CRIMINAL PROCEDURE LAW

CRIMINAL PROCEDURE LAW

Principles, Rules and Practices

Simeneh Kiros Assefa

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To
Yezabnesh

Preface

Teaching criminal procedure law is exciting. I taught the course over five year's period. The initial draft was prepared in 2001 at the Faculty of Law of Ethiopian Civil Service College. I have the privilege to have formal and informal discussions with many judges, prosecutors and police officers. I have visited almost all the federal courts in Addis Ababa, many of the police stations and some of the public prosecutors offices. I also had the privilege to have active judges, prosecutors and police officers in my classroom. Inasmuch as they were studying the course on criminal procedure in the classroom, I was studying the practice from them on the points I could not obtain information by formal interview. The subject provokes lots of discussions and heated debates which I very much enjoyed. I was able to polish the material over the years by observation of the works of the police, prosecution office and the courts.

I also had the privilege to be a member of the drafting committee on the Criminal Procedure Code a three-person committee established by the House of Peoples' Representatives in 2003 where I had a chance to discuss all the objectives, principles and rules of the Ethiopian criminal procedure. The task involves merging the drafts submitted by the Research Institute and the Ministry of Justice by selecting the most appropriate or suggesting a new approach. The preparation of the draft and its annotations was a challenging work but also very much rewarding, albeit the work remained a draft.

The preparation of this material is therefore, to assist teachers in teaching the criminal procedure law and to enrich the dialogue for reform. However, in order to make the material useful for others who are in the practice of law, I restrained myself from raising highly academic questions. However, effort is made to include almost all of the important issues in our criminal

process. I came to learn, during my teaching career that students do not get enough of materials on the subject included in Part I—the ideal process, the purpose of criminal procedure law, a little bit of economics of the criminal justice and the existing criminal process. They are included in order to better contextualise the criminal process.

Acknowledgment

This material is prepared over eight year's period. During this period many people helped me in the preparation and completion of this material. Nuru Seid, Birhanu Tsigu and Zewugebirhan Zegeye took their time reading the manuscript. Hagos Woldu and Wondwossen Demissie also read the initial draft in 2001. Hiruth Mellese, Getachew Assefa, Muradu Abdo, Demissie Asfaw, Nuru Seid, Ambachew Yohannes provided me with essential materials some of which were not ordinarily available. Many people volunteered for interview and access to their offices and courtrooms. Abebe Masresha, Abrham Ayalew, Adane Kebede, Amha . . . Amha Tesfaye Chernet Wordofa, Mulualem Eneyew, Ruth Assefa, Tesfaye Degefa, Yosef Aemro, . . . I am immensely grateful to all of them. Habtamu . . . availed my access to the Supreme Court archive.

The people who read the material and suggested their comments and who gave me interview do have their own disagreements on some of the arguments I forwarded in this material. I only am responsible for the arguments and opinions in this text.

I would also like Abay Mekonnen who helped me in gathering some crucial information in completing this work. I would also like to thank my former students at Ethiopian Civil Service College Law Faculty. My brother Achu was taking care of all the logistics and Ges provided me the moral and material support I needed for the last more than two years.

Notes on Citations of Legislations, Cases and Translations

In order to make use of this material convenient, the provisions of the FDRE Constitution and the Criminal Procedure Code are reproduced at the beginning of each comment. Where the different sub-articles of a given article have different contents, they are reproduced in their respective subject areas of discussion. Also, where a given provision is found to be necessary under different sections at the same time, which is very rare, a provision is reproduced at two places. Those reproduced provisions are from the English version. Incongruities between the English and the Amharic version of legislations are seen; such discrepancies are indicated only when such incongruity of the two versions has effect on the understanding of a given concept, topic or has impact on the interpretation and application of the law.

The reference to the proclamations is made in accordance with the respective short titles as provided of in the specific legislation and the reference *Negarit Gazeta,* although traditionally used in the Ethiopian legal literature, is not used.

Court cases are not binding in the Ethiopian legal system. The cases included in this material are thus for illustration purpose. The cases selected are decided in different time span; not all are recent cases. As per the Courts' Proclamation Reamendment Proclamation No. 454/2005, those cases that are decided by the Federal Supreme Court cassation bench with not less than five judges presiding are biding precedents where they are published and distributed by the Federal Supreme Court. Unlike civil matters, the Supreme Court is not making as many such decisions on criminal matters. However, where reference is made to such cases binding as precedent, such fact is indicated at the appropriate place.

The old filing system in our courts indicates whether a given case is first instance of appellate or cassation followed by a case number which in turn is followed by the year the case is filed after a slash. For example, if the case number is cited as 'Criminal Appeal No. 11/2000,' it means the case appears before the court on appeal and it is the eleventh case for the year 2000 normally in Ethiopian calendar. The new filing system has only the file number but does not have the year the case is filed. In order to create uniformity, in this text cases are cited as "*Name of Parities* (the Court, the Year the case is decided) File Number". For example, the Tamirat Layine, et al. case is cited as "*Federal Public Prosecutor v. Tamirat Layine et. al.* (Federal Supreme Court, 2000) Crim. F. No. 1/89"

Those cases are written in Amharic. Their translation is that of the author. The translation is made in a manner serving the purpose and in conformity with the concept; not necessarily literal translation.

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Acronyms

A.A.—Addis Ababa
Cass. F No.—Cassation File Number
Civ. C.—Civil Code
Civ. P. C.—Civil Procedure Code
Crim. App. F No.—Criminal Appeal File Number
Crim. App. No.—Criminal Appeal Number
Crim. C.—Criminal Code
Crim. F No.—Criminal File Number
Crim. P. C.—Criminal Procedure Code
D.D.—Dire Dawa
F No.—File Number
FDRE Const.—Federal Democratic Republic of Ethiopia Constitution
Pen. C.—Penal Code
Proc. No.—Proclamation Number
Reg. No.—Regulations Number

Introduction

Criminal justice system is a system where various state actors operate in a very synchronised and coordinated manner. The police, the prosecution office, the court and the prison administration are all legally independent bodies. They can, however, positively impact the administration of the criminal justice system only when they are able to work harmoniously. In fact, there cannot be a criminal "justice system," the two words, "justice" and "system" together if there is no such harmoniously coordinated operation both for the protection of society against crime by, among other things, proper investigation and prosecution of offenders, as well as for respect of the rights of the suspect/accused.

The police investigate an offence where there is a justification for such action, based on the presupposition that the public prosecutor will prosecute the same. The public prosecutor files a charge against an accused, where there is sufficient evidence, based on the expectation that the court will hear the case and enter conviction where the evidence so justifies. The court's decision is based on what the police and the public prosecutor have undertaken on their part. And the court sentences the convict based on the expectation that the prison administration will execute the judgment of the court. Where each institution functions within the ambit of the law, it also maintains its institutional and operational independence.

The criminal procedure law is the law that governs this criminal process. It governs the process beginning from the time the complainant lodges her complaint to the police to the time the punishment is served and beyond. The administration of the criminal justice is application of law to facts. Those facts have to be established by evidence obtained in the course of the investigation. However, truth is not an overriding value; it also endeavours to maintain the 'process value'—the dignity of the person confronted with

the justice system: the suspect, the arrestee, the accused, and the convicted. Thus, inevitably the criminal procedure law is bound in conflicting values in the administration of justice—the balancing of manifestation of the truth and human dignity.

The major balancing decisions are already made in the Constitution, the single most important document in the administration of justice. The letters of the Constitution recognise the rights of the arrested, the accused and the convicted person. Further, it protects the right to liberty, to privacy and to personal security. Unlike other constitutions, which are much more general for the rights of the individual, the Ethiopian Constitution recognises such rights with such level of specificity, which needs less interpretation of the Constitutional provisions in respect of their content.

Within the bounds of the Constitution, the law maker also makes such choices in making subsidiary laws. The police are making such balancing decisions in the application of the law and enforcement of the criminal law in a multitude of cases everyday. Those cases are finally seen by the judiciary, the last arbiter in making such balancing decisions. Inasmuch as the administration of the criminal justice is a challenging process, the degree to which the process respects human dignity is the measure of its development and civility.

Criminal procedure law is at the core of the administration of the criminal justice system. While the state has police power, the power to arrest individuals and investigate crimes, such police power of the government is limited by such law on criminal procedure. The concrete aspect of limited government is recognised not only by the degree to which the balanced division of power among the three government branches is clear, but also by how much the state is limited against intruding into the life, liberty and property of individuals and when such intrusion is committed whether there is a remedy to it. This is not just criminal procedure; it is rather constitutional criminal procedure. The degree of understanding of the nature and purpose of criminal procedure by the actors defines our expectations in the application of the law.

There are certain core and shared basic qualities of the criminal justice system in all legal systems and traditions: The police undertakes investigation (more often under the direction and supervision of the prosecutor); based on the evidence available after investigation, the prosecutor decides whether to prosecute the suspect; the suspect/accused assisted by a lawyer (where she cannot afforded one, by a state appointed counsel) defends herself;

the case is tried before a competent, impartial and independent court; and there is always the right to appeal. The process inasmuch as it tries to maintain quality in the outcome of the case, also tries to be speedy. Other characteristics are contextualised based on specific socio-legal conditions of the respective legal systems in order to address specific politico-economic settings.

This text deals with principles, rules and practices in the administration of the criminal justice. The basic principles justifying each rule on the criminal process are found in the FDRE Constitution; some are also found in the Criminal Procedure Code and other legislations. Each rule, as it is applied to the facts of the case are guided by such principles. Those principles are the tests whether those rules are properly interpreted and applied to the facts of a given case. Where available, cases are discussed in order to show how the rules are interpreted and applied. There is no prosecution policy; the policy on the administration of the criminal justice which is in process since 1998 in the Ministry of Justice remains a draft. Because it has not fully evolved and refined, it is not discussed here.

The law on criminal procedure is fragmented that finding the federal laws is by itself a tough work for students let alone reading and comprehending those fragmented legislations. This text almost exclusively deals with the federal law. The basic texts of the discussion are therefore, the FDRE Constitution, the Criminal Procedure Code of the Empire of Ethiopia, 1961, and related piecemeal legislations, such as, the vagrancy law, the ethics and anti-corruption special procedure and rules of evidence as well as federal courts proclamations. Because many of these legislations are also applicable to state courts, state criminal procedure legislation, if any, is limited to jurisdiction of those state courts. To that extent, therefore, this text is also relevant on state criminal matters. International conventions impacting the administration of criminal justice to which Ethiopia is a party also form the corpus of Ethiopian domestic law. Because those conventions could better be discussed elsewhere, they are not included in this text. Cases decided by federal courts are cited for illustration purposes. However, by a recent amendment to the Federal Courts Proclamation, decisions rendered by the Federal Supreme Court Cassation Division by at least five judges are binding on lower courts. Although there is very limited number of them, they are also discussed.

Furthermore, there were efforts to revise the Criminal Procedure Code at different period. The first completed work for revision was the draft prepared by Ministry of Law and Justice in 1984 based on the principle of 'socialist

legality.' In 2003, the Ministry of Justice and the Justice and Legal System Research Institute, respectively, submitted a draft each to the House of Peoples' Representatives. The latter established a Revision Committee which was required to produce a single document; the draft was submitted to the House in the first week of October 2005 as Draft FDRE Criminal Procedure Code ("the Draft Code"). Because there were many important departures from the Code in force in a manner to address constitutional and practical problems encountered during enforcement, reference is made to the Draft Code in places where it is found to be relevant for discussion.

A glance of the Ethiopian Criminal Procedure Code shows that there are provisions borrowed both from the common law and the civil law traditions. The apparent source of many of the provisions of the Ethiopian Code is The Criminal Procedure Code of the Federated Malay States ("the Malayan Code") as it stood in 1956. Where it is warranted by the discussion, reference is made to the Malayan Code as it stood in 1956.

Based on availability and accessibility of resources, the US and French Legal system are chosen as representatives of the two legal traditions. Therefore reference is made to those concepts and principles that are universally applicable in both traditions insofar as they conform to the Ethiopian constitutional principles and values. In doing so, effort has been made to take into consideration the socio-legal and political differences that existed among legal systems in order to comply with the basic ethics of comparative law.

It is true that the United States has its own socio-economic situation which is different from that of France, both of which are totally different from that of Ethiopia. Accordingly, the natures of offences that are committed in those countries are different; so are those committed in Ethiopia. In the United States, drug related offences and violent crimes could be common. Because the right to bear arms is a constitutional right, the use of force in enforcement of law could be harsh. In France, the nature of offences is different. There is no right to bear arms; therefore, the use of force is so restricted. There is the right to remain silent both in the US system and the French system. But they are implemented differently. The French system relies heavily on confessions as evidence while the US system relies on plea bargain and testimony. The right to counsel in the American system is exercised since indictment while in the French system until very recently the person does not have access to a lawyer in the first 24-48 hours. Thus, the social and economic condition dictates the procedures. There are procedures that are exclusively of civil law tradition, such as, joinder of civil and criminal

cases and there are also procedures that are purely common law traditions, such as, examination of witnesses by the parties both of which exist in Ethiopia. Such reference to other systems approaches to those concepts and principles is made in due consideration of such facts and not only as an academic exercise.

The text is divided into seven parts. The first part is divided into two chapters. Chapter 1, dealing with general background of the criminal process, puts matters in context. This chapter attempts to shed light in the interpretation and application of the rules of the criminal procedure law. It, thus, dwells on history of criminal procedure in Ethiopia, the objectives and purposes of criminal procedure law, some economics in the criminal justice system and the existing challenges to the criminal process. In this chapter, students see how the legal and non-legal variables affect the administration of the criminal justice system in the interpretation and application of the law. Chapter 2 deals with setting justice in motion.

The following part is the largest part of the text; it deals with investigation and is divided in to four chapters. It touches literally everything that is included in investigation in the criminal process. Although investigation is principally conducted by the police, it also indicates that investigation by other organs, such as, the public prosecutor and other government officers, such as, in relation to public health or government procurement or government financial and property administration is a possibility in respect of their own specific responsibilities. This part is organised in a chronological manner indicating what activities of investigation come first and what follows next. Thus, Chapter 3 deals with investigation by other government organs, police duty to investigate, search, both with and without warrant, and seizure, examination of witnesses as well as interception of communications. Chapter 4 deals with the basics of arrest, arrest on summons, arrest with and without warrant and execution of arrest. Chapter 5 deals with police interrogation and confessions. Each of those activities in one way or another could involve encroachment on the rights of the suspect. Therefore, the following chapter, Chapter 6, discusses remedies to possible breaches of the rights of the suspect during investigation.

The third part deals with pre-trial matters. The absence of post-arrest pre-trial judicial examination of guilt is a serious problem in our criminal process. Furthermore, the legal culture has seriously affected the right to liberty of suspects. Chapter 7 deals with preliminary inquiry and preparatory hearing in a purposive manner, elaborating what a preliminary hearing is and showing the gap in a comparative discussion. Despite the gap, a principle

based interpretation of the existing laws would alleviate the problem. Accordingly, Chapter 8 deals the complex and contentious issues of bail and remand much more focused on the constitutional provisions. Chapter 9 deals with jurisdiction of courts. This Chapter particularly dwells on the major problem encountered by the legal system with a unitary state type of legal culture in a newly established federal structure.

The fourth part examines matters relating to the public prosecutor. The pubic prosecutor, both for lack of discretion in the law and bureaucratic structure of administration, has restricted power; but its role is pivotal in the administration of the criminal justice system. Chapter 10 discusses the power of the public prosecutor both during and after the investigation proceeding. Chapter 11 deals with the charge; what form and content it has in different situations, such as, alternative charges, joinder of charges and joinder of offenders etc. It also deals with private prosecution.

The fifth part deals with the powers and activities of the court during trial and hearing. Chapter 12 deals with aspects of fair trial; thus, it discusses concepts and procedures, such as, the right to counsel, trial in open court, pre-trial access to evidence as well as change of venue and withdrawal of judges. Chapter 13 deals with the hearing, particularly examination of evidence, judgment and sentencing. This chapter also deals with length and frequency of adjournments.

The sixth part deals with special procedures. In the criminal process there are three special procedures—procedures concerning young offenders, default proceedings (trial in absentia) and the procedure on contraventions. These procedures are special because they do not follow the regular procedure either because of the standing of the accused or the nature of the offence. In trial in absentia the accused is not present; neither is she represented by her lawyer. Because of absence of one of the accused the prosecution evidence is not properly tested and thus conviction, if the court is satisfied, based only on such unchallenged prosecution evidence. Likewise, the trial of young offenders is different having regard to the nature of the accused. They are not fully responsible as adults are. The procedure is informal and sentences are more or less different from those imposed on adults. Equally, there is a need to have special procedure with a view to correcting the young offender to make her part of the community because young offenders have the capacity to be reformed. This part, thus, deals with the procedure relating to young offenders and trial in absentia.

There are deviations from the regular procedure, such as, in corruption and vagrancy cases because the essential part of the procedure is dealt with by different rules. Corruption cases are dealt with by the *Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005* which modifies the Criminal Procedure Code and gives the power relating to "arrest, search, remand, bail, restraining order or any other related matter with investigation of corruption offences" to the court that has power to hear cases of corruption offences. Vagrancy cases are governed by the *Proclamation to Provide for Controlling Vagrancy*, *No. 384/2004*. The proclamation provides for arrest without warrant and denies the right to bail, among others. For the rest part, it is governed by the Criminal Procedure Code. Therefore, for all intents and purposes, those procedures are not special within the meaning of the Criminal Procedure Code. They are, thus, dealt with along other related issues in the mainstream criminal process.

The last part deals with post judgment remedies to the party that is not satisfied with the decision of the court. The two remedies that are in force are appeal and cassation. Appeal is a constitutional right for everyone to have her case reviewed by the next higher court. Cassation is a procedure for the system to correct its own errors in order to have uniform interpretation and application of laws. Re-trials are common procedures in other legal systems either for mistrial or where new evidence is revealed. This part, thus, also includes reopening of a case after final judgment as included in the Draft Criminal Procedure Code with the hope that it will be included in the Ethiopian criminal procedure law in the future.

BACKGROUND OF THE CRIMINAL PROCESS

Chapter 1

Objectives of Procedure, Ideal Process and Challenges in the Administration of the Criminal Justice

1.1 History of Criminal Procedure in Ethiopia

Modern criminal procedure is new to Ethiopian criminal process. Modern law making and publication was only few decades old. Before the Italian occupation in 1935 there were only few legislation, including the 1931 Constitution, none of which provide for criminal procedure.[1] Ethiopia, with multilingual, multi-religious and multicultural society, has large geographic area with poor infrastructure. The central government was (and still is) weak in the delivery of public goods, such as, security and justice. Therefore, disputes were resolved by customary dispute resolution mechanisms by traditional and sometimes religious institutions.

The *Fetha Negest* was there for centuries but accessible only for the population at the centre and very little is known about it among the populace; therefore, disputes among and between members of different ethnic groups, each having its own customary dispute resolution mechanisms, albeit unwritten, are resolved by the respective traditional dispute resolution mechanism.[2]

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1 Aberra Jembere, *An Introduction to the Legal History of Ethiopia (1434-1974)* (Munster: LIT VERLAG, 2000), at 102

2 For detailed discussions of the various customary dispute resolution mechanisms see *Id.*, at 42-82

After the promulgation of the 1930 Penal Code which was, however, not complemented by procedure law, one could argue that the application of the substantive customary laws was restricted to civil matters.

In traditional Ethiopia, there were various investigation mechanisms; the two widely used modes of traditional investigation procedures used in the highlands and urbanities of present day Amhara, Oromia and Tigrai, where the offender is not known, were *Awchachign* (*afersata*) and *lebashai*.[3] On the other hand, where the offender is known, the case goes directly to litigation which follows a procedure which is very different from what is known today—for example, as there was no distinction between civil and criminal cases, all cases were prosecuted by the victim, including execution of sentences.[4] In such cases, anyone has the power to arrest except the complainant. The common form of arrest was *Quragna* (ambulatory arrest) which is "knotting one corner of each of their cotton togas (*shemmas*)."[5] Thus, any passerby can tie the *shemma* of the disputing parties and escort them or send them to authorities. It is to be noted that public institutions, such as, prison, were not established or developed; thus, if the matter cannot be disposed of immediately the person arrested may be conditionally released on personal sureties, or, exceptionally, detained in the parish headman's (*mislenei* or *melkegna*) living compound which is considered a public facility or in the place of the accuser in ambulatory custody.[6] In the case of ambulatory custody, the accuser is responsible for the welfare of the detained.[7] In fact, sureties are also demanded not only for the continued attendance of the parties but also for all other obligations, such as, paying of wager, execution of judgment (in cases where compensation is awarded to the winner, that such compensation would be paid), and behaving orderly.[8] Bail is always personal sureties.[9] Save as a psychological deterrence, either modes of investigation were not

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3 *Lebashai* (lit. "thief-seeker") is a method of investigation in theft cases where the identity of the offender is not known. In this investigation process, a young man is given certain drinks and smoke (intoxicating substance) in the presence and direction of the governor and whoever the boy chases or fall on to is considered as the person who stole the property. S. Z. Fisher "Traditional Criminal Procedure in Ethiopia" *19 Am. J. Comp. Law*, 3 at 721-723; Aberra, *supra* note 1, at 244

4 Fisher, *supra* note 3, at 742

5 Fisher, *supra* note 3, at 726, 727, 730

6 *Id*., at 728

7 *Id.*

8 Aberra, *supra* note 1, at 249

9 Fisher, *supra* note 3, at 731

proper methods of investigation. In the absence of modern and functioning institutions, those methods of investigation certainly served their purpose.[10] Later, the *Afersata* Proclamation was issued in 1933, a part of which was repealed by the Administration of Justice Proclamation of 1942 which in turn was also repealed by Art 1(2) of the 1961 Criminal Procedure Code.

Trials were conducted in public places, normally under the shade of an old tree.[11] Trial was informal based on free debate of the parties or their pleaders.[12] There was a conciliation effort going on side by side but the litigation process was more or less an arbitration proceeding.[13] The proof was exclusively based on testimony. Witnesses were categorised into three: eye witnesses as *merfe* (needle), witnesses of relevant facts as *dengai* (stone) and hearsay witness *wof* (bird).[14] The evidence is produced by the accuser; as in the modern system, the accused has various grounds of objection to the testimony of witnesses either because of their relation with the accuser or animosity with the accused.[15]

The judge hears from jurors and other elders of their opinion on the matter. Each of them gives their opinion one from the left side of the judge one from the right side in order to help the judge form an opinion. Finally, the judge speaks and his is the judgment.[16]

There were unlimited number of appeals and it could be on any interlocutory matter. In appeals, the judge who rendered the decision appears as a party to the case in appeal either in person or though a representative and where she is found acted arbitrarily, she is to be disciplined.[17]

The earlier Ethiopian court structure follows administrative arrangements. The executive and judicial functions were merged in the person of the

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10 Aberra, *supra* note 1, at 244; Fisher *supra* note 3, at 727

11 Fisher, *supra* note 3, at 731

12 *Id.*, at 730

13 *Id.*, at 729

14 Fisher, *supra* note 3, at 718, 719. Others classify witnesses in to *wof* ("bird") and *dengai* ("stone") only. The person who testifies having seen the commission of the crime is *wof* while the person who testifies having heard the commission of the crime from another is *dengai*. Aberra, *supra* note 1, at 245

15 Fisher, *supra* note 3, at 739

16 *Id.*, at 740; Aberra, *supra* note 1, at 255

17 Fisher, *supra* note 3, at 741

governor; thus, governor generals of all levels were presidents of the courts established in the place they reside. This was the case both for the period prior to 1936 and even after 1942 up until 1973.[18] However, after 1942, the High Court and the Supreme Court were independent of provincial influences.[19] Therefore, appeal goes from the decision of the *Woreda Gezi* to the *Awradja Gezi* to the *Teqlaigizat Gezi* and finally to the King.[20] What is decided by the king is called *Atse Ser'at* and forms precedent for court to follow in similar cases.[21]

Once judgment is given, it was up to the winner to decide whether she wants the execution of the judgment. For instance, in a murder case where the accused is found to be guilty and is sentenced to death, she shall be handed over to the kin of the victim and it is up to the victim's kin to decide whether the judgment was to be executed or not. Where it is compensation, the person is handed over to the winner who shall detain the latter until the compensation is paid.[22] What is common in the traditional criminal procedure is there is always conciliation effort made by the elders and sometimes by the churches and monasteries to avoid the execution of sentence as is. When that is not bearing fruit, they seek forgiveness from the winner. In few instances, the Emperor himself pleads with the winner either to forgive the convict or to accept compensation in lieu of execution of the convicted person in murder cases.[23] Therefore, there was a possibility of forgiving the convict and a death sentence could be changed to compensation, or if compensation is already ordered, it may be reduced in amount or it may even be remitted.

For modern lookers, the criminal procedure discussed above appears to be undeveloped and unsystematic. With respect to the manifestation of the truth, it was the best Ethiopia could have had. In fact, some opined that the procedural laws were comparatively better developed and had attained high level of excellence than the substantive laws. It was also more popular among the populace than the substantive law—albeit only in its civil litigation aspect.[24]

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18 Aberra, *supra* note 1, at 222, 227

19 *Id.*

20 Fisher, *supra* note 3, at 715

21 Aberra, *supra* note 1, at 83

22 *Id.*, at 260-262; Fisher, *supra* note 3, at 742, 743

23 Aberra, *supra* note 1, at 262; Fisher *supra* note 3, at 743

24 Aberra, *supra* note 1, at 243

Post-1942

The face of modern criminal procedure is seen in the Ethiopian justice system only after 1942. By virtue of the Anglo-Ethiopian agreement, Britain had had significant role in restructuring government and the administration of justice in Ethiopia. Thus, in accordance with Art 5 of this agreement,[25] the official paper *Negarit Gazeta* was established by *ESTABLISHMENT OF THE NEGARIT GAZETA No. 1 of 1942* and the *Administrating of Justice Proclamation* was the second proclamation to be published on the newly introduced *Negarit Gazeta*.[26]

In radical modernisation of the justice system, the *Administration of Justice Proclamation* establishes Supreme Imperial Court, the Provincial (*Awradja*) Court, Regional (*Woreda*) and Communal (*kebele*) courts in hierarchy.[27] It also provided for the qualification and appointment of judges;[28] it anticipated the creation of civil and criminal benches;[29] it also provided that decisions of the Supreme Court, the High Court and Provincial Court are by majority[30] and appeal lies from the decision of a court to the next higher court.[31]

Traditionally, all prosecutions were conducted by a private victim or her kin up until the *Public Prosecutors Proclamation No. 29 of 1942* establishes the public prosecutor's office and provides that crimes were to be prosecuted by public prosecutor.[32] In conformity with the traditional criminal process,

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25 Based on Art 5 of the agreement, a Consultative Committee for legislation was established comprising "Our Judicial Advisor, the President of the High Court, three persons having recognized legal qualifications or being qualified by reason of long judicial experience and sound knowledge of law to be specially appointed by Us . . . " Art 21, *Administration of Justice Proclamation No. 2 of 1942*. For the link between the Anglo-Ethiopian Agreement and the Proclamation see J. Spencer, *Ethiopia at Bay, A Personal Account of the Haileselassie Years* (Algonac, Reference Publications Inc., 1984) at 254, 255 cited in Aberra, *supra* note 1, at 198, 199

26 Proc. No. 2 of 1942, *supra* note 25

27 *Id.*, Art 2, 18

28 *Id.*, Art 5

29 *Id.*, Arts 4, 9

30 *Id.*, Arts 3, 8, 14, respectively

31 *Id.*, Art 4

32 Aberra, *supra* note 1, at 248

the proclamation provides that two or more assessors may also sit in hearing cases and ask any question and give final opinion on the case. However, their opinion was not binding on the final decision of the judges.[33]

The Proclamation provides not only for the institutional arrangement of courts, but also the basic procedures in the administration of justice. The proclamation further recognises the need to have rules regulating the administration of the Court, institution, conduct and hearing of proceedings therein, the admission, conduct and discipline of legal practitioners, the selection and duties of assessor, the committal of criminal cases from lower courts to higher courts, the imposition and recovery of fines, the award of imprisonment in default of payment and the procedure relating to execution and attachment, fixing fees and the general administration of justice, among others.[34] It thus provides that such rules may be made, with the approval of the Minster of Justice, by the *Afe Negus* in respect of the Supreme Imperial Court and by the president of the High Court in respect of all other Courts.[35]

Accordingly, the *Courts Procedure Rules*[36] was promulgated to be applied in the High Courts and Provincial Courts. The Rules governing criminal process are found under Part XIII, Art 66 et seq. According to the new Rules, cases are initiated by private victims or complainants.[37] The Rule provides for summons[38] and arrest warrants[39] both of which were to be issued by the court for different purposes. With respect to summoning witnesses[40] and taking of evidence[41] the court had same power as it had in civil matters. It further provides that, the suspect appearing on such summons or warrant may be released on bail or may be remanded into custody.

According to those modern Rules, the charge is to be prepared in written form which is readout and explained to the accused.[42] She is then asked

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33 Proc. No. 2 of 1942, *supra* note 25, Art 19

34 See the Proclamation in general. *Id.*

35 *Id.*, Art 20

36 *Rules*, Legal Notice 33 of 1943

37 *Id.*, Art 66

38 *Id.*, Art 69

39 *Id.*, Art 70

40 *Id.*, Art 72

41 *Id.*, Art 73

42 *Id.*, Art 75

how she pleads.[43] Where she pleads guilty, the court enters conviction and passes sentence; and where she pleads not guilty the court hears evidence.[44] At the close of the prosecution evidence "the court shall ask the accused if she wishes to give evidence in answer to the charge or to produce witnesses".[45]

The Rules further provide for many more modern procedural matters, such as, judgment,[46] appeal and decision on such appeals,[47] evidence on commission,[48] oath/affirmation,[49] transfer of a case to the High Court,[50] stay of execution,[51] and correction of errors.[52] These rules were applicable until the Criminal Procedure Code was promulgated in 1961 with little modifications.

The 1961 Criminal Procedure Code

The period between 1955 and 1965 is the heydays of codification in Ethiopian legal system. The preparation of initial drafts of the Code of Criminal Procedure started in 1955 by Graven the drafter of the *Penal Code of the Empire of Ethiopia Proclamation No. 158 of 1957* ("Penal Code" or "Pen. C."). Because there were members of the Consultative Committee for legislations who have common law tradition and background and those who have civil law tradition background, the discussion on the draft was strained.[53] In order to address both sides, it included procedures both from the common law and the civil law traditions.[54] For lack of annotations and commentaries, the source of the 1961 Criminal Procedure Code remained vague.

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43 *Id.*, Art 76(i)

44 *Id.*, Art 76(ii)

45 *Id.*, Art 77(i)

46 *Id.*, Art 78

47 *Id.*, Art 80, 81

48 *Id.*, Art 87 ff

49 *Id.*, Art 90

50 *Id.*, Art 93

51 *Id.*, Art 98

52 *Id.*, Art 96

53 S. Z. Fisher, *Ethiopian Criminal Procedure: Sourcebook* (Addis Ababa: HSIU, 1969), at xi

54 In 1957, Graven's initial draft was given to Sir Charles Matthew, the British Judicial Advisor for the Ethiopian Government who produced the final version of the Code. For lack of annotations and commentaries, however, the source of the Code is not known. *Id.*

The provisions of the various codes were selected from different legal systems and put together in a logically consistent and coherent manner. As many of the provisions are taken from different legal systems, they are not taken from a single source, except the civil procedure. With respect to the Criminal Procedure Code, there is no clear idea on its source. Fisher believes that the Ethiopian Criminal Procedure Code is taken from various sources, such as, the Criminal Procedure Codes of Malaya, Sudan, Northern Nigeria, India and Singapore. This conclusion is based apparently on the finding that there are various provisions which Fisher opined are verbatim copies of those codes.[55] For instance, with respect to Art 35, recording of statements and confession, Fisher states that "it is unquestionable that the drafters of the Ethiopia's Code were to some extent looking towards the Indian system."[56] However, the reading of the provisions of the three Codes, as Fisher himself noted, indicate that Art 35 of Ethiopian Code is much closer to section 115 of the Malayan Code of Criminal Procedure than section 164 of the Indian Code.

Looking at the contents of the provisions and other factors as discussed below, I believe the principal foreign source of the Ethiopian Criminal Procedure Code of 1961 is the Malayan Code of Criminal Procedure as it stood in 1956. This is for the following reasons. First, based on the similarities of the provisions of the Ethiopian Criminal Procedure Code with those other codes the Ethiopian Code is very much closer to the Malayan Code than to anyone of the others.[57] This is further supported by the usage of some key terminologies. For instance, while the Indian Code of Criminal Procedure uses the phrase *reasonable cause to believe*, the Malayan Code of Criminal Procedure uses the phrase *reason to believe* which is used in

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55 Fisher stated this view in many instances; S. Z. Fisher (1966), "Involuntary Confessions and Article 35, Criminal Procedure Code" *III JEL No. 1* ("Fisher 1966a"); Fisher, *supra* note 53, at ix; S. Z. Fisher (1966) "SOME ASPECTS OF ETHIOPIAN ARREST LAW: THE ECLECTIVE APPROACH TO CODIFICATION" *III JEL No. 2* ("Fisher 1966b"). However, he also withdraws his contention and states that "actually, the *direct* source of code is . . . more likely the Malayan Criminal Procedure Code which, like the codes of many former British dependencies, was closely patterned after Indian law" Fisher (1966a), at 333 footnote 16.

56 Fisher (1966a), *supra* note 55, at 333

57 The similarities and the differences between the Ethiopian and Malayan codes of criminal procedure are discussed in the body of this text in the respective topics as found appropriate.

the Ethiopian Code of Criminal Procedure only once but which pervades the police activities in the Ethiopian criminal process. Although the two phrases may not have difference in connotation, their usage is an indication to which the Ethiopian law is much closer.

Second, similarity with those other codes does not warrant the argument that a given provision is taken from a specific code. There are similar provisions on the Draft Evidence Rule for instance which is fully taken from the Indian Evidence Act of 1872. The IEA as prepared for the Indian lay judges by English drafters was found to be 'appropriate' for other colonies and dependencies of the British Empire. It was thus received and adopted by many of former British colonies including many in African. Thus, Nigeria, Ghana, East Africa (now Uganda, Tanzania and Kenya) Sudan and South Africa incorporated the Indian Evidence Act, 1872 into the corpus of their legal system. The readings of those Codes indicate there is only little difference among them, if any. The DER is similar to the provisions of those countries that adopted the IEA. However, it is rather directly taken from the IEA rather than taking bits and pieces from those other code. Further, Ethiopia borrowed its Civil Procedure Code from Indian Civil Procedure Code with minor modifications. This might have given the impression that the Criminal Procedure Code must have come from Indian Criminal Procedure Code.

The conclusion that the Ethiopian Criminal Procedure Code is taken for its most part from the Malayan Code of Criminal Procedure is supported by other historical facts. In 1957 when Sir Charles Matthew came to Ethiopia, the initial draft prepared by Graven was given to him. If the draft is actually prepared by the Consultative Committee for legislation it must be very much influenced by the Judicial Advisor and the President of the High Court who are both influenced by their experiences. Matthew, the Judicial Advisor, was a chief justice of Malaya and the President of the High Court, Buhagiar, was an assistant to Matthew in Malaya and worked in different capacities including as "legal draughtsman in the federal department of Malaya."[58] The final version of the code is much closer to the Malayan Code as it existed in 1956 and the initial draft prepared by Graven is modified 'beyond recognition.'[59] The opinion that the code is a provision from various sources is not supported by the results; certainly, some uniquely civil law tradition provisions are included in the code. That must only be the remnants of the

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58 Buhagiar, William <www.maltamigration.com> (last accessed 26 August 2009)

59 Fisher, *supra* note 53, at ix

initial draft and not a result of the effort of the drafters to bring selected provisions from different legal systems.[60]

It does not mean that the Ethiopian and the Indian Code of Criminal Procedure are totally unrelated. The Malayan Code of Criminal Procedure is borrowed from the Indian Code of Criminal Procedure, 1873 and the Ethiopian Code is borrowed from the Malayan code, it only means that the Indian Code of Criminal Procedure is an indirect source of the Ethiopian Code. However, the Malayan Code was refined both in 1948 and 1956 making it a little different from its original content.

1.2 Objective of and Some Economics in Criminal Process

The purpose of the criminal law, as it is provided for in the Criminal Code ("Crim. C.") Art 1, is "to ensure order, peace and the security of the State, its peoples and inhabitants for the public good." This, it does by aiming at "prevention of crimes by giving due notice of the crimes and penalties" and, when such notice is not heeded, "by providing for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others, or by providing for their reform and measures to prevent the commission of further crimes." These objectives of the criminal law are sometimes referred to as purposes of punishment in the study of criminal law.

The objectives and relevance of criminal procedure law, on the other hand, cannot be seen in isolation. For right or wrong reasons, adjective laws in general and criminal procedure law in particular, are seen only in the context of adjudication.[61] Adjudication involves facts and consequences. While the substantive criminal law contains only rules, the facts to which the substantive rules to be applied are established by the adjective law. This relationship of the two branches of law—the procedure law as the "instrumentality" of the *correct* and *proper* application of the substantive law—creates lack of clarity as to the relevance and purpose of criminal procedure law. In fact, it is clear the procedure law is important for the proper and correct application of the substantive criminal law. In this regard, the effectiveness of the procedure law is thus measured by the

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[60] The "eclectic" approach of the final version of the Criminal Procedure Code does not reflect a comparative preference of specific procedures more than mere compilation to appease different interests.

[61] Bayles, M., (1986) "Principles for Legal Procedure" *2 Law and Philosophy*, at 36

accuracy of the application of the substantive law. The efficacy of the process is measured by the degree of its effectiveness and efficiency in the establishment of those facts to which the substantive law is applied because truth is at the heart of justice. Therefore, one of the important objectives of procedure is manifestation of the truth.[62] By this, the focus is on the procedural objective of manifestation of the truth and not the cognitive possibility of discerning fact from fiction which is the realm of evidence law.

In adjudication of cases before Christianity took root in the European continent, the emphasis was much more for the consequences and facts, regardless of the process by which the facts of the case are established. Therefore, in the adjudication process the deities give their judgment. The manner of disposition of cases was a negative process that a person is thrown into water, a burning flame, or well and if he survives the ordeal, the deities were said to have given their judgment and cleared him off and he is innocent.[63]

Later, in the medieval period, adjudication of cases by a passive proof was changed into active proof that the public prosecutor had to prove the accused is guilty. This is a change from one that 'cases must be decided' to one 'cases must be decided right.'[64] Facts were to be proved either by witnesses or by confession. Where the *corpus delicti* is already present but there were no (sufficient number of) witnesses, the accused is tortured as a prelude to confession; i.e., he is tortured and makes confessions. He then makes confession later without torture. If he refuses to confess, he would be tortured again. This would go on three times.[65] Christianity gave the moral justification for torture; in the canon law such trial by ordeal where the deities were given the responsibility to judge on the accused, was considered "impotent appeal to the judgment of God" and a "temptation of God" as an act of low belief.[66] The whole of criminal procedure was all about the law of torture devoid of the process values we talk about today. However, torture was not only a criminal investigation but an act of 'arrogance'; there

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62 *Id*., at 40; also see generally, J. B. Weinstein (1966) "SOME DIFFICULTIES IN DEVISING RULES FOR DETERMINING TRUTH IN JUDICIAL TRIALS" *66 Col. L. R. No. 2*

63 J. C. Welling (1892) "The Law of Torture: A Study in the Evolution of Law" *5 American Anthropologist, No. 3,* at 193, 194

64 *Id*., at 196, 208

65 *Id*., at 206

66 *Id*., at 209

were torture warrants and immunities—that "noble persons and persons of quality," such as, "bishops and other high civil dignitaries" were exempt from torture "even under strong presumption of guilt."[67]

Those days of trial by ordeal and trial by torture are long gone. It came to be understood that torture is a test of physical and moral strength; it is not a test of truth and veracity. Furthermore, a different understanding of the objective of criminal procedure evolved—that truth is not an overriding value of the administration of the criminal justice system, or any dispute resolution mechanism for that matter. Justice (fairness or human dignity) as referred to as "process value"[68] is the other important value in the administration of the criminal justice. "Process value" refers to the "standards of value by which we may judge a legal process to be good as a process" apart from any "good result."[69] It is shown that there is a fundamental distinction between truth as an objective of adjudication and the objective of fairness as a process.[70] As modern society appreciates the value of human dignity in the administration of justice, those process values are equally important as the manifestation of the truth. Those process values are good not only as a means to good results but also as a means of implementing or serving process values.[71] Therefore, a different notion of criminal procedure evolved that the law on criminal procedure has its own end or objective independent of the outcome of the case.

Those process values are incorporated in different forms in the FDRE Constitution and, to some extent, in the Criminal Procedure Code and other relevant legislations. For instance, in the FDRE Constitution the following provisions are essential in the administration of the criminal justice: Art 16—The Rights of the Security of Person, Art 17—Right to Liberty, Art 18—Prohibition against Inhuman Treatment, Art 19—Rights of Persons

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67 *Id*., at 205, 211

68 Bayles, *supra* note 61, at 51; Weinstein, *supra* note 62, at 241; T. L. Meares (2005) "Everything Old is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice" *3 Ohio State J. Crim. L.*, at 108

69 R. S. Summers (1974) "Evaluating and Improving Legal Process—a Plea for "Process Value"", *60 Cornell L Rev No. 1* at 3

70 J. Thibaut and L. Walker, "A Theory of Procedure" *66 Cal. L. Rev.*, at 541; also see J. M. Landis and L. Goodstein (1986) "When Is Justice Faire? An Integrated Approach to the Outcome Versus Procedure Debate" *American Bar Foundation Research Journal No. 4*

71 Summers, *supra* note 69, at 4; Meares, *supra* note 68, at 112

Arrested, Art 20—Rights of Persons Accused, Art 21—The Rights of Persons Held in Custody and Convicted Persons, art 34—Prohibition of Double Jeopardy, Art 26—Right to Privacy, Art 37—Right of Access to Justice.

As can be seen from the readings of those provisions of the Constitution, it affords those procedural guarantees in two ways. First, it affords protection to the person confronted with the criminal justice. Therefore, a suspect has the right to be promptly informed of the reasons of her arrest in the language she understands, that during police interrogation, she has the right to be informed that she has the right to remain silent and that anything she says may be used in court against her (or she has the privilege against self-incrimination); she has the right not to be subjected to inhumane treatment, the right to counsel and presumption of innocence, among others. Second, it imposes obligations on the government. Accordingly, the public prosecutor has the burden to prove the case against the accused beyond reasonable doubt; that the government has the obligation to afford pre-trial access to evidence to be produced in court against her and the conditional obligation to afford a lawyer where the accused is not able to afford one and miscarriage of justice is likely to occur. For further discussions on some of the specific procedural guarantees, see Section 12.1.

Researches further established that litigants' satisfaction with dispute resolution decisions would be influenced by their judgment about the fairness of the dispute resolution mechanism[72] because fairness, certainly, is an essential part of the administration of criminal justice. It, therefore, matters how much parties are involved in their own case. It is only an understatement to say that trial by ordeal or trial by torture excludes the accused from participating in the criminal process. Lack of discovery procedure or lack of pre-trial access to evidence, lack assistance by counsel is equally excluding the accused from the fact finding process resulting in an unfair process.

However, the two values—truth and fairness (justice)—directly conflict each other most often in the criminal procedure. In such cases officials (unjustifiably) scarify, without remedy, the process values for desired outcome for various reasons.[73] First, the value of outcome served may be thought to outweigh the process values. For instance, where the suspect is

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72 Generally, see Thibaut and Walker, *supra* note 70

73 Summers, *supra* note 69, at 41, 42

alleged to have committed an offence but the police did not have evidence, they are more likely to employ means that are not lawful, including, failing to tell the suspect that she has the right to remain silent, that anything she says may be used in the court against her, or may even employ third degree. For the zealous police officer, solving the mystery of murder is more worthwhile than those procedural rights of the suspect.[74] Secondly, inasmuch as those process values are less susceptible to measurement, law enforcement agents, courts and the legislature accord less weight to those process values.[75] This is particularly the case in claims by the defence for exclusion of as essential evidence, such as, confessions to the police, at trial. The court sees that the evidence is essential particularly where there is no other substantive evidence or the confession is the bed rock explanation of other evidence;[76] excluding the evidence significantly weakens the prosecutor's case. In such cases, the court looks for justifications for admitting the evidence. When the police are effecting arrest, they do not inform the arrestee the reasons for her arrest; when they are interrogating her, they do not tell her that she has the right to remain silent and that anything she would say might be used in evidence against her.[77] Cases are not litigated before the court based on these facts because there is the underlying assumption that they

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74 In the administration of the criminal justice, that there are many sacrifices of process values for other ends. The arrestee's right to be informed of the reasons for her arrest and later, during interrogation, her right to remain silent and that anything she might say may be used in evidence is a procedural guarantee that is consistently breached. For many law enforcement agents, to inform the arrestee that she has the right to remain silent and to later ask her what she has to say about the crime she is suspected of appears as a hide and seek game. Such debate begs questions about our basic understanding of 'law' and makes our loyalty to the law questionable.

75 See Section 1.4 on the challenges faced by all legal actors in the administration of the criminal justice.

76 For instance, in *Tamirat, et al.*, the principal defendant, Tamirat Layine petitioned to exclude the confession of the accused on the ground of impropriety, a petition the court denied. There were other evidences such as testimonial and documentary evidence. They all could make sense only in light of the confession. The closer reading of the judgment indicates that exclusion of the confession would make the prosecution's case weaker that would not support conviction. *Federal Public Prosecutor v. Tamirat Layine, et al.* (Federal Supreme Court, 2000) Crim. F No. 1/89

77 I should caution here that in some police stations in Addis Ababa, the suspect is told that any statement she makes may be used against her in evidence.

are "minor" procedural irregularities that have no "substantive" effect on the outcome of the case.[78] Third, often the rationale for the provisions meant for the protection of process values is not evident from the reading of those provisions. For instance, the public prosecutor has the duty to file the charge within fifteen days of the receipt of the police investigation report or the record of the preliminary inquiry and the accused also has a pre-trial access to evidence both of which are consistently breached. The rationale is not evident from the reading of the provision therefore violation of it does not appear to entail a consequence; therefore they are deemed without remedy. Finally, the rules of procedure are rather viewed as mere technicalities or rule of thumb the violation of which is inconsequential. Thus, where a charge does not state an essential element of a crime or contains incorrect statements, the measure appears to be merely stating such fact or correcting the misstatement.

In order to clearly indicate the independent underlying objectives of the criminal procedure law and the place of the Constitution in the administration of the criminal justice, the 2005 *Draft Code of the FDRE Criminal Procedure*, ("Draft Code") under Art 2 provides that:

> *The purpose of criminal procedure law is to secure speedy and complete exposure of offences in conformity with the basic procedural principles as laid down in the Federal Democratic Republic of Ethiopia Constitution, so that no innocent person may be criminally prosecuted or convicted; person accused obtain fair trial and person found guilty be subjected to just punishment.*

The purpose of this article is multifaceted. *First,* the basic procedural provisions on criminal procedure law are found in the Constitution and they have primary application; in this provision the constitutional values are effectively incorporated in the administration of the criminal justice despite the fact that they have direct application. Furthermore, as indicated earlier, the Constitution has already made some of the most important value choices—e.g., the arrestee has the right to be promptly informed of the reasons of her arrest in the language she understands. The arresting police officer does not have a justification not to inform the arrestee the reasons of her arrest, nor is it a minor procedural irregularity that it cannot trigger constitutional litigation before the appropriate forum. *Secondly*, it tries to show that criminal procedure law is not mere technicalities;

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78 On the issue of exclusion of evidence, see Section 6.5 *infra.*

rather it has its own ends and objectives to be achieved at each stage of the proceeding, different from that of the substantive criminal law. *Third*, in the interpretation and application of every provision of the Code, regard may be had to the purpose for guidance.

Costs in the Administration of the Criminal Justice

Fairness in the administration of the criminal justice cannot be seen in isolation from the costs it involves. It is beyond doubt that the fairness of the process is very much determined by the budget allocated to the administration of the criminal justice system. There are two types of suspects confronted with the justice system—the guilty and the innocent; and there are two possible outcomes for each of them—conviction and acquittal. The conviction of the guilty and the acquittal of the innocent is a correct outcome of the process. The conviction of the innocent and the acquittal of the guilty are, however, incorrect outcomes.[79] In order to maximise the correct outcomes we need resources—best investigators, best prosecutors and best judges in sufficient number with all the necessary facility. The resources we allocate for the administration of justice are referred to as "direct cost." However, resources are not unlimited. We cannot focus on the *whole truth* because economically it is expensive and practically it is impossible.[80] As the direct costs and incorrect outcomes are inversely related, the less budget we allocate, the higher the number of incorrect outcomes will be.

From the two incorrect outcomes of the process, society is willing to tolerate the acquittal of the guilty but it is not willing to tolerate the conviction of the innocent. The more incorrect outcomes the justice system produces the less confidence the public has in the administration of justice—this is referred to as "moral cost."[81] It is a necessary conclusion that we have to balance the *direct cost* and the *moral cost*. These two costs can be optimised by the *process benefit*—the degree to which the process is fair to the suspect or the person confronted with the criminal justice system. While allocating a reasonable direct cost (budget), the moral cost may be reduced by making the process more faire[82]—access to justice, human treatment of detainees, speedy trial, presumption of innocence, predictability of outcome, assistance by counsel, etc.

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79 Bayles, *supra* note 61, at 42

80 *Id*., at 40

81 *Id*., at 51

82 *Id*., at 52, 53

There are no researches conducted for the assessment of the moral cost of the Ethiopian administration of the criminal justice system.[83] There are incidental statements that "perception of the independence of the judiciary is very low" and "image of the police is very poor."[84] But researches suggest that the direct cost of the administration of justice is minimal that there is "shortage of qualified manpower" and "lack of budget" that resulted in "congestion and backlogs."[85] By the time the research was conducted, for instance, there were 144 federal prosecutors—100 prosecutors have law degree, 39 prosecutors have diploma and 5 did "not meet the legal minimum requirement." On the other hand, the number of police investigation report flowing to the federal prosecution office is beyond what the institution can handle.[86] At state level, Amhara has 548 prosecutors of which 91 have diploma and 417 a certificate; Oromia has 500 prosecutors of which 150 have diploma or higher education and 344 a certificate. Under the then existing structure, Omoria state needed 1,350 prosecutors.[87] The same problem is faced by the police[88] and the judiciary.[89]

The following is a table showing the budget allocated by the Federal Government for selected years for which data is available. In order to put the numbers in perspective, those data include the total budget of the

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83 Menberetsehai made a general statement that public confidence in the administration of the criminal justice is being "eroded." Menberetsehai Taddesse "Forgotten Provisions of the Criminal Justice Process" (title in Amharic) (A discussion paper presented at a workshop organised for Federal Judges, Prosecutors and Police, August 31- September 3, 2003, Sodare), at 1

84 Centre for International Legal Cooperation, *Comprehensive Justice System Reform Program Baseline Research Report* (Addis Ababa: FDRE Ministry of Capacity Building, 2005) ("Baseline Study Report"), at 14, 16, 188

85 *Id*., at 58, 60, 62

86 See Section 10.1 note 1, *Infra*.

87 Baseline Study Report, *supra* note 84, at 96; these are also problems understood by the administration. Menberetsehai, *supra* note 83, at 4

88 Ali states that even though the police legally exist, in fact, it is afflicted by lack of professional and organizational competence. Ali Mohammed Ali "The Role of Courts, Police and Prosecution in the Respect and Enforcement of Human Rights" (title in Amharic) A discussion paper presented at a workshop organised for Federal Judges, Prosecutors and Police, August 31- September 3, 2003, Sodare), at 21

89 Ali states that the court does not have the capacity to dispose cases in a speedy manner. *Id*., at 36

Federal Government and the budget allocated for the different agencies in the justice system. Seen in context, the numbers indicate that the budget allocated for the administration of the criminal justice system was significantly minimal. First, the budget allocated to the Federal Courts was for criminal, civil and labour benches. Therefore, only a fraction would actually be spend for the disposition of criminal cases before the courts. As discussed in the next section, the Ministry of Justice is both the legal advisor of the Federal Government and is the prosecution arm on federal offences. The proportion of allocation of budget for the two activities is not clear but it is without doubt that the advisory unit (part) is much bigger than the prosecution part. Likewise, the police structure includes different parts, such as, the prison, riot police and crime prevention in addition to crime investigation. The numbers clearly indicate that much less budget is allocated for crime investigation. Students are highly encouraged to look at the budget allocation in contrast to other sectors, such as, education, health, agriculture, defence, etc. Education, defence, finance and agriculture are essential public services that need the big chunk of the annual budget and the justice system would still get modest portion of the total budget. However, the budget allocated to the justice sector need to be seen in context.

Aside from budgetary shortfalls, for lack of such important element of fairness in the administration of the criminal justice as absence of legal aid for the absolute majority of the accused and absence of re-trial procedure, it is not known whether there are wrongful convictions, which society does not tolerate. However, the fact that the conviction rate is very minimal—for instance, for the 1996 e. c., it was 33.3% and 15% for the Federal High Court and First Instance Court, respectively[90]—while the number of detainees on remand is significant—ranging from 25—63.3%—often for a long time[91] is a reflection of lack of fairness in the administration of the criminal justice system.

1.3 The Ideal Procedure in the Criminal Process

The preceding section tries to highlight the discordance between the law and the practice. In order to put issues in context for a rational discussion, therefore, it is appropriate to state the "ideal process" for the investigation prosecution and adjudication of crimes as enshrined in

[90] *Id*., at 42; Menberetsehai, *supra* note 83, at 1, 7

[91] Menberetsehai, *supra* note 83, at 6

the FDRE Constitution the Criminal Procedure Code and other relevant laws. The discussion on issues of criminal procedure is always a subject of contention that there are many issues that one hates to concede. In the discussion of the ideal process, however, many points of discussion are discussed in general for mere reason of simplicity and convenience. Those issues are discussed later in the body of the text from different perspectives. Furthermore, the nature of the case determines the nature of the process to be followed; therefore, the special procedures for young offenders and default proceedings are not included in this section.

Crimes are committed; those which are discovered and which are communicated to the police in the normal course of things begins with an accusation by any person (Art 11)[92] or a complaint made by the victim or a person claiming under her (Art 13). There are certain formal requirements to be complied with when such complaint/accusation is made which are more stringent in cases of offences that are punishable only up on complaint. The police officer or the public prosecutor to whom the accusation/complaint is made shall reduce such accusation/complaint into writing and read over to the complainant who shall then sign and date it (Art 14). There are also offences the actual commission of which is witnessed by the police officer herself, flagrant offences (Arts 19, 20), wherein the investigation begins with the arrest of the suspect (Arts 21, 50). Whatever mode of initiation of investigation may be, the investigation begins when the information is communicated to the police (Art 22).

