

# **INTRODUCTION**

## **CHAPTER ONE: EVIDENCE LAW GENERAL INTRODUCTION**

- **Introduction**
- **Objectives of the topic**

### **1.1. Nature, Meaning and Purpose of Evidence Law**

#### **1.1.1. Nature of evidence law**

Dear learner, you have already taken many courses of law. You have taken Law of Persons, Family Law, Contract Law, Criminal Law, Constitutional Law, Extra-contractual Law, Business Organizations and many others. You have cited Family Laws, Civil Code, Commercial Code, Criminal Code and other laws. Many of the courses you have been learning define rights, privileges and duties. These types of laws give rights and privileges to and impose duties on individuals. They are called substantive laws because they specify the substance- rights, privileges and duties.

- o Do you recall the discussion on substantive and procedural laws in any of the courses you have taken so far?

These substantive laws are enough as long as people understand them very well and they are ready to respect them. For instance, the FDRE Criminal Code specifies acts which amount to offenses and which are punishable. The Code is believed to deter persons from committing or omitting such unlawful acts by giving them fair warning about the consequences. To the extent of people's perfect understanding of the Criminal Code and respect for it, the Code is sufficient for criminal law.

However, some of our rights must be claimed before state organs and we may be required to do some things on our part to exercise them. When, for example, a person wants to change his name, it must be shown that the change is not for some illegal purposes. Hence, certain formalities must be completed. In the same way, when a person marries another, the

state organs (or other recognized ones) must make sure that the marriageable age is fulfilled by both applicants.

Moreover, conflicts arise either because people do not fully understand the substantive laws or some people want to have more rights and fewer duties than are prescribed by the substantive laws. When a conflict arises, there must be a system of dispute settlement. This system contains laws and institutions to enforce the right or privilege violated or the duty not performed.

- o How do the criminal procedure and civil procedure differ?

How the procedural justice system is initiated and how it proceeds with cases have been the issues of discussion of Civil Procedure and Criminal Procedure courses. The major difference is that while in civil cases, an individual is mandated to set the justice in motion, in criminal cases, the state, in principle, takes the initiative. Hence, the individual in civil cases has the right to search for other means to satisfy his case. This goes to the extent of waiving his right to bring a claim against a wrongdoer.

The option, particularly in civil cases, can also be resorting to alternative dispute resolution (ADR) mechanisms. So long as the parties resort to mechanisms where there is no third party acting as fact finder, the issue can be settled without the need for any of the parties to prove his case. However, if the mechanism used is arbitration (or conciliation, where the third party acts a fact finder), parties must make claims, defences and counter-claims and must prove them. In case of conciliation, however, parties may authorise the conciliator to give a decision based only on the arguments made by the parties.

Parties may also opt to enforce their rights in the formal judicial systems where they will be required to argue their cases by producing evidence to support their arguments. How courts proceed with the cases presented to them is dealt with in the procedural courses. Law of evidence will answer questions related to the facts and evidence that are

made to prove a case. It tries to determine questions of fact with the central aim of maximising the accuracy of fact determination.<sup>1</sup>

As a conclusion, law can be broadly divided into substantive laws and adjective laws. The first group of laws defines rights, privileges, duties and liabilities while the second group is enacted to enforce the substantive laws.

- o So, what is the place of evidence law?

Evidence law does not, as its main purpose, define rights and duties. It, in effect, does not give rights and duties to individuals. It rather helps courts in effectively solving disputes. Evidence law is one division of the adjective laws. The other division is Procedure Law.

There are certain issues procedural laws do not address and are left to evidence law. For instance, in the procedural law you did not study about the standard of proof, facts to be proved or need not be proved and the value to be given to each piece of evidence etc. These are left to evidence law; therefore, evidence law is not strictly speaking procedural law, but shares the commonality with procedural laws in the sense that both serve as means to the enforcement of the substantive law. Thus, evidence law suitably falls within the general category of adjective laws, which deal with the enforcement of the substantive law.

### **1.1.2. Purpose of evidence law**

In civil procedure, you discussed that the purpose of a civil proceeding is to reach a solution in a fair, expedient and less costly manner. The criminal proceeding wants to see a result that punishes a criminal and set the innocent free. Still, the issues of time and cost are important, as a belated and costly justice cannot fulfil the needs of any justice system. In both cases, the triers of fact try to reach at the truth with maximum accuracy, also taking into account the cost and time implications.

Hence, there is inevitable tension between values of accuracy (truth ascertainment), efficiency (time to disposition), access (costs of litigation, availability of representation, and relative transparency and simplicity of rules), achievement of substantive justice, and more recently procedural

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<sup>1</sup> The difference between the inquisitorial and adversarial systems will be discussed at later sections of this chapter.

justice (or perceptions of or satisfaction with the process of dispute resolution itself.<sup>2</sup>

The roles of everyone involved in proceedings must be determined to achieve the predefined proper balance in a justice system. Systems differ on the amount of responsibility they impose on each participant. Answers to such important balancing questions also differ when we compare civil and criminal cases.

The idea of actual truth, i.e., certainty, is a very difficult endeavour, if not impossible. Hence, errors can be committed in the way. Hence, a system must decide to what side to err. The trier of fact tries to maximise the accuracy of the outcome. In doing so, shall the trier of the fact be guided by rules of evidence? Or shall it be guided by logic and common sense alone?

For instance, when we see the arguments related to the governance of relevance by law of evidence, proponents of free proof (open-ended system) approach claim that legislating relevance can hamper the trier-of-fact's work. The trier of fact must be trusted on his capacity to analyse relevance of any evidence presented to him. Limited exceptions can be allowed if necessary for the speedy dispensation of cases. Bentham argued against technical evidence rules as illogical and indefensible mess. He and others argued that relevance was a matter of logic, not law.<sup>3</sup>

Opponents of this approach argue that a trier of fact shall not have unlimited discretion as this may result in different decisions for similar cases. Moreover, a trier of fact may delay in determining relevance and accept prejudicial evidence which leads to a hasty conclusion. Moreover, it is argued that such approach can hamper access to justice by denying the fundamental human rights of accessibility of laws.

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<sup>2</sup> Carrie J. Menkel-Meadow and Bryant G. Garth, Civil Procedure and Courts (679-704) in Peter Cane and Herbert M. Kritzer, *The Oxford Handbook of Empirical Legal Research*, Oxford University Press, 2010, p680.

<sup>3</sup> William Twining, *Rethinking Evidence: Exploratory Essays*, Cambridge University Press, (2006) p202.

Both arguments have their disadvantages though. The complete absence of rules imposes huge burden of examining and analysing on the trier of fact. On the other hand, strict rules of evidence unduly constrain the discretion of the trier of the fact from considering all information available.<sup>4</sup>

- o Which argument do you support?

All legal systems have some extent of rules to determine evidentiary issues. There is, however, significant difference among legal systems on the amount of rules of evidence.

Leaving the above argument aside, law of evidence tries to answer four main questions:

- i. what to prove?
- ii. how to prove?
- iii. who proves? and
- iv. by what standard is proof made?

Having the understanding of the nature and purpose of evidence law, it's now time to define it.

### **1.1.3 Meaning of evidence law**

The search for a truth (determination of what really happened) is entrusted to the trier of the fact. *'The function of the presiding officer (also referred to as 'trier of fact') over a legal dispute is ideologically to apply the law to the factual situation of a dispute in order to determine whether the rights of a person were infringed in the process and whether the injured party is entitled to have the imbalance caused to him rectified by law'.<sup>5</sup>*

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<sup>4</sup> Evidence, 53(7) Virginia Law Review, 1623-1641 (1967), p1923.

<sup>5</sup> Jan Hendrik de la Rey, The Fact-finding Process and Burden of Proof during Litigation, University of Pretoria (2007), p120, p16.

- o What is the difference among proof, probative value, evidence and evidence law?

A party in a case, who claims that decision in the case must be given in his favour, must show that his narrative of the case is the right one. He must do so by proving the facts at issue in the case. The establishment or not of these facts is what we call '*proof*'. The degree of prove required from the person is determined by the standard of proof in the specific case. The means of such proof is called '*evidence*'. Evidence is what helps the trier of fact in determining the issues of fact before it. '*Evidence is any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or dis-affirmative, of the existence of some other matter of fact*'.<sup>6</sup>

The DER 2004 defines evidence as:

"Any means whereby any alleged matter of fact, the truth of which is submitted to investigation is proved or disproved and includes witness testimonies, admission by parties, documents, court files, notice, legal presumptions, demonstration and exhibits."

- o So, what is the evidence- the witness or his testimony?; the document or its contents?; the physical evidence or observations made from it?

Evidence is different from the methods we use to bring the evidence. Testimony of a witness, contents of a document, observation from a physical object are evidence while the witness, the document, and the physical object are not evidence, rather methods of proof.<sup>7</sup> For example, when Art 147(1) of the Criminal Procedure Code states that '*the evidence*

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<sup>6</sup> William Twining, Rethinking Evidence: Exploratory Essays, Cambridge University Press, (2006), p193.

<sup>7</sup> JOPTC Module on Evidence, p12.

*of every witness must start with his name, address, occupation, and age and an indication that he has been sworn or affirmed', the evidence is the testimony and the witness is the person producing the evidence.*

The main examples of judicial evidence are statements by witnesses (testimony), things (real evidence), and documents presented to the tribunal as a basis for determining the issues of fact before it.<sup>8</sup> Chapters 4 and 5 of this material will deal with these types of evidence.

## **1.2 Development of evidence law**

As the determination of truth was important at all times, evidence and evidence law have had an important place in history. However, the nature of it and its governance under the law has always been evolving. Different aspects of life have played in its evolution. Religion played a prominent role in shaping the evidence rules. The belief that the spirits protect the person with the truth led to several tests of ascertaining the truth which included to mechanisms of proof which can be termed in general as ordeal.<sup>9</sup> The initial understanding of oath was also based on religious beliefs, part of it still valid in this modern time.

Such system was followed by oath by the party which usually required additional witnesses to testify on either the fact in issue or the trustworthiness of the oath giver. In England, for example, in 1833, a plaintiff in loan case must bring, after giving oath, 12 witnesses to testify his trustworthiness; failing such he cannot succeed with the case.<sup>10</sup>

Personal knowledge of the trier of fact, which is not generally acceptable evidence at present, was important part of evidence in England. Jurors

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<sup>8</sup> William Twining, *Rethinking Evidence: Exploratory Essays*, Cambridge University Press, (2006), p193

<sup>9</sup> Tadek Tadesse, *Fundamentals of Evidence Law (Amharic)* (2003EC), p10 (all translations from this book are mine).

<sup>10</sup> Tadek Tadesse, *Fundamentals of Evidence Law (Amharic)* (2003EC), p11.

used their personal knowledge of a case in determining an issue until the 17<sup>th</sup> C when jurors started hearing witnesses.<sup>11</sup>

The following three extracts show the development of evidence and evidence law:

**Jan Hendrik de la Rey, The Fact-finding Process and Burden of Proof during Litigation, University of Pretoria (2007), p21-24**

*In Roman law there existed no formal rules as far as the burden of proof was concerned. The trier of fact had a vast amount of discretion as far as the presentation of evidence and the admissibility of evidence were concerned. There existed, however, a general notion that a party who makes allegations had to prove his/her case, which is still true in modern law, in principle.*

*The medieval history of fact finding (the search for the truth) consists of mainly three stages, namely the primitive stage, the formal stage and the rational stage. During the primitive and formal stages the focus fell on rigid procedures where human reason and argument played a minimal role, if any role at all. Fact finding was based on the results of certain procedures which were followed in order to determine whether a person was guilty, or not, of the alleged wrongdoing. It was only during the rational stage where the tribunal no longer merely verified procedural formalities that reasoning powers in the fact finding process were employed.*

*The primitive stage was also called the religious stage. It amount to an appeal to God (or the gods) to decide a factual dispute. The accused was expected to perform certain tasks (usually called ordeals), of which a variation existed, which would determine whether he/she is guilty of the offence charged, or not. An example hereof is that an accused was required to swallow a dry morsel of bread, accompanied by a prayer that*

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<sup>11</sup>Tatek Tadesse, Fundamentals of Evidence Law (Amharic) (2003EC), p11.

*the accused should choke if he/she was guilty. In some Asian countries, a suspect was required to hold rice in his mouth for a few minutes. If the rice then emerged dry, the suspected was deemed to have lied about the fact that he denies having done wrong, whereafter execution would follow. In India, a red-hot iron would be applied to the suspect's tongue. If it burned the tongue, he would be found guilty. In Rome the test for chastity, for instance, was that the names of the potential lovers would be recited out loud, in front of the suspect, whilst the pulse rate would be monitored. A sudden increase in the pulse rate would indicate guilt. The premise of all this was that the body will reveal the truth through involuntary uncontrollable processes. This very premise is still the underlying principle of, for instance, the polygraph test, which has limited application in modern litigation. Similarly, the demeanour of a witness still plays a role in modern fact finding, in that a presiding officer may make certain deductions from the manner in which a witness conducts himself in the witness box.*

*The formal stage developed during the 12<sup>th</sup> C, when an emphasis on human reason evolved and old irrational methods were abandoned. During this stage so called 'compurgators' became very popular, especially in England. The compurgators were not eye-witnesses but merely people who were prepared to state under oath that the oath of one of the parties should be believed, and the party who was able to summon the largest number of compurgators won the case. This practice was regarded as decisive, but did still not entail that the tribunal required weighing evidence (reason about it).*

*During the rational stage, these compurgators were called upon to act as adjudicators, largely because of their knowledge of the events. Interestingly, this is also the manner in which trial by jury developed, which was the period during which jurors determined the facts and the judge deciding manners of law, originated.... It is an important aspect of fact finding, in that, most of our exclusionary rules in the law of evidence*

*can be attributed directly to the trial by jury. What is of importance during this phase [for the purposes of this research] is the fact that the human factor was brought into the system of fact finding most prominently. The reasoning of a person, as opposed to reliance on certain processes, to determine truth, was now utilised in order to find facts, together with a realisation that the actual truth is unattainable. The significance of reasoning and argument were thus born in this phase and have been utilised until now.*

*In conclusion it can be said that the historical attempts to find truth have also fallen short of a cardinal rule in that although the truth is important, it should not be established by resorting to improper means. Dhlamini argues that people should be treated as human beings, because in the past, internationally, people have been subjected to inhumane treatment by those more powerful than them in an attempt to arrive at the truth.*

- o What according to the above material are the three stages of fact finding in the medieval period?

**John H. Langbein, Historical Foundations of the Law of Evidence: A View from the Ryder Source, 96(5) Columbia Law Review, 1168-1202 (1996), p1170-1171, 1200**

*The medieval system of self-informing juries, said Maitland, "hardly had any place for a law of evidence." In an age of tiny, intensely interdependent agricultural communities, jurors were drawn from the neighborhood of the contested events. The hope was that a jury of the locality would contain witness-like persons who would know the facts, or if not, that these jurors would be well positioned to investigate the facts on their own. The early jury was self-informing. No instructional trial was held to inform its verdict. If the jurors thought they needed more information, they obtained it "by consulting informed persons not called into court." The medieval jury came to court not to listen but to speak, not to hear evidence but to deliver a verdict formulated in advance. The*

*court accepted this "rough verdict," as Maitland described it, "without caring to investigate the logical processes, if logical they were, of which that verdict was the outcome."*

*Toward the end of the Middle Ages the trial jury underwent its epochal transformation from active neighborhood investigators to passive triers. The jury came to resemble the panel that we recognize in modern practice, a group of citizens no longer chosen for their knowledge of the events, but rather chosen in the expectation that they would be ignorant of the events. This passive jury required a courtroom instructional proceeding at which outside witnesses could inform them. "By the 1500s," thought Wigmore, "the constant employment of witnesses, as the jury's chief source of information, brings about a radical change. Here enter, very directly, the possibilities of our modern system."*

*Instructional jury trial made the law of evidence possible. Once witnesses routinely testified in open court, the jurors' practical monopoly over knowledge of the facts was broken. Once the trial judge heard the same testimony as the jurors, he was able to comment on the evidence and advise the jury on how to apply the law. And the opportunity arose for the judge to regulate the trial testimony of witnesses. Wigmore saw the dawning of the instructional trial as the watershed of the law of evidence. He detected the outline of the modern law of evidence already in the years 1500-1700, although not until the years 1790-1830 could he document "[t]he full spring-tide of the system ... ."*

*Underlying the movement from oath-based to cross-examination-based theories of safeguard in the law of evidence was a changed view of what promoted veracity. The oath-based system pre-supposed the witness's fear that God would damn a perjurer. In place of the former reliance upon the vengeance of God, the new order substituted its faith in the truth-detecting efficacy of cross-examining lawyers.*

- o How did the jury system evolve in terms of fact finding?

**Morris D. Forkosch, The Nature of Legal Evidence, 59(6) California Law Review, 1356-1383 (1971), p1360, 1370**

*The so-called trials in the Anglo-Saxon period were not really concerned with evidence or reasoned law and justice. They were, rather, methods of proof used primarily for the personal rightings of wrongs. Their inflexible judicial operations made "no attempt to apply any measure of probability to individual cases. Oath was the primary mode of proof . . . going not to the truth of specific fact, but to the justice of the claim or defence as a whole ... [and,] if duly made, was conclusive. ... ." Their procedures were formulary, not evidentiary: if one failed to produce the proper number of persons to swear, or was disqualified from taking an oath, he "had to go to one of the forms of ordeal." For example, the Saxon methods of proof included compurgation (oath helpers) and the ordeal; later, after the Norman conquest, trial by combat was introduced by William. Thus, common law trials "were methods of proof; and the party who went through the form of proof-witnesses, battle, compurgation, or ordeal-won his case."*

*The earlier half of the 16th century was probably a period of transition," and even into the 17th century the jurors, hearing the testimony of witnesses in open court as to the facts in the matter, but being drawn from the neighborhood, "may [themselves] have evidence from their own personal knowledge," or "know the witnesses to be stigmatized and infamous," and therefore determine their verdict from their own knowledge as well as the evidence (or, if no evidence were given, then upon their own knowledge). Nevertheless, the rule evolved that "where a jurymen has knowledge of any matter of evidence in a cause which he is trying, he ought not to impart the same privily to the rest of the jury, but should state to the court that he had such knowledge, and thereupon be examined, and subject to cross-examination, as a witness."*

- o Is vengeance from God still a consideration when witnesses take oath before testifying?

### **1.3 Evidence in civil and common law legal system**

- o What is the difference between the common law and civil law systems?

In common law (case law) countries, triers of fact apply inductive reasoning- deriving general principles or rules of law from precedents or a series of specific decisions and extracting an applicable rule, which is then applied to a particular case. Summation of court decisions will amount to a rule and will be applied to a particular matter. In the civil law (statutory law) the process is the reverse. The reasoning is deductive- from top to bottom. The judges refer to the general principles or rules of law contained in the codes and apply it to a specific matter.

In the procedural law courses, you have learnt the major differences between the common and civil law legal systems. Such differences have importance for comparative study of evidential issues in the two systems.

A difference relevant to the comparative study of law of evidence is the role of the participants in adjudication. The principle of party presentation in the adversarial system dictates that presenting and proving facts in issue and relevant facts is responsibility of the parties.

Langbein has the following to say about the role of the judge in the adversarial system citing history:

*'Adversary procedure pressured the judge toward passivity and broke up the older working relationship of judge and jury. In a system of "trial that was coming to be more commonly conducted by lawyers," Beattie observes, "the judge came to play a much less active role in producing the evidence." In the seventeenth and early*

*eighteenth centuries, "it was the trial judge who examined the witnesses and the accused, and ... like the modern Continental presiding judge, dominated the proceedings." By the early nineteenth century a visiting French observer reported that the judge "remains almost a stranger to what is going on," while counsel for prosecution and defense examined and cross-examined the witnesses. Other hallmarks of lawyer-driven criminal procedure fell into place in these years, including the privilege against self-incrimination and the articulation of the beyond-a-reasonable-doubt standard of proof.'*<sup>12</sup>

In the inquisitorial systems, the trier of fact plays a more active role. The extent of participation differs from one legal system to another but in all inquisitorial systems, the trier of fact's role is not limited to the trial stage.

The magistrate (*Juge d'instruction*) in the French judicial system has power to interrogate defendant and witnesses; visit the scene of the crime; investigate background of defendant and witness; and draw inferences from such evidence. Investigation is not limited by time. After such investigation, trial is much shorter affair, dealing with the dossier prepared by the juge d'instruction, using witness depositions.

In sum, *'There is a difference in the entity responsible for conducting the litigation. While in common law legal system, the primarily responsibility lies on the parties and the trier of the fact plays a limited role, in civil law legal system, the judge controls the litigation leaving him with wide discretion on litigation matters.'*<sup>13</sup>

The importance of the trial stage is also another difference between the systems. While trial plays the major part of adjudication in adversarial

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<sup>12</sup> John H. Langbein, Historical Foundations of the Law of Evidence: A View from the Ryder Source, 96(5) Columbia Law Review, 1168-1202 (1996), p1199.

<sup>13</sup> Sedler, the Development of Legal Systems: the Ethiopian Experience, 562-635 (1967), p621.

system, majority of the fact finding process is made during the pre-trial stage in the inquisitorial system.<sup>14</sup>

Another reason can be the high importance of the trial stage attached to adversarial systems. Thus, the rules of oral evidence draw their significance from this process since it is solely on the evidence retained in court, usually by formal oral testimony that the decision is based. The common law gives predominance to the day in court, with the opportunities for cross-examination of opposing witnesses and for argument on both sides. That is, in oral evidence it is believed that the person who gives his testimony is before the trier of the fact and the action is physical expression. This helps the jury in clarifying the matter and the accused to have a chance of cross-examination.

- o What is the effect of the difference in importance of the trial stage to the significance of the type of evidence?

In common law legal system, oral evidence is given considerable weight and usually prevails over written evidence. In a common law (criminal) trial witnesses are examined and cross-examined in the presence of the judge and jury. Counsel often makes motions and objections orally, and the judge acts as umpire, ensuring that the rules on procedure and evidence are followed, directing the jury on the law to be applied and reminding them of the evidence that they have heard. The jury's role is firstly to decide questions of fact, i.e., to make up their minds between conflicting accounts as to what happened and then to decide on the guilt or innocence of the defendant.

*'The difference has its source in the difference in importance of litigation in the legal systems. As litigation lies at the heart of the common law system, more concern is given to the conduct of litigation and there are detailed rules to govern it.*

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<sup>14</sup>JOPTC Module, p43.

*In contrast, the civil law legal system, which gives less focus to litigation, the need for the details is reduced.'*<sup>15</sup>

Generally speaking, a civil trial consists of a number of hearings, and written communications between the parties, their attorneys and the judge during which an eventual dispute on court jurisdiction is resolved, evidence is presented, and motions are made. There is less emphasis on oral arguments and examination.

We can assume that the continental /inquisitorial/ system unlike the Anglo-American/adversary/ system has its own character, according to which the determination of what issues to rise, what evidence to introduce, and what arguments to make is left almost entirely to the discretion of the judge rather than the parties. One can sometimes observe the fact that in civil law trials, questions are put to witness by the judge instead of by counsel for the parties or by the parties themselves. This kind of experience leads someone to the inference that the civil law judge determines what questions to ask and unlike the common law judge in effect determines the scope and extent of examination.

Read the excerpts for better understanding of the difference in evidentiary issues in civil and common law legal systems:

**Raymond Emson, Evidence (4<sup>th</sup> ed.) Palgrave Macmillan (2008), p21**

*In litigation with the jury, the jury determines the questions of fact based on the directions of the judge. The judge decides on all the questions of law including admissibility of evidence and gives direction on the matters of criminal law, procedure and evidence which are important in the fact finding process. The judge also decides whether there is a motion to defend by the defendant after hearing the prosecutor's evidence. In*

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<sup>15</sup>Sedler, the Development of Legal Systems: the Ethiopian Experience, 562-635 (1967), p621.

*general, the judge is the tribunal of the law and the jury is tribunal of fact.*

*The judge's fact finding role during the trial is limited to the determination of any facts which need to be proved as a condition precedent to the admissibility of evidence or the exercise of an exclusionary discretion; or exceptionally to the determination of foreign law, which is also question of fact. E.g., confession's inadmissibility- judge may have to hear witnesses, at a 'trial-within-a-trial' ('voir dire') in the absence of the jury, to determine whether the prosecution are able to prove that the confession was not obtained by oppression. During voir dire the judge is both tribunal of fact and of law.*

*In the civil courts, the vast majority of trials are now conducted without a jury; so the judge is in all respects the tribunal of both fact and law. This means the judge must exclude from his mind, as the tribunal of fact, any inadmissible evidence he has heard as the tribunal of law. This is not regarded as problematic. First, exclusion of much relevant evidence is to ensure that the accused is not wrongly convicted of a criminal offence, and this is not a relevant consideration in civil trials. Second, if a judge does need to disregard evidence, it is generally assumed that his professional experience allows him to do so without too much difficulty. This can be a problem in criminal proceedings before lay magistrates, who are the triers of fact and law. Nevertheless, if magistrates rule at a preliminary hearing that certain prosecution evidence is inadmissible or ought to be excluded, and the evidence is highly prejudicial to the accused, then exceptionally, the interests of justice and the appearance of fairness may dictate that the trial should be conducted before a differently constituted bench (R v. South Worcestershire Justices ex parte Lilley [1995] 1 WLR 1595 (DC), R (Ratra) v. DPP [2004] EWHC 87 (QBD)).*

- o From the above discussions, can you see in which system of adjudication is written and detailed law of evidence more important?

Adversarial system's reliance on lawyer-conducted presentations of evidence led to the need for specific rules to govern the relationship among the parties involved in the litigation. This need is less pressing if a learned judge controls the proceedings, as in the inquisitorial system. Morgan states that the cross-examination-based-system of trial necessitated rules which:

*would obviously have been unnecessary in a trial before a judge alone. But they would have been equally unnecessary had the adversary not gained such a large measure of control over the sources of available evidence and the right to cross-examine, a right unknown to systems of trial other than the common-law system.*<sup>16</sup>

Moreover, the fact that jurors are triers of fact in the common law necessitated rules of inadmissibility that excludes misleading information from the jury. This is particularly important since review of decisions of jury on matters of fact is minimal.

Langbein has the following to say about the necessity for law that arises due to the jury's trier of fact status:

*From the Middle Ages to our own day, the driving concern animating the Anglo-American law of evidence has been to protect against the shortcomings of trial by jury. Despite its merits, jury trial has always been fraught with danger. Jurors are untrained in the law, they decide without giving reasons, they have no continuing responsibility for the consequences of their decisions, and their verdicts are quite difficult to review. The risks of error and partiality in this system of adjudication are ineradicable. The*

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<sup>16</sup> John H. Langbein, Historical Foundations of the Law of Evidence: A View from the Ryder Source, 96(5) Columbia Law Review, 1168-1202 (1996), p1200.

*law of evidence has changed mightily since the Middle Ages, along with the jury itself, but the primary mission of our law of evidence to guard against the inherent weaknesses of jury trial-has remained constant.*<sup>17</sup>

Supporting the above idea:

*Evidence law as a 'subject suitable to be treated as a unified field of regulation and of study' is a product of the Anglo-American adversarial tradition (Damaska, 1997:109). Continental civil law systems have fewer rules of evidence, and these tend to be associated with specific bodies of substantive law. While Anglo-American evidence law is broadly accepted as a relatively discrete domain, it is generally viewed as 'labyrinthine' and 'dishevelled', 'largely ununified and scattered, existing for disparate and sometimes conflicting reasons.....a mixture of astonishing judicial achievements and sterile, inconvenient disasters' (Damaska, 1997: 10-11; Heydon, 1984: 3).*<sup>18</sup>

**Jan Hendrik de la Rey, The Fact-finding Process and Burden of Proof during Litigation, University of Pretoria (2007), p29-32**

*Systems of fact finding*

*The accusatorial system*

*The accusatorial systems, the presiding officer plays the role of an independent 'referee' who does not enter the arena in the 'duel' between the parties involved in litigation, with a view of protecting his independent function between the adversarial parties. In criminal cases, the police represents the primary investigation authority, who gathers evidence in the form of a docket (which contains the total of the gathered evidence) who then hands over the docket to the prosecution, who in turn, decides whether to prosecute a suspect or not. The prosecution is therefore dominus lites. Similarly, in civil law, the*

<sup>17</sup> John H. Langbein, Historical Foundations of the Law of Evidence: A View from the Ryder Source, 96(5) Columbia Law Review, 1168-1202 (1996), p1194.

<sup>18</sup> Peter Cane and Herbert M. Kritzer, The Oxford Handbook of Empirical Legal Research, Oxford University Press, 2010, p653.

*accusatorial nature of the proceedings is found in the passive role which the presiding officer plays, as well as in the strict rules for the admissibility of evidence. Schmidt and Redemeyer add that further characteristics of an accusatorial system include the accused's right to refuse to answer questions and the inadmissibility of certain types of evidence, despite the fact that it is relevant.*

*The South African criminal and civil procedural systems have historically always been mainly accusatorial. Its accusatorial nature is a legacy of its Anglo-American roots. It is however important to take note as pointed out by Terblanche that although the South African choice has fallen predominantly on an accusatorial system, it is furthermore generally accepted that South Africa, in actual fact, has a mixed system. In support of this argument Terblanche refers to R v Hepworth where it was observed by the court, referring specifically to criminal cases (but is logically also applicable to civil cases) that a trial is not a game where the one side, in litigation, is entitled to claim the benefit of any omission or mistake made by the other side and that a presiding officer's job is not merely to be an umpire to see that the rules of the game are observed by both sides. The function of a presiding officer is much rather that the presiding officer is an administrator of justice in that he is not only to direct and control the proceedings according to rules and procedures, but also to see that justice is done. However, in the process, he is sometimes obliged to follow inquisitorial procedures. As illustrations, Joubert et al list some instances where inquisitorial elements are, in fact, utilised in the South African law namely when:*

- The presiding officer calls witnesses;*
- The examination of a plea of not guilty takes place in terms of section 115 of the Criminal Procedure Act;*
- The examination by the court during a plea of guilty in terms of section 112 of the Criminal Procedure Act is conducted.*

*The inquisitorial system*

*Joubert et al state that in inquisitorial systems the judge, as opposed to the public prosecution (in accusatorial systems), is dominus litis in the sense that he actively drives and controls the search for truth in playing the most important role in the questioning of the witnesses, including the accused, in criminal matters. The investigating judge will, for instance, after the arrest of an accused, primarily question the accused, (rather than the police). The same applies during trial.*

*Inquisitorial systems dominate most of European continental systems. Terblanche states that it is often claimed that inquisitorial systems are more effective in arriving at the so called material truth and that the accusatorial system can only achieve formal truth. The notion of this claim is that the findings in terms of the accusatorial systems are baded only on that information which the parties choose to present to the court. Terblanche however argues that, on the other hand, one of the major objections which may be sought against inquisitorial system is that the presiding officer cannot remain impartial and the accused or defendant may often perceive the presiding officer as an opponent.*

*Both the accusatorial and inquisitorial fact finding systems should be regarded as true and honest attempts to find the elusive 'actual truth', although the accepted reality is, however, that the search in modern law is, in fact for the 'legal truth.*

**Audley Sheppard, The Best of Both Worlds, European Lawyer, (2004), p33**

*Civil law procedure is inquisitorial, with the court taking the initiative in identifying issues, asking questions and requesting documents and sometimes even suggesting settlement. On the other hand, common law systems are adversarial, with the parties identifying the issues they dispute, producing the evidence they rely on and cross-examining the other side's witnesses and experts. The common law judge or arbitrator is less proactive, leaving it to the parties to battle it out. Comparison has*

*been made to a gladiatorial contest with lawyers being modern day gladiators fighting with sword, trident and shield in the sand and dust - at the end the emperor (or judge) will signify the victor with a signal of thumbs up or down.*

*Civil law procedure allows a party to submit the documents it relies upon and keep hidden any documents unhelpful to its case. In common law procedure a party is generally required to produce to the other side all documents in its possession relevant to the issues in dispute including any harmful documents. The common law system of document disclosure can be very time consuming, painstaking and expensive. However, those that favour it strongly believe it is essential in order to get to the truth. In the common law, evidentiary privileges are important (such as the privilege that attaches to legal advice, including advice of in-house lawyers). But in the civil law, because there is no (or very limited) non-voluntary disclosure, evidentiary privileges are not so important (although this has become an issue in the context of EU Commission competition enquiries in which parties can be ordered to disclose all relevant documents).*

*Written statements by factual witnesses are not used in civil law courts but they have become commonplace (and often mandatory) in the English courts, their main purpose being to avoid lengthy direct examination at the trial. The witness evidence will be written out, often in a very long document that is drafted with the lawyers. At the hearing the witness is asked to confirm their statement, and they may be asked questions by their counsel for 15 minutes. After that opposing counsel begins cross-examination. In common law jurisdictions trial counsel can meet with the witnesses and discuss the case and the witness' evidence, but this is prohibited in some civil law jurisdictions. Also, officers and employees of a party to the litigation may give evidence in common law countries, while this is not always the case in civil law procedure.*

*In the civil law, experts have an important and influential role and are often appointed by the court. In common law systems, experts may be appointed by the court but more often each side appoints its own. They will submit lengthy reports and reply reports and meet with the other side's experts to seek to narrow their differences. They are then cross-examined at the trial. More often than not, the experts take diametrically opposite views, which is of little assistance to the court. Indeed, English judges are becoming increasingly critical of experts that behave more like advocates for their side rather than independent and impartial consultants.*

*Another difference relates to cross-examination. This is the peculiar practice of the common law where one side's trial lawyer may ask the opposing party's witnesses almost any question they like in an attempt to confuse and humiliate them. Sometimes a single witness can be cross-examined for days on end, but traditionalists argue that it is the only way to unmask the truth. Civil lawyers often despair at how much time cross-examination can take and say that some questions seem to be completely pointless. As a result of lengthy cross-examination, common law trials are on average significantly longer than civil law trials.*

**John H. Langbein, Historical Foundations of the Law of Evidence: A View from the Ryder Source, 96(5) Columbia Law Review, 1168-1202 (1996), p1168-1169**

*The great chasm that separates the modern Continental legal systems from the Anglo-American systems is largely about the conduct of fact-finding. On the Continent, professional judges take the main responsibility for investigating and adjudicating, although the lawyers for the parties guide and limit the judicial inquiry in important ways. In the Anglo-American legal tradition, by contrast, we parcel out this work of fact-finding among three sets of actors: the lawyers for the parties, the professional judge, and the laypersons who serve as jurors. We leave to the lawyers the responsibility for gathering, sifting, and presenting*

*evidence of the facts. Prototypically, our trial judge sits with a jury. Although many cases fall outside the jury entitlement, and in many others the parties waive it, jury trial remains the presumptive norm in American civil and criminal procedure. The judge who presides over this jury court mediates between the lawyers and the jurors. The judge superintends the lawyers as they adduce their competing versions of the facts and the law for the jurors, and the judge instructs the jurors on the standards they should apply to determine the dispute.*

*A fundamental consequence of these radically different arrangements for the conduct of fact-finding has been the difference in attitude toward what Anglo-American lawyers call the law of evidence. Sit in one of our trial courtrooms, civil or criminal, and you hear counsel interrupting incessantly to raise objections founded upon the rules of evidence. These incantations are so familiar that they have passed into the popular culture. Close your eyes and you can hear Perry Mason or the protagonists of "L.A. Law" or similar television fare bound to their feet, objecting fiercely: "Immaterial!" "Hearsay!" "Opinion!" "Leading question!"*

*Cross the Channel, enter a French or an Italian or a Swedish court-room, and you hear none of this. Over the past two decades I have had frequent occasion to observe German civil and criminal proceedings. I have heard much hearsay testimony, but never a hearsay objection. No one complains of leading questions, and opinion evidence pours in without objection.*

Please take note that no judicial system that exists in the world fall perfectly as inquisitorial or adversarial system.<sup>19</sup>

## **Exercise**

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<sup>19</sup> William Twining, *Rethinking Evidence: Exploratory Essays*, Cambridge University Press, (2006), p195.

Tatek states that oral evidence is more important in adversarial systems due to two reasons. First, the system has developed respect to oath (keeping ones word as an English culture). Second, as the jury is the trier of the fact, it is proper that the evidence be presented before them so that they can look into the witnesses' emotions and feelings.<sup>20</sup>

Comment

The role of the professional judge in American trials is different from that in the continental European systems: he is an arbitrator; establishing the truth is reserved for the parties to the trial, who exercise the right of examination and cross examination in order to do so. Criminal procedure 2001, on the other hand, emphasizes the active role of the judge and his responsibility for establishing the truth. If necessary, the judge can have experts and witnesses called up *ex officio*. If, after the investigation is closed, it proves in chambers that the investigation was complete, it is possible that the case will be reopened, and further investigative acts can be ordered. (Theo de Roos, Criminal procedure 2001, p122)

In major criminal cases, the judge will under no circumstances be able to limit himself to 'verification' of the results of the preliminary investigation. If the defence is lacking in quality, the judge will have to be extra alert. (Theo de Roos, Criminal procedure 2001, p123)

Comment

## **1.4 Evidence law in Ethiopia**

### **1.4.1. Development of evidence in Ethiopia**

There are sources that indicate that the Ethiopian litigation system has always been more of adversarial. Almost every matter was subject to private prosecution, the individual victim initiating the system.<sup>21</sup>

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<sup>20</sup>Tatek Tadesse, Fundamentals of Evidence Law (Amharic) (2003EC), p15.

<sup>21</sup>Sedler, the Development of Legal Systems: the Ethiopian Experience, 562-635 (1967), p622.

- o Verify the validity or not of the above statement by referring to your legal history and traditions course discussions.

Moreover, Ethiopians are referred to be litigious people. *'To the Ethiopian, a right necessarily means something that he can enforce in court, and he will be insistent on enforcing rights. Litigation will continue to be very frequent, and vindication of rights in court will be very important to the people.'*<sup>22</sup> Abera Jember supported this assertion by, among others, citing a saying: *'behig kehedech bekloye, yalehig yehedech doroye'*<sup>23</sup> and an Ethiopian love for justice is demonstrated by the Tigrigna saying: *'bedagna ztekoretsetedis darga zela'*.

General E. Virgin as cited Melin summarized his vivid eyewitness account of court proceedings conducted according to the indigenous mode of litigation of Ethiopia, in the following manner:

*The Abyssinian is a born speaker and neglects no opportunity of exercising this talent. A law-suit is a heaven-sent opening and entails as a rule a large and appreciative audience: now threatening and gesticulating, now hoarsely, whispering with shrugged shoulders, now tearfully, he tells of his vanished farthing, and points a menacing, trembling finger towards the accused. The judge in the midst of circle of spectators, having listened to the eloquence with a grave and thoughtful men, now invites the accused to reply. Like a released spring he leaps up, and with raised hands calls heaven to witness his innocence, the falls on knee, rise, stands on tip toe, drops back on his heels, shakes his fist under the nose of his adversary and approaches the judge with clasped hands, while all the time unceasing stream of words pours lips. What can you understand from the above statement made General E. Virgin?*

<sup>22</sup>Sedler, the Development of Legal Systems: the Ethiopian Experience, 562-635 (1967), p623.

<sup>23</sup>Abera Jembere, An Introduction to the Legal History of Ethiopia, 1434-1974, Shama Books, 2012.

The traditional procedure of litigation was transmitted from generation to generation by oral tradition. This procedural law includes the law of evidence, which incorporate a highly sophisticated technique of interrogation and cross-examination known as *Tatayyaq Muget*. *Esette-Ageba-Muget* was interchangeably used with *Tatayyaq* to denote features of court proceedings and the same mode of litigation.

*Leba shai* and *awchachin* are the two commonly cited systems of fact finding in Ethiopian history. The following excerpt shows how the methods worked.

**Abera Jembere, An Introduction to the Legal History of Ethiopia, 1434-1974, Shama Books, 2012, p238-240;**

On *leba shai*

*Leba shay* was a method employed to identify a thief by using a young boy who had not attained the age of puberty. He was made to drink a beverage made of a certain herb. One end of a strip of a cloth would be tied around the waist of the boy and the chief of *leba shay* would follow the intoxicated boy wherever he went by holding the other end. Since it was believed that water would neutralise the effect that the herb would have on the boy, great care was taken to keep him away from it. In the house where he collapsed, he would again be made to drink the beverage so that he could identify the particular individual from among the inhabitants of the house. The boy would push aside anyone he meets entering the house of the suspected culprit. Any person whom he laid his hand would be taken as a suspect and brought before a court of law. At some stage of its development, supplying information to the boy was made a part of the practice. This brought more harm than the service it rendered, for it could easily be manipulated to serve individual interests.

During the reign of emperor Zewditu (r. 1916-1930) an investigation for a thief who had stolen a garment from the palace was conducted by *leba*

*shay. The chief of leba shay hinted to the intoxicated boy to indicate someone as the person who has stolen the garment. The person thus picked was a well-known personality among the imperial courtiers but he was not on good terms with the chief of leba shay. This incident triggered a lot of controversy among the imperial courtiers, particularly when it was later discovered that the garment had been found after it was offered for sale at the market and that it had been stolen by a maid of the palace.*

#### *On Afersata*

*The afersata (in some regions of Ethiopia, it is referred to as awchachine or ewese) was a device by which all male members of a community would assemble to identify an offender. Whenever a person or a group of persons reported to the local chief or other official that cattle had been stolen, that they had been robbed or that one of their relatives had been murdered, the local chief (chiqa shum) or the village chief (dug) would call on all male members of the community in that locality to assemble in a fixed place on a given date. In the assembly, the elders would call upon each person to tell whom he suspected. Every person would declare the identity of the person he suspected or what had been told to him by the 'singing bird'. The person who would testify the identity of the criminal under oath was kept secret and referred to as 'bird'. The person thus identified as the offender would be prosecuted and convicted before a court without having the chance to confront the witnesses for prosecution.*

*In what is now the Gondar region, the person who said that he saw the commission of the crime was known as a 'bird' (wof), while the one who testified as having heard it from another person was referred to as a 'stone' (dengay). A prosecution would take place against the person who was identified as the offender by the testimony of the 'bird' or the 'stone'. It was an established practice not to allow anybody to go home until the identity of the criminal was established. ....*

*A law regulating afersata meetings was issued on August 2, 1933. This law provided that gatherings be conducted on Sundays only. The person who revealed the identity of the suspect, pursuant to this law, was made to testify before the court. Hence, this law made it possible for the accused to confront witnesses for the prosecution. A person who failed to attend such gathering would be liable to a payment of a fine (adafagne). If the people failed to identify any person responsible for the alleged crime, the entire community would be liable to make the damage good. ...*

*Later on, circular letter was issued by the Ministry of Interior that required the attendance of a policeman in all such meetings. Furthermore, when the investigation was over, the so-called 'bird' was required to testify openly before the court.*

#### **1.4.2. Ethiopian law of evidence**

- o What system does the Ethiopian judicial system adhere to- the civil or common law?

It is very difficult to group Ethiopia in either of the legal systems by its laws of evidence. Ethiopia does not have a codified evidence law. On the other hand, it also does not follow the common law practice of trial by jury.

The Ethiopian criminal procedure and civil procedure codes follow the common law approach of litigation. Sedler presents the more adversarial approach of the criminal procedure and guarantees of the criminal accused as evidence of Ethiopia's system of litigation tilting towards common law approach.<sup>24</sup> On the civil procedure side, the presence of pleading, stage preclusion, a separate trial as opposed to conferences and proof-taking, direct and cross-examination, and specific powers and limitations for the judge make the Ethiopian civil litigation more of a

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<sup>24</sup>Sedler, *The Development of Legal Systems: the Ethiopian Experience*, 562-635 (1967), p622.

common law in its approach.<sup>25</sup> In both proceedings the parties are responsible to presenting and proving their cases, an approach in line with the common law system.

The Civil Procedure Code makes exceptions to the adversarial and party presentation principles of the common law system through the degree of control of the court in the civil proceeding. More chance to parties to correct their mistakes through first hearing; the possibility for the court to ask for additional evidence even in the presence of admission; court framing issues without being limited to pleadings of the parties; liberal amendment of the pleadings and the broad powers of the court to examine parties' witnesses and to call additional witnesses are the major exceptions in the civil proceeding system.<sup>26</sup> These provisions are necessary, as Sedler states, because of the need to prevent grave consequences from procedural mistakes.<sup>27</sup>

Enactment of the draft evidence code would consolidate the common law position of the Ethiopian evidence system. The Draft Evidence Rule 1967 followed the Indian evidence system, which in turn follows the common law evidential system.<sup>28</sup>

## **Exercise**

British experts were working as judges in Ethiopia soon after the resumption of power by the emperor after the Italian occupation. The civil and criminal procedure codes were influenced by the common law legal system. This led to the dominance of common law characteristics of the Ethiopian evidentiary rules.<sup>29</sup>

## **Comment**

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<sup>25</sup>Sedler, the Development of Legal Systems: the Ethiopian Experience, 562-635 (1967), p622.

<sup>26</sup>Sedler, the Development of Legal Systems: the Ethiopian Experience, 562-635 (1967), p625. See Arts 91, 235(2), 241, 246, of the Civil Procedure Code.

<sup>27</sup>Sedler, the Development of Legal Systems: the Ethiopian Experience, 562-635 (1967), p625.

<sup>28</sup>Tatek Tadesse, Fundamentals of Evidence Law (Amharic) (2003EC), p29.

<sup>29</sup>Report of the drafting taskforce, (2012), p4.

### **1.4.3. Need for codified evidence rule**

Concerning the Ethiopian case, though it does not have codified evidence law, many matters of evidence are found scattered in different codes. The civil procedure code, for example, talks about facts in issue and presentation of evidence. The same is true with criminal procedure code. The civil code part on capacity and proof of contracts, for example, are also the concern of evidence laws.

There has been a drafting process being done. This drafting process has one thing as a premise- Ethiopia does not need to conform to any of the legal systems. The drafters then reached consensus on the importance of a separate codified evidence law. The justification given is different from that of the common law legal systems. The justification is on its importance to the whole public.

‘Whether we need codified evidence law must be based on the problems we face, not based on the legal system we follow. The common law systems use of codified evidence law cannot solely be based on the presence of jury as trier of fact. Even after abolition of it in some cases, the legal system still has codified evidence law. Moreover, evidence law is not only for the trier of the fact, but also to the police, prosecutor, attorney, etc.’<sup>30</sup>

- o How do you think is this related the public as a whole?

Law has to be clear to the general public so that they can understand them and apply it in practice. The judges and attorneys are presumed to know the general principles of law of evidence. However, majority of litigants argue by their own (with no legal aid). These litigants have no knowledge of evidence rules. There must be a codified evidence law that specifies the detail points that will show the people on how to argue their

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<sup>30</sup>Report of the drafting taskforce, p9.

case. This is also being seen in the common law legal system countries. Some nations are avoiding the jury system while retaining their codified laws.

Moreover, litigations must be predictable. Predictability is one important derivative of due process. A litigant must know what will happen if he produces something or does not do. In evidence the person must know what facts must be produced, what are relevant and admissible, how he can prove a certain matter and other evidentiary issues. There must be a standard- the codified law- on which to judge the functioning of the court. If a decision of a court is not, for example, according to the standard, the losing party will have confidence to appeal. But if there is none, it will be difficult to appeal.

Absence of codified law of evidence brought about differences in application of evidential principles and difference in decision on similar cases. Moreover, there is no easy access to the evidential provisions dispersed in the different laws. The constitutional provisions are not also implemented leading to miscarriage of justice.<sup>31</sup>

## **Exercise**

If rules of evidence were to be codified, what tier of government do you think has the power to make the law- the federal legislator or the state councils?

### **1.5 Evidence in civil and criminal cases**

We have said that certainty is never the objective of the rules of evidence. Beyond certainty what a trier of fact strives to achieve is a probable result, the intensity of probability differing according to the standard of proof required for the case. The fulfillment of the legal burden does not necessarily show that the decision reached is absolutely

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<sup>31</sup>Report of the drafting task force, p2.

true. Errors will be committed and the whole effort of the adjective laws is to reduce them.

The difference between evidence laws in civil and criminal matters emanate from this logic. How far is a system committed to reduce errors? What if an error occurs?

