it might create difficulty in cases of exceptional complexity. It seems prudent to leave room for such kinds of unique situations.

To sum up, bringing a suspect to court immediately after arrest guarantees the rights of individuals from not being curved by the state. The court has to ascertain the legality of the arrest. However, it should not unnecessarily hamper the legal efforts of the police to prevent and investigate crime. The court should appraise each and every case striking a balance between the interests of individuals and that of the community.

### **3.2. Release on Bail**

## Relevant Laws

Art 3, 8, 11, UDHR

Art 9, ICCPR

Art 17, 19-21, FDRE Constitution

Art 28, 59-79, CPC

Vagrancy Control Proclamation No. 384/2004

Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005

## Bail

Persons accused, convicted or under arrest for an offence may be granted bail, which means they are released under a duty to attend court or the police station at a given time.

### ***Forms of bail***

The form of bail varies from jurisdiction. But the common forms of bail include:

- **Recognizance** — a promise made by the accused to the court that he/she will attend all required judicial proceedings and will not engage in illegal activity or other prohibited conduct as set by the court. Typically a monetary amount is set by the court, but is not paid by the

defendant unless the court orders it forfeited; this is denominated an *unsecured appearance bond* or *release on one's own recognizance*.

- **Surety** — when a third party agrees to be responsible for the debt or obligation of the defendant. In many jurisdictions this service is provided commercially by a bail bondsman, where the agent will receive 10% of the bail amount up front and will keep that amount regardless of whether the defendant appears in court. The court in many jurisdictions, especially jurisdictions that prohibit bail bondsmen, may demand a certain amount of the total bail (typically 10%) be given to the court, which, unlike with bail bondsmen, is returned if the defendant does not violate the conditions of bail. This also known as *surety on the bond*.
- **Conditions of release** - many varied non-monetary conditions and restrictions on liberty can be imposed by a court to ensure that a person released into the

community will appear in court and not commit any more crimes. Common examples include: mandatory calls to the police, surrendering passports, home detention, electronic monitoring, drug testing, alcohol counseling and surrendering firearms.

- **Protective order**-also called an **Order of protection**- one very common feature of any conditional release, whether on bail, bond or condition, is a court order requiring the defendant to refrain from criminal activity against the alleged crime victim, or stay away from and have no contact with the alleged crime victim. The former is a *limited* order, the latter a *full* order. Violation of the order can subject the defendant to automatic forfeiture of bail and further fine or imprisonment.
- **Cash** — typically "*cash-only*," where the only form of bail that the Court will accept is cash.
- **Combinations** - courts often allow defendants to post cash bail or bond, and then impose further conditions, as mentioned

above, in order to protect the community or ensure attendance.

### **Forms of Bail**

In the UK there are three types of bail namely:

1. **Police Bail** where a suspect is released without being charged but must return to the police station at a given time.
2. **Police to Court** where having been charged a suspect is given bail but must attend his first court hearing at the time and Court given
3. **Court bail** where having already been in court a suspect is granted bail pending further investigation or while the case continues

### **Summary**

In principle, every one arrested suspected of a crime has the right to be released upon conditions set. Denial of bail should be an exception. The accepted grounds for denying release are possibility of absconding, tampering with evidence, commission of other offences, gravity of an offence, etc. In case a court determines to release the suspect, it has to take into account several factors, such as, the nature of the offence, social ties of the suspect, and

capacity to bring guarantee. The court could also impose further conditions on the released person. Their purpose is to limit the danger of absconding, for the protection of the suspects themselves, and danger to the public. This could be prohibition of emigration, going to certain places, not contacting victims, electronic monitoring, etc. These non-monetary restrictions are particularly helpful to protect victims of rape from potential harassment from the suspect.

The release of a suspect could take several forms. These include bond, surety, personal recognizance, and cash. Generally, they can be classified into monetary and non-monetary. To ensure transparency, accountability and predictability, many jurisdictions adopt guidelines to handle bail issues.

Release on bail is a conditional undertaking. The suspect or accused has to comply with the terms of the release. One should attend each and every proceeding of a court. Besides, the non-monetary conditions have to be respected. Otherwise, it could result in different financial and non-financial consequences. There may be forfeiture of the amount of money set as a bail. The released person may also be detained as the

case may be. Besides, in some jurisdictions, failure to comply with bail obligation may entail criminal liability.

The FDRE Constitution guarantees the right to bail. But, it can be denied on certain circumstances. Whether the Constitution allows automatic denial of bail by law is not clear. Its formulation seems to restrict disallowance of bail on a case by case basis by court. In this regard, the laws pertaining to vagrancy and corruption are contestable. The CPC has also provisions regulating bail matters.

Therefore, bail is a constitutional right. It could be limited by law on justifiable grounds. It takes different forms. Failure to comply with bail obligation could entail civil and criminal liability.

### **3.3. Habeas Corpus**

#### **Relevant Laws**

Art 3, 8, 9, 11, and 12, UDHR

Art 9, ICCPR

Art 19 and 21, FDRE Constitution

Art 15/2/I, 177-179, Civil Procedure Code

Federal Courts Proclamation No. 25/96 (as amended)

#### **Habeas Corpus**

A prisoner can challenge the legality of detention by petitioning for a writ of habeas corpus. Such a writ orders the person holding the prisoner to produce him or her in court and justify depriving the person of his or her liberty. It is available where the court sending the petitioner to prison was powerless to do so or where such detention violated the prisoner's constitutional rights.

The writ of habeas corpus is available, either by statute or constitutional provision, in every state, but it is generally considered an extraordinary remedy, to be used only when other adequate procedure exists to protect the petitioner's rights. It is not a second chance to litigate the case or a substitute for normal appeal procedures...

### **Habeas Corpus (Ethiopia)**

Habeas Corpus (literally, in Latin, "you have the body") is the procedure by which a person illegally detained may obtain release from such detention. It is a civil remedy, although in most cases the person seeking release from custody will have been detained on a charge of committing a criminal offence. A discussion of the grounds for granting the application of habeas corpus, that is, of what constitutes an illegal detention, is beyond the scope of this

book. We will merely be concerned with the procedure for filling the application. However, it may be observed that in England and United States, this procedure has proved very valuable in protecting individuals from arbitrary restraint by government officials. There was some doubt as to whether the procedure was available in Ethiopia, and the Civil Procedure Code makes it clear that it is.