The police have the obligation to investigate offences even when the information is open to doubt (Art 22).[93] Investigation is a proceeding for the purpose of gathering evidence to reach a decision whether a crime is committed and whether it is committed by the suspect or the arrested person. Investigation involves undertaking various activities by the authority conducting the investigation including: a) the arrest of the suspect; b) her interrogation c) search of the persons and premises of the suspect or a third party; and d) examination of witnesses and view of crime scenes and other things.[94]

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92 The references in this section are to the provisions of the *Criminal Procedure Code of Ethiopia, 1961* unless it is indicated otherwise.

93 It is a common practice in the Ethiopian legal system that only the police undertake investigative activities. However, it can also be undertaken by the public prosecutor.

94 It does not mean all of the activities have to be undertaken in every single case;

Once information is communicated to the police, the investigating police officer, after recording such information, elicits from the person lodging the accusation/complaint the relevant information, such as, the identity of the suspect, the victim and other witnesses present at the time of the commission of the crime (Art 24). This then leads the police to examine witnesses which are said to have observed the commission of the offence or who have some other relevant information about the offence, the offender or the person against whom or the thing in respect of which the offence is committed (Art 30). The police may go to the scene where the offence is said to have been committed or where immovable evidence is situate and view effects and settings of facts and things depending on the nature of the case.

In non-flagrant offences, if the investigating police officer has *reason to believe* the person against whom the accusation complaint has been lodged has committed the offence, she may call the suspect by summons (Art 25). It is up to the person summoned whether to appear. But should she fail to appear before the police, the latter shall take such steps that are *necessary to effect the arrest* of the suspect (Art 26). Stated directly, the police requests warrant of arrest from the nearest court.

Upon receipt of the application for an arrest warrant by the police, the court shall consider whether the arrest of the person is *absolutely necessary* and *cannot otherwise be obtained.* In the absence of either of the requirements the court cannot grant the warrant. Such decision shall be based on the evidence that the police officer has sent summons and the summoned person after receiving the summons failed to appear and that the attendance of the suspect is indispensible for completion of the investigation (Art 53). A requirement that is not expressly provided for but that can be abstracted from the Constitution is that the court has to determine that the offence in respect of which arrest warrant is demanded has to be punishable by imprisonment or death (FDRE Const., Art 17).

Where the police or any ordinary person observes the commission of a crime, flagrant offences (Arts 19, 20) such police officer or person can make arrest without warrant provided the offence is punishable without complaint (Art 21). Arrest without warrant could also be made in other cases where a warrant of arrest is not required by law, such as, those listed under Art 51 of the Code or Art 6 (1) of the vagrancy law. Once the person appears

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depending on the nature of the offence and the facts of the case, only some of those activities may be undertaken as part of the investigation.

before the police, whether it is by summons or by arrest with or without warrant the consequence is the same—ARREST.

In effecting arrest the police officer making the arrest has the obligation to promptly inform the arrestee the reasons of her arrest and any charges against her in the language she understands (FDRE Const., Art 19 (1)). Also, the police have the obligation to inform the arrestee that she has the right to remain silent and any statement she makes may be used against her in evidence, also promptly in the language she understands (FDRE Const., Art 19 (2)). Where the arrest is made with warrant, the police shall read out the warrant to the arrestee and if so requested, she shall show the warrant to the arrestee (Art 56).

Once the suspect is arrested, the police interrogate her. The police before conducting the interrogation shall first inform the suspect that she has the right to remain silent and should she make any statement that such statement shall be recorded and may be put in evidence in her trial (Art 27 (2)). Where the arrested person wishes to speak to her lawyer, she has the right to do so either before or during her interrogation (FDRE Const., Art 20 (5)).[95]

As part of the investigation process, the police may conduct search with warrant either in search of the suspect or evidence. The court shall issue a warrant of search only if it is satisfied that "the purpose of justice or any other inquiry, trial or other proceedings" in the Criminal Procedure Code will be served by such warrant. Should the court grant the warrant, it shall specify the place where the search is to be conducted and the items to be searched and seized (Art 33).

In exceptional circumstances, such search may be made without warrant. Those exceptional circumstances are only two: that is: (i) where "the offender is followed in hot pursuit and enters premises or disposes of articles the subject matter of an offence in premises;" and (ii) where (a) information is given to the police (b) that an item which may be relevant as evidence in respect of an offence is concealed or lodged in any place in the premise provided: (c) the offence is punishable with more than three years imprisonment; and (d) the police has good grounds for believing that by reason of the delay in obtaining a search warrant such articles are likely to be removed. Also the person of the arrestee could be searched without warrant (Art 32).

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95 Caution: this is a right to counsel not a right to a state appointed counsel.

After the interrogation, (a) where the offence complained of is not punishable with rigorous imprisonment, as a sole or alternative punishment, or (b) it is doubtful that the offence has been committed or (c) that it is doubtful the summoned person committed the offence,[96] the investigating police officer may release the arrestee, on her discretion, with or without sureties that she will appear at such place, on such day and at such time as may be fixed by the police (Art 28). If the arrested person is not released as per Art 28, however, she has the right to appear before the court within 48 hours (FDRE Const., Art 19 (3); Art 28 of the Code). The court before which the arrested person appears either releases her on bail or remands her into custody as the case may be (Art 59).

The arrested person has the right to be released on bail (FDRE Const., Art 19 (6)). The court then may consider granting bail either upon the application of the accused person or on its own motion. Despite this constitutional provision, there are certain (contrary) provisions of the law that deny bail *a priori*. Therefore, the consideration of bail bond turns out to depend on two factors (a) the *nature of the offence* whether the offence is bailable, and (b) the *character of the offender* whether the suspect is likely to comply with the requirements of the bail bond.

With respect to the nature of offences, according to the Constitution, all offences are bailable. Those provisions of the law made some of the offences non-bailable. This is in respect of offences committed against a physical person and where the victim has died or is likely to die and such offence is punishable by death or rigorous imprisonment fifteen years or more (Art 63); and with respect to the crime of corruption where the offence is punishable by ten years rigorous imprisonment or more (Art 4 (1))[97] or the offence is dangerous vagrancy (Art 6 (3)).[98] In such cases, it is not a matter of the decision of the court; it is pre-emptively decided by the law-maker.[99]

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96 This provision appears to be applicable only to arrests made on summons; but there is no reason why it should not be applicable to persons who are arrested without warrant for flagrant offences and on court warrant.

97 *Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005* ("Proc. No. 434/2005")

98 *Vagrancy Control Proclamation No. 384/2004* ("Proc. No. 384/2004")

99 The unconstitutional nature of such provisions is discussed in detail in the Chapter 4 dealing with arrest.

Judicial involvement is required only in bailable offences where the focus is on the character of the suspect that if the person is not likely to appear on such date and hour as may be fixed by the court or, is likely to tamper with evidence the court may deny her bail (Art 67). Thus, bail is denied basically to ensure the continued presence of the arrested person before the court and in some cases to enable the police officer to complete her investigation (also Art 19 (4), FDRE Const.).

In the majority of cases the investigating police officer does not complete her investigation within those previous 48 hours. Thus, she routinely requests the court for remand of the suspect to enable her to complete the investigation. The court, after examining the evidence produced by the investigating police officer, must be satisfied that the investigating police officer is doing her level best to complete the investigation and is showing progress. The investigating police officer must also show that the release of the suspect negatively affects her investigation in order for the court to remand the suspect or to deny bail to the latter. Remand is granted, however, only for a maximum of fourteen days on each occasion the frequency of which is determined by the court reasonably (Art 59).

Where bail is granted, the nature and amount of such bail should not be prohibitive because it is a procedure securing the liberty of the suspect. However, it also has to be one that ensures the continued attendance of the suspect because the court has the duty to secure the continued attendance of the suspect for trial. Thus, the court has a painful duty of balancing making bail within the reach of the suspect as well as securing the continued attendance of the same before the court (Arts 68, 69). If the type of security required is personal guarantee, the guarantor has the obligation to ensure the continued presence of the person released on bail at the pain of losing anything that has been promised or deposited by the guarantor (Art 70).

The investigating police officer has the obligation to complete the investigation without unnecessary delay an obligation unambiguous. The investigating police officer enters all relevant information, which is accessible to her in the investigation diary and in the investigation report day-by-day as are provided for in the law. After completing the investigation, she shall forward the investigation diary accompanied by the investigation report to the public prosecutor (Art 37).

Upon receipt of the police investigation report, the public prosecutor may decide that further investigation be conducted or preliminary inquiry be held or close the investigation file where the suspect has died or is a young

person below the age of nine or the offence is subject to amnesty or pardon, or the suspect cannot be prosecuted by reason of any special law, such as, those providing for parliamentary immunity (FDRE Const., Arts 54 (6), 63 (2)) or diplomatic immunity (Art 38).

Preliminary inquiry is a judicial process whereby the public prosecutor has her evidence recorded until the day of the trial. The preliminary inquiry is mandatory where it relates to grave offences, such as, aggravated robbery and first degree murder and it is optional depending on the discretion of the public prosecutor as in offences that are the jurisdictions of the High Court (Art 80). If the evidence is testimonial, such witnesses shall enter bond that they will appear on such date and hour as may be fixed by the court for the trial (Art 90).

Upon receipt of the records of the preliminary inquiry or the police report, the public prosecutor has the power to decide whether to prosecute the suspect. The Ethiopian system adopted compulsory prosecution based on the availability of evidence that where there is not sufficient evidence, the public prosecutor cannot institute a charge against the suspect. The public prosecutor cannot also institute a charge where there is no possibility of finding the accused and the offence is not one triable in absentia or where prosecution is barred by period of limitation. On no other grounds can she refuse to institute a charge (Art 42)

Where the public prosecutor believes that there is sufficient evidence, she shall frame a charge and file before the court having jurisdiction within fifteen days of the receipt of the police report of the records of the preliminary inquiry (Art 109). The charge has two important functions: it informs the accused what charges she has to answer to and it initiates judicial proceedings.

Formally, a charge has four parts: the caption, the statement of the offence, the particulars of the offence and the list of evidence. In terms of content, emphasis is placed on the particulars of the offence. It should contain the name of the accused, the offence with which the accused is charged and its legal, moral and material elements, the time and place of the offence, the law and the article which is said to have been violated and where appropriate the person against whom or the thing in respect of which the offence is committed (Art 111). As mere description of the dry facts is found to be insufficient to inform the accused what charges she has to answer to, the circumstances under which the offence is said to have been committed shall also be described (Art 112).

Should there be any error in stating any of these elements or omission, and such error or omission is substantial or misleads the accused or is likely to defeat justice, the court may order the public prosecutor, on its own motion or up on the application of the parties, to alter the misstatement or add the omitted fact or to frame a new charge as the case may be (Art 118).

In order to prepare and file the charge, the public prosecutor determines whether Ethiopian courts have jurisdiction over the matter; and if so whether it is a federal or state matter. She also has to determine which level of court in the hierarchy has jurisdiction as provided for by the Third Schedule of the Code. The question whether Ethiopian courts have jurisdiction over an offence (judicial jurisdiction) is not an issue almost in all cases. With respect to the federal arrangement, the law has clear basic principles based on the law, the place of offence and the identity of the accused (Art 3).[100] Thus, where the law violated is a federal law or the offence is committed in Addis Ababa or Dire Dawa (federally administered cities) the offence shall be seen by the Federal Courts. Likewise, where the suspect is from a regional state other than where the court is situate, then the case is to be seen by the Federal Court.

Both the Federal Government and the state governments have the power to promulgate criminal law (FDRE Const., Art 55 (5)). However, as no state has legislated criminal law so far, it is only the federal criminal law that is in operation. Thus, criminal matters are at present the jurisdiction of Federal Courts only. However, as there are no Federal Courts all over the country, the jurisdictions of the Federal First Instance and Federal High Courts are delegated to the State High Courts and State Supreme Courts in localities where there are no Federal Courts (FDRE Const., Art 80 (2), (4)). Thus, jurisdiction over offences is distributed among Federal First Instance, High and Supreme Court and State High and Supreme Courts. Therefore, State First Instance Courts do not have jurisdiction over criminal matters under the existing law.

After determining which court has jurisdiction over the offence, the public prosecutor shall determine which local court has jurisdiction. Normally, it is the court within the local limits of whose jurisdiction the offence has been committed which has jurisdiction over the offence (Art 99). If there are several local areas that are involved in the case, the courts in each local area, which is involved in the case, has jurisdiction over the matter (Arts

100 *Federal Courts Proclamation No. 25/1996* ("Courts' Proclamation")

100, 101). However, having regard to cost and convenience, the public prosecutor has discretion to determine before which court to institute the charge (Arts 102, 103).

Up on filing the charge before the court having jurisdiction, the evidence (exhibits) pertaining to those allegations in the charge are to be deposited in the registry where the accused or his counsel access those evidence to see whether they are reliable and to assist her prepare her defence (Art 97 of the Code; FDRE Const., Art 20 (4)). A copy of the charge accompanied by list of evidence and if preliminary inquiry has been conducted, a copy of such record, shall be sent to the accused (Art 91).

Once the charge is filed, the court fixes the date and the hour for the hearing (Art 123). On such fixed date the charge is read over and explained to the accused where after she shall be asked if she has any objection to the charge. Her objection may be related to the form or content of the charge or whether the case is pending in another court, or had been entertained and finally decided or is subject to amnesty or pardon or any other objection that substantially affects the proceedings of the case (Arts 129, 130).

If the accused does not have any objection or her objection is not sustained, the court shall then ask the accused whether she pleads guilty (Art 132). If the accused admits committing the offence in the terms stated in the charge or she admits all the elements that constitute the offence with which she is charged, the court enters a plea of guilty and may convict her forthwith (Art 134). There is a possibility, however, to amend the plea of guilty to a plea of not guilty later in the proceeding before judgment is entered and where there is conviction, it shall be reversed (Art 135). Again even when the accused pleads guilty, the court may demand the public prosecutor to corroborate the plea with evidence depending on the seriousness of the offence and whether it is convinced beyond reasonable doubt by the admission (Art 134).

Where the accused denies the charge or the public prosecutor is ordered to corroborate the plea of the accused, the public prosecutor shall produce evidence on the date adjourned (Art 136). If it is testimonial evidence, the public prosecutor shall conduct the examination-in-chief and the accused or his counsel may conduct the cross-examination if she wishes and the public prosecutor again conducts the re-examination if there is any cross-examination and if the public prosecutor wishes to rehabilitate the testimony challenged during cross-examination (Arts 136, 137). The scope and purpose of each type of examination is different.

After going through all the evidence (including documentary evidence and exhibits, if any) the court makes its ruling depending on the degree to which it is convinced by the proof. If the court is not convinced that the prosecution has proved her case to the required degree of proof, it shall acquit the accused without calling her to enter her defence. Where the defendant is in custody, the court also order for her release or where she is on bail, for the discharge of such bail bond (Art 141).

If the prosecutor proves his case, however, the court calls up on the accused to enter her defence. Such ruling may be made by the court immediately after the conclusion of the case for the prosecution or on the next adjournment depending on the complexity of the case and the evidence produced thereto. In the production and examination of evidence in the defence proceedings, the parties follow the same procedure as in the prosecution proceedings. The examination-in-chief is to be conducted by the accused or his counsel, the cross-examination by the public prosecutor and the re-examination by the accused or his counsel again (Art 142).

After the conclusion of the case for the defence the court shall make a final ruling on the guilt or innocence of the accused. If the court is satisfied that the accused/her counsel have rebutted the case for the prosecution, the court shall acquit the accused (Art 149). Should the court convicts her, however, the court shall call upon the prosecutor to produce evidence relating to the antecedents of the accused that are relevant to either aggravate or mitigate the penalty (Art 138). If it is for aggravation, the accused has the right to be heard and she may reply thereto (Art 149 (3), (4)). This could properly be identified as the sentencing proceedings. Finally, the two parties may make final address to the court based on issues of law and of fact. In any case, the accused has the final word. If there are more than one accused the court determines in which order the accused make their final address (Art 148).

The court in writing the judgment considers all the relevant facts that were alleged by both parties. It frames the issue and addresses the same in the judgment. It considers the evidence that were produced for and against the prosecution. It also states the reasons why a certain item of evidence is admitted or rejected and state what weight has been attached to each item of evidence. Whatever conclusions the court has made, by way of inference from those proved facts, is a judgment (Art 149 (1), (2)). After reading out the judgment the court informs both parties that they have the right to lodge an appeal.

If both or either of the parties is not satisfied with the judgment of the court, they may, as of right, lodge an appeal to the next higher court for review. (FDRE Const., Art 20 (6)). Those cases appearing before the Federal Supreme Court in its first instance jurisdiction have practical limitation as the Supreme Court is the last court in the hierarchy (Art 8).[101] Normally, appeal is one. If the appellate court confirms the decision of the lower court, that decision of the higher court is final. If the appellate court reverses or varies the decision in some way, however, a second appeal lies to the other next higher court. Such is the case with cases that are tried by the Federal First Instance Courts (Art 9 (2)).[102]

If the judgment is a final one from which appeal does not lie or if appeal has been exhausted and there is a fundamental error of law, a party may lodge a petition to the Federal Supreme Court to have her case reviewed in cassation (Art 10).[103] With that a judgment goes to execution.

1.4 Challenges in the Administration of the Criminal Justice

The change in the political landscape always affects the criminal justice system one way or the other. The adoption of FDRE Constitution is meant to mark a clear break from the past. Certainly, a third of the Constitution is devoted to fundamental rights and freedoms. The Constitution incorporates the "process values" in the administration of the criminal justice. The basic framework of the criminal procedure laid in the Constitution is thus much more detailed than what is common for a constitution, i.e., generality.[104]

More than a decade after the adoption of the Constitution, the administration of criminal justice system is not any different from what it was before the adoption of the Constitution making the functional addition of the Constitution marginal.[105] This is because there are numerous inseparably

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101 Courts' Proclamation

102 *Id.*

103 *Id.*

104 D. A. Donovan, "Leveling the Playing Field: The Judicial Duty to Protect and Enforce the Constitutional Rights of the Accused Persons Unrepresetned by Counsel." *1 Eth. L. Rev.*, 2002 at 32, 33; Wondwossen Demissie, "The Role of Courts in the Enforcement of Constitutional Rights of Suspects" *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitutioin.* Addis Ababa: ECSC, 2000, at 45-47

105 Menberetsehai states that "we all understand our justice system is in serious trouble; the criminal justice system is in much worse condition that the civil justice

connected legal and non-legal variables in the administration of the criminal justice each of which have significant effect. Those variables relate both to the norms and institutions of the criminal process but they can generally be put under three categories—legal gaps, lack of proper understanding of the criminal process and politicisation or disregard of the criminal procedure law—creating a significant discordance of the law and the practice.[106] Although such discordance is observed in other areas of law none is comparable as in the criminal process.[107] This section highlights some of the problems of the criminal process as they exist today

1.4.1 Constitutional Interpretation and Litigation in Relation to the Criminal Process

As the major part of the Constitution deals with fundamental rights and freedoms, the basics of the criminal process are laid down in the FDRE Constitution. Some of the provisions are not provided for in the Criminal Procedure Code and, thus, they need direct application. However, those provisions, providing for matters that are both covered by the Code and that are not, present their own problems—the false problem of interpretation compounded with weak constitutional litigation system and culture.

1.4.1.1 Constitutional Interpretation in the Criminal Process

While the basics of the criminal process are laid down in the Constitution, there is less resort to the Constitution by law enforcement institutions, and even the courts resort to the Constitution much less frequently. This is because there is a general 'conception' that the courts do not have power to 'interpret' the Constitution; such power is vested in the House of Federation.[108] This is further

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system." [Translation mine]. Menberetsehai, *supra* note 83, at 1. Mandefrot outlines some of the problems in the administration of justice in general and their impacts, such as, "court congestion, obstacle in the promotion of human and democratic rights and inefficient enforcement." Mandefrot Belay "Justice System Reform Program: Preliminary Reform Profile, Program Contents and Objectives" *Justice System Reform* (Addis ababa: Minstry of Capacity Building, 2002) at 36, 37

106 Baseline Study Report, *supra* note 84, at 11; See Wondwossen generally, *supra* note 104; Ali, *supra* note 88

107 Baseline Research Report, *supra* note 84, at 117; Menberetsehai, *supra* note 83, at 1

108 *Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995* ("FDRE Const."), Art 62 (1) provides that "[t]he House has the power to interpret the Constitution."

strengthened by provisions in various legislations, such as, the *Proclamation for the Consolidation of the Power of the House of the Federation*,[109] the *Council of Constitutional Inquiry Proclamation*[110] and *Federal Courts Proclamation*.[111] Such repeated and nagging provisions have created some level of restraint on the part of the judiciary.[112]

It is beyond the scope of this work to dwell on constitutional interpretation. However, few words are necessary by way of addressing the issues related to constitutional criminal procedure. The Constitution provides that "[a] ll Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions" dealing with fundamental rights and freedoms.[113] The court, as one of the government organs, has this duty of enforcing the provisions of the Constitution relating to fundamental rights and freedoms. The Constitution further provides that "[j]udicial powers, both at Federal and State levels,

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109 *Consolidations of the House of the Federation and Definition of Its Powers and Responsibilities Proclamation No. 251/2001* ("Proc. No. 251/2001"), Art 4(1) provides that "[t]he House shall have the power to interpret the Constitution."

110 *Council of Constitutional Inquiry Proclamation No. 250/2001* ("Proc. No. 250/2001"), Art 17(2) provides that "[w]here any law or decision given by any government organ or official which is alleged to be contradictory to the constitution is submitted to it, the Council shall investigate the matter and submit its recommendations thereon to the House of the Federation for a final decision."

111 Art 6(3) provides that "[w]here a case brought before them gives rise to issues of Constitutional interpretation, Federal Courts shall refer the case to the Council of Constitutional Inquiry prior to giving decision on the matter."

112 Kemal states "it is obvious to anyone . . . that courts do not have power to interpret the constitution as this power resided in the House of the Federation." However, he goes on to state that "[i]t still remains to be asked, even though the courts do not have the power to interpret words of the constitution itself, is there any role left for them to enforce it?" Opening Speech by Kemal Bedri, President of the Federal Supreme Court and Chairman of the Council of Constitutional Inquiry on a symposium on 'The Role of Courts in the Enforcement of the Constitution,' *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution* (Addis Ababa: ECSC, 2000), at 4; Tsegaye Regassa, "Courts and Human Rights Norms in Ethiopia: An Overview" *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitutioin* (Addis Ababa: ECSC, 2000), at 113; Wondwossen, *supra* note 104, at 49

113 Art 13(1)

are vested in the courts;"[114] and that "[j]udges shall exercise their functions in full independence and shall be directed solely by the law."[115] The Constitution being one of the laws, the issue with respect to the extent of the role of courts in the enforcement of the Constitution is thus unavoidable.

On Interpretation of the Constitution—it stands to reason that 'interpretation' for the purpose of ascertaining the meaning of a provision is required where the law is not clear, ambiguous, or contradictory. The provisions of the Constitution dealing with the administration of the criminal justice are "unusually, for a Constitution, detailed, explicit, and clear"[116] that need no interpretation.[117] See, for instance, many of the contents of the provisions dealing with the rights of arrested persons and the accused, Arts 19 and 20, respectively. Thus, where the Constitutional provision is clear, courts have only the obligation to apply the relevant provision of the Constitution. However, courts are reluctant to apply the Constitution.[118]

Application Distinguished—constitutional interpretation is commonly "equated with the power to declare federal and state laws as unconstitutional and therefore null and void."[119] However, application of the law to the facts certainly demands an elementary interpretation giving the words and phrases of the law their ordinary meaning that does not raise dispute between the parties. Such interpretation or "declaring the law" is the central part of application of the Constitution. [120] Many opined that this is the inherent responsibility of the courts which are precluded from interpretation of the Constitution but who also have the duty to apply the same.[121] Therefore, judges can properly invoke, for instance, the provisions of Art 17 of the Constitution in *habeas corpus* cases, Art 18 of the Constitution in allegations of ill-treatment during investigation, and Art 19(5) on involuntary confessions.

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114 Art 79(1)

115 Art 79(3)

116 Donovan, *supra* note 104, at 32

117 Wondwossen, *supra* note 104, at 47

118 *Id.*, at 49; Tsegaye, *supra* note 112, at 113

119 Kemal, *supra* note 112, at 4; Donovan, *supra* note 104, at 31

120 Tsegaye, *supra* note 112, at 109, 116, 117; Wondwossen, *supra* note 104, at 46, 47

121 Kemal, *supra* note 112, at 5; Tsegaye, *supra* note 112, at 113; Donovan *supra* note 104, at 32; Assefa Fiseha "Constitutional Interpretation: The Respective Role of Courts and the House of Federation (HOF)" *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution* (Addis Ababa: ECSC, 2000), at 12

1.4.1.2 Weak System of Constitutional Litigation and Culture

Although many of the constitutional provisions relating to criminal process do not need interpretation as to their ordinary meaning, matters of constitutional interpretation are part of the problem for the administration of criminal justice system for those provisions, which actually need constitutional interpretation.[122] Constitutional interpretations are handled by the Council of Constitutional Inquiry ("CCI") which is composed of part-time members—President of the Federal Supreme Court, Vice President of the Federal Supreme Court, six legal experts appointed by the President of the Republic on recommendation of the House of Peoples' Representatives ("HPR"), and three persons designated by the House of the Federation from among its members.[123] This organ is responsible for all constitutional litigation and interpretation issues that may be raised both in the Federal and State Courts. Cases involving constitutional interpretation are submitted to the CCI either by the court before which a case is pending or by the parties.[124] Such issue of interpretation may also be forwarded to the CCI by the House of the Federation.[125]

There is very little interest or there are other reasons for individuals not to take their case to CCI seeking remedy. For the few, who are represented by a counsel, they understand they can take their case to CCI where the court is not willing to address the constitutional issue. Such is the case with *Tamirat et al.*[126] and *Assefa et al.*[127] However, with respect to individuals who are not represented, they may not even be aware of their rights; thus, the court has the primary responsibility to forward such cases to the CCI where constitutional issues arise.

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122 For in-depth discussion see Assefa, *id.*; Assefa Fiseha (2007) "Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HOF)" *1 Mizan L. Rev. No. 1*

123 Proc. 250/2001, *supra* note 110, Art 4; Art 9(2) further provides that "[w]hen it is found necessary, some members of the Council of Inquiry may be assigned to work at the Head office permanently." (sic)

124 *Id.,* Arts 21, 22 respectively.

125 Proc. No. 251/2001, *supra* note 109, Art 6

126 *Tamirat, et al, supra* note 76

127 *Federal Ethics and Anti-Corruption Commission v. Assefa Abreha, et al.* (Federal Supreme Court, 2002) Crim. App. No. 7366

However, the practice of the courts is not consistent with respect to cases involving constitutional interpretation. For instance, following the May 2005 election the Prime Minister decreed there would be no public gathering for the following one month. Coalition for Unity and Democracy (CUD) brought action before the Federal First Instance Court to have the decree quashed. The court referred the matter to the CCI on the ground that the action calls for constitutional interpretation before even waiting for the response of the Prime Minister.[128] On the other hand, in other cases where counsels for the defence raised objection based on the constitutionality of the laws enforced, the respective courts held those legislations were constitutional. In *Betula, et al.*,[129] defendants were charged for corruption based on the 1957 Penal Code and the Special Penal Code. They challenged the constitutionality of the Special Penal Code. The Federal High Court held that the objection was not appropriate without any further comment.

In *Tamirat, et al.*,[130] the case appears before the Federal Supreme Court in its first instance jurisdiction as per Art 8(1) of the Federal Courts Proclamation.[131] The defence thus raised objection contending the fact that the case is tried by the Federal Supreme Court in its first instance jurisdiction restricts the constitutional right of the defendant to appeal.[132] Certainly, there is a contradiction between the provisions of the two laws and the claim of the defence is constitutionally valid from the reading of the two provisions. However, the Federal Supreme Court held that the law is not unconstitutional. Also, in the *Assefa, et al.*,[133] the defendants were charged for corruption. The then existing law denies bail to persons who were suspected with the crime of corruption.[134] The defendant challenged the constitutionality of

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128 *Coalition for Unity and Democracy v. Prime Minster Melese Zenawi* (Federal First Instance Court, 2005) F No. 54024; Assefa, *supra* note 122, at 17

129 *Federal Ethics and Anti-Corruption Commission v. Betula Mossa and Asselefech Tekle* (Federal High Court, 2001) F No. 934/94

130 *Tamirat, et al., supra* note 76

131 Courts' Proclamation, Art 8(1) provides that the Federal Supreme Court has first instance jurisdiction over "offences for which officials of the Federal Government are held liable in connection with their official responsibility."

132 FDRE Const., Art 20(5) provides "[a]ll person have the right of appeal to a competent court against an order or judgment of a court which first heard the case." Also, note the difference between appeal and cassation.

133 *Assefa, et al.*, *supra* note 127

134 The *Anti-Corruption Special Procedure and Evidence Rule (Amendment) Proclamation No. 239/2001* ("Proc. No. 239/2001"), Art 51(2) provides that "a

the law denying bail *a priori*. Here again, the provisions of the two laws are contradictory and the claim of the defence is constitutionally valid. What the constitution anticipates is a law that recognises the discretion of the court having regard to the circumstances of each case.[135] However, the Federal Supreme Court held "the law is clear and unambiguous that it is not in want of interpretation. With regard to the argument forwarded linked with constitutionality, it does not imply constitutional question; and thus, it is not a type we believe there is a need for constitutional interpretation that it is not a matter we should refer to the CCI" [Translation mine].

In an interesting twist, the High Court rejected a demand to exercise the constitutional right of the defence to have access to evidence based on FDRE Const., Art 20(4). The Court reasoned that "apart from serving as a general principle of law, [FDRE Const. Art 20(4)] cannot serve as a provision of the Criminal Procedure Code to regulate a criminal proceeding."[136] The court further stated that the constitutional provision does not specify the time at which such access is to be exercised.[137]

The practice of the courts is inconsistent in that, at times the Court indulges into constitutional interpretation proper asserting that the law is in conformity with the Constitution. It would be tolerable if the court is actively enforcing the constitutional rights of the accused by stepping out of its bounds, but unfortunately, the interpretation of the court is stifling the rights of the accused. One would certainly raise questions about the practice of the courts and the constitutionality of those decisions too. Such and other 'timid' approach to the constitutional issues generally in the administration of the criminal justice, however, gave legitimacy to such unconstitutional laws and practices. For various reasons the parties are reluctant to take their case before the House of the Federation seeking remedies.

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person who is arrested on suspicion of having committed a corruption offence shall not be released on bail."

135 FDRE Const., Art 19(6) provides that "[p]ersons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person."

136 *Special Public Prosecutor v. Kidanemariam Birhanu, et al.* (Federal High Court, 1998) Crim. F. No. 642/89 cited in Wondwossen, *supra* note 104, at 49

137 *Id.*

1.4.2 The Politics of Criminal Procedure— Problems Relating to the Lawmaker

The lawmaker, as an essential legal actor, plays a role in the administration of criminal justice. The politics of criminal procedure could be seen from the law making perspective too. In fact, the major part of the problem is assumed by the law maker for not making laws, for making certain laws or for making laws in certain forms.

1.4.2.1 Failing to Fill Legal Gaps

With respect to causes that have significantly contributed to the poor administration of the criminal justice there are many clear and major legal gaps. For instance, the total absence of pre-trial post arrest judicial assessment of guilt has resulted in a prolonged detention of persons who are denied bail who would later be acquitted. A conservative research indicated that by June 2004, there were 5,114 detainees in Tigray State, 15,993 in Amhara State, and 26,460 in Oromia State. Out of those detainees 25% in Tigray, 27% in Oromia, 30% in Amhara, 55% in Southern Nations Nationalities Regional State[138] and 62.3% at the federal level were awaiting trial.[139] Arrestees who are suspected of offences that are the first instance jurisdiction of the Federal High Court are most likely denied bail because of the seriousness of the offence. On the other hand, the conviction rate for the Federal High Court for the year 1996 was 33.1%[140] while that of the

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138 The proportion of person detained without conviction in the Southern Nation Nationalities and Peoples' Regional State in February 2003 is 50%. Baseline Study Report, *supra* note 84, at 114.

139 At the federal level although authorities recognise that there were only 73 persons awaiting trial, the prison record shows by the end of 1996 e. c. out of the 4,756 detainees only 1,794 were convicted, 228 were on remand and the rest were awaiting trial. Ali, *supra* note 88, at 36. Another research indicates that the Head of the Federal Prison admitted that by February 2003, there were 55,000-60,000 prisoners nationwide. The research further indicates that the three States, Amhara, Oromia, and SNNPRS, had 14,000, 24,761 and 12,500 detainees, respectively. On the Federal level, by November 2002, there were 4,000 prisoners in Addis Ababa prison; 800 in Kality prison; 647 in Zeway prison and 694 in Shewa Robit prison excluding the former regime prisoners who were in a special facility. For Dire Dawa, data was not available. Baseline Study Report, *supra* note 84, at 114 also footnote 11.

140 Menberetsehai, supra note 83, at 7; Ali, *supra* note 88, at 42

Federal First Instance Court was 15%.[141] Thus, those detainees who are awaiting their trial are more likely to be acquitted than to be convicted. Second, once investigation is completed the public prosecutor has 15 days within which to draw and file the charges. However, during such period the condition of the detainee is not governed by law. Most often, the detainee stays under detention indefinitely without court supervision.[142] Third, despite the fact that the law grants wide power of arrest to the police, the grounds of release of innocent suspects is or very minimal.[143] In this regard, the lawmaker failed either to grant the police the power to release

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141 Ali, *supra* note 88, at 42

142 Once the investigation is completed there is no ground on the basis of which the arrestee may be remanded into custody. Thus, some judges just close the investigation file for lack of ground to remand the arrestee anymore but unfortunately without giving further order about the condition of the arrestee. That keeps the arrestee in limbo because the police keep the arrestee under detention on the ground that the court did not order them to release the arrestee. Some judges, on the other hand, make use of Art 93 and remand the person into custody "until the public prosecutor makes appropriate decision after evaluation of the police investigation report." Art 93 is provided for in the section dealing with preliminary inquiry and is exclusively the power of the committal court and not of the court before which the person appears by virtue of Art 29 cum. Art 59. In order to fill the gap the earlier Supreme Court extends the power of the court under Art 59 to grant remand for one more 14 days which is contrary to the spirit of the law. *Public Prosecutor v. Alemu Ourga, et al.* (Imperial Supreme Court, 1968) Crim. F No. 864/1960. The public prosecutor never files the charge within those fifteen days which made the broad interpretation of the law by the Supreme Court useless. See section 3.2.1 *infra.* The problem is appreciated by the current court authorities. *Minutes of the Meeting of the Court Authorities on the Challenges in the Criminal Justice Administration* (title in Amharic) (Federal Supreme Court, May 2004) ("Minutes"), at 13

143 For instance, Art 51(1)(a) provides that "[a]ny member of the police may arrest without warrant any person whom he reasonably suspected of having committed or being about to commit an offence punishable with imprisonment for not less than one year." While this is just one ground of arrest without warrant, a cursory view of the Criminal Code indicates that more than half of the provisions contain rigorous imprisonment and many of the provisions of simple imprisonment punishments are well more than one year. It is evident that arrest without warrant is the rule because arrest warrant is made less relevant by the law. On the other hand, there is no unconditional release in the criminal procedure law. The only ground for the police to release the suspect on police bond is provided for in Art 28. The police are generally reluctant to release the suspect as per Art 28 for various reasons.

apparently innocent suspects or to restrict the grounds of arrest. Fourth, there is no clear time limitation for investigation of offences neither on the frequency of investigative remands nor on the number of adjournments the court could grant in a given case making the criminal process unending process.[144] Finally, there is not remedy for wrongful convictions in the criminal process.[145]

1.4.2.2 Legal Fragmentation

In any free, open and democratic society, where the need to address new social problems by the criminal justice arises, it is only a matter of the substantive criminal law and not a matter of procedure. The procedures are almost uniform and are enforced accordingly. In our criminal justice system, the law maker made two special legislations for some types of crimes which were originally part of the mainstream procedure. For instance, vagrancy was prohibited under the 1957 Penal Code Art 472 and it was also a ground of arrest without warrant under the Criminal Procedure Code ("Crim. P. C.") Art 51(1) (h). While the lawmaker could redefine the crime of vagrancy as it did with respect to the crime of corruption in the new *Criminal Code of Federal Democratic Republic of Ethiopia of 2004* ("Crim. C.") it adopted the new vagrancy control law as a separate law.[146] The new vagrancy control law authorises arrest without warrant, as did Crim. P. C., Art 51(1)(h).[147]

The special law, however, has additional minor modifications on the procedure; it makes such offence non-bailable; it also provides that the investigation be completed within 28 days and that the public prosecutor decides whether she frames a charge within ten days of the receipt of the

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144 Art 59(3) provides only for one absolute limitation that remand may not "be granted for more than fourteen days on each occasion." However, there is no regulation or guideline on how many times the arrestee may be remanded for investigation. It could be argued the constitutional provision "strictly required to carry out the necessary investigation" guides the process but it is only a wishful thinking. Art 94 governs only the grounds of adjournment which are less complied with; it does not provide for the length and frequency of adjournment. See section 13.6, *infra*.

145 Appeal is one possible remedy; however, should new evidence or mistrial be discovered after conviction of the defendant and appeal is exhausted, there is no re-trial procedure.

146 Proc. No. 384/2004, *supra* note 98

147 *Id.*, Art 6(1)

police investigation report.[148] Arguably, however, despite the fact that the procedural modification in the vagrancy law were made with good intentions, the overall impact of the vagrancy law on the criminal justice system is not positive because the system treats the law as 'special' while it is not significantly different from the already existing law on procedures.

The other special law is the *Anti-Corruption Special Procedure and Rules of Evidence*.[149] This law is evidently 'special' law. It introduces few more concepts that were not known to the system, such as, preparatory hearing, protection of whistleblowers, cross-examination of hostile witness and degree of proof in certain cases.[150] However, with respect to those procedural provisions that are constitutionally valid, it is not significantly different from the main stream criminal process. Even those new procedural concepts could have been put as additions to the existing procedure law because they were also needed in other processes.[151]

Such fragmentation of legislations does not foster the administration of criminal justice. It rather created uncertainty on the content of the law[152] and thus denies its predictability of outcome of cases which is an essential part of justice. Further, the special treatment of those laws gives them a political ramification as that was given to the Special Penal Code that was adopted by the previous military regime.[153]

1.4.2.3 Making Laws in Excess of Its Power

The notion of constitution and constitutionalism is all about limited government; it is meant not only to limit the power of the executive, it is also meant to limit the power of the law maker, particularly by those human

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148 *Id.,* Arts 6(3), 8(1), respectively.

149 Proc. No. 434/2005, *supra* note 97

150 Section Five, Section Seven, Arts 44 and 33, respectively.

151 The point is that, the government is committed to combating corruption; but its combat to corruption cannot come at the expense of a weaker judiciary and a weaker criminal justice process.

152 Baseline Study Report, *supra* note 84, at 13

153 The Special Penal Code was in application until it was expressly repealed by the Criminal Code. Thus, *Tamirat, et al.*, *supra* note 76; *Assefa, et al., supra* note 127; and *Abate, et al., (Federal Ethics and Anti-Corruption Commission v. Abate Kisho, et al.* (Federal High Court, 2002) Crim. F No. 260/94) were charged and tried under the Special Penal Code.

rights provisions contained in Chapter Three of the Constitution. Therefore, the HPR does not have power to issue laws that restrict or nullify rights of individuals that are enshrined in the Constitution. In not few cases, however, the law maker promulgated or failed to repeal laws that are clearly contrary to the Constitution. Such provisions are contained not only in the Criminal Procedure Code which was in existence before the Constitution but also in those 'special' laws on vagrancy and corruption.

First, denial of the right to bail and appeal: it has been alluded earlier that the provisions of both the vagrancy control law and the anti-corruption law that deny bail *a priori* are unconstitutional.[154] Likewise, the provisions of the Courts' Proclamation allocating first instance jurisdiction to the Federal Supreme Court of those cases against the Federal Government Officials are also unconstitutional because they restrict the constitutional rights of those officials' to appeal.[155] Unfortunately, some regions are making direct copies of the federal laws; for instance, the Southern Nations and Nationalities Regional State has identical provisions.[156] Therefore, a corruption cases against state officials are tried by the State Supreme Court.

Second, provisions contrary to the principle of presumption of innocence of the accused: In the original Anti-Corruption Special Procedure Law, the burden of proof may be shifted from the public prosecutor onto the accused to prove her innocence where the public prosecutor is able to prove certain basic facts.[157] This 'presumption' is contrary to the constitutional right of the

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154 FDRE Const., Art 19(6)

155 FDRE Const., Art 20(5)

156 *Revised Southern Nations, Nationalities and Peoples Regional State Courts Proclamation No. 43/2002* ("SNNPRS Courts Proc. No. 43/2002") Art 5(1)(a). This jurisdiction of the State Supreme Court is added by revising the Region's Courts' Proclamation No. 5/1996.

157 *Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 236/2001* ("Proc. No. 236/2001") Art 37 Provides:

1) With respect to offence of corruption, the burden of proof may shift from the prosecutor to the defendant if the prosecutor can show that:

(a) the service is a government or a public service;

(b) there is a ground which indicates a gratification has been sought, exacted a promise of, or received by the accused; and

(c) the person who has sought or exacted a promise of, or received gratification has a working relationship with the corrupter;

accused to be presumed innocent until proven guilty which was supposed to be challenged only by proof 'beyond reasonable doubt degree.'[158] This provision is not included in the amendment proclamation, Proc. No. 434/2005. When the definition of corruption is included in the new Criminal Code, these provisions of presumption (of proof) are also included with little modification now becoming part of the substantive law.[159]

Third, restriction on the right to privacy: FDRE Const., Art 26(2) recognises the inviolability of correspondence including communications made by means of telephone, telecommunications and electronic devices. Restrictions to such rights, as exceptions, are interpreted strictly. Thus, under the grounds of restriction of the enjoyment of the right to privacy provided for in sub-art 3 of Art 26, there is no "crime investigation" in the list. Therefore, one could validly argue that the right to privacy may not be restricted for investigation purposes. Naïve as this argument appears, the provisions of the Constitution are clear. However, the lawmaker even authorised interceptions of communications for investigative purposes and the power to authorise such interception of communications which initially was granted to the courts[160] is now granted to the Commission, an executive organ.[161] Thus, if interception communication is not constitutional, *a fortiori* interception of communication by the order of the executive without judicial supervision is unconstitutional.

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2) Notwithstanding the provision of Sub-Article (1) of this Article, if the prosecutor can show that the service is a government or a public service and the defendant has lived, or has accumulated wealth, beyond his legal means of income, the burden of proof may shift from the prosecutor to the accused.

158 The degree of proof for a criminal conviction is not set in the law. See Section 13.3. However, the lack of definition of degree of proof for criminal cases does not justify nullifying the constitutional principle of presumption of innocence.

159 *The Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No. 414/2004* ("Crim. C."), Art 403 provides that "[u]nless evidence is produced to the contrary, where it is proved that the material element (the act) has been committed as defined in a particular Article providing for a crime of corruption perpetrated to obtain or procure undue advantage or to cause injury, such act shall be presumed to have been committed with intent to obtain for oneself or to procure for another an undue advantage or to injure the right or interest of a third person."

160 Proc. No. 236/2001, *supra* note 157, Art 42

161 Proc. No. 434/2005, *supra* note 97, Art 46(1)

Those laws were adopted contrary to the restriction on the power of the lawmaker not to make laws contrary to the Constitution. If the Constitution is the supreme law of the land and those rights of the suspect are provided for in the Constitution, it is evident that it does not have to be drafted in the manner the American bill of rights was drafted, as "congress shall make no law."

1.4.2.3 Making Laws that Weaken the Administration of the Criminal Justice

The lawmaker has also promulgated laws that weaken the administration of the criminal justice; few issues are outstanding. The first is on specialisation of benches and the number of presiding judges during trial. Originally, Federal Courts had three specialised divisions (Civil, Criminal and Labour)[162] each of which were to be presided over by three judges.[163] When the *Federal Courts Proclamation (Amendment) Proclamation* was promulgated the mandatory specialisation was abolished and it was provided that "the Federal High Court and the Federal First Instance Court shall have such divisions as are necessary for their functions."[164] The amendment proclamation also reduced the number of presiding judges in both Federal High Court and First Instance Courts to one in civil matters.[165] In the Amendment Proclamation, the criminal matters were treated, apparently, differently.[166] By another amendment to the Courts' Proclamation, a single judge presides on criminal matters before the Federal First Instance Courts.[167] After a while this single judge rule was extended to the Federal High Court. The entire provision of Art 23 is thus replaced by the following provisions.[168]

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162 Courts' Proclamation, Arts 20, 23

163 *Id*., Art 23(2)

164 *Federal Courts (Amendment) Proclamation No. 138/1998* ("Proc. No. 138/1998"), Art 6 replacing Courts' Proclamation, Art 23 (1) of

165 *Id.*, Art 23(2)

166 *Id.*, Art 23(3)(c) provides that "any criminal case heard by the Federal Courts and the Federal First Instance Court" may be heard by a division with a presiding judge and two other judges sitting.

167 Proc. No. 138/1998, *supra* note 164, Art 23(3)(c) was amended by *Federal Courts (Amendment) Proclamation No. 254/2001* ("Proc. No. 254/2001") so that only " . . . criminal case falling under the jurisdiction of the Federal High Court" be tried by a presiding judge sitting along with two other judges.

168 *Federal Courts Proclamation Re-amendment Proclamation No. 454/2005* ("Proc. No. 454/2005")

23. Divisions of the Federal High Court and First Instance Court:

1/ The Federal High Court and First Instance Court shall have divisions as are required by their functions.
2/ There shall sit a single judge in each division of the Federal high (sic) Court and First Instance Court.
3/ Notwithstanding the provisions of Sub-Article (2) of this article,

a/ Criminal charges brought before the Federal High Court that are punishable with more than fifteen years rigorous imprisonment shall be heard by a division of the court with not less than three judges sitting.
b/ The Federal judicial (sic) Administration Council may, issue directives for cases to be heard by three judges which otherwise could have been heard by a single judge under this proclamation.

4/ The President and Vice President of Federal High Court and First Instant Court may sit in any division of their respective courts.

These changes are indication of the quality of justice; certainly three minds are better than one provided they are of equal training. In such cases, they can digest the case by discussing the facts, the evidence, and the applicable law. In the common law system, where the fact finder is the jury and the prosecution and the defence counsel are the ones who are doing the entire work of proving the facts, the judge is only an arbiter and one judge may be good enough. This is not, however, the case in the civil law legal system. The Ethiopian legal system is closer to the civil law legal system that the judge is the fact finder. The fact that the lawmaker was initially reluctant to make criminal trials be presided by one judge in the Federal Courts (Amendment) Proclamation No. 138/1998, as it did in civil matters is a sufficient indication that it had recognised the importance of having three judges in criminal cases. Moreover, specialisation of bench increases the quality of justice. This can be seen with the simple application of Art 141 of the Criminal Procedure Code, a procedure which is unique to the criminal process.[169]

[169] One of the procedures that distinguish criminal cases is that evidence is weighed twice. Thus, before the judge rules the defendant enters her defence she must be convinced that the prosecutor established a *prima facie* case. Such ruling is significant because should the criminal defendant fails to produce evidence

What affects the criminal process more is the fact that all pre-trial matters granted to the Addis Ababa and Dire Dawa Cities' Courts. Initially, the Addis Ababa Charter[170] provided that "without prejudice to the jurisdiction of Federal Courts, remand in custody and bail applications on Federal offences" be the jurisdiction of Addis Ababa City Courts criminal jurisdiction. Later, that was amended and the City Courts were granted sweeping power on all pre-trial jurisdictions "without prejudice to the jurisdiction of federal courts on the substance of federal offenses, cases brought in accordance with Article 33, 35, 53 and 59 of the code of criminal procedure of 1961."[171] The Dire Dawa City Courts were also given the same power save recording of statements and confessions as per Art 35.[172]

One could raise a host of reasons why this is a matter of concern; the major one being that these courts are not constitutionally recognised. The Constitution recognises Federal Supreme Court, Federal High Court, and Federal Fist Instance Court at the federal level; and at the state level it recognised State Supreme Court, State High Court and Woreda Court. In order to address certain historical ills, the Constitution expressly prohibits the establishment of "[s]pecial or *ad hoc* courts which take juridical powers away from the regular courts or institutional legally empowered to exercise judicial functions and which do not follow legally prescribed procedures."[173] Likewise, it specifically recognises customary and religious courts.[174] Addis Ababa and Dire Dawa Cities' Courts are not recognised nor were anticipated in the Constitution. That may not make them unconstitutional for one who ardently argues for the actions of the Government, but it is a matter of principle that what is not unconstitutional is not necessarily constitutional on such critical issues as the liberty of individuals. Even if

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that creates a reasonable doubt the court convicts her. This is not the case in civil matters. Where the judge is frequently presides on civil matters, there is a possibility that she might order the criminal defendant to enter her defence without properly evaluating the prosecution evidence and finding a *prima facie* case.

170 *Addis Ababa City Government Revised Charter Proclamation No. 311/2003* ("Proc. No. 311/2003"), Art 41(1)(c)

171 *Addis Ababa City Government Revised Charter (Amendment) Proclamation No. 408/2004* ("Proc. No. 408/2004"), Art 2

172 *The Diredawa Administration Charter Proclamation No. 416/2004* ("Proc. No. 416/2004"), Art 33(2)(c); note the contradiction between the Amharic and the English versions.

173 FDRE Const., Art 79(4)

174 *Id*. Art 79(5)

trials are to be made a "one-day-theatre" it is all the pre-trial procedure that matter.[175] Unfortunately, the pre-trial processes are afflicted by a multitude of problems. For instance, the Addis Ababa City Courts are closed to the public during those hearings because of lack of space in the judges' office. Furthermore, the judges both in the Addis Ababa and Dire Dawa Cities' Courts deciding on the liberty of the suspects are not appointed by the HPR.[176]

1.4.2.4 Over Criminalisation in Federal Laws

The Constitution provides that the HPR has the power to promulgate a federal penal code. On matters that are not covered by the federal criminal code, states have the power to issue criminal law. However, the federal HPR has promulgated the Criminal Code on all aspects of life and there is little or no subject left for the states. The federal penal code includes those offences that do not even fall under the federal government's jurisdiction, such as, those moral offences like incest, adultery and bigamy. Such over criminalisation of activities results in less enforcement and thereby gives signal to the public that the law is not enforced or selectively enforced where only selected cases are to be prosecuted, as there is no proper mechanism of selection, their enforcement is arbitrary.[177]

1.4.3 Matters Relating to Enforcement

Although the nature of the law and the lawmaker share the responsibility for the current state of the weak and inefficient criminal justice system because the framework also matters, the actual enforcement of the law raises serious concern of fairness of the process. The problem of the enforcement of the law is seen based on the legal actors—the courts, the prosecution and police, the focus being only on the first two.

1.4.3.1 The Prosecution

The public prosecutor has powers to exercise both during and after the completion of the investigation. Because both the functional and the structural aspect are equally important, we need to look at both aspects

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175 See the discussion on Art 141, Section 13.3, *infra*.

176 FDRE Const., Art 55(13)

177 This may be seen in respect of moral offences, such as, bigamy, incest and adultery which are not universal values.

of the prosecution office. The structural aspect includes the institutional independence of the prosecution arm of the government from the advisory responsibility under the Ministry of Justice as well as the communication between the investigation police officer and the public prosecutor, while the functional aspect examines the responsibilities of the prosecution office only.

The Structural Aspect

Ideally, the advisory and the prosecution aspect of the justice office are separate in order to promote both services professionally and effectively. Thus, the Attorney General's Office, as the prosecution arm of the government, was created as an independent organ separate from the Ministry of Justice which is an advisory bureaucracy.[178]

The public prosecutor is strategically placed as a pivotal of the administration of the criminal justice system. The police undertake investigation on a great number of cases. Once investigation is completed the police investigation report is forwarded to the public prosecutor. It is a continuous flow of cases from the police to the public prosecutor.[179] Not all cases go to trial; it is rather only a fraction of those investigated cases that goes to trial. The public prosecutor is the sole authority to decide the fate of those cases because she is located at the middle—between the police and the court. She can properly seep those *relevant* cases by leaving out the *irrelevant* ones—those which have sufficient cause, evidence and that deserve the public resources to proceed with from that which does not have merit.

The contents of these responsibilities indicate that the public prosecutor acts representing the public. There is, thus, demand for institutional and functional separation of the prosecution service, which is judicial and more professional, from the government advisory service, which is more political. However, with

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178 The Transitional Government Central Attorney General Office was established as an independent entity. *Office of the Central Attorney General of the Transitional Government of Ethiopia Establishment Proclamation No. 39/1993* ("Proc. No. 39/1993"), Art 3

179 For instance, there is an estimate that about 62,000 cases were rolling over the years and transferred to 1996 e. c. It was also estimated that in Addis Ababa 4,000 completed police investigation reports are sent to the prosecutor's office every month. These cases along with those cases coming from the Federal Police are estimated to be 83,863 for that calendar year. Ali, *supra* note 88, at 43, 44,

the adoption of Attorney's Proclamation[180] the prosecution and the advisory responsibilities of the prosecution office are merged.[181] The merger of the responsibilities has a detrimental effect on the institutional independence of the prosecution office which is reflected on its efficacy of the prosecution service and the politicization of its activities in favour of the government.

The second structural problem is the relationship between the public prosecutor who handles the case and the investigating police officer. There are various duties and responsibilities vested on the public prosecutor in the Constitution, the Code, and elsewhere in other laws. The Constitution under Art 13(1) imposes the duty to respect and enforce the provisions of Chapter Three, the chapter dealing with fundamental rights and freedoms, both on state and federal executive, legislative and judicial organs. The prosecutor, as the principal organ of the executive, has this obligation; more so as the law enforcement organ of the government. The prosecution office is therefore expected to avoid unlawful activities by law enforcement agents in the investigation process, such as, unlawful arrest, interrogation and search. The prosecutor, ideally, is expected to make sure that the evidence are obtained in a lawful manner, and when she finds out that they were obtained contrary to the Constitution, she has to exclude them. It is with this in mind that the prosecutor is given the power to supervise investigation and to give directives to the investigating police officer.[182]

Recently, a liaison and support unit (*mirmera kititilna digaf sechi budin*) is created in the *lideta* office to facilitate communication with the police. This

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[180] *Attorneys Proclamation No. 74/1993* ("Proc. No. 74/1993"), Art 5 provides that "[a]ttorneys shall be accountable to the Minister [of Jusitce]."

[181] *Proclamation for the Definition of the Powers and Duties of the Executive Organ of the Federal Democratic Republic of Ethiopia No. 4/1995* ("Proc. No. 4/1995"), Art 23 (1) provides that the Ministry of Justice is the "chief advisor to the Federal Government on matters of law." Sub-article 2 also provides that it "represents the Federal Government in criminal cases falling under the jurisdiction of the Federal Courts."