One of the reasons for stricter rules of evidence in criminal cases is because the gravity of the potential consequences of errors in criminal matters is worse than errors in civil matters. In civil cases, there are two possible outcomes: either the plaintiff wins or he does not, though there may be instances where both parties are not satisfied by the outcome.<sup>32</sup>

At the end of a criminal proceeding we may have any of the four possible outcomes:

a) convict the guilty; b) acquit the innocent; c) acquit the guilty; and d) convict the innocent person. These are the only alternatives from which we make our preferences known. The first two are correct and just outcomes.<sup>33</sup> To what extent is the third outcome (*acquittal of criminals*) to be tolerated to avoid the fourth outcome (*conviction of the innocent*) is a decision to be made by the criminal justice system.

- o At this point, you can refer to criminal procedure course's discussion on the models of criminal justice: the due process and crime control models.

Despite the difference in extent all systems accept the last outcome to be worse. It is also worse when compared to the wrongful outcomes in civil proceedings.

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<sup>32</sup>If, for example, the plaintiff has claimed cancellation of a contract and compensation and the defendant defended against both claims; and the court only supported the claim for cancellation. The plaintiff may be dissatisfied with the rejection of the compensation claim and the defendant dissatisfied by the decision of cancellation.

<sup>33</sup>However, issue of appropriateness of sentence may still be raised with the first outcome.

This is therefore the reason for possible differences between the purposes of civil and criminal proceedings.

The standard of proof is one illustration. In common law, criminal guilt is to be determined by 'beyond reasonable doubt' standard while civil liability only requires fulfilment of 'preponderance of evidence' standard. Hence, a person, against whom negligent body injury claim is brought (both civil and criminal), may be acquitted by the criminal bench and at the same time be ordered to pay compensation by a civil bench due to the differences in the standards.

Differences can also emanate from the constitutional protections in favour of a suspect or an accused. Arts 19 and 20 of the Constitution enshrine rights of suspects and accused respectively, which have high significance in shaping the law of evidence.

The following excerpts clarify the distinction of evidentiary rules in civil and criminal cases:

**William Twining, Rethinking Evidence: Exploratory Essays, Cambridge University Press, (2006), p224**

*Criminal Evidence remains the most important area of controversy. Here the disagreements are primarily political. The central issues relate to the relationship between, and the priorities to be accorded to, competing values. Utilitarians, following Bentham, tend to express this in terms of balancing the costs and benefits of rectitude of decision, on the one hand, and vexation, expense and delay on the other. One weakness in Bentham's treatment was that he failed adequately to analyse and elaborate on what is encompassed by 'vexation'; another is that, even on his own terms, it can be argued that he miscalculated the extent and intensity of such 'vexations' as wrongful conviction, just as most modern treatments of litigation tend to underestimate the vexations or pains for*

most participants of being involved in litigation at all – the mischiefs of misidentification being merely one example. Modern economic analysis has produced much more sophisticated utilitarian assessments of both civil and criminal litigation. Many[myself included] do not think that even the most sophisticated versions of utilitarianism can adequately take account of some of the most important values that bear on the risks of wrongful conviction, fair procedures, and acceptable treatment of suspects and of other participants in criminal process. One does not necessarily have to embrace a theory of procedural rights in order to maintain that a very high priority indeed should be given to the principles of non-conviction of the innocent and fair and humane treatment of all participants in litigation, including suspects. Rectitude of decision can, and in my view should, be an important value for non-utilitarians as well as utilitarians. Reconciling and balancing values and principles in criminal process is problematic for all of us.

**Mike Redmayne, The Structure of Evidence Law: Foundations of Evidence Law by Alex Stein, 26(4) Oxford Journal of Legal Studies, 805-822 (2006), p805**

Here is a fairly straightforward sketch of the theoretical structure of evidence law. Fact-finding involves decision-making under uncertainty,' that is, in situations where we cannot be absolutely sure of where the truth lies. The best that fact-finders can do, then, is assess the probability of liability. Fact-finding should be conducted rationally, therefore we can think of it as governed by the rules of probability theory. These rules provide a framework within which fact-finders should draw on their general experience to assess the probability of the evidence presented and, ultimately, of the facts in issue. Because fact-finders make decisions under uncertainty, evidence law needs to provide rules specifying the degree of certainty required for a verdict. Such rules are termed standards of proof. Standards of proof can only be set by considering what is at stake in a finding of liability, so at this point accounts of the rules governing civil and criminal trials diverge. In civil trials, the basic

*presumption is one of equality between claimant and defendant: a mistake affecting one side is as serious as a mistake affecting the other. Decision theory can then be used to show that the civil standard of proof should be set at a probability of 0.5, the 'balance of probabilities', a rule which has the additional merit of minimizing the number of expected fact-finding errors. The presumption of equality does not apply to criminal trials, where the censure involved in a finding of liability, as well as the 'hard treatment' which frequently follows such a finding, point to a higher standard of proof.*

### **Issues to ponder**

1. 'Analysis of our procedural laws may suggest that while criminal procedure insists in finding the truth as predominant aim, the civil procedure is more concerned about settlement of disputes.'

Comment

2. Look into the following provisions of laws and cassation court decisions. Analyze what they imply about the nature of the Ethiopian judicial system.

### **Criminal Procedure Code**

Art 136(1): '..... *He shall do so in an impartial and objective manner*'

Art 136(4) *The court may at any time put to a witness any question which appears necessary for the just decision of the case*

Art. 143. - *Additional witnesses.*

*(1) The court may at any time before giving judgment call any witness whose testimony it thinks is necessary in the interests of justice.*

*(2) The prosecution and the accused may call any witness whose name does not appear on the list of witnesses. Such witness shall be summoned where the court is satisfied that he is a material witness and the application for a summons is not being made for the purpose of delaying the case.*

*(3) The prosecutor may in a case committed for trial to the High Court call any witness who has not given evidence at the preliminary inquiry where he informs the accused in writing of the name of the witness he proposes to call and of the nature of the testimony he will give.*

*Art. 194. - Additional evidence.*

(I) In dealing with an appeal the court of appeal, if it thinks additional evidence is necessary, shall record its reasons and may take such evidence itself.

(2) Evidence taken in pursuance of sub-art. (1) shall be taken as if it were evidence taken at the trial in the court of first instance.

### **Civil Procedure Code**

Art 124(a)- discretion of the commissioner to call any other person he deems proper

Art 145, 256 and 345

### **Federal Supreme Court Cassation Division Decisions**

Volume 12, FN 66767- court does not have the obligation to call additional evidence;

Volume 9, FN43005: perjury; additional evidence after judgment for conviction, not possible

Volume 9, FN39853: parties must present all their evidence first and those which they cannot, they can ask for court's assistance (Art 145 of Civil Procedure Code). Additional evidence in Arts 256 and 345; In appeal, additional evidence is accepted if it was improperly rejected by lower court; court deems it necessary for proper determination of justice; or based on reasonable application of parties.

### **Chapter Summary**

## **CHAPTER TWO: PROOF WITHOUT NEED TO ESTABLISH EVIDENCE**

### **- Introduction**

A person alleging some fact must bring evidence to prove that particular fact. This is the general principle of evidence law. However, there are some facts in which the court does not require the person asserting them to prove the same. These facts that do not need to be proved are the concern of the chapter.

The first exception applies where a party admits a fact by making a formal admission either before the trial or at the trial. The second exception applies where the proof of the fact in issue may be presumed by the court from an inference drawn from one or more primary facts. And the third exception to the general rule is dealt under the doctrine of judicial notice. Judicial notice covers those facts that are so well known and notorious that it is not necessary for a party to prove that fact formally to the court.

### **- Chapter objectives**

## **2.1. Admission of facts**

In the fact finding process, if a party accepts some of the facts alleged against him, there is no law requiring the trier of fact to hear additional evidence to prove the fact. Such admission can be taken to prove the existence of the fact in a conclusive manner. For the admission to have such effect, it must have been adduced before a trier of fact.

Formal or judicial admission refers to admission made before a tribunal. It can be made as part of a proceeding, as in the statement of defense or by the parties before the tribunal. It is this type of admission for which a court cannot be required to ask for proof. The admission can be taken as a full proof of the issue.

On the other hand, informal or evidentiary or extra-judicial admission refers to admission made outside courts. If an informal admission of the existence of a fact is made by a party, such admission can be presented to the trier of fact by the opposite party. Whether it will be valid evidence, its admissibility and the weight to be attached to it are to be determined by pertinent laws. We must refer to the laws of relevance, admissibility and weight discussed in the next chapter to answer the questions.

The party who has admitted a fact outside a tribunal may not be able or willing to give that admission before the tribunal. Such outside-of-tribunal admission is presented by, probably, the opposite party. Hence, such kind of admission is regarded as hearsay evidence and rules of hearsay must be applicable to it. For instance, if admission made by an accused before the police officer is produced as evidence by the prosecutor, it is hearsay. Chapter 4 will discuss the admissibility of hearsay. Therefore, informal admission is not the admission which is the discussion of this section.

In the preceding chapter, the reasons for stricter rules of evidence in criminal cases than in civil cases were discussed. One of the manifestations of such strictness is the rule on judicial admissions. This can be expressed in two ways. First, there is wide scope of admissions in civil cases than criminal cases. One example is the status of silence in the proceedings- while it is taken as admission in civil, it is not admission in criminal proceeding. Second, even when there is admission, the tribunal in criminal cases may order additional evidence.

To clearly understand the status of admissions in both civil and criminal case, we must classify the admissions in civil and criminal cases.

## **I. Admission in civil cases**

The need for evidence arises when there is a dispute between the plaintiff and defendant on certain fact. Art 247 of the Civil Procedure Code defines an issue as a material proposition which is affirmed by one party and denied by the other. According to the above provision, a fact will be an issue only if it is alleged by the plaintiff and denied by the defendant. So, admission by defendant makes a fact not to be an issue.

Admission as conclusive evidence of the existence or non-existence of a fact is applied when the admitting party makes it before the trier of fact, be it a court, a commissioner or jury. An admission is said to have been made before the trier of fact in civil cases when it is made in the following cases.

### **i. Admission by pleadings**

Art 248 of the Civil Procedure Code indicates pleading as one source of framing issues. In fact, civil proceeding starts with written pleading from the parties. Hence, affirmations and denials are to be made in the

pleadings. A party can also, directly or indirectly, admit a fact alleged by the other.

- o You need to recall your discussions on pleadings from civil procedure course.

This type of admission is made on the statement of defense or a reply to a counterclaim. The statement of defense is a written document submitted to a court that specifies the response to the statement of claim filed by a plaintiff; and the reply is a written document submitted to a court that specifies the response to the counterclaim filed by a defendant.

NB: The following discussion on statement of defence also relates to a reply.

### **Clear Admission**

The first case of admission by the statement of defense is clear admission. In this case the defendant expressly admits some facts stated by the plaintiff in the statement of claim. So, if a certain statement of claim states that the plaintiff was injured by the defendant's car and the defendant in his statement of defense clearly admits the fact, the court will not frame an issue on whether defendant's car inflicted injury on plaintiff. The injury will be regarded as proved since the defendant clearly admits it. Art 247(1) of the Civil Procedure Code states *"issues arise when a material proposition of fact or of law is affirmed by one party and denied by the other."*

### **Failure to properly deny**

Admission is not always clear, however. If defendant fails to deny some facts alleged by the plaintiff, it can amount to acceptance of such facts. Art 83 of the Civil Procedure Code states in this regard:

### **Art83: Denial to be specific**

It shall not be sufficient for a defendant in his statement of defense to deny generally the grounds alleged by the statement of claim or for a plaintiff in his reply to a counterclaim *to deny generally the grounds* alleged by the defendant and each part shall deal specifically with each allegation of fact of which he does not admit the truth *except damages*.

Silence, therefore, means admission in civil cases and this admission found from the pleading is conclusive proof against the party who failed to deny facts asserted by the other party. Though Art 83 accepts non-denial as admission, it does not apply to compensation claims; in the latter case, court must hear evidence even though defendant did not appear. The FSC CD has passed a binding decision on this issue:

የፌ/ብ/ሥ/ሥ/ሔግዴንጋጌቁጥር 235(2)

የሚነግገውብግሌፅያሌተከፊሬነገርእንታመነዕቆጠራሌየሚሌሲሆንይህተዳሚነቱተከሳሽቀርቦከርከሩንባሰማጊዜነው።

ከዚህምላሊበፌ/ብ/ሥ/ሥ/ሔግቁጥር 83

እንተመከተውብመርህረጃበተከሳሽብግሌፅያሌተከፊሬነገርእንታመነየሚቆጠርሲሆንምየካሳጥያቁሊያገንይህምትተዳሚሉሆንእንማይችሉነው።

ስሆንምበተያዘውጉዲይአመሌካችቀርቦያሌተከፊከረሲሆንምየዲኝነትጥያቄውየካሳጥያቄእንመሆኑመጠንቀርቦእንኳሊከፈርፈሬ/ቤቱበማስረጃጉዲዩንማጣራትእንዲበትአመሊካችነው።ከዚህእንፃርየሥርፈሬ/

ቤትተጠሪእንከሱያስረዲሌኛሌያውንማስረጃሰምቶመወሰንሲገባውተከሳሽቀርቦአሌተከፈረምወይምአሌከምበሚሌብ

ቻውሳኔመስጠቱከተጠየቀውየዲኝነትጥያቄእናከሥነሥርዓትሔጉየመግትአመራርመርህአኳያጉዴትያበትሆኖአግኝተና

□□□<sup>34</sup>

The other case of admission by pleadings concerns Art 235 of Civil Procedure Code.

### Art 235: Evasive Denial

- (1)Where a defendant denies an allegation of fact in the statement of claim, *he shall not do so evasively*, but answer the point of substance and if an allegation is made with

<sup>34</sup> Mulsa Beyecha v Debele Beyecha, Sene 14, 2002, Volume 9, FN48632, page 348.

diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

- (2) Every allegation of fact in the statement of claim, if not denied specifically or by necessary implication, or stated to be not admitted in the statement of defense, shall be taken to be admitted except as against a person under disability: provided that the *court may in its discretion require any fact so admitted to be proved otherwise than by such admission.*

Whenever there is evasive denial it may not be clear to what the denial is directed to and in this circumstance, the court may reject the general denial and consider them to be admitted. Thus, at trial, the plaintiff will not be required to introduce evidence to prove the allegations. However, this does not prevent the court from ordering the proof of a fact evasively denied

**ii. Admission in examination of parties-** Arts 124, 128, 241, 242, 243 CPC

The pretrial stage of a civil proceeding is conducted to examine both parties of a case. As part of the stage, examination of parties is conducted to clarify the points that were raised in the pleadings. Evidence will not be produced at this stage except for some cases that can be settled without the need to conduct a full scale trial. Both pleadings are read to the parties and they will have to say something on it. If during the proceeding, one of them accepts a certain fact alleged by the opposite party, the fact will be taken as established against the person admitting. The court will not require evidence to prove such admitted fact.

**iii. Admission by agreement-** Art 252 CPC

Parties may at a later stage of a proceeding agree to settle their dispute. In that instance, one party may agree to do what the other demands or

admit a particular issue in the case. When this agreement is submitted to the court and after the court checks the fulfillment of essential conditions of the agreement (like consent, capacity, etc), it will ratify the agreement and the fact agreed will be taken as a fact admitted. This can also be governed by Arts 3312 and 3324 of the Civil Code, without the authorisation of the court.

#### **iv. Admission by testimony-261(2)**

After the case is brought before the trial, the parties will have a chance to say something about the case. The parties can even be witnesses in their own case and will be bound by every particular rule that relate to witnesses including being subject to cross-examination. If at the time of testimony, the parties admit some of the facts as true, it will be taken as admitted facts and, hence, no need for proof.

#### **Exercise**

- What happens to admission by an indispensable party?

## **II. Admissions in Criminal Cases**

When a charge is read to an accused, he will be asked to say something about it. If he says nothing or admits it with some reservation, it will be recorded as a plea of not guilty. The only case in which plea of guilty is recorded is when the accused accepts all the ingredients of the offence stated in the charge as true. In the latter case, the court must make sure that the accused has the competence (mental capacity) to plead guilty and the confession given was free of confusion, misunderstanding and undue influence.

### **Art 134 of the Criminal Procedure Code: Plea of Guilty**

- 1) Where the accused admits without reservation every ingredient in the offence charged, the court shall enter a plea of guilty and *may* forthwith convict the accused.

- 2) Where a plea of guilty has been entered, the court *may* require the prosecution to call such evidence for the prosecution as it considers necessary and may permit the accused to call the evidence.

Once plea of guilty is entered, the court can act in two different ways. It can accept the confession and convict the accused forthwith. In that case, the conviction is not subject to appeal (Art 185(1) of CrPC).<sup>35</sup>

However, if the court is suspicious of the confession, it can order the public prosecutor to produce additional evidence to prove his case. Sometimes, accused persons may confess to a crime they have not committed. The reasons for false judicial admissions can be to mislead justice, to hide the real criminal, to acquire material benefits, to free themselves from some duties, to prove some rumours wrong (for example, if someone was suspected a homosexual, can admit sexual crimes), to get social acceptance, etc.<sup>36</sup>

Also in those systems that follow plea bargaining, some innocent accused persons take the deals especially when the punishments they will suffer are reduced sentences or probation.<sup>37</sup>

### **Issues to ponder**

1. Tatek states that there is jurisprudence showing Ethiopian courts ordering production of evidence in homicide cases.<sup>38</sup> This of course is seen in contrast to the findings of some researches that indicate that false admissions are more common for less serious crimes with less severe consequences. Studies in US

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<sup>35</sup>You can refer FSC CD decision Volume 12, FN 63741 for interpretation of Arts 134 and 185.

<sup>36</sup>JOPTC Module on Evidence, p103.

<sup>37</sup>Allison D. Redlich, Alicia Summers and Steven Hoover, Self-Reported False Confessions and False Guilty Pleas among Offenders with Mental Illness, 34(1) Law and Human Behaviour, 79-90 (2010), p80.

<sup>38</sup>Tatek Tadesse, Fundamentals of Evidence Law (Amharic) (2003EC), p50.

indicate that false admissions are more common in property and drug crimes than violent crimes.<sup>39</sup>

Comment

2. Can confession given to the court be withdrawn at later stages in the trial court? In England, it can be withdrawn with the leave of the court particularly when the defendant benefitted from a lawyer. Judges would not allow withdrawal if a person was supported by a lawyer unless defendant proves that the confession was given by misunderstanding or mistake.<sup>40</sup> However, the court has full discretion to allow the accused to withdraw his plea of guilty at any time before sentencing.<sup>41</sup>

What about in Ethiopia?

3. In England, only the accused can enter plea of guilty.<sup>42</sup> Can the legal representative of the accused enter plea of guilty in Ethiopia? (Refer to the criminal procedure code that discusses trial in absentia)

## **2.2. Presumptions**

Presumptions are assumptions of facts taken by a trier of fact. Presumptions can be made by the law (presumption of law) or be made by the judge (presumption of fact). The law may presume certain facts to exist when some others are proved. For such cases the judge must take judicial notice because they are part of laws. When there is no law obliging a trier of fact to take judicial notice, he can presume a certain

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<sup>39</sup>Allison D. Redlich, Alicia Summers and Steven Hoover, Self-Reported False Confessions and False Guilty Pleas among Offenders with Mental Illness, 34(1) Law and Human Behaviour, 79-90 (2010), p80.

<sup>40</sup>Raymond Emson, Evidence (4<sup>th</sup> ed.) Palgrave Macmillan (2008), p421 citing R v Kolton [2000] Crim LR 761 (CA).

<sup>41</sup>Raymond Emson, Evidence (4<sup>th</sup> ed.) Palgrave Macmillan (2008), p421 citing R v. Dodd (1981) 74 Cr App R 50 (CA).

<sup>42</sup>Raymond Emson, Evidence (4<sup>th</sup> ed.) Palgrave Macmillan (2008), p421 citing R v. Ellis (1973) 57 Cr App R 571 (CA).

fact after hearing some others. This is called permissive presumption because the trier of fact has an option to either presume or not. He does this based on logical inferences. The presumption of the law is, on the other hand, a mandatory presumption because the trier of fact is obliged, by law, to make the presumption.

### **2.2.1 Presumptions of fact**

This presumption is an inference to be taken by a trier of fact based on logic, experience and common sense. It can be based on the idea of regularity (some things are regular), common course of natural events or common course of business, continuance, habit, etc.

*'Presumption of fact is no more than an example of commonly occurring circumstantial evidence from which a common-sense inference has been drawn in the past and might be drawn again for the same reason'.<sup>43</sup>* The trier of fact does it (inferring something unproved from something proved) all the time when it does the fact finding process. Hence, permissive presumption gives the court the discretion to presume the existence of a presumed fact when a basic fact is proved.

For instance, when Art 22 of the Civil Code states in the following way,  
Art 22: Medical Examination

*Where a person refuses to submit himself to medical examination not involving any serious danger for the human body the court may consider as established the facts which the examination had the object of ascertaining.*

it is allowing the court to presume something from refusal of medical examination. Without this provision, the court would not, arguably, be allowed to take the inference.

### **2.2.2 Presumptions of law**

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<sup>43</sup>Raymond Emson, Evidence (4<sup>th</sup> ed.) Palgrave Macmillan (2008), p406.

Under your law of persons course, you have seen that a child is presumed to be conceived on the 300<sup>th</sup> day preceding his birth. What does this mean? What is expected from the person alleging the conception date of a child?

Presumptions are logical inferences from a given fact or group of facts. So, when there are two facts logically connected and a party proves one fact (the primary/basic fact) the second fact (the presumed fact) will also be taken to have been proved, unless there is contrary evidence and production of that contrary evidence is allowed. The theoretical basis for recognizing presumptions is that the presumed fact would, in the normal course of things, flow naturally from the existence of the primary fact. Hence, there is a strong rational connection between the two that makes it unnecessary to require evidence of the presumed fact.

Art. 4(1) of the Ethiopian Civil Code states '*a child shall be deemed to be viable where he lives for forty- eight hours after his birth.*'

In the above provision if a person proves the basic fact (living for 48 hrs) the presumed fact (viability) will be taken as proved by the law and the person has no duty of bringing additional evidences to prove viability. Law imposes on the courts the duty of presuming a certain fact when another fact is proved. The court is with no discretion to decide on the viability of a child who has lived for 48 hours after his birth. It must presume viability when the fact that the child lives for 48 hours is proved. In this case the court cannot ask the one claiming the fact to prove it because the law, through presumption, does prove it.

There are different justifications for applying the concept of presumption:

### **A. Natural Presumptions**

There are some facts which are natural consequence of another fact and in the normal course of events the second fact flows from the preceding first fact. Hence, if the first or primary fact is proved to exist, it can safely be concluded that the second fact does really exist. For example, in presumption of paternity, the family law presumes a child has as a father the husband of the mother. It is natural that if the husband and wife live together, they will consummate the marriage and the law presumes that the father of a child is the husband of his mother.

Natural presumptions are also based on the theory of reason of probability in that the second fact will most probably exist upon the proof of the first fact. This strong correlation suggests that the law shall presume the existence of the second fact if the first fact is proved to exist and no contradictory evidence is submitted against the first fact. Consider the following provision laid down under Art 1193 of the Civil Code which flows from the basis that the most probable owner of a corporeal chattel is the one who is in possession in the time when the controversy arose as to the ownership of a specific corporeal chattel. Person who possess chattel often does own it.

#### **Article 1193: corporeal chattel**

- 1) Whosoever is in possession of corporeal chattel shall be deemed to possess it on his behalf and to be the owner thereof.
- 2) Whosoever disputes such ownership shall have to show that the presumption laid down in sub art (1) is not justified in the circumstances

#### **B. Social Policy**

The law also takes other social policy considerations while presuming facts in favor of one party. Consider the presumption laid down under Art 22 of the Civil Code where many civil cases involving medical

examination would have been lost for individuals may refuse to submit to medical examination.

### **Art 22: Medical Examination**

Where a person refuses to submit himself to medical examination not involving any serious danger for the human body the court may consider as established the facts which the examination had the object of ascertaining.

### **C. Procedural Convenience**

Speedy and smooth trial is envisaged in all types of litigations. But some facts may cause the delay in the litigation process and the law tries to create convenience in the proceedings by presuming certain facts where proof of the opposite is easier than the proof of the presumed fact. Imagine the difficulty and inconvenience around proving capacity of an individual whenever there is a civil case; and that is why a presumption on capacity is laid down under article 196 of the Civil Code.

### **Article 196: proof of disability**

1. Capacity is presumed
2. Any person who alleges the disability of a physical person shall prove such is under disability.

### **Types of legal presumptions**

Legal Presumptions can be classified as rebuttable or irrebuttable presumption. The first is when an opposing party can bring evidence to refute/rebut the presumption made by the law while the second one is when proof to the contrary is disallowed.

#### **- Irrebuttable presumption**

A conclusive presumption is an inference which the court is compelled to make upon proof of the basic fact or group of facts notwithstanding any evidence to the contrary.

**Draft Evidence Rules: Rule 5(3)** provides:

When one fact is declared by these rules or any law to be conclusive proof of another, the court shall, on proof of the one fact, regard the fact as proved and *shall not allow evidence* to be given for the *purpose of disproving it*.

Consider also Article 3 of the Civil Code where no proof to contradict date of conception may be accepted by the court. No proof (for example, medical certificate showing the woman was virgin at the date before 300 days of birth) may be admitted to disprove the presumed fact that the child was conceived on the 300<sup>th</sup> day preceding his birth.

**Article 3: date of conception**

1. A child shall be deemed to have been conceived on the three hundredth day which precedes his birth.
2. *No proof shall be admitted against this presumption.*

It is argued that conclusive (irrebuttable) presumptions are not really presumptions at all but simply compulsory rules of law. This is why it is argued that this presumption is not part of evidence law, rather a substantive rule, as evidence cannot be produced to rebut them.<sup>44</sup> When the law as a matter of some policy wants to make assumptions definite and unchangeable, it writes them in a way which makes no reference to words used in presumptions. For example, the Ethiopian legal system made a definite assumption that persons who have attained 18 years of age are regarded as capable of entering into juridical acts. Also that,

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<sup>44</sup>Raymond Emson, Evidence (4<sup>th</sup> ed.) Palgrave Macmillan (2008), p406.

persons under the age of 18 are unable to give consent to sexual intercourse, making such sexual intercourse a crime. These rules are stated as substantive laws, not presumptions. Some others indicate the word 'presumption' (such as presumption of innocence) but cannot strictly fall under the concept of presumption.

#### - **Rebuttable presumption**

This are regarded as the real evidentiary presumptions because the presumption has itself become evidence that benefits one party. The presumption can be contradicted by producing evidence. Contrary proof is acceptable by the court to rebut these types of presumptions. This can be done by bringing a particular type of proof – certain document, producing a person, etc – or contrary proof can be brought by any means.

Let's see examples:

Art 13 of Procl. No. 668/2010: Effect of Non-Registration of Assets

Any asset of an appointee, an elected person or a public servant not registered in accordance with this Proclamation shall, in the absence of proof to the contrary, be considered as an unexplained property for the purpose of applying the provisions of Article 419(2) of the Criminal Code.

Article 1147 of the Civil Code: Transfer of title

- 1) *Unless the contrary is proved*, he who began to possess on behalf of another person shall be regarded as a mere holder.
- 2) Proof to the contrary may be adduced by *any means*.
- 3) It shall not result from a mere change in the intention of the holder.

- o What are the types of rebuttable presumptions?

Rebuttable presumption can be of two types differing on how rebuttal is to be made. The first type of rebuttable presumption is called freely rebuttable presumption. In the above article, sub article (2) talks about the means of contrary proof. "*Proof to the contrary may be adduced by any means*" gives the other party to produce any evidence that can rebut the presumption stated under sub article (1) of the same article. In this case, the party is free to produce evidence for the rebuttability of the presumption made in favor of the other party.

The second type of rebuttable presumption is proof rebuttable presumption. In this case only limited types of evidence, usually provided by the next sub article or the next article, can be produced to contradict this type of presumption. For example, Art 1195 of the Civil Code lays down the presumption and the next article provides for the types of proof or manner of contradicting the presumption.

#### **Article 1195: 2-title deeds**

The issue by the administrative authorities of a title deed to the effect that a given immovable belongs to a given person *shall raise a presumption* that such person is the owner of such immovable.

#### **Article 1196: proof to the contrary**

The presumption lay down in Art. 1195 shall be rebutted where:

- b) the title deed was not issued in accordance with the law or was issued by an authority having no jurisdiction; or
- c) the title deed was issued on the basis of invalid act; or
- d) the plaintiff acquired the ownership of the immovable after the day on which the title deed was issued.

The presumption of title deed under Art 1195 can only be contradicted by the submission of the fact that either the title deed was issued on the basis of an invalid act, or it was issued not in accordance with the law or by the person having no jurisdiction, or it was issued after acquisition of immovable. No other type of evidence will be accepted by the court to contradict this presumption even though the party moving to contradict may appear with valid numerous evidences. The party is restricted to the limited ways of contradicting the presumption.

Read the excerpts for more discussion on presumptions:

**Raymond Emson, Evidence (4<sup>th</sup> ed.) Palgrave Macmillan (2008), p408-412, 415-416**

*Presumption of fact*

*Proof or admission of the basic fact of recent possession is therefore circumstantial evidence that the accused is guilty of handling but it is no more than that. The accused does not bear any legal or evidential burden to prevent the inference being drawn, although in a practical sense he bears a tactical burden to provide a plausible alternative explanation. E.g.s, 'doctrine of recent possession' (stated above), 'presumption of continuance' (a certain state of affairs existed at a particular time, it may be possible to draw an inference that the same state continued to exist some time later or earlier, although much will depend on the nature of the state of affairs in question and the interval involved).*

*If a man is given a lift into town during daytime and expresses his intention to have sexual intercourse 'tonight one way or the other', his state of mind during the journey can be presumed to have continued until later that night when he is alleged to have raped a woman in a park. The intention of rape is likely to be fairly transitory so, logically, it will not be possible to infer its continuance for more than a relatively short time. A religious, irreligious or political belief, on the other hand, is likely to last*

*for some considerable time and an inference as to its continuing existence will be possible, in the absence of evidence to the contrary, for much as several years after it was expressed.*

*A presumption which is particularly important in criminal proceedings is based on the generalization that people intend the natural and probable consequence of their conduct. If, for example, the accused is charged with the murder of his former employer by planting a bomb under his car, the inference is likely to be irresistible that the accused had the mens rea for murder, but there is no obligation on the jury to draw that inference because the presumption of intention is one of fact and not law (see s. 8 of the Criminal Justice Act 1967).*

#### *Rebuttable presumptions of law*

##### *Due to logic and policy*

*A persuasive presumption is effectively a rule which places the legal burden of proof on a particular party once certain basic facts have been proved or admitted. The basic facts give rise to the presumed fact, and it is for the opposing party to prove the contrary. The presumed fact has no evidential value of its own but merely lays down the rule as to the incidence of the legal burden of proof. However, the basic facts which give rise to the rule may have evidential value, at least where the presumption has a logical basis, and this will need to be weighed in the balance at the end of the trial to see whether the opposing party has adduced sufficient evidence to discharge the legal burden. If no or no sufficient evidence is adduced to discharge the burden (that is to rebut the presumption), the tribunal fact must accept the truth of the presumed fact.*

*An evidential presumption does not affect the incidence of the legal burden of proof but places an evidential burden upon the opposing party once certain basic facts have been proved or admitted. The party relying on the presumption still bears the legal burden of proving the presumed*

*fact, but this burden will be deemed to have been discharged, and the tribunal of fact will be obliged to accept its truth, if the opposing party fails to adduce sufficient evidence to suggest the contrary. If the evidential burden has been discharged, the tribunal of fact will have to weigh in the balance the probative value of the evidence adduced by the opposing party against that of the basic facts and any other evidence adduced by the party bearing the legal burden, in order to determine whether the legal burden has been discharged.*

*If a presumption is persuasive, the opposing party in civil proceedings bears a legal burden of disproof on the balance of probabilities. In criminal proceedings, the prosecution will have to disprove the presumption beyond reasonable doubt, but it is highly unlikely any common law presumption would be held to impose a legal burden of disproof upon the accused if the prosecution was to rely on it. According to the House of Lords in Woolmington v. DPP [1935] AC 462, the accused bears the legal burden of proof at common law only on the issue of insanity. If a presumption is evidential, the opposing party will rebut it by adducing sufficient evidence for the tribunal of fact to find the presumed fact not to have been proved.*

*e.g., legitimacy of a child- presumption itself carries no probative value but simply determines which of the parties bears the legal burden of proof, so even weak evidence against legitimacy must prevail if there is no other evidence to counterbalance it; policy (to ensure that children are not held to be illegitimate unless the fact can be proved to the satisfaction of the court) rather than logic which explains this.*

*Marriage based on status- presumption has traditionally been seen as persuasive one requiring cogent evidence to rebut it- underlying policy that the validity of marriage entered into good faith should be upheld wherever possible.*

*Res ipsa loquitur* ('the thing speaks for itself') to raise a *prima facie* case against the defendant; on this basis, the claimant will establish a *prima facie* case against the defendant, following which the defendant is under an evidential burden to adduce sufficient evidence to the contrary; if the defendant cannot discharge his evidential burden, the judge will be obliged to reach a finding of negligence at the end of the trial. However, the legal burden ultimately remains with the claimant to prove his allegation of negligence on the balance of probabilities.

There is an evidential presumption that the person in possession of property is its owner and a persuasive presumption that a deceased person did not commit suicide. There is also a statutory persuasive presumption that an engagement ring is given absolutely; and a statutory evidential presumption that an accident in the course of a person's employment arose out of it.

### **Issues to ponder**

File Number 29181, Vol 10, p118

In the absence of the defendant, lower courts decided that payments which are due more than two years are deemed to be paid (Art 2024) and declined the claims of the plaintiff

**Issue:** does presumption under 2024 apply even if the defendant failed to appear or did not deny?

Read the decision of the court (including the dissenting opinion) and then read the following excerpt by Worku and discuss the issue

### **Worku Yaze, Operation and Effect of Presumption in Civil Proceedings: An Inquiry into the Interpretation of Art 2024 of the Ethiopian Civil Code, 4(2) *Mizan Law Review*, 258-296 (2010)**

*Acareful reading of the majority and the minority opinions of the court evokes the following questions: 'What are presumptions?' 'Are they items of evidence?' How does a given presumption of law come into operation in a given proceeding? How is such operation related to burdens of*

*pleading and proof? What legal consequence(s) follow from an operation of a given presumption of law? Does the operation of any presumption of law in a given case require courts to follow special rules of evidence and procedure to resolve a dispute in litigation? These and related issues, of course, were the core themes in the case mentioned above.*

*Other subsequent cases bearing similar allegations of non-payment of matured debts falling under Art 2024 of the Civil Code have triggered the same issues. These cases were resolved in accordance with the majority's interpretation of Art 2024 of the Civil Code in the Agency for the Administration of Rented Houses v. Bironi Atikpo case. A minor deviation was shown only last year in Commercial Bank of Ethiopia v Liyew Chekol & Million Mengistu (file number 29181, vol 10) wherein seven sitting judges unanimously observed that the type of presumption under Art 2024 of the Civil Code is a restrictively rebuttable presumption.*

*The judicial interpretation in the cases mentioned above and other cases (both in lower and appellate courts) and the academic debate that ensued demonstrate the difficulties in establishing a proper link between presumptions of law and burdens of proof on the one hand, and burdens of pleading, burdens of proof and presumptions of law, on the other. It is also clear that there is ambiguity in grasping the true nature of presumptions, in identifying the mode of operations and legal effects of the various presumptions. The Cassation cases mentioned above substantiate this fact.*

*As can be understood from the discussion above, a presumption is neither a fact nor evidence. We know that fact, unlike presumption, refers to an occurrence or event or state of affair which is perceptible through our sense organs. We also know that in the strict legal parlance evidence refers to that thing or circumstance or data that establishes or proves the existence or otherwise, the falsity or truthfulness of a fact under inquiry. It refers to one of the means of proof. It consists of oral,*

*documentary and real evidence. But presumption is a different thing. It is not a kind of oral or documentary or real evidence. It may, however, be treated as one other mechanism of proving of facts under inquiry like evidence, formal admissions, or judicial notice - without being confused with any of the latter. To this end, McBaine stresses that it is wrong to treat presumptions as evidence or as something that is equivalent to evidence.*

*Moreover, presumption is neither argument nor an item of evidence. Argument refers to the persuasive propositions of material facts, issues, laws, analysis, reasoning, conclusion and relief submitted by litigating parties while presumption is not. An item of evidence pertains to probative material which consists of oral testimony of witnesses or contents of documents (including electronic and digital data,) or appearance or state of conditions of physical objects while presumption is entirely a different thing. Belton and many others conclude that presumption is not even a substitute for evidence; it is a rule of law or a legal mechanism that operates to affect the evidential and persuasive burdens of litigating parties one way or the other.*

*As most scholars including Morgan, Laughlin, McBaine, and Belton (cited above) correctly stated, the true presumptions are rebuttable presumptions of law. And rebuttable presumptions of law are neither evidence nor substitutes for evidence. Rather, they are rules of law that require judges to draw conclusions about the truthfulness or falsity or the existence or otherwise of facts based upon other proven facts unless the adversely affected parties disprove the conclusions with evidence of any admissible kind.*

*Presumptions without basic facts are said to be presumptions that arise without proof of any particular fact. In such cases we do not have preliminary (basic) facts and presumed facts to be drawn or inferred from basic facts. The law simply says that something shall be presumed*

*until the contrary is proved. No precondition is set for the operation of such so-called presumptions. Truly speaking, such presumptions without basic facts are rules of substantive law that allocate or fix the place of burden of proving or legal burden of proof. It is regrettable that such rules are described in terms of presumptions.*

*Presumptions with basic facts, on the other hand, are presumptions that arise after the initial establishment of some other basic fact. Such presumptions with basic facts only arise when some basic fact is first established. No presumed fact will come into the scene for judicial inquiry without such prior establishment of a basic fact. It is impossible for anyone to bring such a presumption into operation without securing that prerequisite. If W/ro A, for example, institutes a paternity case against Ato B alleging that the defendant is the father of Mamush who denies the existence of marital status and his paternity to the child, the court must draw the conclusion that Ato B is the father of Mamush by virtue of Art 126 of the Revised Federal Family Code if W/ro A can prove the existence of the marriage, and secondly if she can prove that the child was born or conceived during the marriage. The court arrives at this conclusion because plaintiff has proved two basic facts that compel drawing of the presumed controversial fact. The two basic facts are: that there was marriage between plaintiff and defendant, and that Mamush was born while the marriage was intact. The presumed fact that the court must draw is: that Ato B is the father of Mamush.*

*In the case of presumptions with basic facts, once certain basic facts are established or proved, other facts may or must be taken as proved in the absence of contrary evidence or must be taken as proved conclusively. According to Emson, presumptions that require initial proof of basic facts are of three types: (i) presumptions of fact, (ii) irrebuttable presumptions of law, and (iii) rebuttable presumptions of law. For Dennis such presumptions can be subclassified into: (i) provisional presumptions or presumptions of fact, (ii) evidential presumptions, (iii) persuasive*

presumptions, and (iv) conclusive presumptions. There is no basic difference in these further classifications. They all are varieties of presumptions with basic facts; they all fall within that broad categorization of presumptions into presumptions of fact and presumptions of law. It is the latter that is further sub-classified into rebuttable and irrebuttable, or into evidential, persuasive and conclusive presumptions. The evidential and persuasive presumptions are subdivisions of rebuttable presumptions of law. And conclusive presumption is another expression for irrebuttable presumption.

*Presumptions of fact also termed as provisional presumptions denote a conclusion which may be drawn from proof of the basic fact of the presumption, but the court is under no obligation to draw the conclusion, even in the absence of any rebutting evidence. For example if a person refuses to submit himself/herself to medical examination (that does not involve any danger) which a court needs to prove or disprove an allegation invoked in a statement of claim, the Court can, by virtue of Art 22 of the Ethiopian Civil Code, consider the fact Under inquiry as established. Courts may draw inference about certain facts from other proven facts or circumstantial evidence. Emson notes that "to say a presumption of fact has arisen is simply to state that as a matter of common sense it would be permissible to draw an inference from a proved or admitted basic fact."*

*Drawing of such common sense inference from other proven facts is within the discretion of courts. They are thus referred to as permissive presumptions or permissive inferences. Most legal writers label this process of drawing of a conclusion as inference rather than as presumption.*

*A presumption of law is what the law requires a court to make where certain facts are established. Such presumptions may be irrebuttable or rebuttable.*

*Irrebuttable presumptions of law (praesumptio juris et de jure) refer to conclusions that must be drawn by a court on proof of a basic fact. Here, once a basic fact is established, the court must draw a conclusion about the existence or non-existence, truthfulness or falsity of the presumed fact. And it is not open for any other party or for the court to rebut the presumed fact; i.e., no rebutting evidence is allowed to the contrary. Since no rebutting evidence is admissible at any rate, irrebuttable presumptions of law are referred to as conclusive or absolute presumptions. In a paternity case for example, if Ato D admits marriage but argues that the child was conceived after divorce without refuting W/ro C's evidence that the child was born on the 21<sup>0</sup>th day from the date of divorce, the court is bound to draw a conclusion that Mimi is conceived in wedlock. This is because Art 128(1) of the Federal Revised Family Code provides that a child shall be deemed to have been conceived in wedlock if she is born within 300 days after the dissolution of marriage. In this case it is not possible to adduce any evidence with a view to disprove the date of conception. Sub (2) of the article proclaims: "No proof to the contrary shall be admitted."*

*As many scholars in this area observed, irrebuttable presumptions fall outside the scope of the law of evidence. Such presumptions are, properly speaking, parts of the substantive law. As Dwyer stated, "conclusive presumptions allow no proof which might contradict them. They thus provide an absolute basis for judgments in certain fact situations. Such presumptions are therefore more accurately matters of substantive law than of procedural or evidentiary law because of their definitely decisional nature." (Emphasis added).*

*Rebuttable presumptions of law are either persuasive presumptions or evidential presumptions. Persuasive presumptions of law denote a conclusion that must be drawn by a court on proof of the basic fact of the presumption unless and until the party disputing it disproves the*

*conclusion. Here, if a proponent of a basic fact establishes this basic fact with admissible evidence or if the basic fact is admitted by the opponent or if the court can take judicial notice of the alleged basic fact, the court must draw the conclusion on the existence or otherwise, truthfulness or falsity of the presumed fact. And then, it is up to the party against whom that presumption is drawn to satisfactorily disprove that established basic fact with admissible evidence and to prevent the court from considering the presumed fact as established.*

*It is not sufficient for the party against whom this presumption is operating to introduce rebuttal evidence. To win on that issue, this party has to convincingly disprove the alleged basic fact with sufficient degree or quantum of proof. It is not sufficient to create balance of probability, or to put the fact at an equilibrium state of condition in a civil proceeding. This party has to prove with a preponderant degree of persuasion showing that his version is true. If it is a criminal proceeding relating to the elements of the crime under inquiry it is, of course, sufficient if the defendant brings or spreads some reasonable doubt against the prosecution's established basic fact.*

*Evidential rebuttable presumptions of law, on the other hand, signify a conclusion that must be drawn by a court upon proof of the basic fact of the presumption in the absence of any evidence to the contrary. As in persuasive rebuttable presumptions of law, evidential rebuttable presumptions of law first come into the picture in any lawsuit after the initial establishment of basic facts in the litigation process. It is such establishment of the basic fact(s) that activate or bring into operation this type of presumption.*

*Once such a presumption has come into the scene following the proof of the basic fact(s), it has its own legal consequence different from that of persuasive presumptions of law. That effect is to put the incidence of the evidential burden, i.e., burden of going forward with evidence, or simply,*

*burden of adduction of evidence, on the party against whom that presumption applies. This simply pertains to the party that has to move to adduce or present admissible evidence under the pain of losing on that particular issue(s) if the case stops at that point. Of course, mere adduction of some evidence by the party against whom this presumption is operable is not sufficient: rather, it is necessary to adduce sufficient evidence that contradicts the existence of that presumed fact. Yet, this party, unlike the party that bears legal burden, is not expected to convince judges about the truthfulness of the fact under investigation on his side as compared to his opponent because bringing the minds of judges to the state of equilibrium is sufficient to win on the issue under inquiry. In short, evidential presumptions do not affect the incidence of legal burden of proof.*

*Whether a given rebuttable presumption of law is of a persuasive or evidential nature has to be checked from the express or implicit gist of the law. One has to check by asking the following two questions. (1) Which of the two opposing parties in the litigation risk losing on an issue of fact under inquiry, in the face of an operable rebuttable presumption of law, if the case stops at a given point? (2) Which of the two opposing parties in the litigation risks losing on an issue of fact under inquiry, in the face of an operable rebuttable presumption of law, if the cogency of evidence produced on both sides remain at equilibrium?*

*In the case of evidential presumptions of law, once a basic fact is established, the court is duty bound to draw a conclusion about the existence (or absence), the truthfulness (or falsity) of a disputed matter of fact in the absence of evidence to the contrary. This "shifts" 68 the burden of adduction of evidence from the party who bears the burden to the opposite party against whom that presumption is operating. As the court is legally required to give a decision on the basis of the presumption in the absence of evidence to the contrary, this party, therefore, bears the burden of adduction of sufficient evidence- evidence*

*that is sufficient to raise doubt against the conclusion that should be drawn in its absence. This party's rebuttal evidence must be strong enough to justify a finding in his favor if the case stops at that point. If his evidence brings equal probability, or puts the matter in equilibrium at the end of the litigation process, or if the court is left in doubt at the conclusion of all the evidence, the party with the evidential burden wins on that issue. That is because the party in favor of whom the presumption is operating, i.e., the beneficiary of the presumption, still bears the burden of persuasion.*

*In the case of persuasive presumptions of law, however, the court is duty bound to draw a conclusion about the existence or otherwise of the fact in dispute unless such conclusion is disproved **by** the other party disputing it. Such presumptions operate to place a legal burden on the party challenging the presumed fact. Here, unlike evidential presumptions, the legal burden of proof "shifts" from the beneficiary of the presumption to the party against whom that presumption is operable. Hence it is not sufficient for this latter party to adduce some evidence. It is necessary for this party to adduce evidence that convinces judges of the truth on his side with greater probability. Putting the matter at equilibrium will not be sufficient for this party.*

*The Cassation Division, which consisted of a panel of five judges, examined the case in the absence of the respondent. The issue framed by the Cassation Division was "whether it is possible to apply the presumption contained in Art 2024 of the Civil Code in the circumstance where a defendant did not deny the alleged money debt or in the circumstance where the case is proceeded exparte."*

*In this writer's opinion, the majority in the Cassation Division and the judges in the lower courts should not have invoked Article 2024 and raised an affirmative defense of payment of money on their own.*

*As defendant did not raise any defense, there was no single fact in favour of defendant, which the court could have established. Defendant did not allege a fact that could be established/proved by drawing a conclusion from another alleged and known (that could be judicially noticed) or admitted or proved fact. There was no basic fact; and there was no presumed fact alleged by defendant that the court had to deduce from. As shown before, presumption of law envisages certain conditions. There are no ideal facts that exist in the vacuum. There had to be an asserted fact, the truthfulness or otherwise of which could be established by proving a related basic fact. In the case at hand, there was no fact, or circumstance that commands calling for and applying any presumption of law in favor of the defendant.*

*Art 89 of the Civil Procedure Code This provision does not stipulate about the exemption of a party's burden of pleading as such. It rather provides for an exception to the rules of pleading embodied in Articles 80 to 88 of the Civil Procedure Code. This pertains to the exception rule whereby a party to a lawsuit may be exempted under certain circumstances from pleading some facts in preparing his statement of claim or defense. The facts that may fall within this exception are those that the law presumes in favor of one, and those other facts that the other party to a dispute bears burden of proof. In such instances, the party that bears burden of pleading is not required, in principle, to plead specifically alleging such facts which the law presumes to exist in one's favor or which the law imposed the burden of proving on the opponent. Again, this exception will not be applicable if such fact is already specifically denied by the other party in his pleading. By providing the exceptional situations where parties may be exempted from burden of pleading of some facts, the provision clearly states the need to allege other facts in pleadings. There hardly exists a principle of law or rule of positive law or case law that entirely relieves a party to a dispute from his burden of pleading on the assumption that a given rebuttable presumption of law will be applicable in the case.*

*As made clear in earlier sections of this Article, a given presumption of law, on the other hand, imposes burden of adduction of evidence or burden of persuasion or both on the other party provided that the beneficiary of the presumption proves certain other basic fact(s).*

*The main focus of this article has been on cases of true presumptions of law, i.e., rebuttable presumptions of law. These presumptions clearly presuppose the establishment of basic facts before courts resort to drawing conclusions regarding the presumed facts. Such basic and presumed facts must be part of the allegations of the parties in dispute. It is the assertions of facts in the pleadings that provide the foundation for evidential and persuasive burdens. Mere allegations of facts may not force the coming into operation of such presumptions of law because proving of basic facts is indeed a requirement. Admission of such basic facts **by** an opponent may relieve the proponent from the burden of establishing the asserted basic fact. This is also true if the basic fact alleged is of a kind which courts may take judicial notice of. Otherwise, it is hardly possible to see the coming into operation of such presumptions.*

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### **2.3 Judicial Notice**

In principle, a party alleging the existence of a fact must present evidence to support his claim. The opposite party brings arguments and evidence to challenge the claims made by the party. A trier of fact in an adversarial system decides the matter by looking into the arguments and evidence produced by the opposing parties.