An application for habeas corpus comes within the exclusive jurisdiction of the High Court. It may be made by any person who has been restrained otherwise than in pursuance of an order duly made under the Civil Procedure Code or Criminal procedure Code. It does not matter that the order was made under legal authority; if, in fact, the nature of the restraint or the means by which it was imposed is in violation of the law, the application is proper. The application must be accompanied by an affidavit of the applicant stating the name of the person under whose custody he is, the nature and place of the restraint and the names of any persons who can testify to the facts alleged in the application. If the person restrained is unable to make the application himself, e.g., if he is restrained in a remote area or is prevented by his custodian from making the

application, the application may be made by any person on his behalf; in such cases, the application must state the name of the person restrained and that he is unable to make the application and/or affidavit himself.

### **Summary**

Habeas corpus is a remedy in case government authorities detain a person and fail to bring the arrestee to the nearest court. It is a civil proceeding. The person is claiming civil right though detained for matters related to crime. Consequently, the Civil Procedure Code has provisions governing it. Thus, habeas corpus is one of the remedies available in exceptional circumstances of denial of the rights of persons.

## **CHAPTER FOUR**

### **PROSECUTION AND PRELIMINARY INQUIRY**

#### **4.1. Prosecution**

##### **Relevant Laws**

Art 37-48, 122, CPC (Note that the Office of the Central Attorney General of the Transitional Government of Ethiopia Establishment Proclamation No. 39/1993

has repealed Art 42/1/d, 42/3, 44/2, 45, and 122/1,2,4 of the CPC)

Office of the Central Attorney General of the Transitional Government of Ethiopia Establishment Proclamation No. 39/1993

Art 23, Definition of Powers and Duties of the Central and Regional Organs of the Transitional Government of Ethiopia Proclamation No. 73/1993

Definition of Powers and Duties of the Central and Regional Organs of the Transitional Government of Ethiopia (amendment) Proclamation No. 73/1993

Attorneys Proclamation No. 74/1993

Art 23/3, Definitions of Powers and Duties of the Executive Organs of the FDRE Proclamation No. 471/2005

Art 16/2/b/2, Ethiopian Revenues and Customs Authority Establishment Proclamation No. 587/2008

### **Summary**

The criminal procedure has different filtering mechanisms to avoid or at least minimize the risk of endangering innocent persons. These systems are pre-filing screening and post filing screening. Before submitting a charge, in some jurisdictions, the police have the discretion to drop a case under investigation. Even prior to such a decision, in a modern criminal justice

system, the police should have a reasonable ground to trigger criminal investigation.

After the police, it is up to the public prosecutor to scrutinize the police investigation file to determine the presence of sufficient evidence to prove guilt. The prosecution office should not rush to frame charge. The available evidence has to be evaluated. If there are points not clarified, a further investigation has to be ordered.

In some jurisdictions, the public prosecution has to evaluate the interest of the public in proceeding with the case even though there is sufficient evidence to guarantee realistic prospect of conviction. Thus, there is a possibility to pass two hurdles in certain jurisdictions.

There are two major principles guiding the function of prosecution. These are mandatory and discretionary principles of prosecution. The former is a compulsory or mandatory approach to resort to prosecution whenever there is adequate evidence to convict a person. The public prosecutor lacks the discretion to drop cases on the grounds of public interest. In the latter, the prosecution is accorded wider autonomy in the decision to prosecute or not considering

public interest. The expediency of prosecution has to be evaluated.

The discretionary system may be open to abuse. However, countries have designed prosecution guidelines and policies to counteract its negative effect. It has the benefit of reducing court burden. On the other hand, mandatory or compulsory system tends to increase the burden of courts. Some jurisdictions like Germany try to take a mid-way approach. Here it is good to note that even in countries favoring discretionary prosecution like most United States jurisdictions and United Kingdom, there is a possibility of judicial review in case the public prosecutor abuses its power.

The discretion of the prosecution has an impact over its role in the determination of continuing or discontinuing a criminal case. Once a charge is filed, the situation is different. The court has to know at least the interruption. In some jurisdictions, the approval of the court is sought. Others differentiate cases to be subjected to limitation. As regards the role of the victim, many jurisdictions allow the victim to have a say in terminating less grave offences like misdemeanors.

In Ethiopia, the decision to prosecute or not has now been left to the public prosecution office. Anyone aggrieved has to follow the hierarchical channel till the general attorney, now head of the Ministry of Justice and justice bureau heads at the federal and regional levels, respectively. It appears that there is no judicial review. The possibility for court intervention in the process is debatable. The CPC contains provisions regulating the manner of deciding whether to charge or not.

As the law stands, there is no law clearly empowering the public prosecutor to drop charges. Art 122 of the CPC has been repealed by Proclamation No. 39/93. Art 23/3 of Proclamation No. 471/2005 allows withdrawal based on a law. It implies that there is another law defining the conditions necessary to terminate the prosecution. There is up to now no law allowing that. But, this law permits automatic interruption of a criminal investigation for due cause. Once a charge is filed, it does not seem legal to drop charges. Art 16/2/b/2 of Proclamation No. 587/2008 also contains similar provisions regarding interruption of criminal investigation and charges pertaining to revenues and customs related offences.

The case of upon complaint cases is different. It is the absolute right of the victim to decide the fate of the case until a judgment is entered.

To sum up, the public prosecutor has the key role in the determination of case to be brought to court or discontinued. But, the police and courts have also some role. In our country, the legal regime regulating prosecution and interruption is found in the constitution, CPC and many statutes. There is controversy over the power to discontinue charges filed in court.

## **4.2. The Preliminary Inquiry**

### **Relevant Law**

Article 80-93, CPC

### **Function of the Preliminary Hearing**

**(a) Screening.** The preliminary hearing, also known as the “preliminary examination” or the “probable cause” or “bind over” hearing, is a judicial proceeding, hearing, is a judicial proceeding, commonly conducted by a magistrate and available only in felony prosecutions. At that proceeding, the prosecution in an open and adversary

hearing must establish that there is sufficient evidence supporting its charge to “bind the case over” to the next stage in the process (either review by the grand jury or the filing of information in the trial court).