[182] Furthermore, such communication increases efficiency of the operations of both the police and the prosecution office because, if there is proper supervision of the investigation by the public prosecutor, there would be little or no request on the part of the public prosecutor for further investigation. However, for lack of such supervision, the number of cases that are sent back to the investigating police officer for further investigation are significant and further (additional) investigations take long. Baseline Research Report, *supra* note 84, at 184; Ali, *supra* note 88, at 31

unit screens the police investigation report to see to it that the investigation is complete and where the public prosecutor needs further investigation to properly channel to the investigation police officer. The creation of this unit has changed the pace of case handling and investigation at the federal level.[183]

The Functional Aspect

Despite the important position it assumed in the administration of the criminal justice and its sole and principal responsibility of law enforcement, the prosecution office does not comply with many of the provisions of the law and it is less inclined to enforce them that they be complied with by the police during investigation. This is because of lack of professional independence and strained communication with law enforcement agents, among others.

i. Lack of Professional Independence of the Public Prosecutor

At least at the federal level, the structure of the public prosecutor office is a hierarchical bureaucratic structure. All prosecutors are accountable to the Minister (of Justice) but a prosecutor is also accountable to her immediate superior.[184] This bureaucratic hierarchy is also entrenched by the hierarchy of title, such as, Assistant Attorney General, Deputy Assistant Attorney General, Higher Prosecutor, Prosecutor One, Two and Three, and Candidate Prosecutor, in their respective order.[185]

There is also an important procedure of petition. Thus, where a person is not satisfied with the decision of a prosecutor, she has the right to petition to the superior of the prosecutor who has the power to "amend, suspend,

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183 Interview with Ayana Abebe and Ayele Bogale, Prosecutors at the Federal High Court and Abebe Gebremedihin and Zewdu Ayele, Prosecutors at the Federal First Instance Court (July, 2008)

184 *Federal Prosecutors Administration Council of Ministers Regulations No. 44/1998* ("Reg. No. 44/1998"), Art 10; this provision is a verbatim copy of Proc. No. 74/1993, *supra* note 180, Art 5

185 *Id.*, Art 3. Such hierarchical structure has always been there. For instance, Proclamation No. 39/1993 (*supra* note 178) had its own hierarchy. Thus, the zonal prosecutor was subordinate to the regional prosecutor who in turn was subordinate to the central prosecutor.

alter, revoke or confirm" the decision of the prosecutor against which petition is filed.[186] While this is a rational approach to accountability of each prosecutor to the public, it is taken beyond the limit that no line prosecutor decides on the merit of a case by herself without the approval of her immediate superior. It is succinctly put that "if the prosecutor decides to discontinue a case, s/he is required to send a detailed report giving the reasons for this decision and s/he must receive a signed approval from the head of prosecutors. After giving the approval not to institute proceedings, the head of the public prosecutor also sends the file to the Minister of Justice of the Head of Justice Bureau, each of whom has the authority to reverse the decision."[187] The orders of the superior prosecutor have to be complied with at the pain of sanctions.[188] Such strict and inefficient hierarchical structure added to other reasons would only encourage the prosecutor to go to prosecution for there is no explanation needed for prosecuting a weak case.[189]

ii. Lack of Proper Supervision of the Investigation Process

Police investigation involves arrest, interrogation, search and examination of witnesses and the prosecutor's supervision relates to such activities. The public prosecutor can order the discontinuance of an investigation; or she can close police investigation file. She can also refuse prosecuting a suspect where there is no sufficient evidence, among others, or can withdraw charges, though repealed lately.[190] This power of the public prosecutor is to be exercised on the continuum of the proceedings.

Crim. P. C., Art 8, the law governing the relationship between the public prosecutor and the police is, however, "obsolete" and it is even opined that this provision is repealed by disuse.[191] It is Proc. No. 4/1995, Art 34, which is invoked for the exercise of the power of the public prosecutor. Sub-article 4 provides that the Ministry of Justice[192] "instruct for investigation where it believes that a crime, falling under the jurisdiction of the Federal Courts, has

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186 Proc. No. 74/1993, *supra* note 180, Arts 9, 10

187 Baseline Study Report, *supra* note 84, at 100

188 Reg. No. 44/1998, *supra* note 184, Art 23 cum. 75 (1)(n)

189 The public prosecutor obtains very low rate of conviction. See *supra* section 2.1

190 Proc. No. 39/1993, *supra* note 178, Art 24(2)

191 Baseline Study Report, *supra* note 84, at 15

192 Note that the reference is to the Ministry of Justice (the office) not to the public prosecutor who actually does the work.

been committed; order the discontinuance of an investigation or instruct for further investigation on good cause."[193] Despite such provisions, however, the role of the public prosecutor in supervising and giving direction to the police investigation activities in the current state of affairs is minimal or "poor."[194] For some, this provision is not good enough to address the issue of power of the public prosecutor with respect to supervision of the investigation. This is because the public prosecutor had extensively listed power under the repealed proclamation for the establishment of Office of the Central Attorney General of the Transitional Government.[195] For them, the repeal of the proclamation without similar power in the subsequent Attorneys Proclamation is denial of the power.[196] Because of such 'lack of clarity in the law' and other reasons, the public prosecutor is not discharging her duties of supervision of the investigating police officer.

Ordering Further Investigation

One of the powers of the prosecutor upon receipt of the police investigation report is to order further investigation where she believes such is needed.

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193 The fate of sub-article 3 does not seem to be clear after the Federal Police is made accountable to the Ministry of Federal Affairs, *Federal Police Commission Proclamation No. 313/2005* ("Proc. No. 313/2005"), *supra* note 193, Art 4(2). Nevertheless, the question on the relationship between the Federal Police and the Public Prosecutor is far from clear.

194 Baseline Study Report, *supra* note 84, at 16

195 Proc. No. 39/1993, *supra* note 178, Art 11 provides for the power of supervision of organs of investigation: "*With respect to supervision over organs of investigation the Office of the Central Attorney General shall have the following powers and duties:*

1. *to ensure that all organs of investigation conduct their activities in accordance with the law, and to issues directives to such organs as may be necessary;*
2. *to issue instructions for investigation where it believes that a crime has been committed; to order discontinuance of an investigation or to issue instructions for further investigation on good cause;*
3. *to supervise the reporting of arrest of a person for criminal investigation to the appropriate office of the Central Attorney General within 24 hours pursuant to the manner prescribed by law;*
4. *to transfer any case from one organ of investigation or investigator to another or to carry out the investigation itself, as may be necessary; . . .*

196 Interview with Demissie Asfaw Head of the Research and Advisory Department, Ministry of Justice (September 2005)

This power is vested on her on the assumption that as soon as she is in receipt of the police investigation report she would examine it.[197] Where she finds that certain facts are not supported by evidence or that there are certain items of evidence which should be gathered, she gives order to the investigating police officer so specifying. It is stating the obvious that the public prosecutor examines the police investigation report after it is too late and the police could do very little by way of further investigation. This is exacerbated by the poor institutional arrangement. The response of the police to the public prosecutor thus "occurs only after a delay" sometimes taking as long as six months.[198] The liaison and support unit created at *lideta* may be of some help in facilitating this communication but its effectiveness is yet to be seen.

The Application of Crim. P.C., Art 42(1)(a)

Ethiopian prosecution is called compulsory prosecution; thus, the public prosecutor has no discretion. She distinguishes cases that can be prosecuted from those that cannot be either because of permanent limitations, such as, period of limitation or temporary limitations where the suspect cannot be found and the offence is one which cannot be prosecuted in absentia. However, in ideal situations, the major ground for the public prosecutor not to prosecute a suspect is where there is no sufficient evidence.[199] Although the meaning of "sufficiency of evidence" is not clear, the practice is that the public prosecutor only looks at her side of the evidence not possible exonerating evidences or possible defences of the defendant. If the prosecution has evidence that is 'sufficient' to justify conviction without looking at the possible defence, she has to go for prosecution. Defences, many prosecutors believe, are to be weighed by the judge not by the prosecution.[200] This approach is also wasting the limited public resources.

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197 The amount of case flow to the prosecution office is so huge (see *supra* note 79) that it is beyond the reviewing capacity of the office. Thus, longer period lapse before a police investigation report is reviewed by the public prosecutor. By the time the prosecutor requests for further investigation it is too late. Baseline Research Report, *supra* note 84, at 100.

198 "Besides, police do not seem to take the prosecution seriously . . . in case of request for further investigation." *Id*., at 192. Not few investigation files are closed because they are barred by limitations. *Id*., at 186; Ali, *supra* note 88, at 44

199 The law is clear that "on no other grounds" can the public prosecutor refuse to institute proceedings against the suspect. Art 42(2)

200 Demissie, *supra* note 196

Other Duties of Supervision of Legality

Arbitrary arrest is constitutionally prohibited. The Constitution further provides that persons held in custody have the right to treatments respecting their human dignity. Having regard to the "poor" and "intolerable" conditions of the places of detention[201] and with a view to enforce legality in law enforcement and protection of the rights of the suspect/accused, the public prosecutor is supposed to visit places of detention. Although some prosecutors state that they visit places of detention regularly,[202] others admit that for reasons, such as, workload and lack of transportation to such places they do not visit places of detention.[203] The fact of the matter is, at least the federal prosecutors do not visit places of detention at all.[204] Here again, the argument is the same—lack of clarity in the legislation. The repeal of those detailed provisions in Proc. No. 39/1993[205] without including equivalent provisions in the Attorneys Proclamation is revoking the public prosecutor's power.[206]

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201 Baseline Study Report, *supra* note 84, at 17, 116, 196

202 Abebe and Zewdu, *supra* note 183

203 Ayele and Ayana, *supra* note 183

204 Baseline Study Report, *supra* note 84, at 17; Ali, *supra* note 88, at 31

205 Proc. No. 39/1993, *supra* note 178, Art 12 provides that *the Office of the Central Attorney General shall have the following powers and duties with respect to the administration of prisoner and detainees:*

1. *to supervise the legality of the imprisonment or detention of the prisoner, detainees, inmates held in prisons, temporary centres of detention and correction or medical institutions, and ensure that their rights are duly respected;*
2. *to ensure that the rights of any individual under custody are respected;*
3. . . .
4. . . .
5. *to visit, at any time convenient to it, prisons or centres of detention or other places where prisoners are held;*
6. *to order the release of persons detained or imprisoned in violation of the law;*
7. *to ensure that penalties are executed and protective measures are taken in respect of prisoners in accordance with the law and prison regulations, and that prisoners are properly treated; to cause the rectification of irregularities that it may come across.*

206 Therefore it is recommended that the provisions of Proc. No. 4/1995, *supra* note 181, Art 23 be amended in order to: a) give power to supervise the legality of imprisonment and handling of inmates wherever housed; b) give pertinent legal orders and direction with respect to federal inmates; and c) order the

1.4.2.2 The Courts

The last arbiter of cases is the court. The court is the single most important organ in the administration of the criminal justice. Matters of constitutionality, powers of the public prosecutor and police misconduct would not stand in the face of an impendent, competent and impartial court. Conversely, apart from the problems of interpretation and application of constitutional provision as discussed earlier, there are many points of concern of fairness in the interpretation and application of the Code and the special laws.

The Charge is Required to be Filed within 15 Days

As part of the suspect's right to speedy trial, should the public prosecutor decides to file a charge against the suspect, Crim. P. C., Art 109 requires she does so within 15 days of the receipt of the police investigation report or the record of the preliminary inquiry. This provision does seem to be totally disregarded and sometimes the charge is filed as late as two years.[207] For the public prosecutors', the justification for failure to comply with this provision is the workload which is not a sufficient reason for violating the law. However, the courts consistently fail to enforce the law on the ground that the law is "silent" as to what the consequences of such failure are.[208] The suspect who is denied bail is virtually without a remedy.[209] However, it is a matter of common sense that when the law provides that the charge has to be filed within 15 days, it only means the charge filed after the 15 days is not a valid charge. Therefore, the person cannot be tried on the basis of such an invalid charge.[210] Automatic time limit is not a new concept nor is it limited to the period before the charge is filed. It can also govern the proceedings before the court.[211]

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immediate release of those held unlawfully. Baseline Research Report, *supra* note 84, at 26

207 *Id*., at 185, 186; Wondwossen, *supra* note 104, at 34;

208 Baseliner Research Report, *supra* note 84, at 85; Wondwossen, *supra* note 104, at 34

209 See *supra* note 142

210 Wondwosssen, *supra* note 104, at 35

211 The US Speedy Trial Act of 1974 addressed the issue of delay in the criminal process and created the concept of 'public right to speedy trial.' The Act regulates the period for investigation, prosecution and trial in absolute terms. There were complaints as to the practicality of the fixing of the period in absolute terms for the justice system which is said to operate in its own time, it soon got used to. See G.

Controlling the Judicial Process

Once the case appears before the court, whether upon charge or otherwise, the latter has full authority on the case. Thus, the court is expected to discharge its constitutional duties by being in full control of the case and the proceeding. Such control is exercised particularly by regulating the life of the case. In this regard, remand and adjournment are two important procedures of control.

Remand

Remand is strictly regulated by Crim. P. C., Arts 59 & 67(c). The Constitution also provides that remand may be granted for such period "strictly required to carry out the necessary investigation."[212] This is a good guidance as to the length and frequency of remand for investigation purposes where the court is properly following up the progress of the investigation. Thus, remand for investigation purpose is limited only to situations where the suspect is likely to tamper with evidence or interfere with witnesses, Art 67(c). However, investigation takes much longer than what is warranted by the law.[213]

Adjournment

Once the charge is filed before the court, the court based on the provisions of Crim. P. C. Arts 94 & 95 can properly limit prolonged and frequent adjournments. Despite these provisions, however, the court is granting long and frequent adjournments sometimes on grounds that are not warranted by the law.[214] Cases sometimes thus take many years to be disposed.[215]

Public Prosecutor's Appeal against Granting of Bail

The law of bail, as incorporated in the Code, grants the right to appeal to the person arrested where the court denied her bail. The lawmaker deliberately did not give such power to the public prosecutor where bail is granted to

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S. Bridges "The Speedy Trial Act of 1974: Effect on Delays in Federal Criminal Litigation" *73 J. Crim. L & C. No. 1* (1982), at 50-56

212 Art 19(4)

213 See, *supra* note 139

214 Menberetsehai, *supra* note 83, at 6; Wondwossen, *supra* note 104, at 37

215 Menberetsehai, *supra* note 83, at 9

the arrested person. In *Sgt. Mekonnen* the Federal Supreme Court Cassation Bench held that although the right to appeal against a decision of a court on bail is only when the applicant is denied bail, an interpretation by analogy is prohibited only in substantive law which harms the accused and thus we recognise such right to appeal is also granted to the public prosecutor.[216] Such right to appeal is recently incorporated in the Anti-Corruption Special Procedure but it is not a justification to expand the ambit of the law in the Code for other cases.[217]

Pre-Trial Access to Evidence

As provided for both in the Constitution and the provision of the Code and other laws, access to evidence is possible at various stages of the criminal process. For instance, the Code provides that where preliminary inquiry is conducted, a copy of the record of such proceeding should be given to the accused having the same content as one given to the public prosecutor and the one forwarded to the court having jurisdiction to hear the case.[218] This access to evidence is exercised before the public prosecutor decides whether to prosecute the suspect.

In all other cases where there is no preliminary inquiry, once a charge is filed before the court, all the records and evidences, including exhibits, are to be submitted to the court registrar.[219] The registrar receives, mark them and keep them in a safe place until trial. The content of the record that is given to the registrar includes all depositions including witness testimony and confession of the accused whether it is given to the police by virtue of Art 27 or to a court by virtue of Art 35. Furthermore, where

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216 *Amhara Regional State Justice Bureau v. Sgt. Mekonnen Negash* (Federal Supreme Court Cassation Bench, 2008) Cass. F No. 35627

217 Proc. No. 434/2005, *supra* note 97, Art 4(4) merging the contents of the provisions of Crim. P. C., Arts 28 and 67 provides for the right of appeal. However, Art 5(1) further provides that "[a]ny one aggrieved by the decision of the lower court on the issue of bail has the right of appeal in accordance with Article 4" also granting the public prosecutor the power to lodge an appeal against grants of bail. Sub-art 2 further provides that "[w]here an appeal is taken objecting the decision granting bail or the amount of bail, the decision of the lower court shall stay from being executed."

218 Art 91

219 Art 92

the public prosecutor wants to call additional witnesses, which were not originally included in the list of evidence given to the accused, she is required to give the list of those new witnesses she wants to call to the accused in writing before she calls them.[220]

Access to evidence is not introduced by the FDRE Constitution in 1995, because it has always been there since the adoption of the Criminal Procedure Code in 1961. However, the right is elevated to be a constitutional right of the accused by virtue of Art 20(4). However, it is indicated elsewhere in this essay that the Federal High Court ruled the Constitutional provision is a general guiding principle and the stage at which access to evidence is to be exercised is not clear.[221] This is only a reflection of the entrenched traditional practice that, save in corruption cases governed by a special law, the accused is not given the list of witnesses and evidence to be produced against her because of the belief that she would tamper with evidence and interfere with witnesses; and the examination of witnesses and other evidence at trial is enough access to evidence by the accused.

This argument is afflicted by a multitude of fallacies; first, there are inbuilt procedural guarantees against such possibility. It is all up to the investigating police officer to do whatever is required to preserve the evidence. This activity of the investigating police officer is assisted by the various remands granted by the court for investigation purposes. Moreover, where witnesses change their testimony, the provisions of Arts 144, 145 are there to address such issues. Second, such argument is based on the presumption of guilt. Third, it is up to the criminal justice system to afford witness protection scheme and preservation of evidence is not at the expense of the right of the accused.[222]

This practice is, however, being changed in Federal Courts recently; and the accused is being given the charge sheet along with list of evidence the

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220 Art 143

221 *Kidanemariam, et al., supra* note 136

222 In this regard, the Anti-Corruption Commission was in the lead that it drafted witness protection legislation which, from the readings of the draft, is also applicable to other criminal processes. The draft was discussed at a workshop in the Commission's Head Quarter in late 2001 and it is yet to be adopted into law.

public prosecutor intends to produce save in situations where the public prosecutor refuses to give same 'for good reason'.[223]

The Application of Crim. P.C., Art 141

Although the practice was not consistent, the application of the provisions Crim. P. C., Art 141 did not have much problem. The application was that after the prosecution evidence is completed, the court evaluates and where there is not case for the defence to answer to, the court acquits the accused. Where there is a case to answer, the court makes a reasoned decision that the defence has to enter her defence. It is a matter of fact that the overwhelming majority of defendants are not represented by counsel.[224] However, the trend in court administration reform is a matter of concern. Initially when the presidents of the regional and the federal supreme courts decided there should not be a reasoned written ruling to require the defence to enter her defence.[225] Currently, in few benches of the Federal Courts "one-day trial" is introduced. The concept of one day trial is that both the prosecution and the defence produce their evidence in single adjournment whether the hearing takes a day or two.[226]

This approach is contrary to the spirit of the provision of Art 141. In fact, in a criminal justice system like ours where there is no any form of discovery procedure, save in corruption cases, such an approach is contrary to the constitutional right of the accused to be presumed innocent because she is required to present her defence before a *prima facie* case is established by the prosecution.

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223 The usual good reason is that the accused would be intimidating witnesses and tampering with evidences. Often the court accepts such reasons; but those concerns are still not sufficient justifications to constitute 'good reason' to deny the accused access to evidence a reasonable period before the date of the hearing.

224 In the absence of state appointed counsel for the indigent, Donovan argued for the active role of the judge. See Donovan in general, *supra* note 104

225 Minutes, *supra* note 142, at 8

226 This is one of the points presented as points of consensus among court authorities. Menberetsehai, *supra* note 83, at 3-7. Those points of discussion agreement is said to have been reached on include, preliminary inquiry (Arts 80-93), first appearance, search and arrest warrants, objections as per Arts 130, 131, oral rulings of the court as per Art 141, final address (Art 148), direct and indirect knowledge of witnesses (by way of promoting admissibility of hearsay, Art 137), and the filing of charge (Art 109), among others. Minutes, *supra* note 142

Chapter 2

Setting Justice in Motion

Introduction

The justice machinery is always in motion; setting justice in motion, thus appears to be a misnomer. It rather means making the justice machinery work in respect of a particular alleged offence. The igniting bullet for the justice machinery start operating in respect of a particular offence is receipt of information by the police (or person with the power to investigate) about the alleged offence. Such information may be obtained through *accusation*, *complaint* or personal *observation*, each of which is operating in different circumstances. In the normal course of things, information may be communicated to the police by a complainant either in the form of accusation or complaint. Accusation/complaint is a formal statement made by a complainant to the police, a public prosecutor or a person having the authority to investigate that particular offence with a view to criminal proceedings being instituted. Initiation of a case by accusation is the rule and it may be made by any interested citizen against any alleged offender in respect of offences that are punishable without complaint. In some cases, however, the lodging of accusation turns out to be an obligation in respect of few serious offences. On the other hand, there are offences that are basically private nature in respect of which complaint of the victim or the person claiming under her is necessary for the initiation of the criminal proceedings. Without such complaint no investigation may commence nor may the offender be tried and convicted for such offence.

In flagrant offences, however, investigation commences with the arrest of the alleged offender provided the offence is punishable without

complaint. All the three cases/ modes have the same legal purpose or consequence—initiation of criminal proceedings. Thus, once information is communicated to the police the latter starts the investigation.

2.1 Accusation

Art. 11.—Accusation in general.

> *(1) Any person has the right to report any offence, whether or not he has witnessed the commission of the offence, with a view to criminal proceedings being instituted.*
> *(2) There shall be a duty to report in the cases provided in Art. 267, 344 and 438 Penal Code.*[227]

The purpose of criminal law, as provided for under "Crim. C.", Art 1, is "to ensure order, peace and the security of the State, its peoples, and inhabitants for the public good." This is done "by giving due notice of the crimes and penalties prescribed by law" and where such notice is not heeded the criminal law provides "for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others, or by providing for their reform and measures to prevent the commissions of further crimes." Thus, offences are prosecuted by the public prosecutor in the name and on behalf of the public.[228]

This objective of the criminal law can only be achieved if information is communicated to the police with a view to undertaking investigation of the offence and prosecution of the offender. Accusation is a widely used form of communication of information to the police. As a member of the public, any individual can legitimately claim to have been affected by an offence that is predominantly public in nature[229] because it goes beyond

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227 Those Articles of the Penal Code of 1957, referred to in the Criminal Procedure Code are replaced by equivalent provisions of Crim. C., Arts 254, 335 and 443. The content of the provision of Art 11(2) are not repealed by implication as only the substantive provisions are replaced. Thus those provisions of the Criminal Code are to be read as substituted.

228 P. Graven (1965) "Prosecuting Criminal Offences Punishable only upon Private Complaint" *II JEL No. 1* at 121

229 Pen. C., Art 217 uses the clause "predominantly private nature" describing those complaint offences. It is in the nature of those offences and a matter of *a contrario* understanding that non-complaint offenses are predominantly public nature.

the individual victim affecting the peace and security of the state or its inhabitants. Thus, each member of the public is given the right to lodge an accusation against a suspect. The term "accusation" is not defined in the Criminal Procedure Code; however, it is information communicated to the police concerning an offence which is a predominantly pubic nature. There are few important points to be noted: first, the person making the accusation does not have to witness the commission of the offence. If she obtained the information from a credible source that an offence has been committed, then she has the right to lodge the accusation as a member of the public. Second, she lodges the accusation not for any other reason than with a view to criminal proceedings being instituted against the suspect. The requirement that the accusation be made with a view to criminal proceedings being instituted appears only to be a caution against false accusation and defamation. Otherwise, in light of the provisions under Art 23 the police have the obligation of to undertake investigations despite the accusation received is open to doubt and the individual's view is not material for the commencement of investigation.

Lodging an accusation to the police is a right. Thus, Art 39(1), Crim. C., provides that "[f]ailure to report preparation, attempt or commission of a crime or of the person who committed the crime" does not constitute an offence and does not entail the liability of the person who so failed. However, communication of information to the police in few exceptional circumstances is an obligation either because of the seriousness of the offence or the nature of the profession. Thus, in three conditions reporting an offence is an obligation. First, with respect to ordinary crimes, Art 443 Crim. C provided that:

> *(1) whosoever, without good cause:*
>
> *a) knowing the commission of, or the identity of the perpetrator of, a crime punishable with death or rigorous imprisonment for life, fails to report such things to the competent authorities; or*
> *b) is by law or by the rules of his profession, obliged to notify the competent authorities in the interest of public security or public order, of certain crimes or certain grave facts, does not do so,*
>
> *is punishable with fine not exceeding one thousand Birr, or simple imprisonment not exceeding six months.*

As an exception to the rule, thus, Crim. C., Art 39(3) further provides that the obligations to report under Crim. C., Art 443 "are to be construed in a restricted manner."

Second, the provisions of Crim. C., Art 254 cover two categories of offences in respect of which reporting of the commission of the crime are an obligation. The first category includes Crim. C., Arts 241-246[230] while the second category includes Crim. C., Arts 252-258.[231] In such cases, the failure to report the commission of a crime or identity of the offender entails rigorous imprisonment not exceeding five years and when it was 'committed' in time of internal or external emergency, it entails rigorous imprisonment not exceeding ten years. The third category of offences in respect of which reporting the crime is a duty, as provided for under Crim. C., Art 335 is mutiny or desertion. Failure to report such offences entails simple imprisonment and where the offence is at least attempted, it is punishable with rigorous imprisonment not exceeding three years.

2.2 Complaint

Art. 13.—Offences punishable on complaint.

In the case of offences which under the law may be prosecuted and punished only upon a formal complaint by the injured party or those deriving rights from him, the provisions of Art. 217-222 and 721 Penal Code shall apply.

The rule is that "prosecution with a view to a judgment and the enforcement of the penalty is a public proceeding and is instituted by the [pubic prosecutor] in all cases where the law does not provide expressly otherwise."[232] As an exception to the rule, however, the law in a restrictive manner provides that certain offences are punishable only upon compliant.[233] Not all offences are, however, public nature and thus, not all offences do give the right to

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230 The first category includes Attack on the Political and the Territorial Integrity of the State, Crim. C., Art 241; Violation of Territorial or Political Sovereignty, Crim. C., Art 242; Unlawful Departure, Entry or Residence, Crim. C., Art 234; Attacks against the State and National and Other Emblems, Crim. C., Art 244; Unlawful Use of Official Emblems, Crim. C., Art 245; and Attacks on the Independence of the State, Crim. C., Art 246.

231 The second category includes Espionage, Crim. C., Art 252; Protection Extended to Allied Powers, Crim. C., Art 253; Indirect Aid and Encouragement, Crim. C., Art 254; Attempted Incitement and Assistance Crim. C., Art 255; Material Preparation of Subversive Acts, Crim. C., Art 256; Provocation and Preparation, Crim. C., Art 257; and its aggravation, Crim. C., Art 258.

232 Pen. C., Art 216

233 *Id.* Art 217

lodge an accusation to everyone. Some are "predominantly private nature"[234] that does not jeopardize the peace, order and security of the state and its inhabitants going beyond the interests of the private victim. Those offences are called "complaint offences" because they cannot be prosecuted without the compliant of the private victim or persons claiming under her. Once such complaint is filed, however, the government is under the obligation to institute criminal charges "as custodian of [her] rights for the purpose of prosecution and punishment insofar as this is possible."[235]

What the law provides for is, absent such complaint, neither the public prosecutor prosecute the suspect nor the court try the case. It does not, however, provide for whether the police could investigate into the matter. It is a matter of rationality that if the public prosecutor cannot prosecute the police need not waste public resources. Particularly, with respect to flagrant offences, if the police cannot make arrest without warrant in complaint offences, it means, the police cannot undertake investigation in such cases for various reasons one of which is it is contrary to the basic notion of complaint offences.[236]

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234 *Id.* Art 217. The discussion in this section seems to be shady in that it relies on a repealed law. During the revision process, the Drafting Committees of the Criminal Code and the Criminal Procedure Code discussed and agreed that all provisions relating to procedure are to be included in the Criminal Procedure Code and those relating to substance are to be included in the substantive Criminal Code. Thus, the provisions of Arts 217-222 of the Penal Code were excluded from the Criminal Code with a view that the two codes (the Criminal Code and the Criminal Procedure Code) would simultaneously be promulgated. The provisions of the Penal Code are included in the draft of the Criminal Procedure Code without any major modification. The Criminal Code is promulgated while the Draft Criminal Procedure Code is not. Should the Draft Criminal Procedure Code be adopted any time, it is the belief of this writer that, it would contain the same provisions. This discussion is thus made based on the Penal Code which is still widely available than the Draft Code of Criminal Procedure.

235 Graven, *supra* note 228, at 121

236 Graven states that "[f]irstly, it is debatable as to whether the words "in such cases" appearing in Sub-Article (2) are meant to refer to all cases of flagrant and quasi-flagrant offences or only to those where proceedings may be instituted without an accusation or complaint being made, i.e., all cases where the offence is not punishable on complaint (*stricto sensu*). Secondly, when a flagrant offence is committed, justice is set in motion by the mere fact of the arrest; to allow an arrest without a warrant when the offence is punishable on compliant would be

Thus, complaint in the strict sense of the term is a formal request made by the aggrieved person or a person claiming under her. It is not mere information communicated to the police or to the public prosecutor. It is an affirmative authorization and a precondition enabling the police and the prosecutor to conduct investigation and to bring a charge against the offender and to try the offence and pronounce judgment for the court. Unlike accusation, where the police have the duty to investigate despite the accusation they received is open to doubt, in complaint offences the investigating police officer cannot investigate into the matter even when she is certain that a crime has been committed unless she has a complaint complying with the formal requirements. This is because the public interest at stake is not more important than the interest of the individual victim. Thus, the choice between prosecution and maintaining the relationship with the offender or secrecy of the matter is left to the victim.

Again, if such offence is committed along with other offences, which is punishable without complaint, "the prosecutor, in the absence of complaint may prosecute only for the latter offence. He may not disclose that another offence has been committed, nor may the court increase the sentence on the ground of concurrence of offences as though the accused had also been charged with, and found guilty of, the offence punishable on complaint."[237] As the difference between complaint and non-complaint offence is only with respect to setting justice in motion, once complaint is made, the procedure regarding the investigation, prosecution and trial of the offence is the same in both categories of offences.

Those compliant offences, as exceptions to this rule of non-compliant offences are provided for in the Special Part of the Criminal Code. Thus, those provisions in the Special Part of the Criminal Code are phrased in such a manner that is understandable only from the reading of the provisions as they contain the clauses " . . . is punishable up on complaint with . . ." or

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inconsistent with the principle that it is for the injured party to set justice in motion. Thirdly, one of the purposes of an arrest without a warrant in flagrant cases is to prevent public order from being disturbed or further disturbed; yet, he who is about to commit or is committing an offence punishable on complaint does not disturb public order. Finally, to permit an arrest without a warrant when the flagrant or quasi-flagrant offence is punishable on complaint would as often as not result in defeating one of the main purposes of the complaint, that is, to avoid the scandal when the injured party does not want certain things known." *Id*., at 122-23

[237] *Id*., at 122 footnote 5

" . . . proceedings shall be instituted only upon complaint by the injured party . . ." etc. For instance, Breaches of Professional Secrecy (Art 399), Common Wilful Injury (Art 556), Assaults (Art 560), Intimidation (Art 580), Threat of Accusation or Disgrace (Art 581), Deprivation of Powers of Decision (Art 583), Violation of the Right to Freedom of Work (Art 603), Defamation and Calumny (Art 613), Insulting Behaviour and Outrage (Art 615), and Adultery (Art 652) are complaint offences.

In order to lodge a complaint the victim must be at least eighteen years of age if she is responsible. However, if she does not have legal capacity the right to lodge complaint may be exercised by her legal representative.[238] Unlike non-complaint offences where there is a very long period for prosecution the right to lodge a complaint has a shorter period to be exercised; the compliant has to be lodged in three months time from the day on which the injured person (or her legal representative) knows of the criminal act or the offence.[239] Unless she can show that she was materially incapacitated from acting, once this period lapses the victim is deemed to have renounced the right and it can no longer be entertained. Where she was materially incapacitated, however, the period may be reckoned from the day on which the incapacity ceased to exist.[240]

As it is the discretion of the victim to lodge a complaint, it is also her discretion to withdraw the same. Such withdrawal, which is to be filed in writing, can be made at any stage of the proceedings before judgment and is final.[241] Such withdrawal of compliant is indivisible and if there is more than one suspect, the withdrawal in respect of any of them benefits all others. However, a suspect can also insist she be tried.[242]

2.3 Other Requirements

Art. 12.—Anonymous accusations.

Anonymous accusations which disclose serious breaches of the law and are on the face of them circumstantial and credible shall be investigated by the competent police authorities in the manner prescribed by Art. 22 et seq. with a view to ascertaining the truth or otherwise of the accusation.

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238 Pen. C., Art 218

239 *Id.*, Art 220

240 *Id.*

241 *Id.*, Art 221

242 *Id.*, Art 222

Art. 15.—Accusation or complaint against an unknown offender.

Where the offender cannot be identified because he is unknown to the person making the accusation or complaint, such person shall furnish such details as are known to him with a view to establishing the identity of the offender.

Individuals may not be willing to appear before the police and to undergo a lot of hassle simply because they report a crime; they prefer not to identify themselves but would want to assist the victim or the administration of justice. As can be read from the provisions of Art 12, there could be anonymous accusations. Where such accusation reveals serious breaches of law, the police have the obligation to investigate into the matter to ascertain whether the accusation is true. The law further gives the impression that the accusations (or such breaches of law) on their face have to be circumstantial and credible in order for the police to proceed with investigation of such anonymous accusation.

On the other hand, the accusation or compliant made is against a person unknown to the person making the accusation or compliant. Certainly, premeditated offences are committed in secret and it is difficult to trace offenders at least in the majority of cases. The whole purpose of investigation is to manifest the truth, one of which is to establish the identity of the offender. Thus, lack of knowledge of the offender is no bar to lodging an accusation or compliant. The complainant, however, has to give such details about the offender that are known to her with a view to enabling the police establish the identity of the offender.

By the same extension, it is possible that an anonymous accusation may be made against an unknown offender. Suppose a person who did not tell who she is, called the police and reported that a crime of murder is committed at a particular place, the offender of which she does not know. According to the information the police went to the said place and found the corpse. Insofar as the police knew of the commission of an offence, the investigating police officer does not have reason to refuse commencing investigation. But do the police have to go to the scene in the first place? See Art 22.

Art. 14.—Form of accusation or complaint.

(1) Any accusation (Art. 11) or complaint (Art. 13) shall be reduced to writing by the person to whom it is made and when completed shall be read over to the complainant who shall sign and date it.

(2) Where an accusation or complaint is made by more than one person (Art. 219 Penal Code), all such persons shall sign it.

With respect to formality, the law is clear that it requires the accusation/complaint is reduced into writing by the person (the police, the public prosecutor or any other person or authority as has been envisaged under Art 16) to whom the accusation is made. It shall be read over to the person who is making the accusation/compliant who is required to sign and date it. If the accusation/complaint is made by more than one individual, it is to be signed by all of them. The practice is, however, different that the complainant write her compliant and submit to the chief investigator who first determines whether the complaint actually concerns a criminal offence and if so, she assigns to an investigating police officer.[243] It is only after such assignment that the investigating police officer records the statements of the complainant. Recently, the Addis Ababa Police made certain changes in order to make the practice conform to the law. Thus, there are various printed forms one of which is for taking statements of the complainant are taken without such requirement of written petition. It is hoped the state police practice will follow suit.

The law is not clear as to what the consequence is, should the person making the accusation/compliant refuses to sign and date it. Art 12 provides that where anonymous accusations are made which disclose serious breaches of the law and are on the face of them circumstantial and credible, the competent authority conducts investigation as in any other ordinary accusation pursuant to Arts 22 et seq. This, however, is in reference to accusations where the informant is not known. How about when the person making the accusation is known but refuses to sign the accusation? "Those formalities, which are in the nature of information, are not, in such a case, an essential condition but merely the occasion setting in motion the public prosecution."[244] Insofar as the information is communicated to the police with a view to criminal proceedings being instituted against the offender, and that the accusations are on their face credible, formality is no bar to investigation.

However, the formality is strictly important in complaint offences because the compliant is authorization to the police to undertaken the investigation, for the public prosecutor to conduct prosecution and for the court to enter

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243 Some contend that this is because of shortage of resources at the disposal of the police. However, there is no indication that the law has been complied with before.

244 Pen. C., Art 216

judgment, without which each of them do not have the power to do so. Unlike accusation, where the complainant may refuses to sign, it means she does not want the case to proceed.

Art. 16.—Authority competent for receiving accusation or complaint.

(1) Any accusation (Art. 11) or complaint (Art. 13) may be made to the police or the public prosecutor. An accusation or complaint regarding a young person shall be made in accordance with Art. 172.
(2) Where it is made to the public prosecutor, the prosecutor shall forward it to the competent police officer with a view to an investigation being made under Art. 22 et seq.

Art. 17.—Accusation or complaint addressed to wrong authority.

Where an accusation or complaint is made to a person or authority other than the police or the public prosecutor or to a police authority or a prosecutor having no jurisdiction, such person, authority or prosecutor shall without delay forward the accusation or complaint to the appropriate police authority or public prosecutor.

Art. 18.—False accusation or complaint.

Whosoever makes a false accusation or false complaint shall be liable to the punishments laid down in Art. 441 and 580 Penal Code.[245]

Art 16(1) provides that it is both the police and the public prosecutor that are competent to receive accusations and complaints by any person or victim, respectively, with a view to criminal proceedings being instituted. However, as it is the investigating police officer that undertakes the investigation in the normal course of things, where the public prosecutor receives an accusation or a complaint she forwards it to the former with a view to investigation being undertaken as per the provisions of the Constitution, the Criminal Procedure Code and other relevant legislations.[246]

Where an accusation or a complaint is made to a person or authority other than a police officer or a public prosecutor, or, to a police officer or

[245] The provisions of Pen. C., Arts 441 and 580 are replaced with that of Crim. C., Arts 447 and 613

[246] For investigation by other organs, see Section 3.1

a prosecutor having no jurisdiction, either by mistake, ignorance or other reason, of the complainant, such authority, police or prosecutor to whom the accusation or the complaint was made, forwards such accusation or complaint to the appropriate police officer or public prosecutor without delay.

The last Article of this section, Art 18, provides for false accusation. Whoever makes a false accusation or a false complaint shall be liable to the punishment laid down under Crim. C., Arts 447 and 613.

A person, who claims to have seen, heard about or suffered from the commission of the crime, have the right to lodge an accusation or a complaint. Based on such complaint investigation is conducted. The result of the investigation might show that the suspect against whom the complaint/accusation is lodged has not committed the crime. Even if it passed the first hurdle, the court might find the accused to be not guilty. Does it mean that the complainant is criminally liable under Crim. C., Arts 447 and 613? Accusations may be lodged with a view criminal proceedings being instituted and the criminal law is enforced. She may be liable for false accusation where she made the accusation knowing that the person is innocent or in any other way especially by feigning a crime of making an anonymous accusation with the objective to cause such proceeding to be instituted against such innocent person,[247] or with intent to defame such person, even when the accusation is true, if she did it with intent to injure such person. [248] These provisions are meant to protect individuals from false legal wrangling and not to waste public resources based on false accusation only. False accusation, therefore, does not include innocent mistake.

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[247] *Whosoever:*

(a) denounces to the authorities as the perpetrator of a crime a person he knows to be innocent; or

(b) has in any other way, especially by feigning a crime or making an anonymous or inaccurate denunciation, intrigued with the object of causing such proceedings to be taken against an innocent person,

is punishable with rigorous imprisonment not exceeding five years and fine. However, where the false denunciation or accusation has resulted in more sever punishment he himself shall be sentenced to the punishment which he has caused to be wrongly inflicted upon the innocent person. Crim. C., Art 447,

[248] *Id.*, Art 613

2.4 Flagrant Offences

Art. 21.—Effect as regards setting in motion of proceedings or arrest.

(1) In the case of offences as defined in Art. 19 and 20, proceedings may be instituted without an accusation or complaint being lodged, unless the offence cannot be prosecuted except upon a formal complaint.

When flagrant offences are committed, the person is apprehended and justice is set in motion upon the arrest of the person without the need for accusation. Where, however, the offence is a complaint offence, the person cannot be arrested without such complaint nor can the case be investigated. (See Arrest Without Warrant for Flagrant Offences, Section 4.4 *infra*.)

CRIME INVESTIGATION

Introduction

Crime investigation is a fact-finding process in a criminal case. It is undertaken by the police and sometimes by the public prosecutor. It involves various activities mainly arrest and interrogation of a suspect, search of promises and containers, and examination of witnesses. Each of these activities has implications on the rights of the suspect or the arrestee, such as, on her right to liberty, to privacy, to physical integrity, or on her privilege against self-incrimination. Investigation is therefore the initial process conducted by balancing those apparently conflicting interests of manifestation of the truth for the proper administration of the criminal justice and that of individual dignity. In order to undertake the balancing decision dispassionately, the law ideally expects investigations to be judicially supervised. Despite the fact that it is not expressly provided for, the public prosecutor also has the supervising authority over the investigation.

As the major part of the criminal process, this Part deals exclusively with investigation. In order to give perspective to police investigation, investigation by other organs of government and the reasons for focusing much on investigation are included. Further, each of the investigation activities—arrest, search, examination of witnesses, interrogation—deserves a chapter. However, in order to make good impression of the investigation process in an orderly manner, first, the duty of the police to investigate crimes, examination of witnesses and search and seizer are discussed together as pre-arrest activities in Chapter 3. Chapter 4 deals with arrest.

Arrest is made on summons, on court warrant and without warrant—each discussed under a separate section with diverse points of debate that are raised under each category. Having regard to the evidentiary importance attached to confessions by the court, and the serious problems that exists during the recording of confession, both by the police and the

court, interrogation and confessions are discussed under a separate chapter—Chapter 5.

The emphasis in this material, as it is in any other discussions on criminal procedure, is on investigation. That is because the balancing activities of the police are very much challenging and often happens to be encroachments to the rights of the suspect. Therefore, the last chapter in this Part, Chapter 6, deals with the legal remedies to breaches of the rights of suspects and the accused during investigation.

Chapter 3

Police Duty to Investigate, Examination of Witnesses, and, Search and Seizure

3.1 Investigation by Other Government Organs

Investigation is a fact-finding process. This process of fact finding is undertaken in all areas where the government has regulatory power or where there is a public interest. Therefore, with respect to the protection of various public interests there are various bodies undertaking the respective investigations.

The House of Peoples' Representatives for instance had established *ad hoc* fact-finding commissions for two incidents that took place in Gambela and Addis Ababa.[249] Such matters are better suited to the discussion of human rights and criminal law.

The various investigative entities are rather part of the executive bodies. For instance, the public health inspectors are appointed as within the Public Health Authority as per the *Public Health Proclamation*.[250] Such public health inspector has the power, among others, to "to enter and

[249] See *An Inquire Commission to Investigate the Conflict Occurred in Gambela Regional State on December 13, 2003 Proclamation No. 398/2004* and *An Inquiry Commission to Investigate the Disorder Occurred in Addis Ababa and in Some Parts of the Country Proclamation No. 478/2005*.

[250] *Public Health Proclamation No. 200/2000* ("Proc. No. 200/2000"), Art 6

inspect any premise which he has sufficient reason to believe that there exists a situation endangering public health," "to appropriate any article or material which is the result of any act committed contrary to law or used for the commission of the illegal act or has any connection with the commission of the illegal act," "to take, where necessary, samples of articles, materials or goods from any premise or building, or any sample of air from within the premise or from the compound" and "to request any information from any person which she believes can give any information relevant for his investigation."[251]

In order to facilitate her investigation, the public health inspector can request for the assistance of the police if she has "reason to believe that there exists a situation obstructing the execution of [her] responsibility."[252] Once investigation is completed and if the inspector is convinced that there is a wrongful criminal act committed against public health, she can forward the result of her investigation to the public prosecutor for criminal prosecution.[253]

Likewise, the customs police are assigned by the Federal Police for the enforcement of customs regulations that are administered by the Customs Authority.[254] A customs police officer is granted the power to "seize goods and detain persons moving in contravention of customs or any other laws that are enforced by the Authority"[255]and "to investigate customs offences."[256] In undertaking such investigation, the customs police officer has "the powers and duties vested to [sic] regular police force in the criminal procedure code."[257] Customs police officers can also use "reasonable force to stop and detain any person who overruns customs stations, or transport goods out of customs transit routes to evade prohibition, restrictions or duties on the goods" and "to detain any person

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251 *Id.*, Art 7(1)(3)(5)(9)

252 *Id.*, Art 7(2)(a)

253 *Id.*, Art 7(10)

254 *Re-Establishment and Modernization of Customs Authority Proclamation No. 60/1997* ("Proc. No. 60/1997"), Art 2(27)

255 *Id.*, Art 59(1)

256 *Id.*, Art 59(3), 61(1)

257 *Id.*, Art 59(3). Although the customs police is under the direction and supervision of Customs Authority, it "maintain professional and operational co-operation with federal police" on the basis of the Federal Police Proclamation" *Id.* Art 8(2)(c) and 59(4), respectively.

who obstruct customs officer while searching in the discharge of his responsibilities, and carry out the necessary search."[258] The customs police officer has also the power to "search, seize and detain goods, means of transport or persons found in contravention of Customs laws where there is no Customs officers (sic)."[259]

Once investigation is completed, the customs police officer forwards "the investigation report to the customs prosecutor or in serious cases to the Attorney General."[260] The Customs prosecutor institutes "criminal proceedings, in accordance with the criminal procedure code, in the court having jurisdiction."[261] Customs offences are prosecuted by the customs prosecutor who, for all intents and purposes, can be considered part of the Ministry of Justice as she is discharging her responsibilities "under the strict supervision and follow-up of the Attorney General."[262]

The third important investigation entity is the Public Procurement Agency ("the Agency").[263] It is true that government procurement of goods and services is one of the largest government expenditures. With respect to government procurement activities the Agency has the *power to:*

1) *require any information, document, records and reports in respect of any aspect of the public procurement process where a breach, wrongdoing, mismanagement or collusion has been alleged, reported or proven against any procuring entity or supplier;*
2) *summon witnesses, call for the production of books of accounts, plans, documents and examine witnesses and parties concerned on oath;*
3) *cause or undertake investigation and conduct procurement contract and performance audits;*
4) *cause to be inspected by procurement transaction to ensure compliance with a bid award by a procuring entity;*
5) *act upon complaints by procuring entities, suppliers and any other entity or person in respect of any party to the procurement activity*

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258 *Id.*, Art 60

259 *Re-Establishment and Modernization of Customs Authority (Amendment) Proclamation No. 368/2003* ("Proc. No. 368/2003"), Art 60(3)

260 Proc. No. 60/1997, *supra* note 254, Arts 61(1), 59(2)

261 Proc. No. 368/2003, *supra* note 259, Art 60(3)

262 Proc. No. 60/1997, *supra* note 254, Art 61(3)

263 *Determining Procedures of Public Procurement and Establishing its Supervisory Agency Proclamation No. 430/2005* ("Proc. No. 430/2005")

> *in accordance with the procedure set out in Chapter VIII of* [the government procurement] *Proclamation.*[264]

Where the investigation of the Agency reveals the violation of the government procurement rules, the latter forward its investigation report to the Ministry of Justice for prosecution. However, where such violation is a result of corrupt practice the most appropriate organ to forward the investigation result is to the Federal Ethics and Anti-Corruption Commission ("the *Anti-Corruption Commission*"). A glance of the convictions obtained by the Anti-Corruption Commission indicates that, at least some public officials are tainted by such criminal wrongful actions in government procurement. For an onlooker the Agency appears to be the professional arm of the Anti-Corruption Commission although it is established as an independent state organ.

In the same vain the Anti-Corruption Commission is established both to investigate and prosecute crimes of corruption.[265] With respect to the investigation and prosecution of those offences, the Commission has the powers vested on the police and the public prosecutor.[266] Thus, the Commission can arrest suspects, conduct search, interrogation and examination of witnesses. In fact, the Commission has even more power: it has the power to order the interception of communications[267] and affords witness protection.[268] The Commission may also delegate this investigation and prosecutor power to other organs except with respect to 'grand offences'.[269] In actual facts, be it on delegation or otherwise, many of the investigative activities are undertaken by the police.[270]

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264 *Id.*, Art 12

265 *Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation No. 433/2005* ("Proc. No. 433/2005"), Art 7(3)(4)

266 *Id.,* Art 23

267 Proc. No. 434/2005, *supra* note 97, Art 46.

268 Proc. No. 433/2005, *supra* note 265, Art 7(8)

269 *Id.*, Arts 8, 9; for the characterisation of 'grand offences' see Arts 7(4)

270 The examination of the complaints of those who were charged with and convicted for the crime of corruption, for example, defendants in the matter of *Tamirat, et al.*, complained against alleged ill-treatment by the police during interrogation. This indicates that, despite the fact that the prosecutor in the Anti-Corruption Commission has the power to investigate corruption offences, corruption cases are also being investigated by the police. *Tamirat, et al., supra* note 76

Unlike other organs of the government whose principal responsibility is regulatory, the customs police and customs prosecutors as well as the Anti-Corruption Commission can be considered part of the mainstream criminal process, albeit, they are focusing on specific offences.[271]

3.2 Police Investigation

This Part, dealing with investigation, is the larges part of this material because there is a greater emphasis on investigation; this is because of the nature of law—constitutional criminal procedure. Almost in all criminal justice systems, there is a serious focus on investigation be it in the common law or the civil law tradition.[272] In modern criminal procedure, in all legal systems, there is a greater emphasis on investigation; in our case, this Part emphasizes on investigation for the following reasons.

First, investigation involves a wide range of activities by the person conducting the investigation. Such person, conducting the investigation, in the normal course of events is the investigating police officer, and exceptionally the public prosecutor particularly so in our system. The investigating police officer have *extensive* power, in our criminal process—the power to arrest, to interrogate suspects, to search and seize items it deems necessary for evidence, to examine witnesses, to take fingerprints and blood samples,

[271] The reference to the 'individuals' officer in the Customs cases and to the 'Commission' in corruption cases is only based on the references used in the respective Proclamations. In the case of Anti-Corruption Commission the powers are given to the Commission not to its officers while in the Customs Authority, the power is given to the individual customs police officer.

[272] Investigation is exceptionally rigorous in the civil law legal systems. For instance, in the French system, the investigation is conducted so meticulously that the *dossier* is the 'encyclopaedia' of that particular offence. See, for instance, Pugh, supra note 272, (1960) "ADMINISTRATION OF CRIMINAL JUSTICE IN FRANCE: AN INTRODUCTORY ANALYSIS" *XXIII Louisiana L. Rev No. 1*; G. L. Kock (1960) "CRIMINAL PROCEEDINGS IN FRANCE" *9 Am. J. Com. L. No. 2*; B. McKillop (1997) "Anatomy of a French Murder Case" *45 Am. J. Com. L. No. 3*. In the common law system, although the emphasis appears to be on the trial, investigation is closely supervised both by the public prosecutor and the court. Any inappropriate act during investigation is a point of challenge to the prosecution during the trial. See, for instance, Meares, *supra* note 68; G. C. Thomas III (2005) "The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence" *3 Ohio State J. Crim. L.*

etc., in order to obtain evidence whether it is incriminatory or exculpatory, although the emphasis seems to be on the former. Police power is susceptible to abuse and is more often abused than not; there is little room for the person confronted with the justice system to challenge police action either because of illiteracy, or poverty. The level of development of our criminal justice system is measured by how far police power is limited constitutionally and legally. This limitation is not just normative statements in the letters of the law, but it needs to be sanctioned and judicially enforceable entitling the victims a remedy.

Second, investigations are focused on manifestation of the 'truth'. Truth is not, however, the overriding value of the criminal process—there are other values as provided for in the Constitution. Such investigative activities at times happen to be serious government encroachments on the rights of the individual on her freedom, such as, on her right to liberty, to privacy, to integrity of her person, to be humanely treated, to her privilege against self-incrimination, each of which is a core of the dignity of the person. Not all of these rights are absolute at all times; but their restriction has to be balanced by a legitimate "pubic interest."[273] It is the process of balancing these conflicting interests which is challenging in our criminal process.

Third, unlike the substantive criminal law, the procedure is more process-focused and less end-focused. Thus, where investigation is not conducted properly, it taints the outcome. Where a suspect is ill-treated, intimidated or promised something in return for the information, certainly the judgment of the suspect is vitiated; therefore, whatever she says is not reliable. But in the final event, it is very likely that she would be convicted on the basis of her admission. There is no empirical research conducted

[273] The content of the notion 'public interest', as an aspect of government power and a concession on justice, has never been clear. It is subject to abuse as it is insusceptible to any definition or standard. In this text, it is used very broadly to include the rights of the suspect as an aspect of public interest. The rights of the suspect are treated as public interest for two reasons. It is the value of the public to pursue a constitutional order where the individual is respected. The other approach is that, where the government is exercising power and where the rights of a suspect are violated, the government is becoming a threat to the public in the sense that there is no guarantee that the rights of other citizens may be violated in the same way. Violation of the rights of individual becomes a major public interest issue because uncontrolled government is more dangerous than an individual suspect.

but, people have been following up certain pattern and they came to the conclusion that, the earlier a suspect gets a lawyer the higher likelihood of her release is. Where the investigation is conducted properly, there is high number of relatively faire outcome.

Fourth, what makes the Ethiopian investigation system much more a matter of concern, particularly in respect of serious offences, is that the suspect does not have a post-arrest pre-trial procedure to require the public prosecutor to produce evidence that there is a justifiable ground to detain her further.[274] In order to reduce unreliable and unacceptable outcome of the process because of legal gap, the investigation needs to be handled carefully and professionally.

These are issues that are provided for both in the FDRE Constitution and other legislations. The police have the obligation to investigate a crime even where the allegation is "open to doubt." On the other hand, the police have other constitutional duties as provided for both in the Constitution and the police proclamation. The Constitution under Art 13 (1) provides that "[a]ll Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to *respect* and *enforce* the provisions" of Chapter Three, the chapter that deals with fundamental rights and freedoms [emphasis added]. The police, as part of the executive organ, both on federal and state levels, have therefore the obligation to *respect* and *enforce* those provisions. The Federal Police Commission Proclamation requires the police to be "faithful to the constitution" and to "ensure the observance of human and democratic rights."[275] The Proclamation has two important specific provisions. First, it requires a police officer "to perform his activities in accordance with the criminal procedure code and other relevant laws by fully observing human and democratic rights ensured in the constitution."[276] Second, it prohibits "[a]ny inhuman or degrading treatment or act."[277] In fact, one of the criteria for recruitment of a police officer is faithfulness to the Constitution.[278] Those provisions are also included in the Regulations establishing the Addis Ababa Police Commission.[279]

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274 Fisher (1966b), *supra* note 55, at 467, 468

275 Proc. No. 313/2003, *supra* note 193, Preamble, Para 1.

276 *Id*., Art 20(1)

277 *Id*., Art 27

278 *Id.,* Art 15

279 *Addis Ababa City Police Commission Establishment Council of Ministers Regulation No. 96/2003* ("Reg. No. 96/2003") Art 14 provides that "the provision stated under

This indicates to the police that it is a major actor in the balancing process of those two often competing values—the adjudication objective of truth and the constitutional value of fairness. The question is whether the police are actually balancing a public interest against a private interest, or one public interest against another. It certainly is a public interest to protect the rights of individuals from arbitrary arrest, torture and inhuman treatment as much as it is the interest of the public to be protected against (sometimes unknown) "criminals." However, it is not clear how far the police are competent to make such balancing decisions. It is thus imperative to subject police actions to prosecutors' and judges' supervision. The manner and extent of such supervision sanctioned by the law and it does not depend on the good will of the supervising organ.