Moreover, the trier of the fact relies on what is presented by the parties and cannot use his personal knowledge in reaching a decision. There was a time in history, as seen in the previous chapter, where juries would decide based solely on their personal knowledge. The trier of fact might be influenced by his understanding and personal knowledge of a situation

in weighing evidence and passing a decision. However, the adversarial litigation does not allow a trier of a fact to base its decision on his personal knowledge. Doing so would violate the principle that *'the parties should have a fair opportunity to address all the material considered by [the decision making body] when reaching its verdict'* (R. v. Karakaya [2005] EWCA Crim 346 para. 24).<sup>45</sup>

It is excepting these two principles that the concept of judicial notice is developed in evidence. When a fact is taken judicial notice on, a party who presented the fact would not be required to present evidence to prove it. The trier of the fact takes the fact as proved. *'Judicial notice may be defined as a mechanism by means of which a court accepts a proposition as proved, without evidence to that effect having been formally adduced.'*<sup>46</sup>

There would be no reason to require evidence for a fact which is commonly known or which can be known with easy reference. It goes contrary to efficient use of the tribunal's time. *'Judicial notice is therefore aimed at streamlining the proceedings by eliminating fanciful disputes, while still ensuring that the decision is based on proven facts.'*<sup>47</sup>

There are three generally recognized matters of judicial notice. The fourth one is due to the special power given to FSC CD to pass binding decisions.

- i. Facts of common knowledge
- ii. Facts of public knowledge
- iii. Laws
- iv. Federal Supreme Court Cassation Decisions

## **i. Facts of common knowledge**

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<sup>45</sup>Raymond Emson, Evidence (4<sup>th</sup> ed.) Palgrave Macmillan (2008), p420.

<sup>46</sup>BSC Martin, Judicial notice of foreign law, 31(1) The Comparative and International Law Journal of Southern Africa, 61-77 (1998), p65.

<sup>47</sup>BSC Martin, Judicial notice of foreign law, 31(1) The Comparative and International Law Journal of Southern Africa, 61-77 (1998), p65.

Facts of common knowledge are facts generally known to be true by the people in the community where the court sits. It takes no excellence to know the fact that there is the day and there is the night. It is not a fact of judicial notice if only an individual (for e.g., the judge) or member of a group know the fact. The knowledge must be common in the community and any member is, in that case, presumed to know the fact.

A fact of common knowledge in one place may be a fact of public knowledge or even an ordinary fact in other places. A judge in Gurage is not expected to know the location of Mekelle University. Hence, a party alleging the fact can be required to prove it. For the determination of common knowledge, the fact must be commonly known in the area where the court accepting the fact has jurisdiction.

### **Exercise**

What happens if a trier of fact does not know a fact which is regarded as common knowledge? Can he order production of evidence for its proof? Can he get the information outside of the tribunal?

The trier of fact shall ascertain fact which is of public knowledge. Facts of common knowledge are more notorious than facts of public knowledge. This shows us that the trier of fact can easily ascertain the fact of common knowledge and he should. So, in the above example, a trier of fact may come from another place and is handling his first case. This trier of fact may be unaware where a public school in the locality is located. He can ascertain the location using any of the means without the need to require evidence.

### **ii. Facts of public knowledge**

These facts are not facts of common knowledge. However, these facts can easily be ascertained by referring books or other documents. The fact that Meskerem 17 is a public holiday may not be a common knowledge. Even the judge can be unaware of this fact. However, it is

easy for the court to refer calendar and know the truth of the assertion. It does not need any evidence from the person alleging the fact.

In this case too, what makes judicial notice to be taken on a fact is its ascertainment as truth. The fact that is referred in the texts must be indisputably true. The court cannot, for example, take judicial notice of opinions of citizens. The truth of the opinions must be proved by the party alleging the opinion. After inquiry, the facts must be indisputable facts. In such cases, the court may also receive expert opinion evidence as part of its inquiry to reach the indisputable fact.<sup>48</sup>

Cases of geographical divisions and historical issues fall under this category. It is easy to reach undisputable fact, for example, on the fact of the duration of the flight of the Ethiopian from Addis Ababa to London.

### **iii. Judicial notice of laws**

The triers of fact must base their decision on pertinent laws and it is they themselves who determine which laws to apply. There can be arguments on the application of laws and their interpretation but courts are expected to know and apply the law. So, is law part of a fact which needs to be proved? The answer is no.

Evidence is produced to prove or disprove matters of fact and not matters of law. Disputes relating to the law are to be solved by interpreting the law, not by producing evidence.<sup>49</sup>

Art. 2(3) of Federal Negarit Gazeta Establishment Proclamation No. 3/1995:

All federal or regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of laws published in the Federal Negarit Gazeta.

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<sup>48</sup>Raymond Emson, Evidence (4<sup>th</sup> ed.) Palgrave Macmillan (2008), p418.

<sup>49</sup>JOPTC Module on Evidence, p12.

The courts are one of the entities that are to take judicial notice of laws published in the Federal Negarit Gazeta. This proclamation is federal law and obliges all organs in the country to take judicial notice of federal laws.

As state laws are also to be enacted in accordance with the FDRE Constitution and regional states and federal government has the duty to respect the laws of each other, it follows that organs must also take judicial notice of state laws.

It is a common sense that state judiciary must interpret state laws and must take judicial notice of such laws. On the other hand, the federal judiciary may rule based on state laws. This happens in cases of conflict of law issues. In applying the state laws, the federal judiciary is taking judicial notice of state laws. States also need to take notice of each other's laws when they apply different state's laws.

#### **iv. Judicial notice of decisions of Federal Supreme Court Cassation Division (FSC CD)**

Another matter of judicial notice emanates from the Amendment Proclamation 454/2005. This proclamation was enacted to amend the Federal Court Establishment Proclamation No. 25/1996. The amendment proclamation under Art 2(4) established a precedent system in that the decisions of the FSC CD would be binding, as authoritative interpretations, on all Ethiopian courts (regional and federal).

- o Do you remember the system of precedent?

This would mean that all courts would take judicial notice of the decisions of the FSC CD.

#### **Issues to ponder**

What part of the decision of the court is to take judicial notice on- the *ration decidendi* only or the *obiter dicta* too? Read the following excerpt and comment

**Kalkidan Aberra, Precedent in the Ethiopian Legal System, 2(1) *Ethiopian Journal of Legal Education*, (January 2009), p34, 39**

*In common law legal systems, the court cannot go beyond the issues raised by the parties in giving its judgment; this part of the judgment is called ratio decidendi and is binding while decisions on facts before the judge but not covered by the argument is called obiter dicta and is not generally binding. Moreover, no case could be precedent if the court gave two or more reasons for it.*

*In principle, the court cannot go beyond the issues formulated by the parties to a case and if a party has conceded a point, a decision on that point is not binding. But sometimes the judge goes beyond the points raised in the pleadings, e.g., he suggests that he would have decided the case in the same way even if the facts had been somewhat different. In such circumstances, the part of the judgment that is unrelated to the facts before the judge and generally not covered by the arguments of the parties is not strictly binding. However, some scholars have thought that it is rather absurd for a later court to ignore a deliberate statement of law on a given set of facts if made by a judge or court of several judges after full discussion, even though it goes a little outside the facts argued on the case.*

*Another problem may arise where the court finds its legal ruling in its findings of fact, but states that it would be the same on different facts. For instance, if a counsel argues that his client should recover damages because he falls under a certain category, but she cannot recover damages for some reason, irrespective of his category. The ruling that one cannot recover (p40) damages is one reason and the classification of the plaintiff is another. And it has been held that one cannot accept one*

*reason and reject the other as a matter of personal choice, otherwise, no case will be precedent where the court gives two of more reasons for its judgment. (in these two paragraphs, she cited A.K.R. Kiralfy, The English Legal System, (London: Sweet and Maxwell, 8<sup>th</sup> ed, 1990, p77-78)*

### **Issue to ponder**

Based on the above reading, opine on the following issue:

Look into the case below and determine which is part of the *ratio decidendi* and which is part of *obiter dicta*

FSC CD, Vol. 15, FN78470: can a party who has won in civil case be punished in criminal case which required the same evidence? Art 2149- if convicted, conviction is relevant to the civil case- this is because standard required in criminal case is more stringent than civil cases (also stated under FN 46386; this indicates that the evidence which is not sufficient for civil cases cannot be sufficient for criminal cases; person freed from civil liability (FN 69179); the act in both cases is similar- conviction contradicts spirit of Art 141 of CrPC and a contrario reading of 2149; one judge differs on the reasoning though accepted the decision: differs on the interpretation of Art 2149; this article states that a person acquitted cannot be said to have no civil liability- it does not imply- 2149's a contrario reading shall not be applied due to its special nature and purpose; the prosecutor can present the evidence heard in civil case in a better way and refute evidence presented by the defendant; the mere fact of lack of civil liability does not amount to acquittal in criminal cases; in the particular case, the prosecutor did not prove his case, so, acquittal was proper; an evidence which was not competent in the civil case cannot be competent in criminal case.

- Are lower courts also expected to take the interpretation on Art 2149 (application of criminal conviction on civil cases)?

FN 46386, Vol 13- court will have the duty to evaluate all relevant evidence; a contrario reading of Art 2149- criminal conviction is relevant

to civil cases on same issue- the evidence presented in both cases must be the same; however, the present case is not the same with the previous criminal case, hence, no obligation to take it as evidence

- What point in this decision are the courts bound to take judicial notice on?

- **Judicial notice of foreign laws?**

The common law regards foreign laws as facts.<sup>50</sup> Hence, when a party wants to benefit from a foreign law, he has to produce it to the trier of fact. He also has the obligation to persuade the court on what it means, i.e., its interpretation. Proof can only be made, however, by an expert who has adequate knowledge of the foreign law presented.<sup>51</sup>

What about in Ethiopia?

- **Judicial notice of decisions of foreign courts**

There is no law or principle that imposes general obligation of triers of fact to take judicial notice of foreign laws or decisions of foreign tribunals. When the issue the trier of fact is entertaining is a matter of enforcement of decisions of foreign tribunals, Ethiopian tribunals may be required to recognize such decisions.

For instance Art 13 of Proc No. 657/2009:

A final judicial order or judgment that provides for the confiscation of property, connected to money laundering or the financing of terrorism, issued by a court or other competent authority of another country shall be recognized by Ethiopian court as evidence.

- **Judicial notice of international laws and international agreements?**

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<sup>50</sup>BSC Martin, Judicial notice of foreign law, 31(1) The Comparative and International Law Journal of Southern Africa, 61-77 (1998), p61.

<sup>51</sup>BSC Martin, Judicial notice of foreign law, 31(1) The Comparative and International Law Journal of Southern Africa, 61-77 (1998), p62.

Art 9(4) of the constitution makes international agreements ratified by Ethiopia part and parcel of the law of the land. Moreover, Art 13(2) makes international human rights instruments tools of interpretation in applying the human rights provisions of the constitution. Hence, such laws shall be noted by the Ethiopian courts in determining court cases.

For the other laws, there is no obligation on the courts to take judicial notice.

Read the excerpt below for more on judicial notice:

**Colin Manchester, Judicial Notice and Personal Knowledge, 42(1) The Modern Law Review, 22-28 (1979), p24, 27-28**

*The principle laid down, then, allows a judge or jury to make use of their general knowledge, but not their personal knowledge. The meaning of "general knowledge" in this context initially seemed to have encompassed only knowledge which was common to the whole community-the court in Rosser referred to general knowledge "which any man can bring to the subject," while in Ernest Jones it was what the jury knew of the state of the country and of society generally (which, presumably, would be what was known universally throughout the country). Thus it would seem that, in its initial development, the principle only allowed judicial notice to be taken of matters which were common knowledge throughout the country and not, it is submitted, of matters which were common knowledge within the locality of the court. It seems to have been a later extension whereby notorious local matters were regarded as matters of general knowledge.*

*Thus a number of questions remain unanswered regarding the extent to which judicial notice can be taken of notorious local facts. Whatever that extent might be, however, the principle that judicial notice can only be taken of matters of common knowledge, whether in relation to the whole country or a particular locality, and not of particular knowledge, is clear.*

*The application of the principle, unhappily, has not been so clear, for it is not always easy to draw a distinction between common and particular knowledge. The point is succinctly put by Wigmore "Where to draw the line between knowledge by notoriety and knowledge by personal observation may sometimes be difficult, but the principle is plain." That plain principles do not always make for easy applications is highlighted by the decision in R. v. Field JJ., ex parte White. A grocer had been charged with selling adulterated cocoa and the point in issue was whether cocoa must necessarily contain a quantity of foreign ingredients. Admiral Field, the chairman of the petty sessions, and two other justices used personal knowledge they had acquired in the Navy (that cocoa did contain foreign ingredients) in arriving at their decision, and their use of this knowledge was upheld by the Divisional Court. In the course of upholding the decision, Wills J. said: "no one, in determining a case of this kind, can discard his own particular knowledge of a subject of this kind. I might as well be asked to decide a question as to the sufficiency of an Alpine rope without bringing my personal knowledge into play." It is a matter of conjecture in what kinds of cases one cannot discard one's own knowledge, and so be justified in using it, and it is submitted that his Lordship's words cannot be regarded as laying down any statement of principle. It is further submitted that the decision must be regarded as falling very close to the dividing line, if indeed not on the wrong side of it. Surely this was not a matter of general notoriety or something which could be put beyond dispute by reference to appropriate sources of information.*

*It is submitted that there is no authority for the proposition that, with regard to the use of personal knowledge, the position should be different for laymen than lawyers. It is true that it will certainly be easier for a lawyer to exclude his personal knowledge than for a layman, and it is probable that in any event laymen will use their own knowledge in a number of instances, but it would surely be illogical to justify the use of that knowledge on this basis. It is therefore submitted that no distinction*

*should be drawn between laymen and lawyers in this respect, and that the same principles should apply to both. The rule in Reynolds, that personal knowledge of notorious local matters can be used if properly applied and within reasonable limits, is the correct approach to be adopted. It is impossible to lay down any more precise limits, and the court must have regard to the facts of each individual case in deciding whether the use of such knowledge is proper and within reasonable limit.*<sup>52</sup>

### **Issues to ponder**

Defendant was charged with sale of intoxicating liquor in violation of a city ordinance. Proof of sale of beer alone was offered. Held, that judicial notice of the fact that beer is intoxicating cannot be taken. The fact must be proved. *Du Vail v. Augusta* (1902), - Ga., -, 42 S. E. Rep. 265. The court in its opinion says that it cannot be assumed that beer is intoxicating. The kind of beer should have been alleged, whether persimmon, rice, or lager, to more fully inform the court of its nature. This is the first time this question has been presented to this court, and while the decision cites no authorities, its holding is sustained by *Blatz v. Rohrbach*, 116 N. Y. 450, 6 L. R. A. 669; *Netso v. State*, 24 Fla. 363, 1 L. R. A. 825.<sup>53</sup>

Comment. What would be the decision if the case was presented before Ethiopian tribunals?

## **Chapter Summary**

### **CHAPTER THREE: RELEVANCE AND ADMISSIBILITY**

#### **Introduction**

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<sup>52</sup> Colin Manchester, *Judicial Notice and Personal Knowledge*, 42(1) *The Modern Law Review*, 22-28 (1979), p28.

<sup>53</sup> *Criminal Law: Evidence: Judicial Notice that Beer is Intoxicating*, 1(3) *Michigan Law Review*, 228-229 (1902), p228.

In a proceeding, both civil and criminal, the trier of the fact must determine some questions on fact and evidence before rendering a decision based on them. First, the court shall determine what facts must be proved by parties to win their respective claims. The determination is made from the substantive law that defines the matter. Such facts are facts at issue. If, for example, the claim is compensation based on default in performance of a contract, the contract laws define what facts must be fulfilled to decide on the side of the plaintiff. The criminal laws determine what facts need to be proved to convict an accused and punish him and also all the defences he can produce to be free from liability.

Second, whenever a party wants to prove the fact at issue, he can do so through other facts that have correlation with the fact at issue. These are relevant facts. A fact is relevant fact if it supports or negates one or more of the facts at issue. The relevance of a fact to a fact at issue may be determined by law or may be left to the trier of the court. One of the major differences in approach discussed under chapter 1 on codification or not of law of evidence is on whether to determine relevance by law or not. For instance, the Draft Evidence Rules 1967 included list of relevance evidence. When the determination of relevance is to be made by the trier of the fact, it is made based on logic and general experience.

Third, a relevant fact presented as evidence to prove a fact at issue is in principle admitted by the trier of the court. However, there can be a rule that makes relevant evidence inadmissible. This can be through a blanket prohibition of admissibility of the evidence or by specific consideration on case-by-case basis. Hence, there are some facts which are deemed inadmissible and there are some which are, after looking into circumstances of the case, contrary to some important policies.

Fourth, a fact admitted by the trier of the fact must be given some weight. What amount of weight is to be given to a certain relevant fact or evidence is to be decided by the trier of the fact. This is the issue of

evaluation or weighing of facts and evidence. The probative weight of a fact or evidence is determined by the trier of the fact.

Not all facts are to be proved in court of law. This is because unnecessary facts will merely create burden on the court and will in effect result in delay of proceedings. So facts to be proved must be facts which are material facts of the case. They must either be facts in issue or facts which are relevant to the facts in issue. Moreover, these facts must also be admissible. This chapter mainly deals with the question 'what facts are to be proved'.

## **Chapter Objectives**

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### **3.1. Facts in Issue**

When we deal with the facts in issue in criminal cases, we refer to the elements of a certain offense. Facts in issue in criminal cases are, therefore, the commission by the accused of the material element, the presence of any mental element and any defense going beyond a mere denial of the prosecution (e.g., legitimate defense, necessity...). For example, if the accused does not plea guilty to the charge of arson, the whole elements Art 494 of Criminal Code will be facts in issue. It is with regard to these facts that the public prosecutor must proof beyond reasonable doubt. The elements under Art 494(1), which are facts in issue, are:

- Did the defendant act maliciously or with intention of causing danger of collective injury?
- Whether he set fire to his or another's property?

In a civil case, any fact is in issue if, having regard to the pleadings and the substantive law, it is a fact necessary to the success of any claim or defense disclosed by the pleadings. For instance, Abera in his statement of claim stated that he concluded loan with Hailu. Hailu, in his statement of defense, stated that there was no loan contract. The fact in issue in this case is whether there was contract of loan between the two.

As a conclusion, the facts in issue in a case, sometimes called ultimate facts, are the facts which a party to litigation (including the prosecution in a criminal case) must prove in order to succeed in his claim or defense and to show his entitlement to relief (or to obtain a conviction). Such facts are often said to be '*material*' to the case. The substance of these facts is not the concern of the law of evidence, but may be derived from the substantive law applicable to the cause of action, charge or defense in each case. In procedural terms, they are to be found in the pleadings or charge, as the case may be. Moreover, parties in civil proceeding can by agreement frame the fact at issue.

A fact will be in issue if it is alleged by one party and denied by another. In the second chapter, you have seen that admitted facts need not be proved.

### **3.2. Relevant Facts**

Article 137 of the Criminal Procedure Code (*questions put in examination-in-chief shall only relate to facts which are relevant to the issues to be decided* and to such facts only of which the witness has direct or indirect knowledge) and Article 263 of the Civil Procedure Code (*questions put in examination-in-chief shall only relate to facts relevant to the issues to be decided* and only to such facts of which the witness has direct or indirect knowledge) provide that only relevant facts can be proved.

A relevant fact is a fact that has a tendency to make a fact in issue of a certain proceeding be *more or less probable* than it would be without the evidence. Evidence is relevant if it has sufficient rational probative value to create an inference of the existence or non-existence of a fact in issue. The subject of relevance explores what additional facts it would be proper for the court to consider.

It is difficult, if not impossible, for the law to state all facts which are said to be relevant because the chains of circumstance that give some evidence its probative value are infinite in their variety. This is the reason relevance is stated in general terms (any fact that advances the inquiry for truth finding is relevant fact). Rule 401 of the US Federal Rules of Evidence puts it:

*'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence'.<sup>54</sup>*

A fact is relevant only when measured against a fact at issue or a fact relevant to the fact at issue. For instance, a person's blood type has nothing to do in contractual agreements by a person. The contract could have been made or performed by any person with any blood type. However, when a case concerns a criminal act in which the criminal is proved to have blood type A, a person's blood type is material evidence. If it matches with the suspect's blood type, it makes it more likely that the person is the suspect; if it does not, it makes it less likely, if not unlikely, that the person is the suspect. To what extent the probability works is to be determined by rules of weighing evidence.

Federal Supreme Court Cassation Division in its File Number 75980 (Volume 13 of the compiled decisions) defines relevant facts in criminal matters.

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<sup>54</sup>James W. McElhaney, *Arguing Relevance*, 13(2) *Litigation*, 49-50, 56-58 (1987), p50.

*'Circumstantial evidence is evidence that tend to prove the matter by providing events or circumstances from which the occurrence of the matter at issue can be reasonably inferred. They do not bear directly the fact in dispute but make clear various attendant circumstances from which the judge might infer the occurrence of the fact in dispute.'* This includes acts, behaviour, conversation before, during or after the incident.

Draft Evidence Rules, 1967 had eleven provisions (Rules 7-17) that describe what facts may be considered as relevant in addition to facts in issue, which are always relevant and admissible. Relevant facts provided in this respect are made admissible for they have a close bearing in explaining the fact in issue. Following is a list of these rules together with their illustrations. (They are mainly taken from the Federal Teaching Material on Law of Evidence).

#### **A. Facts forming part of the same transaction (Res Gestae)**

These are facts surrounding an event. To state a fact or event in isolation, without reference to its antecedents in time, place or event is impossible to comprehend. A witness, for example, is permitted to state facts, not in a meaningless isolation, but with such reasonable flow and in such reasonable context as will make them comprehensible and useful.

Some facts are so closely connected with the fact in issue to be in reality part and parcel of the same transaction.

Rule 7 of the DER on this regard states:

#### **Rule 7:**

Any fact is relevant which, though not in issue, is so connected with a fact in issue as to form of the same

transaction whether both facts occurred at the same time and place or at different times and places.

These facts may come into picture either to explain or accompany the main fact in issue. They occurred simultaneously or immediately before or after the event which consists of the main fact in issue and testified by the parties or other persons around them. In most of the cases these facts are taken as a circumstantial evidence.

For instance, A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating, or so shortly before or after the beating as to form part of the same transaction, is a relevant fact.

#### **B. Facts being the occasion, cause or effect of facts in issue**

A fact is said to be in occasion to a fact in issue if the fact creates an opportunity for the event in the fact in issue to exist.

A fact is said to be a cause to a fact in issue if it is the exact reason for the event in issue to exist.

A fact is said to be an effect of a fact in issue if it comes after and has a logical connection with the fact in issue.

The DER to this effect states:

#### **Rule 8:**

Any fact is relevant which is the occasion, cause or effect, immediate or otherwise, of facts in issue or relevant facts or which constitutes the state of things under which such facts happened or which afforded an opportunity for their occurrence or transaction.

So, to solve a dispute on whether A robbed B, the facts that, shortly before the robbery, B went to a fair with money in his possession and that he showed it to third persons or mentioned that he had it to third persons are relevant.

### **C. Motive, preparation and previous and subsequent conduct**

Identifying motive is very important particularly when there is no direct evidence. Motive can be inferred/deducted from words, facial expressions and acts. The conduct of the suspect when he saw a police officer or if he was watched by people while he was staring at a person who has been robbed will, for example, also be relevant. This is stated under Rule 9 of the DER.

#### **Rule 9:**

- 1) Any fact is relevant which shows or constitutes a motive or preparation for a fact in issue or relevant fact.
- 2) The conduct of any party or of any agent to any party, to any proceedings, in reference to such proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any persons an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.
- 3) When the conduct of a person is relevant, any statements made to him or in his presence and hearing, which affects such conduct is relevant.
- 4) Without prejudice to anything contained in these rules concerning the relevancy of statements, the word 'conduct' in sub-rules (2) and (3) of this rule does not include statements which accompany or explain acts other than statements.

For instance, in a case where A is tried for the murder of B, the facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

#### **D. Facts necessary to explain or introduce relevant facts**

If facts can explain a relevant fact will be relevant by themselves.

#### **Rule 10:**

A fact which:

- ✓ Is necessary to explain or introduce facts in issue or relevant fact; or
- ✓ Supports or rebuts an inference suggested by a fact in issue or relevant fact; or
- ✓ Establish the identity of anything or person whose identity is relevant; or
- ✓ Fixes the time or place at which any fact in issue or relevant fact happened; or
- ✓ Shows the relation of parties by whom any fact in issue or relevant fact was transacted,

is relevant in so far as it is necessary for that purpose.

For instance, the state of A's property and of his family at the date of the alleged will may be relevant facts if the question is whether a given document is the will of A.

#### **E. Facts not otherwise relevant become relevant**

Some facts are irrelevant if they stand by themselves. But when we connect them with a certain relevant fact, they will be relevant. The best example for such type of evidence is the defence of alibi. When a person proves the fact that he was at a certain place in a particular time, it seems it has nothing to do with a certain criminal case. However, if the time of commission specified in a certain charge is, for example, 9:00

A.M and the person proves that he was in a place other than the place of commission of the crime, he will be set free. The above fact would have been irrelevant but with a relevant facts, it itself becomes relevant.

**Rule 12:**

Facts not otherwise relevant are relevant where:

- i. It is inconsistent with any fact in issue or relevant fact, or
- ii. By itself or in connection with another fact or facts it makes the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

For example, the question is whether A committed a crime at Adgrat on a certain day. The fact that, that day, A was at Adwa is relevant. The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render highly improbable, though not impossible he committed it, is relevant.

A fact that shows that a witness cannot be trusted is another fact that fall under this category. The evidence submitted for this purpose may have nothing to do with the main issue. So, in a murder case, the accused may ask the defendant, in an examination in chief, some questions which have no direct relation with the act (murder). But if the accused is successful in creating doubt about the credibility of the witness, relevant facts stated by that witness will be inadmissible. This kind of evidence is called to refute the facts of the case.

**F. Facts showing existence of state of mind, of body or bodily feelings**

**Rule 15:**

- 1) Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill will or good will towards any particular person, or showing

the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

- 2) A fact relevant as showing the existence of a state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Provided that where, upon the trial of a person accused of an offence, the previous conviction of an offence by the accused is relevant within the meaning of this, the previous conviction of such person shall also be relevant.

For instance, A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of particular stolen articles. The fact that, at the same time, he was in possession of many other stolen articles is relevant as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

### **G. Facts bearing on question whether act was accidental or intentional**

#### **Rule 16:**

When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that act formed a series of similar occurrences, in each of which the doing of the act was concerned, is relevant.

For example, A is accused of burning down his house in order to obtain money for which it is insured. The fact that A live in several houses successively, each of which he is insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

In general, the relevant fact whose production acts as evidence to prove a fact at issue can be a prospective, concomitant or retrospective fact.

NB: these are not the only relevant facts that court takes into account in deciding a matter. As was mentioned above, a relevant fact is a fact that makes the existence of a fact at issue more or less likely. Hence, the above statements are meant to show what relevant facts can be. The list cannot be an exhaustive list of relevant facts.

Section 3.3 of the material discusses some specific issues of relevance and admissibility.

### **3.3. Admissibility**

There are two rules in admissibility. One is that if a fact is not relevant to a fact at issue, it is inadmissible. Relevance then is a condition for admissibility.

Second, a fact which is relevant is, in principle, admissible. However, a fact is relevant does not necessarily mean that the trier of fact will use it in its fact finding process. While some rules apply to all relevant evidence, the others are rules applied to specific relevant facts. The specific facts may be inadmissible because of their nature or the way they are acquired.

So, to say a fact is relevant is not to say too much as the relevance of a fact, though essential, is not the only condition for admissibility.

Admissibility, like relevance, is measured in terms of the facts at issue or facts relevant to the facts at issue. Hence, for instance, *'bad driving record offered to show that the truck driver was negligent is not going to*

*be admissible. That same record may come in to show that the employer was negligent in letting the driver have a truck.'*<sup>55</sup>

While a certain fact may have a remote possibility of supporting or negating a fact in issue and hence logically relevant, may not be regarded as legally admissible. For example, as per the US Federal Rule of Evidence 403:<sup>56</sup>

*'[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'*

Unfair prejudice means that the trier of fact will use the evidence the wrong way or may give it too much weight. In the jury system, this happens if jurors are to be prejudiced despite instructions from the judge about it.<sup>57</sup> However, the factors stated for inadmissibility must *substantially outweigh* the probative value of the fact to make the latter inadmissible. Hence, the law sides with admissibility.

The limitations to admissibility described in the above rule are mainly because of the doubt on the jury's capacity to properly assess what is presented to them.<sup>58</sup> They can be prejudiced, confused or misled by a fact or evidence. The judge must make sure this does not happen by preventing a calling party from producing such fact. The judge does this following an objection from the opposite party, which the judge sustains. If the fact or evidence is presented, the judge instructs the jury to ignore

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<sup>55</sup>James W. McElhaney, *Arguing Relevance*, 13(2) *Litigation*, 49-50, 56-58 (1987), p50.

<sup>56</sup>Mike Redmayne, *The Relevance of Bad Character*, 61(3) *The Cambridge Law Journal*, 684-714 (2002), p686

<sup>57</sup>James W. McElhaney, *Arguing Relevance*, 13(2) *Litigation*, 49-50, 56-58 (1987), p56.

<sup>58</sup>Regina A. Schuller, *Expert Evidence and Hearsay: The Influence of 'Second Hand' Information on Jurors' Decisions*, 19(4) *Law and Human Behaviour*, 345-362 (1995), p346.

the inadmissible fact. Its inclusion may also warrant a new trial.<sup>59</sup> This is why rules of exclusion are more important in jury trials than judge trials.

### **Issues to ponder**

How does this general exception work in Ethiopia? Do Art 146 of the Criminal Procedure (*where the prosecutor or the accused objects to the admission of any evidence or the putting of a question to a witness the court shall decide forthwith on the admissibility of such evidence*) and Arts 138 (The court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection) and 270 (*where any question to a witness is objected by a party or his pleader and the court allows the same to be put, the question, the answer, the objection and the name of the person making it shall be recorded together with the decision of the court thereon*) of the Civil Procedure Code imply the discretion of the court to consider the general exception of admissibility of relevant evidence?

Read the following excerpt for arguments regarding the discretion of triers of facts in determining admissibility of evidence:

### **Eleanor Swift, One Hundred Years of Evidence Law Reform:**

**Thayer's Reform, 88(6) California Law Review, 2437-2476 (2000), p2441-43, 2446-47, 2451, 2476**

*To Thayer, Wigmore, and Morgan, extending the judge's "discretion" to admit or exclude evidence meant freeing this decision from the burden of the common law system of appellate court precedent that purported to control, through detailed rules of law and findings of trial court error, the outcomes in a large number of cases. Central to the project of all three reformers was narrowing the scope of, or prohibiting altogether, appellate review of the trial judge's decision to admit or exclude evidence.*

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<sup>59</sup>Regina A. Schuller, Expert Evidence and Hearsay: The Influence of 'Second Hand' Information on Jurors' Decisions, 19(4) Law and Human Behaviour, 345-362 (1995), p346.

*Thayer and Morgan, but not Wigmore, also advocated that evidence law should consist of principles rather than detailed rules in order to promote the exercise of trial court discretion.*

*The primary example of guided discretion in modern evidence law is Federal Rule of Evidence 403, which states a rule of exclusion that applies to most trial court decisions: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."*

*The criteria that the judge must consider in deciding whether to admit or exclude the evidence-probative value, danger of unfair prejudice, and so on-are explicitly stated, although not defined. The standard by which the judge must compare them in order to exclude an item of evidence-the danger must substantially outweigh the value-is also established. The trial judge must consider only these criteria, and must adhere to the Rule's overtly pro-admission standard unless a categorical rule requires admission or exclusion.*

*Second, discretion also connotes a functional mental process, requiring the judge to apply non-mechanical criteria and standards that call for the use of judgment.<sup>2</sup> Evaluating an offered item's "probative value" under Rule 403, for example, necessitates judgments that estimate both the probability of inferences that link that item to the disputed proposition to be proved, and the probative impact of the item in the context of the case. The judge must also evaluate the quality of the danger, such as "unfair prejudice," that an item may present to jury decision making, and estimate the likelihood and degree of that danger, again in the context of the specific case. The comparison of probative value to such dangers also requires judgment, taking the form of "interest balancing" or "factor*

*analysis," which, according to Professor George Christie, has become the dominant technique for making judicial decisions "more sensible accommodations of the often conflicting imperatives of public policy."*

*The third salient characteristic of discretion, well understood by Thayer, Wigmore, and Morgan, is that it is subject to a deferential standard of appellate review. Commentators have described discretion as a "review-restraining concept." Thus, it insures a tolerance for a range of trial court decisions that the appellate judges would not have made them-selves. If appellate judges applied a non-deferential, de novo standard of review to Rule 403 decisions-reversing the trial court simply because they disagreed with its outcome-they would have to justify their own decision in one of two ways: either by reapplying to the specific facts of the case the factors that guided the judgment of the trial judge (in the case of Rule 403, the estimation, evaluation, and comparison process described above), or by announcing a more rigid, result-oriented doctrinal test that would, theoretically, have to be applied by trial courts whenever similar facts appeared.*

*There are both benefits and costs to granting discretion to the trial judge to admit or exclude evidence. Some commentators argue that deferential appellate review of trial court discretion promotes judicial economy by reducing appellate expenditure of time and energy. Proponents of discretion also contend that many questions that arise in litigation, including the decision to admit or exclude evidence, require individualized and flexible decision making based on the particular context of the case; "they involve multifarious, fleeting, special, narrow facts that utterly resist generalization... ." Shoe-horning such decisions into rigid rules would promote error and injustice. And once the need for individualized decision making is acknowledged, trial courts are in a superior position to make decisions that require taking the context and specific facts of a case into account. This serves a truth-seeking function, as "rules allowing room for a trial judge's sensitivity to the complexity*

*and uniqueness of a particular case necessarily should promote truth more than rules providing for only mechanical application of a closed and complete system." The costs of discretion and deferential review are also well known. There are fears that discretionary power will be exercised arbitrarily and unfairly; that broad and ambiguous principles make evidentiary rulings unpredictable to parties preparing for trial and result in inconsistent out-comes; and that the perceived unfairness of inconsistent outcomes, or out-comes dependent on the personality of the judge one happens to draw, could lead to a loss of confidence in the judicial system. Even more troubling, perhaps, is the fear that trial judges, although closer to the context and facts of the case, simply are not capable of making the subtle and pro-found judgments that rules like Federal Rule 403 require.*

*In the debate over trial court discretion, its cited costs and benefits both have validity; indeed, that they do probably accounts for the longevity of this debate in evidence law throughout the twentieth century.*

*Thayer regarded law of evidence as law of exclusion.*

*A frequently quoted passage from his Preliminary Treatise reveals what Thayer regarded as the two most fundamental propositions of a rational system of evidence: first, "a principle which forbids receiving anything irrelevant, not logically probative," and second, "another precept ... that unless excluded by some rule or principle of law, all that is logically probative is admissible." These propositions are another of Thayer's triumphs, recreated as the rule of relevance in every major reform effort of the twentieth century.*

*Our society has increasingly fragmented along lines of racial, economic, and, more recently, technological privilege and underprivilege. These highly visible and highly politicized dividing lines raise significant legal issues and have dramatically changed the kinds of cases that are brought to court. Applications of the evidence rules discussed in this Essay often*

*have (or appear to have) outcome-determinative effects on some of these highly-charged cases. For example, the expansion of the discretionary admission of both hearsay and character evidence has been driven by cases involving drug and other gang-related crimes, raising the specter of racial stereotyping and bias. Class actions brought against technologically sophisticated enterprises for environmental hazards and toxic torts depend on the admission of scientific expertise to establish the link between corporate conduct and harm. Thus, unreviewed discretion lodged in the trial courts to admit or exclude outcome-determinative evidence in such cases assumes far greater legal and political significance than Thayer might have imagined. Should trial court discretion continue to expand the power of trial judges by eroding the bright-line categorical rules that have, for the past one hundred years, defined our system of adjudication? This question about the proper uses of evidence, and of adjudication, in a racially and economically, and increasingly technologically, divided society demands our attention.*

### **3.3.1. Relevance and admissibility of Character Evidence**

#### **- Definition**

- o What is character?

Broadly construed character can refer to:

1. The reputation in which a person is held in his community, among those by whom he is known;
2. The disposition of a person to behave in a certain way;
3. Specific incidents in the personal history of the subject, for example previous convictions for criminal offenses.

Disposition can be of an entire character of a person (he is good or bad) or it can discuss about a specific trait of a person (conservative v. liberal; trustworthy v. untrustworthy; selfish v. generous); character can also

refer to reputation is about the opinion of the community about a person's character.

### **Rule 48 of Draft Rules of Evidence: Character defined**

In rules 46 and 47 the word '*Character*' includes both regulation and disposition but except as provided in rule 47, evidence may be given only of general reputation and general disposition and not of particular acts by which reputation or disposition were shown.

#### **- Bad Character in criminal cases**

A defendant shall be charged and punished for what he is alleged to have committed and not for his previous conducts. This necessitates making bad character irrelevant and inadmissible evidence. Its admission also implies an assumption that people of previous bad character do not change. Moreover, its admission will, in practice, open the door for law enforcement officers to excessively interfere with liberty and privacy of individuals.

### **Rule 47 of Draft Rules of Evidence: In Criminal Cases**

1. a) The fact that the accused person is of a good character is relevant.  
b) The fact that the accused person has a bad character is irrelevant, unless evidence has been given that he is of good character, in which case it will become relevant.
2. Notwithstanding the provisions of sub-art (1) (b) of this rule, a previous conviction for any offense becomes relevant, after conviction in the case under trial, for the purpose of affecting the sentence to be awarded by the court.

Previous or present character of accused can affect the judgment of a court on certain case. So, law of evidence excludes the relevance of accused's bad character if it will unfairly prejudice him. The Criminal Procedure Code under Art 138 states that the previous convictions of an accused shall not be disclosed to the court before conviction. The above assertion is justified by first, an accused on the basis of the evidences submitted to the court that can prove the facts in issue. Secondly it will prejudice the judges entertaining the case.

However, there are exceptions to the exclusions of bad character evidence in criminal cases. One is when character is a fact in issue (it is an element of a crime). For example, vagrancy has as elements behaviors of the criminal showing bad character- idleness and danger to society. So, the character of a person will be very relevant to this issue. The crime has bad character of the accused, as inferred from different activities, as a material ingredient. To prove that a certain person has committed vagrancy we have to prove the legal, material and mental element of the crime. The material element has bad character as one component. So, the public prosecutor has to prove bad character of the accused. In other words, evidence showing bad character of the accused will be relevant and admissible.

Second, bad character can be accepted as a rebuttal to the claim of good character. An accused with good character can always use his good character as a defense. While doing this, the accused assumes one risk. The public prosecutor will also bring bad character as a response to the accused's claim. In such cases bad character, which is, in principle, irrelevant, will be relevant and decision on that matter can be to the detriment of the accused.

The other thing worth nothing is that bad character is inadmissible for decisions of conviction. It may be relevant and admissible when the issue is issue of bail, for example. The proof of bad character is one of the

factors to allow or deny bail under Art 67 of the Criminal Procedure Code. Moreover, character of an accused is one ground for aggravating or mitigating sentences. This is clearly stated by the second sentence of Art 149 (3) of the criminal procedure code.

- **Bad character in civil cases**

**Rule 46 of Draft Rules of Evidence - In Civil Cases**

- a. The fact that the character of any person concerned is as much as to render probable or improbable any conduct impute to him is irrelevant, except in so far as such character appears from facts otherwise relevant,
- b. The fact that the character of any person concerned is such as to affect the amount of damage which he ought to receive, is relevant.

So, according to the above example, the fact that a defendant is known in his community for breaching contracts will not be relevant evidence to the issue whether he does or does not perform the contract in dispute. The two exceptions stated exceptions stated are:

The first is where character is a fact in issue. In that case, it may be proved or disproved like any other fact in issue. The most common example is suit for defamation. The suit is in this case, brought to recover damages for injury to reputation. So, decision must be reached as to the plaintiff's reputation prior to publication of the defamatory matter, and the extent to which that reputation has been injured or diminished. Son reputation (character) will be relevant in this case.

Another example relates to the determination of notorious insanity under the Civil Code. One way of deciding the notorious insanity of a person is whether the reputation of the person was that of an insane one.

The following excerpt gives more explanation on the relevance and admissibility of bad character in both civil and criminal cases:

**David Torrance, Evidence of Character in Civil and Criminal Proceedings, 12(6) The Yale Law Journal, 352-363 (1903), p352-360**

*In our law, the word character has no single, well defined, technical meaning. Sometimes it means actual character, disposition, what a person is, and sometimes it means reputed character, reputation, community opinion as to character, what a person is supposed to be. When used in the sense of nature or disposition, sometimes it means the entire character, the "sum of the inherited and acquired ethical traits which gave to a man his individuality," as when we speak of good or bad character generally; and sometimes it means a single trait of character, as when we speak of a person's honesty, chastity, or veracity. Sometimes it has reference to moral traits or qualities and sometimes not.*

*It is probably true, however, that in law, as in common speech, the word character usually means moral character, and actual character, as distinguished from reputation; though, from the fact that reputation is in law the chief means of proving character, the words character and reputation are frequently but improperly used as if they were synonymous.*

*Character is what a person is, reputation is what the community thinks he is; but evidence of the general reputation of a person affords the basis for an inference as to the actual character; for behind a good reputation usually there lies a good character, and behind a bad reputation a bad character.*

*The character sought to be proved may be that of a party to the proceeding, or that of a witness therein, or that of a person neither a witness nor a party to the proceeding. Again character may be offered in*

*evidence either (1) simply to prove its existence as one of the facts in the case, or (2) to prove its existence as circumstantial evidence tending to prove some other fact therein. In the one case, character is a disputed fact whose existence may be proved by evidence, but which is neither offered nor used as evidence of any other fact; while in the other case it is offered and used as evidence, that is as the basis of an inference to some other facts in the case.*

*The rules relating to the admissibility of character evidence may be conveniently considered under three heads: (I) those relating to its admissibility to prove the character of a party or of a third person as one of the facts in the case; (II) those relating to its admissibility to prove the character of a party or of a third person as circumstantial evidence in the case; and (III) those relating to its admissibility to prove the character of a witness.*

*Whether the defendant, in mitigation of damages, may show the plaintiff's general bad character, or only his bad character in respect to the trait involved in the defamation, or may show both, are questions upon which the courts are not quite agreed. Upon principle it would seem that he should be permitted to do both, but it can hardly be said that this is the prevailing rule. It is, however, well settled in this class of cases that good or bad character, whether general or in respect to some trait involved, can only be shown by evidence of general reputation, and not by evidence of specific acts.*

*On principle, as good character is generally assumed in the absence of anything to the contrary, it would seem that before it is attacked in some way, evidence in support of it should be excluded.*

*The cases where character is admitted as an evidential fact, and the rules relating thereto, are next to be considered. In this class of cases character is regarded as circumstantial evidence tending to prove some*

*other fact. "That a human being has a moral disposition or character of a certain sort is of more or less probative value in indicating the likelihood of his doing or not doing an act of a related sort; for example, a disposition as to violence throws light upon the probability of a violent killing, and a disposition as to honesty on the probability of committing a fraud."*

*The general rule in civil cases is that the character of the parties is not admissible as evidence tending to prove their acts or conduct. "Because of the usual slight probative value of a party's character, and of its confusion of issues to little purpose, and for other reasons variously stated by different judges and not easy to disentangle or define, it has come to be generally accepted that the character of a party in a civil cause cannot be looked to as evidence that he did or did not do an act charged."*

*Such evidence in civil cases is excluded, not only in cases where it has little or no probative force, as in actions upon contract, but also in actions where, if admitted, it might have considerable probative force, as in actions charging adultery or gross indecency or flagrant immorality. Thus in a civil action for divorce charging adultery against a wife, evidence of her good character was held to be inadmissible,' although if she had been prosecuted criminally for the adultery, evidence of her good character would have been admissible. In cases like this the rule that admits character as evidence to prove or disprove adultery in the criminal proceeding, and shuts it out when offered for the same purpose in the civil proceeding seems to be illogical and inconsistent, but it is the widely prevailing rule.*

*Some courts, in a certain class of cases involving the issue of negligence, admit evidence of the person's character for carelessness or prudence whose conduct is in question, as bearing upon the question whether he*

*was negligent or not; but the widely prevailing rule excludes such evidence.*

*It is now well settled that the accused, in substantially all criminal prosecutions, may give evidence of his good character in proof of his innocence; and that when he has done so, and not until then the State may give evidence of his bad character. If the accused fails to offer evidence of his good character no presumption arises that he is guilty of the offense charged, or that he is of bad character. The good or bad character of the accused in such cases, can be proved only by evidence of general reputation, and not by evidence of particular acts or conduct. Evidence of good character, in criminal as in civil cases, may be negative in its nature, for the best character is often the least talked about. The accused may not only offer evidence of general good character, he may also offer evidence of specific traits of character; but such traits can only be proved by evidence of general reputation. The specific trait, offered to be proved, however, must correspond with the trait involved in the offense charged, or it will be inadmissible because irrelevant. Thus in a prosecution for homicide the accused was permitted to give evidence of his general reputation "for peace and quietude"; while in a prosecution for assault and battery evidence of his reputation for veracity was excluded as irrelevant.*

*In prosecutions for rape the question of consent on the part of the woman is usually an important one; and evidence of her character for chastity is admissible as bearing upon the probability of consent.' The courts in this country seem to be agreed that in a prosecution for rape or an attempt to ravish, the woman's bad character for chastity may be shown by witnesses, and also that if she becomes a witness she may be examined as to her previous connection with the prisoner; but they disagree as to whether acts of connection with other men may be shown, and if so by what kind of evidence. The same agreement and disagreement measurably exists in actions for seduction. In a prosecution*

*for carnal knowledge of a girl under sixteen and "therefore chaste," the girl's character for chastity must be proved by the State. In an indictment for an indecent assault the accused may show that the reputation of the woman for chastity is bad.*

*In prosecutions for homicide where the accused claims that the killing was in self-defence, and the question arises whether the deceased was the aggressor, the character of the deceased for violence and turbulence, is held to be admissible, as circumstantial evidence bearing upon that question. In this class of cases it is of no consequence whether the accused at the time had knowledge of the character of the deceased or not. In this class of cases also, when the question arises whether the accused in what he did acted in reasonable apprehension of an attack, evidence of the character of the deceased as a man of violence, if known to the accused at the time, is admissible as circumstantial evidence bearing upon the question of reasonable apprehension. These last two rules are of comparatively recent origin, and are by no means universally adopted, and the courts that have already adopted them are not fully agreed as to the conditions and limitations under which the evidence should be admitted.'*

### **Issues to ponder**

*'There are other rules that are based on the notion that the jury might give the evidence too much weight. Take the familiar rule that character does not prove conduct. Someone's speeding violations are no proof that he was speeding this time, right? But when you think about it, several recent speeding violations probably indicate that the driver speeds quite a bit and just as a matter of probability, is more likely to have been speeding this time than someone else might have been. While there is some probative value to this evidence, there is even more harmful prejudice. It is not that the jury will use it the wrong way. They will use it*

*for exactly the right purpose. The danger is that they may give it too much weight, so we keep it out.*<sup>60</sup>

Comment.