**(b) Discovery.** In meeting the evidentiary standard for a bind over, the prosecutor will necessarily provide the defense with some discovery of the prosecution’s case. The defendant may obtain even more discovery by cross-examining the prosecution’s witnesses at the hearing and by subpoenaing other potential trial witnesses to testify as defense witnesses at the hearing.

**(c) Future impeachment.** Extensive cross-examination of prosecution witnesses the preliminary hearing may be of value of the defense even though there is little likelihood of successfully challenging the prosecution’s showing of evidentiary sufficiency and little to be gained by way of discovery. That is because, as the Supreme Court has noted “the skilled interrogation of witnesses (at the preliminary examination) by an experienced lawyer can fashion a vital impeachment to for use in

cross-examination of the state witnesses at the trial.” In many instance witnesses are more likely to make damaging admissions or contradictory statements at the preliminary hearing because they are less thoroughly briefed for that proceeding than they are for trial. Also, with respect to some witnesses, the more they say before trial, the more likely that there will be some inconsistency between their trial testimony and their serious statements. Arguably, the jury may view such inconsistencies as more damaging to the witness’ credibility when the testimony, as opposed to prior statements given to the police, since the preliminary hearing testimony was given under oath in a judicial setting. Moreover, in some jurisdictions, the use of the inconsistent statement is not limited to impeachment; it may be used as substantive evidence.

**(d) The Perpetuation of testimony.** Preliminary hearing testimony traditionally has been admitted at trial as substantive evidence, under the “prior testimony” exception to the hearsay rule, where the witness is not available to testify at trial.

Thus, the hearing perpetuates the testimony of witness, ensuring that it may be used even if the witness should die, disappear, or otherwise become unavailable to testify. While the Supreme Court has stated that a major advantage of the hearing for the defense is its availability to “preserve testimony favorable to the accused of a witness who does not appear at the trial,” the hearing is not commonly used by the defense for this purpose.

**(e) Other functions.** In a particular jurisdiction the preliminary hearing may be utilized to serve other incidental functions, such as to gain release. This is particularly true where bail is set at the initial appearance largely on the basis of a schedule tied to the defense charged, and the preliminary hearing provides the magistrate with his first extensive examination of the facts of the individual case.

### **Summary**

One of the essential events in the criminal justice process is the preliminary hearing. It is the procedure for hearing evidence before charge or trial. It has various functions such as filtering, discovery, basis for future impeachment, and preservation of testimonial evidence. The United States has a unique system of grand jury hearing for felony cases. This jury is different from the

jury that is going to see the merit of the case during trial. The preliminary hearing is often used by the prosecution. Defendants are reluctant to use it. It might be fear of the exposition of their defence to the opposing side. But, the chance should be granted for both sides.

The CPC also recognizes this procedure. Its main purpose is preservation of evidence. Other purposes can also be inferred from the provisions of the law. But, it is not a screening mechanism used by the courts found in other jurisdictions. The criminal bench entertaining a preliminary hearing cannot have a say in deciding whether there is sufficient evidence against the suspect. In fact, the primary responsibility of the court is notifying the purpose of the preliminary hearing to the suspect at the earliest possible opportunity before starting taking evidence. So, the preliminary hearing is undertaken for various purposes. In our country, its functions are limited.

## **CHAPTER FIVE**

### **THE CHARGE**

#### **5.1. Framing the Charge: Form and Content**

## **Relevant Laws**

Art 108-122 and Second Schedule of the CPC

Art 20 of FDRE Constitution

## **The Charge**

The provisions relating to “charges” are intended to provide that the “charge” shall give the accused full notice of the offence charged against him.

The purpose of a charge is to tell an accused person as precisely and concisely as possible of the matter with which he is charged and must convey to him with sufficient clearness and certainty what the prosecution intends to prove against him and of which he will have to clear himself ...It has been repeatedly held that the framing of a proper charge is vital to a criminal trial and that this is a matter on which the Judge should bestow the most careful attention...

## **Indictment Consists of Three Parts**

### **(a) The commencement**

This states the place of the court’s jurisdiction, usually a particular county or borough.

...

### **(b) The statement of offence**

The statement of offence, with which every count must begin, merely names the crime charged , e.g. ‘murder’, ‘manslaughter’, ‘cruelty to a child, contrary to sect. I of the Children and Young Persons Act, 1933’.

### **(c) The particulars of offence**

The particulars of offence follow, in order to inform the accused as to the circumstances- e.g. time, place, conduct, subject matter-of the crime which has thus been alleged against him, in fact, such particulars as may be necessary for giving reasonable information as to the nature of the charge.

## **Summary**

A charge or indictment is written information to an accused. It is used to communicate to the accused the legal provision alleged to be violated and the particulars of the offence in order that one gets the opportunity to challenge the truth or otherwise of the charge. Thus, framing a charge is a requirement of due process of law. After the preparation of the charge, the suspect becomes an accused.

The extracted materials elaborate the laws of England, United States and Indian, respectively. We can observe that the charge has to be prepared so as to fulfill its intended

purpose. It should be precise. But, it should not be general. It must explain with reasonable clarity the alleged offence with its particulars. The satisfaction of these criterias has to be seen on a case by case basis.

The indictment could contain several counts against a single accused in the case of concurrent crimes. But, one count should be restricted to the case of violation of an independent offence. In other words, it should avoid duplication. It is also possible to charge several persons at a time in case there is a link between them with the alleged crime. A court could order separate trial whenever justice requires it.

Besides, there could be alternative charges. It is also possible to convict a person for an offence not mentioned in the indictment. However, there has to be a nexus between the law found in the charge and the one to be used as a substitute. The accused should get the chance to defend.