3.2.1 Police Structure and Jurisdiction

After the establishment of the federal form of government, police has taken the federal structure. In fact, Federal Police was properly organised by Federal Commission Proclamation No. 207/2000. It is restructured by Federal Police Commission Proclamation No. 313/2003.[280] Addis Ababa and Dire Dawa are federal cities and thus, both Addis Ababa and Dire Dawa have their own police envisaged both in the Federal Police Commission Proclamation[281] and the respective Cities' Charters[282] that are accountable to the Federal Police.[283]

The Federal Police Commission has jurisdiction to prevent and investigate crimes that fall under the jurisdiction of the Federal Courts.[284] This Proclamation is drafted based on the understanding that only those that are listed under Art 4 of the Courts' Proclamation are the jurisdictions of the

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Article (sic) . . . 20 . . . & 27 of the Federal Police Commission Proclamation No. 313/2003 and Federal Police Commission Administration Regulations No. 86/2003 shall apply upon the Commission."

280 The new proclamation has made significant changes in the structure and accountability of the Federal Police.

281 Proc. No. 313/2003, *supra* note 193, Arts 5, 24

282 *Addis Ababa City Government Revised Charter Proclamation No. 361/2003* ("Proc. No. 361/2003"), Art 27; Proc. No. 416/2004, *supra* note 172, Art 26(1)(a)

283 Reg. No. 96/2003, *supra* note 279, Art 3(2); Proc. No. 416/2004, *supra* note 172, Art 26(1)(a)

284 Proc. No. 313/2003, *supra* note 193, Art 7(1)

Federal Courts.[285] Other offences fall under the jurisdictions of the Federal Courts insofar as they are committed within the territorial limits of the cities of Addis Ababa and Dire Dawa. This only begs questions on (Federal-State or State-State) police jurisdiction that cannot easily be addressed here.[286]

Each state has its own state police, which assumingly, have similar obligations. The FDRE Constitution, the main source of provisions on the criminal process, sets a standard of treatment of citizens below which no state can go. The Criminal Procedure Code had *de facto* application in the regional states; now it is adopted to be the law applicable before the states' courts.[287] Therefore it is legitimate to expect that the standards of treatment a suspect/accused entitled to are identical both at the federal and state level.[288]

There is also a greater possibility of conflict of jurisdiction between the Federal Police and State Polices. In such cases who decide which police has jurisdiction? This is a pre-emptive resolution of dispute between the federal and state prosecutors. There is, however, exceptionally 'smooth' relationship between the federal and state police unlike other organs of the justice system.[289] Whether there could be a good relationship between, such as, Federal Courts or prosecutors and state police is yet to be seen.

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285 Courts' Proclamation; also see Jurisdiction in Chapter 9, *infra*.

286 If the Federal and State Courts jurisdiction is allocated based on Courts' Proclamation, Arts 3 and 4, there is certainly conflict of jurisdiction between the Federal Police, on the one hand, and the Addis Ababa Police and Dire Dawa Police on the other.

287 For instance, SNNPRS Courts' Proc. No. 43/2002, *supra* note 156, Art 4 provides that "[t]he civil and penal codes as well as their procedural laws and other relevant laws in force shall apply with respect to matters not provided for under this proclamation so long as they are not inconsistent herewith." Likewise, the *Tigray National Regional State Courts Proclamation No. 30/90* e. c. ("Tigray Courts' Proclamation"), Art 5 provides that "the Tigray National Regional Courts have jurisdiction to entertain cases both on first instance and on appeal in accordance with the provisions of the Civil Procedure and the Criminal Procedure Codes or other laws."

288 The Federal Police Proclamation envisages identical standard in the police law enforcement activities. Proc. No. 313/2003, *supra* note 193, Art 7(11).

289 The Federal Police Commission is required to work with Regional Police Commission in "cooperation and mutually supportive way." Thus, there is a joint council of Federal and Regional Police Commissioners. There are various areas

3.2.2 Police Duty to Investigate

Art. 9.—Duties of the police.

The police shall in accordance with the provisions of this Code assist the public prosecution department in:

(b) discovering the commission of offences;
(c) apprehending offenders; . . .

Art. 22.—Principle.

(1) Whenever the police know or suspect that an offence has been committed, they shall proceed to investigate in accordance with the provisions of this Chapter.

Art. 23.—Duty of police to investigate.

Investigating police officers shall carry out their duties under this Chapter notwithstanding that they are of opinion that the accusation, complaint or information they may have received is open to doubt.

Police has three principal responsibilities: crime prevention, crime investigation and recording of crime. Crime prevention, the largest responsibility of the police is undertaken based on policy and strategy. It is not part of the criminal procedure law in the existing process though. When crimes are committed the police have the duty to investigate the same and forward the investigation report to the public prosecutor. After the criminal process is completed, whether the identified suspect has been convicted, the report comes back to the police for recording. That is what is called criminal record. There is less discussion on the police record because its significance for the administration of the criminal justice system as well as its impact on the rights of the individual is not very much appreciated by other government organs. The police use it in designing strategies for crime prevention and sometimes in the investigation of certain complicated and mysterious crimes. Where a person with a criminal record is tried for another

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of cooperation between the two in terms of information exchange, training and capacity building, among other things. *Id.*, Arts 23(1), 2(2), respectively; also see Baseline Study Report, *supra* note 84, at 109.

offence, her prior record is presented to the trial court after conviction for the purpose of determination of sentence.

The subject of discussion here is only one aspect of the police duty: crime investigation. Information is communicated to the police in various ways. Once the investigating police officer receives the information, she has the obligation to investigate. Even when the information communicated to the police is open to doubt, as essential part of the information is missing—or the accusation is anonymous or the identity of the offender is not revealed, the police has the obligation to investigate. Investigation is only for manifestation of the truth of the facts; it is not undertaken to dispel doubts.

Art 9 is one of the obsolete provisions of the Criminal Procedure Code. This is because the power of the police is redefined several times by the laws adopted and the practice developed at different period. Art 22 of the Code, however, provides that the investigation is to be undertaken in accordance with the chapter dealing with investigation. The chapter includes, recording of compliant, examination of witnesses, interrogation, arrest, search, etc. How about those other activities not in the list? Does it mean the police are not empowered to undertake them in order to investigate because they are not listed in the chapter dealing with investigation?

3.2.3 Recording of Complainants and Examination of Witnesses

Art. 24.—Recording of Statement.

After having recorded an accusation or complaint in the manner laid down in Art. 14, the investigating police officer shall elicit from the person making the accusation or complaint all relevant facts and dates, the name or description of the offender, the names and addresses of principal witnesses and all other evidence which may be available and shall record them.

The present trend of investigation is that police undertakes various pre-arrest investigations. Thus, the initial stage is properly recording the complaint/accusation and meanwhile eliciting relevant information from the complainant. That information is basically what is required to be provided at the trial, such as, the date of the crime, the name and description of the offender etc. But it is also related to evidence, such as, principal witnesses or any evidence if she has any e.g., documents, photographs or video, or identifying the place where those evidence could be obtained, etc.

Art. 30.—Examination of witnesses by the police.

(1) The investigating police officer may, where necessary, summon and examine any person likely to give information on any matter relating to the offence or the offender.
(2) Any person so examined shall be bound to answer truthfully all questions put to him. He may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge.
(3) Any statement which may be made shall be recorded.

Art. 31.—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 improper method to any person examined by the police.
(2) No police officer or other person shall prevent or discourage by whatever means any person from making or from requiring to be recorded in the course of the police investigation any statement relating to such investigation which he may be disposed to make of his own free will.

After recording the complaint/accusation, the investigating police officer summons and examines witnesses. Such witnesses have the obligation to answer the questions from the investigating police officer truthfully. Where the answer to a given question is likely to expose them to a criminal charge they have the right not to reply; because the statement made by witnesses may be used against them in court. That still raises the question that if the person is illiterate, how does she know she is entitled to remain silent in respect of questions the answer for which is likely to expose her to a criminal prosecution if she is so informed? Here the police do not have the obligation to tell the witness that she has the right to remain silent.

During examination of witnesses any inducement, threat or promise from the investigating police officer, or any other person in authority is prohibited with a view to maintain the integrity of the testimony of the witness. On the other hand, whatever the witness wants to speak about in relation to the matter, the witness cannot be deterred from speaking. All her statements have to be recorded.

The fact that Art 31 prohibiting inducement and other malpractices in taking statements from individual witnesses comes next to Art 30 which deals

with examination of witnesses, gives the impression that such prohibition of inducement and malpractice envisaged under Art 31 is limited to examination of witnesses. While the English version uses generic terms on examination of persons by the police, the Amharic version uses the term 'witnesses'. However, it is a matter of common sense that Art 31 also follows Art 27, interrogation of the arrested person, and thus, has application to interrogation.

In prohibiting such malpractice in examination of persons, the coercion apparently comes from a 'persons in authority.' The phrase 'person in authority' appears to be clear but it is difficult to put into application. What is a person in authority? Does it mean a person who is taking statements from witnesses or the accused? Does it include the public prosecutor or other persons superior to the investigating police officer? Is it the real power or the apparent power that matters for the judgment of the witness to be influenced by such person in giving her statements?

3.3 Search and Seizure

FDRE Const., Art 26

1. *Everyone has the right to privacy. This right shall include the right not to be subjected to searches of his home, person or property, or the seizure of any property under his personal possession.*
2. *Everyone has the right to the inviolability of his notes and correspondence including postal letters, and communications made by means of telephone, telecommunications and electronic devices.*
3. *Public officials shall respect and protect these rights. No restrictions may be placed on the enjoyment of such rights except in compelling circumstances and in accordance with specific laws whose purposes shall be the safeguarding of national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others.*

Like any other modern statement of rights, the Ethiopian Constitution recognizes the right to privacy broadly. This right of privacy includes, but not limited to, the protection of home, person or property. It also includes the protection of notes and communications whether it is made by postal letters or other forms of communication, such as, telecommunications (telephone, fax, telegraph) and electronic means, such as, e-mails. The Constitution

imposes a duty on public officials to respect and protect these rights.[290]The right, like many other rights is not absolute. It is only protected against the arbitrary government intrusion into such private sphere of the individual.

The Constitution, thus, further states the circumstances in which restriction on the enjoyment of such rights may be imposed. 1) **The existence of compelling circumstance**—the Constitution provides that there must be a compelling circumstance that demands the restriction of privacy, a demand that cannot be met without such restriction of privacy. Stated otherwise, the enjoyment of right to privacy cannot be restricted where circumstances do not compel such restriction. 2) **The existence of specific law**—even where there is a compelling circumstance that demands restriction of the enjoyment of the right to privacy it could be restricted only if there is a specific law for such restriction. Such restriction certainly has to be specific and clear enough to be enforced as a restriction to such rights. 3) **The purpose of such law**—the Constitution further provides that the purpose of such law is a) safeguarding of national security; b) protection of public peace; c) the prevention of crimes; d) protection of public health; e) protection of public morality; f) protection of the rights and freedoms of others.

From the list of grounds for the restriction on the enjoyment of the right to privacy is what is provided for in the Public Health Proclamation.[291] Art 7 (1) provides that the inspector has *the power and the duty "to enter and inspect any premise which he has sufficient reason to believe that there exists a situation endangering public health."* The quality of this provision is that, it is meant for the protection of public health as provided for in the Constitution; it specifically provides for authority of the inspector to conducted search and such search is to be conducted by the inspector only where the health inspector has reason to believe that there exists a situation which endangers public health, which qualifies as a compelling circumstance that is envisaged by the Constitution.

Likewise, in other administrative measures there are compelling circumstances when they are indicated by the respective specific laws. Likewise, where the government adopts crime prevention policies and the specific laws provide for certain measures justifying entering into private premises and properties, arguably they would be within the ambit of the Constitution. The point in this section is whether rules of search and seizure

290 FDRE Const., Art 13(1)

291 Proc. No. 200/2000, *supra* note 250

in crime investigation squarely fall under the constitutional provision or whether the lawmaker can authorize such restriction on the enjoyment of the right to privacy for investigation purposes.

Leaving the constitutionality debate aside, we have searches for the purpose of investigation. Such searches are conducted with a view to obtain items that are considered to be used as evidence during the trial. These items may be tools or equipments which probably were used as a means for committing the crime (such as, a gun, a knife or a screw driver) or which probably is a fruit of the alleged crime (such as, things stolen or robbed) or a thing against which the alleged crime is committed (such as, a forged document, a dead body, vandalized property) or it may be an act (such as, concealing something or illegal possession of arms and drugs) or it may simply be an effect of the crime, which only needs view (e.g. footprints and fingerprints left on objects, disordering of things, such as, furniture unlike their usual arrangement) etc.

Search is not limited to physical things out there; search includes acquisition of every bit of relevant information about the offence and the offender. Unlike traditional conception of search, scope and technique of modern search is growing to the extent nullifying the concept of privacy in the digital age. Thus, search could also be authorisation to get access to certain information. It may also include interception of communication or eavesdropping.[292] That access to information could also include examination of fingerprints, blood examination and hair sample taking from the suspect.

Search, as a restriction to the enjoyment of the right of privacy, has to be construed narrowly; thus, searches are to be conducted under certain circumstances only. The issue of search focused on the nature and extent of intrusion the law authorises into the private sphere of the individual. A legal

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[292] In this regard, the right to privacy restricts the power of the authorities from using certain information because that information is obtained by a devise that are not available to the public. For instance, the Ethiopian Telecommunications Corporation has records of telephone calls made or received. They are recorded for the purpose of billing. The government cannot make use of this information for prosecution unless they are initially gathered based on warrant. There are devises the government has that are not ordinarily accessible to the public. For instance, the US Supreme Court considered that thermal imaging is not in ordinary use therefore, use of thermal imaging is arbitrary intrusion of privacy of the person. *Kyllo v. United States* 533 U. S. 27, (2001)

search may be made at any stage of the proceeding pending investigation with or without a search warrant depending on the circumstances that are envisaged by the law. Those items, which were being searched for, once they are found, are to be seized by the police and be kept in a safe place until they are delivered to the court as exhibits.

Despite the difficulty of resolving the Constitutionality of restriction of privacy for the purpose of crime investigation, let us be lenient and consider the commission of a crime as a *compelling circumstance;* because it does not fall under any of the categories listed in the Constitution as justifying restriction of the enjoyment of the right to privacy like prevention of crime, protection of public morality or the protection of rights and freedoms are. Arts 32-34 are the specific laws and crime investigation is the purpose of these specific laws

Art. 32.—Searches and seizures.

Any investigating police officer or member of the police may make searches or seizures in accordance with the provisions which follow . . .

The law provides that search can be conducted only in the manner provided for in the Code. It recognizes different categories of searches; the first is search of persons arrested up on their arrest where the arresting police officer believes that such person has something about her person which is relevant in evidence for the case she is suspected of. The second category of search is physical examination of suspects where such examination is believed to reveal certain facts that are the subject of investigation. The classical forms of search are search of premises to be conducted with or without search warrant depending on the circumstances. In relation to corruption cases, the law also authorizes interception of communication which does not appear to be constitutional. However, their constitutionality is yet to be challenged.

3.3.1 Search of Persons

Art. 32.—Searches and seizures.

. . .

(1) No arrested person shall be searched except where it is reasonably suspected that he has about his person any articles which may be material as evidence in respect of the offence with which he is accused

or is suspected to have committed. A search shall be made by a person of the same sex as the arrested person.

The readings of this Sub-Article clearly indicate that searches can be conducted on the person of arrested persons only if it is conducted according to the provisions of the Code, with a view to obtain evidence that is material to the case under investigation. It is, therefore, to be noted that the arrest needs to be conducted lawfully so that the consequences be given legal effect.[293] Even so, such search is not to be conducted on all arrested persons indiscriminately; rather, the police (1) must have a reasonable suspicion that the arrested person may have any article about her person; and (2) such article is material as evidence in respect of the offence with which the arrested person is accused or suspected of. The *a contrario* interpretation is that, short of those conditions there is no bodily search.

This interpretation of the law raises certain practical security/safety issues for the police officers and fellow detainees where the suspect is placed as it does not allow seizing other things than those connected with the offence with which the arrestee is suspected. The practice, however, is different. The police search arrestees routinely and thoroughly. The suspect is even jailed without shoes or at least required to remove her shoe laces (this does not include prison situations). She is required to remove belts and ornaments and other valuables. This is done on every individual indiscriminately.[294]

The search is made by the time arrest is effected and, for practical reasons, it is conducted without warrant. It is further provided by the law that searches of person are to be made by the person of the same sex as the arrested person. There is also stop-and-frisk that is very common in Addis Ababa and regional cities both on the streets and in every government office and big hotel entrances. Their legal status is not defined.[295]

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293 See the section dealing with other circumstances of search without warrant, *infra*.

294 The extent of intrusion at times amounts to degrading to the person under search.

295 In the US system, a police officer must have sufficient reason for the initial stop ("articulable suspicion"). Once stopped, the police officer has the power to pat the outside part of the suspect. This is based on security for the police because the right to bear arms is taken seriously. If the police officer feels something which might be considered as knife or gun, then she has the reason to conduct full search of the body of the suspect. Such evidence may not, however, be admissible if the

Art. 34.—Physical examination

> *(1) Notwithstanding the provisions of Art. 20 Civil Code where an investigating police officer considers it necessary, having regard to the offence with which the accused is charged, that a physical examination of the accused should be made, he may require a registered medical practitioner to make such examination and require him to record in writing the results of such examination. Examination under this Article shall include the taking of a blood test.*
> *(2) An investigating police officer may, with the agreement of the victim of an offence or, where he is incapable with the consent of the parent or guardian, require a registered medical practitioner to make such physical examination if the offence being inquired into would appear to require. He shall require the registered medical practitioner to record in writing the results of such examination.*

Search of person, so long as search is an endeavour to obtain evidence, is not restricted to search of thing the person may possess. Depending on the nature of the offence, those evidences can only be obtained upon physical examination of the arrested person. If the person had a fight, she might have certain bruises on her body and unless they can be explained otherwise, they are material evidence to the fight she is alleged to have had. If the nature of the offence admits evidence of blood test or hair sampling and under the circumstances such evidence of blood test or hair sampling is necessary, such test might also be undertaken. Such physical (medical) examination is to be made by a registered and licensed medical practitioner who is required to record the results of her examination.

The irony is while the Constitution demands for strict control of search of a suspect's house/residence, property and communication, the Code here provides that the sacred human body can be violated upon the will of the investigating police officer. Thus, the investigating police officer can order a suspect to undergo medical examination notwithstanding the provisions of the Civil Code which allows the person to refuse to submit to medical examination[296] save such refusal to submit for such examination entails

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initial stop was not justified. *Terry v. Ohio*, 392 U.S. 1, (1968). The concept is further elaborated in *Maryland v. Buie*, 494 U.S. 325, (1990).

296 *Civil Code of the Empire of Ethiopia Proclamation No. 165 of 1960* ("Civ. C."), Art 20(1) provided that a "person may at anytime refuse to submit himself to a medical or surgical examination or treatment."

adverse presumption.[297] How can we synchronise the provisions of Art 34 with the constitutional right to the right to bodily integrity? With respect to sero status, the FDRE HIV/AIDS Policy (1998), Art 3.2 provides that "testing and screening shall be voluntary and shall be encouraged along with counselling services." Suppose the investigating police officer wants to have the suspect of rape checked whether he is HIV-positive, can she order blood test of the suspect? What is the effect of such policy? Does it matter whether this is made with a view to give prophylaxis treatment to the victim of rape? Always note that this is only at the investigation stage and the suspect is presumed to be innocent.

On the other hand, examination of the victim may be necessary for investigation purposes; particularly with respect to violence and similar offence, it has to be proved that the alleged victim is actually violated (see the comment on Art 111 (c)). Such examination on the victim of the offence may be made upon the latter's agreement. Where the victim is incapable, the consent of the parents or the guardian must first be obtained.

One troubling area of investigation is the taking of fingerprints. It has been already alluded to one prong of police responsibility—keeping criminal records; those records are, however, only records of criminal convictions. The records also include crime investigation reports which are closed by the public prosecutor which did not go to trial. Those records of conviction are important for various purposes. The first use is for aggravation of sentences after conviction of an accused as envisaged by Arts 114, 148 & 148(4). The other use of such record is to give response to other institutions who would like to inquiry into the character of a person, such as, during employment. The Federal Police Commission is authorized to "issue a certificate of no criminal record."[298] This does not, however, authorize the police to take fingerprints.[299] It is a matter of common sense that it is only the pool of records of criminal conviction that is relevant for both purposes. The issue

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297 *Id*., Art. 22 provides that "[w]here a person refuses to submit himself to a 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."

298 Proc. No. 313/2005, *supra* note 27, Art 7 (10).

299 In practice, police take fingerprints which is not provided for anywhere in the law, but there is a silent acceptance. It certainly cannot fall under this category of search though. On the other hand, the *Oromia Ethics and Anti-Corruption Commission Establishment Proclamation No. 71/2003*, Art 10(7) authorises the Commission to "take fingerprints and photographs" of persons suspected of the crime of corruption.

is, therefore, not only whether the police can take such fingerprints but also how those finger prints routinely collected may be used.[300]

In order to address the issue, the Draft Criminal Procedure Code includes the following provision:

Article 36 Medical Examination and Taking of Finger Prints

1. *The investigating police officer shall first obtain an order from the First Instance Court where medical examination of or taking of finger-prints of the suspect is found to be relevant to prove whether the arrested person has committed the alleged offence.*
2. *The court shall give order for medical examination of or taking of the fingerprints of the suspect where it believes such medical examination or taking of fingerprint is relevant to prove the alleged offence.*
3. *The results of the medical examination or fingerprints taken under sub-article (2) of this Article may not be disclosed to any person or institution unless the suspect is convicted.*
4. *Where the examination of the victim is necessary for the proof of the alleged offence, the investigating police officer may cause such examination be made with the consent of the victim or, where he is incapable with the consent of the guardian.*

3.3.2 Search with Warrant

Art. 32.—Searches and seizures.

(2) No premises may be searched unless the police officer or member of the police is in possession of a search warrant in the form prescribed in the Third Schedule to this Code . . .

Art. 33.—Issue of search warrant.

(1) A search warrant may be issued by any court. No search warrant shall be issued unless the court is satisfied that the purposes of justice

[300] In practice any fingerprint, whether that of a convict or a suspect was being used as a criminal record. Where the person is only a suspect against whom no charge is filed or no conviction is entered, the letter states that the person was suspected of such an offence. Recently, the author learnt the police are making use of only those records of conviction.

or of any inquiry, trial or other proceedings under this Code will be served by the issue of such warrant.

(2) Every search warrant issued shall specify the property to be searched for and seized and no investigating police officer or member of the police may seize any property other than that specified in such warrant.

It is evident that in the discussion of search what readily comes to one's mind is search of premises. This provision is clear in that search of premises is to be conducted only by members of the police. Save in exceptional circumstances expressly provided for in the law otherwise, the police cannot undertake such search without search warrant. The search warrant authorizes the investigating police officer (or any member of the police) to intrude into the private sphere of the suspect. The investigating police officer may, thus, request for a search warrant from any court where she believes that there is an item of evidence to be obtained in support of a case under investigation at a specified place. Certainly, the investigating police officer needs to request such warrant from the nearest court, whether that court is a First Instance Court, High Court or Supreme Court.[301] As in the case of arrest warrant, the phrase "any court" is not as broad as it appears. First, the Addis Ababa and Dire Dawa Cities' Courts are granted the power to issue search warrant.[302] As this power is given to respective Cities' Courts without repealing the power of the Federal First Instance Courts, such request for warrant can also be filed before the Federal First Instance Courts. The second restriction on the power of Federal First Instance Court to issue search warrant is provided for in the *Revised Anti-Corruption Special*

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301 In practice, such request for a warrant is often made to the Federal First Instance (or Woreda) Courts. That is because, first, such requests for search and arrest warrant are big in number and can properly be addressed by the lower courts which are local and larger in number than other higher courts and more accessible; second, because of those first appearance cases, the investigating police officer have good communication with the nearby court.

302 Proc. No. 408/2004, *supra* note 171, Art 2(2); also Proc. No. 416/2004, *supra* note 172, Art 33(2)(c). There is a difference between the Amharic and the English version of Art 33(2)(c) of the Dire Dawa City Charter. While the English version restricts the Dire Dawa City Courts' power to bail and remand, the Amharic version grants them all the power Addis Ababa City Courts have except recording of statements and confessions as per Art 35 of the Code. It reads *be'federal wonjeloch y'federal firidbetoch siltan endetetebqe huno yegize qetero, yemeyazjana yebirbera ti'ezaz endihum yewastina abetutawoch*.

Procedure Law. It provides that request for a search warrant may be made to the court that has jurisdiction to hear those corruption cases.[303] Thus, if the case is one in the jurisdiction of the Federal Supreme Court, such request for a search warrant is to be made to the Federal Supreme Court. Likewise, if the case is under the jurisdiction of the Federal High Court, then such request for search warrant is to be made to the Federal High Court. In such cases, Federal First Instance, Addis Ababa or Dire Dawa Cities' Courts do not have jurisdiction to issue such search warrants.

Remember the requirements that need to be met before the police issues summons to the suspect or the court grants arrest warrant to the investigating police officer. In those cases, there is an assessment of threshold of evidence in order to protect the rights of the suspect and the interests of justice. Likewise, on receiving the request for a search warrant, the court, therefore, must first be satisfied with "the purpose of justice or any inquiry, trial or other proceeding under [the] Code [of Criminal Procedure] will be served by the issue of such warrant." This is an assessment of threshold evidence similar in approach to that of "reason to believe" for the police in order to issues summons to the suspect or "absolute necessity" in order for the court to issue an arrest warrant. Thus, the investigating police officer need to show the court that there is an investigation in progress and that the evidence that is sought to be gathered is relevant to the case under investigation and that such search would assist the investigation.[304] Stated otherwise, the court must ask the investigating police officer, requesting for a search warrant, the reasons that made her believe that (a) there is an item of evidence at a particular location; and (b) whether such evidence tends to prove the existence or the commission of the offence or is likely to assist the investigation process. If the said evidence does not have any connection to the case at hand or that it is not likely to be found at the said

303 Proc. No. 434/2005, *supra* note 97, Art 7 (4)

304 In the American system, the investigating police officer needs to show "probable cause" in order to obtain search warrant. Probable cause is required both in arrest warrant and search warrant although the degree of proof may be different in the two scenarios. See note *infra* for the discussion on probable cause. The requirement that the assessment of probable cause is to be made by a "neutral and detached magistrate" is an essential element of the process. *Lo-Ji Sales, Inc. v New York* 442 U.S. 319, (1979); *Coolidge v New Hampshire* 403 U.S. 433, (1971). The Constitution further requires such request be supported by an oath or affirmation of the police officer so requesting.

place, the above stated purpose cannot be served; therefore the search warrant may not be granted.

A search warrant envisaged in the Code, is specific that the place to be searched and the items to be searched and where found to be seized have to be stated both in the request for the warrant and in the search warrant.[305] As a restriction to the right to privacy, such specificity leaving no discretion for the investigating police officer is only appropriate. The degree of specificity differs depending on the situation. With respect to the place to be searched, for instance, where the person whose premises is to be searched, for instance, has many premises in different vicinities, it is not all of them that have to be searched, as can be read from the schedule; rather only "the house or place, or part thereof" as described in the warrant are to be searched.

There is no question that the protection extends to the entire residential building. Does it matter the door was open normally? How about the area that does not properly constituted part of the building but it is an area which is within the fence of the property? Does it matter whether the fence is one that precludes uninvited external view?[306] Does it include the backyard which is well fenced? Is the vehicle parked in the doorway part of the building or not? If it is not part of the building, is it governed by a separate rule? There is no evidence that those issues are litigated before our courts.

The warrant also needs to specify the item to be searched and to be seized when found. It is stated emphatically as "[n]o investigating police officer or member of the police may seize any property other than that specified in

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[305] On the other hand, the general search warrant gives discretion to the investigating police officer with respect to the place and items to be searched. The Malayan Code of Criminal Procedure recognizes both general and specific search warrant. *The Criminal Procedure Code of the Federated Malay States, as amended up to 1 November, 1956*("Malayan Code") Sec 55 and 54(i), respectively. Ethiopia chose only the specific search warrant.

[306] The US Supreme Court held a person can "legitimately demand privacy for activities . . . in the area immediately surrounding the home." This immediate area surrounding the home is 'curtilage' not 'open fields'. What distinguishes cartilage from open field are four factors: "the proximity of the area claimed to be curtilage to be the home, whether the area is included in the enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 480 U.S. 294, (1987)

such warrant." We may consider two questions here: how specific should the description (listing) of the items to be seized should be? And what if the police in the course of search find out another item, such as, illegally possessed gun? There is no any rule governing the degree of specificity in describing the item to be seized. However, it has to be as specific as possible so as to enable the police to identify the item and to avoid harassment to the person whose premise is to be searched. In respect of other items that may be found in the course of search, the police are expressly prohibited from taking seizure of those items.

Suppose the suspect is charged for forgery of public documents; suppose the investigating police officer obtained a warrant for search of the suspects to obtain those forged public documents. During the execution of the search the investigating police officer encounters unlicensed gun in one of the rooms. The authorisation is clear that "no investigating police officer or member of the police may seize any property other than specified in such warrant." Therefore, she cannot seize such gun as it is not included in the search warrant.

Can we interpret that the prohibition is restricted to legal items and items unrelated to the particular offence under investigation rather than items that are patently illegal? Where the search reveals that there are other crimes certainly, it is the duty of the police to investigate such crimes. In the US legal system, the police may seize items that are in plain view. In the plain view doctrine an item may be seized without warrant where (a) the police officer enters premises lawfully and inadvertently discovers illegal object and (b) the illegality of the object is visible from the vantage point of the police without further examination.[307]

Always the outstanding question that is not directly addressed both in the law and the practice is whether the search warrant can be directed only against the suspect or whether it can also be directed against third parties. Search is for the purpose of obtaining evidence and search warrant is requested/granted based on the assumption that as she has the right so to refuse, the suspect may not be willing to cooperate that the investigating police officer obtains compulsory process. Where there is evidence in a third person's premises, that third person has the obligation to produce evidence. In a crime where she is not a part, there is no reason why there is a compulsory process against her because she has the legal duty to assist the administration of

[307] *Horton v. California*, 496 U.S. 128, (1990)

justice.[308] Where such third person is participating in the crime in whatever capacity,[309] then search warrant may be issued against her.

The approach in the *Revised Anti-Corruption Special Procedure Law* is a little different that "an investigator or a prosecutor may apply for the court to obtain or gain access to relevant material, from any person other than the suspect, in order to establish whether the suspect has benefited from criminal conduct or to get evidence regarding the amount of benefits or its whereabouts."[310] Whether this is a court warrant for search or access to premises does not seem to be clear despite there is no difference between the two. It is made clear from the provision that the "court may order a third party to hand over to the investigator or to the prosecutor any evidence under his possession or to allow access to inspect."[311] Such decision could be made "without requiring the appearance of the person concerned." Such person "who is in possession or who appears to be in possession of the material," may be ordered to "produce it to [the] investigator or prosecutor or give access to same" or she may also be ordered to appear before the court within the period fixed by the court where the latter deems the request is appropriate.[312]

Basically, a warrant of search has to comply with certain requirements and has to (a) be made in writing; (b) be directed to the chief of Woreda or Zonal police; (c) contain an order to effect search of a specified item at a specified place and should she find it or a part of the listed items, seizes and produce before the court forthwith; (d) list the items to be searched for and seized; (e) state where the search is to be conducted; (f) state the offence in respect of which the search is to be conducted; (g) describe the mode of execution in a manner requiring legality and restricting the power of the police; and (h) be signed by the judge and sealed by the seal of the court.

Interception of Communications

A new introduction in to the criminal process is the interception of communications and letters for the purpose of investigation of corruption offences. It is provided that where it is found to be necessary for the

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308 Crim. C., Art 440

309 *Id.*, Arts 33-40

310 Proc. No. 434/2005, *supra* note 97, Art 42 (1)

311 *Id.*, Art 42 (3)

312 *Id.*, Art 42 (2)

investigation of corruption offences, the "head of the appropriate organ[313] may order the interception of correspondence by telephone, telecommunications and electronic devices as well as by postal letters."[314] Such order shall indicate the offence under investigation, the duration of the interception and, if it is a telephone line that is to be intercepted, the link to be intercepted.[315] The duration for a maximum of four months, but up on further authorisation by the head of the appropriate organ, it could be extended.[316]

The law does not specify which organ takes the order. However, it is stating the obvious that our communications services are provided by government entities—Ethiopian Postal Service and Ethiopian Telecommunications Corporation. Such entity in receipt of order from the 'appropriate organ' has the obligation to "draft an official record of each interception and the time the recording operation takes."[317] It also has the obligation to "transcribe and present to [the] appropriate organ the correspondence that is useful for the discovery of the truth." There are a host of issues related to this matter, whether such recording is used only for further investigation or for judicial prosecution, and if it is for judicial prosecution, where there is cross-examination of the person who undertake the recording and transcribed the document and integrity of the evidence itself. There is also the issue why the power to grant such authorisation is taken from the judiciary and granted to the executive organ against which citizens need protection.

The proclamation also provides that "other evidence gathered through video camera, sound recorder, and similar electronic devises may be produced as evidence."[318] The level of intrusion into the privacy of the person by interception of communication and recording by electronic devises is significantly different. The two subjects are casually merged as if their difference is immaterial. They should not have been provided for under the same Article.

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313 "Appropriate organ" is defined to be an organ which is empowered to investigate and/or prosecutor corruption offences. *Id.,* Art 2(3). Such organ which is empowered to investigate and/or prosecute corruption offences is the Anti-Corruption Commission or such regional offices and other organs as may be delegated by the respective organs.

314 *Id.*, Art 46 (1)

315 *Id.*, Art 46 (3)

316 *Id.*

317 *Id.*, Art 47 (1)

318 *Id.*, Art 46 (2)

3.3.3 Search without Warrant

Art. 32.—Searches and seizures.

(2) No premise may be searched [without] *warrant except where:*

(a) an offender is followed in hot pursuit and enters premises or disposes of articles the subject matter of an offence in premises;
(b) information is given to an investigating police officer or member of the police that there is reasonable cause for suspecting that articles which may be material as evidence in respect of an offence in respect of which an accusation or complaint has been made under Art. 14 of this Code and the offence is punishable with more than three years imprisonment, are concealed or lodged in any place and he has good grounds for believing that by reason of the delay in obtaining a search warrant such articles are likely to be removed.

Search without warrant is an exception to the rule of search on warrant. As an exception it is to be interpreted and applied narrowly and strictly. Thus a search without warrant may be conducted only in two exigent situations. The first situation is where there is a flagrant offence as defined under Arts. 19 and 20 wherein the suspect has been chased and enters premises or disposes of articles in premises the subject matter of an offence or evidence. In such hot pursuit, the search is both for the person herself as well as for items of evidence. Therefore entry into such places where the suspect enters in hot pursue is justifiably allowed without warrant. Subsequently, the premise into which the chased person has entered may be searched as well as if such person disposes certain items which may be material evidence for the offence, it may be seized.[319]

The second circumstance in which a search may be conducted without warrant is where information is given to the police as to the location of evidence and where the following preconditions are cumulatively met.

1. The information is communicated to the investigating police officer that an item of evidence is concealed in a certain place. With respect to granting search warrant the law indicates that the court should assess a threshold of evidence that the granting of warrant would further an inquiry or proceeding.

[319] This is also partly search incidental to arrest, *infra*.

Here the police is conducting search without warrant. Therefore, the evaluation of the information as to its reliability is incumbent on the investigating police officer in order to justify her belief that articles which may be used as material evidence in respect of offence are concealed. This, she can do by assessing the trustworthiness of the informant and the veracity of the information. If the information is based on hearsay or the source is vague and unclear, then there is no reason for believing that there is an item of evidence concealed somewhere in the premises of the suspect or that such item is relevant as evidence in the case at hand.

2. For the investigating police officer to act up on such information in order to procure the said item of evidence, there must be *accusation* or *complaint* against the person whose premises is sought to be searched without warrant as recorded as per Art 14. This requirement restricts the power of the police as to the places to be searched but it is also a requirement that such restriction to the enjoyment of the right to privacy must be made in respect of investigation that are in progress.
3. The law further restricts such search without warrant only to serious offences. Therefore, search without warrant is authorised only in respect of offences that are punishable by more than three years imprisonment which are normally under the category of rigorous imprisonment. Therefore even in the new Criminal Code, those offences that are punishable by ordinary simple imprisonment do not justify search without warrant.[320] One may even further qualify the requirement under (a) above that the offence in order to search without warrant must be non-complaint offence.
4. The final requirement, in order to conduct the search without warrant under this section is, the investigation police officer must have good grounds for believing that by reason of the delay in obtaining a search warrant such articles are to be destroyed or removed. This is an effort to preserve an item of evidence from destruction. [321]

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[320] The readings of the Criminal Code indicate that rigorous imprisonment is "a sentence applicable only to crimes of a very grave nature committed by criminals who are particularly dangerous to society" and it is "normally for a period of one to twenty-five years". A sentence of simple imprisonment is "applicable to crimes of not very serious nature committed by persons who are not a serious danger to society." Such sentence normally "may extend for a period of ten days to three years." Crim. C., Arts 108 and 106, respectively.

[321] The practice, however, is the police conduct searches, whatever the circumstance may be, without warrant. It is only in few high profile and political cases that we see search on court warrant.

This appears to be an effort on the part of the law to preserve items of evidence. These four conditions are cumulative requirements that if any of them are missing, the investigating police officer cannot search for the alleged item without warrant which otherwise turns out to be unlawful. Thus, the investigating police officer may be obliged to obtain search warrant.

However, even when those four conditions are apparently met, but where the last requirement is not so demanding, the police can supervise the area while other police officers obtain court warrant in order to avoid argument on the legality of the search. This is because, Art 55 provides that in urgent cases, the police can request for arrest warrant on telephone. Therefore, if there is that degree of positively spirited communication and collaboration between the police and the court, it is always easy to obtain search warrant and safe to have one for insulation of the police against liability of abuse of power.

3.3.4 Execution of Search

Art. 33.—Issue of search warrant.

(1) On seizing any property such investigating police officer or member of the police shall make a list of the property seized and where possible shall have the list checked and signed by an independent person. Any property seized which is required for the trial shall be preserved in a safe place until handed over to the court as an exhibit. Any property not so required may be returned to the person from whom it was taken and a receipt shall be taken.
(2) In effecting a search the investigating police officer or member of the police may use such force as is necessary and may where access to premises is denied use reasonable force to effect entry.
(3) Unless otherwise expressly ordered by the Court, searches shall be carried out only between the hours of 6 A.M. and 6 P.M.

It is not expressly provided for by the law but it can be abstracted from the general reading of the provisions dealing with search that search is to be conducted on premises where there is the owner or the resident. Where the search is supported by a warrant it is to be undertaken during daytime only between the hours of 6 a.m. and 6 p.m. Where the person whose premise is to be searched for instance is not available at such place to be searched during such hours for justifiable reasons, the search may be effected at a different hour as fixed by the court in the warrant. It must, however, be executed within the space of the days specified in the warrant, as, unlike

arrest warrant, it is contrary to the purpose of search to grant a warrant for indefinite period.

Search warrant is a court order to be executed by the police. Therefore, the executing police officer has to comply with the order of the court. It is not indicated in the law but it is a common practice that the police must knock at the door, the premises of which she is to search and announces her presence; the more so for the police in possession of a search warrant. What is prohibited under Crim. C., Art 422(2) is excessive use of force and non-compliance with the conditions set in the search warrant. Although it cannot be a ground of criminal responsibility of the police executing search warrant, failure to knock and announce her presence affects the legality of the search.[322] However, what is not clear is how long the police would have to wait for a response after knocking and announcing her presence. Where, after a reasonable period under the circumstance, the police did not get response from inside or there is resistance to the search, whether the search is with or without warrant. In such cases, the police is empowered to use reasonable force to effect entry and/or search and seizure of items. The amount of force reasonable to effect search depends on the degree of resistance by the owner/occupant of the premises.

In respect of search with warrant, the court specifically states in the warrant the places to be searched and the items to be seized, if found; the law is clear that the police officer seizes only those indicated in the search warrant. The police officer when taking property from individuals makes lists which she shall have checked along with the items seized and signed by an independent person, where possible. [323] The Code further states that any property not so required shall be returned to the person from whom it was taken and a receipt shall be taken. This is a decision to be made by the

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[322] In the American legal system, the 'knock and announce' rule is part of the 'reasonableness' clause of the Constitution. *Richards v. Wisconsin*, 520 U.S. 385, (1997)

[323] The law does not make this clear. However, when the executing police officer takes property from individuals, it is for evidence purposes, and it is taking it for the government. The police prepares list of items seized from individuals during such search. Therefore, the police have to give them receipt that the property has been taken from them. As we shall see later in this section, individuals are bringing property suits before the court and they need evidence that the property belongs to them or it has been taken from them.

investigating police officer during the investigation stage before she sends her investigation report to the public prosecutor.

The *lacuna* here is the investigating police officer is authorized to return only those items that are not needed for evidence. How about perishable items or items that are inconvenient to preserve but relevant evidence? Any property seized for evidence purpose has to be kept in a safe place by the police until it is delivered to the court to be used as an exhibit. Therefore, the issue of perishable items and others is a matter of judgment.[324]

In effecting search with warrant, there are specifications in terms of place where search may be made, the items to be searched and the time during which search may be conducted. There is no express provision of those requirements in search without warrant. However, the time or search, the place or items to be searched are not unlimited; they are circumvented by circumstances that initially justify the search without warrant. It goes without saying that the time of search must be immediate; the place to be searched is one to which the suspect enters in a hot pursuit or the place where the item is said to be found as communicated to and known to the police. Also, the items to be searched for are those in some way related to the offence, which the person is suspected of. If the items of evidence are unrelated to the offence in respect of which the complaint was made, the police do not have the power to take those items. However, there is not restriction with respect to the hour during because the information may be available at anytime of the day or a flagrant offence may be committed any time of the day.

3.3.5 Other Circumstances of Search without Warrant

There are various situations of search that are not covered by the law some of which are unconstitutional and some of which are not so unconstitutional. Those could be search based on consent of the occupants and search incidental to lawful arrest.

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[324] Individuals have the right to property. When the police needs such property, unless the possession of such items is unlawful, it has the obligation to preserve the nature and identity of such property. Where the item is lost, the owner has the right to be compensated. Furthermore, there is lost income and other benefits which can be claimed by the person from whom the property is taken against the government. The burden is thus on the government to exercise proper judgement.

A. Search on the Consent of the Occupants:—this is not provided for in the law but it is not unconstitutional, in that, where the person who resides in the premises gives her permission to the investigating police officer to undertake the search she can legitimately do so. Thus, the investigating police officer can search such premises where the consent of the person whose property is to be searched can be obtained voluntarily. This raises in fact many questions. Once she gives her permission, can she withdraw? Or can she give a restricted permission, such as, for the search of a part of her house and not the entire house? Where there are two or more persons living together and only one of them gave her consent, can the consent of one of them be sufficient to effect search of the premise? Does it matter the other co-dweller objected to the search?

B. Search Incidental to Lawful Arrest:—the power of investigating police officer to conduct search without warrant in exigent circumstances is already discussed. The law of search is limited to persons and premises; with respect to search of persons, it is even limited to persons arrested. In the US legal system, for the protection of the police officers effecting arrest, search incident to lawful arrest is allowed. In light of the constitutional right to bear arms it makes sense. However, such search is restricted to the 'grab area' so that the arrestee may not grab weapon in her immediate surrounding area to attack the police officer or evidentiary item and destroy.[325] This has been extended to vehicles. When the investigating police officer makes arrest, she can also search the passenger compartment including the glove compartment for the same justification.[326] However, search of automobile is also supported by the nature of mobility of vehicles in order to maintain the integrity of possible evidentiary items. This search without warrant incidental to arrest is also extended to mobile containers in the car on the ground that there is very little expectation of privacy in such containers in a vehicle.[327] Thus, these two grounds of search without warrant, search based on the consent of the occupants and search incidental to arrest, are most used in the American criminal justice system that they cover a greater part of search without warrant.[328]

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325 *Chimel v. California,* 395 U.S 752 (1969); *New York v. Belton,* 453 U.S. 454, (1981).

326 *Thornton v. United States,* 541 U. S. 515 (2004).

327 *United States v. Chadwick,* 433 U.S. 1, (1977); *California v. Acevedo,* 500 U.S 565, (1991).

328 S. A Saltzburg and D. J. Capra, *AMERICAN CRIMINAL PROCEDURE: Cases*

3.3.6 Some Practical Problems Relating to Exhibits

The law of search is less respected for various reasons. More than the breach of the letters of the law, there are other practical problems related to exhibits that are worth mentioning. They are practical problems because they are more related to application (than content) of the law, by all actors in the administration of the criminal justice system: the police, the prosecutor and the court. *First*, as it has been indicated earlier, very few searches are conducted on warrant. The fact that the police conducted search without warrant the items to be seized are not limited including cash, vehicles, and essential documents, such as, passport. Those obtained as evidence are sometimes essential to the suspect or the victim. This is the case, for instance, in theft or robbery cases. When the suspect is arrested, any thing in her hands or any thing the complainant alleges to have been taken from her is taken by the police as exhibits.[329] It stands to reason that unless the bank note or the document is one alleged to have been forged it certainly does not prove anything. The taking of such item only harms the interests of such owner. *Second*, those evidences obtained as a result of search are to be deposited with the registrar of the court having jurisdiction when the charge is submitted to such court.[330] However, as the practice stands now, the courts do not have evidence warehouses and the exhibits are preserved in the police stations that had undertaken the investigation.[331] Often times,

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and Commentary. St. Paul: Thomson Publishing Co., 2004, at 277, 298 and 452; LaFave, et al., CRIMINAL PROCEDURE 3rd Ed. St. Paul: West Publishing Co., 2000, at 195, 246

329 At a certain workshop (August 31- September 3, 2003, Sodare) the then Vice Minister of Justice, Ali Suleiman, anecdotally mentioned the fact that a tourist was robbed while he was touring Harrar. The police managed to immediately track down the robbers; but refused to give the passport to the tourist back on the ground that it is needed for evidence as exhibit. Legally, the passport does not prove anything more than what it does when it was recovered from the robber; practically, the tourist could not leave this country without his passport.

330 Art 33(3) last sentence; Arts 91, 97

331 As there are no stores in the Registrars' Offices, exhibits are stored in police stations. The author personally visited *Yeka*, *Qirqos*, *Arada* and *Lideta* Sub-City police satiations in Addis Ababa. Those exhibits most often are not produced at the trial. This has limitation on the right of the defendant to have access to evidence because of the adversarial mind set on both sides. Therefore, the police give access to the defence only on court order. This is not exercised either; for instance, no defendant (or counsel for the defendant) requested the Addis Ababa

they are not produced before the court during the trial and therefore restrict the constitutional right of the accused to have access to evidence against her.[332] *Third*, such items that may be seized are all sorts of things including food items and vehicles. Some of them are perishable; others are expensive to be kept idle. They cost both the individual and the economy a lot. While the investigating police officer has the power to return those items that are not needed for evidence to the person from whom they are taken, the police are very much reluctant. Unfortunately, investigations take long. Once the investigating police officer completes her investigation and the investigation report is submitted to the public prosecutor, the liability is passed on to the public prosecutor who consistently opines that she does not have a legal ground to return items to the owners. Furthermore, because the evidences are not produced at court during trial, the court does not give order on the situation of the exhibits. Thus, the owners are obliged to file a different case for the return of their property.[333] *Finally*, rumour has it that exhibit items are sometimes lost.

police commission homicide investigation unit to have access to such exhibits in the hands of the police. Interview with Sgt. Yared Tareqegn, Addis Ababa Police Commission, Homicide Investigation Unit (July, 2008). Some make distinction between cases that are submitted to the public prosecutor and that are not; and they allow access only in respect of the latter. Interview with Insp. Bedru Sarhe (Lideta Sub-City Police Station, July, 2008)

332 FDRE Const., Art 20 (4)

333 This problem, arguably, is not even appreciated by the law maker. See Proc. No. 434/2005, *supra* note 97, Art 15

Chapter 4

Arrest

Introduction

Arrest is a restriction to the right to liberty of a person on the ground that she is suspected of an offence and investigation, which demands her detention, is in progress as envisaged by the Constitution. Ideally, arrest comes later in the investigation process and is significantly circumvented. Furthermore, the major ground of arrest is to hear the suspect's part of the story. Having regard to the suspect's right to remain silent this may be of lesser a ground as a justification for restriction of the liberty of the person.

Arrest may be made with or without warrant. The legal grounds for effective arrest without warrant are so broad that the police may make arrest in the absolute majority of cases without warrant rendering the constitutional guarantee to the right to liberty a platitude.

In this chapter we shall examine the concept of arrest, the procedure and the legal effects it has in the process of investigation. In order to better understand the constitutional right to liberty, this chapter need to be seen along with the chapter dealing with bail and remand because even though the law of arrest is broad, the immediate remedy, bail, is equally essential.

4.1 The Basics of Arrest Law

FDRE Const., Art 10

1. *Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable.*

FDRE Const., Art 14

> *Every person has the inviolable and inalienable right to . . . liberty.*

FDRE Const., Art 17

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

It is a matter of common practice that rights are the rule and restrictions are the exception. Thus, the rule is rights are stated in the broadest terms. Any restriction is an exception and has to be construed strictly. Therefore the right to liberty is the rule. The Ethiopian Constitution is good in its statements for the recognition and protection of the right to liberty—as a sacred right which is *inviolable* and *inalienable*. Any ground of restriction of the right to liberty is an exception to the rule and is to be interpreted strictly. According to the Constitution, a person may not be arrested arbitrarily; she may be arrested where she is suspected of violating the substantive law the penalty of which entails jail. Furthermore, the arrest must be made in accordance with the procedure as laid down in the procedure law.

4.1.1 The Act must be Jailable

The Ethiopian Criminal Code and other penal provisions, such as, the press law, the customs law, electoral law, etc., contain provisions on the modality of punishment for violation of specific provisions. Those penalties, depending on the seriousness of the offence are fine, imprisonment or in exceptionally grave offences, death.[334] If the law breached is a regulation that only entails fine, there is no reason to effect arrest; because it does not achieve the purpose of the punishment; it does not make the process fair. In such cases, it is only with respect to those offences that are punishable by imprisonment (and certainly by death) that arrest may be justified. Therefore, it is dependent on the substantive law whether the penalty justifies restriction of liberty of the suspect or the accused. This however should not be understood to deny the principle of presumption of innocent or

[334] Ethiopia does not abolish death penalty. There are 26 crimes that were punishable by death in the 1957 Penal Code; there are equivalent numbers of crimes, 27, that are punishable by death in the 2004 Criminal Code.

an introduction of punishment before trial. It is only one of the requirements that justify arrest for the purpose of investigation.

4.1.2 The Procedure

Where the violation of the criminal law justifies arrest of a suspect, the law further provides the procedure for arrest. In the normal course of events arrest is to be effected either based on court warrant or police summons.[335] Where the offence is a flagrant offence, however, or where the offence falls under the list of offences that justify arrest without warrant, arrest may be made on the spot without a court warrant.

4.1.3 Arbitrary Arrest

It is difficult to define arbitrary arrest in a system where there is no jurisprudence of such interpretation of concepts not only of arbitrary arrest but also of any other concept of human right. The idea of arbitrary arrest thus, can be described in a very elementary way as that, any arrest made without a substantive justification and without compliance with the procedure for arrest.

4.1.4 Detention without Charge or Conviction

Even when the initial arrest is not arbitrary, the continued detention has to be justified. Thus, a person may be detained for the purpose of investigation or awaiting trial or serving a sentence. Thus a person cannot be detained without a charge or a conviction. Suppose there was a police investigation which was completed and the police investigation report is sent to the public prosecutor. However, the public prosecutor does not act on the investigation report for a long time that the person in detention does not know her fate. Is this detention justified? Certainly this is a detention without charge and therefore unconstitutional.

4.1.5 Arrest, Definition

The concept of arrest is not defined in Ethiopian law, nor is its purpose. From the readings of the provision of Art 25, on summoning the suspect before the investigation police officer, seen in conjunction with Art 28 which provides for release of such summoned person on bond with or without sureties or on court bail, with Art 59 on reasons for remand and Art 67 denial of bail as

[335] See section 4.2, *infra* why summons result in arrest.

well as from the readings of Art 56 (3), the manners of effecting arrest, we can abstract something with respect to the nature and purpose of arrest.

As provided for under Art 56 (3), the manner of arrest is "actually touch[ing] or confin[ing] the body of the person to be arrested unless there is submission to" the custody of the person effecting arrest "by word or action". Such physical confinements need also be accompanied by the authority of the person effecting arrest and such physical confinement is made with a view to obtain the attendance of the suspect either for interrogation by the investigating police officer or for trial before the court. It is the combination of the authority exercised, the physical confinement and the reason for such confinement that constituted arrest. Arrest, different from detention, may therefore be defined as *restriction of liberty of a suspect/accused by a person having authority to impose such restriction for the purpose of ensuring the attendance of the person before the police or the court.* In this definition, there are things missing, such as, the purpose of prevention of further commission of crime. There is no preventive detention in the Ethiopian criminal process and they are not meant for investigation purposes.

It cannot be stated more emphatically that the Ethiopian law of arrest is much broader than one can imagine; Fisher describes the Ethiopian law of arrest as "one of the troublesome areas of the Code."[336] First, there is summons which always results in arrest. Second, a person may be arrested without warrant for flagrant offences. Third, the provisions Art 51 are there for non-flagrant offences to make arrest without warrant possible. One of the fundamental factors that broaden the power of the police to make arrest without warrant under Art 51 is the revision of the Criminal Code with increased penalty which is not matched by revision in the Criminal Procedure Code. Overall, those three grounds of arrest without warrant cover more than three-quarter of the offences. Thus, as it stands now, the practice is arrest without warrant and in exceptional situation, arrest is made with warrant.

4.2 Summoning the Suspect and Police Bond

Art. 25.—Summoning of accused or suspected person.