### **3.3.2. Relevance and admissibility of co-defendant's admission in criminal cases**

Admission by a co-defendant cannot be evidence against the defendant. If a defendant enters into a plea of guilty, the admission does not affect the case of a co-defendant. A person's admission of his involvement in a crime affects only himself. The defendant is not under oath and is not cross-examined. Hence, the prosecutor cannot use the co-defendant as a witness because it is against the freedom from self-incrimination.

The rule also applies to statements made by a co-defendant. A co-defendant can testify falsely to relieve himself free. Hence, in addition to the prejudice it may create on the other defendant, the statement may also lack trustworthiness.

One solution is to charge the co-defendant alone and make him a witness against the defendant.<sup>61</sup> The FSC CD decided that a prosecutor can opt to relieve a co-defendant of his status to make him a witness.<sup>62</sup> In such a case, the co-defendant (who has now become a witness) will be required to testify and his evidence will be taken as relevant and admissible.

This system is clearly stated as a law in the Revised Anti-Corruption Special Procedure Proclamation No. 434/2005, Art 43:

- 1) Any person who has been involved in corruption offence and who, before the case is taken to the court, provides substantial evidence as to the offence and the role of his partners, may be given

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<sup>60</sup> James W. McElhaney, *Arguing Relevance*, 13(2) *Litigation*, 49-50, 56-58 (1987), p57.

<sup>61</sup> Tatek Tadesse, *Fundamentals of Evidence Law (Amharic)* (2003EC), p50.

<sup>62</sup> *Yordanos Abay v. Federal Prosecutor*, January 19, 2011, FSC CD FN 57988, Vol. 12, p196-197.

immunity by the Commissioner of the Federal Ethics and Anti-Corruption Commission or the Head of the Appropriate Organ.

### **Exercise**

Is admission of a co-defendant relevant and admissible in civil cases?

Explain

### **3.3.3. Relevance and admissibility of court decisions**

Res judicata in civil cases and prohibition of double jeopardy in criminal cases states that once a matter between two parties is settled in a tribunal, that matter cannot be part of a future adjudication between the parties (excepting the review mechanisms). Hence, the decision rendered has settled the issue and becomes binding decision between the parties.

Moreover, the Civil Procedure Code requires a party to present all claims that are based on a cause of action.<sup>63</sup> In other words, a litigant is prevented from splitting his claims. He can present all possible claims against a defendant that arise from a cause of action. The defendant, on his part, must adduce all possible evidence he can present against the claim.

The issue of admissibility of decisions of tribunals arises when a matter is presented more than once in a proceeding with the same parties.

- **Decisions of civil cases to criminal cases**
  - o Can a decision in a matter in civil case be used as evidence in determining the same matter in criminal case?

The standard of proof required in civil cases is less than the standard used in conviction. There can be a possibility where a defendant punished in a civil bench is acquitted in a criminal bench. Hence, in

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<sup>63</sup>Civil Procedure Code, Art 216. The court may authorise split of the claims.

general, a decision in a civil court cannot be admitted as evidence in convicting a defendant.

- o What if the decision benefits a defendant in a criminal case?

However, a decision in a civil case may be relevant to a case at issue. For example, the decision of a court on non-performance of a contract by the defendant may be admitted as evidence in establishing a crime under Art 326 of the Criminal Code (*Breach of Legal or Contractual Obligations*). A finding of force majeure in such contract will also be relevant and admissible in determining Art 326.

#### - **Decisions on criminal case to civil cases**

There are two differing arguments in this point. In common law, criminal decisions are not relevant to civil cases. The justification forwarded is: one, the court entertaining the civil matter is equally competent with the court that renders the criminal decision. So, the opinion of the latter court shall not influence the former. Two, the degree of proof is different in both cases- beyond reasonable doubt for criminal cases and preponderance of evidence for civil cases.

In civil law legal system, particularly in Italy and France, decisions on criminal matters are always relevant on the same matter of civil case. The court is duty bound to accept the decision as relevant evidence. This is in line with the free proof approach in civil law countries.

In Ethiopia, Art 154 (1) of the criminal procedure code states that a plaintiff can ask the court entertaining a criminal case to determine compensation for the injury arising from the same act. This is the case of joinder of criminal and civil cases the court has the discretion to entertain or to reject the request based on certain stated circumstances. If allowed, the issue of criminal case will be decided first. Art 158 states that where acquittal or discharge is the judgment, the court will not

proceed with the compensation case. Based on the rules of interpretation, the same provision would mean that the court will entertain the issue of compensation if conviction is decided.

### **Exercise**

The above case is when cases are joined. What if civil and criminal cases are entertained by two different courts? Will criminal decision be relevant to civil cases? One court convicts Alem for inflicting body injury on Berihu. Will the court entertaining the matter of compensation between Alem and Berihu take the conviction as relevant?

Coming to Ethiopia, the issue is governed by mixing the common law and civil law legal systems. When the court that entertained the criminal matter acquits the accused, the court that entertains the civil matter has the discretion to accept or not to accept the acquittal (Art 2149 of the civil code). However, if the decision of the former court is conviction, the latter court must accept the evidence as relevant (Art 2035 of the Civil Code). This is justified by the presumption that criminal proceedings apply higher degree of proof and a person found guilty by the application of that standard will be liable for the civil matter, the proceeding of which uses less degree of proof.

Comment

### **Exercise**

What if there are two or more proceedings which involve one or more matters of the same nature? Consolidating the suits is one option.<sup>64</sup> If that is not done (because the parties are different or due to other reasons) what is the relationship between decisions in the proceedings on the same matter? Shall a court decide a matter based on the decision of another court?

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<sup>64</sup>Civil Procedure Code, Art 11.

Consider a case where three plaintiffs have brought three suits against a defendant. If in the first suit, a tribunal decides that the defendant was negligent, does it apply as evidence to the next suit? What if the tribunal in the second suit is different- shall it take the decision of the first tribunal as evidence to determination of the defendant's negligence?

#### **3.3.4. Admissibility of admission improperly obtained**

In criminal cases, an extra-judicial admission may be made during police investigation (Art 27 of Criminal Procedure Code) or at the preliminary inquiry case (Art 35 of Criminal Procedure Code). The primary purpose of detaining and interrogating a suspect at a police station is to obtain information that is relevant to the crime under investigation. Notwithstanding the fact that a suspect enjoys a right to silence at the police station, the police hope that by persuading a suspect to talk they can encourage him to make incriminating admissions capable of being used in evidence against him. As a result, the police may use force or coercion either physical or psychological. Thus, we should have a safeguard which regulates the way in which a confession is obtained and the way in which its admissibility is determined.

Even though the confession made during police investigation may be adduced as evidence before the court of law, they may be contradicted by the party making them. For instance, the suspect may exclude such confession on the ground of oppression. In such case it is for the prosecutor to prove that the confession was not obtained by operation and it is not unreliable having regard to things said or done. (Art 27 of criminal procedure code and Art 19(5) of the constitution)

The oppression may include torture, in human or degrading treatment, and the use of threat of violence (whether or not amounting to torture). Even in common law countries like England, the confession made during police investigation may be excluded on the ground of unfairness. This is

the case when the suspect made his statements without being informed of his right (which is known as Miranda warning). Reasons for seeking exclusion of confession evidence under this situation may include denying access to a solicitor, lying to the suspect or tricking him in some way, failing to record the interview properly, failing to inform the suspect as to his right to silence and failing to inform the fact that any statement he may make may be used in evidence.

### **Exercise**

1. May the court exclude the confession made under Art 27 of criminal procedure code due to the mere fact that the suspect is not informed about his right before investigation?
2. What is the relationship between Arts 27 and 35?

According to Tatek, jurisprudence developed by Ethiopian courts tells us that if there is corroborative evidence, Art 27(2) can be taken as evidence but if no corroborative evidence, it must be processed under Art 35.<sup>65</sup> What about the validity of the confession under Art 35 itself? Moreover, the prosecutor is given the power to control investigation- if so, why the need for Art 35?

Under Art 35, the court makes sure that the accused is testifying without influence; like no influence from the police office or in the environment of the court; that is why court must look into the body movement of the accused and also previous actions against the accused, if any; court asks for how long he has been detained; court must assure him that after such confession, he will not go back to police station; Supreme Court Criminal File No. 173/78 can be cited for these assertions: *'if an accused gives his confession that he has given in the wereda court (after which he would go back to police station) but changes it in the high court (after which he would go to prison), it indicates that the accused might have been under influence when he first gave confession'*; this assertion also implies that confession given to police is usually questionable.<sup>66</sup>

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<sup>65</sup>Tatek Tadesse, Fundamentals of Evidence Law (Amharic) (2003EC), p127.

<sup>66</sup>Tatek Tadesse, Fundamentals of Evidence Law (Amharic) (2003EC), p127.

## Comment

In criminal cases, there is a difference on the admissibility of confessions made before the trial court, and before other courts. But the confession made before other courts may be excluded if it is contradicted by the accused person. For instance, a confession made before first instance court under Art 35 of criminal procedure code seems to be conclusively admissible since it is made before the court of law. But this is not true. Because the accused is required to confess before a court while he is in police custody. Thus, if the accused chooses he can at his trial contradict or explain his statement at the preliminary inquiry. He could for instance, allege that he made the statement because he was afraid of the police, because he was confused or because he was paid to do so. (see Art 83(3) of criminal procedure code). However, on the other hand, a judicial admission may not be contradicted if it is made voluntarily and intelligently.

## Exercise

What is the scope of this limitation?

Due to constitutional rights of presumption of innocence and freedom from self-incrimination, it is not only the confession that is rejected but also any other evidence obtained through the confession. The law wants to prevent the production of the principle 'the end justifies the means' in this case.<sup>67</sup>

Confession by intimidation- in a case of arson, a suspect, who had denied his wrongdoing, was told by the police that they have found his fingerprints in an object used to burn the house; he soon confessed. Is this confession obtained by illegal means? (JOPTC Module, p41)

Commentary of the draft FDRE constitution- '*.....the constitution makes it clear that an arrested person shall not be compelled to admit. Any*

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<sup>67</sup>JOPTC Module on Evidence, p39.

*evidence obtained through torture, threat or promise shall not be used as evidence. Irrespective of the seriousness of the crime under investigation and no matter how the involuntary confession of the suspect is useful for further investigation and even if the police officer is certain that the arrestee has committed the crime, confessions obtained involuntarily do not have effect- the suspect would not be deemed to have admitted and the evidence shall be deemed non-existent.'*<sup>68</sup>

The Criminal policy also states that inadmissibility of illegally obtained evidence (or obtained otherwise than procedures in the law) must be clearly stated; If any limitations to this, it must be clearly stated.<sup>69</sup> In accordance with this idea, the draft Criminal Procedure Code, Art 100 makes unlawfully obtained evidence inadmissible.

### **Exercise**

- Can confession be conclusive evidence?
- In relation to voluntariness who has the burden of proof?

Public Prosecutor v. Tamrat Layne (assumption should be that government institutions discharge their responsibilities in accordance to the law; signature indicates voluntariness<sup>70</sup>

The confessor signs or in any way indicates that he has given his confession voluntarily. The accused has the right to show that the confession was obtained involuntarily. Things to consider:

- a. Any physical damage on the confessor;
- b. Duration of the time between arrest and interrogation;
- c. Changes in the testimony of the confessor;

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<sup>68</sup> Brief commentary on the draft Constitution approved by HPR at 31-34 as cited in Wondwossen Demissie, Ethiopian Criminal Procedure, A Text Book, School of Law, Addis Ababa University (2012), page 120.

<sup>69</sup> Ministry of Justice, Criminal Justice Policy, (2011), p17.

<sup>70</sup> Wondwossen Demissie (2009), 'Reflective Analysis of Procedural and Evidentiary Aspects of the Ethiopian Anti-Terrorism Law' in Wondwossen Demissie (2009) 'Human Rights in Criminal Proceedings; Normative and Practical Aspects' Ethiopian Human Rights Law Series, Vol. III, 42-111, p107.

- d. Situation after registering confession before the court- has he gone back to the police station or not<sup>71</sup>

Tatek agrees with this position and states that the prosecutor has the responsibility to prove voluntariness of evidentiary admissions. He further argued that even confessions made under Arts 35 and 80 are refutable.<sup>72</sup>

Consider the following provisions in responding to the above provisions:

**Art 17 of the Constitution: right to liberty**

1. No one shall be deprived of his or her liberty except on such grounds and with such procedure as are established by law.
2. No person may be subjected to arbitrary arrest, and no person may be detained without charge or conviction against him.

**Art 19(2) of the Constitution**

Persons, arrested have the right to remain silent. Upon arrest, they have the right to be informed promptly, in a language they understand, that any statement they make may be used as evidence against them in court

**Art 19(5) of the Constitution**

Persons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible.

**Art 20(3) of the Constitution**

During proceedings accused persons have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves.

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<sup>71</sup>JOPTC Module on Evidence, p39.

<sup>72</sup>Tatek Tadesse, Fundamentals of Evidence Law (Amharic) (2003EC), p59.

### **Art 27 Cr PC: interrogation**

2) He shall not be compelled to answer and shall be informed that he has the right not to answer and that any statement he may make may be used in evidence.

### **Art 31 Cr PC: no inducement to be offered**

1) No police officer or person in authority shall offer or use or make or cause to be offered, made or used any inducement, threat, promise or any other method to any person examined by the police.

### **Exercise**

What is the status of forced admission in civil cases?

### **Art 23 of the Civil Code: Right to Keep Silent**

Any admission or manifestation of the will obtained by methods causing molestation to the personality shall be of no effect.

Read the following excerpt on the status of illegally obtained evidence

### **Wondwossen Demissie, Ethiopian Criminal Procedure, A Text Book, School of Law, Addis Ababa University (2012), p92-93 (footnotes omitted)**

*Stanley Z. Fisher argues that Ethiopian criminal procedure does not allow investigating police officers to interrogate an accused and receive a confession that might be used as evidence during his trial. Fisher asserts that the drafters of the Cr. Pro. Code intended “to require all confessions which the police wish to have proved at trial, recorded and certified ‘voluntary’ under Article 35” of the Code. His reasons follow. The strong similarity between Article 35 of the Code with Section 164 of the Indian Code of Criminal Procedure suggests that the drafters of the Code were influenced by Section 164 of the Indian Code. This Section of the Indian Code authorises the magistrate to record confessions, for only*

confessions so recorded are admissible in evidence at trial. In Ethiopia too, his argument goes, the Code does not allow confessions not judicially recorded to be admitted as evidence against the accused. In Fisher's opinion, the drafters of the code did not expressly state this requirement because admissibility issues are a matter to be governed by evidence law.

Reference to the Draft Evidence Rules shows that confessions not recorded by the court are not to be admitted into evidence. Fisher notes that the wording of Article 27 (particularly the phrase "any statement he may make may be used in evidence") and Article 97 of the Cr. Pro. Code (which requires statements taken under Article 27 of the Code to be marked and numbered by the registrar for possible use later in the trial) might be construed to imply that unrecorded confessions made to the police are admissible in accordance with Article 35 of the Code. However, he dismisses this construction on the ground that these provisions refer only to "statements", as opposed to confessions, to be used during the trial of the accused. In Fisher's opinion, there is a difference between a "statement" and a "confession" in that the latter is necessarily incriminating whereas the former is not. He continued to argue that the failure of Articles 27 and 97 of the Code to mention confessions can be taken as demonstrating the intent that only non-confessional statements are contemplated. One may argue that a similarly worded phrase in Article 19(2) of the FDRE Constitution- "that any statement they may make may be used as evidence against them in Court"- shows that only statements but not confessions given to the police are admissible as evidence, thereby indicating that the Constitution does not change the pre-existing position.

On the other hand, the Federal Supreme Court in *Public Prosecutor v. Tamirat Layne et al* decided in the following way:<sup>73</sup>

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<sup>73</sup>This summary is taken from Wondwossen Demissie, Ethiopian Criminal Procedure, A Text Book, School of Law, Addis Ababa University (2012), p93.

*Under Ethiopian law an accused gives his words regarding the accusation against him at different stages in the criminal proceeding. Provisions relevant to the issue at hand are Article 19 of the FDRE Constitution and Article 27 of the Cr. Pro. Code. Article 19(2) of the FDRE Constitution requires information to be given to arrested persons, in a language they understand, that statements that they may make may be used in evidence. It is not difficult to understand, from this constitutional provision, that statements made out of court by arrested persons are to be used as evidence. Moreover, a look at Article 27 of the Code does not indicate that a confession given to the police is inadmissible as evidence. Rather, its second sub-article requires the police to inform the arrestee that any statement he may make voluntarily may be used in evidence against him. The provisions of both the Constitution and the Code prohibit use of force by the police during interrogation and require that the arrestee be informed of his right to remain silent. Both allow a voluntarily given statement to be submitted to court to be used as evidence.*

*On the other hand, Article 19(5) of the Constitution provides that arrested persons may not be compelled to confess and that evidence obtained through coercion is inadmissible as evidence. What we can understand from these provisions is that it is not any confession given to the police but only that obtained under coercion that is inadmissible as evidence. The lawyers' argument that a statement given to the police by the suspects cannot be used as evidence under Ethiopian law for it is presumed to have been obtained by threat and pressure, apart from being inconsistent with the clear provision of the Constitution, emanates from the assumption that the police, who is supposed to enforce law and order, collect evidence illegally which is unacceptable.*

*The lawyer invoked foreign laws to support their argument. Legal issues in general and issue of admissibility of evidence in particular has to be treated in accordance with relevant laws of the concerned country. Where a reference to foreign laws is appropriate for the better understanding of our own laws, the reference has to be made to jurisdictions having similar laws to ours. Confession given to the police, in the jurisdictions cited by the lawyers, is inadmissible for they have clear legal provisions to that effect. Because evidence is to be inadmissible only where the law provides so, in the absence of such laws we believe that courts should admit the produced evidence and weigh it. Where on the one hand there is no clear provision that prohibits the admission, into evidence, of confession made to the police and on the other there are both constitutional and procedural provisions which envisage the admissibility of confessions given to the police, we do not accept the lawyers' objection on the admissibility of the confession given by the accused persons.*

The following excerpt argues for exclusion of improperly obtained evidence by citing Greek law and laws of different legal systems:

**Dimitrios Giannopoulos, The exclusion of improperly obtained evidence in Greece: putting constitutional rights first, 11(3) International Law of Evidence and Proof, 181-212 (2007), p181-212**

*In contrast with England and Wales, where there is a discretion to exclude improperly obtained evidence, exclusion in Greece is automatic. Article 177 para. 2 of the Code of Penal Procedure mandates that evidence obtained by the commission of criminal offences is not taken into consideration. In addition, article 19 para. 3 of the Constitution prohibits the use of evidence obtained in violation of the right to privacy.*

*Inspired by the rigidity of these exclusionary rules, the rights-centred approach that they reflect and the context of a constitutional criminal procedure within which they apply, this article sheds light on the protection of constitutional rights as a rationale for the exclusion of improperly obtained evidence. It does so against the background of the reliability-centred exclusionary doctrine in England.*

*The majority of criminal law scholars in Greece have traditionally endorsed the 'theory of balancing' (Abwägungslehre), following German scholarship on this point. According to this theory, the exclusion of improperly obtained evidence must be determined upon a balancing of competing interests on a case-by-case basis.<sup>21</sup> Courts should exclude improperly obtained evidence only when the interest in not condoning rights-violations, by admitting evidence obtained in violation of individual rights, weighs more heavily than the interest in efficiently combating crime. This balancing exercise gives courts some flexibility, allowing them to avoid 'predetermined legal formulae' incapable of tracking the infinitely variable circumstances of relevant cases.*

*Since the balancing theory is apparently inconsistent with the idea that exclusion is inherent in constitutional rights, it is revealing to observe attempts to bring it within Hellenic constitutional doctrine. Some commentators argue that the Constitution itself dictates a balancing approach. Nikolaos Androulakis noted, for example, that the 'revelation of truth in criminal trials as well as the discovery and punishment of crimes constitute principles of a constitutional nature'. From this point of view, the pursuit of truth has a constitutional footing equal to that of individual rights enshrined in the Constitution. As a result--the argument goes--the conflict between the pursuit of truth and the protection of individual rights cannot be resolved *ex ante* and *in abstracto*, but only through a judicial balancing exercise *in concreto*.*

*Yet this interpretation has a fundamental flaw, which Argirios Karras pinpointed with illuminating precision: The balancing exercise has already been conducted by the constitutional legislator. Its outcome is reflected in the Constitution itself or in other statutes, which sanction--directly or indirectly--the relevant evidential prohibitions. Thus, when an evidential prohibition is instituted--either constitutionally or through simple statutory provisions --the legal order accepts that this prohibition may render more difficult, or even impossible, the efficient administration of criminal justice and the pursuit of truth, and yet it proceeds to the introduction of this prohibition, having obviously first balanced the competing values and chosen the protection of a particular legal value over the efficient administration of criminal justice and the pursuit of truth [...] As a consequence, there can be no further balancing by the judge, otherwise the relevant provision [containing the evidential prohibition] is bypassed and the evidential prohibition is undermined [...] If a judge retains the discretion to decide in each case whether illegally obtained evidence can be used, it is possible that fundamental provisions [protective of the defendant] will be completely overturned.*

*Karras's argument inevitably leads to automatic exclusion. It leaves no space for balancing and discretion, striking a fatal blow to the 'theory of balancing'. Not everyone is persuaded by 'balancing' in any case. Some commentators point to a serious risk of arbitrary decisions and lack of legal certainty as a result of balancing. Considering these risks, even commentators adhering to balancing stress the importance of conducting the balancing exercise only in accordance with specific criteria, such as the seriousness of the crime, the gravity of the procedural violation, the reliability of the contested evidence, the need to protect the person who has been the victim of the procedural violation, the availability of other evidence or the possibility that the evidence in question could have been legally obtained. Moreover, proportionality is seen as a key component of balancing. In general, the view that only a structured discretion could achieve a compromise between flexibility and legal certainty is shared by*

supporters of the 'theory of balancing'. Some of these commentators even maintain that certain rights cannot be subjected to balancing at all. Others, however, reject balancing altogether, insisting that exclusion is inherent in certain constitutional rights.

The question of barring the fact-finder's access to improperly obtained evidence, while fundamental to Anglo-American law, is irrelevant to Continental jurisprudence. The division between bifurcated and unitary courts is crucial to understanding this difference of perspective. In Continental unitary courts, the fact-finder is a professional judge who decides both the admissibility of evidence and the question of guilt. In this context, 'exclusion' of improperly obtained evidence simply means the fact-finder is obliged to ignore the tainted evidence when he decides on guilt; exclusion has little in common with insulating the fact-finder from accessing improperly obtained evidence. In Anglo-American trials the emphasis is placed on averting contamination of the fact-finding process by tainted evidence. More specifically, in Anglo-American bifurcated courts the trial judge decides the admissibility of evidence in a voir dire or pre-trial hearing and the jury determines guilt without accessing evidence that has been 'excluded' in the literal sense of the word. There is no voir dire when parties seek to adduce evidence during the trial phase in Greece. Professional judges who finally determine the issue of guilt also decide the admissibility of evidence. A ruling that certain evidence is prohibited as a consequence of falling within the scope of an exclusionary rule simply means judges have to disregard such evidence when they reflect on the question of guilt. If they do base a finding of guilt on prohibited evidence, the conviction is null and void, and should be automatically quashed upon appellate review.

The question that inevitably arises is how realistic it is to expect that this duty to disregard improperly obtained evidence will prevent the fact-finder from relying on such evidence when deciding on guilt. Mirjan Damaška argued that 'where the same individuals decide the

*admissibility of evidence and the weight it deserves, the taint from the forbidden but persuasive information cannot be avoided: it always affects the decision maker's thinking'. Exclusion under these circumstances 'easily produces an excursion into unreality', so that 'the occasional identity in the wording of Continental and Anglo-American exclusionary rules can thus be deceptive'.*

*Damaska's analysis implies that, irrespective of how far-reaching they may appear to be, in reality Continental exclusionary rules offer only hollow protections. However, this criticism loses some of its force when one considers that Continental courts have to explain their findings through reasoned opinions. Since professional judges have to indicate the evidentiary basis for their findings of guilt, appellate courts are well equipped to check whether prohibited evidence has been relied upon. An efficient system of appellate review thus reduces the significance of procedural divergence between Anglo-American and Continental systems in relation to improperly obtained evidence. Having said that, the risk remains that the opinion may omit reference to evidence that judges have taken into account in spite of their duty to disregard. Referring specifically to the operation of exclusionary rules in Germany, Craig Bradley drew attention to cases where 'the suppressed evidence is not obviously necessary to support a finding of guilt but is in reality the dispositive factor in the minds of the fact finders'.*

*On the other hand, this criticism applies only to situations where a party seeks to have evidence admitted during the trial phase where there has been no previous opportunity to challenge its admissibility. Continental procedure normally provides parties with the opportunity to contest the admissibility of evidence at the pre-trial phase, usually by an application to the judicial chamber responsible for supervising the pre-trial investigation. In Greece, judicial chambers of courts of first instance have jurisdiction to nullify irregular procedural acts conducted during the pre-trial phase. If an act is conducted in breach of procedural standards, the*

*act is null and void, and consequently without any legal effect. For example, if the judicial chamber finds that a police search has been conducted without the appropriate authorisation, the search will be pronounced null and void and any evidence discovered during that search will not be admissible. Since inadmissible evidence has to be suppressed from the investigation dossier, judicial chamber review during the pre-trial phase can be regarded as the equivalent of the Anglo-American voir dire or pre-trial hearing.*

*Article 177 para. 1 of the Code of Penal Procedure sanctions the principle of freedom of proof, which has the dual meaning of freedom to use any available evidence and freedom to evaluate evidence without being restricted by technical evidentiary rules. In 1996, however, Parliament provided for a specific exception to this principle by inserting a second paragraph to article 177: Evidence obtained by [the commission of] criminal offences or through such offences will not be considered with regard to the pronouncement of legal guilt, the imposition of criminal punishment or the determination of restrictive measures, unless [the process concerns] crimes where maximum punishment is life imprisonment and the court makes a judgment that specifically justifies [the consideration of such evidence].*

*Article 177 para. 2 introduced a rule of automatic inadmissibility making the commission of criminal offences the sole criterion for exclusion. With the exception of 'life imprisonment offences', the rule is wide in scope, at least in theory, as it is not limited to specified offences. Moreover, this rule applies to all stages of the criminal process and endorses the 'fruit of the poisonous tree' doctrine.*

*Article 177 para. 2 is a particularly wide extrinsic exclusionary rule: 'a rule rejecting probative information for the sake of values unrelated to the pursuit of truth'. Admitting evidence obtained by the commission of criminal offences arguably undermines the values implicit in these prohibitions. When constitutional values are implicated in criminal law,*

*the exclusion of evidence vindicates the constitutional values underpinning relevant offences. Thus, the exclusion of evidence obtained through a violation of constitutionally protected private correspondence punishable by criminal law seeks to vindicate the constitutional right to secrecy of correspondence.*

*Georgios Kaminis argues that protecting the integrity of the criminal justice system is the main rationale behind this exclusionary rule. Taking his lead from the 'life imprisonment offences' exception, Kaminis reasons that 'the integrity [of the criminal justice system] is at stake when evidence obtained by illegal acts of private parties or state authorities is used in a criminal process. It is equally at stake though when defendants guilty of serious crimes are acquitted'. However, this interpretation underplays the emphasis placed on constitutional rights during the parliamentary debates preceding the adoption of article 177 para. 2, and is contradicted by the explicitly rights-centred approach of the text. Evidence is automatically excluded, except with regard to 'life imprisonment offences', irrespective of the impact of an acquittal on the integrity of the criminal justice system. Arios Pagos has confirmed that article 177 para. 2 serves to protect individuals' fundamental rights in priority to the pursuit of truth and the efficient administration of justice. Kaminis does not deny this, but rather argues that 'the protection of individual rights does not constitute the main objective of the evidential prohibition' in article 177; instead, this objective 'is realised indirectly and as a reflection [of protecting integrity] only'.*

*A rule that renders the commission of criminal offences the only criterion for exclusion entails that unconstitutionally obtained evidence might still be admissible in cases where no criminal offence has been committed. This is problematic, given that 'the constitutional protection of individual rights and the criminal law protection of corresponding legal values do not necessarily coincide'. In other words, an act that violates the Constitution is not always punishable by criminal law. For this reason, an*

*exclusionary rule that revolves exclusively around criminal acts may be letting unconstitutional acts slip through its protective net. In this regard, article 177 para. 2 arguably fails to realise its intended objectives. This provision was introduced into Parliament by Evangelos Venizelos, the eminent Professor of Constitutional Law and, at that time, Minister of Justice. Venizelos pointed out that the admissibility of unconstitutionally obtained recordings of private conversations should reflect the original position of Arios Pagos concerning unconstitutionally seized letters. He argued that 'evidential prohibitions stem from constitutional provisions and from provisions contained in international documents for the protection of individual rights'. He added that constitutional guarantees were deprived of substance if they did not lead to evidential prohibitions. But in the event, article 177 para. 2 was tied to the protection of values preserved by criminal law, which fails to give the provision its full effect in protecting constitutional rights.*

*For example, article 177 para. 2 is entirely pre-empted when the criminal offence by which the evidence has been obtained can be justified or excused under the application of a criminal law defence, such as the defences of necessity or self-defence. The absence of legal guilt in such a case means no offence has been committed and, therefore, the evidence will be admitted irrespective of whether it has been obtained by the violation of a constitutional right. A classic hypothetical posits the victim of blackmail who secretly records her blackmailer's threats. If the act of recording this conversation can be justified as self-defence (and therefore non-criminal), use of the evidence thus obtained would be admissible at trial despite its having been procured through the violation of a fundamental constitutional right. This illustrates why, in a legal system prioritising constitutional rights, it does not make sense to confuse the separate issues of criminal liability with the admissibility of improperly obtained evidence.*

*The 2001 revision of the Constitution revolved around the protection of individual rights, with the right to privacy a notable area of significant developments. In looking for ways to enforce this right, Parliament introduced article 19 para. 3 of the Constitution: Use of evidence acquired in violation of the present article [article 19 para. 1] and of articles 9 and 9A is prohibited.*

*Articles 19 para. 1, 9 and 9A of the Constitution, respectively, protect the right to secrecy of correspondence, the sanctity of a person's home and inviolability of his private and family life, and place restriction on the use of his personal data. The use of evidence obtained in violation of any of these broadly-based privacy rights (privacy lato sensu) is now constitutionally prohibited. The exclusionary rule contained in article 19 para. 3 is an important innovation, when viewed in comparative perspective, since it simultaneously possesses the following three characteristics: it is constitutional, automatic and absolute.*

*First, the fact that the exclusionary rule is now part and parcel of the Constitution means that the rule has become 'fundamental law' (higher order law) and cannot be abolished by statute or other act of Government. Instead, any statutory legislation infringing this rule must be amended. At a more abstract level, there is a strong symbolism attached to the incorporation of this rule in the constitutional text. Furthermore, exclusion under article 19 para. 3 is automatic. The court does not have any discretion to admit evidence obtained in breach of the right to privacy. The rule of exclusion must be applied mechanically once the relevant constitutional violation has been established. Finally, the exclusionary rule is absolute. The alternative of a less rigid rule was discussed in Parliament, but in the interests of more effective constitutional rights protection the balance tipped in favour of an absolute standard without any exceptions.*

*The rule applies to all stages of the criminal process as well as to civil and administrative proceedings, and to derivative evidence. Violations by private individuals are covered no less than violations of constitutional rights by the state, since constitutional rights in Greece apply erga omnes. This is of great significance for Continental criminal procedure given that private individuals--especially crime victims--actively participate in criminal proceedings against the defendant as 'civil parties' and can submit incriminating evidence to the court. Furthermore, the exclusionary rule applies even in cases where evidence has been obtained through a violation of the right to privacy of a person other than the defendant. Finally, a conviction relying on evidence obtained in violation of the right to privacy will be quashed upon appellate review on grounds of nullity. When a conviction is quashed, the court will often order a new trial.*

*Yet, for all its progressive character and wide scope, article 19 para. 3 is at the same time unduly narrow. The rule applies only to violations of privacy, while the admissibility of evidence obtained in violation of other constitutional rights turns either on the application of article 177 para. 2 of the Code of Penal Procedure or judicial interpolation of an evidential prohibition into particular rights. Treating privacy violations differently from other constitutional violations is not easily justified. The right to privacy is a 'qualified right' and, accordingly, there is no logic in protecting it more rigidly than 'absolute rights' such as the right against torture or the right to respect for human dignity. The effect of article 19 para. 3 ought to be extended through teleological interpretation to include the violation of any constitutional right. This would also pre-empt a possible argument a contrario that the use of evidence obtained in violation of constitutional rights other than the right to privacy is permitted. Meanwhile, the combination of article 19 para. 3 of the Constitution and article 177 para. 2 of the Code of Penal Procedure constitutes a stringent mandatory exclusion regime encompassing both illegally and unconstitutionally obtained evidence.*

*English law on improperly obtained evidence is notoriously difficult to decipher. Its discretionary nature leads to inconsistent case law and lack of legal certainty. Yet, it is well documented in relation to discretionary exclusion under s. 78(1) of the Police and Criminal Evidence Act (PACE) 1984 that reliability considerations reign supreme and that protection of rights is peripheral to pursuing accurate fact-finding. Nowhere is this more evident than regarding evidence obtained in violation of Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private life, home and correspondence. Recent case law illustrates that, in spite of the 'incorporation' of the Convention, such evidence is readily admitted on the basis of its strength and cogency. This has sparked some criticism and proposals for reform, ranging from moving to a structured discretion to introducing a presumption of exclusion for specified rights, even a strong presumption that 'should be able to be rebutted only by compelling considerations in favour of the evidence being admitted'. However, commentators have stopped short of advocating automatic exclusion, since this is considered too radical an option with no realistic prospect of being adopted by English courts. In addition, scant support for this approach can be derived from the jurisprudence of the European Court of Human Rights, which has held that evidence obtained in violation of Article 8 does not necessarily violate the right to a fair trial. Nor does it appear likely that automatic exclusion will gain significant ground in the near future, given the general trend within the English law of evidence to 'move away from mandatory precepts and detailed technicalities in the direction of structured discretion and more flexible norms'.*

*The English law on improperly obtained evidence is to a considerable extent marked by a one-dimensional preoccupation with the pursuit of truth (intrinsic policy considerations). It seems more in tune with 'crime control' than 'due process' values and appears to rest on a consequentialist basis that allows rights considerations to be sidestepped*

*in pursuit of accurate fact-finding and the conviction of the guilty. In marked contrast, an approach much more compatible with excluding evidence on 'broader considerations of the integrity of the criminal justice system' (extrinsic policy considerations) is taken in the field of abuse of process. Andrew Choo and Susan Nash have observed that 'the narrowness of the discretion to exclude an item of "tainted" prosecution evidence stands uneasily alongside the width of the discretion to discontinue a "tainted" prosecution'.*

*Interestingly, the gap between the two doctrines may now be closing. Reflecting on *A and Others v Secretary of State for the Home Department* (No. 2), Choo and Nash suggest that this important decision 'represents an acknowledgment that there may be circumstances in which a court should be prepared, "on moral grounds", to exclude reliable evidence because of the way in which it was obtained'. Viewed in this light, exclusionary discretion may be pulled towards the wider exclusionary orbit of abuse of process. It may be wise to sound a note of caution. *A and Others* concerned evidence obtained in violation of the *ius cogens* absolute prohibition against torture, and related to inherently unreliable confessional evidence rather than tangible (real) evidence. Nonetheless, if the position endorsed in *A and Others* were confirmed in future cases involving tangible evidence and violations of qualified rights, a major step towards an approach more compatible with excluding improperly obtained evidence on extrinsic policy grounds would have been made.*

*In response it should be emphasised that the scope for exclusion is much wider in Greece than in Anglo-American legal systems, and the impact on truth-finding is therefore potentially much more significant. The absence of 'alternative' procedures in Greece--most notably bargained guilty pleas--results in many more trials where exclusionary rules apply. It cannot therefore be said that exclusionary rules in Greece impose no costs in terms of convictions being quashed. Greece has adopted*

*mandatory exclusionary rules in spite of their potentially considerable 'exclusionary toll', and against the background of a Continental criminal procedure committed to the principle of free proof and traditionally hostile towards evidentiary barriers to conviction. Viewed from this angle, Greece's endorsement of a stringent exclusionary approach to improperly obtained evidence reflects a conscious political choice.*

*Analogies with Greece must be taken for what they are worth, however, especially in terms of legal reform. After all, '[t]he decision to endorse a particular approach to the exclusionary rule [...] is partly a political choice'. Independently of whether the law develops under the influence of a liberal Constitution--be that in a common law or Continental law procedural setting--adopting a particular approach to the exclusion of improperly obtained evidence will always come down to a difficult balance between the protection of rights and the efficient investigation of crime. In that respect, Greece offers the interesting example of a country which has taken the unreserved political decision that constitutional rights come first.*

*A confession obtained by oppression would remain wholly inadmissible, but a threat or inducement would only vitiate the confession if it was such as to be likely to render the confession "unreliable." (a rule suggested by a commission).*

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## **Chapter Summary**

## **CHAPTER FOUR: ORAL EVIDENCE**

### **Introduction**

After it is decided what facts are to be proved in court (facts in issue and relevant (and admissible) facts), the next step is how to prove these facts or to choose the method of securing their consideration. Evidence submitted during the trial consist the testimony of witnesses to facts they claim to have seen, heard, felt, tasted or smelled.

This chapter will partly answer the general question: '*How to prove facts that need to be proved?*'

### **Chapter objectives:**

Successful reading of this chapter will enable the reader to:

- Explain the importance of oral evidence in proving facts;
- List the grounds of incompetence;
- Explain the justifications for privileges;
- List the type of privileges;

### **4.1. Overview of Oral Evidence**

- o How do you define oral evidence?

Oral evidence can be defined as '*all statements which the court permits or requires to be made before it by witnesses in relation to the matters of fact under inquiry.*' Evidence does not need to be uttered orally for it to be oral evidence. A witness can give his testimony in writing.

Oral evidence can be an eye witness testimony or an expert testimony.

- **Eye-witness testimony**

An eye witness testimony (also known as lay evidence) is a testimony obtained from someone who has in any way observed the existence of a fact. This testimony is the most common type of oral evidence. It is presented before the trier of the fact through examination-in-chief, cross-examination and re-examination.

- **Expert testimony**

Unlike the eye witness testimony, an expert testimony is not statements of what has happened in relation to the issue. It is rather a testimony indicating the inferences from the facts observed in the case or inferences from real evidence. For example, when two eye witnesses testify to the court that the defendant acted in a certain way, the expert infers whether the behaviour of the defendant was behaviour of an insane person. An expert testimony is an opinion.

Below find some binding decisions of the FSC CD related to lay evidence and expert testimony:

- FN47960 (Volume 12)- inadmissibility of expert witness testimony

Expert testimony can be defeated if the trier of the fact heard testimony of an expert with qualification.

- FN65930 (Volume 12)- expert testimony v. eyewitness testimony

There is a principle that states, '*in the civil context...lay evidence should not be preferred to expert evidence without good reason*' inadmissibility

of expert testimony must be based on adequate reasons. In the absence of such reason, expert testimony is given preference over lay testimony.

- FN43453 (Volume 12)- expert testimony is not fully reliable

Expert testimony is not direct, rather circumstantial evidence. So, it must be weighed like all others and trier of fact does not take it without evaluation;

- FN14981 (Volume 12)- expert evidence is not conclusive

More weight is given if expert testimony is compatible with direct evidence. However, it cannot be conclusive. Court evaluates the testimony of an expert just like any testimony unless provided by law (for instance, where it is forced to decide based on the opinion as in irresponsibility, Art 51- (FN47960 (Volume 12))). According to FN14981 (Volume 12), expert testimony is not fully reliable.

Volume 12, FN65930- expert testimony v. eyewitness testimony

The principle- *'in the civil context...lay evidence should not be preferred to expert evidence without good reason'* inadmissibility of expert testimony must be based on adequate reasons. In the absence of such reason, expert testimony is given preference over lay testimony

## **Exercise**

1. US Supreme Court's *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) decision- the court explained that scientific evidence must be both 'relevant and reliable' and emphasised the trial judge's gate-keeping responsibility. The majority provided four criteria to help trial judges determine the *reliability* of scientific evidence, the criteria are whether the theory or technique: 1) has been tested (referring to the notion of 'falsifiability'); 2) has been published and/or peer-reviewed; 3) has a known or potential rate of error;

and 4) is 'generally accepted' in the relevant specialist community.

The last of these was drawn from *Frye v. United States* (1923).<sup>74</sup>

Can these tests be used for admitting expert evidence in Ethiopia?

2. Opinion evidence is also subject to exclusion. As far as practically possible, witnesses should describe their sensory perceptions in concrete factual terms, without the overlay of interpretation or opinion. A very important exception to this exclusionary orientation is opinion evidence provided by experts. Where, by reason of 'specialised knowledge' a witness can provide a relevant opinion that is beyond the knowledge of the average juror, that opinion may be admissible.<sup>75</sup>

Comment

- o What are the advantages and limitations of oral evidence?

Since oral evidence is given by a person who has personally seen, heard, or otherwise observed the fact, or through an expert concerning opinions, its credibility is high. It is said, '*witnesses are the eyes and ears of justice.*' However, because the actors producing such evidence are human beings, the evidence is highly susceptible to manufacturing.

Oral evidence has always had high importance in proving facts. It was more important in early times where there was no or little real evidence.

#### **4.2. Competence of witnesses**

The function of a witness is to present evidence from which the trier of fact can make a determination as to what happened. Generally to be eligible to testify a witness must have a personal connection with the

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<sup>74</sup> Gary Edmond and David Hamer, Evidence Law, 652-678 in Peter Cane and Herbert M. Kritzer, The Oxford Handbook of Empirical Legal Research, Oxford University Press, 2010, p661.

<sup>75</sup> Peter Cane and Herbert M. Kritzer, The Oxford Handbook of Empirical Legal Research, Oxford University Press, 2010, p661.

relevant occurrences coupled with mental and physical faculties sufficient to comprehend, and recollect and relate them to the trier of fact in a manner, which renders the testimony relevant.

Thus, a competent witness is one who is fit and commonly gives his testimony before courts or a judicial proceeding under oath or affirmation. The topic of competence concerns itself with what witnesses will be permitted to testify. A competent witness is one who is able to testify or one whom nothing prevents from testifying.

At earlier times, there were some groups of persons who were not competent to give testimony before a tribunal. Such incompetence could be because of criminal sentence, physical incapacity or mental incapacity. There was a time where women were not allowed to testify; non-Christians were incompetent to testify; in the *Fetha Negest*, a person must be of 20 years old to testify and neither a soldier, a servant nor a beggar were competent to testify and neither is a person who is a family member to the party.

Oath was a necessary mechanism to show that the testimony is truthful. With regard to oath, the witness would close the door of a church and/or hold the Holy Bible, saying: (*part of competence of witnesses, in particular oath*)

*May He perforate me like his cross,  
May He erase me like his picture,  
May He chop me down into pieces like his flesh,  
May He spill me like his blood, and  
May He choke me up as his altar is closed?  
If I am not telling the truth.*

If he had already testified out of court, the party may impeach the credibility of his testimony or may claim that it may not be admissible at

all. The party, which called the witness, would, before asking him to testify, warn him as follows:

One may go to hell after death;

One maybe reduced to bones, lying sick in bed;

One may also be a permanent inmate of a hospital;

All the same, one is obliged to tell the truth.

The oath was an important part of oral evidence. There was a time where decisions were given in favour of a party by the mere fact that the party has more witnesses than the other. In a time in history, the witnesses were not even expected to explain what happened, rather to testify about the trustworthiness of a party.

At later stages, two requirements have dominated the competence test. These were:

- i. Possession of sufficient intelligence to justify reception (capable of intelligible testimony)
- ii. Understanding the duty to tell the truth

At present, the issue of incompetence has lost its stand and the real issue has become credibility of testimony. For that matter, it would be a waste of court's time to conduct an inquiry into the competence of every witness. But from the allegation of opposing counsel that there is reason to question the witness's competence, an inquiry into general competence will be made. A trier of fact is under no obligation to inquire into a witness's competence unless there is some reason to doubt it.

For example, concerning child witnesses, earlier thoughts include:

- ✓ Child's observation and memory are less reliable;
- ✓ Details unrelated to them are quickly forgotten;
- ✓ Are suggestible especially to leading questions;
- ✓ Little notion of duty to speak the truth;

- ✓ Can act evil beyond their years.

At present, research shows:

- ✓ Memory may be different but not less reliable- difference is on quantity;
  - ✓ People give more attention to our concerns;
  - ✓ Suggestibility depends on the methods of interview;
  - ✓ In general, the risks can be avoided by scientific investigative and examination methods;
- o You may want to revise the discussions in the Interdisciplinary I course for details on such researches.

Thus, to be included as witness in the general competence, a person must possess the physical and mental capacities. This is to mean that the test to competence relates to the ability to understand questions and give rational answers. To put it in another way, competence of a person is determined by his ability to perceive, remember, communicate and understand the matters of fact in the case. Witness give oath or affirmation before testifying but such requirement is not universal anymore. For example, children may not be required to give oath if trier of fact thinks they do not have the capacity to comprehend the importance of oath.

- o Who is then incompetent?

Witnesses are incompetent only if there is impairment of the power of observation. It is for the trier of fact to determine the competence of a witness by looking into the answers of the witness to questions put by the court. Sometimes, a trier of fact may deem a witness incompetent for the benefit of the witness. For example, if a child-witness cannot handle the horror of cross-examination, court may exempt the child from the obligation of testifying? In doing so, the trier of fact must make balancing

between the interests of the child and interests of the party in whose favour such testimony is to be made.

- o Can substantive laws state requirements for testifying before the trier of fact?

Some persons, though not generally incompetent to testify, may be incompetent to testify in specific cases. For instance, Art 1729 of the Civil Code puts a requirement (*Where witnesses are required by law or agreement, they shall be of age and not judicially interdicted, unless otherwise expressly provided*). The same applies to being a witness in a will. Art 892(2) of the civil code (*witnesses to a holographic will must be persons who have attained capacity and those not prohibited by law* (note that this sub-article is missing in the English version of the Civil Code)).

#### **- Competence of a witness who has relationship with the case**

In early times both criminal charges and civil suits, such persons were disqualified as they were considered incompetent. No matter what the degree of interest of the witness and the type of relation he had, the interests of the witness used to determine his competence to a great extent. As a result, interested persons could have been competent witnesses if he had divested himself of his interest or if it has been extinguished or is released liability. This ground of incompetence covers different types of persons, i.e., parties to the case, consanguine and affine relatives, persons with relations on other emotional grounds and so on. These grounds are inherently linked with the bearing of biases.

In the present times, there is no such restriction. Special relationship with the case is most of the time taken as consideration of weighing evidence. For instance, if a witness for the defendant is a brother of the latter, the trier of the fact will treat his testimony with caution.

- **Competence of a party to be a witness**

A party can be a witness in his own case in civil proceedings. This can be implied from Art 261(2) (*if a party wishes to give evidence on his own behalf, he shall do so before calling his witnesses and she shall then for all practical purposes be deemed to be a witness*).

- o What about an accused in criminal cases? can he be a witness? What do Art 20(4) of the Constitution (right to produce his own testimony to his defence) and Art 142(1) and (3) of Criminal Procedure Code (right to make a statement)

Tatek has the following to say about ability of an accused to be a witness in his case:

‘An accused can testify for his case. Testifying does not contradict with justice administration as an accused has the right to present any defence on his side, Art 20(4) of the Constitution. He tells the trier of the fact his narration of the situation but he is not cross examined. However, the trier of fact can ask explanatory questions. The trier of fact attaches such weight as it shall think fit to the evidence.’

Though Art 142(3) only talks about a statement, the accused can be a witness for his case because he has the right to defend his case by any means (Art 20(4) of Constitution). Legal Notice 33/1935, Arts 40 and 47, stated that an accused person can be a witness. Moreover, civil procedure and criminal procedure codes must be interpreted as compatible rather than incompatible. Hence, as it is allowed in civil procedure, it must be so in criminal procedure. Moreover, this principle is recognised in the sources of the civil procedure code.

If the statement of the accused against his interest is taken as evidence, his statements made in his favour must also be taken as

evidence. In fact, the statement he makes under 142(3) is taken as evidence although with little weight.<sup>76</sup>

Do you agree?