The FDRE Constitution has guaranteed for the accused persons to be informed of criminal charges in writing. The CPC, too, has provisions dealing with the charge. But it lacks the necessary detail and some

clarity. Unlike the Civil Procedure Code, the CPC does not authorize the registrar and court to enforce the formal and legal requirement of a charge. It seems prudent to assume the power. But, the registrar should be limited to checking technicality. For instance, the registrar can order correction or reject a charge not mentioning a criminal law violated. It does not have the mandate to evaluate the appropriateness of a law cited. In case no criminal law is stated, it becomes a technical matter.

The prosecution has to frame and file a criminal charge within 15 days. The absence of a clear sanction has the effect of disregarding it. The FDRE Constitution also contains a vague “reasonable time” test. Its justiciability is subject to controversy. Art 114 of the CPC is intended to prevent prejudice of judges as there may be a tendency to be biased by past record. It was targeted to apply provisions like Art 635/3/a of the repealed PC. In the new CC, the requirement of past record for aggravating theft has been left from Art 669/3 of the CC.

Like many other jurisdictions, the CPC separately treats the charge and evidence brought to substantiate or refute it. Art 124 of the CPC imposes a duty on both parties to

make sure that evidence is ready for trial. Other jurisdictions adopt a pre-trial conference system to facilitate the exchange of evidence between the parties. Pre-trial discovery is a reciprocal duty. The CPC does not also have the procedure before full scale trial, i.e., arraignment. It is used to ascertain pleading of guilty or not and make the necessary preparation for the trial. Had the CPC had the arraignment stage, it could have been used for sharing of evidence between the parties. There should not be surprise during the trial. Every one has to be ready knowing the charge and the kind and identities of evidence to be confronted. Art 94/2/e requires adjournment in case any evidence unexpected by either party is produced. Taking by surprise is not allowed.

Forced by the absence of a clear provision regulating pre-trial discovery in the CPC, the practice of stating and attaching evidence to a charge has developed. The need for exchange of information between the parties is out of question. Earlier there was a practice of preparing a charge without indicating or attaching evidence to the accused. But, the court is given a differently prepared charge containing the list of prosecution evidence. This was done fearing the possible move of the accused to tamper

with evidence. This violates the constitutional guarantee to properly confront witnesses and other evidence. Now, the situation is completely changed. The charge and evidence submitted to court and given to the accused are similar.

As regards the manner of indicating the evidence, there is variation between the different prosecuting agencies. The prosecutors of the Ministry of Justice indicate the kind of evidence and only list them under the titles of testimonial, documentary, and exhibit. The Ethiopian Revenues and Customs Authority prosecutors follow a distinct approach. They go beyond and explain what each and every type of evidence is going to prove. This really facilitates the trial process. It becomes easy to determine the relevance or admissibility of the evidence. The prosecutors can also support in achieving speedy trial as it is simple to identify the crucial evidence to win the case. For instance, they may not require adjournment in case one witness fails to appear if there are other witnesses testifying on a similar point.

Therefore, a charge/indictment serves to communicate the law violated and

particulars of an offence for an accused. It enables the accused to properly defend. The Ethiopian constitutional and legal provisions relating to charge resemble the laws of other countries. But, they do lack clarity and detail. The gap found in the CPC has affected the matters to be included in the charge. The mode of production and exchange of criminal evidence is not well addressed. In practice, evidence is made part of the charge. There is also variation as regards the levels of details of the evidence included in the charge.

### **Summary**

Prosecutors are human beings. It is possible to make error during the preparation of a charge. As a result many jurisdictions allow amendment of indictment. But, it should be made before judgment is given. The order could be given upon the initiation of the court, prosecution, or accused.

The CPC is not clear with regard to the ground for amendment. It seems to benefit the accused. It is possible that a public prosecutor may cite an improper provision. But the amendment is prejudicial to the accused. The charge is clear on every standard but the problem is only with the severity of the provision of the criminal law

cited. Thus, amendment of a charge is possible at any time before judgment. But, the purpose for which the amendment allowed is not clear under the CPC. It seems to prohibit amending the charge to cite a more severe penal provision.

## **CHAPTER SIX**

### **THE FEDERAL SYSTEM AND JURISDICTION OF COURTS**

#### **6.1. An Overview of the Court System in the Ethiopian Federal Set-up**

Federal judicial authority is vested in federal courts tiered along three layers based on their competence as provided for by law. By virtue of this arrangement, we have the Federal Supreme Court, which is the highest federal judicial organ, the Federal High Court and Federal First Instance Court.

State judicial power on the other hand is vested in state courts. The structure of state courts comprises state supreme court, state high court and woreda courts. In principle these courts exercise jurisdiction within the concerned state jurisdictions only. Besides these matters which in principle fall under the jurisdiction of Federal High Court and First Instance Court at the state level is to be exercised by state supreme and state high

courts respectively, because of the delegation given under the Constitution.

## **6.2. Criminal Jurisdiction of Courts.**

In principle federal courts have jurisdiction over offences based on three major grounds:

- a. law,
- b. Parties to the case, and
- c. Places of commission

Jurisdiction has three elements:

Judicial

Material, and

Local

A court is said to have jurisdiction over a particular offence only when it has the judicial, material and local jurisdiction of adjudication.

### **6.2.1. Judicial Jurisdiction**

In short, judicial jurisdiction is all about whether Ethiopian courts have power to see and then adjudicate a case or not. Hence, it is related to issue of whether a person is subject to the criminal law of Ethiopia or subject to the jurisdiction of Ethiopian courts and therefore they may be tried by Ethiopian courts for violation of the Ethiopian criminal laws.

Art 11-20 of the CC are devoted to issues of judicial jurisdiction of Ethiopian courts over offences. Thus, whether or not a person is subject to the CC of Ethiopia depends on:

- (1) the place where the offence was committed;
- (2) the nationality of the accused, and;
- (3) the kind of the offence that has been committed.

## **I. Principal jurisdiction**

According to Art 11-16 of the CC principal jurisdiction, which is one form of judicial jurisdiction exists in cases where the accused is :.

1. Charged with the commission of an offence in Ethiopia
2. Charged with the commission of certain offences against Ethiopia in a foreign country.
3. Charged with the commission of an offence in a foreign country where he possesses immunity from prosecution by virtue of his status as an Ethiopian official.
4. Charged with the commission of certain offences in a foreign country while a member of the Ethiopian armed forces.