Where the investigating police officer has reason to believe that a person has committed an offence, he may by written summons require such person to appear before him. [Emphasis added]

336 Fisher (1966b), *supra* note 55, at 465

The investigating police officer has the obligation to investigate a crime even where the information she received is open to doubt. That investigation involves gathering evidence. Once that evidence is gathered the investigating police officer evaluates whether it meets the requirements of "reason to believe" before she sends out summons to the suspect as per Art 25. Summons is a formal document (actually, a small piece of paper) sent to the suspect by and to appear before the police conducting the investigation. Although it is not provided for in the schedule of the Criminal Procedure Code, the practice in few police stations in Addis Ababa indicates that summons has the following content:

> *To:* _____
>
> *(without address of the suspect)*
>
> *Our office seeks your presence for questioning and you are hereby ordered, as per Art. 25 of the Criminal Procedure Code, to appear before the Criminal Investigation Dept. of ___ Police Station, Office No.___ on the day of ___ at _____ O'clock.*
>
> *Name (of the investigating police officer or chief of the investigation department)*
>
> *Signature*

Summons is a voluntary process as it "draws one into custody 'voluntarily' rather than by force."[337] Once the accused arrives at the police station and is detained there involuntarily the voluntary nature of appearance transforms into arrest.[338] In fact, where there is such identical effect between summons and arrest warrant, and the latter is subjected to rigorous requirements one would wonder how far the Code controls the power of the police in issuing summons and how far the requirement of "reason to believe" is regarded by the police.

The content of the phrase "reason to believe," used only once, is not defined in the Code.[339] The Amharic equivalent, *beqi tiretare* (lit. "sufficient/strong

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337 *Id.*, at 473

338 *Id.*

339 The Malayan Code uses the phrase "reason to believe" frequently to mean various degrees of threshold evidence as assessed by police during investigation, by the

suspicion"), does not help define the content. Looking at both versions of the concept, it is a suspicion supported by evidence. 'Reason to believe' is an objective standard based on threshold of evidence that the person is 'probably' guilty in order to justify the restriction of her liberty for the purpose of investigation.[340] Such belief that the person has committed the alleged offence need not, however, be conclusive. If, on the other hand, the evidence is of questionable reliability, such as, "anonymous accusation, ambiguous information or hearsay unsubstantiated by factual investigation etc." or that no single evidence implicates the suspect it is not justified to send her summons.[341]

Where summons is issued in the absence of such threshold evidence establishing a reason to believe that the suspect has probably committed the alleged offence, related subsequent investigation activities, such as, arrest and interrogation of the suspect, are illegal, provided the suspect appears before the police based on such summons. Thus, any confession or admission of evidence made by the suspect is subject to legal challenge. Where the investigating police officer cannot proceed with her investigation, however, she either stays the investigation, which is not very much likely in the existing practice, or sends the already completed investigation to the public prosecutor for appropriate decisions.[342]

Magistrates in post-arrest pre-trial investigation and by the trial court. There are various safeguards in the Malayan Code; for instance, the accused does not sign on a statement made before the police while she is under detention. Such safeguards do not exist in our Code. Therefore, resort to Malayan Code may not be of help for interpretation of the concept.

340 The American equivalent for the concept of "reason to believe" is "probable cause" which is also a constitutional requirement. Unlike in the Ethiopian criminal process where 'reasons to believe' is used only in arrest on summons, the US 'probable cause' is used both in arrest and search warrants. The Court originally assesses probable cause based on the totality of circumstances, *Spinelli v. United States,* 393 U.S. 410, (1969). The US Supreme Court later adopted two prong tests: the reliability of the source or the basis of the knowledge (the informant) and the reliability of the information, *Illinois v. Gates,* 462 U.S. 213, (1983).

341 Fisher (1966b), *supra* note 55, at 473

342 This view is actually difficult to swallow for many in the administration of the criminal justice because the normal practice is that even when there is no other evidence against the suspect, obtaining statements from the suspect appears to be compulsory both for the police to say she has completed her investigating and for the public prosecutor to act on the investigation report. In the absence of the

It is only appropriate to see the requirement of 'reason to believe' the suspect probably has committed the alleged offence in the context of the effect of summons. Where the summoned person appears, the consequence is arrest. The arrestee could then be released either on police bond, as per Art 28, or on court bail, as per Art 64, or may not be released at all. Where summons has such sever consequences, then the investigating police officer should not take sending summons so lightly. She has to evaluate the evidence in her hand and must be convinced that it is clearly tilted towards the suspect's guilt.[343]

One can, therefore, make a rational conclusion that the law attaches such serious consequences to summons on the presumption that by the time the investigating police officer decides to send summons to the suspect, she has undertaken sufficient investigation establishing a strong belief that the suspect has committed the alleged offence, not to dispel suspicion. Thus, where such serious consequences are attached to summons, the investigating police officer has to make her choice very carefully. This is particularly strengthened by the fact of absence of post-arrest pre-trial screening procedure.[344]

A wise investigating police officer would even see beyond the outcome of summons on the suspect. Summons is sent to the suspect in order to take statements from her. As a precondition to taking statements, the investigation police officer has the obligation to inform the suspect that she has the right to remain silent and that any statement she may make is to be recorded and may be used in evidence against her in court. After being informed of such facts, how far is the suspect willing to speak to the investigating police officer, forfeiting her constitutional right to remain silent? That certainly is part of the calculation.

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statement of the suspect, unless the police reports that the suspect could not be found (which may result in closing the investigation file), the public prosecutor might send the investigation report back for further investigation with a view to hear the suspect's part of the story. It is often overlooked that, in the absence of a *reason to believe* that the suspect has committed the offence, the latter cannot be summoned by the police.

343 Where the investigating police officer does properly evaluate the guilt of the suspect against the evidence gathered before she summons the suspect and the latter sustains injury, the former can be subject to liability for abuse of power. See the discussion on legal remedies to breaches of the suspect's rights during investigation, Chapter 6.

344 See the introduction on Preliminary Inquiry, *infra*.

In order to tame the law of arrest, Fisher had made two alternative suggestions: either to grant the power to issue summons to the court, as it decides less passionately, or to grant the police the power to unconditionally release the person summoned where he is found to be apparently innocent.[345] It is still the outstanding argument among authorities that the police are not competent to unconditionally discharge "dangerous criminals." He made a compelling pre-emptive argument that "if the police are not sufficiently competent to decide that a summoned accused is innocent and ought therefore to be discharged, then they are equally incompetent in the first place to issue a summons on the ground that there is "reason to believe" the accused guilty of a crime, and the power to issues summonses ought to be vested in the judiciary instead of the police."[346]

It is the suspect's constitutional right to be promptly informed of the reasons for her arrest and the charges against her in the language she understands.[347] It has been indicated that, the person summoned, should she appear before the investigating police officer, she ends up in arrest. The summons, however, does not contain the reasons why the suspect is needed before the investigating police officer, save she is required to appear before the investigating police officer by virtue of Art 25 of the Criminal Procedure Code. Certainly mentioning the provisos of Art 25 is not good enough to comply with the constitutional obligation to inform the suspect the reasons for her arrest. However, the suspect is not arrested until she voluntarily shows up before the investigating police officer. The question is however difficult with respect to the second summons sent as per Art 26 which is compulsory.

Furthermore, the police summons to the suspect does not contain address of the suspect. The Civil Code contains provisions on residence and domicile (Art 174 et seq.). The importance of residence is, among other things, for the purpose of establishing address to serve summonses. The Civil Procedure Code has express provisions on service of summons in civil processes (Art 94 et seq.). The charge contains the address of the suspect; the summons by the court also contains address of the suspect. The investigating police officer cannot claim not knowing the address of the suspect because that is also part of the investigation. Sending summons without the address of the suspect is thus inappropriate.

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345 Fisher (1966b), *supra* note 55, at 474, 475

346 *Id.*, at 475

347 FDRE Const., Art 19 (1)

Art. 28.—Release on bond.

(1) Where the offence committed or complained of is not punishable with rigorous imprisonment as a sole or alternative punishment, or where it is doubtful that an offence has been committed or that the summoned or arrested person has committed the offence complained of, the investigating police officer may in his discretion release such person on his executing a bond with or without sureties that he will appear at such place, on such day and at such time as may be fixed by the police.

(2) Where the accused is not released on bond under this Article, may apply to the court to be released on bail in accordance with the provisions of Art. 64.

It has been indicated many times that summons is a voluntary process; the person summoned could choose whether to appear or not. As the major purpose of summons is to hear the suspect's part of the story, where she elects to appear before the investigating police officer, the suspect will be interrogated. Once interrogation is completed the investigating police officer decides whether to release her or to produce her before the court within 48 hrs.

The investigating police officer can release such summoned person in three situations:[348]

A. The first situation where the summoned or arrested person may be released by the police on bond is where the offence the suspect is charged with is not punishable with rigorous imprisonment as a sole or alternative punishment. Stated affirmatively, it must be an offence punishable exclusively by simple imprisonment because those offences are that they are not serious danger to the public.[349] In such

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[348] The content of this provision of the Code is reproduced in Proc. No. 434/2005, *supra* note 97, Art 4(2) that "the investigator may release, on bail, with or without surety, a person arrested for corruption offences where:

a) it is doubtful that the offence complained of has been committed, or

b) it is doubtful that the arrested person has committed the offence complained of, or

c) the offence for which the person arrested is not punishable with rigorous imprisonment."

[349] Crim. C., Art 106(1) defines simple imprisonment as extending for a period of from ten days to three years. This term of imprisonment may, however, be extend

cases, there is no doubt that the offence complained of is committed or that the suspect has committed it; it is rather based on the likelihood of her reappearance when she is needed for further proceedings in the criminal process. Thus, even when the suspect might have committed the offence under investigation and she may even have confessed to committing the same, she may still be released on police bond; because, if she is not a person that is likely to disappear before trial, and keeping her in custody serves no purpose. Thus, she could be released on police bond with or without sureties. If she is detained, she might stay in jail for a period that might be more than what she could finally be sentenced to.

B. The second situation where the suspect may be released on police bond is where after interrogation of the suspect, it is doubtful that an offence is committed at all. Here, the nature of the offence is not regarded. Ideally, this situation is very less likely to occur because the investigating police officer is expected to undertake her investigation properly before she sends out summons to the suspect. Therefore, if there was *reason to believe* that the suspect has committed the offence by the time the summons is sent out, then it is very less likely that it would be doubtful that the offence is committed at all. Where the suspect is released because of doubt the offence is committed at all, the police need not have regard to the seriousness of the offence because to put such preconditions for an offence doubtful of its commission is simply nonsense. The police fix the amount simple because there is no unconditional release.
C. The last situation where the suspect could be released on police bond is where there is doubt that the summoned or arrested person has committed the offence complained of. This is not much different from the situation in (b) above, save the situation in (b) appears to be a little absurd in that the offence might not have been committed at all. Here, the offence is committed but there is a doubt whether it is actually committed by the summoned person.

When any of the above conditions are met, the investigating police officer may release such person up on her executing police bond with or without sureties that she will appear on such date and place as may be fixed by the investigating police officer. There is no such a thing as unconditional release

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up to five years where "owing to the gravity of the crime, it is prescribed in the Special Part of [the] Code, or where there are concurrent crimes punishable with simple imprisonment, or where the criminal has been punished repeatedly."

under our law.[350] There are few points to be noted though. First, under (b) and (c), in setting the amount of the bond, the investigating police officer should not make the amount higher in order to compel the suspect to come back. She enters such bond simply because our law does not recognise unconditional release otherwise. Second, such release on bond is allowed not only to persons summoned but also for those who are arrested based on court warrant, or without warrant under other circumstances.[351]

The police are very much reluctant to release suspects on police bond because the time gap between the investigation stage and the trial is too long. When the police release such persons on bond and the trial comes after too long, suspects disappear either because they change their address or otherwise may not be informed of the trial date. In such situations, the court reprimands the police for releasing on low amount of bond. The investigating police officer, in order to shift the blame on to the court itself, thus, would rather bring the arrestee before the nearest court within the 48 hrs limit so that the court would grant her bail.

But, in general, where the arrested person is not released on police bond for whatever reason, she has the right to request the court to be released on bail.[352]

4.3 Arrest on Warrant

Art. 49.—Principle.

Save as is otherwise expressly provided, no person may be arrested unless a warrant is issued and no person may be detained in custody except on an order by the court . . .

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[350] The Draft Criminal Procedure Code has two more points added to this provision: first, in assessing whether to release the suspect on bond and in fixing the nature and amount of bond, it is made clear that the provisions that are applicable to bail are also applicable. Second, where it is clear to the investigating police officer that the arrested person has not committed the offence, such arrestee "can be released without security." Art 29(2), (3)

[351] The investigating police officer does not release the person arrested on court warrant. The court orders the arrest of the suspect for investigation purposes; but the police consider it interference with the power of the court. The police, as is the case in Art 28 in general, prefer to produce the arrestee before the court.

[352] Crim. P. C., Art 28 (2); Proc. No. 434/2005, *supra* note 97, Art 4 (3)

Art. 52.—Principle.

> *(1) Where a warrant is required by law to be issued by a court before a person is arrested the provisions which follow shall apply.*

As has been indicated above, arrest on summons is an anomaly in the Ethiopian criminal process. The rule is the right to liberty. When it is found to be necessary, the restriction should have been based on arrest warrant. Thus, the principle, Art 49, requires the investigating police officer to obtain an arrest warrant unless it is expressly provided otherwise. Arrest warrant is a formal document issued by the court, directed to and authorizing the head of the police to arrest a named suspect with a view to assist the investigation or to produce her before the court for trial. However, there are many confusing provisions with respect to arrest warrant and the way it is enforced.[353] First, as a bridge to the provisions dealing with arrest, it is appropriate to consider the provisions of Art 26.

Art. 26.—Arrest.

> *(1) Where the accused or the suspect has not been arrested and the offence is such as to justify arrest or where the person summoned under Art. 25 fails to appear, the investigating police officer shall take such steps as are necessary to effect his arrest.*
> *(2) Where the arrest cannot be made without warrant, the investigating police officer shall apply to the court for a warrant of arrest in accordance with the provisions of Art. 53.*

Coming next to Art 25 and in face of the arrest warrant provisions, the content of the provisions of Art 26 do not make much sense, more so when read alone. From the preliminary reading of the provision, one can see that Art 26 appears to require certain measure been taken where the suspect has not been arrested where either the offence is one that justifies arrest or such person is summoned and failed to appear. What that measure is, appears to be unclear. Adding to the confusion, the second Sub-Article provides

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[353] For instance, Art 49 is not within the section dealing with arrest on warrant; it is rather found in the section dealing with arrest without warrant. The provisions of Art 26 are not clear but the investigating police officer sends (compulsory) summons as per Art 26 when the first summons, sent as per Art 25, is not complied with. This practice makes the provisions dealing with arrest warrant unnecessary.

that "where the arrest cannot be made without warrant," the investigating police officer applies to court for a warrant of arrest.

The major misunderstanding of Art 26 must have been assisted by the provisions of Art 27 (1) which mentions Art 26 along with Arts 50, 51 in the context of arrest. It provides that "[a]ny person summoned under Art. 25, or arrested under Art. 26, 50 or 51 shall, after his identity and address have been established, be asked to answer the accusation or complaint made against him." This gives the impression to the police that where the person summoned as per Art 25 fails to appear, the investigating police officer can send another summons which is as compulsory as an arrest warrant is.

This confusion has led the police to interpret the content of Art 26 as authorizing the investigating police officer to send another compulsory summons. The summons sent as per Art 26 has the following content:

> *To:* _____
>
> *(without the address of the suspect)*
>
> *Our office seeks your presence for questioning. You are hereby ordered as per Art. 26 of the Criminal procedure Law to appear, along with the police officer serving this summons, before the Criminal Investigation Dept. of Woreda_____ Police Station, Office No.___*
>
> *Name*
>
> *Signature*

The practice of service of summons under Art 25 is different from one police station to another. If a private person lodges a complaint normally it is sent in the hands of the complainant; exceptionally, it may be sent in the hands of a police officer. Where the second summons is sent in this manner, it is sent in the hands of police officers, normally, at least two because they will be arresting the summoned person.[354]

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[354] In one instance, I visited a police station along with a public prosecutor working in that Sub-City in order to see the practice. The investigating police officer showed us both summons that were sent by virtue of Art 25 and Art 26 and he explained to us how it is implemented. I turned to the prosecutor and asked him whether this in

In practice, the police apply to court for an arrest warrant, based on the reading of the second Sub-Article, only when they are not physically able to effect arrest of the suspect either because the suspect is not found in the area or for other similar reasons. Insofar as he is in the area, the second summons has the force of an arrest warrant and the investigating police officer never needed to have one from the court.[355]

In order to make sense out of the provisions of Art 26, however, the Code, the criminal process, the roles and responsibilities of the various actors in the criminal justice system have to be seen in context. While the Code gives the court the power to issue a compulsory process, it certainly does not give the same power also to the police to be exercised at early stage of the process. Such reading of the provisions of Art 26 as authorizing compulsory process by the police nullifies the power of the court to issue arrest warrant under Art 56 et seq. and thereby the power of the court to supervise the legality of arrest. There is no power more susceptible to abuse than police power; the lawmaker never envisaged unregulated police power in the Code.[356] It

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accordance with the law and he replied "this is the practice everywhere including the place I was working earlier; this has been the case for a long time now, what can anyone do then?" in a helpless manner. This person was soon appointed as a judge and I visited him later. He did not seem to appreciate the problem.

355 With a view to avoiding this confusion, the provisions of the Draft Criminal Procedure Code were organized in such a manner indicating the purpose of Art 26 as a good bridge between summons and arrest warrant.

Article 16 Summoning the Suspect

The investigating police officer may, where he has reasons to believe that a person has committed an offence, summon the suspect by a written summons to appear before him for interrogation.

Article 17 Arrest of the Suspect

The investigating police officer may not arrest any person otherwise than provided for in this Code.

Article 18 Failure to Appear by the Person Summoned

Where the suspect duly summoned under Article 16 of this Code fails to appear before the investigation department, the investigating police officer may effect arrest after obtaining a warrant of arrest.

356 In some legal systems, in order to take advantage of the good communication between the police and the public prosecutor, such power to issue search and arrest warrant is given to the public prosecutor. That is still supervision by an independent organ deciding more dispassionately and one can trust that there is a fair procedure or regulation of police power.

is thus, both a matter of logical coherence and internal consistency of the Code as well as common sense in the administration of the criminal justice system that the police do not have a compulsory power, and such compulsory power is to be exercised under judicial supervision.[357] It also reduces abuse of power by the police as it allows judicial supervision.

If this argument is found to be acceptable, the basic scenario is the person is suspected of a crime, summons has been sent to which she did not comply, and thus she is not arrested.

A. The clause under Art 26(1) " . . . the offence is such as to justify arrest" does not seem to be clear as to what kind of offences are covered by this provision. This clause can be interpreted to mean only offences that are punishable with imprisonment or death. However, that is superfluous as it adds nothing to the procedure without this clause because a person according to the Constitution Art 17 can be arrested only when the offence they are suspected of is jailable.

B. The clause "where the person summoned under Art 25 fails to appear . . ." is the precondition for the application of Art 26 because Art 26 comes into play only after the person summoned as per Art 25 fails to appear.

C. Where the person summoned as per Art 25 fails to appear before the investigating police officer, the only power granted to the latter is to " . . . take such steps as are necessary to take effect his arrest." This provision appears to be without content because it does not indicate any thing whatsoever as to what the investigating police officer could exactly do. For a zealous police officer, it can only be surveillance of the area until a warrant of arrest may be obtained from the court.

D. The clause "where the arrest cannot be made without warrant" could have been a very good indication of what the next step could be taken by the police, but a *contrario* interpretation of it mutes the provision. It might be argued the police may have to try the provisions of Art 51, arrest without warrant in respect of those listed offences. Yet, those provisions stand in themselves and are enforceable as such.

The best interpretation of the content of the provision of Art 26 can only be that where the person summoned as per Art 25 fails to appear and the offence

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[357] Where the police do not have compulsory power, there is neither contradiction nor redundancy of the power to issue compulsory process by the court and by the police.

she is suspected of is jailable and the investigating police officer believes that she has to have custody of the suspect for the purpose of investigation, then she can apply for a court warrant. Thus, that step necessary to make the arrest of the suspect can *only* be seeking arrest warrant from the court having jurisdiction; not sending another summons.

Where the summoned person fails to appear, it is to the advantage of the investigating police officer to request for an arrest warrant. First, it insulates the investigating police officer from suits based on false arrest and abuse of power. Second, judges are better than the police, at least, in that they are detached and less involved in the case to decide on the justifiability of the arrest sought less passionately.[358] In a system where there is no post arrest pre-trial judicial screening, this is a very responsible way of criminal justice administration. Thus, arrest based on summons under Art 26 is not warranted. If taken seriously, it has serious consequences both for the investigating police officer and the government.[359]

Art. 54.—When warrant of arrest to be issued.

A warrant of arrest shall only be issued where the attendance of a person before the court is absolutely necessary and cannot otherwise be obtained.

The way the law puts certain limitations over the power of the investigating police officer to issue summons to the suspect, it also puts limitations over the power of the court to issue warrant of arrest. These limitations are stated in Art 56 emphatically preceded by the word "only" which is missing in the Amharic version. The law seems to be clear where it provides that a warrant of arrest may be issued only where the attendance of a person before the court is "absolutely necessary" and "cannot otherwise be obtained."

There is a precautionary note that needs to be made here with respect to where the attendance of the suspect is required. The provision states that

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358 It spears to be a universal rule that because such decision affects the liberty of the person concerned, it has to be supervised by an independent and detached organ, usually the judiciary. In *Lo-ji Sales Inc., supra* note 304, because the Magistrate who granted the warrant of search was present at the execution of the search the US Supreme Court held that such Magistrate was not *independent* and *detached*; thus, the search was unlawful.

359 See the discussion on legal remedies to breaches of the suspect's right during investigation, Chapter 6.

the attendance of the suspect is required *before the court*. This must only be poor draftsmanship; otherwise, while the investigation is in progress and the public prosecutor does not decide whether to take the case to court, the suspect's attendance before the court cannot be required.[360] Even when the attendance of the suspect is required before the court, the manner of communication to the suspect is not governed by this provision. Because that part of the process is not provided for in the Code, in practice, the court sends her summons that her case is adjourned on such date and hour. Where she fails to appear on such summons, the court may send bench warrant. On the other hand, the attendance of the suspect before the court can be absolutely necessary only where the offence cannot be tried in the absence of the accused.[361]

i. The Requirement of *Absolute Necessity*

The first requirement that the attendance of the suspect is "absolutely necessary" is not as strong as it appears. It is rather a screening process for the court to ascertain that there is a ground for detaining the suspect. It is opined that it is the minimum requirement that there is "sufficient evidence to believe that the suspect has probably committed the offence."[362] Certainly, the court must have a threshold of evidence to consider whether there is reason to believe that the suspect has committed the alleged offence that justifies the restriction of her liberty with a view to conduct investigation. As this is the only stage of judicial screening based on evidence of guilt before the trial itself, this requirement is certainly slightly more stringent than what is called a "reason to believe" for the police before she sends out summons to the suspect. Thus, although it is not provided for in the Code, in order to assist the court in the assessment of the weight of the evidence on the probability of the commission of the offence, the application for a warrant of arrest needs to be supported by various proofs and some of them might be "(a) a copy of the accusation or complaint (as recorded under Art 14); (b) the presence in court of the party who signed the accusation or complaint, and his availability for questioning by the judge; (c) copies of any other statements obtained from witnesses during police investigation (Arts

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360 In an attempt to clarify this point, the Draft Criminal Procedure Code, Art 20 (b) provides that "The court to which an application requesting for warrant of arrest is made may issue such warrant only when it finds the attendance of the suspect is absolutely necessary for the investigation and cannot be obtained otherwise."

361 See the Section 14.1 *infra*.

362 Fisher (1966b), *supra* note 55, at 469

24, 30(3)); (d) written statements of the results of any other investigation activities conducted by the police, such as, searches (Arts 32, 33) and physical examinations (Art 34)."[363] For the judge to see whether the investigation is in good progress the investigating police officer need to have her investigation file along with her.

ii. The Requirement that the Person *Cannot Otherwise be Obtained*

The law is reluctant to arrest a suspect with warrant not only because of constitutional limitations but also because it involves possible use of force which may result in bruises.[364] Before the investigating police officer requests for an arrest warrant and the court issues a compulsory process, the investigating police officer must first try other voluntary attendance of the suspect. The only voluntary attendance available to the police is sending summons. Thus, until summons is tried it is believed that the otherwise attendance of the accused/suspect is possible. However, it is not always the case that summons has to first be tried before applying for an arrest warrant. If the police shows upon reliable evidence that sending summons is futile as the suspect has already planned or began to flee, the court is justified in issuing warrant as if his attendance could not "otherwise be obtained." It is, however, reported that many judges interpret the clause "cannot otherwise be obtained" as allowing them to issue warrant only if the suspect cannot legally and practically be arrested without a warrant.[365] It cannot be emphasised enough, however, that the attendance of the suspect "cannot be obtained otherwise" cannot be interpreted to include Art 19, 20 and 51.

Both the absolute necessity of the attendance of the suspect and impossibility of obtaining her attendance otherwise are cumulative requirements as

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[363] *Id.*, at 470; as indicated earlier, other investigations need to be conducted before the arrest of the suspect is sought.

[364] The obvious disadvantages in using arrest warrant may be it involves use of force. Some of the inherent disadvantages of arrest with warrant are: "(a) the use of time and energy on the part of the police who must physically go find the accused and bring him under court supervision; (b) possible embarrassment to an innocent accused being publicly arrested and escorted by the police; and (c) the possibility of resistance to arrest with attendant injuries to the accused and others." *Id.*, at 470, 471

[365] *Id.*, at 470, Footnote 29.

connected by the word "and." The court can then issue the warrant of arrest only after it is satisfied that the suspect is the proper target for criminal investigation and it becomes necessary for the court to obtain physical control over her in order to undertake investigation.[366]

Art. 52.—Principle.

(2) A warrant of arrest shall be in the form prescribed in the Third Schedule to this Code.
(3) A warrant of arrest shall remain in force until executed or cancelled by the court which issued it notwithstanding the death, retirement or replacement of the judge having issued the warrant.

Art. 53.—Issue of warrant.

(1) A warrant of arrest may be issued on the application of any investigating police officer by any court and shall be addressed to the chief of the police in the Taklay Guezat in which it is issued.
(2) A warrant may be issued at any time and on any day of the year.
(3) A warrant of arrest may be executed in any part of the Empire by any member of the police.

Art. 55.—Application for warrant in urgent cases.

(1) In cases of urgency the investigating police officer may apply for a warrant by telephone or telegraph.
(2) In such cases the application to the court in question shall be confirmed in writing within 24 hours.

As can be read from the provisions Arts 53(1) cum. 55, an application for a warrant of arrest shall be made in a written form, perhaps stating also the exigencies that necessitated the arrest of the person. In case of urgency,

366 In May 2000, before the pre-trial process was also given to the Addis Ababa City Courts, a Federal Judge told the author of his experience that the practice in many courts was sticking to the stringent requirements of the law and are refusing an arrest warrant as conditions were not met in the majority of cases. The police, thus, have found arrest of person without obtaining such warrant "handy." As this illegality has developed and became a "lawful" practice, for the purpose of encouraging the legality of the police, the Federal First Instance Courts were granting warrant light heartedly whenever they were requested for a warrant of arrest.

however, the investigating police officer may apply for a warrant of arrest by telephone or by telegraph. It presupposes an ideal situation where there is an efficient court and law-abiding police working hand in hand. Once such warrant is granted, however, the law requires the police to confirm it in writing in 24 hrs.

Generally, the investigating police officer can submit her application for a warrant of arrest to the nearest court. There is no indication as to which particular court shall issue such warrant but from the readings of Arts 33(1) cum 54, any court may issue such warrant. The Addis Ababa Charter authorizes Addis Ababa City Courts to entertain such cases of all pre-trial procedures (Arts 33, 35, 53 & 59) in their criminal jurisdiction.[367] Although the power is granted without prejudice to the power of Federal First Instance Courts, as it stands now, the majority of cases appear to be presented to the Addis Ababa City Courts.

Moreover, in few exceptional cases the law determines which court shall issue arrest warrant. For instance, for corruption cases, it is the court that has jurisdiction to see the matter that has power to issue arrest warrant.[368] The anomaly of this provision is that it is not clear whether it is possible to determine which particular court has jurisdiction to try the case before completion of such investigation.

Once a warrant of arrest is issued it may be executed in any part of the country by any member of the police if it is issued by the Federal Courts. The warrant shall remain in force until it is executed or cancelled by the

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[367] Initially, Proc. No. 311/2003, *supra* note 170, Art 41 (1) (c) provides that "without prejudice to the jurisdiction of Federal Courts, remand in custody and bail applications on Federal offences" to be the jurisdiction of Addis Ababa City Courts criminal jurisdiction. Later, this is amended and the Addis Ababa City Courts were granted sweeping power under Proc No. 408/2004, *supra* note 171, Art 2 which provides that the Addis Ababa City Courts have criminal jurisdiction "without prejudice to the jurisdiction of Federal Courts on the substance of federal offences, cases brought in accordance with Article 33, 35, 53 and 59 of the code of criminal procedure of 1961"

[368] Proc. No. 434/2005, *supra* note 97, Art 7(4) provides that "matters related with arrest, search, remand, bail, restraining order or any other related matter with investigation of corruption offences shall be made to the court which has jurisdiction to hear cases of corruption offences" (sic).

court which issued it despite the fact that the judge who issued it has died, retired or been replaced.

One outstanding problem is the issue of jurisdiction. Although the law was adopted having unitary system of government in mind, it is still applicable in the federal structure. The court is issuing the arrest warrant to the chief of the police where the court sits. The power of the police is restricted by territorial jurisdiction. Therefore, the police can only send the warrant to the chief of the police where the suspect is presumed to be. This can be the case only where the suspect is in that locality for the purpose of evading arrest. What if the place where the arrestee found is his residence? This raises jurisdiction of courts. Can a State Court issue an arrest warrant for the arrest of a person in another state or in the territory of the Federal Government, i.e., Addis Ababa and Dire Dawa? Inversely, can Addis Ababa and Dire Dawa Cities' Courts issue a warrant for the arrest of a person outside their territory? The answer for those questions appears to be in the negative because, as per the provisions of Art 3 of the Courts' Proclamation, it is the jurisdiction of the Federal Courts. Those courts can issue a warrant for the arrest of persons living outside of their territory only in their delegated jurisdiction. Two points are clear though; no court can issue a warrant of arrest ordering the police outside of its jurisdictions nor can the police effect arrest outside of its jurisdiction on warrant of arrest.

In an attempt to address this gap, the Draft Code of Criminal Procedure provides as follows:

Article 21 (c) Enforcement of an Arrest Warrant

1. *A police officer in possession of a warrant of arrest may effect arrest of a suspect in accordance with the provisions of this Code. The Warrant shall remain in force until executed or cancelled by the Court issuing it.*
2. *The warrant of arrest may be executed out of the local jurisdiction of the court issuing it by any police officer.*
3. *Where the execution of the warrant of arrest is not within the Federal or Regional limits of the court's jurisdiction, the chief of the police may send it to the police commissioner within the local limits of the execution of the warrant through any convenient means of communication.*

The extent to which this provision addresses the issue of conflict of jurisdiction can be seen in light of police jurisdiction.

4.4 Arrest without Warrant

Introduction

Remember what is discussed at the beginning of the section dealing with arrest. The right to liberty is the rule, thus, it is provided in broad terms. Restriction to the right to liberty is an exception; therefore, we have to have an arrest warrant in restricted situations. Also remember the fact that arrest on summons in the Ethiopian criminal process is an anomaly. The circumstances in which a warrant of arrest could be granted is based on the fact that the attendance of the suspect for the purpose of investigation is absolutely necessary and her attendance cannot be obtained otherwise. In further exception to a rule of judicially authorised restriction to liberty, however, there is arrest without warrant. Such restriction rules, according to the rules of interpretation, are extremely restricted because they are not only exceptions to the rule of liberty they are also exceptions to the exception.

Arrest without warrant is provided for in two conditions: first, a suspect may be arrested without warrant in circumstances where she is found apparently committing or attempting to commit flagrant offences; and second, a suspect may be arrested without warrant where it is provided for under Art 51 or a special law, such as, the vagrancy control law.

4.4.1 Flagrant offences, definition

Art. 19.—Flagrant offences.

(1) An offence shall be deemed to be flagrant where the offender is found committing the offence, attempting to commit the offence or has just committed the offence.
(2) An offence shall be deemed to be quasi-flagrant when, after it has been committed, the offender who has escaped is chased by witnesses or by members of the public or when a hue and cry has been raised.

Art. 20.—Assimilated cases.

An offence shall he deemed to be flagrant and to fall under the provisions of Art. 19 when:

(a) the police are immediately called to the place where the offence has been committed; or

(b) a cry for help has been raised from the place where the offence is being or has been committed.

Flagrant offences are classified into three categories: flagrant offences, quasi-flagrant offences and assimilated cases. Flagrant offence, according to Art 19(1) is a situation wherein the offender is found committing the offence, attempting to commit the offence or has just committed the offence. As can be gathered from the wording of the provision "committing", "attempting" or "has just committed" the suspect is either in the process of acting (or omitting) in the eye of witnesses or has just completed the last act constituting (completing) the offence. On the other hand, in quasi-flagrant offences the commission or attempt of the offence is completed and the offender has escaped. However, she has been chased by witnesses or members of the public or a hue and cry has been raised from the place where the offence has been committed or attempted. Therefore, there is sufficient time gap between the commission (or attempt) of the offence and the discovery of the suspect.

The assimilated category of flagrant offences are somehow problematic; they are either where the police is immediately called to the place where the offence has been committed or a cry for help has been raised from the place where the offence is being or has been committed. In situations where a cry for help is raised from the place where the offence is being or has been committed is actually a flagrant offence falling under the first category rather than under *assimilated cases*. On the other hand, where the offence is already committed (or attempted) and the police are immediately called to the place, it certainly means some time has already lapsed between the commission of the offence and the arrest of the suspect. In that case, the gap is so long that it defies the purpose of flagrancy.

Despite the difficulty of determination of time gap between the commission (attempt) of the offences and discovery (arrest) of the suspect, there are two elements that are central to the notion of flagrancy: *proximity* in terms of time and place and *publicity* in occurrence (commission). The first element, proximity in terms of time and place can be abstracted from wordings, such as, "has just committed the offence", "after it has been committed", "the police are immediately called" and "a cry . . . . has been raise." Publicity of the commission is also apparent from those provisions that the offender is "found committing the offence, attempting to commit the offence," that she is "chased by witnesses or members of the public" etc.[369] The immediate

[369] Fisher (1966b), *supra* note 55, at 481

effect of the categorization of offences into flagrant is that justice may be set in motion without accusation or complaint.

4.4.2 Effect of Flagrancy

Art. 21.—Effect as regards setting in motion of proceedings or arrest.

> *(2) In the case of offences as defined in Art. 19 and 20, proceedings may be instituted without an accusation or complaint being lodged, unless the offence cannot be prosecuted except upon a formal complaint.*
> *(3) An arrest without warrant may in such cases be made on the conditions laid down in Art. 49 et seq.*

Art. 49.—Principle.

. . . An arrest without warrant may only be made on the conditions laid down in this Section [the section dealing with arrest without warrant].

Art. 50.—Arrest without warrant in flagrant cases.

Any private person or member of the police may arrest without warrant a person who has committed a flagrant offence as defined in Art. 19 and 20 of this Code, where the offence is punishable with simple imprisonment for not less than three months.

Flagrant offences are classified into three categories only for the purpose of convenience of enforcement; else, such classification in the law is practically insignificant as in all the three cases justice is set in motion without accusation or complaint. Stated otherwise, arrest may be effected without warrant. Art 21(2) provides that "[a]n arrest without warrant may in such cases [flagrant offences] be made on the conditions in Art 49 et. seq." Thus, any private person or member of the police who witnessed the commission or attempt of an offence or a police who has been called to the place of the offence may arrest *without* warrant the person who has been alleged to have committed a flagrant offence as defined under Arts 19 and 20 of the Code. However, in order to justify arrest without warrant the offence has to be one punishable without complaint and must entail more than three months simple imprisonment.

The law authorizes arrest without warrant in flagrant offences based on their nature of publicity and proximity for three practical reasons: prevention of further offence, detection of the offence by preserving

evidence and certainty of the commission of the offence and the identity of the offender.[370] However, despite the fact that proximity in time and place of the commission of the offence and arrest of the suspect and publicity are the main justifications for empowering arrest without warrant, there are still circumstances—particularly when hue and cry has been raised or police has been called to the place—where we cannot be sure of the commission of a crime, or, the arrested person may be found to be innocent before any further action than his arrest. Fisher properly suggested that under such circumstances, "in order to protect the police officer, who acted very reasonably under the circumstances, we would have to say that it is immaterial that the arrested person was not truly "found committing" an offence. Rather, he was "apparently" committing an offence, and the proper interpretation of *every requirement* under Articles 19 and 20 must be so viewed—not "found . . . attempting to commit the offence" but "found *apparently* attempting to commit the offence," not "has just committed the offence" but "has *apparently* just committed the offence" and so on. So long as the test of Article 19 or Article 20 *reasonably appears to be satisfied* in any particular case the power of arrest without warrant granted by Article 50 must be seen in law as applicable, even if it should later develop that the test was not actually satisfied."[371]

The proper test of legality of any arrest without warrant for flagrant offences under Art 50 must be the *apparent*, not actual, existence of a flagrant offence. This can be understood as the counterpart phrase "reason to believe" requirement in non-flagrant offences before the investigating police officer issues summons under Art 25. There, the investigating police officer is not certain that the suspect had committed the alleged offence. After having conducted preliminary investigation, however, has "reasons to believe" that

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370 a) Prevention—where prompt arrest may be justified in order to prevent further offence either by the offender himself, (e.g. taking away the fruits of the crime or concealing evidence) or by his pursuers (who want to avenge him) and in order to restore peace and tranquillity by removing the 'cause' from the place; b) Detection—arrest may be made immediately without losing sight of the identity of the offender or to preserve evidence which might disappear during delay after the occurrence (of the offence); c) Certainty—if the person is caught red-handed or immediately after the commission of the offence, there is less probability that he is innocent and, though we cannot totally rule out the issue of innocence, there is no need for judicial safeguards under such circumstances, such as, warrant of arrest. *Id*., at 482

371 *Id*., at 484 (footnotes omitted)

the suspect has probably committed the alleged offence. Likewise, here, the suspect is not found "apparently" committing (attempting to commit) the alleged offence.

Art. 51.—Arrest without warrant by the police.

(1) Any member of the police may arrest without warrant any person:

(a) whom he reasonably suspects of having committed or being about to commit an offence punishable with imprisonment for not less than one year;
(b) who is in the act of committing a breach of the peace;
(c) who obstructs a member of the police while in the execution of his duties or who has escaped or attempted to escape from lawful custody;
(d) who has evaded or is reasonably suspected of having evaded police supervision;
(e) who is reasonably suspected of being a deserter from the armed forces or the police forces;
(f) who has in his possession without lawful excuse housebreaking implements or weapons;
(g) who has in his possession without lawful excuse anything which may reasonably be suspected of being stolen or otherwise obtained by the commission of an offence;
(h) replaced by *Vagrancy Control Proclamation No. 384/2004*, Art 6(4).

(2) Nothing in this Article shall affect the powers of other government officers to make an arrest without warrant under special provisions of other laws.

The other troublesome category of offences where any member of the police is authorized to effect arrest without warrant is provided for under Art 51. Particularly the provisions of Art 51 (1) (a) authorize any member of the police to effect arrest without warrant whom she suspects *has committed* or is *about to commit* an offence punishable with imprisonment for not less than one year. This is troublesome for two reasons. First, while there is no significant change in the definition of simple imprisonment[372] and no

[372] Simple imprisonment in both Codes extends from 10 days to three years (Pen. C., Art 105; Crim. C., Art 106). In the Criminal Code, however, it could be extended to five years where exceptional circumstances justify. Rigorous imprisonment

change at all in the definition of rigorous imprisonment, there is a general trend of increase of penalty in special part of the new Criminal Code. This increased the number of offences that justify arrest without warrant under Art 51(1)(a). Second, this general increase in penalty in the Criminal Code is not matched by increase in the requirement to justify arrest without warrant under Art 51 (1) (a), for example, by increasing the one year period to ten years and/or by replacing the term "imprisonment" with "rigorous imprisonment."

A closer examination of the special part of the Criminal Code indicates that roughly there are more than 650 penalties for various offences out of which 51.4% are simple imprisonments. This might give the impression that simple imprisonments are more in number than rigorous imprisonment. It needs to be further noted that those simple imprisonments are provided for lesser degrees of participation in a given offence and for offences provided for in the later part of the Code. Thus, the numbers of offences in the Criminal Code that entail rigorous imprisonment are much more than those offences entailing simple imprisonment. The provisions of Art 51 (1) (a) is not amended in alignment with the Criminal Code. As it stands now, it justifies arrest in all cases the police suspects a person of any crime entailing imprisonment not less than one year. Furthermore, the police are less likely to exercise their power under Art 28 and there is not post arrest pre-trial judicial hearing

For practical reasons, the police are also authorized to arrest a person who is in the act of breach of peace[373] and person who obstructs a member of the police while in the execution of duties or who escapes from lawful custody.[374] Desertion is a crime both for members of the Defence Forces and for members of the police;[375] thus, a police officer can arrest without warrant a person whom she suspects of desertion. The reason for singling out these offences does not seem to be clear though.

The police are also empowered to arrest any person who is in "possession without lawful excuse housebreaking implements or weapons" and a person

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extends from one to twenty-five years and when it is expressly provided for it could be for life (Crim. C., Art 108 and Pen. C., Art 106, respectively).

373 Art 51(1)(b)

374 Art 51(1)(c)'s authorization of arrest without a warrant of a person who attempts to escape in this context is superfluous.

375 Crim. C., Arts 288, 340, respectively

who is in possession of "any thing which may reasonably be suspected of being stolen or otherwise obtained by commission of an offence."[376] Where attempt is an offence in the Criminal Code and preparation is not and while there is no reason for suspecting such person of attempt or commission of an offence, such act cannot be a ground for arrest. Having regard to our starting point, for a person to be arrested for an offence, the offence the person is suspected of must be jailable as per Art 17 of the Constitution. Authorising such arrest is utterly contrary to the purpose of arrest under the existing law because such acts are not punishable anyway. As it stands now, the Code does not include preventive detention. Furthermore, such provision is contrary to the provisions of the Constitution's Art 25, because they are essentially enforced against the poor or persons on the basis of certain other characteristics.

Those provisions of Sub-Article (1) (h) are covered by the vagrancy control law[377] another category of listed offences in respect of which the police are empowered to effect arrest without warrant based on special law. Thus, Art 6 (1) of the vagrancy control law provides that any police may arrest without warrant any person who may reasonably be suspected of being a vagrant.

The provisions of Art 51 (2) further recognise the power of other government officers to effect arrest without warrant based on other special laws. Such laws are basically administrative regulations, such as, customs law, public health law etc., on the basis of which those government officers are empowered to effect arrest with respect to their respective duties.[378]

4.5 Execution of Arrest and Use of Force

FDRE Const., Art 19

1. *Persons arrested have the right to be informed promptly, in a language they understand, of the reasons for their arrest and of any charge against them.*

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376 Art 51(1)(f), (g).

377 It is not clear whether Art 14 of the Proclamation repeals the provisions of the Code, because it is not inconsistent with those provisions of Art 6 (1). Art 14 provides that "[a]ny laws, which are inconsistent with this Proclamation, shall not apply to matters provided for in this Proclamation."

378 See section 3.1 for Investigation by Other Government Organs.

2. *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. 56.—Arrest how made.

(1) The police officer making an arrest shall first establish the identity of the person to be arrested.
(2) Where the arrest is made with a warrant, the police officer shall read out the warrant to the person to be arrested and shall show it to the person arrested if he so requests.
(3) He shall then actually touch or confine the body of the person to be arrested unless there be a submission to his custody by word or action.
(4) If such person forcibly resists the endeavours to arrest or attempts to evade the arrest, such officer may use all means proportionate to the circumstances to effect the arrest.
(5) The provisions of this Article shall also apply to bench warrants.

Art. 57.—Assistance may be required to effect arrest.

Where the police call for assistance in making an arrest with or without warrant there shall be a duty to assist where assistance can be given without risk (Art. 761 Penal Code).

It is discussed earlier that arrest could be made not only by police officers but also by private individuals who witnessed the commission of the offence where the arrest is made in a flagrant offence. Thus, the use of the term "the police officer" in Art 56(1) gives the impression that only police officers make arrests. This error is made because the provision is found under the section dealing with arrest on warrant and such warrant is executed only by police. It appears, however, some of the obligations imposed by this provision are also applicable to private individuals too who make arrest in flagrant offences. Therefore, where appropriate it is better to construe it to mean "the person making arrest."

A related interpretation problem is that, the obligations stated in this part appear to be applicable only in circumstances where arrest is made on warrant. Certainly, the rights of the arrestee are outstanding whether the arrest is made on summons, on warrant or without warrant. Thus, the person making arrest has the following obligations.

1. **Establishing Identity**—it cannot be emphasized more that the person making arrest must first ascertain the identity of her arrestee so as to avoid irreparable and irremediable wrongs to the innocent.[379] It goes without saying that the arrest of the wrong person is illegal. The illegality entails liability both on the person making the arrest and the government where it is made by the police, at least tortuously.
2. **Informing the Arrestee the Reasons of Her Arrest**—it is provided for in the Constitution that the person arrested has the right to be promptly informed of the reasons for her arrest, in the language she understands.[380] She also has the right to be informed that she has the right to remain silent and anything she might say may be used in a court of law against her.[381] The Code, on the other hand, provides that it is the duty of the arresting person to inform the arrestee the reason for her arrest. The person making the arrest cannot keep the information for herself nor can she tell the arrestee a different reason. However, this is narrowly stated in the Code because the obligation to inform the arrestee the reasons for her arrest is associated with arrest with warrant only. It provides that "[w]here the arrest is made with a warrant, the police officer shall read out the warrant to the person to be arrested and shall show it to the person arrested if he so requests." How about when the arrest is made without warrant or because of urgency, the warrant is obtained on telephone? In such cases, the governing rule must be that of the Constitution which does not make distinction among the manner of arrest for the right to be informed of the reasons for one's arrest.[382]

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379 It is to be noted that there were cases, particularly in relation to cases initiated by the Special Prosecutor's Office, that persons were released for mistaken identity after many years in jail.

380 Art 19(1)

381 Art 19(2)

382 The Draft Criminal Procedure Code attempts to clarify such confusion by providing as follows:

Article 23 Arrest how Made

1. *The police officer making an arrest shall first establish the identity of the person to be arrested.*
2. *Where the arrest is made with a warrant, the police officer shall read out the warrant to the person to be arrested and shall show it to the person if he so requests. Where the warrant is issued in accordance with Sub-article (2) of Article 19 the police officer shall state this fact to the person arrested.*
3. *Where a police officer or a private individual effects arrest without warrant, he shall state the reasons to the person arrested.*

When the person is informed of the reasons for her arrest, she must be told the right reasons. The mere fact of the flagrancy of an offence cannot be a reason for misstatement of the offence. However, an arrest cannot be illegal simply because the person was informed that she is arrested for murder or grave bodily injury and the charge later turns out to be grave bodily injury or murder, respectively, as the victim could survive or die later.[383] The mistake of facts and/or change of circumstances in related offences are possible and the police (the person making the arrest) are not required to use technical terminologies or to frame the charge immediately because the offence is only under investigation and there may not be sufficient information. If it is in respect of unrelated offences, such as, wherein the person was arrested suspected of murder and the charge later turns out to be rape or perjury, it is as good as not informing the arrestee the grounds of her arrest.

It may also be the case where the person is said to have committed concurrent offences and she is informed of only one of the offences, as there was no sufficient information as to the other offence, which is uncovered later in the course of investigation. The arrest in such cases cannot be said illegal. The fact that she is informed of one of the offences during her arrest balances the right to be informed of the reasons for her arrest on the one hand and the obligation of the police to effect arrest and conduct the investigation on the other. Certainly, arrest without informing the arrestee the reasons for her arrest is illegal and can be constitutionally challenged. What are the possible consequences of failure to inform the arrestee the reasons for her arrest?

It may be contended that the arrestee, however, cannot object to her arrest for the fact that she was not informed of the reasons for her arrest if: a) the suspect is arrested for a flagrant offence that is so patent that she has to know the reasons for her arrest, such as, offences the nature of which makes them crime or offences that require intention e.g. murder or theft, respectively; or b) she makes it practically impossible to let her know the reasons for her arrest, such as, by trying to resist arrest, by creating violence, or by trying to flee away.[384] From the reading of the Constitution, those reasons cannot be an excuse because the police can tell the arrestee the reasons for her arrest once she is under control.

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383 *Christie v. Leachinsky* (House of Lords, Eng., 1947) reproduced in Fisher, *supra* note 53, at 29

384 *Id.*

3. **Exercising Authority**—once the identity of the person is established and she is informed of the reasons for her arrest, the person making arrest actually touches or confines the body of the arrestee unless the latter submits to the authority of the former either by word or action. The content of the words *actual touch* or *confinement* is not clear but as it is amplified with the help of the subsequent Sub-Article dealing with the use of force both words do not signify use of force.
4. **Use of Force**—the person making arrest in conformity with the law is discharging her legal obligation; and, thus, her activities should not be obstructed neither can be a ground for her liability. If there be any resistance, that has to be broken by the force of law so as to maintain the rule of law. The law provides that if the arrestee "forcibly resists the endeavour to arrest or attempts to evade the arrest, such officer [the person making arrest] may use *all means proportionate* to the circumstances to effect the arrest." [Emphasis added]. It is also provided in the Police Regulations that "[a]ny use of force by a police officer shall be reasonable, supported by law and on the basis of legal authorization."[385] It further provides that a police officer "may use reasonable force as may be necessary in order to apprehend a person who commits crime or to prevent danger or to defend himself."[386] These provisions do not give any guidance as to what measures and limits of the use of force.

There are practical measures of proportionality and limit to the use of force. *First*, proportionality—If the person making arrest is using force to effect arrest, certainly, the force must be one which reasonably enables her to overcome the resistance in order to effect the arrest. Where the arrestee is suspected of serious offence, then the likelihood of resistance could be higher, but not certain. Therefore, the degree of force the arrestee put up and the seriousness of the offence she is suspected of might be determining factors for the amount of force the person effecting arrest may employ. However, the degree of force put up is to be measured as they happen and not retrospectively. Suppose a suspect resists arrest by throwing rocks and the police returns with live bullet and fatally wounded the suspect. Up on search of the person of the victim the police found out that the suspect was armed which the police did not know earlier. Does this later discovery of pistol in the body of the suspect a justification for the police to assess the proportionality of the use of force? No! Proportionality is assessed prospectively not retrospectively.

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385 Reg. No. 96/2003, *supra* note 279, Art 38 (1)

386 *Id.*, Art 38 (2)

Second, limits to the use of force—in the normal course of things, situations of use of force are difficult to measure and even when they are exceeded it is difficult to prove because both the actors and witnesses are in a very apprehensive state. However, the Constitution recognizes that there is an absolute limit to the use of force. Thus, Art 15 provides that "[e]very person has the right to life. No person may be deprived of his life except as a punishment for a serious criminal offence determined by law." Therefore, it is only the court that condemns individuals to death and not police officers. Thus, the police officer, or any person effecting arrest, has the duty to bring the arrestee alive.

This, however, is not a limitation to legitimate defence as envisaged in the criminal law. Where the police officer is in a situation where her life or that of a third person is threatened by the arrestee and there is no any other way of averting the risk than taking the life of such a person, then she may be justified in doing so.[387]

In making the arrest, individuals may be required to assist. Failure to make assistance "without any reason of force majeure or a risk of a serious damage to his person or property" is a punishable offence.[388]

Art. 58.—*Handing over of arrested person.*

> *(1) Where an arrest is made the person making the arrest shall without unnecessary delay hand over the person so arrested to the nearest police station.*
> *(2) Where the person making the arrest has witnessed the commission of the offence, he shall make a statement in accordance with the provisions of Art. 30.*

The person making the arrest, whether she is a police officer or a private person has the obligation to handover such arrestee to the nearest police station without unnecessary delay. Where the arrest is made for a flagrant offence and she has witnessed the commission of such offence the person making arrest has the obligation to make statement as per Art 30.

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[387] There is a debate whether legitimate defence is immunity from prosecution or a defence to be raised as a defence to a charge against such person making use of force in order to effect not only arrest but also search. The issue is discussed under Art 42(1)(a), Section 10.3.4, *infra*.

[388] Crim. C., Art 806

Chapter 5

Police Interrogation and Confessions

Introduction

Interrogation is questioning of a suspect by the investigating police officer. The previous chapter indicates that a person whose attendance before the investigating police officer for the purpose of investigation may be arrested. The provisions of Art 27 indicate that a person who appears before the investigating police officer by virtue of Art 25, 26, 50 or 51 may be questioned by the police. Thus, police questioning in the Ethiopian criminal process appears to be only custodial interrogation. Such custodial interrogations are to be conducted under diverse constitutional guarantees to the person subject to interrogation. Such statement by the suspect may be used in evidence against her at her trial.

This chapter deals with definition of police interrogation and contents of confessions, the procedure for interrogation and the use of confessions. Interrogation is a very sensitive activity by the police. There are wide ranges of breach of constitutional duties by the police. Thus, the chapter also deals with remedies to such violations of the rights of the suspect during interrogation, and approaches in dealing with those issues when appeared before the court.

5.1 Police Interrogation and Preconditions

FDRE Const. Art 18

1. *Everyone has the right to protection against cruel, inhuman or degrading treatment or punishment.*

FDRE Const. Art 19

> 5. *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. 27.—Interrogation.

> *(1) Any person summoned under Art. 25 or arrested under Art. 26, 50 or 51 shall, after his identity and address have been established, be asked to answer the accusation or complaint made against him.*
> *(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.*
> *(3) Any statement which may be made shall be recorded.*
> *(4) Where the arrested person is unable properly to understand the language in which his answers are to be recorded, he shall be supplied with a competent interpreter who shall certify the correctness of all questions and answers.*

'Interrogation' is police questioning of a suspect with a view to eliciting relevant information pertaining to the offence with which she is suspected of. The Amharic version of the Code uses "*qal se'lemeqebel*" (lit. taking statements) instead of interrogation, which appears to be a little stronger. From the readings of Art 27(1), custodial interrogation appears to be the only interrogation type that exists in the Ethiopian criminal process. This is because, as discussed in the chapter dealing with arrest, summons as per Art 25 results in arrest of the person summoned. The provisions of Art 50 and 51 are dealing with arrest. Thus, non-custodial questioning may not be considered as interrogation and, arguably, any statement so obtained may not have the same legal effect as confessions obtained by custodial interrogations have.

Practice shows that confession is widely used as evidence in criminal trials both for serious and minor offences. Although there is no research on how many charges are based on confessions of the accused, a random look at cases indicate that, in cases where confession is introduced as evidence by the public prosecutor significant number of those confessions were obtained by the investigating police officers. Such confessions were made immediately after the arrest of the suspects within the forty-eight hours (or before the arrestees appear before the court). The other few confessions were made before the Woreda or First Instance Courts.