Art 31 of draft Criminal Procedure Code seems to suggest the possibility of a defendant to be a witness in his own case. Sub-article 18 of the provision includes *the right to give testimony on his behalf* as one of the rights and obligations of an accused.

Whatever the arguments are, it is obvious that a defendant cannot be forced to be a witness in his case. This is an extension of the right to remain silence and freedom from self-incrimination.

**- A co-defendant as a witness**

In the discussion about admission, it was stated that admission made by a co-defendant cannot be conclusive evidence against the defendant. Moreover, a co-defendant cannot, in principle, be compelled to testify against a defendant.

**o Can the co-defendant testify for or against the defendant?**

There is no restriction on the trier of fact from taking the testimony of a co-defendant. As the co-defendant has the right to remain silent and freedom from self-incrimination, he cannot be compelled to testify against the defendant. There are two possible exceptions:

One, a prosecutor can opt to make a suspect to be a witness than a defendant. This is incorporated into a law in Art 43 of Anti-corruption Special Procedure Proclamation No. 434/2005 (*Any person who has been involved in corruption offence and who before the case is taken before the court, provides substantial evidence as to the offence and the role of*

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<sup>76</sup>Tatek Tadesse, Fundamentals of Evidence Law (Amharic) (2003EC), p190.

*his partners, may be given immunity by the Commissioner or the Head of the appropriate organ).*

- o Discuss the above system in terms of the idea of 'prisoners' dilemma'.

Second, if the status of a co-defendant is changed and he is no more an accused (either because of conviction or acquittal), he can be forced to present as a witness to the prosecution or the defendant. On a joint charge, of course, a defendant who first pleads guilty may be compelled by another defendant or by the prosecution, for he is no longer accused.

#### **4.3. Privileges**

Competence implies compellability. In principle, *law is entitled to everyone's evidence*. This compellability applies both to the accuser's and the defendant's witnesses. Arts 124(1) and 125 of Criminal Procedure Code state the duty of witnesses to appear. In civil proceedings, Arts 111 and the following of Civil Procedure Code explain the obligation.

In criminal cases, Art 20(4) of the Constitution states: '*Accused persons have the right....., to adduce or to have evidence produced in their own defence, and to obtain the attendance of and examination of witnesses on their behalf before the court.*'

Failure to appear before a trier of fact when requested is a criminal offence of refusal to aid justice (Art 448 of the Criminal Code).

However, there are some groups of persons who either cannot be forced to testify or even not be allowed to testify.

A litigant's right to "every person's evidence" is a key principle of our justice system. Because evidentiary privileges exist in opposition to this principle and hinder the search for truth, triers

of fact and legislatures have been hesitant to create and expand such privileges. Courts have waived the strong presumption against evidentiary privileges only when a public interest outweighs the judicial system's goals of ensuring fair proceedings and determining the truth. Invoking important societal goals, professionals such as attorneys and psychotherapists have won privileges to shield some of their core functions from discovery. Although news media organizations have sought similar protection, they have lost many of the legal battles to establish a journalists' privileged.<sup>77</sup>

The reasons for exclusionary rules include:

- encourage desirable communication,
- to protect the desired relationship itself,
- uphold the integrity of a profession,
- to avoid futile efforts to coerce testimony,
- to serve commonly shared principles of privacy, fairness, or morality,
- to avoid likely perjury,
- to advance economic policies,
- to encourage voluntary compliance with law,
- to limit governmental invasion of the security of individuals

Different legal systems state different types privileges in giving testimony. Some of the common types of privileges are listed below:

## **I. Privilege against self-incrimination**

One of the issues about competence discussed above is related with privilege of defendants not to testify against their interest. No matter how the issue of an accused's possibility of standing as a witness is addressed,

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<sup>77</sup>Evidence. Evidentiary Privilege. Second Circuit Refuses to Recognise Journalists' Privilege for Non-confidential Information. *Gonzales v. National Broadcasting Co.*, 155 F.3d 618 (2d. Cir. 1998), 112(8) *Harvard Law Review*, 2019-2014 (1999), p2019.

he is not forced to be a witness. This is what is referred to the right of silence and freedom from self-incrimination.

Art 20(3) of Constitution- *'During proceedings accused persons have the right ..... and not to be compelled to testify against themselves.'*

### **Exercise**

Does the privilege against self-incrimination extend to witnesses during trial?; are they forced to disclose matters that may ridicule them? that are immoral? What is the best option- not requiring the witness to answer or to exclude his statements from being evidence in further proceedings?

## **II. Professional privileges**

Art 24 of the Civil Code- *Professional secrecy.*

(1) A person may not be compelled to reveal facts which have come to his knowledge by reason of his profession, if by revealing such facts he will betray or risk to betraying the confidence which a third person has placed in him for the very reason of his profession.

(2) The person who has confided or disclosed such facts may ensure that they be not revealed by him in whom he has placed his confidence.

Even though triers of facts must have access to every possible evidence in searching for the truth, professional secrecy serves individual and public purposes. When professionals do not disclose secret information without the consent of a client, the latter's confidence to search for help from such professionals increases. This also keeps the integrity of the profession as a whole and enhances public interest.

One mechanism to ensure this secrecy is to give privileges against disclosure of information/documents obtained in professional activities. This privilege, in addition to not requiring a professional to divulge information and documents, prohibits him from doing so.

Triers of fact seem more likely to recognize evidentiary privileges when they can identify a private or intimate relationship between a professional and an individual who will speak freely only if she is convinced that her conversations are not likely to be divulged.<sup>78</sup>

The Criminal Justice Policy, under page 21, envisages privilege of communications with attorney, a doctor, religious fathers and spouses.

Art 399 of the Ethiopian Criminal Code makes disclosure of secret information a crime. To be punishable, the disclosed information must have been obtained in the course of professional duties. It does not matter, according to the provision, whether the duty was continuing at the time of the disclosure or not. Negligent breach of professional secrecy is also punishable.

Students training with the professionals are also duty bound to ensure confidentiality of professional secrets. As per sub article 2 of Art 399, students, probationers and apprentices are criminally liable if they disclose information or document (of secret nature) which they have acquired during their professional training. A student who does his externship program is, therefore, duty bound to keep professional secrets.

- o Do you think waiver by the interested person is possible?

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<sup>78</sup>Evidence. Evidentiary Privilege. Second Circuit Refuses to Recognise Journalists' Privilege for Non-confidential Information. *Gonzales v. National Broadcasting Co.*, 155 F.3d 618 (2d. Cir. 1998), 112(8) *Harvard Law Review*, 2019-2014 (1999), p2022.

Art 400 of the Criminal Code states that punishment shall not be due for disclosure if there was express consent of the person interested in keeping the secret. For criminal punishment purposes, even ex post facto consent is acceptable as the crime of breach of professional secrecy (Art 399) is a crime punishable upon complaint.

- o Is the professional bound to divulge the information when the interested person waives his right of disclosure?

This question is answered by responding to the matter whether professional secrecy protects the interested person only or also upholds the integrity of the profession. According to Art 400(2), a professional cannot claim privilege when disclosure is ordered by law or by the trier of the fact.

There are arguments on whether the professional privilege is both sided. The positive response to this states that even though the religious parent or the professional gets consent of the person for disclosure, he is not forced to if he thinks disclosure goes contrary to his profession or status. Some others limit the scope of application of the privilege as only protecting the client. Specifically to lawyer-client privilege, if a client waives privilege, a lawyer cannot refuse to disclose in England while the same lawyer has discretion in France. Hence, there is no agreement on the possibility of forcing the professional to disclose secret information or document if waived by a client. The Criminal Code under Art 400(2) seem to bound the professional to disclose if ordered by law, by competent authority or by the court of justice. Regarding the religious confession privilege, the same provision states the inviolability, which in effect means the consent of the confessor cannot relieve the minister of his duty to keep the secret.

- o What other exceptions to the privilege are there?

Art 400 of the Criminal Code gives some idea about the list of exceptions.

Article 400- Authorized Disclosure.

(1) Any disclosure shall not be punishable:

(a) where it is made with the express consent of the person interested in keeping the secret;

(b) where, at the suggestion, or request of the possessor of the secret, the competent higher professional or supervisory body has given its written permission for disclosure;

(c) where it is made following an express decision of a Court of justice in a specific case; or

(d) where special provisions of the law permit or impose the duty, in the interests of public order, to give evidence before a Court of justice or to inform a public authority.

(2) Where disclosure is expressly ordered by law, by a Court of justice or by the competent authority, the possessor of the secret cannot invoke his professional obligation to maintain secrecy.

The secrecy of religious confession is at all times inviolable.

**Exercises**

- ✓ Does doctor-patient privilege apply after death of patient?
- ✓ Does doctor-patient privilege apply to assistants of a doctor (such as nurses, midwives, etc)?

**Exercise**

- ✓ Are religious fathers and ministers professionals for this case?

Art 399 of the Criminal Code, in its definition of professional secrecy has included religious ministers as professionals.

Art 400(2) second paragraph states that the secrecy of religious confession is at all times inviolable.

**- Lawyer-client privilege**

The privilege is not limited to those communications that specifically give or seek advice but applies to a wide range of documents (letters, memoranda, notes) that are created in the course of a lawyer's relationship with client. The test then is whether the communication or other document was made confidentially for the purpose of legal advice-the giving of advice and assistance of a specifically legal nature.

The privilege extends to 'a document which was produced or brought into existence with the dominant purpose of its author it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of the litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.'

In addition to the common provision on professional privileges stated above, the Council of Ministers Regulations to Provide for the Federal Court Advocates' Code of Conduct Regulations No. 57/1999 under its Article 10 states:

*Art 10: Confidentiality of Information*

- 1) Any advocate shall have professional obligation to keep in secret the personal or organizational information of his client or any other information he obtained in the course of his professional service.
- 2) The advocate may not, without the consent of the client, reveal information relating to his power of representation and any other information.
- 3) The obligation of professional confidentiality of an advocate may not cease because of termination of the contract with the client.

This is a similar provision to the one stated in the Criminal Code. This provision, however, relates not only to criminal penalties but also extends to other forms of duties. The second sub-article strengthens the consent

exception. Moreover, like the Criminal Code provision, the obligation of secrecy is continuous even though the contractual obligation of advocacy has ceased.

In what conditions can disclosure be made?

#### 11. *Condition of Disclosure*

Without prejudice to the provisions of Article 10, an advocate may, when he reasonably believes appropriate, reveal to the extent necessary the information he obtained in the course of his professional duties, in the following cases:

- 1) when the information he obtained from the client is necessary for the task he is represented;
- 2) to defend himself or claim his interests in a controversy with the client;
- 3) when a controversy arises concerning his power of representation; or
- 4) to perform his obligations as expressly provided otherwise by law.

The exception under sub-article 4 does not extend to the order of court to divulge. As mentioned above the professional will not be responsible for criminal punishment if disclosure was due to order of the court.

- ✓ Does this imply the court's power to ask for disclosure for public interest?

The following excerpt discusses lawyer-client privilege in different legal systems.

**Thomas Baudesson and Peter Rosher, Professional Secrecy versus Legal Privilege, 1 International Business Law Journal, 37-66 (2006), p38-42, 45-47, 50-51**

*In countries of a Roman-Germanic tradition, like France, the protection of legal opinions and documents which support them is only guaranteed*

*by virtue of the professional secret for lawyers. In common law countries, it is a very different concept which prevails since in-house lawyers also benefit from legal privilege, and since the content of the communication (it is an approach in rem to confidentiality) is more important than the author or the recipient, as is the case for the professional secret for lawyers which is based upon an approach in personam to confidentiality.*

*Professional secrecy is, as its name indicates, an obligation to remain silent which binds certain categories of professionals, such as doctors, lawyers or priests. The secrecy attaches to the professional relationship between two persons.*

*It is generally admitted that professional secrecy is based on the idea that lawyers- like priests and doctors- are “necessary confidants” who can only advise and defend their client efficiently if the latter may rest assured that he can reveal confidential information without running risks. Professional secrecy is not only a public interest. It is also general, unqualified and of unlimited duration. This idea was expressed by Emilie Garçon in a commentary to the former Article 378 (of French Criminal Code, 1810- repealed by a new Criminal Code) which is still regarded as good authority to date, inasmuch as it emphasised that professional secrecy is of public interest: “Professional secrecy is only based on a public interest. The fact that its violation may cause a prejudice to individuals may not, on its own, justify its sanction by the law. The law punishes because public interest requires it. The orderly operation of society commands that the sick should be able to find a doctor, the litigant an advocate, the catholic a confessor but neither the doctor, nor the lawyer, nor the priest would be in a position to complete their mission if confidential information revealed to them were not covered by an inviolable secret. It is therefore crucial to the maintenance of public order that such necessary confidences should be subject to rules of confidentiality and that the confidants should be bound to remain silent, unconditionally and without restrictions, because otherwise nobody*

would dare seek their assistance anymore, if they could fear disclosure of the secret they revealed. Hence, Article 378 is aimed not so much at safeguarding the secret of an individual as at guaranteeing a professional duty that is essential for the benefit of all”.

Although professional secrecy is relevant to all members of society, it is in the first place of interest to the person who receives the legal advice given by the professional. As the law currently stands, such professional may only be an independent lawyer who is a member of a Bar or Law Society. This may offend many in-house lawyers, especially those who have practised as independent lawyers for a number of years and who nowadays apply their legal skills within a company, with the same care and diligence as when they were in private practice. It therefore seems that the criterion for determining the applicability of professional secrecy is the existence of a certain category of relationship (the relationship between an independent legally skilled professional and his client), rather than the underlying legal advice.

The lawyer may not be relieved of his obligation of secrecy by his client, or by anyone else, and in particular no authorities have such power. However, the law provides for an exception strictly for the purposes of his own defence in contentious proceedings, and in restricted cases (implication in criminal proceedings, civil proceedings in professional negligence, dispute on amount of fees). Professional secrecy is so absolute that even the client may not discharge his lawyer of it. Such strictness precludes a lawyer from disclosing information regarding a matter to third parties at the request of his client. France's European neighbours (United Kingdom, Netherlands, Belgium, Germany, Italy) do not have such strict rules. Indeed in these countries a lawyer may, with the consent of his client, unconditionally circulate information relating to a given matter to third parties.

*However, raids in law firms are becoming increasingly frequent. They can only be carried out in the presence of the President of the relevant Bar or Law Society or his representative. In such case, the seizure of communications exchanged between a lawyer and his client may, by way of exception, be authorised or maintained, provided that the confiscated documents may potentially contribute to establishing the involvement of the lawyer in an offence. It is worth noting that the judge may only search the premises to seize the correspondence if he already has reasons to believe that the lawyer is involved in an offence.*

*Privilege is an ensemble of rules protecting certain types of confidential communications, whether written or oral, of a legal nature from being subject to compulsory disclosure in common law countries. It is particularly important in jurisdictions where the civil litigation procedure incorporates a system of document disclosure, known as discovery (in the United States of America) or disclosure (in the United Kingdom). In the United Kingdom, the Civil Procedure Rules (which govern civil proceedings) require- subject to a contrary agreement between the parties or to a contrary decision of a court- a party to disclose documents which support its case but also those documents which are adverse to a party's interest or that support the other side's case. "Document" is very widely defined and includes internal notes, handwritten notes, emails, reports to the Board and information stored in any form whatsoever, and whether or not confidential. The disclosure obligation extends to all documents which have been in the disclosing party's possession, custody or control. A document is considered as having been in the disclosing party's control if the party in question had physical possession of such document or if it had a right to possession of it. In this way, it is not unusual that a parent company is forced to have to communicate documents held by its subsidiary. The Civil Procedure Rules however recognise a party's right of refusal to disclose a document based on a legal interest or specific legal right. A witness who is called to testify in a trial may refuse to give evidence on the same grounds. Disclosure entails*

*the risk that the other side may gain access to potentially harmful documents for the party which discloses them and uses them in civil proceedings, except where privilege may be successfully claimed. The origins of legal privilege under English law date back to the Duchess of Kingston Case of 1776. In England, it has been clear since this case that the privilege is based not on the legal enforcement of the lawyer's duty of confidentiality to his client but on the public interest in the client having uninhibited access to legal advice and assistance.*

*The House of Lords has recently described legal privilege as: “(...) a necessary corollary of the right of any person to obtain skilled advice about the law. (...). Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice” The rationale for legal privilege under English law was summed up by Lord Taylor CJ to the House of Lords as follows: “Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests”. The courts in the United Kingdom have for more than 150 years regarded legal advice privilege as being a fundamental right and an inviolable safeguard of the interests of justice.*

*Another distinctive mark of the common law principle of legal privilege is that this protection benefits the client and is his prerogative. In the Three Rivers case, the House of Lords confirmed that “if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and it can be overridden by statute”. Failure of the legal advisor, whether he be a solicitor, barrister or in-house lawyer, to comply with his legal obligation of confidentiality entitles the client to commence proceedings against him. The legal advisor is also liable to disciplinary sanctions. As*

*mentioned above, legal privilege in common law jurisdictions is aimed at protecting communications between a legal advisor and his client. As regards the scope of legal privilege, legal advisors also include in-house lawyers. There are therefore no issues in common law countries with regard to in-house lawyers since they are invariably members of the Law Society of their country and therefore have the status of lawyer, the company which employs them being considered as the client.*

*The rule of professional secrecy has the advantage of being simple, easy and relatively secure since all correspondence and emails exchanged between a lawyer and his client automatically benefit from the protection of professional secrecy. The letter-head of a law firm makes the document immediately recognisable as being confidential. The drawback of the simplicity of the system is its rigidity. Professional secrecy applies, in effect, to all correspondence exchanged between a lawyer and his client, regardless of the contents, which is not always necessary. The system lacks flexibility. The fact that it is impossible for a client to relieve a lawyer from his obligation of confidentiality prevents the lawyer, regardless of the client's wishes, to communicate, for example, information by a company's auditor relating to ongoing business.*

*Legal privilege is a pragmatic rule, more flexible than the professional secret since it relates to the substance of the document rather than the author. In this respect, it benefits not only lawyers in Common Law countries, but also in-house lawyers. From this point of view, Anglo-Saxon in-house lawyers enjoy a considerable advantage in comparison with their French equivalents since they can advise their employer, in writing and in all serenity, whereas French in-house lawyers are forced to be prudent and sometimes remain silent: with the risk of being criticised for not having informed their superiors. It should be noted that in Anglo-Saxon civil procedures, whether or not a document is protected by legal privilege is a question always determined before the substantive*

*hearing on the merits, and that the determination is made by a separate judge.*

*Drawbacks: The limits of legal privilege are sometimes unclear. Legal privilege is a relatively contentious issue, indeed it is encouraged by the discovery procedure, but equally by disputes on the proper assessment of the substance of the documents over which the protection is claimed.*

### **Exercises**

By reading the above excerpt, Art 24 of the Civil Code, Art 399 of the Criminal Code, answer the following points

1. What is the scope of lawyer-client privilege in Ethiopia? Does the privilege apply to pleaders of companies?
2. What about other professionals? What is the scope of the professional privilege? For example, journalists' right not to disclose identity of an informant?

### **III. Marital privileges**

Social and personal development of next generation, good quality of life for participants in the marriage and mutual financial support are important objectives of good family institutions. The Ethiopian Constitution describes family as fundamental unit of the society. Art 34 in its sub-article 4 states: *the family is the natural and fundamental unit of society and is entitled to protection by society and the state*. So, marriages, civil partnerships and families are good for society and general non-compellability of a defendant's spouse for the prosecution likely does assist in their protection. Arts 49 and 56 of Family Code also support the need for non-disclosure of communication between spouses.

Compulsion could unnecessarily disrupt marital harmony and place a spouse in invidious position of having to incriminate her/his partner. Accordingly, the Criminal Justice Policy, under its page 21, envisages the idea of marital privilege

However, the privilege has been recognized in a less and less extent.

Today, a spouse's general non-compellability is exceptional both in law and principle. Modern approaches favour principled inclusion of relevant evidence over general exclusionary rules. The Supreme Court's reasoning in *W (Children) (Family Proceedings: Evidence, Re)* suggests that even non-compellability presumptions are not judicially popular. It also privileges an institution arguably in decline. Yet retention of the exception is justified.<sup>79</sup>

English Law states that spouses are, like other witnesses, competent for the prosecution at any case and compellable in some; they are compelled to testify for the accused at all times and also for the prosecution if:

- i. Assault on, injury or threat of injury to wife or husband or a person of under 16;
- ii. Sexual offence on a person under 16;
- iii. Attempting or conspiring to commit or aiding, abating, counseling, procuring or inciting commission of offences under i and ii

Art 93 of the Draft Evidence Rules 1967 states that in all civil proceedings the parties to the suit and the husband or wife of any party to the suit shall be competent witnesses. Art 94 (1) and (2) of the DER states in criminal proceedings against any person, the husband or wife of such person shall be a competent witness if called by the accused, or for an offence committed against the wife or husband such wife or husband shall be a competent witness for the prosecution.

Art 83 of the Criminal Code states:

- (1) when the criminal acted in a manner contrary to the law and *in particular failed in his duty to report to the authority or afford it assistance*, made a false statement or deposition or supplied false information or assisted a criminal in escaping prosecution or the

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<sup>79</sup>Janice Brabyn, A criminal defendant's spouse as a prosecution witness, 8 Criminal Law Review, 613-626 (2011), p616.

enforcement of a penalty, for the purpose of not exposing himself, one, of his near relatives by blood or marriage or a person with whom he is connected by specially close ties of affection, to a criminal penalty, dishonour or grave, injury;

The court shall examine and determine the existence and adequate nature of the relationships invoked.

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

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

## **Exercises**

- ✓ Can non-exemption of a spouse from reporting to or affording assistance to the authority be extended to the denial of privilege from testifying?
- ✓ Is conduct considered a communication to be privileged?
- ✓ Does privilege extend to communications made believing that the spouse is not listening?
- ✓ Shall the test '*a spouse would not disclose the information if it was not for the marriage*' apply in Ethiopia to privilege the information?
- ✓ Which marital privileges apply after dissolution of marriage?
  - o Do privileges apply to an irregular union?
  - o Do privileges apply to other members of the family?

## **Exercise**

Art 9(1) of Procl. No. 699/2010- '....the Ministry (of Justice) may enter into a special protection agreement with a minor where a) the minor is giving information or testimony against his parent or guardian; 2) the special protection agreement must be approved by FHC

- ✓ Does this provision have any implication to the discussion on marital privileges?

The following excerpts discuss marital privileges in different legal systems.

**E.K. Quansah, Competence of a Spouse as a Witness: Some Unresolved Issues in Botswana, 42(1) Journal of African Law, 80-89 (1998), p82, 83, 88**

*In civil cases, spouses of the parties to the suit were generally competent and compellable to testify and difficulties did not arise in the application of this rule. However the decision in Monroe v. Twistleton to the effect that a divorced wife of a party was incompetent to testify concerning a contract made by her former husband during the subsistence of the marriage created an absurdity. To avoid a situation where a present spouse of a party to civil proceedings was competent and compellable while a divorced spouse was not even competent, it was suggested that it should be taken that section 1 of the Evidence Amendment Act, 1853, had overruled the case. This Act made "husbands" and "wives" of parties competent and compellable and it was submitted that these words must be given an extended meaning to cover a divorced spouse testifying to matters occurring during the marriage.*

*The English Criminal Law Revision Committee in its 1972 11th Report proposed changes to the competency rules of spouses. It was of the view that, "if she is willing to give evidence, we think that the law would be showing excessive concern for the preservation of marital harmony if it were to say that she must not do so". After a long legislative inertia, section 80 of the Police and Criminal Evidence Act, 1984 (PACE) at last*

broadly adopted the Committee's recommendation. Section 80(1) makes the spouse competent subject to an exception in subsection (4) where the spouses are jointly charged with the same offence. Nevertheless, even this exception will not apply where he or she is no longer liable to be convicted for that offence by virtue of having pleaded guilty or otherwise. Subsection (2) of section 80 makes the spouse compellable subject to the same subsection (4). Subsection (3) makes the spouse compellable for the prosecution in the following cases: (i) where the case involves violence against him or her or against anyone who was under the age of 16 at the time; or (ii) where the offence is sexual one against a person aged under 16; or (iii) where it consists of attempting or conspiring to commit an offence within the above two cases. Subsection (1)(b) of section 80 makes a wife or husband of an accused a competent witness for the accused and any person jointly charged with the accused. The subsection is silent on the question of an accused charged with more than one co-accused. The view has been expressed that in such a case it is preferable for the spouse of the accused to be compellable for one and not another, rather than that he or she becomes compellable for all by virtue of being compellable for one. Thus the common law rules have been radically modified in the country from where the rules now applicable in Botswana originated.

The rationale for the incompetence of a spouse to testify in criminal trials, especially for the prosecution, where the other spouse is the accused, is the supreme importance which the law attaches to the special status of marriage and the unity supposed to exist between husband and wife. It could also be said that there is a natural repugnance on the part of the public at the prospect of a wife or husband giving evidence against their spouse in such situations. Does this rationale serve any purpose in contemporary society? It is submitted that it does, despite the undercurrent of cynicism of many in society today about marriage. However the question faced by society is how far should a spouse of an accused person be competent and compellable to give evidence. The

*answer entails striking a delicate balance between two competing public interests: that in the proper administration of justice which calls for all available evidence which might lead to the right verdict to be put before the court, and the objection on social grounds of disturbing marital harmony more than absolutely necessary. It is submitted that the right balance is to make the spouse competent to testify and allow the court the discretion to decide whether such a spouse should be compelled or not, the decision on the latter aspect to be reached taking all the circumstances into account, especially the impact on the marriage and the demands of justice in the particular case.*

*The unresolved issues identified in criminal proceedings are: whether section 217 of the C.P. & E. is exhaustive of the situations in which one spouse can testify for the prosecution against the other spouse; whether the incompetence created by the cases falling outside that section extend beyond the marriage; and whether a spouse, though competent to testify for a co-accused of the other spouse, is compellable to do so. It has been submitted that in the first two cases the answer is in the negative and in the latter case the answer is in the affirmative. In civil proceedings the absurdity created by sections 7 and 9 of the E.C.P. needs to be rectified by legislative amendment. All this will be in line with the contemporary progressive contraction of classes of witnesses who were once incompetent and leaving the probative value of such evidence to the court to decide. In the final analysis the question of a spouse testifying, especially against the other spouse, is one of policy, formulated in the light of perceived societal values. It is incumbent on the legislature to determine such values. The present situation leaves something to be desired. That something is the reform of the aspects of the rules discussed.*

**Janice Brabyn, A criminal defendant's spouse as a prosecution witness, 8 Criminal Law Review, 613-626 (2011), p614-615**

*At common law, the defendant's spouse<sup>3</sup> was only a competent witness for or against the defendant with respect to offences against the person of the spouse. In 1898, legislation made a spouse competent for the defendant in all cases and added competence for the prosecution for scheduled offences, essentially rape, some sexual offences against young girls and cruelty offences against children. In *Leach and Hoskyn v Commissioner of Police of the Metropolis* the House of Lords decided that, contra the general rule that compellability follows competence, competent spouses were still not compellable. Then, the Police and Criminal Evidence Act 1984 s.80 made a spouse, now also a civil partner, who is not a co-accused, compellable for the defendant, generally competent for the prosecution and also compellable for the prosecution with respect to what, pursuant to Youth Justice and Criminal Evidence Act 1999 amendments, are now called "specified offences". Divorcees were made compellable as if never married.*

*The original general incompetence of a defendant's spouse for the prosecution owed much to the "doctrine of unity" of husband and wife, also the perceived danger of promoting perjury, a belief in public repugnance at the sight of one spouse testifying against another and the undesirability of the resulting implacable discord and disharmony between the spouses. A blunt rule also had the practical merits of simplicity, predictability and minimising risks of unfair inferences from refusal to testify. By the latter half of the 20th century, the "doctrine of unity" had little credence. In its absence, in a society of increased gender equality and committed individualism, nothing could justify denying a willing spouse the choice of testifying and the trial court access to a willing spouse's evidence, hence general competence.*

*In 1972 the Criminal Law Revision Committee recommended retention of what it believed to be the common law, namely the compellability of the defendant's spouse with respect to offences against that spouse, citing the public interest in the prosecution of serious domestic violence,*

protection against familial pressure not to testify and the absence of proven problems with compellability to date. The Committee also favoured compellability with respect to violent and sexual offences against children of the defendant's household under sixteen, again citing the seriousness of some offences and protection against familial intimidation but also the exceptional difficulty in proving many such cases in the absence of spousal testimony, especially where the child could not testify, and the relatively frequent complicity of the spouses. The Committee rejected extension of this protection to children generally as over inclusive but the extension was made by the EW legislature twelve years later, apparently in response to some "high profile cases of child sex abuse". General compellability was another matter. There was no strong lobby demanding that change and, on balance, the Criminal Law Revision Committee argued against it. The fact a spouse had testified against the defendant was thought highly likely to cause serious and prolonged, often terminal marital conflict, even where internal violence and abuse did not indicate the marriage already had failed or was likely to fail. Marital conflict was still seen as a social evil in itself. Furthermore, unwilling spouses should not generally be exposed to a clash of duties to both prosecution and the defendant, forced to contribute to causing the serious economic and social consequences that followed prosecution of the defendant, nor driven to commit perjury or contempt to protect the defendant. Of course, not everyone agreed.

**J.R. Spencer, Spouses as Witnesses: Back to Brighton Rock?, 62(2) The Cambridge Law Journal, 250-252 (2003), p252**

*In France, the spouse is required to testify, and hence submit to questioning- but does not take the oath, and hence cannot be prosecuted for perjury. In Germany, the spouse is not obliged to testify. However, the spouse is not exempt where (as in the present case) the marriage took place in order to take advantage of the rule. And if an initially co-operative spouse was-as often happens-formally examined by a judge*

*ahead of trial, the trial court can hear the evidence from the mouth of the examining judge if the spouse then declines to testify at trial.*

*In some parts of the common law world the solution is to provide that, where the spouse takes advantage of the privilege at trial, his or her previous statements become admissible in evidence as an exception to the hearsay rule. This is the position under Rule 804 of the Federal Rules of Evidence in the United States—a provision not limited to spouses, but applicable to the previous statements of any witness who declines to testify on grounds of privilege, and of any witness who without such privilege unlawfully refuses. This solution was proposed for England by the Criminal Law Revision Committee in its Eleventh Report in 1972. But alas, nothing so sensible is to be found in the Home Office's latest proposals to reform the hearsay rule, which at the time of writing are before Parliament in the current Criminal Justice Bill.*

#### **IV. Privileges for State Secrets**

##### **- General principles**

Harm shall not be done to the nation or the public service by disclosure of certain documents. On the other hand, administration of justice shall not be frustrated by withholding documents. This privilege is all about balancing these interests, which may at times be conflicting.

In some instances, state interest prevails over individual interests. Hence, if there is no authorization, the state (military, executive or judiciary secrets) must not be disclosed. However, 'smallest probability of injury to the public service must not always outweigh the greatest frustration of the administration of justice'.

The scope of the privilege has been in constant reduction. One development is that the public wanted to see more open government, making the extent of privileged documents less in number. Previously, the

executive had more power to prevent disclosure of state secrets. This is not a principle anymore and at present *'even cabinet minutes are not completely immune from disclosure in a case where, for example, the issue in litigation involves serious misconduct by a cabinet minister.'*

In general, three steps shall be taken in deciding on disclosure or not of a secret state document:

- Party must show the (likeliness) necessity of the document;
- Inspection is made by the judge- as to importance of documents and as to public immunity
- Determination of balance by judge based on; i) weight of the evidence; ii) whether absence would result in partial or complete denial of justice; iii) importance of litigation to parties and the public

The following excerpt gives you some additional idea about state secrets:

**Louis Fisher, The State Secrets Privilege: Relying on 'Reynolds', 122(3) Political Science Quarterly, 385-408 (Fall, 2007), p385, 389, 402**

*On 12 May 2006, a federal district court ruled that Khaled El-Masri could not bring suit against the government on the grounds that he was illegally detained as part of the CIA's "extraordinary rendition" program, tortured, and subjected to other inhumane treatment. The court held that the state secrets privilege had been validly asserted. In a similar case, Maher Arar sued the government for having him removed to Syria for the express purpose of detention and interrogation under torture by Syrian officials. His case was dismissed in part on state secrets grounds.*

*Can the government prosecute someone on the basis of a document it refuses to release? The court proceeded to ask whether "secondary evidence" (not the contract but the oral testimony of the major) was*

*admissible in a court room. It found it unsatisfactory to rely on "a copy of the copy." Because the government had "failed to present the best evidence available to it," the judge concluded that he should have sustained the initial objection to the major's testimony. Without such evidence, the government had failed to sustain its claim that the company was an agency of the United States. The court therefore dismissed the government's prosecution. In short, the government could withhold a requested document, but exercising that privilege could come at a price: keep the document and lose the case.*

*Deciding questions of privileges and access to evidence is central to the conduct of a trial by the judge. In his standard treatise on evidence, John Henry Wigmore recognized the existence of "state secrets" but also concluded that the scope of that privilege had to be decided by a judge, not executive officials. He agreed that there "must be a privilege for secrets of State, i.e. matters whose disclosure would endanger the Nation's governmental requirements or its relations of friendship and profit with other nations." Yet he cautioned that this privilege "has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made." On the duty to give evidence, Wigmore was unambiguous: "Let it be understood, then, that there is no exemption, for officials as such, or for the Executive as such, from the universal testimonial duty to give evidence in judicial investigations." Wigmore posed the key question: Who should determine the necessity for secrecy? The executive or the judiciary? As with other privileges, it should be the court: "Both principle and policy demand that the determination of the privilege shall be for the court".*

#### **- Privilege of state secrets in Ethiopia**

Transparency in government functions is one of the fundamental pillars of good governance. A government must be open to the people it

governs. However, there are some secrets, whose disclosure may be harmful for general public interest.

Art 18 of Proclamation No. 515/2007 includes non-disclosure of information as one of the duties of a civil servant. It states, 'The appointed civil servant shall, before commencement of his work, take the following oath of fidelity:

*"I being a civil servant solemnly and sincerely swear..... not to disclose to any party information that is revealed to me by reason of my duties and is classified as secret or confidential by law or standard transparent procedure".'*

There has been a move to more transparency to the activities of state organs and state officials. The Proclamation on Access to Information and The Registration of Assets of Public Officials are two examples of such move in that direction.

Art 12(1) of Proclamation No. 668/2010 states, '*All information regarding the registration of assets of an appointee, elected person or a public servant shall be open to the public.*' Its sub-article 5 states, '*The Commission shall provide the public with general information regarding the registration of assets under this Proclamation every two years by way of reports.*'

However, the protection against disclosure of some important public interest documents has continued. Analysis of different provisions of the Ethiopian laws provides the conclusion that conditional to exceptions, some documents are not to be disclosed.

The Criminal Code lists some acts of disclosure which are taken to be criminal acts. Art 336(1) makes it criminal to disclose information or documents to an authorized person or the general public documents or information of any kind which are not a matter of common knowledge

and which by their nature are military secrets. This act of disclosure is also punished if done negligently. Art 396 criminalizes a similar action. The source of secrecy can be the nature of the document, specific order of pertinent authority or the law.

Art 397 also criminalizes disclosure of official secrecy. Any public servant is punished for disclosure of information, fact or document which he has obtained in the course of his duties.

More prohibition of disclosure is stated in the Criminal Code.

Article 435 of Criminal Code- Breach of prohibition to publish official debates or documents

Whoever, not being entitled or expressly authorized so to do, publishes in whole or in part deeds, reports, instructions, deliberations or decisions of a public authority, the content of which is required to be kept secret by law or *by virtue of an express decision of the competent authority*, is punishable with simple imprisonment not exceeding three years or fine.

Secrets of court proceedings are also not subject to disclosure without authorisation.

Article 450 of Criminal Code- Breach of Secrecy of Proceedings.

(1) Whoever, without lawful authority or excuse, discloses facts, whether secret or declared secret by the Court hearing the case, which have come to his knowledge in the course of the proceedings at which he was present, is punishable with simple imprisonment not exceeding six months, or fine not exceeding five hundred Birr.

(2) Where the disclosure is committed in violation of official or professional secrecy, the relevant provisions shall apply (Art. 397 and 399).

The duty to keep military, official or other state secrets continues even after termination of the duties.

Secrecy may also be required to protect the interest of voters.

Article 473 of the Criminal Code - Breach of Secrecy of the Ballot.

Whoever:

a) by any unlawful means succeeds in discovering the way in which an elector has exercised his right or cast his vote; or

b) having fortuitously learned of such a fact, intentionally makes it public and spreads it, whether by word of mouth, by way of the press or otherwise, is punishable with simple imprisonment or fine.

In the cases where disclosure is not allowed, or is criminal, there may be exceptions to the prohibition. For instance, Art 12(4) of Proclamation No. 668/2010 permits disclosure of family assets for the interests of justice. This information, in normal cases, is not subject to disclosure. *'Notwithstanding the provisions of this Article the information regarding the registration of family assets shall be confidential unless disclosure is required in the interest of justice or for other purposes to be determined by the Commission as necessary.'*

Criminal liability does not also apply if disclosure is an authorised disclosure.

Article 398 of Criminal Code- Authorized Disclosure.

Disclosure in the interest of the public before a Court of justice or a competent Court of inquiry is not punishable where it is made with the written consent of the competent civil, administrative or military authority.

**- Privileged secrets under Access to Information Proclamation**

Freedom of the Mass Media and Access to Information Proclamation No. 590/2008 explains access to information from public bodies and its limitations. Art 15 of the proclamation stated that restrictive clauses in other laws shall not have any effect, if they are not specified in the proclamation. On the other hand, the only exemptions to the duty to disclosure of information, fact or documents emanate from the proclamation.

Moreover, the same provision states that a record administratively classified as secret may not be exempted from disclosure unless exemption is stated under the proclamation. The following list is taken from the proclamation. It discusses what information is exempted from disclosure and in what cases it can be disclosed.

i. Information relating to third party (Art 16)

Any disclosure which involves unreasonable disclosure of personal information about a third party may not be made by a public body. Disclosure in this case must be made if:

- The third party consents;
- Prior information about disclosure was communicated to the third party;
- Information was already public;
- Third party is under the care of the requesting person and is in the best interest of the third party; this applies to persons who are incapable under the law;
- When third party is a deceased and the requesting person is next of kin or had permission from the next of kin;
- Third party is or was a public servant and information relates to his duty as a public servant

ii. Commercial information of a third party (Art 17)

The public body cannot disclose trade secret, financial, commercial and scientific, contractual information of a third party. Disclosure in this case must be made if:

- Information is publicly available;
- The third party consents;
- Information relates to results of any product, environmental testing or other investigation where disclosure reveals a serious public safety or environmental risk;

iii. Protection of confidential information of third party (Art 18)

The public body cannot disclose information where the public body has the duty of confidence by contract and legal action is to follow if disclosure is made. This prohibition also applies if disclosure would likely prejudice the future supply of similar information from similar source and there is a public interest in the continued supply of such information. For instance, if police offices are forced to disclose information about informants/whistleblowers, there may not be whistleblowers anymore.

Disclosure of such information must, however, be made if the third party consents to the disclosure.

iv. Protection of safety and individuals and property (Art 20)

When disclosure by public body has the following consequences, disclosure must not be made.

- Would likely endanger the life or physical safety of an individual;
- Would reasonably be expected to prejudice or impair the security of building structure or system
- Would likely prejudice or impair methods, plans or procedures for the safety of the public or any part of the public or for the protection of the individual under witness protection scheme;

v. Protection of proceedings of law enforcement and legal investigation (Art 21)

The public body is given the mandate of refusing to disclose information if it or part of it relates to methods, techniques, procedures or guideline for the prevention, detection, curtailment, or investigation of a contravention or possible contravention of the law, or the prosecution of the alleged offenders and if disclosure of such information is likely to prejudice the effectiveness or to lead to the circumvention of the law or facilitate the commission of an offence.

The same mandate is given to the public body if disclosure of information relates to an alleged offender whose prosecution is not instituted or pending and if such disclosure is likely to impede the prosecution, to result in miscarriage of justice or to prejudice or impair the fairness or impartiality of a trial.

However, access to information cannot be denied when request relates to the general condition of detention of persons in custody.

vi. Protection of records privileged from production in legal proceedings (Art 22)

The public body must refuse disclosure if information is privileged from production in legal proceedings. Such disclosure must be made if the person entitled to the privilege has waived the privilege.

All the above exceptions to disclosure relate to information on third parties and their interests. The list continues with exemptions relating to state documents.

vii. Defence, security and international relation (Art 23)

If likely prejudice to the security, defense and international relations of the country is posed by disclosure, the public body has discretion not to disclose such information. Such information includes:

- Information related to military operation, exercises, military tactics or strategy undertaken in preparation of hostilities or in connection

with the detection, prevention, suppression or curtailment of subversive or hostile activities. Also exempted from disclosure is the identity of a confidential source of such information;

- Information related to quantity, characteristics, capacity, power, vulnerability or function or capability or deployment or utility of weapons or any other equipment used for the detecting, preventing or suppressing or curtailing of subversive or hostile activities or anything being designed, developed, produced or considered for use as weapons or such other equipment;
- Information related to the characteristics, capabilities, vulnerability, potential deployment, or function of any military force, unit or personnel, or anybody or person entrusted with the task of detecting, preventing, suppressing or curtailing hostile or subversive activities;
- Information held for the purpose of intelligence related to the national defence or relating to the detection, defence, suppression or curtailment of subversive or hostile activities or relating to another state or an international organization or used by or on behalf of the country in the process of deliberation and consultation in the conduct of international affairs.
- information supplied by or on behalf of the country to another state or an international organization in terms of an international agreement or arrangement with that state or organization which requires the information to be held in confidence;
- information required to be held in confidence by an international agreement or international customary law;
- information on the positions adopted or to be adopted by the country, another state or an international organization for the purpose of present or future international negotiations; or
- Information that constitutes diplomatic correspondence exchanged with another state or with an international organization or official correspondence exchanged with diplomatic missions or consular posts of the country.

viii. Cabinet documents (Art 24)

A public body must not disclose cabinet records unless the records are made available to the general public by the decision of the cabinet. Such record includes:

- a record that has been submitted to the cabinet for its consideration or is proposed by a head of the public body to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the cabinet;
- an official document of a cabinet;
- a document that is a copy of, or a part of, or contains an extract from, the records referred above;
- a record the disclosure of which would involve the disclosure of any deliberation or decision of cabinet, or its committee. Disclosure must be made when a document of the cabinet was officially published.

ix. Economic interests and financial welfare of the country and commercial activities of public bodies (Art 25)

Mandate to refuse disclosure is given to a public body if disclosure likely jeopardizes the economic interests or financial welfare of the nation or the ability of the government to manage the economy of the country. Such information includes:

- Information about a contemplated change in, or maintenance of, a policy substantially affecting the currency, coinage, legal tender, exchange rates or foreign investment;
- Information about a contemplated change in or decision not to change; credit or interest rates, customs or excise duties, taxes or any other source of revenue, the regulation or supervision of financial institutions, government borrowing, or the regulation of prices of goods or services, rents or wages, salaries or other incomes;

- Information about a contemplated sale or acquisition of immovable or movable property or a contemplated international trade agreement.

The public body must also refuse information relating to:

- Trade secrets of the state or a public body;
- financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which would be likely to cause harm to the commercial or financial interests of the state or a public body;
- information, the disclosure of which could reasonably be expected to prejudice a public body in commercial competition or to put a public body at a disadvantage in contractual or other negotiations.

Disclosure of such information is done if the information was already publicly available or consent is given by the public body which owns the information. Disclosure must also be made if the information relates to results of any product, environmental testing or other investigations carried out by or on behalf of the public body the disclosure of which would reveal serious public safety or environmental risk.

#### x. Operations of public bodies (Art 26)

A public body must refuse disclosure of information<sup>80</sup>:

- which contains an opinion, advice, report or recommendation obtained or prepared or an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting, for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law;
- whose disclosure could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid communication of an opinion, advice, report

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<sup>80</sup>The Amharic version of this provision makes non-disclosure the mandate of the public body.

of recommendation or conduct of a consultation, discussion or deliberation;

- whose disclosure could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy;
- whose disclosure could reasonably be expected to jeopardize the effectiveness of a monitoring, auditing examining or testing, procedures or methods used by a public body;
- contains evaluative material, whether or not the person who supplied it is identified in the record, and the disclosure of the material would breach an express or implied promise which was made to the person who supplied the material and to the effect that the material or the identity of the person who supplied it, or both, would be held in confidence; or
- contains a notes, preliminary, working or any other draft of an official of a public body.

All the above cases of non-disclosure are to be applied only when the public interest in non-disclosure overrides the public interest in disclosure.

Art 28 of Proclamation 590/2008: public interest override

Notwithstanding the exceptions in article 15-25 of this proclamation a public body may not refuse a request for information *unless the harm to the protected interest which would be caused by disclosure outweighs the public interest in disclosure.*

✓ Who does this balancing?

The public body is given the mandate of balancing the interests in cases of exercising the exceptions. This is, in fact, conditional to the possibilities of appeal to Institute of the Ombudsman and later to the ordinary courts. Persons who have been denied access to information

may appeal the decision to the Institute of the Ombudsman and then later to the ordinary courts.

- ✓ Can courts order public information to be presented to them for evaluating the application of the privilege?

The following two provisions of the proclamation give the answer.

Art 34 of Proclamation No. 590/2008: Court Appeals

*2/ Subject to the provisions of Article 35, a court reviewing an appeal under this article may examine any record of a public body and no such record may be withheld from the court on any ground.*

3/ The court, in deciding the matter, shall not disclose any exempt information under this Proclamation. The court may, where necessary, receive evidence or hear argument in the absence of the applicant or his representative.

Art 35 of Proclamation No. 590/2008: Issuance of Certificates

1/ In so far as the information sought to be accessed or the existence or non-existence of which is sought to be confirmed relates to national security, national defense or international relations the head of the public body may issue a certificate certifying that the information falls within the scope of exceptions set out in Article 22 and that disclosure of the information would be almost certain to cause serious harm to national security.

2/ Notwithstanding any provision in this Part, neither the Ombudsman nor any court may review a decision under sub-article (1) to issue a certificate.

3/ Any certificate under sub-article (1) must be tabled in the House of Peoples' Representatives within 30 days of its issuance and the House may either approve or rescind the certificate.

Details of rules on non-disclosure of public information are to be regulated by a regulation of the Council of Ministers.

Art 37 of Proclamation No. 590/2008: Powers to Make Regulations.

The council of ministers may make regulations regarding;

2) *The procedures for the custody and classification of information regarded as confidential or declassification of records;*

3) Any matter which is required for the implementation of the provisions of part three of this proclamation.

Another proclamation relevant to disclosure of public information is Registration of Vital Events and National Identity Card Proclamation No. 760/2012. Art 64(1) of the proclamation states, 'information collected in relation to registration of vital events or national ID may be disclosed to other organs for the following purposes, among others:

- (b) for crime prevention and investigation;
- (f) for other purposes authorized by law;

Art 64(3) states that information specific to an individual can be disclosed to any other person only by the *consent of the individual or order of competent court*;

Art 64(5) states that if disclosure of information specific to an individual is likely to prejudice public interest, such information may not be disclosed to any other person irrespective of the consent of the individual.

- ✓ Shall it still be disclosed by the order of the court?

Still another provision relevant for our discussion is Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No. 699/2010. Art 24 states the duty of confidentiality, i.e., records and information relating to protected persons shall be classified as strictly confidential and kept accordingly.

Disclosure may be done, according to the provision, only with the authorization of the top leadership of the Ministry of Justice. The Ministry may disclose the information if:

- The beneficiary of the protection consents for disclosure;
- the beneficiary has disclosed the information already;
- disclosure is necessary to investigate an offence punishable with 10 years or more;
- testimony is found necessary to prove the innocence of another suspect in a criminal case.

The Ministry in considering the last two cases must take into account:

- the impact of disclosure on beneficiary or former beneficiary;
- the absence of alternative other than disclosure;

- **Other privileges**

The following is one example of privileges which do not fall under any of the privileges discussed above.

Article 45 of the Criminal Code- Secrecy of the Identity of a Source.

(1) The editor or publisher of any publication, which is not periodical, may not be compelled to disclose the name or pen-name of the author.

(2) The publisher or editor of any publication may not be compelled to disclose the source of any matter printed in publication.