### **Persons Subject to Ethiopia's Principal Jurisdiction.**

Under this section we have two kinds of jurisdictions, territorial and extra territorial.

#### **Territorial jurisdiction**

Art 11 and 12 of the CC are about territorial jurisdiction. According to this principle, which has almost gained universal acceptance, the Ethiopian courts shall have principal jurisdiction over offences specified in the CC committed by any person on Ethiopian territory. Territory consists of land, sea and air.

#### **Extra-Territorial Jurisdiction**

Any Ethiopian or a foreigner having no immunity is obviously subject to an Ethiopian jurisdiction for violation of Ethiopian criminal laws provided that he is in Ethiopia. However, people may after having committed an offence in Ethiopia may have successfully escaped and taken refuge in a foreign country. In such a case, the Ethiopian authorities are directed under Art 11(3) of the CC to request his extradition so that he may be tried in Ethiopia under Ethiopian law.

### **Art 13 of the CC**

#### **Crimes committed against Ethiopia outside its territory.**

Under this provision, crimes committed in a foreign country which have their effects in Ethiopia are dealt. However, not all such offences are covered. Accordingly, only offences prohibited by Art 238-260 and Art 355-374, i.e. crimes against the state (crimes against the constitutional order and the internal security of the state), and crimes against currencies, government bonds or security documents, official seals, stamps or instruments, respectively, are subject matters of the Ethiopian principal jurisdiction. The offender of such offences is subject to Ethiopian principal jurisdiction.

### **Article 14 and 15**

#### **Crimes committed in a foreign country by an Ethiopian enjoying immunity and by a member of the Ethiopian defense force.**

It is normal that Ethiopian officials and members of defense force goes to another country temporarily. This, however, does not exonerate them from becoming liable for their acts/omissions happened in their stay. Art 14 and 15 is designed to make Ethiopian officials and members of the Ethiopian

defense force subject to the Ethiopian principal jurisdiction for certain offences they committed while abroad.

## **II. Subsidiary Jurisdiction.**

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

Subsidiary jurisdiction exists as to an accused who is charged with:

- Offences committed by members of the armed forces against the ordinary laws of a foreign country, Art 15(1).

- Offences committed in a foreign country “against international law or international offences specified in Ethiopian legislation, or/ and international treaty or a convention to which

Ethiopia has adhered”, Art 17(1) (a).

- Offences committed in a foreign country “against public health and morals specified in Art 525, 599, 635, 636, 640 or 641 of the code, 17(1)(b).

- Offences committed abroad against an Ethiopian national or offences committed by Ethiopians while abroad, if the offence is punishable under both laws and is grave enough to justify extradition, Art 18(1) and

- Other offences punishable by rigorous imprisonment of not less than ten years) committed abroad by non- extradited foreigners, Art 18(2).

### **6.2.2. Material Jurisdiction.**

Material jurisdiction is concerned with the level of courts, and the type of court that should hear the case. Thus, the issue of material jurisdiction should be seen the light of structure of courts.

## **I. Federal Supreme Court Article 8**

### **1. First Instance Jurisdiction**

According to Art 8 of the Federal Courts Proclamation, the Federal Supreme Court is given an exclusive first instance jurisdiction over:

- ❖ Offences for which officials of the federal government are held liable in connection with their official responsibility;
- ❖ Without prejudice to international law and custom, offences for which foreign ambassadors, consuls and representatives of international organizations and foreign states are held liable; and
- ❖ Application for change of venue from one federal high court to another or to itself as provided by law.

## **II. The Federal High Court (Article 12)**

### **First instance criminal jurisdiction**

Article 12 of the proclamation provides that the Federal High Court shall have first instance jurisdiction over:

- ❖ Offences against the national state i.e. offences against the constitutional order, or the internal security of the state.
- ❖ Offences against foreign states.
- ❖ Offences against the law of nations.

- ❖ Offences against the safety of aviation.
- ❖ Offences regarding illicit trafficking in dangerous drugs. Other criminal cases arising in Addis Ababa and Dire Dawa and falling under the jurisdiction of the high court pursuant to other laws in force.

### **Appellate Jurisdiction.**

The federal high court exercises criminal appellate jurisdiction over all decisions rendered by Federal First Instance Court, the national electoral board, tax appeals commission, labor boards, etc.

## **III. The Federal First Instance Court.**

The Federal First Instance Court shall have jurisdiction over

- ❖ Offences against the fiscal and economic interest of the federal government.
- ❖ Offences regarding counterfeiting of currency.
- ❖ Offences regarding the security and freedom of communication services operating within more than one region or at the international level.

❖ Offences in which foreign national who enjoy privileges and immunities and reside in Ethiopia are victims or defendants subject to the jurisdiction of First Instance Court in operating laws and without prejudice to international agreements entered in to by Ethiopia.

## **VI. Concept of Delegation (delegated jurisdiction)**

Art 78(2) of FDRE Constitution provides that “the jurisdiction of federal high court and of the first instance courts is delegated to state courts”. Art 80 of the same also provides that “state high courts in addition to state jurisdiction shall exercise the jurisdiction of the federal first instance court. State supreme courts then shall exercise the jurisdiction of the federal high court because of the delegated authority.

### **6.2.3. Local Jurisdiction**

Local jurisdiction refers to the area of Ethiopia in which the case is to be tried. If jurisdiction over the offence is in the Awraja court, the question is in which Awraja court the particular case is to be tried. Art 6 provides that the court shall exercise local jurisdiction in accordance with the provisions of Art 99-107. The general

principle, embodied in the Art 99 is that every offence shall be tried by the court within the local limits of whose jurisdiction the offence is committed. In this connection where an offence is triable before the high court, which now sits in some of the provincial – now zonal, capitals, the “local limits of whose jurisdiction “ should be interpreted to mean within the local limits of the province- now zone, in which the High Court is sitting.