Investigation is a challenging work; it is a constant effort to resolve puzzles in different scenarios. When the puzzle is a tough one, certainly the suspect may be considered to be the 'best source' of information in respect of the charge against the latter. It is tempting to do whatever it takes having an information store in front of the investigating police officer in respect of the matter that puzzled her. The investigating police officer might use certain measures that are not necessarily lawful to get some information from the suspect. The 'inappropriate' measures employed by the police ranges from failing to do what the police is suppose to do, such as, not informing the person that she has the right to remain silent, and that anything she says may be used in evidence against her in her trial to positive acts like using certain treacherous words to use of coercion in extreme cases.[389] This overborne the will of the suspect and affects voluntariness of the confession thus made.

In order to maintain the voluntariness of confessions to the investigating police officer, there are various guarantees that are put in place both in the Constitution, and the Criminal Procedure Code.[390] *First*, the investigating police officer first establishes the identity of the person arrested. This seems to be the registration of the name and address of the person.[391] It is further a preliminary selection by ascertaining the identity of the subject.[392] *Second*, the investigating police officer then informs the arrestee that she has the

389 The coercions are either moral, such as, intimidation, promise, and persuasion, or, physical, such as, beating of all kinds. In fact, it is very difficult to show such moral compulsion and difficult to avoid them either. At times they are arguable whether a certain statement by the investigating police officer has intimidating effect on the person under interrogation.

390 Many of the provisions on the detailed situation of interrogation are that of the Criminal Procedure Code and not of the Constitution which has only general provision on this issue. The reason is that the Constitution provides that the right to be informed has the right to remain silent and that anything the arrestee may speak may be used in evidence against her is to be communicated to her at the time she is arrested. At the stage of interrogation, the Constitution provides that the subject shall not be compelled to make confessions or admissions of evidence. At this stage, the provisions of Art 27 of the Code govern the situation fully with the same purpose and spirit.

391 The preliminaries are really lengthy; it includes names, age, address, profession, education, ethnicity, marital status, place of birth, etc.

392 Art 27(1)

right not to answer the questions put to her.[393] The arrestee in practice is not informed of this any time during or before her interrogation. A very good example how this provision is set aside in practice is shown in the *Albu Gebre* case.[394] In that case, the police officer who conducted the investigation appeared before the High Court and gave his testimony. He testified that "I then asked the second defendant Zewdie Feleqe, having him called from his cell 'why are you arrested?' He said to me 'I don't know'. Then I said to him, 'it is human to err; if you admit and confess, the state is forgiving and why don't you reveal the truth?' After that, in a kind of regret and sigh he admitted." The same police officer also interrogated the other defendant who admitted in the same manner. They even led the police to places where other evidences were concealed.

Third, the investigating police officer also has to inform the suspect that any statement she is going to make may be used in evidence against her before the court, in the language the arrestee understands.[395] This leaves the discretion to the suspect whether she has to speak to the investigating police officer about the case she is suspected of beyond identifying herself. *Fourth*, during the interrogation, or generally while she is in custody, the investigating police officer, or any person in authority for that matter, cannot compel the arrestee to make confessions or admit evidence, or to elicit other relevant information from same without the latter's consent.[396] *Finlay*, only when such conditions are met, the investigating police officer then legally question the person on the offence in respect of which accusation or compliant is lodged against her.

These are requirements which need to be fulfilled cumulatively. A violation of any of these requirements makes the interrogation ILLEGAL! The bottom line is that the arrestee has to make statements *voluntarily*. A statement

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393 Art 27 (2)

394 *Albu Gebre, et al. v. Public Prosecutor* (Supreme Court Panel Bench, 1986) Crim. App. F No. 61/74

395 Art 27 (2)

396 Art 31; FDRE Const. Art 19(5). The fact that Art 31 comes immediately after Art 30, which provides for examination of witnesses, gives the impression that Art 31 applies only to situations envisaged in Art 30. The provisions of Art 31 are rather broad in application. Thus, the Draft Criminal Procedure Code provides in order also to include examination of "the suspect or any other person giving evidence" in to the application of prohibition of those practices. Draft Code, Art 28. See also Fisher (1966a), at 330

is said to be voluntary if the individual is free from the above mentioned mental and physical vices, and makes such statements having understood the nature, content and consequences of her statements.[397]

The problem with the practice is that in some police stations there is an interrogation form captioned with the warnings, usually pre-printed or duplicated forms, as provided for under Art 27 while in others, where there is no such form, it is written on a blank sheet of paper by the investigating police officer. When the investigating police officer is reading statements to the accused, she is reading only the statement made by the suspect and not the warning part. The accused then signs on the statement as hers. A practice is developing in some police stations in Addis Ababa that the warning is short of what is provided for under Art 27. It only indicates that the suspect is told that any statement she might make may be used in evidence against her.[398]

The different police stations in Addis Ababa are investigating a list of offences that are minor and common. Investigation of serious offences, such as, murder and aggravated robbery, cheque fraud are, however, conducted by Addis Ababa Police Commission. The implication of such centralised interrogation on specific and serious offences on the regularity of the interrogation is not clear.

5.2 Confession, Definition and Background

Under Ethiopian law, there are two ways of recording confession of a suspect; it is recorded either by the police by virtue of interrogation (Art 27) or the court by virtue of recording of statements and confessions (Art 35). The term "confession" has not been defined any where in the Ethiopian laws. The laws of confession are, however, found in both the Constitution and the Criminal

397 Fisher argues that if the police could obtain confession voluntarily, there is no reason why the investigating police officer should not bring the suspect before the nearest court and have the confession certified "voluntary." He further argued that "the only conceivable reason why the police might wish to avoid this procedure is that the confession is not truly voluntary; in such cases, of course, it does not deserve to be admitted in evidence." *Id*., at 334, 335

398 The author was allowed to inspect many police investigation reports in the Addis Ababa Police Commission in order to see how investigations were conducted. None of those police investigation reports have contained the fact that such information was communicated to the suspect.

Procedure Code. Although the two are not drafted in the same wording, they have the same spirit and purpose. The Constitution, for instance, distinguishes the usage of the terms "confession" and "admission."[399] Confession appears to be statement of admitting guilt and admission is used in the context of admitting relevant evidence, such as, a given item of evidence is what it purports to be or leading to its whereabouts. Having regard to the protected rights, there is no distinction between confession and admission of evidence in the Constitution.

On the other hand, Art 35 makes a distinction between "confession" and "statement" implying that a confession is used to include both concepts in the Constitution (confession and admission of evidence) but the term "statements" is used to mean other non-incriminatory statements and description of facts. Even Art 27(3) uses the term "statement" in order to indicate the statement to be made by the arrested person is not necessarily admission of guilt; it is statement of facts with respect to the offence she is suspected of unless she does not want to talk about it at all. We can therefore conclude that confession or admission of evidence is a special admission in that the defendant admits guilt or evidence against her. Those confessions or statements are made either to the police, the court or other organs[400] that undertake the investigation, as the case may be.

Where the confession is tainted, there is a tainted outcome of the case later in the proceeding. In order to minimize such unfair outcomes, there are

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399 Please also note that in the Draft Evidence Rules (DER) which are taken from the Indian Evidence Act (IEA, 1872), 'confession' and 'admission' have totally different meanings. 'Admission' is used in civil matters while 'confession' is exclusively used in criminal matters as a special type of admission.

400 It is already indicated that there are also other organs that undertake investigation. Thus, with respect to government financial and property administration, the person who is alleged to have committed breach of trust is removed from her responsibilities of such property or financial administration. During such period, she signs a statement either as part of the investigation process or as a matter of procedure for handing over to the incoming person, indicating what she received initially and what she delivered last. Although it is not properly called 'confession' it is admitted as evidence and cashers and storekeepers are found guilty of such crime based on such statements. See, for instance, *Mengistie Shiferaw Cherkose v. Federal Ethics and Anti-Corruption Commission* (Federal Supreme Court, 2007) Crim. App. F No. 27899. The debate whether such statement is sufficient to convict a person for breach of trust is outstanding.

various safeguards which, thus, have to be strictly complied with. Those rules, on the one hand, provide for the rights of the subject, such as, the right to be informed that she has the right to remain silent; that any thing she might say may be used against her in evidence in a court of law; that she is protected against any cruel, inhuman and degrading treatment; that she is presumed to be innocent; that she has the right to counsel, which, in the event she is not able to afford one and miscarriage of justice is likely to occur, might be appointed by the state. The flipside of those rules, on the other hand, provide for the obligations of law enforcement and government officials that it is their duty to respect and enforce the rights enshrined in the Constitution both in general and specific terms.[401] These safeguards are meant for the protection of the dignity of the individual who is under custodial interrogation, but incidentally increases the reliability of the statement so obtained.

Secondly, if investigation is conducted to manifest the truth, threat and torture are tests for physical or moral strength and not tests of truth. Thus, where a person is coerced, she speaks only what she thinks her coercer wants to hear in order to avoid the immediate pain and take care of other consequences later. Statements obtained under coercion are generally not reliable resulting in wrong convictions.[402] For instance, in *Ali*'s case,[403] the appellant was suspected of shooting and killing a truck driver and a passenger. The police bitterly tortured him; he therefore admitted killing victims both to the police and the Woreda court conducting the preliminary

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401 The FDRE Constitution under Art 13(1) provides that "[a]ll Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of" Chapter Three, the chapter dealing with human and democratic rights. Police is one of the government organs. The provisions of Proc. No. 313/2003, *supra* note 193, Art 20 and Reg. No. 96/2003, *supra* note 279. Art 14 further provides that each police officer has the obligation to discharge her responsibilities in compliance with the Constitution, the Criminal Procedure Code and other laws.

402 W. T. Westling (2001) "SOMETHING IS ROTTEN IN THE INTERROGATION ROOM: LET'S TRY VIDEO OVERSIGHT" *37 J. Marchall L. Rev.* out of the 4,500 capital offence cases that were reviewed between 1973 and 1995, 68% were either reversed or remanded. Thus, in the state of Illinois, videotaping police interrogation in capital offences is required to follow up the legality of the interrogation and voluntariness of any confession as may be obtained.

403 *Ali Dugadibo v. Public Prosecutor* (Supreme Court Circuit Bench, 1985) Cr. App. F No. 171/75

inquiry. The High Court, which tried the case convicted the defendant based on his confession alone and sentenced him to 20 years rigorous imprisonment despite his objection that he admitted because he was tortured. On appeal, the Supreme Court acquitted the appellant on the ground that the autopsy result and the confession did not match.

Therefore, whether the statement is made to the investigating police officer, a court conducting preliminary inquiry, one recording the confessions or the trial court, or to any other organ of investigation, it must be seen in this context. It is provided for both in the Constitution and the Code that there are various constitutional and procedural safeguards of the person making such statements. Without those safeguards, either no statement may be taken from such person or such statement cannot be taken in evidence because it is unconstitutional.

Exhibits

The Constitution is clear when it provides that no person may be obliged to make confessions or to admit evidence. Thus, where the person makes statements that she has committed an offence and where she led to the discovery of a piece of evidence which is allegedly used in the commission of the crime there is no difference in terms of effect between the two—insofar as they are obtained unlawfully, they are not admissible in evidence.

In cases where the defendants led the investigating police officers to the discovery of physical evidence (exhibits), the court is much less sympathetic to the claim of compulsion raised by the defendants with respect to the confession. Thus, the Supreme Court consistently reasoned that the conviction of such persons is justified not only by the confession she made, but also based on by the physical evidence that she had led the police to its discovery. Thus, the claim that she made the confession because of torture and ill-treatment is not acceptable. This is the holding of the court in *Tesfaye Engidayehu*,[404] *Hailiye Tekle'aregai*[405] and *Hailu Tekle*[406] and

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404 *Tesfaye Engidayehu v. Public Prosecutor* (Supreme Court Circuit Bench, 1983) Crim. App. F No. 162/Wollo/74

405 *Hailiye Tekle'argay v. Public Prosecutor* (Supreme Court Panel Bench, 1985) Crim. App. F No. 625/74

406 *Public Prosecutor v. Hailu Takele, et al.* (Federal High Court, 2008) Crim. F No. 07057

Tamirat et al.[407] The reasoning of the court illustrates that the court did not consider such exhibits as results of coercion or as part of the coerced confession; it rather considers them as separate evidences with separate sources and existence. However, what matters for the Constitution is not their independent physical existence; it is rather their discovery based on the information unlawfully obtained from the arrested person.

5.3 Confession before the Court

Art. 35.—Power of court to record statements and confessions.

(1) Any court may record any statement or confession made to it at any time before the opening of a preliminary inquiry or trial.
(2) No court shall record any such statement or confession unless, upon questioning the person making it, it ascertains that such person voluntarily makes such statement or confession. A note to this effect shall be made on the record.
(3) Such statement or confession shall be recorded in writing and in full by the court and shall thereafter be read over to the person making the statement or confession, who shall sign and date it. The statement shall then be signed by the president of the court.
(4) A copy of the record shall then be sent to the court before which the case is to be inquired into or tried, and to the public prosecutor.

In the normal course of things, interrogation is conducted immediately within the span of the first forty-eight hours after arrest. During the time of interrogation, the arrestee may refuse to answer questions, may remain silent or may demand to speaking to her lawyer, without whom she is not willing to make statements, or she might be willing to tell her side of the story. Her story could be only explaining the extent of her participation in the alleged offence or a statement of admission of full responsibility statement which is properly called 'confession.' Therefore, where, during the interrogation the investigating police officer is able to obtain confession, it is advisable to take the suspect to the nearest court and have the confession recorded because extra-judicial admission as they are obtained in conditions and at places the state chooses, they are susceptible to challenge.[408] If the statement made is not incriminatory or that it may not be used against the arrestee during her trial, it may not be necessary to have it recorded by court.

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407 *Tamirat, et al., supra* note 76

408 Fisher (1966a), *supra* note 55, at 334, 335

Where such statement is obtained before the opening of a preliminary inquiry or a trial, any court has power to record such statements. Likewise, even though it is not expressly provided for in the law, such statements are customarily recorded by lower courts—Woreda or Federal First Instance Courts. Where the alleged offence is committed in Addis Ababa, both Federal First Instance and the Addis Ababa City Courts will have jurisdiction to record such statements.[409] With respect to corruption offences, the court that has jurisdiction to hear the cases of corruption has the power to record such statements.[410] Where such statements are made after a preliminary inquiry or a trial is opened, such person is to be taken to the court which is hearing the preliminary inquiry or the trial.

As in the case of the police, the court before which the arrestee appears for statements also has the obligation to ascertain whether those statements are being made *voluntarily*. Therefore, the court before recording the statements, must ascertain by questioning the person making such confession whether "such person voluntarily makes such statement or confession." There is no provision that indicates the court would tell the arrestee that she has the right to remain silent and that any statement she makes will be used in evidence against her unlike the investigating police officer. However, it is a matter of practical necessity that the court would certainly discuss the consequence of making such statements without which ascertaining voluntariness is impossible.[411]

There are also other practical problems that are not stated in the law which certainly affect voluntariness. Suppose the arrestee is not released on bail on her first appearance, she stays in the police station during the investigation period.[412] This is a big problem for the suspect not to confess before the court because once the investigating police officer obtains confession from the suspect by whatever means, take her to the nearest court and there are at least un-investigated allegations that the investigating police officer gives

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409 Proc. No. 408/2004, *supra* note 171, Art. 2(2)

410 This is not expressly provided for in the law but Proc. 434/2005, *supra* note 97, Art 7(4) provides that "matters related with arrest, search, remand, bail, restraining order or *any other related matters with investigation* of corruption offences shall be made to the court which has jurisdiction to hear cases of corruption offences" [emphasis added];

411 Fisher (1966a), *supra* note 55, at 334

412 Baseline Study Report, *supra* note 84, at 194

a warning to the arrestee to make the same statement to the court.[413] This defies voluntariness. Therefore, it is unlikely that such confession would be voluntarily made if (a) the suspect knows she is going to be returned to the police station which would subject her to the power of the investigating police officer including further interrogation after which, if confession is obtained, inevitably turns involuntary;[414] or (b) she is questioned in the presence of the police officer (any police officer for that matter) in the court room. If there is a police officer in the court room the suspect could feel compelled to confess to the court because the ordinary suspect does not know that the police officer that works in the court and in the police station have different responsibilities. Further, these different responsibilities of police officers are only in Addis Ababa and big state cities where there is good number of police officers. In such situations, court recording of confession is only legitimatizing those involuntary confessions, as it is sort of certification of voluntariness. It makes the problem even worse because such confessions as recorded by the court are less susceptible to challenges for validity later in the process.

Whatever mechanism the court employs in order to ascertain voluntariness, it must enter a note to the effect that it has questioned the person making the statement or the confession and ascertained that the person made such confession or statement voluntarily. The court records such statement or confession "in full," "read over to the person making the statement or confession," make her "sign and date it." It is also provided that the president of the court also signs on it.[415]

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413 For instance, in *Albu, et al., supra* note 394, the defendant alleged that the police warned them that if they would not confess to the court in the manner they confessed to the investigating police officer, they would be coming back to the police station and they would meet.

414 In order to avoid this problem, the Draft Criminal Procedure Code, Art 38(3) provides that after recording her statement whether admitting or denying participation, the court releases her on bail or remands her into prison; furthermore, in order to ensure the voluntariness of the statement the court also informs this fact to the suspect before she makes her statement. Also see Fisher (1966a), *supra* note 55, at 334.

415 There is no indication as to what the content of the courts certification shall include. The Malayan Code, Sec 115, from which Art 35 was taken provides that the following is to be included at the end of such record. "I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct and it contains a full and true account of what he said."

It is commonly mentioned that confessions are introduced as evidence against the accused and they are introduced as documentary evidence.[416] However, there is no clear idea whether such confessions are items of evidence as testimony and exhibits are or whether it is a waiver of the right to be presumed innocent which otherwise means, waiving the burden of the public prosecutor from proving her case against the accused. The law does not provide for such characterization of confessions. In many cases, a confession is the major part of the ground of conviction and in few cases it is the sole ground.[417] As alluded earlier, the Supreme Court, in cases where the propriety of confession was challenged, reasoned that, the accused is convicted not only based on her confession but also based on the evidence discovered using the information admitted, as if the two are admitted in different manners.[418] The court also appears to be influenced by circumstances that in those offences which are alleged to have been committed in darkness, in inaccessible places and where there could not be other witnesses for various reasons that "there can be no better evidence in such a situation."[419] There is a general reservation in the efficacy and quality of the criminal justice administration when convictions frequently depend on confessions only. In *Escobedo v. Illinois* the US Supreme Court held that "a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured though a skilful investigation . . . no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication though unawareness of their constitutional right. No system worth preserving should have to *fear* that if an accused is permitted

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416 See Section 13.2, note 48

417 Although the defendants were not convicted only based on their conviction, according to the judgments of the respective courts, a closer reading of the cases indicate that every other evidence was dependent on the confession or without the confession, there would not be conviction by any stretch or imagination. Such is the case with *Albu, et al., supra* note 394, and *Tesfaye, supra* note 404, and *Tamirat, et al., supra* note 76

418 In all those major cases, such as, *Albu, et al., id.; Tesfaye, id.; Hailiye, supra* note 405, the suspects led the investigating police officer to exhibits.

419 For instance, in *Albu, id.,* the Court opined that "for an offence committed at 2 a. m. (after midnight) where no one knows what is happening in someone else's house, there is no need for more convincing evidence." In *Hailiye, id.,* the court held that "there is not better evidence against a person who killed everyone in the house in the dark."

to consult with a lawyer, he will become aware of, and exercise, these right. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."[420]

5.4 Challenging the Validity of the Confession and Burden of Proof

The discussion on confession is a matter of formality. There are certain procedures to be complied with in order to obtain a valid confession in conformity with the Constitution and the Criminal Procedure Code. The fact that those requirements for recording of confessions are complied with raise the presumption that the content of the confession is true and correct unless there is contrary substantive evidence. Thus, both the accuracy of the content of the confession and the protection of the dignity of the person are equally important.

The challenge to the validity of confessions whether they are given to the police or the court is, therefore, based on breach of any of those formalities and exceptionally it is based on the content of the confession. Thus, where the investigating police officer fails to inform the arrestee that she has the right to remain silent, or that any statement she may make may be used in evidence in court against her, or obtained confession by engaging in certain unlawful activities, such as, promise, deceit, threat or use of violence, or, with respect to confessions recorded by the court, where the latter fails to ascertain voluntariness, the confession is not obtained according to the law. In such cases there are two distinct issues—whether the confession is legally obtained (propriety) and whether the confession is reliable (veracity). The proper issue for the court when the validity of such confession is challenged on the basis of the law is whether such confession is legally obtained or not. Such issue has nothing to do with the issue whether the confession is reliable. Unfortunately, when the validity of such confession is made on the basis of propriety, the court consistently failed to directly and properly address the issue by framing an incorrect or irrelevant issue or by failing to frame an issue at all. In this regard, we can see two cases one old and one new, on how the Supreme Court poorly framed the issue and failed to address it.

In *Ali Dugadibo*,[421] the appellant was charged for murder and robbery which he admitted to have committed (along with other two friends of his, who were

420 *Escobedo v. Illinois*, 378 U. S. 478, (1964)

421 Ali, *supra* note 404

shot dead on their escape) against two individuals and found to be guilty and sentenced for life. The sole evidence was the confession he made to the police as per Art 27 and to the court as per Art 35. The ground of his appeal to the Supreme Court was that he gave the confessions because he was tortured and ill-treated by the police, which he sufficiently proved. The Supreme Court held that, it was proved that the two victims "were shot and killed by unidentified persons; it is not disputable. The issue in dispute was who committed the act? And did the police conduct the investigation in to the facts? Did he [the investigating police officer] take the statement of the defendants appropriately is another issue." The court right there reduces the issue from one of propriety to one of guilt and held that "as we see from both directions, the issue that has to be decided is whether Ali Dugadibo has committed this offence?"[422]

Likewise, in *Tamirat Layine et al*[423] the principal defendant was charged and convicted for corruption offences he was alleged to have committed while he was the Prime Minister, and later Deputy Prime Minister of the Country, in violation of the provisions of the Special Penal Code. In this case, the items of evidence were the confessions of the defendants' and various documents obtained through search. The confessions of the defendants' were the bedrock of the case because they explain also the content of those documents. Those defendants, including the former Prime Minister, contend that they gave the confession to the investigating police officers only after ill-treatment. The former Prime Minister, particularly, stated that he gave the confession after he had been denied access to his lawyer and morally tortured and while he was under such condition that the Head of the Central Investigation Department brought him a document which he was made to read. When he denied that it is not his statement, he alleged that he was told "this is what you already have discussed and don't cause trouble" after which because of frustration he signed.[424] The Court held that "the first defendant contends to the court that he gave his confessions involuntarily to the investigating police officer only after he was denied communication with the outside world and with his lawyer, he has not produced any other evidence supporting his allegations."

The Court further held that "although there is an argument that the confession made to the police should not be admitted in evidence, confession

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422 *Id.*

423 *Tamirat, et al., supra* note 76

424 *Id.* This statement is found at least in two places in the judgment.

made voluntarily may be admitted in evidence as provided for both in the Constitution and the Criminal Procedure Code, as well as the confession given to the police is supported by other prosecution evidences, there is no reason found why the confession is not reliable."[425] In the same case, the fifth defendant made statement before the court apparently by virtue of the last *alinea* of Art 142. In that statement, the defendant contended that he made the confession to the investigating police officer not voluntarily but rather because of ill-treatment from the police, and thus requested the Court that it should not be admitted in evidence. The Court, however, rejected the allegation "because it is not proved whether the police used violence when they arrested him and no evidence is tendered in support of the coercion during interrogation. Further we found the confession given to the police supported by other prosecution evidence. Therefore, it is not possible to say the confession to the police is inadmissible. The court does not find the statement made by the fifth defendant to this court disproving the confession he gave to the police nor can it make the latter inadmissible."[426]

From these cases we can gather that the Courts in general and Supreme Court in particular have made two fundamental mistakes consistently: the framing of the issue of impropriety and allocation of the burden of proof on propriety of confession. With respect to the framing of the issue, it is evident from the provisions of the law that confessions are procedurally guarded. When a person claims to have been coerced, she need not challenge the content of the confession but the process by which it is obtained contrary to what the law provides for. Therefore the issue is whether the confession is obtained in accordance with the law or not rather than whether the confession is reliable or not. Furthermore, it is indicated both in those cases discussed here and in many other cases, the practice in our courts is that, when the defendant claims the confession tendered by the prosecution is involuntarily obtained, the burden is on her to prove the irregularity. This is based on the false appreciation of the principle of allocation of burden of proof that one who alleges the existence/inexistence of a fact has the obligation to prove it because, in challenging propriety in obtaining the confession, the defendant is said to have made the allegation of coercion.

Contrary to the practice, however, there are three major reasons why the public prosecutor has the burden of proof that before introducing confessions given to the police in evidence, she needs to prove that it

425 *Id.*

426 *Id.*

was obtained voluntarily. *First*, both the Constitution and the Criminal Procedure Code provide that confession is admissible where it is obtained in accordance with the provisions of the law. It is provided for in the Constitution that government officials have the obligation to respect and enforce the constitutional rights of citizens.[427] When the public prosecutor is producing the confession in evidence, she is also contending implicitly that it is obtained in accordance with the law. Thus, because she is the one who makes the allegation, the public prosecutor has the obligation to prove that the confession is obtained in compliance with the law and that has discharged her constitutional obligation. It is like laying the foundation as in exhibits.[428]

Second, the interrogation is conducted at the time and the place chosen by the government; therefore, it is unjust to demand the accused, which was in total isolation from the rest of the world and under the strict control of the police during the interrogation. It is practically impossible for the defendant to prove that she was coerced during interrogation unless the investigating police officer does it in the presence of others, which is extremely rare. For instance, in *Abebe Kebede*[429] case the defendant was able to prove he was coerced by the investigating police officer in making his confession by calling witnesses who were also detained in the police station. Ironically, the public prosecutor raised the objection to the trustworthiness of the defence witness to the fact that defendant was coerced by the investigating police officer during interrogation because they were also detained in the same police station. The Court reasoned "one can prove coercion in police custody only by calling those whom he believes have witnessed the event. Such persons can only be those who were detained with him. Persons outside of police station cannot be claimed to have seen the event nor is there opportunity of producing medical and other documentary evidence." This statement is only appropriate in that it implicitly recognizes the public

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427 FDRE Const., Art 13(1)

428 Every time an item of evidence is introduced as an exhibit or documentary evidence it has to be proved that it is what it purports to be. Testimony is not an exception which is to be tested by cross-examination. That introduction of evidence in support of an item of evidence is what laying the foundation is. Likewise, in confession, the foundation is whether it is voluntarily made or not. Thus, public prosecutor has the obligation to prove that the confession is voluntarily made before she introduces it in evidence, more so because it is extra-judicial admission.

429 *Public Prosecutor v. Abebe Kebede* (Supreme Court, 1989) Crim. App F. No. 364/81

prosecutor has the obligation to prove propriety but it also recognises the practical difficulty of proof of coercion. It was similarly held in *Ayalew Bogale*[430] case. In that case, the witnesses the appellant called were the ones who were with him in police custody during his interrogation. But it is only a matter of accident that the defendant gets such kind of witnesses who were jailed with him.[431]

The US Supreme Court in *Miranda v. Arizona* [432] held that "if the interrogation continues in the absence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination . . . The Court has always set high standards of proof for the waiver of constitutional rights, and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means making available corroborated evidence of warnings given during interrogation incommunicado, the burden is rightly on its shoulders."[433] The Court further held that for a waiver to be valid it must be made expressly. Thus, "the mere fact that he signed a statement which contained a typed-in clause stating that he had "full knowledge" of his "legal rights" does not approach the knowing and intelligent waiver required to relinquish constitutional rights."[434]

During interrogation, one can categorically assert that at least in the majority of cases it is only the suspect and the investigating police officer/s that are in such interrogation room.[435] There are no third parties. The only exception is

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430 *Ayalew Bogale v. Public Prosecutor* (Supreme Court, 2006) Crim. App. F No. 17891

431 In the Ethiopian criminal process, even for those who are affluent to afford one, interrogation is routinely conducted without counsel.

432 *Miranda v. Arizona,* 384 U. S. 436, (1966)

433 *Id.*

434 *Id.*

435 The setting and condition of some of the interrogation rooms is that some of them are very narrow rooms or clumsy big; there should not be anything in the room which is likely to distract the attention of the subject including a calendar on the wall; the investigating police officer and the suspect have to face each other and have eye contact; the suspect is not to be given time to think on something and to make her own story that the questions from the investigating police officer come one after the other. Added to that, it is police dominated atmosphere which

witnesses to voluntariness called *yedereja misikir* (lit. secondary witnesses) witnesses that attend the interrogation process and appear before the court to give testimony to the court whether such person was coerced during the interrogation process. This process of having 'secondary witness' has a multitude of problems; first, the independence of such witnesses is much into question because often times it is the police officers that are such witnesses. Second, even when they are independent, such witnesses are coming only during the time of recording of the confession and they have not attended what happened before. Third, their testimony is wrongly appreciated; i.e. they are questioned not on what they have observed; they are questioned on what they have heard as if she is a witness of fact in the primary issue which actually is turning hearsay.[436] Finally, it is not consistently implemented except in few cases.

The *third* reason why the public prosecutor has to prove voluntariness of confession as taken by the investigating police officer takes us to the realm of evidence law. There is a distinction between judicial admission and extra-judicial admission. Judicial admissions generally need not be proved because the court has first hand information of those admissions whether the admission is made under Art 35 or in the form of a plea of guilt under Art 134. When the defendant challenges the propriety of such confession (admission) she is challenging the already established fact, therefore, she has to prove her allegation. When the confession is made out of court, it is a fact yet to be established before the court—the fact-finder. Confession before the police is certainly extra-judicial; therefore, it has to be proved to the fact-finder that such confession was made and that it was made voluntarily.

5.5 Is It a Minor Procedural Irregularity?

There are views that some of those defects, such as, the failure to inform the suspect that she has the right to remain silent are minor procedural irregularities. The contention here is first, those irregularities are "minor"; and second, they are only "procedural". This is not true. First, those

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significantly changes the psychological orientation of both the investigating police officer and the suspect.

436 The testimony should have focused on the process of the confession what they have observed during the interrogation or during the recording of the confession by the suspect; they are rather questioned on what the suspect has said focusing on the content of the confession.

procedural safeguards are provided for in the Constitution which is the supreme law of the land and thus substantive in content and it goes without saying that violation of any provision of the supreme law of the land is a major breach of the law. Second, the readings of the Courts' decisions indicate that those irregularities in interrogations are observed in more serious offences than in less serious ones, such as, complaint offences. Moreover, there is no boundary for the degree of irregularity; once a violation of the right to be informed is tolerated where does it stop? Third, even in those serious offences, there is heavy reliance on confession as evidence. Therefore, the view that those irregularities are minor procedural irregularities is fundamentally wrong.

5.6 Confession of a Co-defendant

The issues related to confession are diverse; the last issue we consider here is the status of confession of a co-defendant against the one who has not made admission in the same case. Confession is not evidence; it is rather a waiver of burden of proof of the public prosecutor. When it is properly obtained, a confession may be true, in that, the person confessing is not just admitting that she has committed the offence, but also she provides a good description of the circumstances in which she had committed the offence, the effects, participants, witnesses, motives etc. Thus, the confession has to be one that is trustworthy and lawfully obtained.

Where X and Y are charged for robbery and X confessed to committing the offence while Y denies participating in such crime, what is the effect of X's confession against Y? To directly address the issue, such confession cannot be accepted for two reasons—first, evidence is not admissible contrary to the Constitution or other laws. Confession is admission of one's guilt and not that of another. Second, if a person can make statements as to the guilt of another, such person must appear as a witness. If she appears as a witness she must take an oath or make an affirmation according to Crim. P. C., Arts 136(2) and there must be opportunity for the defendant to conduct cross-examination of such person according to the FRDE Const., Art 20(4). In the absence of such oath/affirmation and defendant's opportunity for cross-examination her statement is not admissible in evidence against the defendant. In confessions, the person neither is not taking an oath or making an affirmation nor is subject to cross-examination by the other co-defendant. Therefore, her statement is not admissible against her co-defendant.

In *Fitsum Tesfay*[437] the petitioner along with one Mihireteab Araya, who was the first defendant, were charged for first degree murder before the High Court. The first defendant had confessed to the police that two of them committed the alleged offence. Based on the confession and other corroborative evidence, both defendants were convicted and sentenced to twenty years rigorous imprisonment. They both appealed to the Supreme Court and their conviction was changed to one of second degree murder. The decision to convict the second defendant (the petitioner) was by majority vote both in the High Court and the Supreme Court. The Supreme Court cassation bench order the acquittal of the petitioner on the ground that "where an accused admit committing a crime as charged by the Public Prosecutor, the court enters a plea of guilty and may convict forthwith under Crim. P. C., Art 134 (1) Where a co-defendant gives confession implicating the other co-defendant in the crime, there is no law providing for the use of such confession as though it is made by the latter in order to enter conviction." The court very much emphasised the absence of the law to make use of confession of a co-defendant against the other co-defendant.

The difficult issue here is, in a case where X and Y were co-defendants the evidence was obtained unlawfully from X and she was able to exclude it on the ground of impropriety. However, evidence is also relevant in the case against Y. Can this evidence be admitted against Y? Y may not have standing to challenge such evidence for illegality and it may be admitted in evidence.

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437 *Fitsum Tesfay Tesfamariam v. Public Prosecutor* (Supreme Court Cassation Bench, 1991) Cass. Crim. F No. 26/82

Chapter 6

Legal Remedies to Breach of the Suspect's Rights during Investigation

6.1 Constitutional Obligation of the Investigator

FDRE Const. Art 12 (2) provides:

> 2. *Any public official or an elected representative is accountable for any failure in official duties.*

FDRE Const. Art 13 (1) further states that:

> 1. *All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this Chapter* [the chapter dealing with fundamental rights and freedoms].

The investigation activity involve, among other things, arrest of suspects, interrogation, search and examination of witnesses. Inasmuch as these activities are the responsibilities of the person conducting the investigation, the individual is constitutionally protected against, such as, unlawful arrest,[438] coercive interrogation[439] and unreasonable search.[440] As these

[438] FDRE Const., Art 17

[439] *Id.,* Art 19 (5)

[440] *Id.,* Art 26

rights are not absolute rights, there are certain restrictions. The extent of the limitations of the rights of the individual to liberty, privacy, and privilege against self-incrimination, etc., is provided for in the law and their breach affords remedy to the victim and entails liabilities on the violator. It is this delicate balance of those apparently conflicting interests that makes investigation a challenging work. Those balances are already made by the lawmaker both in the Constitution and other legislations. However, there are also discretionary powers granted to law enforcement officials giving opportunity to take exigent circumstances, which are particular to each situation, into consideration. In respect of those issues, where the choice of those conflicting interests is already made in the law or the Constitution, then the issue turns out to be a matter of enforcing the law. Any breach to the standard as set in the law is unlawful entailing liability. So, is the case where the law enforcement officials are given the discretion, but when such judgment is made in an overzealous manner against the interest of the individual depending on the nature of the act.

It is difficult to exhaustively list the circumstances under which a given investigative activity is unlawful. The various investigative powers and procedures as provided for in the law are discussed in length in different section in this material. The requirement that such investigation activities comply with the Constitution is clearly provided for, for instance, in the Federal Police Proclamation, which is also applicable to Addis Ababa Police,[441] that starting at the recruitment stage, faithfulness to the Constitution is a requirement.[442] Every police officer is required to discharge her duties "in accordance with the Criminal Procedure Code and other relevant laws by fully observing human and democratic rights ensured by the Constitution."[443] The Proclamation further prohibits "[a]ny inhumane or degrading treatment or act."[444]

Any activity that is not in compliance with the law is unlawful whether such investigative activity is arrest, interrogation, search or other investigation activity. The remedy is both addressing the damage sustained because of such violation as well as nullifying the effects of such illegal act. The major remedies to violations of a right during investigation are criminal, civil and disciplinary responsibilities of the person violating the right. However, there

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441 Reg. No. 96/2003, *supra* note 279, Art 14

442 Proc. No. 313/2003, *supra* note 193, Art 15(1)(a)

443 *Id.*, Art 20; Reg. No. 96/2003 *supra* note 279, Art 14

444 Proc. No. 313/2003, *id*., Art 27; *Reg. No. 96/2003, id.*, Art 14

are also issue-specific remedies, such as, *habeas corpus* for illegal detention and exclusion of evidence where the violation resulted in obtaining evidence by the investigator.

6.2 Criminal Responsibility of the Person Conducting Investigation

Enforcement of human rights norms is one of the principal purposes of criminal law. Although there are blanket provisions that declare abuse of power is prohibited, there are specific provisions with respect to each specific right and law enforcement. Thus, "[a]ny public servant who, contrary to law or in disregard of the forms and safeguards prescribed by law, arrests, detains or otherwise deprives another of his liberty, is punishable with rigorous imprisonment not exceeding ten years and fine."[445] The Criminal Code further provides that "[a]ny public servant charged with the arrest, custody, supervision, escort or interrogation of a person who is under suspicion, under arrest, summoned to appear before a court of justice, detained or serving a sentence, who, in the performance of his duties, improperly induces or gives a promise, threatens or treats the person concerned in an improper or brutal manner, or in a manner which is incompatible with human dignity or his office, especially by the use of blows, cruelty or physical or mental torture, be it to obtain a statement or confession, or to any other similar end, or to make him give testimony in a favourable manner is punishable with simple imprisonment or fine, or, in serious cases, with rigorous imprisonment not exceeding ten years and fine."[446]

Where the act constitutes an additional crime, both provisions are to be applied concurrently which ultimately increases the penalty.[447] Those criminal responsibilities discussed above are for violations committed by the person conducting the investigation on her own initiative. Where, "the crime is committed by the order of an official," however, "such official shall be punished with rigorous imprisonment not exceeding fifteen years and fine."[448]

Where a public servant without legal authority "executes acts of search, seizure or sequestration of a person's property, [she] is punishable with

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445 Crim. C., Art 423

446 *Id.,* Art 424 (1)

447 *Id.*

448 *Id.,* Art 424(2)

rigorous imprisonment not exceeding seven years."[449] Even when such person is "lawfully authorized to carry out searches or to effect seizure, enters another person's house or premises by using excessive force, or who executes acts of search, seizure or sequestration other than those authorized by law or without due regard for the conditions and forms thereby prescribed, is punishable with rigorous imprisonment not exceeding five years and fine."[450]

During trial, some defendants prove that they were tortured and abused by the investigating police officer. In those cases, there is not evidence that public prosecutor ordered investigation of such illegal acts or has prosecuted such police officers on the basis of such evidence.[451] It is stating the obvious that in such situation, the public prosecutor loses her case against the defendant and it has wider ramification both on the individual and the justice system.

6.3 Civil Liability of the Person Undertaking Investigation

The fact that the official who committed the violation of the rights of the individual is penalized for her criminal activity may not mean more than a moral gratification to the victim in terms of remedy for the damage she may have sustained. There are, thus, compensation remedies found in the Law of Extra-Contractual Liability. Here again, the general rule that a person who causes damage without legal justification makes it good holds.[452] However, there are some specific provisions addressing abuse of power in the investigation process. Therefore, interference with one's liberty, without due legal authority, preventing her from moving about as she is entitled to do

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449 *Id.*, Art 422 (1)

450 *Id.*, Art 422 (2)

451 There are handful prosecutions of police officers for violation of the law during their discharge of duties. However, it goes without saying that, where defendants prove their case that they made confessions because of ill-treatment by the investigating police officer, the public prosecutor who lost her case should have ordered the investigation of the alleged violation of the constitutional rights of the accused and abuse of police power. The evidence that some of the defendants produce is not only creating a reasonable doubt that they have not committed the crime they were charged with; it rather affirmatively proves the investigating police officer was engaged in illegal activities which at least deserve further investigation.

452 Civ. C., Arts 2027(2), 2028

even for a short time entails civil liability of the captor.[453] In such cases, it is "sufficient for the plaintiff to have been compelled to behave in a certain manner by the threat of a danger" of which she is aware[454] and she need not show that there was injury."[455] It also entails civil liability of a person where she "without due legal authority, forces [her] way on the land into the house of another, against the clearly expressed will of the lawful owner or possessor of the land or house."[456] Likewise, she is subject to civil liability "where, without due legal authority, [she] takes possession of property against the clearly expressed will of the lawful owner or possessor of the property."[457] Even when it is made with a court order "an offence shall be deemed to be committed where the order is not in the prescribed form or the bailiff exceeds his instructions or carries them out without due regard for the provisions of the law."[458] In such cases, the plaintiff can claim her compensation from the government, for reason of solvency, where she is able to prove it is a professional fault.[459]

It is up to the plaintiff to bring the case either along with the criminal action or separately (See joinder of civil and criminal cases section 13.7). She might want to bring her case either along with or after the criminal proceedings, because the criminal conviction makes her burden of proof easier because if the act is proved to be a violation of the law, she is not supposed to prove fault.[460] However, there is a risk of shorter period of limitation should the accused not be convicted.[461]

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453 *Id.*, Art 2040(1)

454 *Id.*, Art 2040(3)

455 *Id.*, Art 2040(2). Art 2108 further provides that "[w]here the plaintiff has been unlawfully deprived of his liberty by the defendant, the court may, by way of redress, order the defendant to pay fair compensation to the plaintiff or to a charity named by the plaintiff."

456 *Id.,* Art 2053

457 *Id.,* Art 2054

458 *Id.,* Art 2064(2)

459 *Id.,* Art 2126(2). An act of a government employee is deemed to be a professional fault "where the person who committed it believed in good faith that he acted within the scope of his duties and in the interest of the State." *Id.,* Art 2127(1)

460 *Id., Art. 2035—Infringement of a law*

(1) A person commits an offence where he infringes any specific and explicitly provision of a law, decree or administrative regulation.

(2) Ignorance of law is no excuse.

461 *Id.,* Under Art 2143 the period of limitation within which the victim can bring her

Civil claim for violation of rights during investigation is very limited. In *Taddesse W/Gabriel and Muluken Taddesse*[462] the appellants were suspected of 'illegally concealing foreign currency' for which Woreda 25 court issued a search warrant for US dollars. During the search the police found 1200 ETB; they took the money and detained the appellants for 22 and 26 days respectively. The appellants were released on bail after petitioning to the court. After their release, the appellants filed a civil suit against five police officers including the chief of the police.

The Addis Ababa Zonal Court (High Court) ruled that the police were discharging their professional responsibilities and therefore they cannot be held responsible. On appeal, the Supreme Court held that, the Woreda 25 Court issued a search warrant and not an arrest warrant; and, thus, declared their arrest improper. Even after detaining the appellants, the respondent did not take them to the nearest court within the 48 hours period as the law requires. Therefore, the Supreme Court ruled, the head of the police is responsible for his acts and is liable to pay moral compensation as per Civ. C., Art 2108. However, as the Civ. C., Art 2116(3) limits moral compensation to 1000 ETB, the court ordered ETB 1000 be paid to each appellant. The court further held that because fault of the other police officers was not proved, they were dismissed from the claim.

6.4 Disciplinary Responsibility of the Person Conducting Investigation

The various public officials conducting investigation have their respective disciplinary responsibilities when they are not complying with the rules of the law and their practice. This section deals with disciplinary responsibility of the police. The Council of Ministers Regulations for Administration of Federal Police Commission No 86/2003 provides for those disciplinary measures which are also applicable to the Addis Ababa Police.[463]

Although fault specific disciplinary measure addresses the breach of the right of victim, the main purpose of disciplinary measure is "to rehabilitate a

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action is only two years from the time at which she suffered the damage for which she is claiming compensation. However, where the Criminal Code prescribes a longer period of limitation the latter applies.

462 *Taddesse W/Gabriel, et al. v. Lt. Girma Demeqe, et al.* (Supreme Court, 2001) Civ. App. F No. 826/88

463 Reg. No. 96/2003, *supra* note 279, Art 14

police officer who commits disciplinary breaches by making him learn from his breach and enable him to perform his duties properly or to discharge him from service if he becomes recalcitrant."[464] According to the Police Regulations, disciplinary faults are two categories: those disciplinary faults entailing 'simple penalties' and those entailing 'rigorous penalties.'[465] Rigorous penalties are "fine up to three month's salary, demotion from . . . rank and salary, and dismissal"[466] Those disciplinary faults relating to violation of "human and democratic rights stipulated in the constitution"[467] and "abuse of power" entail rigorous penalties.

Such disciplinary matters that entail rigorous penalty are to be investigated and decided by the Disciplinary Committee[468] composed of five Federal Police officers appointed by the Commissioner.[469] The police officer, who is charged with disciplinary actions, has the right to reply (to be heard) and she can appeal to the Commissioner from the decision of the Committee.[470] The decision of the Commissioner is final.[471] Such disciplinary measures are to be taken despite any court proceedings or actions.[472] The period of limitation for those actions that entail rigorous disciplinary penalty is one year from the time the commission of the offence is known.[473] Disciplinary measures based on individual compliant or allegation and measures based on public evaluation ('*gimgema'* in Amharic,) of members of the police are different.

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464 *Id.*, Art 51

465 *Id.*, Art 52(2), (3)

466 *Id.*, Art 52(1), (3)

467 *Id.*, Art 54(1)

468 Originally, such decisions were supposed to be made by a Council of Commissioners composed of the Commissioner, the Deputy Commissioners and the Assistant Commissioners. *Federal Police Commission Proclamation No. 207/2000* ("Proc. No. 207/2000"), Art 9(4).

469 Reg. No. 96/2003, *supra* note 279, Arts 68, 69

470 *Id.*, Arts 55(1), 57(2)

471 Proc. No. 313/2003, *supra* note 193, Art 11(2)(d)

472 *Federal Police Commission Administration Council of Ministers Regulation 86/2003* ("Reg. No. 86/2003"), Art 55(4)

473 *Id.*, Art 58(2); It is worth noting that in 1996 e. c. about 356 members of the Addis Ababa Police Commission were dismissed from their job for disciplinary reasons. Ali, *supra* note 88, at 45. However, rumour has it that such measures were not necessarily (or primarily) related to breach of police duties.

6.4 Habeas Corpus

FDRE Const., Art 19

> *3. All persons have an inalienable right to petition the court to order their physical release where the arresting police officer or the law enforcer fails to bring them before a court within the prescribed time and to provide reasons for their arrest . . .*

It is discussed in detail in the chapter dealing with arrest that despite the fact that the law of arrest is very broad and the grounds of release are very narrow, there are certain problems relating to the enforcement of the right to liberty. *Habeas corpus*, according to the provisions of the Constitution, is a remedy available to a person who is arrested illegally and/or who is not brought before a court of law within the prescribed time.

One may wonder whether the illegality of the arrest is restricted only to the failure of the person exercising custody to bring the arrested person before the court of law within the prescribed time. This, arguably, sounds to be right because if the manner or ground of arrest is illegal that is to be decided by the court provided the person is produced before the court within the prescribed time. Again, even when the ground and manner of the arrest is lawful, the arrested person has the right not to be detained for a prolonged period than is provided for by the law. Those are the circumstances where a person is said to be arrested without charge or without court order.

Under Art 14 of the Courts' Proclamation, *habeas corpus* is within the civil jurisdiction of Federal First Instance Courts.[474] However, as those civil jurisdictions listed under Art 5 are the exclusive jurisdictions of Federal Courts, on state level *habeas corpus* is the delegated jurisdiction of State High Courts.[475]

The procedure is that the arrested person files an application before the Federal First Instance Court stating she is detained "otherwise than in pursuance of an order duly made under the [Civil Procedure] Code or the

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474 Art 14(1); this is a modification to the original jurisdiction given to the High Court as provided for in the Art *The Civil Procedure Code Decree No. 52 of 1965* ("Civ. P. C."), 15(2)(i)

475 FDRE Const., Art 80(4); Courts' Proclamation, Art 5(10)

Criminal Procedure Code."[476] The law further requires that such application shall be accompanied by an affidavit by the applicant stating the name of the person under whose custody she is, the nature and place of the detention and the names of the person, if any, who can testify to the fact alleged in the application.[477] Where the person detained is not able to make the petition herself for any reason, such application may be filed by any other person. However, such application made by another person, should also contain the name of the person detained and that she is unable to make the application herself.[478]

Upon receipt of the application the Court issues summons directing the person under whose custody the person is (a) to appear before the Court together with the detained person on such day as may be fixed in the summons; and (b) to show a reason why the person detained should not be released.[479] Summons shall also be issued to the persons stated in the application as may be able to testify to the facts alleged in the application.[480] Thus, the case is heard only in the presence of the arrestee and her captor.

After hearing both sides and examining evidence on the legality of the arrest, the court renders its decision.[481] Where the court is satisfied that the detention is unlawful, it shall order the *immediate* release of the person detained. The person under whose custody the detained person is has the obligation to release the detainee immediately notwithstanding any other order or instructions (by other organ or authority) to the contrary.[482] Where the Court is in doubt as to the legality of the arrest, it may order the release of the person detained on her executing a bond, with or without sureties, that she will appear in any court on any future day where her appearance may be required and comply with such other orders as the court may think fit to make in the circumstances.[483]

476 Civ. P. C., Art 177(1)
477 *Id.*, Art 177 (2)
478 *Id.*, Art 177(3)
479 *Id.*, Art 178(1)
480 *Id.*, Art 178(2)
481 *Id.*, Art 179(1)
482 *Id.*, Art 179(2)
483 *Id.*, Art 179(3)

6.5 Exclusion of Illegally Obtained Evidence

FDRE Const., Art 9

> 1. *The Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.*

FDRE Const., Art 19

> 5. *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.*

Where the person from whom evidence is obtained in violation of her rights is charged for the offence under investigation and that evidence is used against her, those above discussed remedies are not sufficient remedies. In such a situation, the exclusion of the evidence obtained illegally is "the best *realistic* remedy."[484] Exclusionary rule is a constitutional rule and it is a matter of "judicial integrity and faithfulness to the Constitution."[485] If such illegally obtained evidence is not excluded, then the provisions of the law turn to be 'a form of words.'[486] This is because while we condemn such act by the investigating police officer, maintaining the power to avail ourselves of the information obtained in this illegal manner is only a disservice to the Constitution. However, exclusion of illegally obtained evidence still remains to be one of the significantly problematic areas in our criminal process. Even in recent decisions, the court often put itself in a constant dilemma between excluding the evidence obtained in violation of constitutional procedural requirements and convicting the accused based on such evidence 'believing' the accused is really guilty. As a consequence the court believes exclusionary rules deflect the truth and it tends to forget that it is a constitutional choice, already made, and its obligation is just to apply the law.

Thus, in order to restrict the application of the rules of exclusion, some opine that the rules of exclusion apply only to confessions because, first, the

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484 J. Dressler and G. C. Thomas, *Criminal Procedure: Investigating Crime 3rd Ed.* (Thomason West, 2006), at 461

485 A. A. Morris (1982) "THE EXCLUSIONARY RULE, DETERRENCE AND POSNER'S ECONOMIC ANALYSIS OF LAW" *57 Washington L. Rev.*, at 648

486 *Id.*, at 649

concept of exclusion is expressly provided for under the Sub-Article dealing with evidence obtained under coercion and it comes immediately next to the illegality of confession. However, the supremacy clause is no less a rule of exclusion to deal with all other forms of illegally obtained evidence. For instance, where an investigating police officer obtained item of evidence as a consequence of unlawful search, the results of such search are null by virtue of Art 9(1) of the Constitution for the activity of the investigating of police officer is contrary to the provisions of Art 26 of the Constitution.[487] Even in the absence of such express constitutional exclusionary rule, the admission of such evidence in evidence in the face of such constitutional guarantee and supremacy clause, can only be "manifest neglect, if not an open defiance, of the prohibition of the Constitution."[488]

Second, the practice effectively nullified even the provisions of Const., Art 19(5) in that, the defendant is required to prove coercion. Even when she proves coercion the present trend indicates that, such illegally obtained evidence may be excluded as unreliable and not as improperly obtained.[489] In the rule of exclusion, there are basic points we have to take into consideration. It is mentioned that manifestation of the truth is not the sole goal of the criminal procedure neither is truth the ultimate value. Moreover, where the evidence is excluded, it may not be the only evidence that the police gathered; there are other items of evidence obtained in compliance with the legal rules; however, where there is no other legally obtained evidence than what is excludable in the circumstances, that is not the end of the criminal justice system. If there are any consequences resulting from the exclusion of the evidence, such as, acquittal of the accused, it is not the exclusion of the evidence that results in such acquittal of an apparently 'guilty' person; rather it is the Constitution that has imposed such consequences.[490] It is not always the case that the guilty is convicted, there are always mistakes and it is better to wrongly acquit the guilty than

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487 When exclusionary rule was introduced in the US legal system by *Weeks v. United States* 232 U.S. 383 (1914) there was no written word in the US Constitution. The Court excluded the items seized without search warrant by interpretation of the Constitution and invoking its *fidelity* to the law. The Court further held that the exclusionary rule is an essential part of the protection of the Fourth Amendment against arbitrary search and seizure.

488 *Id*.

489 See the discussion on police interrogation and confession, Chapter 5

490 *Mapp v. Ohio*, 367 U.S. 643 (1961)

to wrongly convict the innocent.[491] Third, the Court has the duty to enforce the rights of individuals and failure to exclude illegally obtained evidence is only legitimizing the illegal activities of the executive.

The Constitution expressly excludes not only the involuntarily obtained confession but also the admission of evidence. The more or less equivalent rule in the US system is the poisonous-tree rule developed by the Supreme Court in *Walder* held that "the Government cannot violate the Fourth Amendment[492] . . . and use the fruits of such unlawful conduct to secure a conviction. *Nor can the Government make indirect use of such evidence for its case, or support a conviction on evidence obtained through leads from the unlawfully obtained evidence.* All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men."[493] [Emphasis in the original]

The approach to this rule as propounded in the literature[494] is that first, identify the 'poisonous tree' which is a constitutional violation; second, identify the 'fruit' which is the evidence the public prosecutor tenders to introduce; third, determine whether there is a causal link between the poisonous tree and the fruit, i.e., whether the evidence resulted from the violation of a constitutional provision. Finally, if the evidence is not obtained as a result of direct violation of the constitutional provision, the evidence may be admitted in evidence where (a) the poison from the fruit is dissipated, i.e., the violation of the Constitution is mitigated by other factors, such as, distance between the two—the constitutional violation and the evidence obtained[495] or (b) there is a possibility of discovery of the

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491 In order to address the issue at each stage, the Draft Code included various exclusionary rules at important stages including search and seizure that: "[e] vidence obtained contrary to the above provisions [those dealing with search and seizure] is not admissible" Art 33(5)

492 The Fourth Amendment under the title *unreasonable searches and seizures* provides that: *The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

493 *Walder v. United States*, 347 U.S. 62 (1954)

494 LaFave, *supra* note 328, at 502-508; Dressler, *supra* note 484, at 487

495 The following are the standards of attenuation where the taint may be dissipated: "(1) the length of time that has elapsed between the initial illegality and the

evidence through an independent un-poisoned source, or though inevitable discovery the evidence.