(3) Notwithstanding the provision of sub-article (2) of this Article, the Court may order the publisher or editor of the publication to disclose the source of information:

(a) where a crime is committed against the Constitutional Order, National Defence Force or security of the State constituting clear and imminent danger, or

(b) in the case of proceedings of a serious crime, where such source does not have any alternative and is decisive for the outcome of the case.

#### **4.4. Examination of Witnesses**

As stated in the preceding sections, oral evidence is adduced before triers of fact by way of giving answers to questions put to the witness. There are three forms of questions, namely: examination in chief, cross-examination, and re-examination. It is the principle of evidence law in adversarial system that the party who bears the burden of proof has right to begin. Thus, as a rule the public prosecutor/plaintiff begins as the case may be. The witness testifies by giving answer to examination-in-chief followed by cross-examination by the opposing party and re-examination by the calling party.

In Ethiopia there is no law that deals deeply on how the examinations have to be carried out except as mentioned in the two procedures and Court Rule 1943. The court Rule 37 of 1943 stated as follows;

*Every witness shall give his evidence on oath and orally and in open court and in the presence under the direction and superintendence of the court. The party calling a witness examines him...*

##### **I. Examination-in-chief**

In a system that follows the party presentation principle, the calling party must extract testimony from a witness. This type of examination is the only mandatory examination. A party may waive his right to cross-examine, which in effect means absence of re-examination. However, if a party has to present evidence and such evidence is to be presented in the form of oral evidence, i.e., testimony of witnesses, the party must present all the relevant facts through examination-in-chief. This examination is to be conducted as a form of questions from the party and answers from the witness.

Art. 137 of the Criminal Procedure Code- *Form of questions put in examination-in-chief*

(1) Questions put in examination-in-chief shall only relate to facts which are relevant to the issues to be decided and to such facts only of which the witness has direct or indirect knowledge.

(2) No leading question shall be put to a witness without the permission of the accused or his advocate or the public prosecutor, as the case may be.

Art. 263 of the Civil Procedure Code- *Form of questions*

(1) Questions put in examination-in-chief shall only relate to facts relevant to the issues to be decided and only to such facts of which the witness has direct or indirect knowledge.

(2) No leading question shall be put to a witness without the permission of the court.

Only questions relevant to the issue and to which an accused has direct or indirect knowledge can be asked in examination-in-chief. The trier of fact may order the witness not to answer irrelevant questions or order the calling party to focus only on relevant questions. Moreover, the opposing party may object calling party's questions based on irrelevance.

The other important point to be considered is the prohibition of leading questions in examination-in-chief. With the concept of leading questions- that is, a question that is phrased in such a way that the desired answer is contained or implied in the question itself. Art. 263(2) of civil procedure code and Art 137 (2) of the criminal procedure code in the same language stated '*no leading question shall be put to a witness without the permission the court.*'

Sedler elaborated the above assertion by stating 'the purpose of the rule forbidding leading question in the examination-in-chief is to prevent a witness who is quick to adopt the suggestion of the examiner from saying

something that he would not say otherwise. 'We can assume that the testimony must be that of a witness and not of the examiner; the examiner cannot *'put words in the mouth of the witness,so to speak'*. In other word, the examiner cannot suggest the answer he wants to receive and try to get that answer from the witness.

However, in relation to testimony of hostile witness, many jurisdictions allow cross-examination (and hence, leading questions) in examination-in-chief as exception. Hostile witness is a witness who intentionally declines to tell the truth and testifies against the calling party. In Ethiopia, this rule is clearly provided in the Anti-corruption Special Procedure and Rules of Evidence proclamation No. 434/2005.

Article 44 of the proclamation- Hostile witness

1. *The court may allow the party who called the witness to cross-examine a prosecution or a defence witness who, being unwilling to tell the truth, has given the statement contradictory from his previous statement.*
2. *The court shall, before allowing cross-examination, ask the witness whether he has given contradictory statement or not. If he admitted, cross-examination shall be allowed.*
3. *If the witness denies making a contradictory statement, the court shall give its ruling.*

In fact it is reasonable to assert that this exceptional rule shall also work in any criminal case as experiences of many other countries show. It is also not logical to confine the rule only in case of corruption while there many other serious crime cases.

## **II. Cross-examination**

Cross-examination is a constitutional right constituting an important aspect of due process of law and in criminal cases of the right of confrontation. Thus, cross-examination is a fundamental right and not merely a privilege.

As would be suggested, the proper purpose of cross-examination is for the witness's evidence-in-chief to be tested for its accuracy and completeness. The cross-examiner will seek to elicit from the witness any further evidence which may undermine the case of the party who called him and/or support the case of the cross-examining party, for example by showing that the witness's evidence was based on a mistaken understanding of the events. The previous bad character of a witness (previous conviction for perjury) may be raised as alternative way to discredit current testimony of a witness. He may try to show the witness ought not to be believed on oath because of his past conduct, his previous convictions, and his relationship with the party who called him, or his previous inconsistent statements.

In sum, cross-examination is important to invalidate the testimony of a witness through attacking the statements or the trustworthiness of the witness. It can also be used to extract new information that can favour the cross-examiner. This can be done by presenting inconsistent statements, specific contradiction, character (previous conviction such as perjury or bad reputation) and defective ability of the witness. For instance, statements made by a party during police investigation may be used to impeach the testimony a witness has made before the trier of fact.<sup>81</sup>

In Ethiopia, it was Rule 37 of Court Rule of 1943 which first dealt with cross-examination. It stated:

*Every witness shall give his evidence in oath, orally and in open court, and in the presence of and under the direction and super intendance of the court. The party calling a witness shall examine him, and the other party may cross-examine him...*

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<sup>81</sup> Ethiopian Criminal Procedure Code, Art 145.

The Draft Rule of Evidence, Art 108(2) is more specific than that of civil and criminal procedure codes, which has similar to the English approach that cross-examination is not limited to the matter of upon which the witness has already been examined-in-chief, but extends to the whole case and therefore if a plaintiff calls a witness to prove the simplest fact connected with this case the defendant is at liberty to cross-examine him on every issue.

Cross-examination is described as the greatest weapon in defending oneself in an adversarial judicial system. Hence, a cross-examiner must use it effectively. However, a cross-examination can bring about new facts which may hurt the case of the examiner. Hence, a cross-examiner must also be cautious in exercising it.

Tatek states some methods of effective cross-examination<sup>82</sup>:

- ✓ Eye contact
- ✓ Analyse the tone of witness's voice
- ✓ Treatment according to the behaviour of the witness
- ✓ In serious crimes, don't ask too much if you have better chance of success
- ✓ Don't ask ambiguous question as it brings ambiguous answer
- ✓ Control yourself
- ✓ Look into the bigger picture in asking
- ✓ Don't underestimate your opponent
- ✓ Respect the court
- ✓ Take care not to alert the court on a point not clearly raised in examination-in-chief beneficial for calling party
- ✓ Ask questions whose answers you already know so that you will not be misled
- ✓ Require yes-no answers; this controls the witness's testimony and guide him to your own purpose

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<sup>82</sup>Tatek Tadesse, Fundamentals of Evidence Law (Amharic) (2003EC), p202.

- ✓ if your interest is not hurt by examination-in-chief, don't cross-examine
- ✓ Don't attack a true witness- his trustworthy will be consolidated
- ✓ If you get what you need, ask no more
- ✓ Prepare for cross-examination- all leading to your objective

## **Exercise**

- ✓ Do you think the right to cross-examine is an absolute right?

Art 20(4) of the Constitution states the fundamental fair trial right of an accused to cross-examine a witness that testifies against him. This requires the appearance of the witness before the trier of fact in the presence of an opposite party. Whether this right is an absolute right is a matter of controversy.

ICCPR, under its Art 14(3)e includes 'the right to examine or have examined the witnesses against him' as one of the minimum guarantees of the defendant's fair trial rights in determination of criminal charge against him. However, there is no decision that put this minimum guarantee as an absolute right of the defendant.

In English law, a court may allow a witness to testify in writing or without appearing before the court (so, with no cross-examination) if:

- a. There is threat on the witness;
- b. His testimony is relevant and its absence can bring miscarriage of justice;
- c. No substantial damage on the defendant due to lack of cross-examination;<sup>83</sup>

Several Australian jurisdictions have adopted a partial solution to these problems, enacting general compellability for all witnesses, including spouses, but with an additional procedure whereby spouses, parents, children or de facto partners can apply to the trial judge for exemption

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<sup>83</sup>JOPTC Module on Evidence, p52.

from compellability to give evidence or disclose a communication between the applicant and the defendant in a particular case. For example, in South Australia, an application may be made during any proceedings connected with a charge against the defendant and may be granted where it appears to the court:

“(a) that, if the prospective witness were to give *evidence*, or *evidence* of a particular kind, against the accused, there would be a substantial risk of--:

(i) serious harm to the relationship between the prospective witness and the accused; or

(ii) serious harm of a material, emotional or psychological nature to the prospective witness; and

(b) that, having regard to the nature and gravity of the alleged offence and the importance to the proceedings of the evidence that the prospective witness is in a position to give, there is insufficient justification for exposing the prospective witness to that risk” The court must satisfy itself that the “close relative” is aware of the procedure. The application is made in the absence of the jury. The prosecution may not comment on the fact of an application or the failure of the applicant to testify.<sup>84</sup>

The European Convention on Human Rights, under its Art 6(3)d includes ‘the right to examine or have examined the witnesses against him’ as one of the minimum guarantees of the defendant’s fair trial right in determination of criminal charge against him. Before an accused is convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial hearing. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him.

The European Court of Human Rights (ECHR) does not take the right to cross-examination to be an absolute right. Hence, the right must be

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<sup>84</sup>Janice Brabyn, A criminal defendant’s spouse as a prosecution witness, 8 Criminal Law Review, 613-626 (2011), p621.

weighed with other interests and balance must be made. The interests of the witnesses must be considered in determining whether the witnesses must appear before a trier of fact to be cross-examined. In one case, the court stated:

*'In balancing all interests involved, the court is of the opinion that the interests of the four still very young children in not being forced to relive a, for them, possibly very traumatic experience must be given priority over the interests of the suspect in hearing these children.'*<sup>85</sup>

On the other hand, the US Supreme Court has decided that the Sixth Amendment's 'confrontation clause'<sup>86</sup> requires that any testimonial evidence can only be admitted if it was subject to confrontation. When the witness was unavailable at trial, it must be shown that the defendant had a prior opportunity for cross-examination (*Crawford v. Washington* 541 US 36 (2004)). This decision was followed by another one which labeled laboratory analysis reports as testimony oral evidence and subject to confrontation (*Melendez-Diaz v. Massachusetts* 129 SCt 2527 (2009)). Further decision of the court indicated that to fulfill the requirements of the confrontation clause, the defendant must have the opportunity to confront the expert who had written the analysis report (*Bullcoming v. New Mexico* 131 SCt 2705 (2011)). The court accepts waiver of rights of confrontation as an exception. Also an exception is where the defendant has frightened the witness from testifying. (*Davis v. Washington* 547 US 813 (2006), and *Giles v. California* 554 US 353 (2008)). The above decisions are a major shift from a previous case law that evidence with "particularized guarantees of trustworthiness" was admissible without confrontation. The court had asked two questions to accept testimony which had not been confronted: i) whether the prosecutor had done everything to ensure the presence of the witness and ii) whether the state

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<sup>85</sup> ECHR, *Bocos Cuesta v the Netherlands*, 2006.

<sup>86</sup> The clause states that defendants have the right 'to be confronted with the witnesses against them'.

had proved that prior testimony carried an indicia of trustworthiness (*Ohio v. Roberts* 448 US 56 (1980)).

The legal systems that follow the inquisitorial judicial system do not recognize the right to cross-examine of a witness. All oral witnesses are the courts' witnesses, though generally speaking the parties tender them. This is what is called 'inquisitorial.' There is substantially no cross-examination and for practical purposes none at all by the parties or their legal representatives. The witness in effect makes his statement in his own words... there being no "hearsay" rule, i.e., the exclusionary rule, it is for the court to decide the value of what has been said.

✓ What about in Ethiopia?

Analysis of the provisions of Ethiopian laws shows that there are exceptions to the right to confront witnesses. One example of the Anti-terrorism Proclamation No. 652/2009, Art 23(2) that provides that hearsay is admissible in terrorism proceedings. Hearsay is an evidence due to the absence of the person with primary information, the defendant is at difficulty to cross-examine.

Another possible exception relates to the Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No. 699/2010, which according to its Art 3 applies to witnesses and whistleblowers of offences punishable with 10 years or more rigorous imprisonment or death and who gave information under circumstances where a) no other means to reveal or establish the offence; b) threat of serious danger on life, security, freedom, property to them.

Though their testimony has to be produced at trial to be confronted by a defendant, such confrontation, if possible, may be limited to the statements they made. As was mentioned above, cross-examination is not only limited to finding inconsistency or contradiction in the statements of the witness. It also applies to attacking the trustworthiness of the

witness. However, Art 4(1)j and k may limit the efficacy of cross-examination. The provisions state two protections, among others, rendered to witnesses. Protection under (j) is to make the witness testify behind screen by disguising identity. Hence, the defendant cannot attack the witness's credibility by, for example, stating his bad character.

Protection under (k) is more controversial. It states that the testimony of the witness can be produced by electronic devices or any other method. What happens to cross-examination in this case is not clear. If it is to mean that the witness will not appear before a trier of fact, it is denial of cross-examination.

Such kinds of restrictions, interpreted in any way, are to be authorized by the Ministry of Justice, not the court. The court has the responsibility to ensure that protection measures mentioned above are taken as appropriate (Art 23(1)). Is this denying the court the mandate of weighing the interests and decide accordingly?

The fact that a witness is entitled to protection cannot be invoked as a ground to diminish the credibility of his testimony (Art 26 of the Proclamation).

### **Exercise**

- ✓ How do you evaluate the above provisions in terms of Art 20(4) of the Constitution?
- ✓ The FSC has arranged a system to hear child witnesses without requiring them to face the defendant or his counsel. Is this related to the issue at hand?

Comment

The following excerpt explains impeachment of witness's testimony through cross-examination:

**David Torrance, Evidence of Character in Civil and Criminal Proceedings, 12(6) The Yale Law Journal, 352-363 (1903), p361-362**

*Impeachment of a witness's testimony*

*Upon the question whether impeaching and supporting evidence must be confined to evidence affecting veracity alone, or whether it may include evidence of general good or bad moral character, the courts are not at all agreed. "The fundamental trait desirable in a witness is the disposition to tell the truth, and hence the trait of character that should naturally be shown in impeaching him is his bad character for veracity. But there has always been more or less support for the use of bad general character, i.e. the man as a whole, not specifically the trait of veracity-as necessarily involving an impairment of veracity. This was the original English doctrine; but it was replaced in the early 1800s by the first mentioned principle, with the exception that the witness is allowed to base his statement as to the other's veracity, upon his knowledge of the other's general character. In this country the better doctrine that the trait of veracity only could be considered was early introduced; and this is the rule in the great majority of jurisdictions." In a great many States, however, evidence of general bad character is admissible to impeach a witness.*

*Whether the evidence offered to impeach or support the character of a witness is that of character for veracity alone, or that of general moral character, the object is one and the same, namely, to ascertain the character of the witness for truth. Speaking generally such evidence either of the trait veracity, or of general moral character is confined to evidence of reputation.*

*With the single exception of convictions for crime the courts are generally agreed that general reputation in cases of impeachment cannot be established by proof of specific acts, whether brought out upon the direct or upon the cross-examination. As a general rule, with but few*

*exceptions, reputation evidence must be confined to evidence of reputation as to veracity or general moral character, and cannot extend to proof of specific traits other than veracity. A few courts have held that a woman's character for veracity might be impeached by proof of her bad reputation for chastity<sup>2</sup> But the widely prevailing rule is the other way.*

### **III. Re-examination**

Re-examination is confined to issues that were covered in cross-examination. Its purpose is to bring back the credibility of the testimony of a witness which might have been damaged by cross-examination. Questions such as whether re-examination exceeds the scope of cross-examination, whether the testimony offered is in the nature of refutation, as well as the propriety of the form of the question ultimately rest in the discretion of the court.

#### **Exercise**

What is the role of the judge in the examination of witnesses in Ethiopia? Refer to the articles in chapter 1 and discuss

### **4.5. Hearsay**

#### **I. Definition of hearsay**

Example 1: In a divorce case based on adultery, H wishes to demonstrate a romantic relationship between W and her lover (L). Counsel for H tries to introduce testimony of a florist that L ordered flowers to be delivered to W. A statement of the florist as presented by H is hearsay.

Example 2: In a custody contest, the father hopes to demonstrate that his infant child has more affection for him than for the mother. He contends that when he and the mother would return home together after an evening out, the child would rush from the babysitter to him rather than

to the mother. The father's testimony about the child's affection is not hearsay.

Example 3: a mechanic warns a pilot that the carburetor heat on the airplane does not work properly. The mechanic is not available to testify, but a bystander who heard his warning can repeat what he said. If offered with intent to prove that the plane was defective, the bystander's testimony is hearsay. It is an out-of-court statement that is offered to prove its truth. However, if it offered against the pilot to show he was on notice of a defective condition, the statement is not hearsay.<sup>87</sup>

Example 4: a witness testimony about a plate number of a car to prove car was accused's car is hearsay when the witness cannot testify before a court. However, if the testimony was presented to prove statement was made or to prove informant's lie (e.g., for establishing obstruction of justice by informant), testimony is not hearsay. Statements of a witness not present in court to prove offer and acceptance, (in)consistent statements, mental element of a person, false representation and defamation are also not hearsay.

✓ What makes testimony hearsay then?

Hearsay can be defined in any of the following ways:

- Hearsay applies to that piece of testimony given by a witness who relates, not what he knows personally. But who others told him or what he has heard said by others. (Black's Law Dictionary)
- "Hearsay is evidence of an out-of-court statement that is offered to prove the truth of the matter asserted."
- Hearsay is evidence that depends for its probative value on the veracity of an out-of-court declarant."

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<sup>87</sup>James W. McElhaney, Limited Admissibility: Keeping Evidence on Track, 79(2) ABA Journal, 81-82 (1993), p82

- "Hearsay is evidence of an out-of-court statement that is offered to prove its truth."

In the above case, if the witness on the stand says he heard an auto mechanic warn a driver that the tread on his right front tire was starting to separate from the casing and the tire could blow apart any time, throwing the car out of control. If the other side is offering this evidence to show that the tire was defective, who do you want to cross-examine? The answer is 'you want to cross-examine the auto mechanic'. He's the real witness. We do not know whether the person on the stand ever even looked at the tire. However, suppose your opponent offers the mechanic's statement to show that the driver was on notice that there might be something wrong with his car. Now it does not matter whether the mechanic's statement was true or not. The person on the stand is a real witness who heard the mechanic warn the driver.

In another example, at the trial of a man for murder of his wife, a neighbour was allowed to testify that the wife had given her a knife and an axe for safekeeping, saying that her husband had threatened her with them. The wife's reported words were admitted, under the *res gestae*, to explain her behavior. The court failed to notice that the behaviour was itself strictly inadmissible: it amounted to an implied assertion that she had been attacked by her husband. Her words should therefore have been excluded as irrelevant.<sup>88</sup>

When you have a choice of how to offer the evidence, the best one is usually the rule that makes the evidence admissible for all purposes and against all parties. For example, suppose a truck driver crashes into the back of a car stopped at a red light. He jumps out of the truck and runs up to the driver of the car he hit. "I'm sorry," he says, "it's all my fault." Before the Federal Rules of Evidence, the driver's statement was an

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<sup>88</sup>T.R.S. Allan, Hearsay Exception Subject to Relevance. Relevance Subject to Hearsay, 44(3) The Cambridge Law Journal, 345-348 (1985), p345.

admission but only against him, not against his employer. Why not? Because the driver was hired to drive, not to talk. It was outside the scope of the driver's employment, and therefore inadmissible against the employer.<sup>89</sup>

## **II. What about acts, utterances or others which are not statements**

Hearsay evidence can be a testimony given orally or in a written form. However, it is not limited to statements made by a party who cannot appear before the court.

The following excerpts clarify the extension of hearsay to acts, utterances or others which are not statements:

### **Testamentary Hearsay, 38(7) Harvard Law Review, 959-963 (1925), p961**

*Questions of greater difficulty, upon which the authorities are sharply divided, are presented when the issue is as to the occurrence of a physical fact, such as the execution of a will claimed to be a forgery, the fact of revocation, the contents of a lost will, or the exertion of "undue influence." A recent case,<sup>10</sup> following the decision in *Tkrock-morton v. Holt*, holds all declarations of the testator inadmissible, on the issue of forgery, regardless of the nature of the statements, or the time of their utterance. Most courts, however, admit declarations of intent, made prior to the fact in issue.<sup>12</sup> Many go further, and allow such declarations to be used to rebut or strengthen the presumption of revocation arising from the disappearance of a will last seen in the testator's possession,<sup>13</sup> although here the chronological relation between the utterances and the fact sought to be shown is uncertain.*

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<sup>89</sup>James W. McElhaney, Limited Admissibility: Keeping Evidence on Track, 79(2) ABA Journal, 81-82 (1993), p82.

**J.R. Spencer, Hearsay, Relevance and Implied Assertions, 52(1) The Cambridge Law Review, 40-42 (1993), p40-41**

*In so deciding, the House finally resolved a long debated point: does the hearsay rule extend beyond statements intended as assertive, and include what are usually referred to as 'implied assertions'? To prove X has body odour, clearly you may not call Y to say Z says he has: but can you do so by getting Y to say he saw Z walk away from X with a clothes-peg on his nose? Though commentators (like Archbold (1992) para. 11-5) have seen this as a difficult point on which the authorities conflict, the majority in *Kearley (R. v. Kearley* [1992] 2 A.C. 228) thought the law was already clear, and that implied assertions come within the ambit of the rule. Though the callers did not expressly say 'iChippie deals in drugs?', their words and acts-said their Lordships were proved as impliedly asserting this: and therefore should have been rejected as hearsay. (Lord Griffiths and Lord Browne-Wilkinson, dissenting, thought otherwise: the evidence was admissible to show that Kearley had a market for his drugs rather than because it contained implied assertions.)*

*For example, to support the evidence of P that D uttered a threat to shoot him, can the prosecution now lead evidence that the other drinkers in the bar immediately fled? The decision spells more arguments about admissible evidence at trial, and more appeals on evidential technicalities.*

*The second reason the majority gave for suppressing this evidence was that they thought it was irrelevant. What the callers said showed their intent to buy-but that, said the majority, did not prove that Kearley had the intention to sell. As Lord Oliver put it, 'Can one, for instance, legitimately infer an intention to make a gift to charity from evidence of calls made by collectors seeking donations?' The answer to this, surely, is that it all depends on what you mean by 'prove'. The behaviour of the would-be buyers does not prove it conclusively, but it tends to suggest it which is all we normally mean in the law of evidence by "prove"-because*

*people are more likely to try to buy a product from someone who makes a habit of selling it than from someone who does not. Buyers of drugs unlike charity collectors, do not usually go systematically down the street, knocking at every door. If only one buyer calls at a given house that may be due to a hoax, a frame-up, or an error: but the more who do, the less likely such explanations are.*

**R.C.F., Evidence: Hearsay: Declarations Concerning Mental State: Intention, 4(2) California Law Review, 145-148 (1916), p147**

*These statements concerning intention do, however, come within the scope of a recognized hearsay exception, and it was on this ground that the Tugwell case admitted the evidence. This exception makes declarations concerning a present existing mental state admissible as proof of it, when made in a natural manner, free from circumstances of suspicion. It exists by reason of the fact that there is no direct means of proving the mental state except by these assertions. There is no res gestae requirement, nor is its application confined, as in the Tugwell case, to situations where the disputed fact is death by homicidal agency. The absence of spontaneity and remoteness in point of time from the fact sought to be proved (except as regards materiality) are questions of weight, not admissibility. However in proving that A did an act or went to a certain place, his intention alone may be offered in proof of this fact. To allow the use of A's (mental state) belief that he had gone to the place or had done the disputed fact would amount to a complete abrogation of the hearsay rule, for the declarations would not be taken as proof of the existence of the mental state but as direct evidence of the fact in issue.*

**Rosemary Pattenden, Conceptual versus Pragmatic Approaches to Hearsay, 56(2) The Modern Law Review, 138-156 (1993), p138-143, 153, 155**

*However, (in common law) when the question of admitting an out-of-court assertion arises in a criminal trial, no attempt is ever made to measure the real danger which the statement presents to the fact-finding*

*process. Instead the court concentrates on conceptual issues - is the statement being used testimonially? If the answer is yes, does it fall within one of the narrow and inflexible common law exceptions to the rule (all of which were created before the end of the nineteenth century) or one of the more recent, but equally limited, statutory exceptions to the rule. If the answer to the second question is no, the evidence is automatically rejected. There is never any question of weighing the probative value of the evidence against the risk of unreliability.*

*There are many examples in the law reports of hearsay evidence which ought on any pragmatic view to have been before the fact-finder, but which was not acted upon because of an overly conceptual approach to hearsay. The case of Myers v DPP which precipitated the first statutory exception to the hearsay rule for criminal trials is notorious for this. To the list of decisions which confound common sense must now be added the House of Lords' ruling R v Kearley, which will form the focus of this article. The police, who suspected that Kearley traded in illegal drugs, raided his home. They found drugs hidden in a rabbit hutch, but not in sufficient quantities to raise the inference that Kearley possessed drugs with intent to supply, the offence with which he was charged. Whilst on the premises the police intercepted fifteen telephone calls. Ten of the callers asked for the accused and asked for drugs. In addition, nine people visited the premises, seven of whom indicated that they wanted to purchase drugs. None of the callers or visitors appeared as a witness at the trial. The prosecution proposed instead to call the police officers with whom they had conversed to give evidence of what they had said. Those who had requested drugs had done so in terms which implied a belief that Kearley sold drugs. The prosecution contended that this provided the necessary evidence that the drugs found in Kearley's possession were intended for sale and not for personal use. To a layman this was undoubtedly potent evidence that Kearley was a drug dealer. To a majority of their Lordships, however, the evidence of what the callers believed was simply irrelevant. Had the evidence been relevant, it would*

*still have been excluded because it was hearsay. Lord Griffiths, who together with Lord Browne-Wilkinson dissented, echoed the sentiments of Lord Justice Lloyd in the Court of Appeal when he said: [I]t is difficult to think of much more convincing evidence of his activity as a drug dealer than customers constantly ringing his flat to buy drugs and a stream of customers beating a path to his door for the same purpose.*

*Most of the statements offered by the prosecution as evidence against the appellant in Kearley were non-narrative statements. In everyday speech non-narrative statements are commonplace. They may take the form of a request ('Got any drugs for me?'), an offer ('Let me carry your bag'), a greeting ('Hello, daddy'), a protest ('Don't Harry!'), an order ('Come here!' or less peremptorily, 'Get me the police, please') or a threat ('The money or your son is dead'). If one takes a purely conceptual view of hearsay, a non-narrative statement cannot be hearsay since a statement which does not state facts cannot be literally true. The person who makes a non-narrative statement may be sincere or insincere (as where an offer or a threat is a joke), but that is not quite the same thing.'*

*The case of Wright v Doe d Tatham was about the testamentary capacity of a wealthy English gentleman called Marsden whose will in favour of an employee was challenged by his heir-at-law, Admiral Tatham. Those seeking to uphold the will offered as evidence of his mental capacity letters written by persons who were no longer living. These addressed Marsden as if he were an intelligent man, which implied that the authors believed that he was competent. In the course of rejecting the letters on the grounds that their use as evidence of testamentary capacity breached the hearsay rule, Baron Parke assumed that the court was being asked to make a two-step inference: from the letters to a belief held by the letter writers and thence to the truth of that belief: 'Each of the three letters, no doubt, indicates that in the opinion of the writer, the testator was a rational person ... But the point to be determined is, whether these letters are admissible as proof that he did possess these qualities? But*

*the question is, whether the contents of letters are evidence of the fact to be proved upon this issue - that is, the actual existence of the qualities which the testator is, in those letters, by implication, stated to possess: and those letters may be considered in this respect to be on the same footing as if they had contained a direct and positive statement that he was competent.'*

*Many non-narrative statements adduced by parties to prove something about the speaker's state of mind are excluded from evidence because they fail the precondition for the admissibility of all evidence, that of relevance. When one is dealing with a statement which conveys information about the declarant's mind, the evidence may be either directly or indirectly relevant to an issue in the proceedings. The evidence will, for example, be directly relevant if it shows that a crime of intent was committed with the necessary mens rea. It will have circumstantial relevance if it tends to prove the existence of some further fact which is relevant. Thus an implied intention to do an act may be some evidence that the act was subsequently done.*

*The problem with the hearsay rule is that it is a broad rule with a limited number of narrow and inflexible exceptions. Entirely trustworthy evidence has sometimes to be disregarded. As regards the generality of cases, the foregoing analysis of the four 'hearsay dangers' lends support to the position of the majority in *R v Kearley*, that implied verbal assertions should be treated as hearsay. But there are undoubtedly times when it is contrary to justice to do so, for example where the implied assertion solely concerns the declarant's state of mind and assists the defence.*

*In its submission to the Runciman Royal Commission on Criminal Justice, the Home Office expressed the opinion that the rule against hearsay is complicated and unsatisfactory: arguably too rigid, and contrary to the purpose of justice in excluding material altogether because of presumed*

*defects instead of allowing it to be weighed in context.' This fault, which is once more in evidence in R v Kearley, can only be surmounted by a more pragmatic approach to hearsay which recognises that the rational basis for the hearsay classification is not the formula, 'assertions offered for the truth of the matter asserted,' but rather the presence of substantial risks of insincerity and faulty narration memory and perception. Unless the law moves in this direction there will not only be more cases like Kearley which fly in the face of common sense, but there is bound to be an increase in the number of 'hearsay-fiddles,' which have been noted in the pages of academic journals,' by judges desperate to admit manifestly reliable evidence.*

### **III. Admissibility of hearsay evidence**

#### **- Hearsay in common law**

Hearsay is not, in principle, admissible in common law. There are many reasons for such exclusion. The main reasons include:

##### **i. Unreliability:**

The possibility of manufacturing makes hearsay evidence unreliable. As the original speaker is not present before the trier of the fact, it makes it difficult to assess the reliability of hearsay testimony.

This unreliability also relates to inability of the trier of the fact to observe demeanour of the original witnesses. One of the relevant evidence is the behaviour of the witness in giving testimony before the trier of the fact. The latter will use the evidence to assess the trustworthiness of the witness.

This problem of unreliability is aggravated by lack of cross-examination against the original witness. Cross-examination helps identify wrong perception, inaccurate memory and deliberate distortion by a witness. However, the original speaker in case of hearsay testimony is absent,

making cross-examination impossible. The person who is providing the hearsay testimony cannot react to cross-examination questions. Hence, it makes it very difficult to assess the truthfulness of testimony.

Hence, even though hearsay testimony is made admissible, it would probably weigh little. Hence, in most of the cases it would be a waste of time of the trier of fact.

ii. Unfairness to the parties

Due to the above reasons, the right of the defendant to defend ones case becomes difficult. this may amount to violations of the fair trial rights of a defendant recognised in the fundament international human rights instruments.

iii. The jury system

The above reasons are aggravated by the involvement of the jury as a trier of fact in common law systems. As the jurors are not experts of law, they may be more susceptible to believing hearsay testimonies. The jurors have difficulty of assessing the probative value of the hearsay testimony presented before them.

Due to the above reasons, hearsay evidence is in general inadmissible. However, the common law has developed some exceptions to the principle of exclusion. The main exceptions are; dying declaration, statements made in the course of business, declaration against interest, statement of opinion as to the existence of a public right or custom, statement of pedigree, expression of crowd and evidence/deposition given in prior proceeding.

The Draft Evidence Rules of Ethiopia, 1967 followed the same rules as that of the common law. The following discussion lists the exceptions to the exclusion rule in the common law and the Draft Evidence Rules of Ethiopia, 1967.

### **i. Dying Declaration**

Defined in Rule 29(a) Draft Evidence rules as:

It is made by a person who is dead, or as any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes in to question, whether that person was or was not, at that time the statement was made, under expectation of death and whatever may be the nature of the proceeding in which the cause of his death comes in to question.

As to this definition, these are declarations made by a person who knows that his death is imminent and a person cannot be found at the time the testimony is required. The idea is that, if the person who makes the declaration is religious, he will never prefer to die with lie on his lips when he goes to meet his God. Even if this is not true, people do not usually lie unless for a certain benefits. A person who is going to die does not have the motive for which he has to lie.

As Melin stated in the Ethiopian Evidence law book, the dying declaration is only admissible in so far as it details the cause of death and indicates the circumstances of the transaction which resulted in death. For example, as to Melin, it is not admissible to the extent it refers to quarrels between the declarant and the caused which quarrels cannot be regarded as a part of the transaction resulting in death.

Furthermore, the declarant, just as any living witness, must have had an adequate opportunity to observe the facts, which he details. His statement, for example, must not be based on hearsay. He must have been a competent witness.

Note also that the justification for allowing evidence of dying declaration in the absence of the original seems to be necessity of evidence. If the original declarant is dead or cannot be found, there could be no better evidence than the hearsay.

## **ii. Statements made in the ordinary course of Business**

Defined in Rule 29 (b) of the Draft Evidence Rules, and the idea behind this exception is that if the statement is made in the current routine of business, it is more likely to be trustworthy than otherwise. There are, perhaps, fewer motives to lie in the day-to-day aspects of ordinary business transactions than in exceptional private situations.

The term business has a broad meaning covering any trade, profession, occupation or calling. But, in this context, it refers to a person's means of earning a livelihood although it is not perhaps necessary that it be income providing, that is, by ordinary course of business, it meant the current routine of business.

Rule 29(b) requires, of course, that the person who made statement in the ordinary course of business should fulfill certain formalities in his courses of recording; in particular it must consist;

- 1) any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of a professional duty; or
- 2) an acknowledgement written or signed by him of the receipt of money; goods, securities or property of any kind; or
- 3) a document used in commerce written or signed by him; or
- 4) the date of a letter or other documents usually dated, written or signed by him.

Note, however, that records kept with a view to institution of the suit are not admissible under 29(b) when the person making the business record is unavailable at time of trial. If he is available there is no reason why he should not be called personally to the court.

To qualify as an admissible business record, it must be clear that the recorded information came from the person with personal knowledge of the facts and with a business duty to communicate those facts. It is assumed that a person in the business world will discharge his or her duty responsibly; thus the record is judged reliable.<sup>90</sup>

### **iii. Declarations against interest**

Defined in Rule 29(c) of Draft Evidence Rule as:

When it is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

That is, it must be against (1) pecuniary interest- when it has the effect of charging the maker with pecuniary liability to another or of discharging some other person upon whom he would have a claim; (2) proprietary interest- statement in disparagement of title to land; (3) the statement which exposes person to criminal prosecution or suit for damages. This exposure to suit must obviously be at the time the statement was made, not at the time statement is sought to be used in evidence.

Generally, there is an assertion to this that a person is not likely to make statements against his interest lightly or with causal regard for truth. This contributes to the trustworthiness of such statements and is the reason for this exception to the hearsay rule.

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<sup>90</sup>Paul Ivan Birzon, Hearsay: there is more to this evidence than meets the ear, 7(3) Family Advocate, 4-8, 40-41 (1985), p8.

The true rationale of the exception would appear to be that advanced by Morgan: *'The admissibility of an admission made by the party himself rests not upon any notion that the circumstances in which it was made furnish the [court or jury] means of evaluating it fairly, but upon the adversary theory of litigation, A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under the sanction of an oath.'*<sup>91</sup>

In other words, a party to the proceedings cannot invoke the hearsay rule so as to exclude evidence of his own statement. This would also explain why an incriminating statement made by a defendant can be invoked against him, even if he did not realise at the time that it would be incriminating at all, whereas a full, open and unqualified admission of guilt, made by a third party, remains *prima facie* inadmissible.<sup>92</sup>

So what is an admission? Irving Younger offered this definition: *"An admission is anything said or done by a party opponent that is inconsistent with the position they now take at trial."* It's a good definition for several reasons: First, an admission does not have to be against the interest of the party when it was said or done. Often it is not. An admission only has to turn out to be inconsistent with the position the party takes at trial. Second, an admission can be something that is either said or done. It is not limited to statements, or acts that are intended to be substitutes for statements. Third, unlike prior inconsistent statements, there is no need to confront the opposing party with her admission while she is on the stand. Because she is a party to the case, if she wants to explain what she meant or put the admission into context, she has got the rest of the trial to do it. Fourth, because the definition of admissions is so broad and they can be so powerful in trial, you should spend a lot of your discovery time looking for them. No matter whether they are hearsay or not, you know they are admissible.

<sup>91</sup>Michael Hirst, *Confessions as Proof of Innocence*, 57(1) *The Cambridge Law Journal*, 146-164 (1998), p147.

<sup>92</sup>Michael Hirst, *Confessions as Proof of Innocence*, 57(1) *The Cambridge Law Journal*, 146-164 (1998), p148.

**iv. Statements of opinion as to the existence of a public or general right or custom.**

Defined in Rule 29(d) of the Draft Evidence Rule which says:

When it gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest of the existence of which, if it existed, he would have been likely to be aware, provided it was made before any controversy as to such right custom or matter has arisen.

The opinion here is as to the existence of the right, not the existence of facts, which make it likely the right exists.

Generally, those exceptions stated above and those which are stated in Rules 29 and 30 of the Draft Evidence Rules like, statements of pedigree, statements contained in documents, expression of a crowd, and evidence given in prior proceedings, etc are the exceptions of hearsay of rule which are recognized as admissible evidences because of their necessity.

**- Hearsay in other cases**

The common law exceptions to the principle of exclusion have been expanding by statutes. For instance, the British abandonment of jury trials in non-criminal cases accounted for the relaxation of the hearsay rule in civil cases. Even in criminal cases, the exceptions have been expanded by statutes. A series of exceptions was created, each of which included either the absence of one or more specific dangers or the presence of one or more specific safeguards<sup>93</sup> the focus is now more on ensuring trustworthiness of the hearsay evidence and procedural safeguards to rectify the adverse effect of admitting hearsay evidence.

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<sup>93</sup>Paul Ivan Birzon, Hearsay: there is more to this evidence than meets the ear, 7(3) Family Advocate, 4-8, 40-41 (1985), p4.

The striking contrast between legal systems that do and do not undertake to police the receipt of evidence has given rise to a familiar explanation, which centers on the jury. In a famous dictum in the Berkeley Peerage Case in 1816, the Chief Justice of Common Pleas remarked on the institutional logic of the hearsay rule:

*[In] most of the Continental States, the Judges determine upon the facts in dispute as well as upon the law; and they think there is no danger in their listening to evidence of hearsay, because when they come to consider of their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds.*

The following excerpt explains the hearsay rule in non-jury cases:

**Keneth Culp Davis, Hearsay in Nonjury Cases, 83(6) Harvard Law Review, 1362-1368 (1970), p1362, 1364, 1366**

*The main such technique is the tendency in nonjury cases to admit apparently useful hearsay "for what it's worth" without ruling on its admissibility. Emphasizing the realities, McCormick refers to collections of cases supporting his statement that "the same strictness will not be observed in applying the rules of evidence in judge-trials as in trials before a jury." He speaks of "the wisdom of the practice adopted by many experienced trial judges in non-jury cases of provisionally admitting all evidence which is objected to if he thinks its admissibility is debatable, with the announcement that all questions of admissibility will be reserved until the evidence is all in. . . . [A]t the end [he] will seek to find clearly admissible testimony on which to base his findings."*

*The three most significant questions about hearsay are (a) what evidence to admit or exclude under what is known as "the hearsay rule," (b) whether or when to circumvent the hearsay rule by admitting technically inadmissible hearsay that may have some probative effect "for what it's worth," and (c) how to evaluate hearsay that has been admitted even though it is technically inadmissible. In nonjury cases, the first is the least important and the second is by far the most important. In jury cases, the first is the only important question, for the other two seldom arise.*

*...called the law of evidence "a piece of illogical, but by no means irrational patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system." Wigmore said that "any attempt to apply strictly the jury-trial rules of Evidence to an administrative tribunal acting without a jury is a historical anomaly, predestined to probable futility and failure." His remark seems equally applicable to judges with-out juries. McCormick was even more emphatic: "As rules they are absurdly inappropriate to any tribunal or proceeding where there is no jury." Admission without a ruling in a nonjury case does no harm and may be more economical than making a ruling. In jury trials, rulings must be made because the hearsay may prejudice the jury. In nonjury trials, the judge is equally exposed to the hearsay whether he admits it or excludes it. Yet the literal words of the proposed rules clearly prohibit the judge from admitting hearsay "for what it's worth" without ruling on its admissibility; this result of the rules may be more important than any other with respect to hearsay.*

The most significant question about hearsay in nonjury cases is not admissibility but evaluation.

The US legal system follows a very strict rule of exclusion. (refer to the discussion on cross-examination in this chapter)

The European Court of Human Rights does not make admission of hearsay evidence an automatic violation of the fair trial requirement of the European Convention on Human Rights. The court, in *Doorson v Netherlands (1996)*<sup>94</sup>, required three elements before hearsay evidence is accepted by any court. First, there must be necessity of admitting hearsay evidence. Second, a conviction must not be wholly, or to a decisive extent, based on statements of anonymous witnesses. Third, statements obtained from anonymous witness should be treated with extreme care by the trial court. Whenever hearsay evidence is accepted, there must be safeguarding mechanism to rectify or mitigate potential problems. The Court in the case found that the difficulties caused for the defense were adequately counterbalanced by the procedures followed by the investigating judge. The court concluded that there was no violation of Article 6(3)(d)<sup>95</sup>.

The Court, in *Al-Khawaja and Tahery V. United Kingdom (2011)*,<sup>96</sup> cancelled the second requirement. In other words, even if the hearsay evidence is sole or decisive evidence in conviction, it will not automatically imply the violation of Art 6 of the Convention. The necessity requirement for the admission of the statement should be taken into account. At the same time, where a conviction is based solely or decisively of the evidence of absent witnesses, the court must subject the proceedings to the most careful scrutiny. Admission of such evidence requires sufficient counterbalancing factors, including the existence of strong procedural safeguards.

The above analysis indicates that there is no one simple rule regarding admission of hearsay evidence.

Below is Mujuzi's analysis of South African hearsay rule:

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<sup>94</sup> ECtHR, *Doorson V. Netherlands*, No. 20524/92, judgment of 26 March 1996.

<sup>95</sup> The provision of the European Convention on Human Rights states that right to examine a witness is one of the minimum rights of a defendant.

<sup>96</sup> ECtHR, *Al-Khawaja and Tahery V. United Kingdom*, No. 26766/05 and 22228/06, judgment of 15 December 2011.