### **6.2.4. Change of Venue and Withdrawal of Judges.**

#### **6.2.4.1. Change of Venue**

Assuming that a public prosecutor/ private person prepared his charge as against an accused pursuant to Art 111 and 112 of the CPC and then submitted the same to the court which according to the law has judicial, material and local jurisdiction to see and decide the case. Once after this, the next step normally is what we call going to the trial stage because it is presumed that such court is competent enough to properly adjudicate the case. This, however, may not always hold true. One of the parties to the case, i.e. the public prosecutor or the accused, may come up with reasons to show that the said court can not properly and

impartially adjudicate the case thereby protest that court from entertaining the case. In cognizance of this, we have different laws as to how such protections are addressed.

Change of venue, therefore become a process by which a case is to be transferred from one court that have jurisdiction to another court having the same jurisdiction for good cause.

Note that change of venue is possible only for valid reason and that only if the conditions provided by law are complied with, hence, it should be exercised in relation to cases triable before a court in so far as there is a court empowered to entertain the question (application for change of venue).

Art 106 of the CPC states that application for change of venue shall only be made to high court.

Accordingly (Art 106), the accused or public prosecutor can make an application to the high court, before the commencement of trial and the court has to accept the application and permit change of venue if it ascertained that :

✦ A fair and impartial trial cannot be held in the subordinate court, as against which the application has been made

✦ A question of law of unusual difficulty is to arise

✦ Where such an order is necessary for the general convenience of the parties or witnesses

✦ Such and order is expedient for the ends of justice or is required by any provisions of the CPC.

Even though the CPC narrowed that application for change of venue within the ambit of high courts only, Proclamation No. 25/96 widens its scope in a way that such application be made to Federal Supreme Court and Federal High Court.

Art 8(3) of the Courts Proclamation No. 25/96 provides that the Federal Supreme Court has first instance jurisdiction over application for change of venue from one Federal High Court to another Federal High Court or to itself (Federal Supreme Court), in accordance with the law.

The concept of change of venue is an exception to local jurisdiction in general and material jurisdiction in cases where the court decides the case be committed for itself i.e.

transferred to itself from the subordinate court.

#### **6.2.4.2. Withdrawal of a Judge**

Withdrawal of a judge is also another procedure to secure justice. It is related to a particular judge who would have seen the case. Art 27-30 of Proclamation No. 25/96 deals with the issue of withdrawal of judges. Thus, sub- article 1 of Art 27 lists the grounds of withdrawal of judges. It reads as:

No judge of a federal court shall sit in any case where:

- A. He is related to one of the parties or the advocate thereof by consanguinity or by affinity.
- B. The dispute relates to a case in which one of the parties is a person for whom he acted as tutor, legal representative or advocate.
- C .He has previously acted in some capacity in connection with the case or the subject matter of the dispute.
- D. He has a case pending in court with one of the parties or the advocate thereof.
- E. There are sufficient reasons, other than those specified under sub-article (1), (a) to (d) hereof, to conclude that injustice may be done.

## **CHAPTER SEVEN**

### **THE TRIAL**

#### **7.1. Fair Trial Rights and Trial Proceedings**

Trial in general and criminal trial proceeding in particular should be fair. To this effect, parties to the proceeding have certain rights which we call fair trial rights. Almost in all legal systems an accused enjoys rights, often granted by law or customarily. Such rights could be exercised before, on or even after the criminal proceeding. In the subsequent sections, we will highlight some of the fair trial rights, which the writers deem to be the most important.

Simeneh Kiros, Law of Criminal Procedure, has the following:

The idea of fairness during a trial has something to do with equality of arms of the parties. In criminal proceedings, things are considered as a biblical fight between the little saved and the mighty goliath. The accused almost always does not have knowledge of the law and he is inexperienced. It may be his first time to appear before a court of law for that matter he does not know what are his rights and duties at what stage are they to be raised and exercised, what kind of evidences are

relevant to his case, etc. If the offence with which he is charged is not bailable or if he is denied bail, which occurs in the majority of cases, he is not able to gather evidence in his defense.

The public prosecutor, on the other hand is a professional trained and skilled in law, and in the prosecuting arm of the government. He has all the government power and resources to conduct the investigation and the prosecution. The police are under the prosecutor who even takes instructions as to investigations which are to be complied with. He is using the public fund to prosecute. Depending on the economic strength of the country, this power and resource is boundless when seen in light of that poor accused. Fair trial is thus an effort to reduce this unbridgeable gap of power and resources between the two parties and in some way leveling the ground so that there could be a fair hearing. These mechanisms are mainly by “granting” certain rights to the accused such as the right to remain silent, due process of law the right to pre-trial access to evidence, open court trial and presumption of innocence and by imposing certain burdens and obligations on the public prosecutor, such as, the constitutional obligation to respect and have respected the

rights and privileges of the accused, the obligation to prove the charge and to prove it beyond reasonable doubt degree.

The trial stage is critical stage at which the guilt or innocence of the defendant is established. Despite the remarkable diversity, the practice between and within the various legal systems of the world as to the composition of the tribunal and the laws of evidence to be brought before the court, the essence of the right of the accused at this stage is related to the adequate time and facilities given to him to defend himself and that these facilities must be at least equal to those enjoyed by the prosecuting or any other party at trial.

Often the following are mentioned as rights of the accused:

- \* Right to speedy trial
- \*Right to public trial
- \*Right to counsel or legal assistance
- \*Right to obtain a copy of the charge
- \*Right to be presumed innocent
- \*Prohibition of self incrimination

## **7.2. Preliminary Objections and Their Consequences.**

Under Art 130 of the CPC, the grounds of objections to a charge are listed. Thus,

- ✔ That the case is pending before another court; or
- ✔ That he has previously been acquitted or convicted on the same charge; or
- ✔ That the charge against him has been barred by limitation or offence with which he has been charged made the subject of pardon or amnesty; or
- ✔ That he will be embarrassed in his defense if he is not granted a separate trial, where he is tried with others; or
- ✔ That no permission to prosecute as required by law has been obtained; or
- ✔ That the decision in the criminal case against him can not be given until other proceedings have been completed: or
- ✔ That he is not responsible for his acts.