The last question is who has standing to claim exclusion? Where the evidence is unlawfully obtained from X and used against her, she has the right to claim exclusion of the evidence because it is obtained contrary to her constitutional right and exclusion of such evidence is a best remedy to such violation. However, if it is used against Y, X has other remedies for the violation and exclusion of such evidence is not the appropriate one.

We discussed there are different remedies to different violations of rights of the suspect during investigation by law enforcement agents. Those remedies can be applied in any combination depending on the nature of the violation; one remedy does not exclude the other. For instance, if the victim is under detention, she can file petition of *habeas corpus*. She can also claim the criminal responsibility of her captor and she can join her civil claim. The investigator may also be liable for disciplinary measure and if there is any evidence obtained from the victim, that evidence is excludable. Each of these remedies addresses specific interests that one remedy cannot replace the other.

seizure of the fruit in question; (2) the [gravity] of the initial misconduct . . . ; (3) the existence or absence of intervening cause of the seizure of the fruit; and (4) the presence or absence of an act of free will by the defendant resulting in the seizure of the fruit." Dressler, *supra* note 484, at 492

PRE-TRIAL PROCESSES AND JURISDICTION

Chapter 7

Preliminary Inquiry and Preparatory Hearing

7.1 General

A subject neglected needs a long introduction; hence, this long and comparative introduction to the pre-trial hearing in our criminal process. It is indicated in Chapter 4 that the police have wide power of arrest while they have only limited power of release of the suspect. The only ground for the suspect to secure her liberty is bail at any stage before the trial where the offence is 'bailable'. The police investigation is completed when the investigation file is sent to the public prosecutor. The public prosecutor decides whether to prosecute and should she decide so, the case goes to trial. Almost always the accused has undergone pre-trial arrests and even bail often comes late. In not few cases, the detainee petitions for *habeas corpus*. One of the main shortcomings of the criminal process at least on the books is there is no post-arrest pre-trial investigation in our criminal process where the public prosecutor is required to justify the continued detention of the suspect. This problem is unique for our legal system.

Both in the common law and the civil law tradition as well as in the Malayan system from which the bulk of the provisions of our Criminal Procedure Code in general and the provisions of preliminary inquiry, in particular, were borrowed, there is post-arrest pre-trial investigation or some sort of preliminary selection of the right suspect. In those systems where there is

a preliminary hearing, it is conducted at the earliest stage of the process, most often along with police investigation of the crime. Such hearing has two aspects—investigative and dispositive. The investigative aspect of the of the preliminary hearing (inquiry), which is not as much important as the dispositive aspect of it, focuses on investigation into the facts of the case and gathering of evidence for both parties by giving access what each has by way of discovery. The degree of the investigating role of the process differs from one legal system to another. The dispositive aspect of the hearing, however, is identical—the body conducting the hearing examines the evidence presented by the party leading the preliminary hearing (usually public prosecutor) and decide whether there is a sufficient cause to commit the suspect for trial and on what charges. Where there is no sufficient reason to commit the suspect for trial and where she is under detention, the case is closed and the suspect is immediately discharged without bail.

As discharge is not acquittal, the body conducting crime investigation (the police) can keep the investigation file active. The essential objective of the preliminary hearing is determination on the liberty of the suspect based on the finding that there is (or no) sufficient cause to pursue against her. In fact, such preliminary inquiry also increases efficiency of the criminal justice system and has higher rate of conviction.[496]

[496] The rate of conviction is the charges resulted in conviction out of the total cases that went to court for trial. Where there is a preliminary selection process, prosecutors are less likely to take frivolous cases to trial because of an in-built de-selection process for the innocent. For instance, the conviction rate of the Ethiopian Federal High and Federal First Instance Courts for the Ethiopian calendar year 1996 was 33.1% and 15%, respectively, out of the total cases for which the pubic prosecutor filed charges. Ali, *supra* note 88, at 42; Menberetsehai, *supra* note 83, at 7. In contrast, the conviction rate for the French *cour d'assises d'appel* for the same period (2001-2002) was 95%. B. McKillop "The New French Jury Court of Appeal Revisited" *31 Sydney L. Rev.*, at 144; likewise, the conviction rate for US federal courts for the year 1994-2003 was 85-90%. US Department of Justice, Bureau of Justice Statistics <www.ojp.usdoj.gove/bjs> (last accessed on October 5, 2009).

7.1.1. The Practice in France

In France[497] investigation is conducted by the judicial police.[498] As soon as the investigating police officer is informed of commission of an offence, she notifies the district prosecutor who opens the *dossier*[499] and sends to the examining magistrate (*juge d'instruction*).[500] As the 'whole truth' is regarded as paramount in the civil law tradition, the investigation in France focuses on manifestation of the truth; thus, both on the inculpatory as well as exculpatory evidence are gathered.[501] Furthermore, investigation is

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497 The investigation and preliminary hearing are more or less similar in France, Germany and Italy. See in general, ICAC (1994) "Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison" at <www.icac.nsw.gov.au> ("Inquisitorial System") (last accessed 30 November, 2009)

498 In France, there are two categories of police—those responsible for maintaining law and order composed of *police nationale* (operating in large urban areas) and the *gendarmerie* (operating in smaller urban areas and the countryside) and those reacting to commission of an offence. Those responding to the commission of an offence conducting investigation are judicial police. *French Code of Criminal Procedure as amended through 1 January 2006* ("French C. Crim. P."), Art 12, 14, 17; McKillop, *supra* note 272, at 530 footnote 9

499 The dossier, 'painstakingly prepared' is an 'encyclopaedia' of the investigation of a particular crime, is the single most import document serving as the foundation of subsequent criminal process. It has four parts. The first and the largest part of the dossier (*pièces de fond*), comprises the records of investigation—witnesses testimony, investigation report of the investigating police officer, record of interview of the suspect both by the investigating police and the investigating judge, experts reports. The second part (*détention préventive*), contains the defendant's pre-trial detention, including, initial order of detention, the reasons for such detention, and order for prolonged detention. The third part (*renseignement et personnalité*), contains documents relating to the personality of the accused and her background, including, birth certificate, prior conviction, defendant's curriculum vitae, interview of the defendant by the judge and the investigating police. The fourth part (*pièces de forme*), comprises formal documents of the investigation, such as, the initial police report, warrants, requisitions, orders and directives. McKillop, *supra* note 272, at 544, 545, 566; Inquisitorial System, *supra* note 497, at 8; Pugh, *supra* note 272, at 15, 26

500 The phrase 'investigating judge' and 'examining magistrate' are used interchangeably.

501 French C. Crim. P., Art 81; Inquisitorial System, *supra* note 497, at 15; Pugh, *supra* note 272, at 23

not limited to the facts of the case; it also focuses on the character of the accused, her financial, family and social situation. The investigating judge may order medical and psychological examination. Such investigation in to the character of the suspect is mandatory for *crimes* (felony) while it is optional for *délits* (misdemeanour).[502]

Where the examining magistrate believes there is "strong and concordant evidence making it probable that [the suspect] may have participated, as perpetrator or accomplice, in the commission of the offence under investigation, may summon the suspect to such hearing.[503] Thus, she notifies the suspect by a recorded delivery or through a judicial police officer that "he will be called, within a period of not less than ten days or longer two months, for a first appearance."[504] Such preparatory examination is conducted on *crimes* and *délits* selected by the public prosecutor in order to determine whether there exists sufficient ground to commit the suspect for trial.[505] Such investigation is required to be completed in "a reasonable time with consideration to the seriousness of the charge brought against the person under judicial examination, the complexity of the investigation needed to establish the truth and the exercise of the rights of the defence."[506] Furthermore, there is confrontation with the prosecution witnesses by the accused during investigation, in some cases, at two occasions—during interrogation by the investigating police officer and later by the investigating judge.[507]

At the conclusion of the investigation, the investigating judge decides "whether there exist against the person under judicial examination

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502 *Id*., Arts 79, 81; R. Vouin (1970) "The Role of the Prosecutor in French Criminal Trials" *18 Am. J. Comp. L*, at 490. Offences are classified into three categories—*crimes*, *délits* and *contraventions*. *Crimes* are those punishable with imprisonment for ten years or more; *délits* are crimes punishable by imprisonment for up to ten years; and *contraventions* are those petty offences punishable by fine. Kock, *supra* note 272, at 253; French C. Crim. P., Arts 178, 179, 181; B. McKillop (1998) "READINGS AND HEARINGS IN FRENCH CRIMINAL JUSTICE: FIVE CASES IN THE TRIBUNAL CORRECTIONNEL" *46 Am. J. Comp. L.*, at 757

503 French C. Crim. P., Art 80-1. Short of such assessment of threshold evidence, the investigation based on such summons is null.

504 *Id*. Art 80-2

505 *Id*., Art 79; Vouin, *supra* note 502, at 484; Inquisitorial System, *supra* note 497, at 15

506 French C. Crim. P., Art 175-2

507 *Id.*, Art 82-1; McKillop, *supra* note 272, at 571

charges which constitute an offence, of which he determines the legal qualification."[508] After evaluation of the evidence gathered where "the investigating judge considers the facts do not constitute a felony, a misdemeanour, or a contravention, or if the perpetrator has remained unidentified, or if there is no sufficient charges against the person under judicial examination, he makes an order ruling that there is no cause to prosecute."[509] Where such person is under pre-trial detention, she would be released and such order puts the judicial supervision to an end. The investigating judge also returns all articles that were placed under judicial safekeeping to the persons from whom they were taken.[510] Where the public prosecutor believes such decision of the examining magistrate to close the investigation file and discharge of the accused in not correct, she may appeal to the indicting chamber (*chambré d'accusation*) provided such offence is the jurisdiction of the Court of Assize.[511]

If the examining magistrate finds that there is sufficient ground to commit the suspect for trial, she orders the case be transferred to such court having jurisdiction to hear the case after determining the nature of the offence (crime, *délits* or contravention).[512] *Crimes* fall under the jurisdiction of Court of Assize (*cour d'assises*); *délits* fall under the jurisdiction of correctional court (*tribunal correctional*) while contraventions fall under the jurisdiction of police tribunals (*tribunal de police*).[513]

7.1.2. The Process in the USA System

In the US legal system, cases are seen at two levels—federal and state. Many of the crimes are state crimes but there are also significant numbers of federal crimes. At the federal level a case is initiated by complaint (charge) before a magistrate. Where the crime is a felony,[514] it goes to a grand jury

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508 *Id.*, Art 176

509 *Id.*, Art 177; Pugh, *supra* note 272, at 23

510 French C. Crim. P., Art 177. Such discharge may be published in the newspaper on the request of the suspect or the public prosecutor. *Id.*, Art 177-1

511 *Id.*, Art 185; Kock, *supra* note 272, at 255; Vouin, *supra* note 502, at 494

512 Kock, *supra* note 272, at 255

513 French C. Crim. P., Arts 178, 179 and 181, respectively

514 Felony is an offence that is punishable either by death or by imprisonment more than one year. *US Federal Rules of Criminal Procedure as updated on 1 December 2006* ("F. R. C. Pro."), Rule 7(a)(1)

in order to obtain indictment unless there is an intelligent waiver.[515] The grand jury hearing is basically a hearing of prosecution evidence whether to prosecute the suspect and on what charges. The decision of the grand jury is a preliminary selection of the probable offender. However, where there is no grand jury hearing there is a preliminary hearing by a magistrate. Such hearing is held within a week or two after the complaint is filed before the court where the defendant is not released on bail; however, where she is released on bail, such preliminary hearing is held in few weeks.[516] The hearing is not necessarily based on admissible evidence because it is exclusively for the preliminary determination of whether there is a cause to peruse. At such hearings the prosecutor presents only few key witnesses; the defence normally limits herself only to cross-examination of such witnesses. However, there is no prohibition that she cannot have her defence witnesses heard at the grand jury or preliminary hearing.[517] Where the grand jury finds no case against the suspect, the suspect is discharged. In order for the case to go to trial, however, the grand jury must return the indictment by at least 12 jurors concurring.[518] The federal grand jury hearing is replicated in almost all of the states' criminal process. Furthermore, once the grand jury returns an indictment or the magistrate "binds the case over to the next stage" and the public prosecutor decides she has to pursue the case, the rules of discovery kick in starting from the arraignment of the accused.[519]

7.1.3. The Malayan System

The Malayan Code of Criminal Procedure, the principal source of the 1961 Criminal Procedure Code including the provisions on preliminary inquiry, has preliminary inquiry (hearing) similar to those discussed above. Accordingly, preliminary inquiry is to be conducted for offences that may be tried by a Court of a Judge.[520] The public prosecutor presents her evidence

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515 *Id*., Rule 7(a)(1). The defendant waives prosecution by indictment in open court and after being advised of the nature of the charge and of the defendant's rights. *Id*., Rule 7(b)

516 LaFave, et al., *supra* note 328, at 18

517 *Id*.

518 F. R. C. Pro., Rule 6(f);

519 *Id*., Rule 12(b)(3)(D); LaFave, et al., *supra* note 328, at 19

520 Malaya Crim. P. C., Sec 138-151. Cases are tried either by *Court of a Magistrate*, Sec 173, or by *Court of a Judge* depending on the seriousness of the crime. Trial by *Court of a Judge* is further classified into those that are tried by a judge without assessors, Sec 178 et seq., those that are tried with the aid of assessors,

and the accused has the chance to rebut or cross-examine witnesses.[521] Where the magistrate conducting the preliminary inquiry, at the conclusion of the prosecution evidence, finds no case to commit the accused for trial, may dismiss the charge and discharge the accused.[522] The magistrate may even discharge the suspect at any earlier stage where the charges appear to her groundless.[523] Where, after the prosecution evidence is heard, the magistrate believes there are grounds to commit the accused for trial she frames a charge declaring what offence/s the accused is charged with.[524] As soon as the charge is framed the magistrate speaks to the accused:

> *Having heard the evidence against you do you wish to say anything in answer to the charge? You are at liberty to make your defence now or you may reserve your defence until your trial before the Court of a Judge. You are not bound to say anything unless you desire to do so, but if you elect to make your defence now any statement you may make or evidence you may give will be taken down in writing and may be put in at your trial.*[525]

If the accused reserves her defence for the trial she shall be committed to the trial court immediately.[526] If, on the other hand, she produces witnesses or evidence or wish to make statements as an accused or a witness, the court records such evidence or statement.[527] The magistrate may compel witnesses and other documents be produced for the hearing should the defence so requests.[528] After evaluation of the defence evidence again, at the conclusion of the defence evidence, where the magistrate finds there are no sufficient grounds for committing the accused for trial, she discharges the suspect. Where, on the other hand, the magistrate finds

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Sec 184 et seq., and those tried by jury, Sec 200 et seq. The Malayan Code has been progressively modified since 1956; in this discussion the Code is taken as it stood in 1956 assuming that was what the drafters of the Ethiopian Criminal Procedure Code had access to.

521 *Id*., 139(i)(ii)

522 *Id*., 140(i)

523 *Id*., 140(iii)

524 *Id*., 141(i)

525 *Id*., 141(ii)

526 *Id*., 142(i)

527 *Id*., 142(ii)

528 *Id*., 142(v). The accused may also testify in her defence during such inquiry, *Id*., Sec 142(iv)

sufficient ground for committing the accused for trial she commits her for trial before the Court of a Judge.[529] At the preliminary hearing, although the person conducting the preliminary hearing does not have to make opening explanation on the case, she produces her evidence in support of the alleged crime; the defence, however, may address the court at the conclusion of examination of prosecution evidence both on the evidence and examination of witnesses.[530]

Those preliminary hearings as discussed appear to be mini-trials. However, these are dispassionate and essential selection procedures handled by lower court judges and prosecutors. They are also essential preparations for the trial should the case ends up in trial. They should not be considered costly for two reasons: first, as effective the selection process is, irrelevant cases are deselected at early stage of the criminal process and only those viable cases will be tried by the court having jurisdiction. For instance, in the American system, such preliminary hearing results in 15-30% of felony cases being dismissed by the prosecutor before the hearing is scheduled and further 5-10% of the cases is dismissed by the magistrate.[531] Such hearing further reduces the burden on those higher courts which would have to try those cases and increases the conviction rate which is one of the indices of the efficacy of the criminal justice system administration. Second, it is discussed in previous chapters that there is a wide speared practice of arrest pending investigation or detention awaiting trial. Without such de-selection process and a terribly low conviction rate at the end of the process significantly affects the public perception towards the administration of the criminal justice system. Such preliminary post-arrest pre-trial hearings help properly select the probable offender from among the innocent suspects at the earlier stage.

As essential the preliminary hearing may be in those three legal systems, both the investigating and dispositive aspects of the process are missing in our criminal process. This is because, first, preliminary inquiry according to Art 80 is to be conducted only for few offences—first degree murder, aggravated robbery and any other offence that falls under the jurisdiction of the High Court in respect of which the public prosecutor requests preliminary inquiry be held. Second, the general purpose of the hearing is preservation of the prosecution evidence and the court does not have power

529 *Id*., 143(i)(ii)

530 *Id*., 151(ii)

531 LaFave, et al., *supra* note 328, at 18

to dispose the matter. Third, even in the existing process, preliminary inquiry is a procedure to be undertaken after (at least, the major part of) police investigation is completed only as a process for recording and preservation of the prosecution evidence. There is no express provision requiring that preliminary inquirymay be held after the completion of police investigation. However, the reading of certain provisions of the Code indicates to that effect. If the power of the public prosecutor is to be exercised up on receiving the police investigation report (Art 37 (b)) and charge is to be framed within the next fifteen days of the receipt of the record of the preliminary inquiry (Art 109), if preliminary inquiry is meant for recording of the prosecution evidence (Arts 84, 88), and if the judge has to decide the condition of the arrestee until trial (Art 93) then it is correct to assume that the law requires such preliminary inquiry be conducted after the police investigation is completed. The committal court does not have the power to inquire into the matter nor to dispose the case.

The lack of preliminary hearing in the criminal process has been raised as a point of concern for many decades now, but to no avail.[532] The preparatory hearing introduced in the Anti-Corruption Special Procedure and Evidence Rules is not a preliminary hearing, unlike what its name suggests, for at least two reasons. First, it is ordered by the court before which a charge against the accused is filed; and the preparatory hearing is conducted by the court having jurisdiction to hear the case. Second, the preparatory hearing is conducted not having the preliminary selection of the accused and her right to liberty as its central objective. It is conducted only when the issue is complicated and with a view to clarify issues to be disposed of by the court and to assist the court in the management of the case. The Proclamation further gives the impression that, after the hearing of both parties, where it finds no case against the accused, the court discharges her. Unfortunately, the provision is framed from the perspective of preserving the right of the prosecutor to file another charge; not from the perspective of the right of the accused. Thus, as it exists today, there is no preliminary hearing in the criminal process of Ethiopia. This Chapter discusses both the preliminary inquiry and the preparatory hearing and their practice.

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[532] Regarding the law of arrest, Fisher discussed the absence of the post arrest pre-trial screening and he placed emphasis on the strict interpretation of the law on arrest stricter than would otherwise be had there been judicial screening giving the opportunity to the arrestee "to show her innocence short of the trial." Fisher (1966b), at 467, 468

7.2 Preliminary Inquiry

Art. 80.—Principle.

(1) Where any person is accused of an offence under Art. 522 (homicide in the first degree) or Art. 637 (aggravated robbery) a preliminary inquiry shall be held under the provisions of this Book:

Provided that nothing in this Article shall prevent the High Court from dispensing with the holding of a preliminary inquiry where it is satisfied by the public prosecutor that the trial can be held immediately.

(2) Where any person is accused of any other offence triable only by the High Court no preliminary inquiry shall be held unless the public prosecutor under Art. 38 (b) so directs.

This provision delimited the scope of preliminary inquiry in the criminal process. Accordingly, preliminary inquiry is to be held mandatorily for two specific offences: first degree murder and aggravated robbery.[533] Even for those offences in respect of which preliminary inquiry is mandatory, where public prosecutor shows the court that the trial will be held soon, the High Court can dispense with such process. The second category of offences in respect of which preliminary inquiry may be held are those falling under the jurisdiction of the High Court provided the public prosecutor requests preliminary inquiry be held by virtue of Art 38 (b). There is no indication on what grounds the public prosecutor could require preliminary inquiry. However, having regard to the purpose of preliminary inquiry, which can also be gathered from the readings of the provisions of Arts 88 & 90, is preservation of the prosecution's evidence. Thus, it is justified to believe that the public prosecutor may request preliminary inquiry be held where because of the time lapse between the date of the completion of the investigation and the trial she believes there is a possibility of evidence to be lost and witnesses might not be available later or their memory might fade. In practice, such request is initiated by the investigating police officer who, during investigation, identified key witness with no a fixed abode or

[533] The equivalent provision to Pen. C., Art 522, Homicide in the First Degree Murder in the new Criminal Code is Crim. C., Art 539, Aggravated Homicide; likewise, the equivalent provision to Aggravated Robbery under Pen. C., Art 637 is Crim. C., Art 670.

regular employment or is not resident of the area, and informs the public prosecutor stating why such evidence has to be recorded.[534] If the committal court has dispositive power, one of the grounds for the public prosecutor to request the court to conduct preliminary inquiry would be where the suspect is detained. However, the provisions of preliminary inquiry were in disuse until recently by the decision of presidents of the supreme courts.[535]

Despite the fact that preliminary inquiry is mandatory for the two crimes, save the public prosecutor is dispensed with it by the High Court, failure to conduct preliminary is not listed as one of the grounds for preliminary objection under Art 130. In *Kidanmariam Birhanu, et al.*[536] wherein defendants were charged under Art 281 and 522 of the 1957 Penal Code, alternatively, the defence counsel raised the objection that the preliminary inquiry had not been conducted according to what is required by the law. The Federal High Court ruled against the objection on the ground, among others, that it is not included in the list under Art 130.[537]

It is alluded in the discussion above that the provisions of Art 80 are not good enough in terms of scope to address the post-arrest pre-trial screening process. The Malayan Code of Criminal Procedure, Sec 138, the apparent

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534 Interview with Teshome Nida and Fekadu Tsega Federal First Instance and High Court prosecutors, respectively, July, 2008; Sgt. Yared, *supra* note 331

535 Wondwossen, *supra* note 104, at 35. The Vice President of the Federal Supreme Court and the Presidents of the State Supreme Courts held a meeting for three days (June 15- 17, 2004) on the issue of enforcement of the law on criminal procedure. The minutes indicate, among others, that the participants of the meeting discussed the need for undertaking preliminary inquiry for the purpose of recording of evidence. The Minutes of the meeting further indicate that "because of lack of recording of evidence, particularly testimony, there is problem of change of the content of the testimony as a consequence of which the efficacy of the criminal justice system became questionable. This is because the testimony given to the police is not supported by preliminary inquiry; the testimony given to the police is not found to be useful as well as it should" [translation mine] Minutes, *supra* note 142, at 2.

536 *Kidanmariam, et al., supra* note 136. Also see Minutes, *supra* note 142, at 3

537 This same question was raised in a discussion among the Presidents of the Supreme Courts and agreement is reached on the fact that as it is not in the list of Art 130 it cannot be a ground of objection. Minutes, *supra* note 142, at 3; see the comments on Art 130 in Section 13.1.2, *infra*. (unless it is indicated otherwise, the referred provisions of the law are that of the 1961 Criminal Procedure Code)

source of Art 80, provides that preliminary inquiry is " . . . held with a view to committal for trial before the *Court of a Judge*, and no person shall be tried before such Court unless he shall have been committed for trial after a preliminary inquiry . . . ." In order to broaden the scope of preliminary inquiry, the Draft Code makes a modest proposal that requires preliminary inquiry where the arrested person is denied bail. Art 49(1) provides that "The public prosecutor shall cause preliminary inquiry be held for persons who are denied bail under Articles 68[538] or 72.[539]" Art 49(2) further provides that "Where a person is accused of an offence triable only by the High Court or the Supreme Court, preliminary inquiry may be held when the public prosecutor so requests under Article 51 of this Code."

Art. 81.—Court having jurisdiction.

Without prejudice to the provisions of Art. 99-107, the preliminary inquiry shall be held before the Woreda Guezat Court within whose area of jurisdiction the offence was committed.

Art. 82.—Procedure.

(1) All preliminary inquiries shall be held in the manner provided by the following Articles.
(2) An adjournment may be granted on the conditions laid down in Art. 94.

Art. 83.—Opening of preliminary inquiry.

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538 *Article 68 (b).—Conditions Where Bail is not Allowed*
Notwithstanding the provision of Article 67, the arrested person may not be released on bail if the offence with which he is charged or suspected of:
1. Carries a rigorous imprisonment for not less than 10 years and the person in respect of whom the offence was committed dies or is likely to die ; or
2. Carries death penalty.

539 *Article 72.—Other Conditions Where Bail not Allowed*
1. An application for bail shall not be allowed where:
a) the suspect is of such nature that it is unlikely he will comply with the conditions laid down in the bail bond;
b) the applicant, is likely to interfere with witnesses or tamper with or remove evidence.
2. Where the court finds the reasons not to release a person under sub-article (1) cease to exist or disappear, it shall release such person in custody on bail.

(1) Where the public prosecutor decides under Art. 80 (2) that a preliminary inquiry shall be held, he shall send a copy of his decision to the Woreda Guezat Court having jurisdiction and, where appropriate, to the public prosecutor acting before such court.
(2) The court shall fix the day on which the inquiry shall be held and cause to be summoned such witnesses as the prosecutor may wish to call in support of the prosecution.
(3) The case for the prosecution shall be conducted by the public prosecutor acting before the committing court.

The court having jurisdiction to conduct preliminary inquiry is the Woreda Court in whose local jurisdiction the offence is committed. The determination of jurisdiction of the committal court is identical with the local jurisdiction of the trial court.[540] Once the public prosecutor files her request for a preliminary inquiry, jurisdiction could be one of the grounds of objections that may be raised by the suspect at such hearing.

Preliminary inquiry is conducted only in respect of offences that are the jurisdiction of the high court; whether it is mandatory or optional, preliminary inquiry is initiated by the public prosecutor conducting the prosecution as per Art 38(b). Thus, upon receipt of the police investigation report, should she decide preliminary inquiry be held, the public prosecutor sends her request to the court having jurisdiction (the local Woreda Court) that preliminary inquiry be held.[541] However, as the Woreda (First Instance) court prosecutor appears before the committal court, the High Court prosecutor sends her decision also to the Woreda (First Instance) court prosecutor. As the prosecution office is a bureaucratic hierarchy, this cannot be a problem.

The committal court, after being in receipt of the decision of the public prosecutor, fixes the date on which the preliminary inquiry may be held. On such date fixed by the court, the public prosecutor, her witnesses and the accused will appear.[542] The procedure of the preliminary inquiry

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[540] See jurisdiction in general Chapter 9

[541] The reference "Woreda Court" might be a little confusing in the federal arrangement; it may be used to refer to Woreda Courts at the state level. At the federal level, it certainly is understood to refer to the Federal First Instance Courts as it is the lowest in the hierarchy.

[542] The requirement of the appearance of the accused is only alluded to in Art 84, 85 and 144. However, it is her constitutional right to personally attend when

needs to be completed at once. Unlike preliminary hearing, however, the prosecutor is not producing only her key witnesses or part of the evidence; she is producing all the evidence she has for recording. Thus, having regard to the number of witnesses and complexity of the case, the hearing may not be completed at once and if the committal court find adjudication is necessary, it may so order as in ordinary hearing. That raises the concern that preliminary inquiry might take, unless properly controlled by the judge, as long the time as the trial takes. A closer examination of the provisions of Art 94, however, indicates that many of the grounds of adjournment are not applicable. For instance, as the defence witnesses are not to be examined, there cannot be adjournment because they cannot be required to appear. Generally, the grounds of adjournment provided for under 94 (2) are where:

(a) the prosecutor, public or private, or the accused fails for good cause to appear; or
(b) witnesses for the prosecution or the defence are not present; or
(c) in a trial other than that of a case committed on preliminary inquiry to the High Court, the prosecution require time for investigation; or
(d) further evidence requires to be produced; or
(e) evidence is produced either by the prosecution or the defence which takes the other side by surprise and the production of which could not have been foreseen; or
(f) the charge has been altered or added to and the prosecutor or the accused requires time to reconsider the prosecution or defence; or
(g) the accused has not been served with a copy of the charge or of the preliminary inquiry or has been served too short a time before the trial to enable him properly to prepare his defence; or
(h) prior sanction for a prosecution is required before the trial may start; or
(i) a decision in the trial cannot be given unless other proceedings be first completed; or
(j) the mental stability of an accused requires to be established by an expert; or
(k) the court considers that the accused, if a young person, should be placed under observation; or

prosecution evidence is recorded and to put questions for cross-examination to witnesses.

(l) the trial cannot be completed in one day and is adjourned to the following day.

Those grounds of adjournment are mainly for trial hearings than to preliminary inquiry; for instance, (b) is not applicable because there is not defence evidence to be heard; (c) applies exclusively to trial hearings; (e) does not apply to preliminary inquiry because there is no surprise in such hearings; (f) does not apply because there is no formal charge; (k) does not apply because there is no preliminary inquiry process for young persons. The only applicable ground of adjournment appears to be (l) where the hearing cannot be completed in one day. The applicability of other grounds is yet to be tested.

Art. 84.—Taking evidence for prosecution.

Where the accused person appears or is brought before it, the court shall require the prosecutor to open his case and to call his witnesses.

Art. 87.—Additional witnesses.

The court may at any time call any witness whose testimony it thinks necessary in the interests of justice, notwithstanding that the prosecutor has not applied for such witness to be summoned.

Art. 88.—Recording of evidence.

Evidence shall be recorded in accordance with Art. 147 and the evidence of each witness shall be recorded on separate sheets of paper

Art. 90.—Bond of witnesses.

(1) All witnesses who have given evidence at the preliminary inquiry shall execute before the committing court bonds binding themselves to be in attendance before such court and on such date as they shall be summoned to appear.
(2) Any witness who refuses to execute the bond may be kept in custody until the trial or until he binds himself.

At the preliminary inquiry, the public prosecutor opens her case. As already indicated, at the stage of preliminary inquiry the investigation is (at least for the major part) completed. Thus, the public prosecutor has well structured idea about the nature of the offence and the type of evidence to be recorded.

In opening her case, the prosecutor thus explains the charges and the type of evidence she wants the court to enter in the record.[543] Furthermore, she has to produce all evidence that are available to her and which she deems relevant for her case for proper recording. Those evidences are to be examined before recording. The accused has to have access to exhibits and the right to cross-examine witnesses. There is no express provision to this effect in this section, Book III, of the Code. However, this can be gathered from the manner of recording of the evidence, Art 147, the effects of the recorded evidence, Arts 91, 144, and the constitutional rights of the accused person, FDRE Const. Art 20 (4).[544]

The prosecution evidence during the preliminary inquiry is recorded in the manner evidence is recorded at a trial according to the provisions of Art. 147. Particularly important is Sub-Article 3 which provides that "the evidence shall be divided into evidence-in-chief, cross examination and re-examination with a note as to where the cross-examination and re-examination begin and end." Therefore, witnesses during preliminary inquiry are examined-in-chief by the public prosecutor, may be cross-examined by the accused/suspect or her counsel if she wishes to, and re-examined, again by the public prosecutor, if she wishes to. The fact that the deposition of a witness, who later could not appear before the trial court to testify, is read and put in evidence during the trial as per Art 144 makes it imperative that the accused need to have the opportunity to properly cross-examine prosecution witnesses at the preliminary inquiry.

The tiniest investigative role of the committal court is seen in light of calling witnesses not called by the prosecutor. Thus, where the examination of prosecution witnesses and evidence reveals certain other facts pertaining to evidence that there is a witness that need to be heard, the court may call such witness at any time of the proceeding in the interest of justice. Furthermore, if the evidence in the preliminary inquiry is recoded in the manner evidence is recorded at trial and the court has power to call

543 Seen in light of Art 84, evidence at the preliminary inquiry is recorded in the manner that evidence for trial is recorded. It may, thus, further be argued that the provisions of Art 136(1) are also applicable at preliminary inquiry hearing that the public prosecutor must present her case in "an impartial and objective manner."

544 In fact, the Malayan Code of Criminal Procedure under sec 139 (ii) provides "[n]othing in this section shall prevent evidence being produced in support of the prosecution or called for by the Magistrate at any stage of the proceedings provided that an opportunity is given to the accused to cross-examine and to answer and rebut such evidence."

witnesses, it may be argued that the court may put questions which appear necessary to such prosecution witnesses at the preliminary inquiry.

The sole purpose of preliminary inquiry in the Ethiopian criminal process is recording and preservation of prosecution evidence. Therefore, at the conclusion of the preliminary inquiry, witnesses shall enter bond binding themselves to appear before the trial court. Where a witness is not willing to enter bond, she remains in custody until she enters bond. The Amharic version states in the alternative that such person may remain in custody until the date of trial. In light of the provisions of Art 144, the wisdom of such harsh provision on the witnesses is not clear.

Art. 85.—Accused asked whether he wishes to make a statement.

(1) After the witnesses for the prosecution have been heard and their evidence recorded, the court shall ask the accused whether he wishes to make a statement in-answer to the charge.
(2) He shall be informed that the preliminary inquiry does not constitute a trial and that the decision as to his guilt or innocence will be taken by the High Court and not by the committing court.
(3) He shall be informed that he is not bound to say anything but that any statement he may wish to make will be taken down in writing and may be put in at his trial.

Art. 86.—Statement of accused.

(1) If the accused elects to make no statement, he shall forthwith be committed for trial before the High Court.
(2) If the accused elects to make a statement, such statement shall be taken down in writing, read over to him, signed by the accused and kept in the file.

Art. 89.—Committal for trial.

(1) After the statement, if any, of the accused has been taken down, the court shall commit the accused for trial before the High Court without specifying the charge or charges on which he is committed for trial.
(2) Such charge or charges shall be specified in the charge framed by the public prosecutor in accordance with Art. 109-122 of this Code.
(3) The court shall then require the accused to give a list of the witnesses he wishes to call at his trial together with their addresses.

Preliminary inquiry is not a trial. The accused is not required to say any thing at the beginning of the hearing unlike the trial where she is required to enter her plea. Once the examination of witnesses and evidence of the prosecution is over, the committal court explains to the accused that it is not a trial and the determination of guilt is to be made by the trial court. It then states that she is not required to say anything if she does not want to. But, should she elect to speak any statement she makes may be recorded and put in evidence against her in her trial. She is also given a chance to give only a list of witnesses and their addresses whom she wishes to call in her defence during the trial.

Where the accused makes statements it is recorded, read over to her, signed on and kept in the file. As to who signs on the statement, there is a difference in the Amharic and the English version. The Amharic version states that it is to be signed on by the court while the English version states that it is to be signed by the accused. Certainly, this is a statement by the accused; it amounts to a statement under Art 35 except the latter is always a recording of only the defendant's statement. It thus appears the statement must to be signed by the accused and not by the court. However, the Amharic version prevails over the English version.

After recording the statement of the accused or if she elects not to make statements at the conclusion of the prosecution evidence, the court commits the accused, without specifying the charges, for trial before the High Court having jurisdiction. The charge (s) to be instituted against the suspect are to be specified in the charge drawn by the public prosecutor acting before the High Court in accordance with the provisions of Arts 109-122, the Chapter dealing with drawing and filing the charge.

These provisions made it clear that the purpose of preliminary inquiry is mechanically recording the prosecution evidence to which the power of the committal court is limited. The committal court does not assess whether there is a case for trial nor the sufficiency of the evidence against the accused. It records only the prosecution evidence.[545]

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[545] The apparent source of this provision, the Malayan Code, Sec 141 (1), however, provides that "[i]f after taking the evidence for the prosecution the Magistrate is of the opinion that on the evidence as it stands there are sufficient grounds for committing the accused for trial he shall frame a charge under his hand declaring with what the offence or offences the accused is charged"—which is to be read and explained to the accused by the Magistrate.

Art. 91.—Record to be forwarded to registrar.

(1) When the accused is committed for trial, the committing court shall send the original record and the exhibits (if any) to the registrar of the High Court. Any exhibit which from its bulk or otherwise cannot conveniently be forwarded to the registrar of the High Court may remain in the custody of the police.

(2) A list of all exhibits showing which of them are forwarded with the record and which remain in the custody of the police shall be sent to the registrar of the High Court with the record.

(3) The registrar of the High Court shall be responsible for making copies of the record and sending one to the public prosecutor and one to the accused.

Art. 92.—Contents of record.

(1) The record shall contain the following particulars:-

(a) The serial number of the case; and
(b) the date of the commission of the offence; and
(c) the date of the accusation, if any; and
(d) the name and address of the accuser, if any:
(e) and the name, address, occupation and age, if known, and nationality of the accused; and
(f) the offence shown and, where appropriate, the value of the property In respect of which or the special status of the person against whom the offence was committed; and
(g) the date of the warrant of arrest, if any, or on which the accused was first arrested; and
(h) the date on which the accused was first brought before a court; and
(i) the name of the prosecutor and, where appropriate, of the advocate for the defence; and
(j) the date of and reasons for any adjournment that may have been granted; and
(k) the date on which the preliminary inquiry was completed; and
(l) all statements made in the course of the preliminary inquiry, including those which may have been made by the accused; and
(m) the list of defence witnesses.

(2) The same particulars shall appear in the copy of the proceedings sent to the public prosecutor and the accused.

Art. 138.—Antecedents of accused.

(2) The previous convictions of an accused person shall not be included in the record of any preliminary inquiry.

Art. 144.—Depositions taken in preliminary inquiry may be put in evidence.

() The deposition of a witness taken at a preliminary inquiry may be read and put in evidence before the High Court where the witness is dead or insane, cannot be found, is so ill as not to be able to attend the trial or is absent from the Empire.
(2) The deposition of an expert taken at a preliminary inquiry may be read and put in evidence before the High Court although he is not called as a witness.

When the committal court commits the accused to the High Court for trial, it sends the records and the evidence to the registrar of the High Court. However, where there are evidences which cannot be forwarded to the registrar because of bulk or otherwise, they remain with the police and a list must be included in the record. The list, however, indicates both those that are sent to the registrar of the High Court and those that are not sent. As it stands now, the courts do not have evidence warehouse and all evidence are in the custody of the police.

The registrar of the High Court is responsible for giving one copy each to the public prosecutor and to the accused with the same particulars contained in each copy. The record of the preliminary inquiry is detailed and its contents are sufficiently clear. It does not, however, include the previous conviction of the accused, if any.

One of the substantive effect of preliminary inquiry in the criminal process as provided for under Art 144 is that, where the witness who has already given deposition is dead or insane or cannot be found or is so ill that she cannot attend the trial, her depositions before the committal court may be read and put in evidence before the High Court. There is a possibility that the accused may not have cross-examined the witness. Although the right to access to evidence is limited to the "opportunity" to cross-examine because the accused may choose not to, the fact that the court informed the accused that the preliminary inquiry is not trial and guilt is to be decided by the trial court might deceive the accused and she might reserve her questions to the trial.

Art. 93.—Accused may be remanded.

Without prejudice to the provisions of this Code relating to release on bail the committing court may order that the accused be kept on remand until the trial.

Whatever the purpose of the preliminary inquiry may be, one of the significant ramifications can be seen with respect to the power of the committal court at the conclusion of the hearing. In a proper preliminary hearing, if it finds no case to try against the accused after hearing the evidence for the prosecution, the committing court discharges her. For lack of such power in the Criminal Procedure Code, the court has the power either to release the suspect on bail or to remand her into custody. However, because those cases in respect of which preliminary inquiry would be conducted are the jurisdictions of the High Court and many judges consider them as serious offences, the tendency is to keep the accused in detention until trial. Certainly, aggravated homicides are treated as "non-bailable offences" under Art 63; even in respect of those other offences which are said not to fall under Art 63, the accused normally comes from prison for her preliminary inquiry and she is sent back to prison most often than not.[546] Draft Criminal Procedure Code, therefore, contains a modest proposal to granting some power to the committing court:

Article 56 Decision

(1) The committing court shall order the release of the suspect where after examination of evidence for prosecution and statement of the suspect, if any, is of the opinion that there is not ground for prosecution.
(2) Where the court is of the opinion that there are grounds for prosecution:

a. stating same it shall notify the court having jurisdiction in writing that the case is committed for trial before such Court;
b. it shall cause witnesses heard during preliminary inquiry enter a bond that they would appear before the trial court; and
c. inform the suspect that it is decided he be prosecuted.

[546] Teshome, *supra* note 534; Sgt. Yared, *supra* note 331; the presidents of the supreme courts also agreed to reduce incidents of indefinite detention until trial. Minutes, *supra* note 142, at 13

7.3 Preparatory Hearing

The Anti-Corruption Special Procedure and Rules of Evidence introduced a process called "preparatory hearing."[547] The name is not an accurate depiction of the process as to what it purports to be unlike what was in the initial proclamation.[548] Under the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, preparatory hearing is to be held only where the court before which a corruption charge is filed so orders. It provides that, the court orders such preparatory hearings where "it appears to [the] court that a charge of corruption offences reveals a case of such complexity and as a result of which the trial is likely to be of such length, and where the purposes mentioned in Article 36 . . . is going to be likely fulfilled."[549] This provision makes two points clear; first, preparatory hearing held after the corruption charge is filed before the court having jurisdiction. Because preparatory hearing comes after the completion of the investigation and after the Commission's prosecutor draws and files the charge to prosecute the accused. Thus, it is not as such preliminary inquiry as properly understood. As discussed below, it is a process that only facilitates the hearing. Second, preparatory hearing is not held for all corruption offences indiscriminately; the court before which the charge of the crime of corruption is filed must believe that the case is complex and such preparatory hearing advances one of the objectives of the preparatory hearing.

Turning to the purpose of preparatory hearing, Art 36(1) lists four purposes: a) identifying issues which are likely to be material in the case; b) assisting

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547 Proc No. 434/2005, *supra* note, 97, Section Five Art 35-41

548 Proc. No. 236/2001, *supra* note 157, Art 30 provides that "a preparatory hearing shall be held by the court which hears the case before the corruption case is submitted for trial." Art 31 provides for the purposes of preparatory hearing but no where the law limits the circumstances in which such preparatory hearing could be conducted. Thus, in *Assefa, et al., supra* note 127, the Supreme Court held the trial may not be held without prior preparatory hearing; preparatory hearing was applied for all corruption offences indiscriminately.

549 Proc. No. 434/2005, *supra* note 97, Art 35. The law was, however, amended after the original proclamation is tested for about four years. The wisdom of ordering preparatory hearing before the court having jurisdiction to hear the case once the charge is filed is not clear; nor is the distinction between preparatory hearing and the trial clear save coercing the accused in the process of the preparatory hearing.

the parties in comprehending the issues; c) facilitating the proceedings; and d) assisting the court in the management of the trial. In conducting the preparatory hearing, the court may order the public prosecutor to prepare and submit both to the court and the accused three types of documents: 1) a written statement on facts and evidence; 2) the prosecution evidence and any explanatory material in such form as appears to the court to be likely to assist the proceedings; and 3) a written notice of documents and other evidence which in the opinion of the public prosecutor are true and ought to be agreed to.[550]

The public prosecutor's statement on facts of the case and evidence contains, among others, 1) the principal facts of the case for the prosecution; 2) unless it is deemed necessary to keep secret the identity of the witnesses up on the application of the prosecutor and the court authorization, the witness who will speak to those facts;[551] 3) any exhibits and documentary evidence relevant to those facts; 4) any provision of the law on which the prosecutor proposes to rely; and 5) any matter falling within the preceding Sub-Articles or that appear to the prosecutor to flow from same.[552]

Once the prosecution completes her part by preparing and submitting those documents, and the accused is given a chance to review the same, the court may order the accused to prepare and submit both to the court and to the public prosecutor the following documents: 1) a written statement setting out in general terms the nature of her defence and indicating the principal mattes on which she takes issues with prosecution; 2) notice of any objections that she has to the case statement; 3) notice of any point of law and the admissibility of evidence which she relies on; and 4) the extent to which she agrees with the prosecutor relating to documents and other matters referred to in Art 37(3). This last requirement is basically demanding

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550 *Id.*, Art 37

551 This sub-article is contrary to the provisions of Art 20(4) of the Constitution which provides for the rights of the accused to have full access to evidence presented against her. There is no such a thing as "secrete evidence;" if it is secret for whatever reason, the public prosecutor can exclude it from the very beginning. Once introduced as evidence, it cannot be concealed from the accused for she has the right to know. In fact, she is better positioned to test the veracity of the testimony. Otherwise, it is up to the justice system and the prosecution office, to design and implement witness protection schemes and it cannot in any way burden the accused in the case against her.

552 Proc. No. 434/2005, *supra* note 97, Art 38

the accused to state to what degree she agrees with the allegations of the public prosecutor based on the evidence presented. It could be described as a negotiation between the two, except that it is judicially sanctioned.

These provisions of the Anti-Corruption Special Procedure and Rules of Evidence Proclamation are only discovery procedures except that they are judicial procedures coming after the charge is filed before the court. It does not appear that there is wisdom in going back to discovery after the charge is filed. However, even as a discovery procedure it is not complete. In *Abate Kisho, et al.*,[553] where defendants were charged for corruption offences during preparatory hearing the Commission's Prosecutor submitted only list of witness against defendants. The defendants thus requested the court to order the public prosecutor to give them the content of the depositions of witnesses by the police. The High Court that "with regard to the issue whether testimony of witnesses during investigation should be given to the defendant, examining the matter in light of the provision of Proclamation No 236/2001, Art 33(2), we realised the Proclamation provides that the public prosecutor shall, by written statement, give the identity of witnesses to the material facts; it does not, however, provide that the testimony of witnesses during investigation be given to defendants. Therefore the objection by defendants is not based ob law and is thus proper." The court further ordered the public prosecutor to prepare a statement that describes the facts which the witnesses would testify about as per Proclamation No 236/2001, Art 33(2). When the proclamation was revised in 2005 by Proclamation No 434/2005, the procedure in regard to discovery was not modified. Thus, the practice currently is that the Commission prosecutor gives only list of witnesses and not the content of their testimony.

In the course of the preparatory hearing, the court may decide on matters of fact and law. Thus, it decides on the admissibility of the evidence produced by both the prosecutor and the defence as well as on issues of law necessary for a ruling before the trial starts.[554] Parties may lodge an appeal to the court having jurisdiction where they are not satisfied with the decision of the court on those preliminary matters of fact and law.[555] After all the process, what would be the decision of the court as to the guilt of the accused is not clear. However, Art 41 provides that a "closing of the file at the preliminary hearing as a result of inadmissibility of evidence may not be a bar to institute

553 *Abate, et al., supra* note 153

554 Proc. No. 434/2005, *supra* note 97, Art 36(2)

555 *Id.*, Art 40

a new charge on the same matter after gathering other evidences." There are two possible and tenable interpretations as to the consequences of this provision. First, the court, after examining the evidence produced by both parties, if the case cannot be committed for trial for lack of evidence because those prosecution evidence are ruled inadmissible, the court may close the file and discharge the accused. Implicit in it, the insufficiency of the prosecution is one of the grounds of closing the file. So is where the defence evidence is sufficient to contradict the prosecution evidence. The second and the direct interpretation of this provision is that, the fact that the file is closed for inadmissibility of evidence doesn't bar to institute another charge by the prosecutor based on further investigation. However, it is indicated earlier that the preparatory hearing is conducted by the court having jurisdiction to hear the case after the corruptions charges are filed by the prosecutor. Where the facts of the case are complex, the court may order preparatory hearing be conducted (by itself). This is basically examination of the evidence by both parties before the hearing starts. Thus, preparatory hearing is only a misnomer; the hearing was rather a trial; so is the "closing" of the case file as the accused is acquitted. On such background, the subsequent institution of a charge by the public prosecutor and hearing of the case by the court might be challenged for violating the constitutional prohibition of double jeopardy.

Chapter 8

The Right the Arrestee to be Released on Bail Bond and Remand in Custody

Introduction

The right to liberty is guaranteed by the Constitution; thus, a person may not be deprived of her liberty unless on such grounds and in accordance with the law. However, a person may be arrested in accordance with the provisions of the procedural law where she is suspected of a crime punishable by imprisonment or death, for investigation purposes. Such provision on the right to liberty restricting the power on the initial deprivation of the right does not stand alone; there is also the possibility of subsequent release—the immediate ground of release being bail. The Constitution thus provides that persons arrested have the right to be released on bail. Bail, thus, plays a central role in the administration of the criminal justice by balancing the interest of the individual in securing her liberty pending investigation or trial and the interest of criminal justice administration by securing her continued attendance. Bail may also be seen as an extension of the principle in the criminal justice system that such person is presumed to be innocent until proven guilty. Therefore, where there is no ground for the continued detention of the suspect, she must not be punished for an offence it is not proved that she had committed.

However, the Constitution further provides that in exceptional circumstances provided for by the law, the court may deny bail or demand adequate guarantee. What is unique in the Ethiopian criminal process is that such denial of bail is made by a decision of a court based its on assessment of

facts provided those are the grounds that are provided for by the law. There is no *a priori* denial of bail by the law maker.

Bail is particularly important in the Ethiopian criminal process for two reasons: first, the police have broad power of arrest but very limited ground of releasing the arrestee. Second, there is no post-arrest pre-trial screening process by which the prosecutor shows there is justifiable ground for the continued detention of the arrestee; nor for the arrestee to show her innocence. In order to avoid irremediable damage and also to secure maximum liberty of the suspect, it is important that the provisions of bail are favourably interpreted and vigorously implemented in order to secure the maximum liberty of the suspect.

Bail and remand are two sides of a coin. Where the arrestee is denied bail, she is remanded into custody. Although remands are often based on denial of bail for the interest of the administration of justice, not all grounds of remand are denial of bail. Where the court grants bail on condition but the arrestee refuses (being able) to comply with those conditions, its consequence is remand. This Chapter dwells on the purpose of bail, and examines the law and the practice on bail and remand.

8.1 Bail

8.1.1 Purpose of Bail and Some Concerns

Bail plays a central role in the administration of the criminal justice system by balancing two apparently conflicting interests. First, bail is a process of securing the liberty of the arrestee. A suspect or an accused is arrested based on *reasonable suspicion*[556] that she probably has committed the alleged offence which is yet to be proved before the court of law. Thus, by securing the liberty of such arrestee, bail pursues the basic constitutional principle that such person is presumed to be innocent until proven guilty. The release of the person also avoids irreparable damage to the arrestee would have deprived her of "contacts with friends and family absence from employment and possibly loss of job . . . diminished ability to support family and to hire counsel and preparation of a defence[557] and stigmatizing effects on the

[556] Arts 25, 50 and 51

[557] For instance, in *Kinney v. Lenon* (425 F.2d 209 (9th Circ., 1970) a juvenile defendant awaiting trial alleged in support of his pre-trial release that he did not know the names of his witnesses but he would recognize them if he saw them. The court

prisoner's reputation."[558] Furthermore, our prisons and police stations are in poor conditions and when the person is remanded into custody, she is detained in those conditions.[559] Second, bail is also meant for promoting the interest of the administration of criminal justice by securing the continued attendance of the suspect either for investigation, prosecution or service of sentence should she be found guilty.

In order to appreciate the importance of bail in the Ethiopian criminal process, it is imperative to see it in context. First, police has wide power of arrest while it has only limited ground of release of arrestees. Second, such arrest is made often at the early stage of the investigation and the latter takes long to be completed. Third, there is no post-arrest pre-trial screening. Because the trial comes long after the investigation, the damage, both to the detainee and the legal system, is serious. Bail is an important process for the court to take it seriously to achieve both the freedom and attendance of the suspect.

Unfortunately, in the system where politics of criminal procedure is at its height, bail is too susceptible to abuse by all actors in the administration of criminal justice. The law on bail is fragmented and frequently amended. For instance, the vagrancy and corruption offences have each separate rule different from other crimes in the mainstream criminal process. Moreover, when the Anti-Corruption Rules were originally adopted, corruption was a bailable offence. By a minor amendment made few days later, corruption became a non-bailable offence.[560] This Rule again was amended after few years, in that, only those corruption offences that are punishable by

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was convinced that, although defendant was assisted by counsel, he was the only person who could prepare his defence and granted him bail in order to enforce his constitutional right of compulsory process of witnesses.

558 Saltzburg and Capra, supra note 328, at 929

559 "The conditions of detentions in Federal as well as in State Prisons do not meet international standards. Their physical state and conditions [. . .] are poor and hygiene and sanitation need improvement. The budget for food is 2 Birr a day for each prisoner, which allows only for one meal. Medical care is scarce." The Report further states that the prisons conditions are "really intolerable (not to say degrading)." Baseline Study Report, *supra* note 84, at 116, 196

560 Proc. No. 236/2001, *supra* note 157, promulgated on May 24/2001, was silent on the right to bail and thus, bail was governed by the provisions of the Criminal Procedure Code. However, Proc. No. 239/2001, *supra* note 134, Art 2(2), promulgated on June 12, 2001, made corruption offences non-bailable.

at least ten years of rigorous imprisonment were made non-bailable.[561] Likewise, vagrancy, a crime which justifies arrest without warrant was made non-bailable offence.

On the other hand, all pre-trial procedures in respect of ordinary crimes, including first appearance an important stage for determination of bail are granted to Addis Ababa and Dire Dawa Cities' Courts. These courts are not recognized by the Constitution[562] because the Constitution recognizes only State and Federal Courts, and it is exhaustive in its listing.[563] Federal Courts are Federal First Instance Courts, Federal High Courts and the Federal Supreme Court while State Courts are First Instance Courts, State High Courts and State Supreme Courts.[564] Addis Ababa and Dire Dawa are not states but they are federally administered cities; thus, the respective Cities' Courts are not envisaged in the Constitution nor is the House of Peoples' Representatives empowered to establish one, nor to grant criminal jurisdiction to such courts.[565]

8.1.2 The Constitutional Right of Arrested Persons to Bail

FDRE Const. Art 19

> 6. *Persons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person.* [Emphasis added]

Art 19(6) of the Constitution provides that arrested persons have the right to be released on bail. This right is stated in the widest possible terms and does not make any distinction among the various offences whatsoever. The

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561 Proc No. 434/2005, *supra* note 97, Art 4(1),

562 See, Proc. No. 361/2003, *supra* note 281, Art 41(2)(c); Proc. No. 408/2004, *supra* note 171, Art 2(2). Likewise, Dire Dawa City Courts are given the power to hear "[r]emand in custody and bail applications without prejudice to the jurisdiction of Federal Courts on federal offences.", Proc. No. 416/2004, *supra* note 172, Art 33(2)(c)

563 The FDRE Constitution also recognizes customary and religious courts. However, it is a matter of reason that they cannot have criminal jurisdiction, Art 78(5).

564 *Id.*, Art 78(2), (3)

565 *Id.*, Art 78(2) is clear in providing that "[t]he House of Peoples' Representatives may, by two-thirds majority vote, establish nationwide or in some parts of the country only, the Federal High Court and First Instance Courts it deems necessary."