**Jamil Ddamulira Mujuzi, Hearsay evidence in South Africa: should courts add 'the sole and decisive rule' to their arsenal?, 17(4) International Journal of Evidence and Proof, 347-366 (2013), p347-349, 351-358**

*The South African Law of Evidence Amendment Act (LEAA) recognises the fact that as a general rule hearsay evidence is inadmissible but creates exceptions to this general rule. South African courts are reluctant to convict accused in cases where hearsay evidence plays a decisive or even significant role in the accused's conviction. However, while relying on the LEAA the Supreme Court of Appeal held that the true test of the admission of hearsay evidence is whether it is in the interest of justice to admit such evidence irrespective of its role in the accused's conviction. Relying on the jurisprudence of the European Court of Human Rights, the author argues that the introduction of a sole and decisive rule would strengthen the accused's right to a fair trial in hearsay evidence cases.*

*Section 3(4) of the South African Law of Evidence Amendment Act<sup>1</sup> (Law of Evidence Amendment Act 1988 (South Africa) s.3) defines hearsay evidence to mean 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'. In South Africa the general rule is that hearsay evidence is inadmissible. Although some common law principles still apply to the admission of hearsay evidence in South Africa, the most important legislation that relates to the admission of hearsay evidence is the LEAA, which provides for the admission of hearsay evidence in the following three circumstances in s. 3(1): Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless--*

*(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*

*(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*

- (c) the court, having regard to--
- (i) the nature of the proceedings;
  - (ii) the nature of the evidence;
  - (iii) the purpose for which the evidence is tendered;
  - (iv) the probative value of the evidence;
  - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
  - (vi) any prejudice to a party which the admission of such evidence might entail; and
  - (vii) any other factor which should in the opinion of the court be taken into account,

*The LEAA was designed to bring an end to the rigid common law hearsay rule in terms of which hearsay evidence was admissible in very limited circumstances.*

*Unlike the jurisprudence emanating from the European Court of Human Rights in which the court has dealt with the contentious issue of whether a conviction of an accused based solely or decisively on hearsay evidence violates the accused's right to a fair trial, the sole and decisive rule, courts in South Africa have not held that the accused's right to a fair trial is violated simply because his conviction was solely or decisively based on hearsay evidence. However, South African courts are reluctant to convict an accused in a case where hearsay evidence has played a decisive or even significant role. Unlike the European Court of Human Rights, South African courts (as far as I know) have not dealt with the issue of whether the accused's right to a fair trial is violated in a case where his conviction is solely based on hearsay evidence. Courts have dealt with the issue of the accused's right to a fair trial in cases where hearsay evidence has played a decisive or significant role in the accused's conviction. The purpose of this article is to argue that jurisprudence emanating from South African courts shows that the LEAA has been interpreted to give courts a wide latitude in terms of admitting hearsay evidence. It is argued that to ensure that the accused's right to a*

*fair trial is not violated, South African courts could invoke the 'sole and decisive rule' of the European Court of Human Rights in its rigid form.*

*The same principle was emphasised by the Supreme Court of Appeal in S v Ndhlovu in which the court stated that '[t]he principal reason for not allowing hearsay evidence is that it may be untrustworthy since it cannot be subjected to cross-examination'. Of course, this is the same reason why hearsay evidence has been found problematic, not only in countries such as England, but also by the European Court of Human Rights. The first two exceptions under which hearsay evidence is admitted in terms of the LEAA are not problematic and do not threaten the accused's right to a fair trial. Under the first exception, if the accused or his legal representative does not agree to the admission of the hearsay evidence in question, that evidence will not be admitted. Under the second exception, although the hearsay evidence in question is admitted, it is admitted on condition that the maker of the statement will come and testify. If he or she testifies, it ceases to be hearsay evidence.*

*The effect of s. 3(3) is that even if the accused objects to the admission of such evidence, for example, on the basis that its admission would violate his right to a fair trial and the maker of the statement does not testify, whether his failure to testify is attributable to the accused, for example through intimidation, or not, the court can still admit such evidence on the basis of its discretion under s. 3(1)(c) if it is in the interest of justice to admit such evidence. The fact that s. 3(1)(c) gives courtwide discretion to admit hearsay evidence cannot be over-emphasised and it is a fact that courts have expressly recognised. In President of the RSA and others v M&G Ltd, the Supreme Court of Appeal held that s. 3 of the LEAA 'gives a court wide discretion to admit hearsay evidence' and that s. 3 should be interpreted broadly.*

*The phrase does not mean that a negative ruling on admissibility in terms of some other law, such as the Evidence Act or the common law, also*

*rules out the admission of the evidence under s 3. That, after all, would leave s 3 with rather limited, if any, scope for application where hearsay evidence would be admissible only under the section when it is already allowed by some other law ... [T]he 'other laws' referred to in the phrase are merely alternative avenues to admissibility and do not rule out the reception of the evidence in the interests of justice under s 3(1)(c) ... [T]he very purpose for the introduction of s 3(1)(c) was to 'supersede the excessive rigidity and inflexibility--and occasional absurdity--of the common-law position' by creating another avenue for the admission of hearsay evidence which turns on what the interests of justice require.*

*The above rule is what has come to be called the 'sole and decisive rule' which is to the effect that any conviction that is solely or decisively based on hearsay evidence violates the accused's right to a fair trial in terms of Article 6(3)(d) of the European Convention on Human Rights.*

*Therefore, any hearsay evidence which falls between decisive evidence and that which is merely needed to complete a 'mosaic pattern' should be classified as evidence playing a significant or vital part in convicting the accused. As mentioned earlier, the Supreme Court of Appeal held in *S v Shaik and Others* that the true test when it comes to the admission of hearsay evidence is whether it would be in the interest of justice to admit such evidence. In the author's opinion this means that even if the evidence in question is the only evidence that the prosecution has adduced, that is, the sole evidence, or decisive evidence or evidence that plays a significant part or vital part in the accused's conviction, such evidence could be admitted if it is in the interest of justice to admit it.*

*In the South African law of evidence the general rule is that hearsay evidence is inadmissible. However, there are exceptions to this rule in terms of the LEAA, common law and other pieces of legislation. Jurisprudence emanating from South African courts shows that courts are reluctant to convict an accused on the basis of hearsay evidence*

*which plays a decisive or significant role in such a conviction. However, the Supreme Court of Appeal held that the true test is whether it would be in the interest of justice to admit hearsay evidence. Relying on the jurisprudence from the European Court of Human Rights, the author has argued that the introduction of a rigid form of the 'sole and decisive rule' in the South African law of evidence could strengthen the accused's right to a fair trial.*

*Section 35(3)(i) of the South African Constitution provides that 'every accused person has the right to a fair trial, which includes the right to adduce and challenge evidence'. Unlike the European Convention on Human Rights which specifically mentions that the accused has the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him', the South African Constitution does not expressly state that the accused has the right to cross-examine state witnesses. However, courts have held that the right to challenge evidence should be interpreted to include the right of the accused to cross-examine prosecution witnesses. The meaning of the right to a fair trial has been a subject of several cases. The Supreme Court of Appeal held that: Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment, but also requires fairness to the public as represented by the State. This does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution.*

*This means that if the admission of hearsay evidence will be fair to the prosecution and at the same time not render the accused's trial unfair, the court will admit such evidence. However, the SCA has laid down several safeguards to ensure that the admission of hearsay evidence does not compromise the accused's right to a fair trial. The SCA held that in*

*order to ensure that the admission of hearsay evidence does not render the accused's trial unfair: [I]n applying the hearsay provisions of the 1988 Act, [the court] must be scrupulous to ensure respect for the accused's fundamental right to a fair trial. Safeguards including the following are important: First, a presiding judicial official is generally under a duty to prevent a witness heedlessly giving vent to hearsay evidence. More specifically under the Act, 'it is the duty of a trial Judge to keep inadmissible evidence out, [and] not to listen passively as the record is turned into a papery sump of "evidence"'. Second, the Act cannot be applied against an unrepresented accused to whom the significance of its provisions have not been explained. Third, an accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of the Act, and, before the State closes its case, the trial Judge must rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces.*

*In S v Ndhlovu the Supreme Court of Appeal added that the right to a fair trial is not violated simply because the accused did not cross-examine the maker of the statement that was adduced in evidence against him as long as there were counterbalancing safeguards to compensate for the accused's inability to cross-examine the witness. Another measure that has been put in place by the Supreme Court of Appeal to regulate the admission of hearsay evidence relates to the issue of the identification of the accused at the scene of the crime. The court held that: What has by now become axiomatic, is that our courts apply considerable restraint in allowing (or relying on) hearsay evidence against an accused person in criminal proceedings. The reasons for this restraint have become equally well settled. They flow mainly from the nature of the onus that rests on*

*the state and from the rights of an accused person underwritten by the Constitution ...*

*An important consideration in deciding whether the court should overcome its general reluctance to admit the hearsay evidence under consideration in a particular case, relates to the role that the evidence will play. It stands to reason that a hearsay statement which will only serve to complete a 'mosaic pattern' will be more readily admitted than one which is destined to become a vital part of the state's case .... By its very nature, hearsay evidence cannot be tested in cross examination. The possibility of mistake can therefore not be excluded in this way. The result is, in my view, that hearsay evidence of identification can only be admitted if the possibility of mistake can be safely excluded in some other way, eg with reference to objectively established facts. The court in the above decision seems to reason that hearsay evidence will be readily admissible if it does not play a decisive role in determining the outcome of the case especially if that outcome will lead to the accused's conviction. The opposite is thus true--that if hearsay evidence will play a decisive role in determining the outcome of the case leading to the conviction of the accused, such evidence should not readily be admissible. However, if there are measures to exclude the possibility of a mistake on the part of the maker of the statement who is not available in court to give such evidence, the court will admit such evidence. One challenge to the accused's right to a fair trial in the context of hearsay evidence is the question of the admissibility of extra-curial admissions by an accused against a co-accused or by a state witness against an accused in cases where such admissions have been disavowed by their makers (a co-accused or a state witness). In *S v Ndhlovu* the Supreme Court of Appeal held that it was in the interest of justice to admit as hearsay an extra-curial admission by an accused against a co-accused although the former had disavowed the admission during the trial. The court reasoned that: The probative value of the hearsay evidence depends primarily on the credibility of the declarant at the time of the declaration, and the*

*central question is whether the interests of justice require that the prior statement should be admitted notwithstanding its later disavowal or non-affirmation. And though the witness's disavowal of or inability to affirm the prior statement may bear on the question of the statement's reliability at the time it was made, it does not change the nature of the essential inquiry, which is whether the interests of justice require its admission.*

*The Constitutional Court was petitioned to hold that the holding in Ndhlovu was erroneous, but it declined to do so by reasoning that the admission in question was not an admission but a confession which in terms of s. 219 of the Criminal Procedure Act was inadmissible against a co-accused. Subsequently, the Supreme Court of Appeal, although it has not expressly overruled its reasoning in Ndhlovu, has handed down judgments that have thrown more light (or cast doubt?) on that decision. In Balkwell and Another v S, Ponnann JA observed that: Ndhlovu makes no attempt to reconcile the incongruity between the bar created by section 219 of the Criminal Procedure Act 51 of 1977 and its application of section 3 of the Law of Evidence Amendment Act ... Moreover, in dealing with the constituent parts of section 3, Ndhlovu offers no guidance as to how the receipt of the extra-curial admissions which it allows under that section, should be approached given the rationale at common law for their exclusion or what role, if any, the various common-law safeguards should play. In effect it is as if a pen has been struck through those well recognised common-law safeguards and they have been summarily jettisoned. What is envisaged it seems in the case of an accused implicated by the extra-curial statement of another, is that he should go into legal battle without the sword of cross-examination or the shield of the cautionary rules of evidence. That can hardly conduce to a fair trial, as in my view, it impacts in a direct and substantial way on the fairness of the process. Moreover, how is an accused person to regulate his conduct and to make informed choices about the conduct of his defence? For, surely now his decision to apply for a discharge at the close of the*

*prosecution's case or to close his case without testifying or to enter the witness-box in his defence or to call other evidence in his defence may well have to be informed not just by the evidence implicating him in the commission of the offence charged and the strength or weakness of the prosecution's case but also by what is contained in an extra-curial statement that has in any event been disavowed by its maker in evidence.*

*In Libazi and Another v S it was held that the rule laid down in Ndhlovu was flexible and is inapplicable in cases where, for example, the accomplice does not testify. Some High Courts have followed the rule in Ndhlovu and there is one case known to the author in which the High Court cast doubt on the principle in Ndhlovu. In S v Mangena, the court held that the principle was obiter and that: A confession by an accused which implicates his co-accused does not necessarily amount to a confession against his co-accused, but only an admission of certain facts indicating the co-accused's involvement. Accordingly, to prohibit the admissibility of evidence contained in a statement, on the basis that it amounts to a confession as against its author, does not indicate that the legislature intended that those parts of the confession which amount to an admission by him against his co-conspirator would be receivable in evidence against the latter. Yet the state's interpretation of s 219A as read with the Law of Evidence Amendment Act would allow it to argue that the section is wide enough to allow it to extract and use against a co-accused those parts of the confession of the one conspirator which contained admissions (but not a confession) concerning the involvement of the other.*

*Although courts appear to have developed mechanisms to ensure that hearsay evidence is reliable, there is a danger that such mechanisms are not watertight. The admission of hearsay evidence under the umbrella of the interest of justice is too broad and the present author argues that the introduction of the sole and decisive rule would be a critical safeguard to ensure that the accused's right to challenge evidence and the common*

*law protection against the admission of extra-curial admissions by an accused against a co-accused are not jettisoned in the name of the interest of justice. This call should be understood in the light of the fact that, as it will be shown later, the vast majority of the accused in South Africa are unrepresented and may not be able to fully appreciate the implications of the admission of hearsay evidence even if the courts make an effort to explain to them the contents and reach of the LEAA.*

*One important question that needs to be addressed in the context of s. 35(3)(i) of the Constitution is why admitting hearsay evidence, where such evidence plays a sole or decisive role in the conviction of an accused, violates the accused's right to a fair trial? It should be mentioned at the outset that the admission of hearsay evidence which does not play a decisive role in the conviction of an accused does not violate the accused's right to a fair trial per se if there are safeguards to ensure that such evidence is reliable. This is because of the obvious reason--with or without that evidence the accused's guilt can be proved beyond a reasonable doubt on the basis of other evidence. This is the case whether the accused chooses to testify in his defence or not. In other words, there are safeguards to ensure that even if the hearsay evidence in question was unreliable, its contribution to the accused's conviction was minimal and the irregularity in question may not go to the root of the fairness of the trial.*

*However, in cases where the accused's conviction is solely or decisively based on hearsay, his trial is unfair because it violates his fundamental right to challenge evidence through cross-examination. The right of an accused to cross-examine state witnesses is protected under s. 35(3)(i) of the Constitution. The South African criminal justice system is, with a few exceptions, an adversarial system where cross-examination plays a critical role. As the High Court reminds us: '[t]he purposes of cross-examination are to elicit evidence which supports the cross-examiner's case and to cast doubt upon the evidence given for the opposing party'. In*

*cases where hearsay evidence is the sole evidence or plays a decisive role in the accused's conviction, his right to challenge such evidence is in practice unavailable. This is because, as mentioned earlier, in terms of the LEAA the probative value of hearsay evidence depends on the credibility of the person other than the person giving such evidence in court. The accused has a right to cross-examine the person (witness) leading such hearsay evidence in court but his cross-examination can only go as far as impeaching the credibility of such a person which impeachment, if successful, does not mean that the court will not admit the evidence in question. The court can admit such evidence if it is of the view that it is material and relevant. The accused is denied his right to effectively and meaningfully challenge the evidence in question and thus his trial cannot be said to be fair. Put differently, the person giving evidence in court is the 'conduit' through which the original declarant, who is not in court to give evidence, is testifying before court. The accused is in effect cross-examining the 'messenger' and not the author of the statement. It is argued that the admissibility of hearsay evidence is unfair especially where it is the sole or decisive evidence in cases where the accused has not had an opportunity to cross-examine potentially unreliable witnesses. It is because of this inherent danger that South African courts have developed and continue to develop safeguards to avoid convictions greatly influenced by hearsay evidence. The Supreme Court of Appeal observed that 'cross-examination is integral in the armoury placed at the disposal of an accused person to test, challenge and discredit evidence tendered against him'. The above argument becomes critical in the light of the fact that, as indicated earlier, some South African courts have held that an extra-curial admission by an accused or a state witness is admissible as hearsay evidence against a co-accused or the accused respectively even if such an admission is disavowed by the co-accused or witness during the trial.*

*There is nothing that bars courts from relying or substantially relying on such an admission, admitted by way of hearsay evidence, to convict an*

*accused if the judge is of the view that it was reliable—for example, that it was made voluntarily and under oath at the police station. The use of such admissions against the accused also means that if the accused chooses to exercise his right to remain silent and does not challenge the reliability of such admissions, potentially the defendant could be convicted on the sole basis of such admissions. In other words, he is indirectly obliged to testify at his trial otherwise he stands a risk of being convicted. This now brings me to the issue central to this article. In the light of the above jurisprudence, the question is whether the time is not ripe for South African courts to expressly adopt the ‘sole and decisive rule’ in its rigid form in their bid to make sure that the accused's right to a fair trial is not compromised by courts exercising their discretion under s. 3(1)(a) of the LEAA? In the next section I will deal with the sole and decisive rule and suggest ways through which it could be applied in South Africa.*

#### **IV. Hearsay in Ethiopia**

There are different viewpoints regarding the admissibility of hearsay evidences in Ethiopia. Art 137(1) and Art 263(1) of the Ethiopian criminal procedures and civil procedure codes respectively provide that “*questions put in examination in chief shall only relate to facts which are relevant to the issue to be decided and to such facts only of which the witness has direct or indirect knowledge*”. Here, some provide that the phrase “*indirect knowledge*” in the above provisions include ‘hearsay evidence’. Thus, they argued that, in Ethiopia hearsay evidence is admissible as a rule, not as an exception. While, other argue that the phrase ‘*indirect knowledge*’ implies the circumstantial evidences rather than hearsay evidence. They provide that since admitting hearsay evidence as a rule is against the constitutional rights of the accused to confront witnesses brought against him as provided under Art 20 (4) of the FDRE constitution, we have to admit hearsay evidence only in exceptional circumstances as that of common law countries. When we see the practice of our courts it is clear there is confusion on admissibility of

hearsay evidence. There is no uniform application of the rule; some judges admit it while others do not.

Art 20(4) of the Constitution gives the right of confrontation against witnesses testifying against the defendant. One of the questions relevant to hearsay evidence and its admissibility is the definition of a witness. One issue is whether a medical report is a testimony of a witness or a documentary witness.

✓ What is your opinion on this?

There are decisions of courts indicating that medical reports are documentary evidence. This definition makes them outside the scope of the right of confrontation under the constitution. Hence, when a medical report is submitted to court and the doctor who wrote the report is not present, it is not subject to the hearsay rule. However, if medical reports are regarded as testimonies and the doctor who wrote it as a witness, the right of confrontation requires the presence of the doctor for cross-examination.

A court, in *Public Prosecutor v. Tamrat Layne et al*, decided that a person, whose written statement was presented before the court by the prosecutor, was not a witness. In that case the prosecutor was not able to bring the person to testify before the court. The court decided that the term 'witness' in Art 20(4) of the Constitution refers to one who appears before the court of law, take oath and testify in the presence of the judges of the trial court and the parties. The written testimony was taken to be documentary evidence, not a testimony.<sup>97</sup> Therefore, the testimony was not subject to the hearsay rule.

✓ Comment on the above interpretation

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<sup>97</sup>Wondwossen Demissie (2009), 'Reflective Analysis of Procedural and Evidentiary Aspects of the Ethiopian Anti-Terrorism Law' in Wondwossen Demissie (2009) 'Human Rights in Criminal Proceedings; Normative and Practical Aspects' Ethiopian Human Rights Law Series, Vol. III, 42-111, p90 including Footnote 152.

## **Exercise**

- ✓ There is clear rule on admissibility of hearsay evidence in terrorism crimes (Art 23(2) of Proclamation No. 652/2009)- does it imply that in all other cases, hearsay is not admissible?
- ✓ "Hearsay evidences shall be admitted as a rule in civil proceedings since the standard of proof required to win civil cases is the preponderance of evidence". Discuss on the validity of the statement?

## **Chapter Summary**

### **CHAPTER FIVE: REAL EVIDENCE**

#### **Introduction**

The previous chapter has dealt with oral evidence as one means of proving the existence of a fact. Another type of evidence important to prove the existence of a fact by a party is real evidence.

Unlike oral evidence for which the court depends on observation of third parties (witnesses) on ascertaining whether a certain fact does or does not exist, the courts direct observation and inspection is called in proving existence or non-existence of facts in issue by real evidence. Hence, real evidence is a type of evidence for which the court can personally inspect and make inferences and conclusions on the existence or non-existence of fact to which the evidence is sought to prove.

Real evidence comprises of documents and physical objects in various forms. Not all documents and physical objects are real evidences to prove a fact unless they satisfy the tests of authentication and corroboration, respectively. Such type of evidence is subject to relevance, probative weight and avoidance of prejudice as well as the exclusionary rules.

Real evidence is evidence that, in a sense, speaks for itself, as when the prosecutor holds up a bag containing the murder weapon, asks the police officer “is this the weapon you found?”, and then enters it as “Exhibit A”. Even though it is authenticated by a witness, real evidence is separate, distinct, and does not rely up on a witness’s testimony. It has the weight of being additional evidence and can serve many purposes.

## **Chapter Objectives**

**Chapter objectives: after reading this chapter, students should be able to:**

- Distinguish between real evidence and other types of evidences
- Know how documentary and demonstrative evidences authenticated and corroborated respectively
- Explain the concept of what best evidence means
- List down all instances in which copy (secondary) documents would be admissible

### **5.1. Demonstrative evidence**

Before photographs and other demonstrative evidence, lawyers relied on purely testimonial or substantive evidence. In adversarial system, most evidence takes the form of witness responses to questions directed by the parties. However, the traditional preference for oral evidence is in decline, as documentary evidence and ‘paper trials’ become more prevalent, most conspicuously in civil litigation without juries.<sup>98</sup>

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<sup>98</sup>Peter Cane and Herbert M. Kritzer, *The Oxford Handbook of Empirical Legal Research*, Oxford University Press, 2010, p654.

Demonstrative/physical evidence concerns itself with any type of physical objects which are capable of being inspected by the court and demonstrate the existence of a fact in issue. Demonstrative evidence is any evidence introduced in a trial in the form of a physical object, intended to prove a fact in issue based on its demonstrable physical characteristics. Demonstrative evidence can conceivably include all or part of any object. In a murder trial for example (or a civil trial for assault), the physical evidence might include DNA left by the attacker on victim's body, the body itself, the weapon used, pieces of carpet spattered with blood, or casts of footprints or tire prints found at the scene of the crime.

Demonstrative evidence is evidence in the form of a representation of an object. Examples include photos, x-rays, videotapes, movies, sound recordings, diagrams, maps, drawings, graphs, animations, simulation, and models. It also includes include physical objects, demeanor (frankness, anxiety, evasiveness, attitude showing credibility of testimony) of witnesses, and visit to a site. It is useful for assisting a trier of fact in establishing context among the facts presented in a case.

For example, Art 354(2) of the Civil Code states, '*It (the court) may not pronounce the interdiction without having seen the person whose interdiction is applied for.*' The person whose interdiction is applied becomes demonstrative evidence to enable the court decide on interdiction.

It is evidence that illustrates or helps explain oral testimony, or recreates a tangible thing, occurrence, event, or experiment. Scientific evidence falls into this category, as when a toxicologist testifies that the victim died of lead poisoning and refers to a chart of the human body showing the circulatory pathways that the toxin traveled. Visual aids of this type are intimately tied to the credibility of the witness who testified with

them, and although they are not separate pieces of evidence, like real evidence, a jury can usually view them again while it deliberates.

Here is a list of illustrative means used as demonstrative evidence:

- Plaster casts or molds
- Scale models
- Maps, charts, diagrams, and drawings
- Police composites, mug shots, sketches
- Photographs
- Microscopic enlargements
- Videotapes
- Computer reconstruction or animation
- Scientific tests or experiments

Demonstrative evidence can be of two types based on the accuracy of identification that can be made by them. These are individual classification and class classification. When demonstrative evidence indicates one individual as the possessor of the mark/object, it is individual classification. For example, finger prints, foot prints and DNA indicate an individual. A finger print in a crime scene shows that an individual was in that place. On the other hand, demonstrative evidence may indicate group of persons as possessor of the mark/object. For example, hair or blood found in a crime scene may indicate that white people had been to that place. The second type is particularly important in excluding possibilities, rather than directing an individual suspect.<sup>99</sup>

Where physical evidence is of a complexity that makes it difficult for the average person to understand its significance, an expert witness may be called to explain to the court the proper interpretation of the evidence at hand.

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<sup>99</sup>You may refer to your Interdisciplinary course materials for detail discussions on this issue.

To be admissible, a demonstrative exhibit must “fairly and accurately” represent the real object at the relevant time.

#### **5.1.1. General rules on demonstrative evidence**

- (1) The first general rule is that there must be some other piece of evidence: a fact, an object, or testimony that needs to be illustrated or demonstrated. Presentation is actually a two-stage process: first some issue of fact, then the explanation or demonstration stage. Demonstrative evidence is intended to be an adjunct to testimony;
- (2) The next general rule involves the foundational requirements for demonstrative evidence. Certain preliminary steps must be followed such as authentication and accuracy. This is known as “laying the foundation” and is mandatory whenever any scientific expertise is about to be forthcoming. Foundational requirements (other than those dealing with the expertise of the person) usually involve:
  - i. **Authentication-** demonstrative evidence should convey what it is meant to convey. What it conveys must not alter, distort, or change the appearance or condition of something in any significant way. A computer enhanced photograph, for example, to make a crime scene area look lighter than it actually was is probably inadmissible. There are specific rules, however, that do allow computer enhancements under some circumstances.
  - ii. **Representational accuracy-** the demonstrative evidence should fairly depict the scale, dimensions, and contours of the underlying evidence. A photograph or chart with some small section of it enlarged to focus on is probably inadmissible. This is followed rigorously whenever comparisons

(such as between two samples of handwritings) are made so that any lay person compare the evidence.

iii.           **Identification-** the demonstrative evidence must be an exact match to the underlying evidence or the testimony illustrated. For example, an expert witness is about to testify using an enlarged photograph clearly showing the outline of a footprint with a unique manufacturer mark on the bottom of it. The victim (or police officer if the victim did not survive) who was boot-stomped by it must identify that mark as the one that boot-stomped by it must identify that mark as the one that boot-stomped her.

(3)The third general rule is that demonstrative evidence must pass the “three hurdles” of admissibility: relevance, materiality, and competency. Relevance means that the demonstrative evidence has something to do with the reason the trial is being held, a point at law , a question of guilt or innocence, etc; materiality means it goes directly to the purpose of illustration, is easily understandable, produces no wayward inferences, and is not just an exercise in “educating” the court or jury. Competence means it is the kind of thing that fits with the décor and decorum of the court, is on the up-and-up, ethical, and does not taint the court or subvert the justice process.

(4)The fourth general rule is that demonstrative evidence must pass an additional balancing test for relevancy- a weighing of what is probative/ prejudicial. Probative is what is relevant to win the case for the prosecution by anticipating all defenses. Prejudicial is whatever inflames the passions and prejudices of the jury. This rule necessarily favors the defendant, and is rooted in the principle of fundamental fairness, and protects them from unwarranted inferences about bad character or habit.

It's important to understand that the weighing of what probative/prejudicial varies with each and every case, and is not an arbitrary standard. It should not be referred to as the "gruesomeness" standard, as it is sometimes called. The mere fact that a photograph, for example, shows a shocking crime scene does not automatically make it gruesome or inflammatory. The courts have also ruled that a photo of a nude, bloodstained body is not inadmissible, but innocuous. Autopsy photos are another matter, and depend upon how much cutting and opening the forensic physician has made. The risk of bias must be cautiously dealt with especially in a jury system where the jurors can easily be influenced by shocking demonstrative evidence.

#### **5.1.2. Specific rules on demonstrative evidence**

These are more like guides to judicial discretion than specific rules, and involve established practices or procedures for the presentation of various types of demonstrative evidence. In this respect, practices may vary considerably by jurisdiction.

(1)Plaster casts, molds, and models- these are most admissible when viewable in all dimensions. Three-dimensional is always better than two-dimensional. Whatever construction material is used does not matter. Models of the crime scene are a regular feature of trials, and models that are not precisely to scale will also sometimes be admitted if they are professionally made and presented. An attorney, for example, cannot take a Styrofoam head and stab a knife through it in order to demonstrate the attack on the victim. Further, no one is usually allowed to play around with the models, and this is what was mostly involved in the controversy over anatomically correct dolls in the late 1980s.

- (2) Maps, diagrams, sketch, and charts- it is generally not important that the original creator of a map testify; only that whatever used is "official". Police-generated sketches and diagrams fall generally within judicial discretion where accuracy is the main concern. Sometimes, the evidence is taken as hearsay, or falls under one or more hearsay exemptions. A lot depends on the conditions of fairness and reliability at the time the sketch or diagram was made. Charts are viewed as useful adjuncts to testimony or not.
- (3) Photographs- the broad use of photographs is permitted. The photo must substantially and accurately depict the subject matter, and not be unduly prejudicial. Photos that support only one party's theory, or a small part of a theory, are considered self-serving and untrustworthy. Examples of such inadmissible evidence would be staged or posed photo. Some courts place limits on lens filters, color, and other special equipment, but not many.
- (4) Enlargements- some courts place limits on the magnification allowed, no more than twenty powers, for example. Photographs taken through microscopes depend up the standardized criminalities of the crime lab for a state or region.
- (5) Videotapes - videotaped depositions and confessions are becoming common, and in civil cases, the practice of a "day-in-the-life" video is often admitted. The practice of taping drunk drivers is also popular in some states, but is best considered as real, rather than demonstrative evidence. Courts have upheld surveillance imagery of the perpetrator in action at the scene of the crime. With demonstrative evidence involving motion, each "frame" or specified number of milliseconds is considered a separate piece of evidence. In other cords, a move is treated as a series of still photographs since the courts are more comfortable and familiar with still photography. Any audio

portion of videotape cannot be played or if it is, requires separate authentication.

(6) Computer reconstruction- reconstructions are a fast-growing forensic specialty, and the expertise involves a projection of possible outcomes mathematically predicted by a computer program. For example, known facts such as weight, physical dimensions, and surface friction are plugged into a computer algorithm to generate an accident simulation. It must be shown the simulation (algorithm is based on accepted principles of physics, and there are sometimes further requirements involving the credentials of the expert.

(7) Scientific tests/demonstrations- if a laboratory test is performed in front of the trier of fact, the benefit is that jurors would be allowed to draw independent inferences from it rather than being warned by the judge later that they are free to disregard the scientific testimony. The standard, therefore, is substantial similarity. The expert presenting a test, upon being qualified, is assumed to represent the theory of virtual certainty that the test would yield consistent results if replicated under substantially similar conditions. However, cross-examination of such experts is notoriously fierce.

## **5.2. Documentary evidence**

Document is defined in the Draft Evidence Rules 1967 as any matter expressed or described upon any substance by means of letters figures, marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Documentary evidence is a type of written proof that is offered at a trial to establish the existence or nonexistence of a fact that is in dispute. Letters, contract, deeds, license, certificate, ticket, and other writing are documentary evidence. Documentary evidence as the definition indicates

is any inscription found in any material for which the contents are submitted as proof.

This type of evidence is any evidence introduced at a trial in the form of hard or soft (electronic) documents. Traditionally, it was regarded as a statement recorded on paper in some form (such as an invoice, a contract or a will). In modern sense, anything in which information of any description is recorded, e.g., film, videotape, photo, emails, etc can be documentary evidence.

- o Is a film of a murder a documentary or demonstrative evidence?  
What about a blood-spattered letter?

A piece of evidence is not physical evidence if it merely conveys the information that would be conveyed by the physical evidence, but in another medium. For example, a diagram comparing a defective part to one that was properly made is documentary evidence-only the actual part, or a replica of the actual part, would be physical evidence. Similar, a film of a murder taking place would not be physical evidence (unless it was introduced to show that the victim's blood had splattered on the film), but documentary evidence (as with a written description of the event from any eyewitness).

A piece of evidence is not documentary evidence if it is presented for some purpose other than the examination of the content of the document. For example, if a blood-spattered letter is introduced solely to show that the defendant stabbed the author of the letter from behind as it was being written, then the evidence is physical evidence, not documentary evidence. However, a film of the murder taking place would be documentary evidence (as a written description of the event for an eyewitness). If the content of that same letter is then introduced to show the motive for the murder, then the evidence would be both physical and documentary.

Moreover, if the documents contain testimonies of persons, they are part of oral evidence, not documentary evidence. For instance, if a person, a potential witness, recorded his testimony in a tape recorder, such evidence is oral evidence, not documentary, and will be subject, for example, to hearsay rules.

- o What are the requirements documentary evidence must fulfill to be admitted?

Documentary evidence is subject to specific forms of authentication, usually through the testimony of an eyewitness to the execution of the document, or through the testimony of the witness who is able to identify the handwriting of the purported author. Authentication is a mechanism of ascertaining authorship of the document (who author of a document is) and genuineness of the document sought to be introduced. There are various method of authentication both in our substantive and procedural laws and the draft evidence rules.

Documentary evidence is also subject to the best evidence rule, which requires the original document unless there is a good reason not to do so. The two requirements are discussed below.

#### **5.2.1. Authentication of Documentary Evidence**

Documentary evidence is subject to specific forms of authentication for its reliability, usually through the testimony of an eyewitness to the execution of the document, or to the testimony of the witness who is able to identify the handwriting of the purported author. Below are discussed some modes of authentication of handwriting and signature:

##### **i. Admission of authorship by the writer**

The writer himself may admit or concede that he is the author of a certain document and if this admission is a formal admission it will serve

as a conclusive proof to the issue of who the author of the document is. Consult Articles 2007 and 2008 of the Civil Code on proof in relation to contracts.

**ii. Proof of signature or handwriting**

The following rules provide mechanisms on how signature in documents and handwritings in issue is to be proved.

- ✓ Rule 58 of DER 1967: If a document is alleged to be signed or to have been written or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in the person's handwriting must be proved to be in his handwriting.
- ✓ Production of a person or persons who witnessed the writing or signature: persons who have observed or witnessed or witnessed a certain document be writing by someone the persons may be called to ascertain the author of a specific document.
- ✓ Attesting witnesses: certain documents are required by law to be attested by witnesses whose signature will be included in the document (for example articles 629 and 1727(2) of the Civil Code). Testimony of these attesting witnesses, whenever the authorship of an attested document is questioned, is sufficient to prove that the author of the attested document is the one who signed on the document.

**iii. Presumption as to documents not produced**

According to Rule 74 of the DER 1967, courts shall presume that every document called for and not produced after notice to produce was attested, Stamped, and executed in the manner required by law.

**iv. Comparison of signature/writing with others admitted or proved**

Another mechanism of authentication is to compare the writings or signature of the contested document with other writing proved to be authored or signed by the same person. The court will compare two writings/signatures of the same person and may reach to the conclusion that the author/signatory of this specific document is the person whose writing is submitted to investigation. The court may ask help of experts in so doing. In this regard, DER 1967 on the issue is stated below;

#### Rule 59

(1): in order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, or seal has not been produced or for any other purpose.

(2) The court may direct any person in court except a person accused of an offence to write any word or figures for so written with any words or figures alleged to have written by such person.

(3) This rule applies with any necessary modifications to finger impressions.

#### **v. Lay witness authentication**

There may be some persons who are well acquainted with the writings of the person who is submitted for investigation. Hence, calling these persons to verify whose writing is a specific document is another mechanism of ascertaining authorship. These witnesses do not apply modern ways of examining and ascertaining writing in laboratories or somewhere else but by a comparison between retained mental image of the supposed writer's writing and the writing in dispute.

#### **vi. Opinions of experts**

Authentication by expert witnesses refers to proof of authorship depending on the opinion of a person who has specialty on identifying the

writing of persons. These persons are called expert witnesses for they form conclusions based on inferences. DER 1967 states this hereunder:

#### Rule 42

(1) when the court has to form an opinion upon a point of foreign law or of science or art or as to identity of handwriting or finger impressions, the opinions that point of persons (hereafter called “experts”) specially skilled in such foreign law, science or art or in question as to identity of handwriting or finger impressions are relevant facts.

(2) Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

#### **vii. Ancient document rule**

A document which survived long enough, for example 30 years according to the Indian Evidence Act, and kept in proper custody it will qualify as ancient document and then no need for proof of authorship. The draft evidence rules do not contain document rule and neither do our substantive and procedural codes.

- o What about authentication of other documentary evidence?

Other mechanisms of authentication apply to prove the authentication of documentary evidence. In proof of execution of the evidence, it must be shown that it was made at the time and the manner alleged by the person adducing the document as evidence (a proper foundation). This mainly works as a rebuttable presumption in favour of the party producing the documentary evidence. For example, the presumption that a computer (which produced the evidence) was working properly can be challenged by the party against whom the evidence is produced. With machines, proper functioning of the machine must be checked. For example, read the following provision:

Art 45 of Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005:

Art 45: Document produced by a Computer

A statement in a document produced by a computer may not be admissible as evidence of any fact stated if it is shown that:

- (1) There are reasonable grounds for believing that the statement is inaccurate because of improper use of the computer; and
- (2) At all material times, the computer was not operating properly, or while the computer was not operating or was out of operation, was such as to affect the production of document or the accuracy of its contents.

### **5.2.2. Best Evidence Rule**

Authentication alone is not a sufficient for the admission of documentary evidence as proof but must also be qualified by the best evidence rule, which states the contents of a document must be proved by adducing the original document itself.

However, at present, a party is entitled to introduce a copy whether the original exists or not, as long as a copy is properly authenticated. In civil cases, signed copies are equivalent to original.

#### **i. Justification for best evidence rule**

The best evidence rule is common law rule of evidence, which can be traced back at least to the 18<sup>th</sup> century. The general rule is that secondary evidence, such as a copy or facsimile, will be not admissible if an original document is available.

The rationale for the best evidence rule can be understood from the context in which it arose: in the eighteenth century a copy was usually made by hand by a clerk (or even a litigant). The best evidence rule was

predicated on the assumption that, if the original is not produced, there is a significant chance of error or fraud in relying on such a copy.

In the age of digital facsimiles, etc. the rule is more difficult to justify. The likelihood of actual error (as opposed to mere illegibility) through copying is slight. The balance of convenience favours avoiding needless effort and delays where there is no dispute about the fairness and adequacy of a digital facsimile. Further, it is by no means clear what the 'original' of an electronic communication such as an e-mail actually is: as many as eight electronic 'copies' of a message might come into existence from creation to receipt.

The best evidence rule is also thought to be the basis for the rule precluding the admissibility of hearsay evidence, although the two rules are now quite distinct.

In the United States the rule has been codified in the Federal Rules of Evidence as rule 1002: *'to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of congress.'*

The rule requires that when writings are introduced as evidence in a trial, the original writing must be produced as the "best evidence". In federal practice, however, any exact copies of the original carry the same legal weight as the original unless their authenticity is in question.

The term "writing" has been liberally interpreted to include photographs, x-rays, and films. Note that for photographs and film, this could be construed to mean negatives, not prints, as they are the true 'original'. The rule applies in two situations:

- a) Where the terms of the writing are legally dispositive in the issue at bar (not collateral documents or issues).
- b) Where the witness's sole knowledge of a fact comes from having read it in the document.

There is an exception. If the original document is unavailable for reasons other than serious misconduct of the proponent, secondary sources of evidence (such as oral testimony) can be used in place of the original.

Currently, both California law and the federal rules allow the use of mechanically produced duplicates unless a party has raised a genuine question about the accuracy of the copy or can show that its use would be unfair.

- o What do you think the situation in our legal system?

The best evidence rule provides that the best proof of a document's content is the document itself. A written document can only be proved by the instrumentality of itself. In proving the terms of writing, where such terms are material, the original writing must be produced, unless it is established that the document evidencing the contract has been destroyed, stolen or lost.

Rule 53 of the DER 1967 states that the contents of a document may be proved either by primary evidence (this is the best evidence) or by way of exception that secondary evidence may be used to prove the content of a document.

#### **- Primary (Best) evidence**

Primary evidence is defined in Rule 54 of the DER 1967 as the document itself (the original) produced for the inspection of the court. As clearly provided in Rule 53(2) of DER 1967, documentary contents must be proved by primary evidence except in the cases mentioned in Rule 56. Nothing in the rules hereinafter contained shall affect the provisions of any law regarding proof of the existence and contents of particular documents, such as the provisions of the civil code regarding proof of wills and contract.

## - **Secondary evidence**

The contents of documents may be proved by secondary evidence where primary evidence could not be found. Secondary evidence is the second next alternative for proving the contents of a document. When original cannot be produced, acceptance of the secondary evidence depends on the nature of the documentary evidence. If it is a public document, the signature and seal of the person in the government institution may suffice. If it is a private document, there must be other supporting evidence.

There can be reasons to produce a copy, instead of the original, which include<sup>100</sup>:

- ✓ Original out of reach of the court;
- ✓ Admission by opponent;
- ✓ Destruction or loss of original. In case of loss, it may be necessary to show that all reasonable steps to search for that document have been taken;
- ✓ Non-portability of the evidence- e.g., inscriptions in cemetery or photo posted on a wall, and the court cannot visit the site for different reasons;
- ✓ Original is a public document- when it cannot be produced for different reasons;
- ✓ Original in possession of adversary- party shows prima facie the document is with adversary and the latter is not willing to produce it. Where an opponent is given notice and fails to produce the original document, a party is entitled to rely on secondary evidence. A party cannot oppose an opponent by withholding. In criminal proceedings, accused cannot be compelled (right against self-incrimination) but refusal to produce after notice can lead to secondary evidence being given.

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<sup>100</sup>Tatek, p249

- ✓ If a third party refuses to produce the document and the court cannot enforce such production;

In general, if original document is not available for reasons other than serious misconduct of the proponent, secondary sources of evidence (such as oral testimony) can be used in its place. Where secondary evidence is admissible, the copies can be the copies of the original or copies of copies, all of which are acceptable. However, there must be evidence that the copies are true copies of the original.

Read the following provisions on the use of secondary documentary evidence and their probative value:

Art 2011CC: copies of authentic deeds

- (1) copies or Photostat copies of original authentic deeds shall have the same probatory value as the originals where they are certified by a duly qualified public officer.
- (2) The same shall apply to photostat copies of parts of the originals.

Art 2012CC: public records

Copies of public or private instruments kept in public registers, issued in accordance with regulations by the registrar to whom the instruments are entrusted, shall have the same authentic value as the originals.

Art. 2014 - *Loss of original*

Failing an original text or a copy kept in public registers, copies made in accordance with the preceding articles shall retain their authenticity where on their face appear no erasures, alterations or any other particularity justifying suspicion.

Art 18 of the Procedure of Pardon Proclamation No. 395/2004

- (1) A receipt of pardon shall be proved by producing the original certificate thereof.

- (2) Notwithstanding the provision of sub article (1) of this article, the grantee may prove his pardon with another authenticated evidence if he shows convincingly that he lost the original certificate due to force majeure.

Secondary evidence is defined under Rule 55 of the DER 1967 in the following manner:

Rule 55: Secondary evidence means and includes:

1. Copies given under the provisions hereinafter contained;
2. Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies Compared with such copies;
3. Copies made from or compared with the original;
4. Counterparts of documents as against the parties who did not execute them;
5. Oral accounts of the contents of a document given by some person who has himself seen it.

Secondary proof as means of proof of contents of a document is employed in limited circumstances as outlined in Rule 56. The circumstances are described in Rule 56 in following manner:

Rule 56

(1) secondary evidence may be given of the existence, condition, or contents of document when:

- (a) The original is shown or appears to be in possession or power of the person against whom the document is ought to be proved or of any person out of reach or not subject to the process of the court or of any person legally bound to produce it and when after the notice mentioned in rule 57, such person does not produce it;

- (b) The existence condition or contents of the original have been proved to admitted in writing by the person against whom it is proved or by representative in interest;
  - (c) The original has been destroyed, lost, or when the party offering evidence or its contents cannot for any other reason produce it in reasonable time;
  - (d) The original is of such a nature as not to be easily movable;
  - (e) The original is a public document within the meaning of rule 60;
  - (f) The original is a public document of which a certified copy is permitted by these rules or by law in force to be given in evidence;
  - (g) The original consist of numerous accounts or other documents which cannot conveniently be examined in court and the fact to be proved is the general result of the whole collection.
- (2) In the cases mentioned in paragraph (a), (c) and (d) of sub-rule (1), any secondary evidence the contents of the document is admissible.
- (3) In the case mentioned in paragraph (b) of sub-rule of (1) the written admission is admissible.
- (4) In the case mentioned in paragraph (e) and (f) of sub-rule (1) a certified copy of document, but no other kind of secondary evidence is admissible.
- (5) In the case mentioned in paragraph (g) of sub-rule (1) evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in examination of such documents.

The weight and probative value given to documentary evidence is to be decided by substantive law. When a law requires that some transaction shall mandatorily be made in writing, the documentary evidence becomes the only evidence with probative value. Examples can be taken from Articles 1412 and 1727 of the Civil Code.

Art 2003CC: Contracts to be in writing

Where the law requires written form for the completion of a contract, such contract may not be proved by witnesses or presumptions unless it

is established that the document evidencing the contract has been destroyed, stolen or lost.

Art 2005CC: probatory value of written instrument

(1) A written instrument shall be conclusive evidence, as between those who signed it, of the agreement therein contained and of the date it bears.

(2) It shall have the same probatory value for persons represented in the act and the heirs of the parties.

Art 2006CC: contrary proof

(2) no proof by witnesses nor any presumption is admissible against such statements.

Sometimes, all evidence can be accepted but documentary evidence prevails. For example, Art 1406(2) of the Civil Code states, '*he may not prove that the price shown in the contract is less than what actually is paid.*' In other cases, all types of evidence may be given the same weight. In contrast to the provision mentioned in this paragraph, the second sub article states, '*the beneficiary may prove by all means that the price shown in the contract is higher than the price actually paid.*'

Sometimes, documentary evidence has probative value when it is produced in favour of one party, but not of the other. Read the following provisions:

Art 2016CC: trade books

(1) Entries in trade books are no evidence in favor of those who made the entries.

(2) They are evidence against those who made the entries, but a party wishing to avail himself thereof may not sever them so as to discard entries contrary to his claim.

Art 2017CC: domestic records and papers

Domestic records and papers are no evidence in favor of the person who wrote them.

See Art 2018CC for the use of domestic records and papers against the person who wrote them.

Finally, freedom of contracts cannot override rules of evidence in contract matters. Read the provision below:

Art 2004CC: Agreements relating to evidence

Parties are not allowed to provide in their contracts exceptions to the rules which bar or restrict the admissibility of certain means of evidence.

### **5.2.3. Parol evidence rule**

- o What is the essence of the parol evidence rule?

The parol evidence rule restricts the use of extrinsic evidence be it oral or written and requires that the party proves his case exclusively by the evidence of the contents of a writing. As opposed to the best evidence rule, the parol evidence rule does not require that the evidence of the document be the document itself. Instead, it simply limits proof of the fact to the contents of the writing and prohibits consideration of any evidence which contradicts, alter, vary, change, and modify any of the terms or provisions of the written agreement.

Art 897 of CC: 2- *Proof how made*

- (1) The existence and contents of a public or holograph will shall be proved by producing the instrument itself in which such will is contained, or a copy thereof certified to be true by the notary or registrar who has received the will for the deposit thereof in his archives.

(2)*They may not be proved by any other means for the purpose of obtaining their execution.*

(3)They may be proved by any means for the purpose of obtaining damages from the person who, through his fault or negligence, has caused the will to disappear.

The rationale behind the parole evidence rule is that the parties by reducing their agreement to writing are regarded as having intended the writing they signed to include the whole of their agreement. The terms and provisions contained in the writing are there because the parties intended them to be there.

For instance, A instituted acclain against B on the breach of loan contract. And he annexed the original document signed by the defendant on the value of Birr 1600. But the defendant disagrees as to the amount of the loan he borrowed. And he provides defense witnesses who are ready to testify that the amount of loan is not as prescribed as in the contract. Rather it is Birr 1060. In this case, the court shall not accept the defendant's witnesses. Since neither party is permitted subsequently to show that the contract they made is different from the terms and provisions as they appear in the written agreement.

Art 2006(2) of the civil code provides for the parole evidence rule for contracts. Accordingly, no proof by witnesses or any presumption is admissible against statements contained in a written instrument. Here the article does not provide whether it is possible to challenge the contents of a written contract by other written document.

When we observe the practice of courts, some judgments supports the sprit of Art 2006(2). While others provides the possibility of variation of the contents of the original contract by another contract entered by the parties. According to Art 1722, a contract made in a special form shall be varied in the same form. This means if the original contract was made in

written form, the parties can vary its contents by another written contract. Thus, even though proof by witness or any presumption is inadmissible, proof by another written contract is admissible against statements contained in written instrument under Art 2006 (see Art 1722 of Civil code). *Do you agree?*

The parties may differ as to the proper or intended meaning of language contained in the written agreement, where such language is ambiguous or susceptible of different interpretation. To ascertain the proper meaning requires a construction of the contract. Therefore, rule of interpretation permit the introduction of evidence in order to resolve ambiguity and to show the meaning of the language employed and the sense in which both parties used it (reread Art 1734 and 1736 of civil code).

Read the following excerpts on parol evidence:

**E. K. Quansah, The 'Parol Evidence' Rule in Botswana: Choosing Equity over Inequity, 42(1) Journal of African Law, 121-128 (1998), p121**

*The "parol evidence" rule is to the effect that extrinsic evidence is generally inadmissible to prove the contents of a document; to add to, vary or contradict the terms of a document or to prove the meaning intended by the author of the document. The classic formulation of the rule is that of LORD MORRIS in Bank of Australasia v. Palmer:2 "Parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract.*

*The application of the rule is usually to be found in the realm of the 'law of contract but it also has application to documents in general. It was its application to negotiable instruments that the Botswana Court of Appeal was called upon to decide in the recent case of Trans Lobatse (Py) Ltd v.*

*Marsh; Mahajan & others v. Trans Lobatse (Ply) L td5. The main issue before the court was the liability of a signatory of a negotiable instrument who signed the instrument without qualifying his signature so as to indicate, ex facie the instrument, that he signed merely in a representative capacity or by procuration of another.*

**Eric A. Posner, The Parol Evidence Rule, The Plain Meaning Rule, and the Principles of Contractual Interpretation, 146(2) University of Pennsylvania Law Review, 533-577 (Jan 1998), p534- 537, 541-543**

*Most courts would subscribe to something close to the following statement of the parol evidence rule: A court will refuse to use evidence of the parties' prior negotiations in order to interpret a written contract unless the writing is (1) incomplete, (2) ambiguous, or (3) the product of fraud, mistake, or a similar bargaining defect (Purists will object that I conflate the plain meaning rule, which I treat as exception two, and the parol evidence rule. As far as I can tell, nothing turns on this distinction, and my version avoids needless complexities. Because both the parol evidence rule and the plain meaning rule concern the same issue-under what circumstances extrinsic evidence can be used to supplement a writing-they are best analyzed together. Courts and commentators often treat the two together, but sometimes do not.*

*The rule is susceptible to hard and soft interpretations in several ways, each of which turns on the use of extrinsic evidence to determine whether any of the exceptions apply. First, consider the completeness exception. The harder courts declare a writing complete if it looks complete "on its face." Writings generally look complete if they are long and detailed, or at least contain unconditional language, cover many contingencies, or at least the most important contingencies, and contain a clause, such as a merger clause, which says that the contract is complete. The softer courts declare a writing complete only if the extrinsic evidence supports that determination. In theory, this means that*

*a court looks for extrinsic evidence that suggests that the writing is not complete, such as an oral statement that the writing is just a memorandum. If the court finds no such evidence, no extrinsic evidence is admitted. In some cases, this procedure may result in the exclusion of relevant extrinsic evidence. In practice, however, courts adopting this soft version of the complete-ness exception generally admit all relevant extrinsic evidence, because any inconsistent extrinsic evidence suggests (however indirectly) that the contract is incomplete, and any consistent extrinsic evidence that might be excluded would not affect the interpretation of the contract anyway.<sup>3</sup> A similar point can be made about the ambiguity exception. The harder courts consider a writing ambiguous if it looks ambiguous "on its face." A contract is facially ambiguous when the writing has conflicting terms or no provision relating to the contingency under which the dispute arises. In contrast, the softer courts decide whether a writing is ambiguous by looking at extrinsic evidence. Even if the writing has no apparently conflicting terms, extrinsic evidence may indicate that the parties agreed on terms that conflict with the written terms. This conflict creates an ambiguity that requires admission of the extrinsic evidence. In contrast, if the extrinsic evidence does not conflict with the writing, it is not admissible, but its admission would make no difference, anyway. Again, the soft version of the ambiguity exception for the most part allows courts to consider any relevant extrinsic evidence.*

*The fraud exception presents a difficulty for the harder courts because one cannot read fraud off a contract's face; one must look at extrinsic evidence in response to an allegation of fraud. Once one looks at extrinsic evidence for fraud, however, it is easy for a party to gain admission of all extrinsic evidence. The party alleges that the promisor fraudulently violated a pre-writing promise, which induced him or her to sign the writing. Although in theory it is harder to prove promissory fraud than to prove breach of contract, in practice the distinctions between the two causes of action break down. The fraud exception*

swallows the parol evidence rule. Harder courts resist this outcome by distinguishing two sorts of promissory fraud, "fraud in the inducement," which refers to the use of fraudulent promises, and "fraud in the execution," which refers to the use of a false writing such as a forgery, and admitting extrinsic evidence only to show fraud in the execution. Hard courts also sometimes limit the fraud exception by restricting its use to cases where the allegedly fraudulent promise does not directly contradict a promise contained in the writing. An example will clarify the relationship between the different versions of the parol evidence rule. Suppose that Seller and Buyer sign a written contract for sale of a used automobile, that is detailed and looks complete, but does not contain a merger clause. Before the writing is signed, Seller states in response to Buyer's query that the carburetor is in fine shape. The writing contains many provisions describing the parties' obligations, but does not contain a provision that guarantees the quality of the carburetor. In fact, the carburetor is in poor shape. Under hard-PER, Buyer would have difficulty convincing a court to take account of the oral representation for the following reasons: First, the contract appears complete "on its face" because it is detailed and refers to the most probable contingencies; second, the contract appears unambiguous "on its face" because (we assume) it contains no gaps or conflicting terms; third, the fraud claim could not plausibly allege fraud in the execution, but only fraud in the inducement. As no exceptions apply, the extrinsic evidence cannot be used to interpret the contract.