## **7.5.3. Judgment: Conviction/Acquittal**

All the criminal prosecutions are made with the ultimate destination of rendering judgment which would either be conviction

or acquittal. To put it in simple terms, the accused would be convicted if the evidences produced by the prosecutor convinced the court to the extent of the required degree that the accused committed the alleged crime and his evidence, if any, could not rebut such evidences and affects the court's conviction. On the other hand, is the defense evidence(s) produced by the accused can falsify the evidence of the prosecution or at least shed a reasonable doubt, the court must decide for the acquittal of the accused and be released from prison if had been in custody. It is one of the responsibilities of a judge to give reason for any of its decisions

## **7.5.4. Sentencing**

Where the accused is found guilty, the court shall ask the prosecutor whether he has anything to say as regards sentence by way of aggravation or mitigation as being provided under Art 149/3/ of the CPC. It is at this stage of the procedure that public prosecutor could reveal to the court aggravating grounds such as previous conviction(s) of the accused so that the court could take this fact in to consideration in the determination of the sentence.

## **CHAPTER EIGHT**

### **SPECIAL PROCEDURES LEADING TO JUDGMENT**

#### **8.1. Private Prosecutions**

#### **8.2. Default Proceedings**

Under the ordinary proceeding, which we have been looking above, the accused is required by law to attend the trial personally not through representative. However, a representative can appear before the trial court and explain the reason(s) for the accused's non appearance and request an adjournment of the case until the accused will be able to appear only. The court then if satisfied with the reason for the non-appearance of the accused as explained by the representative would adjourn the case by virtue of Art 94/2/a/ of the CPC. However, if no representative appeared to explain the reason why the accused fail to appear or the reason is not satisfactory, the court shall issue arrest warrant for the accused's arrest presuming that he is hiding himself from the court /justice. Normally arrest warrant is issued up on the request of the public prosecutor and be executed by the police officer as the latter can find the accused. If the accused cannot be found or known to have fled abroad the court has to resort to Art 160/3/ of the CPC and see if it can see the case even in the absence of the accused

i.e. if *trial in absentia/default proceeding is possible*.

Trial in absentia may be held only in respect of certain grave offences, of specific offences that are committed by adult offenders. Such offences are either punishable with rigorous imprisonment for not less than twelve years or offences that are provided for under Art 354-365 Of the PC ( Offences against the fiscal and economic interest of the state), which are punishable with rigorous imprisonment of fine exceeding five thousand birr. Even then, default judgment possible if the accused is not young person.

#### **8.4. Juvenile Procedures**

In many countries, there is what we call juvenile court which is a special court designed to see cases in which young persons /juveniles are parties. Such courts grew up as a reaction to the traditional practice, which used to adjudicate young offenders under ordinary courts where adults are tried. Some of the innovations claimed for juvenile court have been: specialization of judges, informality of the court room and of other aspects of the proceedings, rigid segregation of juveniles from adult subjects of the criminal process at all pre-trial and

post-trial stages, protection of juvenile offenders from publicity, emphasis on discovering the cause of anti-social behavior in the juvenile, and on the rehabilitating him through affecting his environmental rather than on fixing his blame and punishment. In most countries the non punitive philosophy of the juvenile court has led to the discarding of such criminal court nomenclature as “charge”, “offence”, “plea”, “conviction”, and “sentence” in favor of more neutral words with the view of protecting the juvenile from any connotation of crime and punishment.

In general, juvenile courts and boards, which have the same function in some countries, frequently dispense procedural protections for the juvenile who is subject to such treatment as being provided by law.

Coming to the existing Ethiopian laws, we find chapter ten of the CPC that deals about procedures concerning young persons. Thus, issues concerning complaint and accusation, arrest, investigation, charge, plea, trial, judgment, sentence and appeal are dealt and supposed to be governed pursuant to provisions listed therein.

## **8.5. Corruption Crimes**

### **Relevant Laws**

Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005

Art 402-419 of the CC

The last type of special criminal procedure to be discussed in this document is corruption offences. Separate rules are enacted to regulate the arrest, investigation, search and seizure, bail, injunction, restraining order, remand, prosecution, trial, evidence, standard of proof, confiscation, appeal, etc of corruption crimes. These provisions are mainly found under the proclamation dealing with procedural and evidentiary matters of corruption cases and the CC. Thus, there are special procedural and evidentiary rules pertaining to corruption offences.

An arrested person on corruption case has bail right. But, there will not be bail if the crime entails more than 10 years imprisonment. It is not clear whether the minimum or maximum penalty should be considered to determine bail matters. Both sides could appeal on the decision of bail question. If there is appeal on the release of the suspect or accused on bail, it will not be

enforced in case the investigator or prosecutor brings appeal. The court has to wait for reasonable time to let the appeal is filed. The investigator may also release the suspect on legally set grounds. Unlike other criminal cases, the court is empowered to order other conditions besides the bail. These conditions are prohibition of tampering with evidence, restriction of movement to certain places, periodic reporting obligation, and prohibition of leaving the country. The court may also grant restraining order on the properties of the suspect or accused upon request supported by affidavit. There are also specific provisions dealing with search and seizure. The court handling matters related to investigation of corruption crimes is only the Federal High Court and regional high courts in their respective jurisdiction.

There are two modes of handling the trial. These are the ordinary criminal procedure approach and the special procedure designed for conducting trial for corruption offences. The choice is dependent upon the complexity of the matter. The purpose of the special procedure is to facilitate the process, easy understanding of the matter and clarification of issues. For complex matters, there will be pre-trial hearing. At this stage,

there will be mainly exchange of evidence as well as ruling on the admissibility of evidence and issue of law. There could be appeal on the rulings made. The elements to be proved and the standard of proof are also different from other criminal cases. The law also protects prosecution witnesses from possible attack. It tries to encourage whistle blowing.

To sum up, like other developed criminal justice systems, the Ethiopian criminal procedure adopts differentiated case management system. Corruption offences are one of the specially treated areas. Even the law identifies simple and complex corruption crimes and stipulates separate procedures to be followed. The system is like a modern highway devising different ways to allow smooth traffic.

## **CHAPTER NINE**

### **POST JUDGMENT PROCEEDINGS**

#### **9.1. Review of Judgment by the Court of Rendition**

Review of judgment by the court of rendition is a procedure, which is about reopening of a case, by the trial court once after it pronounced judgment for various reasons.

Art 238 of the Code provides the grounds of the application for reopening of the case once after final judgment. These are:

I. discovery of new circumstances, after the exercise of due diligence, were not in the knowledge of the defendant at the time of the giving of the judgment.

II. the establishment of the falsity of the testimony of the witness or the opinion of an expert, an evidentiary document or of a translation which has resulted in the delivery of the judgment and which, after the exercise of due diligence, was not within the knowledge of the public prosecutor or the defendant now the convicted person at the time of the giving of the judgment.

## **9.2. Right of Appeal and Powers Appellate Court.**

Appeal is recognized as a fundamental right, constitutional right, too, of any aggrieved party to the case there are certain legal conditions and limitations to the exercise of this right. The law provides that there is no interlocutory appeal or there is no appeal on decisions on interlocutory matters. Stated other ways appeal is possible only in respect of final decisions.

Art 184 of the CPC provides only three classes of interlocutory matters from the decision of which no appeal lies. These are:

- a. granting or refusing an adjournment under Art 94; or
- b. regarding an objection under Art 131; or
- c. regarding the admissibility or non admissibility of evidences under Art 146

Thus , we can understand that interlocutory decisions are decisions which do not dispose the case finally- finally in respect of that particular court which is trying the case.

Normally, appeal is based on facts and evidences which were raised during the lower court but if the appellate court deems the production of additional evidences is necessary for justice, it may order the production of such additional evidences on its own motion or accept the application of the parties to this effect.

Pursuant to Art 195 /2/ of the CPC, the possible decision of the appellate court once after going through the appeal as:

- i). on an appeal from an order of acquittal or discharge reverse such order and direct that the accused be tried by a court of competent

jurisdiction or find him guilty and sentence him according to the law ; or

ii). on an appeal from conviction and sentence

a). reverse the finding and sentence and acquit the accused; or

b). with or without altering the finding maintain , increase or reduce the sentence.

iii). on an appeal from conviction only reverse the finding and sentence and acquit the accused;

iv). on an appeal from the sentence, only maintain, increase or reduce the sentence .

Where the court confirms the decision appealed against, there is no second appeal. If the appellate court reverses or varies the decision of the lower court, be it on guilt or sentence , a second appeal lies to the next higher court.

### **9.3. Review in cassation**

Be it once or twice for appeal a case has to come to an end sometime. This, however, does not mean that the case is dispensed correctly nor that the parties are satisfied with such decision. Thus, leaving the case untouched might result in further injustice. To combat this, the law devises a mechanism for review of cases finally decided by way of cassation.

Review of cases by cassation is the power of the supreme judicial bodies be it federal or regional. Thus, it is the power of the federal or regional supreme courts to review cases that were finally decided by subordinate courts or itself and which have exhausted appeal.

Sometimes an appeal may concern several convicted persons but only one of them lodged the appeal, the court may order that the judgment be applied also to the other convicted persons as though they had appealed where:

a. the judgment is to the benefit to the appellant ; and,

b. had the accused been appealed they would have been benefited similarly.

Art78/2/ of the FDRE Constitution provides that the supreme federal judicial authority is vested in the Federal Supreme Court and thus, it has the power of cassation over any final court; decision containing basic error of law.

Decisions over which the Federal Supreme Court has cassation power are listed under Art 80/3/a/ of the FDRE Constitution as:

— final decision of the Federal High Court rendered in its appellate jurisdiction;

— final decision of the regular division of the Federal Supreme Court; and

— final decision of the regional supreme court rendered as a regular division or in its appellate jurisdiction.

The application should contain the reasons for claiming the grounds for review by cassation i.e. there is a fundamental error of law in the final judgment against which review is claimed in which it is implicit that appeal has been exhausted and the case has been finally decided.

An application for review of a case by way of cassation shall be filed within ninety days from the date of final judgment against which the applicant is claiming review and such application shall be accompanied by copies of such judgment and the judgment of the first lower court in respect of which appeal had been lodged before the second lower court, which rendered the final judgment.

The cassation court reviews a case only if it contains fundamental error of law and not error of law(s). Though the law says this, the cassation courts practically reviews fundamental errors of facts in not few cases.

#### **9.4. Execution**

A judge at the end of the judgment in general and the sentence in particular write, among other things an order to the pertinent organ normally prison administration or police to effect the execution of the judgment for a mere decision without it being executed is nothing.

#### **9.5. Pardon and Amnesty**

##### **Relevant Laws**

Art 28, 74/7, FDRE Constitution

Art 229-231, CC

Procedure of Pardon Proclamation No. 395/2004

Pardon and amnesty are possible avenues for persons convicted and sentenced for committing crime. Amnesty can be available before prosecution or judgment. The other major distinction between the two lies on their effect on the criminal record. Pardon does not cancel the criminal record. However, in case of amnesty, the convicted persons will be made free of negative consequences of criminal record which is considered to be absent.

Both may be granted conditionally or unconditionally. In case it is given upon the fulfillment of certain conditions, there is a possibility for the enforcement of the judgment for failure to comply with those conditions. They may also be made for the whole or part of the penalty.

However, there is a limitation upon the power of the government to grant pardon and amnesty. The FDRE Constitution prohibits pardon and amnesty for crimes against humanity as defined by international agreements ratified by Ethiopia and other laws of the country. These include genocide, summary executions, forcible disappearances and torture. But, the

President of the nation could commute death penalty into life imprisonment.

As regards their effect on civil liability, the CC provides that the civil remedy is not affected. The law tries to distinguish between reparations made and damages paid to private persons and the state. Unless there is reservation on the order granting pardon and amnesty, damages to be paid to the state will be remitted automatically. But, the wording of the law is subject to controversy. It says costs payable to the state. It may be costs of the criminal proceeding or the damage incurred due to the commission of the offence.

Thus, pardon is available for convicted and sentenced persons. Amnesty is possible for persons not yet prosecuted or convicted. Committing certain categories of crime could be a ground to absolutely bar the possibility of pardon and amnesty. They could be made conditionally or unconditionally. The civil effects remain in relation to private persons. Amnesty has the advantage of deleting criminal record.