Under soft-PER, the court would more likely admit evidence of the oral representation, for any of three reasons. First, the oral representation suggests that the contract's failure to stipulate or disclaim the quality of the carburetor means that the parties failed to put a crucial part of their contract in the writing. As the writing is incomplete, the oral representation can be used to interpret the contract. Second, the oral representation conflicts with (let us suppose) a rather vague written disclaimer in the contract. Was the disclaimer intended to extend to the

carburetor? The oral representation may be considered in order to resolve this ambiguity. Third, the oral representation may be considered as evidence of fraud in the inducement. Under any of the three exceptions, the extrinsic evidence of the oral representation will be admitted for the purpose of interpreting the contract. As noted earlier, parties can, in principle, contract out of the parol evidence rule by including a "merger" or "integration" clause. This clause typically states that courts should treat the writing as a complete embodiment of the agreement. Soft-PER and hard-PER courts approach the merger clause differently. Hard-PER directs courts to defer to the clause except when the extrinsic evidence refers to an entirely different contract-as courts sometimes say, a contract that would not naturally be joined to the contract in dispute. Soft- PER directs courts to admit extrinsic evidence for the purpose of determining whether the merger clause was intended to cover the terms at issue. In the example above, a soft court could evade a merger clause by holding that the oral representation shows that the merger clause was not intended to extend to the question of warranty, that the merger clause is ambiguous (as to whether it covers only some terms or all terms), or that the oral representation fraudulently induced Buyer to enter the contract, including the integration aspect of it.

Suppose that Seller and Buyer conclude a contract after several days of negotiations." During the negotiations, Seller made many statements, including promises and disclaimers, which we shall refer to as the set *S*. The contract consists of a subset of those statements, which we shall call *C*. The statements in *C* are all the statements in *S* that the parties would want enforced if the enforcement mechanism were perfect. *C* is smaller than *S*, because during the negotiations Seller makes all sorts of proposals, some of which Buyer accepts, some of which Buyer rejects, and some of which Seller withdraws before Buyer has a chance to accept or before formal conclusion of the negotiations. *C'* consists of the statements in *S* that are not in *C*-the statements that were made but not

put in the contract, or what I will call the "extra-contractual statements." The parties put into a writing a subset  $W$  of  $C$ ; and we call the statements that are in  $C$ , but not in  $W$ ,  $W'$  namely the statements in the contract that are not put in the writing, or the "unwritten statements."  $W$  is smaller than  $C$  because it is costly to write down every statement in the contract and because, at some point, the marginal cost of writing down an additional statement exceeds whatever marginal benefit results from putting it in writing. Figure 1 illustrates the analysis.

Now we can define hard-PER as a rule that tells the court to enforce all statements in  $W$  and no statement in  $W'$  or  $C'$  and soft-PER as a rule that tells the court to enforce all statements in  $W$  and  $W'$  namely,  $C$ -but none in  $C'$ . In words: Hard-PER tells the court to enforce written contractual statements, and not to enforce unwritten contractual or (written or unwritten) extra-contractual statements; soft-PER tells the court to enforce written and unwritten contractual statements, and not to enforce any extra-contractual statements. If courts never made errors, soft-PER would clearly dominate hard-PER, because only soft-PER allows courts to evaluate all relevant evidence. The parol evidence rule makes sense only on the assumption that courts make errors, an assumption we make. Specifically, a court errs by enforcing an extra-contractual term ( $C'$ ), which means failing to enforce a written or unwritten contractual term ( $W$  or  $W'$ ). Courts make characteristic errors under each version of the parol evidence rule. Under soft-PER, courts err by enforcing extra-contractual statements with some probability greater than zero. The reason is that courts have trouble distinguishing unwritten statements that are part of the contract from unwritten statements that are not part of the contract. For the moment, we assume that courts under soft-PER enforce unwritten and written promises with an equal amount of error-proneness. Under hard-PER, courts "err" by refusing to enforce unwritten contractual statements with a probability of one. So the characteristic error under soft-PER is the court's erroneous enforcement of statements in  $C'$ . The characteristic error under hard-PER is the

*court's refusal to enforce statements in W, which are part of the contract, even if not part of the writing. The expected loss under each rule is the product of its characteristic error and the contractual gains that are not captured as the result of error.*

*One might object that because soft-PER allows courts to use more information than hard-PER does, soft-PER should enable courts to produce better decisions on average even if the decisions of courts applying soft-PER will exhibit greater variance. This alternative characterization would not affect the analysis for parties that are risk-averse, since such parties are willing to pay for a reduction in variance. Even risk-neutral parties would prefer the reduction in variance because the uncertainty of the legal decision in case of a dispute would cause parties to incur greater litigation costs than they would if the legal decision could be accurately predicted. Another relevant cost is the cost to the parties of writing down promises, including the cost of remembering to put promises in writing and checking the writing to make sure that it does not contain errors. This cost will be called the "transaction cost." Consider the case where transaction costs are zero. Under hard-PER, the parties have the choice between writing down a promise or not writing it down. If they do not write it down, it will not be enforced, and they will lose the gains from trade. If they do write it down, it will be enforced with a probability of one, supposing that the contingency it governs occurs. (Many contractual terms, of course, concern low-probability contingencies, so the benefit of including them is probabilistic.) Because it costs the parties nothing to write down the promise, the parties include all promises in the writing, and all promises are enforced with perfect accuracy. Under soft-PER, the parties have the same choice, but now because they gain nothing from writing down the promises, they do not write down any promises. But because under soft-PER the courts erroneously enforce some extra-contractual promises, and therefore fail to enforce some of the un-written contractual*

*promises, the full gains of trade are not realized. Accordingly, when transaction costs are zero, hard-PER dominates soft-PER.*

## **Chapter Summary**

## **CHAPTER SIX: BURDEN AND DEGREE OF PROOF**

### **Introduction**

Next to presentation of prosecutor's case is colloquially known as 'half time', because it is the point between the close of the prosecution case and the start of the defence case. Occasionally, the defence will make a submission to the trier of the fact that the case against the accused ought to be dismissed on the ground that the prosecution have failed to place before the trier of the fact sufficient evidence of his guilt to justify a conviction. A successful 'submission of no case to answer' will result in the trier of the court acquitting the accused. If it fails or is not made, defence case begins. At the end of defence, the prosecution and defence will make their closing speeches to the trier of fact, after which the trier

of fact will summarise the evidence and proceed to determine on the law.<sup>101</sup>

Similar procedure happens in civil proceedings. Once the plaintiff states his claims and produces evidence to prove his claim, the trier of fact must decide whether the case needs to proceed with the defence's case. If the plaintiff has proved his claimed with the standard required, the defendant will be asked to present his defence.

What burdens the parties have and to what standard these parties are required to win their cases are the main issues for this chapter. The chapter will first deal with the burden of proof and proceeds with the discussion on standard of proof.

**Chapter objectives: after reading this chapter, students should able to**

- Know up on whom burden of proof normally lays in civil cases and criminal cases
- Distinguish between burden of production (evidentiary burden) and burden of persuasion (legal burden)
- Understand cases in which burden of proof shifts from the plaintiff to the defendant or from the prosecution to the accused in civil cases and criminal cases respectively
- Discuss the constitutionality of shifting burden of proof in criminal proceedings
- Explain the degree of proof required in civil litigations and criminal proceedings

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<sup>101</sup>Raymond Emson, Evidence (4<sup>th</sup> ed.) Palgrave Macmillan (2008),p21.

## 6.1 Burden of proof

Black's Law Dictionary defines burden of proof as *"in the law of evidence the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties. The obligations of a party to establish by evidence a requisite degree of belief, concerning a fact in the mind of the trier of the fact or court."*

According to the definition, the party within whose knowledge it lies and who asserts the affirmative is to prove it and not he who asserts the negative. The negative is a denial which would be made by the opposite party.

### o Who has the burden of proof?

The test most commonly applied in determining the burden of proof is, *'if no evidence at all were presented, which party would lose the case.'* The one who will lose if evidence is not produced or proved has the burden of producing and proving the evidence. On the other hand, the person who mobilises the legal machinery or the one who is trying to change the *status quo* has the obligation to produce evidence and prove before the trier of fact.

The FSC CD has agreed with the above statement by asserting that, *'the one who alleges in the affirmative shall prove it.'* It states that someone who has not proved the existence of a right or a duty, the court shall not grant his request.<sup>102</sup>

### o What if there are two or more issues in a case?

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<sup>102</sup> *Taye Hosaena v. Meseret Weldeyes*, FN 44634, Yekatit 22, 2002EC, FSC CD, Volume 9, p306.

A particular burden may be on one party as to some issues and on the other party as to the other issue in the same case.

There are many provisions in the different laws indicating the burden of proof. Below are some examples:

*Art. 5 CC- Proof of life or death of person- 1) Burden of proof*

- (1) Whosoever, for the purpose of exercising a right, alleges that a particular person is or was alive on a certain day, or is dead, shall prove the allegation.

*Art 196 CC- Proof of disability.*

- 1) Capacity is presumed.
- (2) Any person who alleges the disability of a physical person shall prove that such person is under a disability.

*Art. 896 CC- Proof of will 1) Burden of proof*

Whosoever claims rights under a will shall prove the existence and the contents of such will.

*Art 2001 CC- burden of proof in contracts*

- (1) He who demands performance of an obligation shall prove its existence.
- (2) He who alleges that the obligation is void, has been varied or is extinguished shall prove the facts causing such nullity, variation or extinction.

*Art 2141 CC- burden of proof in extra contractual liability*

The victim of the injury shall establish the amount thereof and prove the circumstances which render the defendant liable to make it good.

*Art 2447 CC - Proof of donation.*

- (1) Whosoever alleges that a donation has been made shall prove its existence.

*Art 2941- Limit of liability.*

- (1) The lessee shall not be liable where he proves that the loss or deterioration is due to the fault of the lessor or to a fortuitous event.
- (2) He shall not be liable where he proves that the loss or deterioration is due to old age or to some other defect of the thing given on lease.
- (3) He shall not be liable where the deterioration is due to normal and lawful use of the thing given on lease.

*Art 111 of Labour Proclamation No. 377/2003- Burden of Proof*

The benefits referred to in Article 110 shall not be payable where the worker dies after twelve months from the date of the injury, unless it is proved that the injury was the principal contributory cause of his death.

**General Rules on burden and standard of proof:**

- ✓ Burdens relate not to the actions as a whole but to particular issues within;
- ✓ In general, both will be borne by the same party;
- ✓ Discharge of any burden involves adducing sufficient evidence but what is sufficient varies
- ✓ These burdens do not shift. What changes in the course of the trial is the tactical balance between parties. The only situation where legal burden may shift is where there is the operation of another rule of law, such as the impact of a rebuttable presumption, e.g., absence as death.

**6.1.1. The burden of production**

Black's Law Dictionary defines burden of production as follows;

*Burden of producing evidence is the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue. Such burden is met when one with the burden of proof has introduced sufficient evidence to make out a prima-facie case, though the cogency of the evidence may fall short of convincing the trier of fact to find for him. It is the burden of introducing some evidence on all the required elements of the crime or tort or contract to avoid the direction of a verdict against the party with the burden of proof.*

Burden of production refers to burden of going forward with evidence on a particular issue. This refers to burden of producing evidence and burden of proceeding with the evidence on a particular issue at the start of a case.

In common law, evidential burden is about setting the agenda. It is to adduce enough evidence for the judge to be satisfied that the issue should be left to the jury. This can be termed as '*the problem of passing the judge*'.

A defendant bears burden of production where defence goes beyond mere denial. In a situation such as a claim for the recovery of a loan, it is for the plaintiff to prove that the loan was made, but the defendant who alleges that the loan has been repaid bears the burden of producing that fact in order for the defence to succeed.

In criminal cases, the burden of production lies on the prosecutor. Art 136 of the Criminal Procedure Code states that the prosecutor opens his case by stating shortly the charges and evidence. As the public prosecutor has burden of production of evidence in criminal cases, he bears the risk of non-production. Art 141 of the CrPC provides to this effect, i.e., when the case for prosecution is concluded, and if the court

finds that no case which would warrant conviction against the accused has been made, it shall record an order of acquittal. One rational for not making a case against the accused may be due to the prosecutor's failure to produce evidence which reasonably enable the court believe that there has been made a case against the accused so as to continue proceeding. However, where the prosecutor makes a case against the accused, the defendant has burden of producing rebutting evidence as clearly provided under Art 142 of the criminal procedure code.

The same applies to civil cases in which case, the plaintiff carries the burden of production. The FSC CD, in a case on partition of property, the Court stated that, *'the applicant does not produce a fact that the properties to be partitioned exist and it was not a fundamental error of law if subordinate courts rejected the applicant's case accordingly.'*<sup>103</sup>

In some cases, the court may take the initiative to order the production of a fact in some cases. For example, under Arts 51 of CrC, the court has the mandate to order production of a fact of irresponsibility when the court doubts the responsibility of a person to his acts. In other words, without the party alleging irresponsibility, the court can bring up the case of irresponsibility. This is in direct contrast with the principle that *'a party who wants to benefit of a fact must produce the fact before the trier of a fact.'* Similar arguments can be made in both civil and criminal proceedings related to the issue of preliminary objections. There are some objections (facts) which can be raised by the court even if parties are silent about it.

- o Does Article 136(4) of CrPC (*The court may at any time put to a witness any question which appears necessary for the just decision of the case*) fall under this category? Can the court bring a new fact (that may favor any of the parties) when it deems it important for the just decision of the case?

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<sup>103</sup> Taye Hosaena v. Meseret Weldeyes, FN 44634, Yekatit 22, 2002EC, FSC CD, Volume 9, p306.

### **6.1.2. Burden of persuasion**

If burden of production (evidential burden) is going forward with the evidence on one issue, legal (persuasive or probative) burden is about persuading the trier of the fact to decide any particular issue in ones favour.

- o Shall the party with burden of production on an issue carry burden of persuasion as well?

Whosoever bears the legal burden also bears the evidential burden. The same party normally bears both evidential burden and legal burden at the same time, i.e. where a party produces sufficient evidence to make a case she shall again establish a fact so as to persuade the tier of fact. These two burdens do not have analogous application in civil actions and criminal offence. When we see legal burden in civil cases we face with the general rule that who asserts must prove; on other hand, the party who positively asserts must bear the risk of his failure to prove his assertion. This does not mean that party cannot bear the onus of proving the negative dimension the fact. Thus, it is probably better expressed that a party who wishes the court to take action on a particular issue has the responsibility of showing why action should be taken.

The exception to the above rule is that the accused will bear an evidential burden, although legal burden of disproof rests on the prosecution, when defendant raises certain positive defences, over and above a denial of a definitional element of the offence, such as self-defence, provocation or duress. Even as to one particular issue, burden of production may lay on one party and burden of persuasion on the other.

In US, for example, the defendant has only burden of production (to adduce evidence), not burden of persuasion in affirmative defences.<sup>104</sup> Writing about the English Law of evidence, Emson notes that, 'As a general rule, the prosecution are obliged i) to prove that the accused committed the *actus reus* of the offence with the requisite *mens rea* and ii) to disprove any defence (in respect of which the accused has discharged a mere evidential burden). The accused is required to discharge an evidential (and not legal) burden when it comes to affirmative defences. Therefore, in addition to proving the elements of a crime, the prosecutor need also prove the absence or non-applicability of any defences the accused may raise.'<sup>105</sup>

- o What about in Ethiopia?

Rule 84(2) of the DER imposes up on the defendant the burden of proving criminal irresponsibility and limited responsibility. However, it is not clearly provided whether that rule imposes burden of production or burden of persuasion. But upon comparative investigation of Rule 84 of DER, it seems that it imposes up on the accused burden of production, not burden of persuasion. Melin made an opinion that burden of persuasion by the accused is required in special defense of insanity. The writer also added, that referring to Rule 84(2)c, that the rule places burden of persuasion as well as burden of production upon the accused in proving criminal irresponsibility or limited responsibility. The prosecutor then has to prove beyond reasonable doubt on the issues he has burden of persuasion.

- o Do you agree with the above assertions? Shall this apply to issues of force majeure, contributory negligence, legitimate defence and other affirmative defences? Does the phrase '*....if he can prove...*' in

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<sup>104</sup>Tatek Tadesse, Fundamentals of Evidence Law (Amharic) (2003EC), p42.

<sup>105</sup>Hanna Arayaselassie, the Standard of Proof in Criminal Proceedings: the Threshold to Prove Guilt under Ethiopian Law, 8(1) Mizan Law Review, 84-116, p89.

the following provision apply to burden of production or both burdens?

Article 614 CrC- Truthful assertions and safeguarding of higher interest excepted

(1) A person charged with defamation cannot in general plead in defence that he acted without intent to injure, or that he confined himself to repeating even though not believing them, allegations emanating from another, or that it was a matter of common knowledge, or that he uttered suspicions or conjectures.

(2) *Where the criminal commits the act by uttering or expressing the truth, or having sufficient ground to believe that it is true, he shall not be liable to punishment if he can prove that:*

*a) he did not have the intention to injure the honour or reputation of another; or*

*b) he acted in the public interest or he was actuated by a higher interest or moral aim.*

### **6.1.3. Shifting burden**

The concept of shift of burden of proof can be approached from two angles. First, it can mean the exception to the general principle, '*any party alleging the existence of a fact must prove it.*' The law may itself shift the burden of proof from the prosecutor to the accused in criminal cases and from the plaintiff to the defendant in civil cases. The following provision is an example of such cases:

Art 7 of Right to Employment of Persons with Disability Proclamation No. 568/2008

*1) Any person with disability who alleges that discrimination on the ground of his disability existed with respect to recruitment, promotion, placement, transfer or other conditions of employment*

*may institute a suit to the competent court on the issue without the requirement of the burden of proof.*

- 2) *The defendant to a suit instituted pursuant to sub article (1) of this Article shall be responsible to prove that there was no act of discrimination.*

This is an exception because in normal cases the person who claims to have been discriminated must prove the existence of discrimination. In this case, the court relieves the plaintiff (in this case, the disabled person) from proving discrimination. The burden is shifted to the defendant (employer) to prove the absence of discrimination.

Second, shift of burden is also seen as changing the party responsible for producing or proving a fact during a proceeding on an issue. Burden is shifted to the other party when the party has sufficiently presented his evidence for the case.<sup>106</sup> If the issue in a case changes into another, the burden is transferred to the other party. This mainly happens when the defendant raises a point which goes beyond mere denial of claims of the accuser. For example,

Art 2001 CC- burden of proof in contracts

- (1)*He who demands performance of an obligation shall prove its existence.*
- (2)*He who alleges that the obligation is void, has been varied or is extinguished shall prove the facts causing such nullity, variation or extinction.*

In a claim for the recovery of a loan, it is for the plaintiff to prove that the loan was made, but the defendant who alleges that the loan has been repaid bears the burden of proving that fact in order for the defence to succeed. If at the end of the trial it is established that the loan was made, but it is unclear whether it was repaid, the plaintiff will succeed. In

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<sup>106</sup>Tatek Tadesse, Fundamentals of Evidence Law (Amharic) (2003EC), p280.

conclusion it must be said that although such examples may appear that the burden of proof shifts from one party to another in civil cases, it is not so. The incidence of the burden of proof, once established, never shifts as the only thing which may happen is that each of the parties might bear the burden of proof in relation to separate issues in the trial.<sup>107</sup>

#### Art 15 of Pro No. 657/2009

##### Unexplained Property

1/ Without prejudice to Article 419 of the Criminal Code, any person, who is in control of pecuniary resources or property disproportionate to his present or past lawful income or obtained from other lawful means shall, *unless he gives a satisfactory explanation to the court as to how such pecuniary resources or property come under his control* be punished, without prejudice to confiscation of the property or pecuniary resources or restitution to the rightful owner, as it deems appropriate, with imprisonment from three to five years and fine from Birr 5,000 to Birr 10,000.

The following excerpt discuss the shift of burden of proof

#### **Worku Yaze, Burden and Standard of Proof in Possession of Unexplained Property Prosecutions, 8(1) *Mizan Law Review*, Sept 2014, p7**

*As the formulation (definition) of the offence illicit enrichment under the international/regional conventions and national laws shows, transfer ('shift' or 'reversal') of burden of 'proof' from the prosecutor to the accused is made only in relation to the fifth element of the offence ('absence of justification'). The nature of this 'burden' and other related details are to be explained in the context of the operation of the form of presumption envisaged by the law. we have to note that the accused is*

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<sup>107</sup>Jan Hendrik de la Rey, *The Fact-finding Process and Burden of Proof during Litigation*, University of Pretoria (2007), p120.

*required only to shoulder some form of burden of 'proof', and this is only in respect of this element of the offence ('absence of justification'). It is thus wrong to take this transfer ('shift') as amounting to a total shift of burden of proof from the prosecutor to the accused in respect of every element of the offence. And this transfer of a form of burden of 'proof' to the accused in respect of this one element of the offence does not in any way signify presumption of guilt. It is impossible to consider the transfer of burden in respect of this element before the prosecutor successfully proves the four threshold elements.*

*Moreover, it must be underscored that such transfer of burden of 'proof' in respect of 'absence of justification' element of the offence from the prosecutor to the accused is different from the one that occurs in case of tactical burden of proof in other criminal proceedings, this transfer of burden of 'proof' comes in the middle of the proceeding as soon as the prosecutor establishes the four threshold elements but before it is required to establish the other essential element of the offence in the charge. For example, if an accused raises an affirmative defence such as legitimate defence or duress or lawful order in a given criminal charge brought against him, a tactical burden of proof transfers from the prosecutor to the accused only after the prosecutor has comprehensively established every element of the offence in charge. In the case of illicit enrichment, however, the 'shift' of burden of 'proof' comes into the picture only after the prosecutor has established the four basic elements and before it is required to prove 'absence of justification' element of the offence. This is made possible by the operation of the presumption of law.*

#### **6.1.4. Burden of proof and presumptions**

Presumptions may have the effect of imposing burden of proof on the party against whom the presumption is made. For example, the

presumption of innocence in Ethiopia refers to a rule of procedure requiring the prosecution to bear the persuasive burden.<sup>108</sup>

Art 98(6) of Labour Proclamation No. 377/2003

*6) In the absence of proof to the contrary, any disease which occurs frequently only to persons employed in certain occupations shall be presumed to be of an occupational origin where the worker suffering from such a disease was engaged in such an occupation and the existence of the disease is ascertained by a medical doctor.*

A plaintiff (an employee) claiming on the ground of disease of occupational origin has the responsibility to prove three facts in the above provision. The first one is that he is suffering from a disease, which must be ascertained by a medical doctor. Second, the disease occurs frequently only to persons employed in his or related occupation. Third, he was engaged in the occupation. In all these three facts, which we call basic facts, the employee has the burden of production and persuasion. In normal cases, the plaintiff would also be required to prove that the disease is an occupational disease. However, the plaintiff, according to the above provision, is relieved of his burden of proving the link between the disease and the occupation. In other words, the burden of proof for this specific fact is imposed on the defendant (the employer).

According to the first view, a presumption creates an evidential burden on the opponent, i.e., 'the presumed fact will be taken as proved unless the opponent produces some evidence to rebut the presumption. If the opponent succeeds in doing this, the normal burden of proof comes to be applied as if the presumption never existed. The second view, on the other hand, holds that a presumption has the effect of shifting the legal burden of proof of the presumed fact to the opponent who will be

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<sup>108</sup>Worku Yaze, Presumption of Innocence and the Requirement of Proof Beyond Reasonable Doubt: Reflections on Meaning, Scope and their Place under Ethiopian Law, in Wondwossen Demissie, Human Rights in Criminal Proceedings: Normative and Practical Aspects, Ethiopian Human Rights Law Series, Vol. III Jan 2010, Faculty of Law, Addis Ababa University, p127.

required to disprove it to the applicable standard of proof. However, this distinction is relevant only to civil cases because in criminal cases presumptions do not have the effect of shifting the legal burden of proof. When a presumption is applied in a criminal case, it will only have the effect of shifting the evidential burden to the accused.<sup>109</sup>

## 6.2 Standard of proof

The party with the burden of persuasion has the obligation to persuade the court to some standard that the fact he claims is true.

Certainty is not the aim of law of evidence.....

### 6.2.1 Standard of proof in civil cases

Art 33 of Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005 states:

*The standard of proof required to determine any question arising as to whether a person has benefitted from criminal conduct, or the amount to be recovered shall be that applicable in civil proceedings.*<sup>110</sup>

- o What does this provision mean when it states standard of proof applicable in civil cases? Discuss

The Ethiopian laws use different standards of proof in civil cases. Look into the following provisions of the Civil Code:

Art 157: principle of decision

(1) the court shall declare the absence where the death of the absentee appears to it to be probable.

<sup>109</sup>Hanna Arayaselassie, the Standard of Proof in Criminal Proceedings: the Threshold to Prove Guilt under Ethiopian Law, 8(1) Mizan Law Review, 84-116, p90.

<sup>110</sup>This proclamation is recently repealed and you have to check if similar provision is included in the new proclamation.

Art 161: Judgment declaring death

If the evidence collected by the court establish in a manner which may be considered certain that the absentee is dead, the court to which the application for the declaration of absence was made, may deliver a judgment declaring the death of the absentee.

Art 184: presumed intention

(2) an intention to the contrary expressed by such person shall not be taken into consideration unless it is sufficiently precise, and it is to that effect on the happening of an event which will normally happen according to the ordinary course of things.

Art 232: 2- tutor

The tutor may be removed by the court, where it appears that he administers badly the property of the minor, or.....

Art 233: 3- removal of ascendants

(1) the court shall declare only with extreme caution the removal of the mother or the father or of the other ascendants as guardians or tutors of their children or descendants.

Art 756: Annulment

(2) it may not be annulled on the ground of error or fraud, in accordance with the provisions of the same Title, unless it is decisively proved that the child could not have been conceived of the person making the acknowledgment.

Art 862: 3: power of the court

(1) the court may maintain in whole or in part the effect of the provisions contained in such wills where it is of opinion that such provisions were not influenced by the state of health of the testator.

Art 878: effect of nullity of a provision

The nullity of a provision contained in a will shall not entail the nullity of other provisions contained in the same will, unless it appears *in a clear manner* that there existed in the mind of the testator a necessary connection between the execution of the provision which is null and that of other provisions.

Art 2341: whole ownership transferred to buyer

(3) the contract may not be cancelled where the right with which the thing is encumbered is of small importance and *it appears* that the buyer would have bought the thing, had he known the encumbrance.

- o Order the above-stated standards of proof in order of their strictness.

How is any standard of proof to be met is decided by the substantive laws or/and the requirements of relevance and admissibility. For example, Art 98(4) of the Labour Proclamation No. 377/2003 states:

The occurrence of any of the diseases listed in the relevant schedule on any worker having been engaged in anyone of the corresponding types of work specified therein, shall *by itself, constitute sufficient proof* of the occupational origin of the disease.

### **6.2.2 Standard of proof in criminal cases**

Like the standard of proof in civil proceedings, there is no one clear standard in criminal cases. One point of agreement, however, is that standard of proof in criminal cases is higher than that of the civil cases. Several reasons can be mentioned for the difference.

- i. The presumption of innocence

The constitutional protection of presumption of innocence means that a prosecutor must prove guilt of an accused by a higher standard. Some have related this right with the standard of *beyond reasonable doubt*.

The Human Rights Committee has discussed the meaning of presumption of innocence under General Comment 32 in which it clarified the obligation of state parties to the covenant by specifying that the presumption requires the prosecution to prove the charge and ‘... guarantees that no guilt can be presumed until the charge has been proved *beyond reasonable doubt*....’.<sup>111</sup>

ii. The unbalanced position of the parties in criminal proceeding  
Criminal proceeding is between the prosecution, a machinery of government, and the accused, an individual. The power imbalance is so clear in this cases that the law may device ways to avoid it. Due process of law expects that the accused must have adequate chance to defend himself. This may impose on the state a positive obligation to provide legal assistance or an obligation of proving its case in higher standards.

iii. Consequences of punishment in criminal cases  
In a civil proceeding, the defendant who has lost his case will mainly suffer loss of interests expressed in money. On the other hand, in criminal cases an accused who has lost his case will mainly suffer loss of personal liberty, including life in case of death penalty. The interest at stake is higher in criminal cases than in civil ones. Hence, the law imposes higher standards in criminal proceedings than in civil proceedings.

iv. The risk of error  
The scenario in a formal civil dispute is a ‘win-lose’ situation, i.e., one party wins while the other loses. Interest is transferred from one person to another though in time of error, the transfer may be wrong. The risk of

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<sup>111</sup>Hanna Arayaselassie, the Standard of Proof in Criminal Proceedings: the Threshold to Prove Guilt under Ethiopian Law, 8(1) Mizan Law Review, 84-116, p92. The same argument is made in the Law of Evidence Federal Teaching Material, p199. Refer to UN HR Committee, GC No. 32, Art 14, Right to equality before courts and tribunals and to fair trial, August 23, 2007, CCPR/C/GC/32, available at: <http://www.unhcr.org/refworld/docid/478b2f2.html>.

error is not a zero sum game. However, in a criminal case, if error is committed, nobody is benefitted and all parties involved lose. As discussed in criminal procedure course, the worst of the errors is convicting and punishing an innocent defendant. This is the reason more caution must be exercised in criminal proceedings than civil proceedings.

The following excerpt explains standard of proof in comparative perspective:

**Jan Hendrik de la Rey, The Fact-finding Process and Burden of Proof during Litigation, University of Pretoria (2007), p20, 73, 76, 78, 90, 92, 94, 96, 133-134**

*Due to the historical development of South African law, the evidence law is based on the English law. The required burden of proof is 'on a balance of probabilities' in civil and labour cases and 'beyond reasonable doubt' in criminal cases.*

*In civil law countries, France and Germany, the truth of the case is to be proven in order for the party in the litigation to satisfy the required burden of proof. They seem to appeal to the inner, deep-seated, personal conviction of the presiding officer. But not all civil law systems employ exactly the same standard in all their civil and criminal cases.*

*Miller v. Minister of Pensions (1947) 2 ALL ER 372:373H- 'That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course if it is possible but not in the least probable' the case is proved beyond a reasonable doubt, but nothing short of that will suffice.' This definition has been referred to*

constantly by the English courts as well as South African courts until this day.

*In order for a court to find that such 'a reasonable possibility' exists it must also be based on proven facts, in order to be regarded as such, in the specific circumstances of the case.*

- 1) *An accused cannot be convicted if his/her version can be regarded as reasonably possibly true;*
- 2) *An accused can only be convicted if the prosecution is able to prove its case beyond a reasonable doubt;*
- 3) *The manner to attain the standards in 1) and 2) above is dependent on the degree of probabilities of the truth of a case, as required by that case.*

*Miller v. Minister of Pensions (1947) 2 All ER 372:374A- 'if at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a conclusion one way or the other, then the case must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it is more probable than not', the burden is discharged, but if, the probabilities are equal, it is not.'*

*Bater v. Bater (1951) p. 35:36-37- 'it is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. but this is subject to the qualification that there is no absolute standard in either case. In criminal cases, the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that*

standard... So also in civil cases the case must be proved by preponderance of probability, but there may be degrees of probability, within the standard.’ ‘The degree depends on the subject matter. A civil court when considering a charge of fraud, will naturally call for a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion.’

*But both the standards of ‘beyond reasonable doubt’ and ‘on a balance of probabilities’ are determined, to an extent, on the probabilities of the whole case before a court, more specifically, the degree of probabilities, of a case. In a civil case, if the probabilities are weighed and found equal, the defendant will be successful as the plaintiff carries the burden of proof. If the scale however tips in the slightest in the favour of either of the parties, that party will be successful. Anything more than an equal weight will ensure that party is victorious. In a criminal case, the probabilities are expected to be much higher.*

*The question which is of importance here seems to be: when can it be said that the probabilities are such that it is high enough to satisfy a particular standard? There is healthy confusion in both the case law and opinion of authors as to how the standard is determined. The crux of this difference is whether the standard to be applied should be an objective or subjective standard.*

*If the standard is objective, weighing the probabilities may be the answer to the problem. The degree of probabilities would be able to determine whether a case was not proven, proven ‘on a balance of probabilities’ or ‘proven beyond reasonable doubt’, which may be termed the scales of probabilities. The weight of the evidence, given its probabilities, would*

*become the hard and fast rule of how to determine whether a case was proven or not.*

*If the standard is subjective, on the other hand, it could be argued that a trier of fact, as in the continental European system, is to be convinced of the truth of a fact or a case before that party can be the successful party having proven his/her case or not. It is however submitted that it could still be argued that this decision of the trier of fact is made on the probabilities of a fact and/or the probabilities of a case. In fact, it is more so that in this case the balance of the probabilities would determine whether a trier of fact believes something or not. The measure would merely be dependent, not only on the weight of the probabilities of a fact or case, but also, in addition, on whether a specific trier of fact, is convinced subjectively that a fact exists or a case was proven or not. The subjective approach would also entail a personal belief or disbelief of a fact or case by the trier of fact. It is submitted that the probabilities would thus be evaluated from a value-laden personal belief as opposed to a weighing of probabilities from an objective point of view.*

*The reality is that traces of both an objective and subjective approach are to be found in both the Anglo-American and South African legal systems.*

*The word 'guilt' in the abovementioned context can synonymously be used as 'accountability' or 'liability' in both the criminal and civil law. Actual accountability would entail a finding of a one hundred percent truth about the facts in a legal dispute. On the other hand, legal accountability would entail that in a criminal case a person can be found accountable for his/her actions if a case is proven against him 'beyond a reasonable doubt' (vis-à-vis 'one hundred percent or beyond all doubt').*

- o What is the standard of proof in criminal cases in Ethiopia?

In no Ethiopian law will you find the ‘beyond reasonable doubt’ standard clearly stated. Many infer it from the constitutional right of presumption of innocence. Some also cite court practices, mainly previous ones, to state that this standard had been commonly applied.<sup>112</sup> For example, in *Sisay Dagne Yirdaw v PP* (FSC App. No. 17739, Tahsas 28, 1997), the court stated that confession is not adequate evidence to prove the prosecutor’s case *beyond reasonable doubt*.<sup>113</sup>

Majority of our courts require beyond reasonable doubt standard. However, Art 141 and 142 of CrPC require adequate evidence to convict a defendant. Adequacy does not imply beyond reasonable doubt standard. The latter is taken to be more than enough. It does not imply preponderance of evidence either. If it were to mean that, the adequacy requirement would not have been necessary. Rather the requirement implies to mean clear and convincing evidence. If so, prosecutor must prove all material ingredients in clear and convincing manner.<sup>114</sup>

Comment

In commenting the above paragraph, look into the following provisions from the Criminal Procedure Code:

Art 40: duty to institute proceedings

(1) Subject to the provisions of Art 42, the public prosecutor shall institute proceedings in accordance with the provisions of this chapter whenever he is of opinion that *there are sufficient grounds* for prosecuting the accused.

Art 42: cases where proceedings shall not be instituted

(1) no proceeding shall be instituted where:

(a) the public prosecutor is of opinion that there is not *sufficient evidence to justify a conviction*

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<sup>112</sup>Simeneh Kiros, notes on the ideal process on the Ethiopian criminal procedure, p160. The same idea is stated in JOPTC Module on Evidence, p64.

<sup>113</sup>Wondwossen, Law of Criminal Procedure, Text Book, AAU, p. 330.

<sup>114</sup>JOPTC Module on Evidence, p64.

Art 141: acquittal of accused when no case for prosecution

When the case for prosecution is concluded, the court, if it finds that *no case against the accused has been made out which*, if unrebutted, *would warrant his conviction*, shall record an order of acquittal.

Art 142: opening of a case for defence

(1) Where the court finds that a *case against the accused has been made out* and.....

There are assertions that ‘beyond reasonable doubt’ standard is not the standard of proof in criminal proceedings in Ethiopia.

Sufficiency of evidence was discussed as a necessary requirement of conviction in criminal cases by the FSC CD. The court repeatedly held that the evidence presented before the trial courts was sufficient to warrant convictions. By sufficient evidence, the court stated, in *Girma T. v FEACC*, FN51706, that it is meant that the evidence presented must be coherent, consistent, and supportive to each other.<sup>115</sup> The main focus seems to be the adequacy principle as defined under Art 141-149. This is the closest the court has come to defining what standard of proof is.<sup>116</sup>

Art 428 (1) of the draft CrPC puts ‘*clear and convincing evidence*’ as the standard for guilty verdict.

- o Does fulfilling standard oblige courts to include reasons in their final decisions?

One point related with the standard of proof is that the court must state its reasons for judgment in its final verdict. For example, an appellate court can reverse a judgment when it finds that the evaluation of the evidence by the lower court, as documented in the written judgment, is

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<sup>115</sup>*Girma T. v FEACC*, FN51706; FSC CD Decision, Vol. 10, 21 July 2002, p211-218.

<sup>116</sup>Hanna Arayaselassie, *the Standard of Proof in Criminal Proceedings: the Threshold to Prove Guilt under Ethiopian Law*, 8(1) *Mizan Law Review*, 84-116, p112.

self-contradictory or incomplete or contradicts common experience. Moreover, FSC CD decisions hold that the cassation division, though cannot evaluate weight of evidence given by lower courts, it can review sufficiency of evidence.<sup>117</sup> This shows that the lower courts must state their reasons in reaching a verdict.

- o How does a party fulfil the standard requirement in criminal proceeding?

How is any standard of proof to be met is decided by the substantive laws or/and the requirements of relevance and admissibility. For example, Art 552(2) of Criminal Code states, 'in the case of terminating pregnancy in accordance with sub-article (1) (a) of Article 551 the mere statement by the woman is adequate to prove that her pregnancy is the result of rape or incest.'

The following excerpts discuss the '*beyond a reasonable doubt* standard' in making the conclusion that '*beyond reasonable doubt standard is a corollary to the right presumption of innocent*' and must be applied in the Ethiopian case:

**Worku Yaze, Presumption of Innocence and the Requirement of Proof Beyond Reasonable Doubt: Reflections on Meaning, Scope and their Place under Ethiopian Law, in Wondwossen Demissie, Human Rights in Criminal Proceedings: Normative and Practical Aspects, Ethiopian Human Rights Law Series, Vol. III Jan 2010, Faculty of Law, Addis Ababa University, p113, 120-122, 129-130, 135**

*This high standard of proof is identified as proof beyond a reasonable doubt in the common law world. Its counterpart in the continental system is referred to as intimate conviction of the trial judge- a rule that*

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<sup>117</sup>Hanna Arayaselassie, the Standard of Proof in Criminal Proceedings: the Threshold to Prove Guilt under Ethiopian Law, 8(1) Mizan Law Review, 84-116, p113.

subscribes to the maxim in dubio pro reo- in case of doubt, favour the defendant.

Proof beyond reasonable doubt is a fluid, slippery and elusive concept. What doubt amounts to reasonable doubt is one problem. The word reasonable is susceptible to subjectivity. (p121) The standard relates to the weighing of evidence presented in support and against of disputed matters of fact. The rule focuses on what remains in the mind of the judge after consideration of all the evidence in an objective manner. It is, therefore, different from any intuitive knowledge or probability of things or things that may be thought of in experience.

Professor Ashworth succinctly expressed that 'No jurisdiction has yet devised a form of criminal trial that can guarantee absolute accuracy in fact finding.' It is known that the fact finding process is not a watertight and a hundred percent reliable mechanism. There is always an unavoidable margin of error. In this error, more weight is given to the protection of innocent individuals.

Proof beyond reasonable rule, as opposed to other standards of proof, has been accepted in many national and international jurisdictions for the following reasons:

- i. Prevents or minimizes the risk of convicting innocent individuals where life, liberty, dignity and reputation may be at stake;
- ii. Helps maintain public confidence in the criminal law and the administration of justice in general avoiding fear of potentially falling victim of unfounded criminal convictions;
- iii. Protects individuals from the state's considerable resources and its potentially oppressive power.

What degree of proof is applied in deciding whether or not to grant a no case motion? Unless we take the spirit and imperative of the presumption of innocence we do not find expressly standard in our laws. (FN 49: what

*Art 33 of Proclamation No. 434/2005 provides under the title 'Standard of Proof' is not relating to the general assessment and measurement of corruption offences. It enacts not about the standard of proof of guilt as such but about the standard of proof to determine whether the accused has benefitted from the alleged criminal conduct or to determine the amount that should be recovered from the accused). A critical reading of the various Articles of the Criminal Procedure Code would inform us that a progressively increasing level of certainty as to the commission of crime is required as we go along the criminal process.*

*When compared with what the prosecution employs (sufficient evidence to justify conviction) under Arts 40 and 42 of the Cr. PC to prosecute or not to prosecute (FN 51- this can partly be gathered from what Art 134(2) of the Cr. PC provides. Even when the accused person admits each and every ingredients of the offence charged the law gives the discretion for the judge either to convict that accused forthwith or to order the prosecution to adduce its evidence despite the plea of guilt. The legislature's intent is very clear here. It wants to avoid or minimize the possibility of convicting innocent defendants. It requires courts to consider criminal cases seriously even when defendants plead guilty). There is no doubt that the ruling of the court under Art 142 requires higher degree of proof.*

*The presumption of innocence demands such a stricter standard of proof before courts take, perhaps, irreversible position in case defendants fail to allege defences and produce supportive evidence. What Art 142 and 142 provide goes in line with the presumption of innocence. Art 141 by stating '...if it finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction...' makes it clear that the court would decide that a case against the accused is made out only where the prosecution, subject to possible rebuttal by the accused, proves his case beyond reasonable doubt and hence it would automatically convict the accused in case he lacks rebuttal evidence.*

*Hence, one may safely conclude that courts in Ethiopia are required to apply the proof beyond reasonable doubt standard to rule under Arts 141 and 142.*

*If properly understood and consciously applied this standard of proof ensures that only the guilty will be convicted and punished under the Ethiopian criminal justice system. It saves innocent individuals from erroneous convictions and the resulting miscarriage of justice. The standard maintains and protects the values that underlie in the doctrine of the presumption of innocence. Yet some margin of error is unavoidable due to the frailty or inherent weaknesses of the fact finders. The effort is to minimize the risk of convicting individuals accepting the risk of erring on the other side of the coin.*

*From what we have seen so far, there are indications that the judges lack proper understanding of the criminal standard of proof. They seem to fail even to use the proper expression that stands for the degree of proof let alone to get the very ideas of the terms ‘reasonable’, ‘doubt’ and ‘beyond’.*

**Worku Yaze, Burden and Standard of Proof in Possession of Unexplained Property Prosecutions, 8(1) Mizan Law Review, Sept 2014, p15, 21, 25-29**

*In criminal proceedings the standard is measured differently at the various stages of the criminal process. For example, the amount or intensity of evidence that is required to issue an arrest warrant is different from that which is required to decide to prosecute or prepare a formal criminal charge. Therefore, the different forms of standards of proof in criminal proceedings include those degrees of ‘proof’ utilized in pre-trial proceedings to assess if there exists:*

- 7. Probable cause- a prerequisite to issue summons or arrest warrant or search and seizure warrant;*

8. *Sufficient evidence- a prerequisite to decide to prosecute (prepare a criminal charge); and*
9. *The standard employed during trial proceedings such as prima facie degree of proof, preponderance degree of proof, clear and convincing degree of proof, and proof beyond a reasonable doubt degree of proof.*

*The Ethiopian criminal process is thus closer to the common law adversarial systems. Professor Fisher has also noted that the Ethiopian system of criminal procedure is predominantly adversarial with some fragments of inquisitorial elements. Hence what has been discussed in the previous sections in respect of issues of burden and standard of proof in the context of common law adversarial systems generally hold true to the Ethiopian criminal justice system.*

*Clearly, the accused is not required to prove any element of the offence or any other under Art 419 of the Criminal Code. There is a distinction between ‘giving and explanation about something’ and ‘proving something’. Yet it is to be noted that the explanation required from the accused has to be satisfactory. This requirement of ‘satisfactory’ explanation implies the degree of proof (in its loose sense) required of the accused.*

*Some people assume that Art 419 of the Criminal Code shifts persuasive burden of proof from the prosecutor to the accused thereby violating presumption of innocence embodied in Art 20(3) of the Constitution. However, the discussion in Sections 1 and 2 above indicates that this assumption is not tenable. As mentioned above, Art 419 is an exact copy of Hong Kong’s provision dealing with the same offence. In Hong Kong and other jurisdictions including Argentina and India (jurisdiction where criminalization of illicit enrichment originated), similar provisions on illicit enrichment are being enforced, and they merely envisage the*

*reversal of evidential burden without being incompatible with the principle of presumption of innocence.*

*This author does not share the view of some people who regard Art 33 of Proclamation No. 434/2005 as one which envisages a lesser standard of proof in criminal cases involving corruption. What this provision stipulates had to do with the determination of whether an accused person has benefitted from an identified criminal conduct in a charge or it has to do with the determination of the amount of money (or other property) to be recovered from an accused charged of committing some identified offence of corruption.*

*As has been elaborated, the accused is not required to disprove; the accused is not under duty to convince even to a preponderant degree about the truthfulness of his side of the story in respect of any or all of these four elements of the offence. By virtue of the operation of the principle of presumption of innocence, it is the prosecutor that is expected to convince judges beyond a reasonable doubt when the court (in respect of a similar fact situation) assesses the evidence submitted by the prosecutor against the evidence of the accused.*

*In relation to the fifth element, the evidence must have the intensity to satisfy judges as to 'how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control'. He is expected to secure the inner conviction (belief) of judges to some extent (satisfactorily) though he is not under duty to persuade (convince) them about the truthfulness of his assertion in his explanation. As the specific form of presumption drawn against him is not one of persuasive presumption, he is not even required to convince judges to a preponderant degree (50%+1) of proof.*

*The true and proper sense of standard of proof in criminal trials comes at the end of the trial and presentation of evidence stage of the process*

*when all the evidence of each party is assessed both individually (separately) and in combination (holistically). At this stage, the other third legal effect of the operation of the principle of presumption of innocence comes into the picture. As many scholars in the field explained and as the Human Rights Committee of the UN interpreted it in its General Comment 13, the principle imposes upon the public prosecutor an ultimate burden of proof that is met by a proof beyond a reasonable doubt standard of proof.*

o What do you think is the standard of proof in ADR cases?

In ADR, there is no hearing; generally no production of evidences and arguments, no presentation of witnesses, no cross examinations etc. This does not, on the other hand, mean that ADR proceedings do not involve any kind of discussions, presentations and explanations. ADR proceedings are of course required to be much more informative of the general personal emotional and material backdrop of the dispute - A matter which cannot be attained without open and candid discussions.<sup>118</sup> However, such discussions or presentations are not made in order to convince the neutral as in arbitral hearings. What ADR gives the parties is the opportunity to really explore what the other side is looking for, and to identify the focus upon the issues. In other words, the neutral is never going to turn around and say "yes, ok you have persuaded me," and there is little point in trying to convince him of a party's arguments because ultimately the neutral has no power to impose his own view upon the parties. Put differently, while the presentations in arbitration are made to the neutral, they are directed to the parties in ADR.<sup>119</sup>

Comment

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<sup>118</sup>Fekadu Petros, Underlying Distinctions between ADR, *Shimglina* and Arbitration: A Critical Analysis, 3(1) *Mizan Law Review*, (2009) 105-133, p117.

<sup>119</sup>Fekadu Petros, Underlying Distinctions between ADR, *Shimglina* and Arbitration: A Critical Analysis, 3(1) *Mizan Law Review*, (2009) 105-133, p117.

## **Chapter Summary**

## **REFERENCE MATERIALS**