Constitution further provides that in exceptional circumstances provided for by the law, the court denies bail or demands adequate guarantee for conditional release. The plain reading of the Constitution indicates that the law does not deny bail *a priori*, but it gives grounds for the court to assess the situation; the Constitution envisages a situation wherein the restriction of the right to be released on bail is both a matter of law and a matter of the decision of the court. Thus, with respect to matters of bail, the ultimate decision is that of the court and not of the lawmaker. The direct implication of this provision seen in light of Art 9 (4) of the Constitution[566] is that the provisions of Art 63 of the Code, Art 6(3) of the Vagrancy Law and Art 4(1) of the Anti-Corruption Special Procedure[567] are unconstitutional. That is because, in such provisions the court plays no role other than sending the person back to jail for she does "not" have a right to be considered for bail at all.

On the other hand, there is an argument that the Constituent Assembly (the body which drafted the Constitution) when drafting this particular provision, had the provisions of Art 63 of the Code in mind and, in fact, mentioned it in the minutes of the meeting. Such resort to historical documents is necessary only for the purpose of interpretation of a given provision of the law. However, interpretation is needed when the provisions of the law are vague, ambiguous, contradictory, or where there are gaps. Here, the provision of the Constitution is very clear—persons arrested have the right to be released on bail. In exceptional circumstances provided for in the law, the court may deny bail or demand adequate guarantee for conditional release. Furthermore, the argument that for the purpose of interpretation of the Constitution regard may be had to the subsidiary legislation, the Criminal Procedure Code, is legally improper. Therefore, reference to the minutes of the Constituent Assembly is not necessary. In this regard, one would expect the courts to be active in asserting their duty on constitutional interpretation for the purpose of application of same.

The Federal Supreme Court in *Assefa Abreha, et al.*[568] was encountered the issue for the first time. The suspects were charged with various crimes of corruption; by the time they were arrested, corruption offences were bailable.

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566 *Id.*, Art 9(4) provides that "[t]he Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect."

567 Proc. No. 434/2005, *supra* note 97

568 *Assefa, et al., supra* note 127

After their arrest, however, corruption offences turned non-bailable. Art 51 (2) thus provides that "[a] person who is arrested on suspicion of having committed a corruption offence shall not be released on bail."[569] The defendants thus raised various objections on various ground before the Federal Supreme Court against the ruling that they would not be release on bail. Two of the grounds raised by the defendants challenging their detention were the unconstitutionality of the law denying bail *a priori* and the non-retrospective application of the same law.

With respect to their first ground of objection, defendants contended that "although there is a law that provides for a person suspected of a corruption offence may not be released on bail, it cannot restrict or nullify the constitutional right. Government cannot adopt anti-corruption or other legislation that is contrary to the Constitution; even when so adopted, the court has the duty to make it inapplicable because the provision is not covered by Art 19(6) of the Constitution." The Court, however, ruled that "defendants knew the existence of a law denying bail for corruption offences . . . . Basically, the provision denying bail for corruption offences is clear and unambiguous, that it cannot invite debate. Regarding the argument in relation to the Constitution we are not referring the matter to the Council of Constitutional Inquiry because we believe it is not a nature that raises a constitutional issue or constitutional interpretation." The Court further went on interpreting the content of Art 19(6) of the FDRE Constitution and concluded that the argument is 'not legal'; therefore not acceptable. On the second argument based on the retroactive application of the amended law denying bail the Court ruled that "because the law focuses on procedure and evidence . . . the objection by the defence is not acceptable." [Translation mine]

As can be seen from those decisions, at all levels of courts as discussed in this material, the application of the provisions of Art 63 and others which deny bail to suspects based on the nature of the offence is so much entrenched in

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[569] Proc. No. 239/2001, *supra* note 134. The amendment also governs jurisdiction on pre-trial matters that sub-article 1 provides "[a]ny application for arrest, search, remand, restraining or any other similar application or issue related to investigation of corruption offences shall be heard by the court which has a jurisdiction to hear cases of corruption offences." The case was first seen by the Federal First Instance Court that granted bail based on the Proclamation 236, *supra* note 56. Subsequently, the case appeared before the Federal Supreme Court as per Courts' Proclamation, Art 8(1).

the practice that it certainly will continue to be applied by the courts until such time the House of Federation declares such laws unconstitutional or until the courts are convinced that such laws are unconstitutional and that it is their constitutional duty not to apply a law that is inapplicable. Thus, further discussion on the content and application of such provisions, insofar as they are applied by the courts is only practically important.

Art. 63.—Principle.

> *(1) Whosoever has been arrested may be released on bail where the offence with which he is charged does not carry the death penalty or rigorous imprisonment for fifteen years or more* ***and*** *where there is no possibility of the person in respect of whom the offence was committed dying.* [emphasis added]
> *(2) . . .*
> *(3) Nothing in this Article shall affect the provisions of Art. 67.*

Art 63(1), as it suggests, could be construed as a principle because it provides that whosoever has been arrested may be released on bail. However, this sub-article further provides that bail may be denied where two cumulative conditions are met: (a) where the offence alleged to have been committed carries death penalty or rigorous imprisonment for fifteen years or more; and (b) the person against whom the offence was committed has died or is likely to die. Thus, those non-bailable offences as provided for under this provision are serious offences against persons. Other offences, however serious they may be, are not covered by this sub-article. The existence/inexistence of the word "and" is of immense significance because the above interpretation of the provision is valid only in the presence of the word "and." In the absence of the word, an offence is non-bailable provided it is punishable by death or fifteen years or more rigorous imprisonment. Likewise, if the person against whom the offence is committed is likely to die whatever penalty the offence carries, the offence is non-bailable.

In *Birhanu Degu, et al.*[570] defendants were charged for attempt to over throw the constitutional government by violence contrary to the provisions of Crim. C., Arts 32(1)(a), 27(1) and 238(1)(a). The High Court denied the suspects bail based on Crim. P. C., Art 63, against which they appealed to the Federal Supreme Court. The Supreme Court held that "an accused may

[570] *Birhanu Degu, et al. v. Public Prosecutor* (Supreme Court, 2007) Crim. App. F No. 25485

be denied bail based on Crim. P. Co., Art 63 where the two requirements are met—that the offence [with which the arrestee is suspected of] is punishable by death or rigorous imprisonment for more than 15 years and the person against whom the offence is committed has died or is likely to die. Furthermore, even though the requirements under Art 63 are not met, it is provided that a person may be denied bail based on the circumstances provided under Art 67. Coming to the issue at hand, the Crim. C., Art 238(1) (a) is punishable by 3 to 15 imprisonment; therefore one of the requirements under Art 63 is not met."[571]

The other branch of the law that denies bail *a priori* is the Vagrancy Control law which under Art 6(3) provides that "[a] person who is reasonably suspected of being a vagrant . . . shall not be released on bail."[572] In the same vein the Revised Anti-Corruption Special Procedure Law denies bail to the arrestee where she is "charged with a corruption offence punishable for more than 10 years."[573]

Those provisions that deny bail *a priori* based on the penalty attached to the offence have their own practical problems. Suppose the person is charged with ordinary homicide[574] which carries a penalty of 5-20 years rigorous imprisonment or a person is charged with the offence of abuse of power[575] which carries 7 to 15 years rigorous imprisonment or the offence of corrupt practice[576] which carries rigorous imprisonment not less than one year and not exceeding ten years? Can the court before which the person appears decide that the requirements of the law are met to deny bail based on the provisions of Art 63 of the Code and Art 4(1) of the Anti-corruption Special Procedure Law, respectively? The answer is in the negative because, even though the offence is committed against a person, the clause "death or rigorous imprisonment for fifteen years or more" excludes an offence which is punishable by imprisonment between 5 to 20 years. Likewise, while bail is denied for corruption offences that carry at least 10 years rigorous imprisonment, an arrestee charged with corrupt practice punishable with 1

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571 The Supreme Court affirmed this interpretation in similar cases, such as, *Shimelis Dejene, et al. v. Public Prosecutor* (Federal Supreme Court, 2007) Crim. App. F No. 26858

572 Proc. No. 384/2004, *supra* note 98

573 Proc. No. 434/2005, *supra* note 97, Art 4(1)

574 Crim. C., Art 480

575 *Id.*, Art 407

576 *Id.*, Art 408

to 10 years imprisonment cannot be denied bail on the ground of Art 4(1) of the Revised Anti-Corruption Special Procedure Law.

However, the practice of courts is not consistent with such interpretation. For instance, in *Enyew Mengistie*[577] the present appellant was detained because he was suspected of the crime of corruption. The High Court denied him bail against which he appealed to the Federal Supreme Court. The Supreme Court denied the appeal on the ground that "the Court denied him bail because the accused may be sentenced to more than 10 years imprisonment" based on Proc. 434/2005 Art 4(1)." Despite what the courts held, the suspect, should he be convicted may be sentenced to a term much less than 10 years because the trial court has a discretion to impose a sentence between 5 to 20 years imprisonment defying even the courts' existing interpretation of bail provisions. In such cases, it is up to the lawmaker to synchronize the substantive laws and the procedure and the court cannot fill in the gaps by compromising the constitutional rights of the accused.

8.1.3 Characterization of the Offence the Defendant is Charged with

Although bail appears to be a matter of procedure, it is already made clear that it also depends on the provisions of the substantive law. Thus, whether the court should grant bail to the arrestee depends on many variables—the nature and seriousness of the offence, for instance, is one major factor. There are diverse views whether the court have to look into the substantive Criminal Law or not in the determination of grating bail and in the nature and amount of the bail bond. In *Assefa Abreha, et al.*,[578] the 11th and 12th defendants with respect to their bail claim raised the objection that their acts do not constitute the crime of corruption.[579] The Court ruled that "whether the crime committed was actually corruption or not was to be seen later at the trial and it couldn't be raised at the bail proceedings. The matter could only be decided by referring to the offence as characterised by the public prosecutor." Later in the process, the names of those individuals were struck out from the charge.

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577 *Eneyew Megnistie v. Federal Ethics and Anti-Corruption Commission* (Federal Supreme Court, 2007) Crim. App. F No. 32021

578 *Id.*

579 Those defendants raised this objection because by then all corruption offences were non-bailable as per Proc. No. 239/2001, *supra* note 134, Art 51 (2) which provides that a "person who is arrested on suspicion of having committed a corruption offence shall not be released on bail."

In *Mulugeta Ayenew, et al.*,[580] on the other hand, although the issue was also one of bail, which is procedural law, the court went on to characterise the offence. That was triggered by the fact that after the defendants were charged under the Special Penal Code, which carries serious punishment, the law was replaced with the Criminal Code which imposes less severe penalty. At the same time, the anti-corruption special procedure law which made corruption offences non-bailable was amended to the effect that only those corruption offences that entail at least 10 years imprisonment are non-bailable. It is the principle of criminal law that new criminal laws are applicable to offences already committed retroactively only if it favours the defendant. In order to determine whether an offence is bailable, it was necessary to determine what the accused would be sentenced to at the end of her trial which made it imperative to refer to the substantive Criminal law. The Supreme Court concluded that the new Criminal Code was applicable as a consequence of which the defendants' case became bailable under Art 4(1) of the Revised Anti-Corruption Law. Therefore, they were granted bail.[581]

One can see that characterisation of the offence is an important variable for the determination of whether to grant bail and fixing the nature and amount of bail bond. It is, therefore, imperative to consider the nature of the offence in terms of substance. Characterisation of the crime for bail purpose is important for many reasons. (i) Offences are first characterised by the investigating police officer as soon as she receives the information about the commission of the offence. Whether this is valid characterization or not is to be tested by investigation. The practice indicates that the police are effecting arrest before they are well into the investigation. Therefore, it is yet to be ascertained that the facts and the characterisation at the end of the investigation and at least until such time the charge is framed by the public prosecutor the court must be able to look into the nature of the offence; (ii) it follows from the above argument that bail comes at the early stage of the proceeding. In the absence of post-arrest pre-trial process in the criminal justice is a serious gap and bail is the only opportunity for the court to look

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580 *Mulugeta Ayenew, et al. v. Federal Anti-Corruption and Ethics Commission* (Federal Supreme Court, 2006) Crim. App F No. 22136

581 It was similarly held in *Federal Anti-Corruption and Ethics Commission v. Ambellu Shibeshi, et al.* (Federal Supreme Court, 2004) Crim. App. F No. 20566; *Federal Anti-Corruption and Ethics Commission v. Selomon Woldie, et al.* (Federal Supreme Court, 2004) Crim. App. F No. 20304; *Federal Anti-Corruption and Ethics Commission v. Yeshareg Zewudie* (Federal Supreme Court, 2004) Crim. App. F No. 19962

into the matter; (iii) non-bailable offences are unconstitutional; until such time some organ decides otherwise, however, their effect could be mitigated by seriously considering the merit of the case before giving effect to such law; (iv) the period of pre-trial detention is to be counted to the term of sentence the defendant may have to undergo should she be found guilty. A criminal sentence has its own objective. The longer the pre-trial detention is the greater its impact on nullifying the purpose of punishment; (v) finally, the longer the pre-trial detention, the less will be the public confidence in the administration of the criminal justice either by way of the protection of the public from criminals as well as the treatment of the innocent.

8.1.4 Application for Bail

FDRE Const., Art 19

> 3. *Persons arrested have the right to be brought before a court within 48 hours of their arrest. Such time shall not include the time reasonably required for the journey from the place of arrest to the court . . . .*

Art. 29.—Procedure after arrest.

> *(1) Where the accused has been arrested by the police or a private person and handed over to the police (Art. 58), the police shall bring him before the nearest court within forty-eight hours of his arrest or so soon thereafter as local circumstances and communications permit. The time taken in the journey to the court shall not be included.*
> *(2) The court before which the accused is brought may make any order it thinks fit in accordance with the provisions of Art. 59.*

Art. 59.—Detention.

> *(1) The court before which the arrested person is brought (Art. 29) shall decide whether such person shall be kept in custody or be released on bail.*

Art. 64.—Application for bail.

> *(1) A person under arrest may at any time apply for bail.*
> *(2) The application shall be made in writing and signed by the applicant. It shall contain a summary of the reasons for making the application and the nature of the bail bond the applicant is prepared to enter into.*
> *(3) An application for bail may be granted by any court.*

Art. 65.—Court may direct by endorsement on warrant security to be taken.

(1) Any court issuing a warrant for the arrest of any person may, in its discretion, direct by endorsement on the warrant that if such person enters into a bail bond on the terms laid down by the court, the police officer to whom the warrant is directed by the court shall take such security and shall release such person from custody.
(2) The endorsement shall state: the amount to be guaranteed and the guarantors, if any; and the time at which the person released is to attend before the court.

(3) Where a bail bond is entered into as required under this Article, the police officer to whom the warrant is directed shall release the arrested person and forward the bond to the court.

Once the case is set in motion, bail is under continuous consideration; the investigating police officer considers bail bond by virtue of Art 28 after the arrested person is questioned as per Art 27. Where she is not released on police bond, the investigating police officer has the obligation to bring her to the nearest court within the next 48 hours. As it has already been indicated the phrase "any court" in Art 64(3) is not as broad as "any court"; there are certain limitations, such as, for suspects in Addis Ababa and Dire Dawa, the Addis Ababa and Dire Dawa Cities' Courts have jurisdiction to hear all pre-trial matters and suspects are appearing before the Addis Ababa City Courts.[582] Suspects arrested in relation to corruption offences are appearing only before the court that has jurisdiction to hear the matter.[583] Otherwise,

[582] Proc. No. 408/2004, *supra* note 171, Art 2(2); Proc. No. 416/2004, *supra* note 172, Art 33(2)(c). Although it is provided that the Addis Ababa City Courts have jurisdiction to hear matters of bail and remand without prejudice to the power of Federal First Instance Courts, the decision before which court the arrested person appears is to be made by the investigating police officer and not by the arrestee. The author has made personal observations that while for Yeka Police Station the nearest court is Yeka Federal First Instance Court which is not more than 100 meters distance, the police are taking the detainees to the Addis Ababa City Court sitting at Qebena which is more than 2 kms away. Likewise, while the Arada Federal First Instance Court is the nearest court for Arada Police State, detainees from Arada Police Station are appearing before Addis Ababa City Court sitting at Qebena.

[583] "Matters related with arrest, search, remand, bail, restraining order or any other related matters with investigation of corruption offences shall be made tot eh court

the investigation police officer takes the suspect before any court, normally the Woreda or First Instance Court which has jurisdiction in that territory. That rationality of territory is not binding; for instance, those cases involving 'government interest' which are handled by the Federal Police might be routinely appearing before the Federal High Court and the court has no ground of refusing to hear such cases.

Leaving the practice aside, a rational examination of the process does not properly indicate at what stage of the proceeding application for bail may be made. Where the suspect is on her first appearance or remanded for purposes of investigation, she does not have to apply for bail because the court has the obligation to consider bail on its own motion on every adjournment each of which is not exceeding 14 days. During this period the investigating police officer has the obligation to complete her investigation without unnecessary delay.[584] The law does not expressly govern how long the detainee may be remanded into custody. Once investigation is completed there is not law governing the situation; her continued detention after completion of the police investigation would be illegal. Thus a suspect who remains under detention after the completion of police investigation could only file application for *habeas corpus* (see remand). For practical reasons, arrestees are filing application before the court both during investigation, when it takes too long, and after the investigation is completed because the public prosecutor takes a long time before she examines the police investigation report and act on it save in corruption offences, the very first time the public prosecutor is involved in the case.[585]

The law provides that the arrested person may apply for bail any time. It, however, further requires that, the application be made in writing and signed by the applicant stating the summary of the reasons for making the application and the nature of the bail bond the applicant is prepared to enter into.[586] The requirement that the applicant states the nature of

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which has jurisdiction to hear cases of corruption offences." Proc. No. 434/2005, *supra* note 97, Art 7(4). The same is true for corruption cases. Thus, Art 4(3) provides that "[a]n arrested person who is not released according to sub article 2 of this Article [which is identical with Art 28 of the Code] may apply to court to be released on bail."

584 Art 37(1) provides that every "police investigation . . . shall be completed without unnecessary delay."

585 Baseline Research Report, *supra* note 84, at 183

586 Art 64

the bail bond she is prepared to enter into appears to be an anomaly to co-exist with Art 69(1) unless it is for the purpose of showing the court the nature and types of security from which it can choose. Although the law unjustifiably requires that the application be made in writing, practically it is necessary that the application be made in writing because the applicant is in detention; otherwise it could even be made orally if the arrestee has the chance to appear before the court. With respect to stating the reasons in her application why the accused should be released on bail, however, there is no better explanation than the right to liberty to such application.[587] It is the court that needs to state its reason to further detain the arrestee.

In some cases, the court could also direct the police officer effecting arrest, as an alternative, if the person to be arrested pursuant to the arrest warrant enters into a bail bond as fixed by the court in the endorsement, the police officer takes such security and release the person forthwith and the police officer forwards the bond to the court.[588] The endorsement made by the court on the arrest warrant has to clearly state: a) the amount to be guaranteed; and b) the time at which the person released is to appear before the court.[589]

8.1 5 Assessment of Bail: Propriety, Nature and Amount

Art. 66.—Decision on application for bail.

Any court to which an application for bail is made shall consider it without delay and shall call upon the prosecutor or the investigating police officer in his absence for comments and recommendations. It shall make its decision within 48 hours.

Art. 67.—Bail not allowed

An application for bail shall not be allowed where:

(a) the applicant is of such nature that it is unlikely, that he will comply with the conditions laid down in the bail bond;
(b) the applicant, if set at liberty, is likely to commit other offences;

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587 The readings of many of the applications are really humble that some even contend that because they are family heads and they are breadwinners, if they are released on bail, they would be able to discharge their family responsibility.

588 Art 65(1),(3)

589 Art 65(2)

(c) the applicant is likely to interfere with witnesses or tamper with the evidence.

Art 66 provides for the manner and duration within which the application for bail bond may be disposed. Thus, where the accused files her application, the court sends a copy of such application to the public prosecutor to enable her make "comments and recommendations" for a proper hearing on bail. In the absence of the public prosecutor, the investigating police officer can give her comment. If the public prosecutor has any objection she has to state it so soon so that the court has only forty-eight hours to make its decision.[590] Art 67 provides for three grounds of objection for the public prosecutor or the investigating police officer or for the court to consider on its own motion. These grounds are also included in the Revised Anti-Corruption Special Law without substantive modification.[591] However, as discussed below, the ground for denying bail is based only on the fact that it is unlikely that the accused will comply with the conditions laid down in the bail bond. The only condition that is laid down in the bail bond is her continued appearance before the court at the place and on the date as may be fixed by the court.

Art 67 (a), Applicant's Likelihood of Complying with the Conditions Laid Down in the Bail Bond:—if the purpose of bail is to balance the interest of the arrestee in securing her liberty and the interest of the criminal justice administration, the major (perhaps the sole) ground of whether granting bail is the likelihood of the person complying with the conditions laid down in the bail bond—that is whether she will continually attend the

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590 It is a matter of common practice that the public prosecutor takes more time than what is provided for in the law to review the police investigation report and she may not be in a position to give helpful comment in the determination of the bail application. In fact, as the case is sent to the prosecutors' office and is not assigned to a particular prosecutor, it may even be difficult to get reply from the public prosecutor's office. Thus, the application for bail cannot in any way be decided within 48 hours. Baseline Research Report, *supra* note 64, at 182, 183, 193

591 Art 4(4) provides that:
Without prejudice to the provision in sub article 1 of this Article, the court may not allow an application to be released on bail of the accused or the suspect as per sub-article 3 of this article, where;
a) the suspect or the accused, if released on bail, is likely to abscond;
b) the suspect or the accused, if released on bail, is likely to tamper with evidence or commit other offences.

proceedings. Because such decision is only looking into the future, there is every possibility for arbitrariness. Furthermore, determination of whether the accused is likely to come back or not is an extremely difficult job Therefore, there has to be some evidence of a fact in the past on which we base our prediction of the facts in the future. First, the mere fact that investigation is underway does not justify remand. Therefore, the investigating police officer must show to the court that it is most likely that the detainee has committed the alleged offence under investigation. Second, the investigating police officer (or the Public Prosecutor) must show the court by evidence that the person is not likely to comply with the conditions of the bail bond if she is released on bail. Third, in no case, as examined by the author, the degree of proof of such evidence is discussed by the court before which bail is pending. In the US legal system, the state must prove such allegations by a clear and convincing degree.[592] In the determination of whether the applicant is likely to comply with the conditions of the bail bond, the focus needs to be on the factors listed under Art 69 and prior criminal records of conviction.

According to those cases decided by the courts and other discussions, however, the issues that transpire are other factors. Some indicate for instance that persons who are married and have established a family are more likely to comply with the bail bond than those who do not. Also contended is that those who are unemployed and students are less likely to come back than those who are employed. They have supported this by the data that link non-coming back and status.[593] This type of application of the law is contrary to what the Constitution provides for under Art 25 that all persons are "equal before the law and are entitled without any

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592 LaFave, et al., *supra* note 328, at 936, 657, 639, 640, 641

593 In his discussion Ali considered that out of the total 43,856 persons detained in 1995 e.c. there were unemployed people, students, traders, self-employed people and police officers each 7,068, 5,038, 4,768, 4,665 and 1,077 respectively. He simply concluded that these people could evade justice by changing address etc. and caution need to be taken in considering bail for such category of persons. What transpires in these statements is that there is the assumption that such persons, having regard to their economic condition and social status, could evade justice. The major fallacy of this conclusion is that while these categories of persons constituted a little more than half of those detained in the same year, it has not considered the composition of our society and what percentage these groups of people constitute. Furthermore, it does not indicate the possible prejudice of law enforcement against such category of people. Ali, *supra* note 88, at 43

discrimination to the equal protection of the law." The Constitution further provides "the law shall guarantee to all persons *equal* and *effective* protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or *other status*" [emphasis added]. Whether the person is employed, a student or unemployed, or she is an urban or rural resident, cannot be a ground for deciding whether she complies with the conditions as may be fixed by the court. Each case needs to be supported by specific evidence that such person is unlikely to comply with the conditions set in the bail bond. In fact, such manner of consideration of bail bond is denying a person the right to bail only based on her social status.

The Federal Supreme Court Cassation Bench in *Asnake Bekele*[594] reasoned that "the right to bail is a constitutional right and restrictions are exceptions." As exceptions, they have to be construed restrictively. The Court further held that even though there is suspicion the defendant may abscond it is not sufficient to deny bail; there have to be grounds leading to that conclusion. When a suspect is released on bail, it does not mean she will come back with certainty. We are judging the situation that she is more likely to come than not. The fact that she is not coming does only means there is a responsibility for the police to find and bring her to justice and where it is found out that she failed to appear because she attempted to evade justice, she may not be granted bail again.

The other two grounds of denial of bail as provided for under Art 67 (and Art 4(4) of the Revised Anti-Corruption Procedure Law) are not valid at least at this stage of the proceedings—after investigation is completed, or are not relevant at all.

Art 67 (b), Committing Other Offences:—the denial of bail on the ground that the accused, if set at liberty, will likely commit another offence, to say the least, does not make sense. It is logically a contradiction to argue that the person is presumed to be innocent for the offences that she is alleged to have committed and considering releasing her on bail and arguing that she should not be released on bail because she would commit other crimes which she is not charged with nor suspected of. Further, neither the court nor the public prosecutor has the capacity to know whether this will happen for that is humanly impossible. Even when a person is charged with and

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[594] *Asnake Bekele v. Public Prosecutor* (Federal Supreme Court, 2007) Cass. F No. 31734

convicted for 9 offences previously, the likelihood of her committing another offence is 50% which is not more than any other person's likelihood. The best the investigating police officer and prosecutor can do as responsible public servants is to undertake the investigation speedily and filing the charge promptly.

The practice is a little help in the understanding what the law anticipates. What the law anticipates appears to be a criminal record of conviction. In some instances, the courts grant bail despite the public prosecutor's objection on the ground that there were pending cases under investigation. In most other instances, where there is a pending court case, the courts deny bail. In *Deribachew Mohamed*[595] the appellant was denied bail by majority in the Showa Province High Court. The High Court based its decision on the ground that "should the applicant be released on bail, the security of the public in Woliso town and its environs may be disturbed as a consequence of which other offences may be committed. The court is further convinced that the interest of the individual may be overturned by the interest of the mass and the denial of bail is for the security of both the public and the applicant himself." The Supreme Court examined the case and the record shows there were three separate cases pending investigation before the police. The Supreme Court reasoned that "the court is established for the enforcement of individuals' rights." There is no evidence that the release of the appellant could endanger the peace and security of the Woliso public and reversed the decision of the High Court.

In *Mohamed Ousman*[596] the appellant was charged with cheque fraud and the Federal High Court denied him bail on the ground that because he committed such fraud twice, if he is released on bail he would commit another fraud. The Supreme Court reasoned that as he could appoint an agent to sign on his behalf, denial of bail is not a solution to the problem; it therefore granted bail to petitioner. In *Yisehak Yayehyirad, et al.*[597] appellants who were suspected of aggravated robbery were denied bail because they had another case before the court. The Supreme Court affirmed the decision of the High Court on the ground of the nature of the offence and the frequency

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595 *Deribachew Mohamed v. Public Prosecutor* (Supreme Court Criminal Bench, 1974) Crim. App. F No. 345/66

596 *Mohamed Ousman v. Public Prosecutor* (Federal Supreme Court, 2002) Crim. App. F. No. 7609

597 *Yisehak Yayehyirad, et al. v. Public Prosecutor* (Federal Supreme Court, 2002) Crim. App. F. No. 7485

of its commission. Likewise in *Tiliksew Bekele*[598] the appellant was arrested along with 10 other individuals for an offence under investigation. While the High Court granted bail for the others, the appellant was denied based on Art 67(b) for he was suspected of another offence and investigation was in progress. The appellants claim was that because others were released on bail, he should also be treated in the same manner. The Supreme Court held, bail was denied by the High Court recognizing that there was investigation on another offence. The fundamental point of concern in this decision is that the fact that investigation is pending before the police appear to be a ground for denying bail under Art 67(b) because it is considered to be proof that the arrested person is likely to commit other crimes.

From the foregoing cases decided before different courts, the practice has only one thing clear—that the arrestee, if it appears to the court that she is likely to commit another crime, she will be denied bail. The crime she would commit is similar to the one she is already suspected of having committed. Those decisions were confusing on the essential issue—the degree of proof required to establish the fact that the arrestee is likely to commit another crime.

Art 67(c), Interfering with Witnesses and Tampering with Evidence:—the likelihood of interference with witnesses and tampering with evidence are grounds for denying bail to the suspect; this ground of denying bail is effective only for a very short period not even the entire 14 days. This is for two practical reasons. First, as can be gathered from the provisions of Arts 22-24, investigation is conducted prior to the arrest of the suspect that developed to be a ground of arrest (whether it is made based on summons or arrest warrant). That is the first element to be shown to the court when a request for remand for investigation purpose is made. Furthermore, where the ground of requesting remand is Art 67(c), it presupposes that there is identified witness not questioned by the police or other item of evidence not gathered by the police. If there is such identified witness or evidence, it requires very short time for additional investigation. Where there is no such identified witness or evidence, either Art 67(c) cannot be a ground for remand or there is rarely evidence to be gathered. Where remand is granted and investigation is completed that same ground cannot be a reason for denying bail for the accused because the investigation is already completed and the evidences are recorded. The chance for the accused to tamper

[598] *Tiliksew Bekele v. Public Prosecutor* (Supreme Court, 1996) Crim. App. F No. 76/88

with evidence and interfere with witnesses is very unlikely; and if there is a chance, it is still not worthy of the liberty of the accused. It is rather the responsibility of the criminal justice system to afford witness protection. Second, even for that evidence that are already gathered by the police, the accused has the right to have access to inspect and test the veracity of such evidence in order to challenge before the trial court.[599]

Art. 68.—Bail allowed.

Where the application is allowed, the court shall fix the conditions on which bail is granted.

Art. 69.—Amount to be secured.

(1) The choice of the guarantors and the amount to be guaranteed shall be in the discretion of the court.
(2) The court shall decide such matter having regard to:

(a) the seriousness of the charge; and
(b) the likelihood of the accused's appearance: and
(c) the danger to public order which his release may occasion: and
(d) the resources of the accused and his guarantors.

(3) Any decision granting or refusing the application shall be in writing and shall give reasons.

Where the issue whether the arrested/accused person should be released on bail is decided in the affirmative, the court determines the conditions on which the person is to be released; those conditions are the "nature" and "amount" of the bail bond. The term "nature" refers to the type of security the court could demand. The available alternatives are personal recognizance of the accused, money deposit or production of a guarantor or any combination thereof. The determination of the nature of security is seen along with the determination of the amount with a view to complying with the objectives of bail. The "amount" refers to the extent of liability that the accused in personal recognizance or in money deposit she makes or the amount the guarantor undertakes to pay should the accused fails to appear on such date and at such place as fixed by the court. The amount is always expressed in terms of money. It has been indicated that bail is a

[599] See for instance, Arts 91, 145; FDRE Const., Art 20(4)

mechanism by which the justice system secures the continued attendance of the suspect before the court. Thus, the amount should not be too low that the accused would rather evade justice by paying the said amount; nor should it be prohibitively high that it keeps the accused in jail for lack of the said amount because the accused is still presumed innocent.

Art 69 provides that there are four standards to be taken into consideration in the assessment of the nature and amount of the bail bond. These are: a) the seriousness of the charge; b) the likelihood of the accused's appearance; c) the danger to public order which her release may occasion; and d) the resources of the accused and her guarantor. Out of those four standards provided for by the law for determination of the nature and amount of conditions of bail bond, three of them are relevant and only two stand in themselves.

The likelihood of the defendant's appearance—is the core of the bail bond and it is already decided in the affirmative when the court is going to the determination of the nature and amount of the bail bond under Art 67(a); it is also relevant here in the determination of the nature and amount of the bail-bond. However, it cannot stand by itself; it is to be implicitly assessed along with the other two standards in the determination of the nature and amount of conditions of the bail bond. *Where the accused is believed to be dangerous*—the issue might be whether we should grant bail. Because the obligation the accused enters is not in respect of other crimes; it is rather with respect to her continued attendance before the court on such date and at such time as may be fixed by the court. Despite its impropriety, further crime is addressed under Art 67(b) and there is no preventive detention in the Ethiopian criminal process. Thus, the only two grounds that are worth considering having regard to the conditions of bail are the seriousness of the charge and the resources of the accused or her guarantors.

The seriousness of the offence determines whether the suspect is likely to appear or not. Thus, there is this unavoidable presumption that the more serious the offence the accused is charged with, the more likely that she will abscond the lesser the amount of the bail bond is. Therefore, the seriousness of the offence is an index to the court for the determination of the nature and amount of the bail bond. A person who is charged with simple theft cannot be required to produce an amount that a person charged with robbery would be required to produce because the seriousness of the offence is certainly different as the one who is charged with a more serious offence, robbery, in this example, is less willing or less likely to reappear than the one who is charged with a less serious offence, simple theft.

In all cases there is this overriding idea of presumption of innocence until convicted by the court which must also be reflected in setting the conditions of the bail bond. This can be seen in the context of, for instance, theft or robbery cases. Suppose a person is charged with theft of a valuable worth of 10,000 birr but she is unemployed. Would the court be justified to demand her to produce a guarantee for 500 birr? Some contend in similar cases that such is an "insufficient security" because she can deposit such amount and fly away. This argument is based on the assumption that she has taken the valuables and it is contrary to the principle of presumption of innocence. With the principle of innocence, if 500 birr is good enough to secure her attendance having regard to the nature of the offence (theft) and her resources, it is appropriate.

The other ground of determination of the nature and amount of bail bond is the resources available to the accused or her guarantor. Where they have good resources individuals are ready to forego the little amount deposited than to lose their liberty. The amount has to be one pinching the accused or her guarantor that would make the accused come back. The amount that may be fixed for a person who is charged for a serious offence but has no good resources at her disposal may be equivalent to the amount fixed for a person who is charged with a minor offence but who has good resources at her disposal. This can only be a necessary differential treatment with no bearing on their right to liberty.

When the two grounds of determination of the nature and amount of security are joined in the determination of the nature and amount of bail bond to be produced, the outcome is more or less what is expected of the purpose of a bail bond. If a person who is well off is charged with assault and another person is charged with serious bodily injury, they might be required to deposit the same amount of bail bond; because what is in play is not only the seriousness of the offence which positively correlates with the amount of the bail bond, but also the resources of the accused or of her guarantor which significantly determines the same.

In the assessment of the bail-bond, the cases do not indicate that the courts consider the seriousness of the crime. Almost all the appeals on bail-bond decided by the Supreme Court indicate regard is had to the resources of the accused (not even her guarantors). This and the examination of those cases give the impression that the seriousness of the crime is assessed during the decision whether to grant bail or not; thus, where the offence is serious, bail is denied save the reasons do not appear sufficient. For instance, in *Dawit*

Kebede, et al.[600] defendants were charged with an offence that is considered non-bailable under Art 63(1). At the conclusion of the prosecution's evidence, the court ordered defendants to enter their defence under Crim. C., Art 257 which was a bailable offence. Defendants, thus, requested the court to be released on bail. The court denied bail as per Art 67(a). The court's reason was that even though the offence is bailable, defendants failed to enter their defence; where defendants fail to enter their defence, the next step is entering conviction. Under such circumstances defendants are not likely to comply with the conditions in the bail bond. The decision of the high court is reversed by the Supreme Court on appeal.

The court then determines what security to require from the detainee—personal recognizance, money deposit, guaranty or any combination thereof. Personal recognizance is a condition that the person undertakes for herself that she will appear on such date and at such time as may be fixed by the court and should she fail to do so, she would pay the fixed amount of money to the state. In money deposit, the person is released up on depositing the specified money while in guarantee, the guarantor enters an obligation to bring the accused person at such place and date as may be fixed by the court from time to time and should she fail to comply with it, she will pay the amount as fixed by the court to the state.[601]

8.1.6 Formality and Duration of Bail Bond

Art. 62.—Finding of sureties.

Any person on remand who may be released on bail shall be given the opportunity to find sureties.

Art. 63.—Principle

> *(2) No person shall be released on bail unless he has entered into a bail bond, with or without sureties, which, in the opinion of the Court, is sufficient to secure his attendance at the court when so required to appear.*

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600 *Dawit Kebede, et al. v. Federal Public Prosecutor* (Federal Supreme Court, 2007) Crim. App. F No. 30723

601 Forfeiture is a significant amount of revenue for the government. See any year government budget on the revenue column.

Art. 71.—Duration of bail bond.

(1) The bail bond shall be in the form prescribed in the Third Schedule to this Code.
(2) The bail bond shall remain in force for such period as shall be fixed by the court but may be extended from time to time by the court.
(3) Where the charge against the person released on bail is withdrawn the court shall discharge the bail bond.

Suppose that the nature of security is surety, the guarantor undertakes a contractual obligation to pay the fixed amount should she fail to comply with the obligations she undertakes—to produce the accused before the court. However, making sure that she is solvent to pay that amount takes a little while. This is done in many ways. For instance, if the guarantor is an employee, she is required to have a letter written from her employer specifying her salary and that should she resign or otherwise terminate her employment the employer undertakes to notify the court of this fact. Once such letter is obtained, the court bail bond executor enters those formalities and she writes an order of release to the prison which is to be signed by the judge, without which the accused cannot be released. The forms both for personal recognizance and sureties are found under Form VII Third Schedule of the Code. When the accused cannot find sureties, the police have to do all it can to help her get one. This help is particularly needed, for instances, where the person is detained in a place other than where she lives and she cannot readily find someone in that area.

From the readings of the provisions, the duration of the bail bond does appear to be granted for a fixed period and may be extended from time to time by the court.[602] The form on the other hand indicates that the obligation of persons released on bail is to attend court sessions until the court otherwise orders. The form is governing the practice and the accused is normally released for an indefinite period until the court proceeding is completed or the court orders otherwise. The otherwise order can be made based on withdrawal of the charge,[603] death of the guarantor, application of the guarantor etc.[604]

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602 Art 71(2)

603 Art 122. Those provisions are repealed by Proc. No. 39/1993, *supra* note 178

604 Arts 70(3), 72(3), 149(2), 141

8.1.7 Effect of Bail Bond

Art. 70.—Obligations of guarantors.

(1) Unless otherwise expressly provided in the bail bond the guarantor shall be responsible for securing the appearance of the person released on bail at any time and place to which during the course of the proceedings the hearing may from time to time be adjourned.
(2) Nothing herein contained shall affect the provisions of Art. 77 and 78.
(3) . . .

Art. 72.—Release.

When the bail bond has been entered into and all formalities complied with, the accused shall be released from custody.

Where bail bond is entered into and the required formalities complied with, bail has two important legal consequences.[605] First, the arrestee is released from detention which is the most essential consequence of the process. The release continues until the hearing is concluded all the way to appeal.[606] Where the nature of security is personal guarantee as a sole or additional security, such guarantor assumes the obligation to "secure the appearance of the person released on bail at any time and place to which during the course of the proceedings the hearing may from time to time be adjourned."[607] However, the guarantor has the obligation to produce the accused that is at large on bail. Where the accused is arrested for another

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605 Art 72

606 At the conclusion of the hearing, an accused released on bail bay be convicted. Ideally, the service of sentence does not start when such conviction is entered; rather when the judgment is final. Judgment is final where all appeals are exhausted or the period to lodge an appeal is expired. Thus, Art 188(2) provides that where "an accused person is released on bail pending the hearing of his appeal the sentence of imprisonment shall not commence until the court of appeals delivers its judgment." Unfortunately, when the trial court renders judgment as per Art 149, it also makes an order to the prisons to start executing the sentence contrary to the provisions of Art 203(2). The appellate courts are reluctant to hear matters of bail from a convict which thus makes the process contradict the principle of presumption of innocence. Baseline Study Report *supra* note 84, at 187

607 Art 70(1)

offence and the guarantor is not able to produce the accused, the former is not failing in her obligation. In *Semahegn*[608] petitioners were guarantors for a defendant in the High Court, who later was arrested for a different offence, as a consequence of which the latter failed to appear before the court on the date his case was adjourned. Because the guarantors 'failed to discharge their obligation,' of securing the attendance of the accused, the High Court ordered the forfeiture of the amount petitioners promised. The Supreme Court reasoned the record of the Court shows the court is informed the defendant is arrested for another offence and it gave order to the Addis Ababa Prison to produce him on the following adjournment. The guarantors have the obligation to produce person at large. The fact that the defendant is arrested is "sufficient ground" as required by law for failing to discharge their obligation. It accordingly reversed the decision of the High Court.

8.1 8 Appeal against a Bail Decision

Art. 75.—Application to court of appeal where bail refused.

(1) Where bail has been refused by a court, the accused may apply in writing within twenty days against such refusal to the court having appellate jurisdiction under Art. 182 (1) to grant bail. The application shall set forth concisely the reasons why bail should be granted.
(2) The court of appeal after considering the application shall dismiss the application or grant bail on such conditions as it shall fix. No appeal shall lie against a decision given by the court of appeal under this Article.

Unlike other interlocutory matters, the effect of bail bond involves a fundamental right which cannot be stayed until final judgment is rendered—the right to liberty. Where the accused is denied bail, she can lodge her appeal to the next higher court within the following twenty days.[609] The twenty days period is not with a view to deny the arrestee the right to lodge an appeal afterwards; the proper interpretation that makes sense is, rather, where such twenty days have lapsed, the grounds on which the suspect was denied bail may have disappeared and another application can be filed before the court of rendition in stead of lodging appeal.

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608 *Semahegn Gebeyehu, et al. v. Public Prosecutor* (Supreme Court, 2008) Crim. App. F. No. 3428

609 Art 75(1)

There is no provision whether the public prosecutor can lodge an appeal where the court grants bail. However, the clause "[w]here bail has been refused . . ." is a sufficient indication that the public prosecutor is precluded from lodging appeal where appeal is granted. This has been the understanding and the interpretation in different benches of the High Court despite often prosecutor lodges an appeal against such decisions. Recently, the Federal Supreme Court in *Sgt. Mekonnen Negash*[610] decided the public prosecutor has the 'right' to lodge an appeal where the Court grants bail to an accused.

The case arose in Chilga Woreda Court, North Gondar Zone, Amhara Regional State. The Woreda Court denied the defendant bail based on Art 63. On appeal the Zonal High Court decided the suspect is accused of negligent murder; he cannot be denied bail as per Art 63 and no reason is shown why he should not be released on bail under Art 67; and thus, it granted bail by majority vote. The Regional Justice Bureau appealed to the Amhara State Supreme Court. The State Supreme Court held, "leaving aside the debate whether the public prosecutor has the right to lodge an appeal, second appeal is not allowed" therefore closed the case before looking into the merit of the case. The case appears before the Federal Supreme Court on cassation which found 'fundamental error of law' and reversed the decision of Amhara State Supreme Court. The Federal Supreme Court reasoned that "Art 75(1) provides that where the suspect is denied bail she has the right to lodge an appeal within twenty days. Although this is in respect of the rights of the suspect denied bail, as interpretation by analogy is prohibited only in substantive law where it harms the defendant, we recognise that the right to appeal is also granted to the public prosecutor." The wisdom of such interpretation is not clear but it does not appear to have one.

The Revised Anti-Corruption Special Procedure law, however, expressly provides that where bail is granted to a detainee, the public prosecutor can lodge appeal against such decision to the next higher court.[611] In such a case, "the decision of the lower court shall stay from being executed."[612] Such stay shall be effective only for a period the court deems reasonable within which the prosecutor or the investigator can produce "evidence showing it has lodged an appeal against it in appellate court."[613] The Amharic version

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610 *Sgt. Mekonnen, supra* note 216

611 Proc. No. 434/2005, *supra* note 97, Art 5(1)

612 *Id.*, Art 5(2)

613 *Id.*, Art 5(3)

makes it clear that the grounds of appeal are either the fact of granting bail or on the amount of the conditions of bail.[614] Where the court grants the appeal, it may grant the arrestee bail on conditions it fixes. Whether the appeal is made by the person who is denied bail or by the public prosecutor, the appellate court has the power to grant/deny bail and to fix the conditions of release where it grants bail. The decision of the appellate court is final from which no other appeal lies.[615]

The discussion so far is on denial of bail; however, it is indicated in the introduction and in the determination of the amount and nature of the bail bond that excessive bail also amounts to denial of bail. For instance, in *Hagos Kebede*[616]the appellant was granted bail by the High Court. However, because he could not afford such bail bond he was detained for more than four months after such bail was granted. He appealed to the Supreme Court contending, among others, the amount of the bail bond did not consider his recourses. The public prosecutor objected to the appeal that the appellant is granted bail and he cannot lodge an appeal based on the amount of the bail bond. The Court held that if it is shown the amount of the bail bond is fixed without taking the resources of the accused into consideration it amounts to denial of bail; in such cases, there is no prohibition to lodge an appeal. The court accordingly reduced the amount. In this case, as discussed above, the detainee could file his petition to the court of rendition before lodging his appeal because twenty days lapsed after the initial decision of the court on bail.

8.1.9 Forfeiture of the Bail Bond

Art. 76.—Failure to appear.

(1) Where the person released on bail fails to appear on the date fixed a warrant for his arrest shall be issued.
(2) The guarantors shall be summoned and required to show cause why their recognisances should not be estreated.
(3) The court shall make such order regarding the bail bond as the circumstances of the case may require.

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614 *Id.*, Art 5(2)

615 Art 75

616 *Hagos Kebede v. Public Prosecutor* (Supreme Court, 2005) Crim. App. F. No. 20905

Art. 79.—Forfeiture of recognisances.

Whenever the accused fails to comply with a condition in a bail bond, the bail bond shall be forfeited unless the accused or his guarantors can show cause why the bond shall not be forfeited.

The principal obligation of the person released on bail is to appear before the court at such place and on such time as may be fixed by the court. Likewise, where the accused person is released on personal guarantee, it is the obligation of the guarantor to produce the accused before the court each time. This is a contractual duty assumed voluntarily. When it is not complied with that is a fundamental breach to the contract and thus the pledged amount must be paid to the state or if it is deposited it may be forfeited. Before the court orders that the money deposited is forfeited or the money promised is paid to the state, the court calls up on the accused or the guarantor to show reasons why the court should not so order. Normally, the guarantor sees that the arrestee is released from jail and trust that she regularly appears before the court and thus, the former does not follow up whether the latter is showing up or not.

In *Moges Demissie*[617] the petitioner was a guarantor for birr 2000 for the release of an accused. On the date adjourned for the hearing of witnesses, the accused failed to appear. The High Court summoned the guarantor and asked why the accused failed to appear on the date the case was adjourned. The guarantor replied "he tells me he is appearing before the Court; I don't know why he failed to appear." The Court then decided to forfeit the promised 2,000 birr. The petitioner appealed to the Supreme Court and the ground of his appeal was that the accused in fact did not fail to appear; because he did not have money for transportation he walked from Yeka to Lideta and he was only late. The Supreme Court affirmed the decision of the High Court on the ground that even the time on which the accused is required to appear before the Court is essential that the accused failed to appear. The petitioner finally petitioned to the cassation bench on the ground that there was a fundamental error of law. The cassation bench held that if the accused were to walk from Yeka all the way to Lideta he could have started early in order to be there at the time the case is adjourned. The "reason is not sufficient and convincing;" the court thus held there is no fundamental error of law.

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617 *Moges Demissie v. Public Prosecutor* (Supreme Court Cassation Bench, 1989) Cass. F No. 23/80

Where the court orders that such money may be paid or forfeited, it also takes other measures, such as, issuing a warrant for the arrest of the person released on bail. Once the attendance of the person is secured, the court may give such orders it deems appropriate under the circumstances regarding the bail bond—release the accused on the same bail bond, or require additional security or deny bail.[618]

8.1.10 Mistake, Fraud and New Facts in Bail Decisions and Discharge of Sureties

Art. 70.—Obligations of guarantors.

(1) Where the guarantor of a bail bond dies, his guarantee shall lapse. Any recognisance which has been deposited shall be returned to the, guarantor's personal representative. The person released on bail may be required to produce new sureties.

Art. 73.—Mistake or fraud.

(1) If through mistake, fraud or otherwise, insufficient sureties have been accepted the court may issue a warrant for the arrest of the person released on bail and when such person appears, the court may order him to find sufficient sureties.
(2) Where he refuses or is unable to do so, the court shall order that he be remanded.

Art. 74.—New facts.

Where certain facts are disclosed which were unknown when bail was granted, the court may at any time of its own motion or on application reconsider the conditions on which bail has been granted and may order the released person to produce new sureties or to be remanded.

Art. 77.—Released person likely to abscond.

(2) Where the guarantors are of opinion that the accused may abscond, they shall inform the court and may apply to the court to be released from their obligations.

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618 Art 76(3)

(3) The court shall issue a warrant of arrest and when the accused has been arrested the court shall release the guarantors.

Art. 78.—Discharge of sureties.

(1) The guarantors may at any time bring the released person to the court which released him and thereupon they shall be discharged.
(2) All or any of the guarantors may at any time apply to the court which caused the bond to be taken to discharge the bail-bond either wholly or so far as relates to the applicant. On such application the court shall issue a warrant for the arrest of the person on whose behalf the bail bond was executed and upon his appearance shall discharge the bond either wholly or so far as relates the applicant.
(3) In the case provided in sub-art. (1) and (2), the court shall require the accused to find other sufficient sureties and, if he is unable or refuses to do so, shall order his remand.

As the obligation of guaranty is entered voluntarily, unlike other contractual obligations, it can be withdrawn from easily. Thus, where the guarantor is of the opinion that the released person is likely to abscond or the guarantor is otherwise unwilling to continue in her obligation, she may apply to the court to be released from her obligations.[619] On the receipt of the application the court issues a warrant of arrest of the released person and after which the guarantor is to be released from her obligations.

If the guarantors are many and any of them apply to the court to be released from her obligations, the court issues a warrant of arrest of the person released on bond and upon her arrest the court releases the applicant from her obligations. Whether the application to be released from one's obligation in the bail bond is based on suspicion of absconding by the person released on bail or otherwise, the latter has the right to find another security and be released on bail.[620] The personal assessment of the guarantor that the accused might abscond cannot be a ground for denying the accused bail.

Although it is not expressly provided for in this section, it is a matter of commons sense that when the person released on bail dies the obligation of the guarantor comes to an end as the case comes to an end because all

[619] Art 78(1), (2)
[620] Art 78(3)

criminal process in respect of such person comes to an end.[621] In *Dagne Mekonnen*[622] the petitioner, Akalewold Wondaferaw, was a guarantor for a convicted person who later died. The petition is to be released from bail bond obligation which the Court granted.

Surety is a contractual obligation; unlike other contractual obligations, the law here provides that it cannot be inherited. Where the guarantor dies, the surety comes to an end. As a consequence, the money deposited is to be paid to the representative of the deceased and the person released on bail is to produce new sureties.[623] If, again, insufficient sureties have been accepted through mistake, fraud or otherwise, the court may issue a warrant for the arrest of the person released on bail.[624] The purpose of arrest is in order to secure sufficient securities after which she may be released. Likewise, if certain facts are disclosed which were unknown to the court when bail was granted and the nature and amount of the bail bond fixed, but which would have increased the amount of security, the court either upon application presumably, of the public prosecutor, may reconsider the conditions on which bail may be granted and may demand the person to produce new sureties.[625] Whether it is as a result of mistake, fraud or disclosure of new facts, such person is required to produce new or additional securities. Thus, she can be released only when she produces such sufficient securities as required by the court. If the person is unable or refuses to produce the so ordered additional surety, the court may order the person be remanded into custody.

8.2 Remand of the Arrestee in Custody

FDRE Const. Art 19

> *(3) . . . Where the interest of justice requires, the court may order the arrested person to remain in custody or, when requested remand him for a time strictly required to carry out the necessary investigation. In determining the additional time necessary for investigation, the court shall ensure that the responsible law enforcement authorities*

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621 Art 39(1)(a)

622 *Dagne Mekonnen v. Special Public Prosecutor* (Supreme Court, 2007) Crim. App. F. No. 08337

623 Art 70(3)

624 Art 73

625 Art 74

carry out the investigation respecting the arrested person's right to a speedy trial.

Art. 59.—Detention.

a. . . .
b. Where the police, investigation is not completed the investigating police officer may apply for a remand for a sufficient time to enable the investigation to be completed.
c. A remand may be granted in writing. No remand shall be granted for more than fourteen days on each occasion.

Art. 60.—Conditions of remand.

Any arrested person shall be detained on the conditions prescribed by the law relating to prisons.

Remand is the flipside of bail. Where an arrested person is denied bail, she is remanded into custody; the grounds of denial of bail are grounds of remand and thus all remands are denial of bail. However, they are not necessarily co-extensive in that having the provisions, such as, Art 63(1) of the Code, Art 4(1) of the anti-corruption special procedure law, Art 6(3) of the Vagrancy control law, not all denials of remand would otherwise result in granting bail. Under those provisions, the person is not denied bail; she is not considered for bail at all and her only fate is remand into custody.

Thus, remand is a technical term used to mean two things—sending an arrestee back to police for investigation purposes because she does not qualify for bail but only one of them is recognized in the Constitution—remand for investigation purposes. In the discussion whether to grant bail, under the provisions of Art 76 it is argued that those other provisions that deny bail a priori are unconstitutional. However, it was also suggested that in deciding whether to grant remand based on Art 67, the court needs to see whether the arrestee is a proper target of investigation, whether the grounds for granting remand are justified in that they assist the furtherance of the investigation and whether those facts are proved to the satisfaction of the court.

In order to properly address those issues, therefore, the court may have to first consider whether the initial arrest is made properly. Arrest may be made based on summons as per Art 25, on warrant as per Arts 54, 56 and without warrant for flagrant offences, Art 19-21, or other offences listed under Art 51. Where such arrest is made before the court grants remand, it must first

be satisfied that the arrestee was proper suspect. Where the arrest is made based on warrant, the justifiability of the initial arrest is presumed. Where the arrest is made on summons or without warrant, however, it is the first time the court examines the justifiability of arrest. This can be gathered from the police investigation diary whether the investigating police officer has undertaken prior investigation before the arrest of the suspect. Those investigative activities are the ones, such as, stated under Art 22-24, and 30. If the person is arrested before the police has undertaken prior investigations, the court must be reluctant to grant remand because the arrest is less likely to be in compliance with the law.

Second, Art 29 provides that a person who is not released on police bond as per Art 28 has the right to appear before a court of law within 48 hours. Where the investigation is not completed and the continued detention of the arrestee in any way helps the furtherance of the investigation, the investigating police officer may request the court to remand her in custody. The investigating police officer must show to the court a sufficient justification that the continued detention of the arrestee furthers the investigation activity.[626] The Constitution is clear in this regard that when requested the court may remand her "for a time *strictly required* to carry out the necessary investigation" [emphasis added]. When the court grants such additional time, it has the constitutional obligation to "ensure that the responsible law enforcement authorities carry out the investigation respecting the arrested person's right to speedy trial."[627] Thus, remand is strictly regulated. The strict regulation of remand is guided by the purpose of remand. The only justification of denying bail to the arrestee that has connection with the investigative activity is the possibility of her tampering with evidence and interfering with witnesses and thereby obstructing the investigation process.[628]

Remand is not for the purpose of obtaining evidence from the suspect because she can be interrogated within the 48 hours she was with the police before she appears before the court. Remand is requested in order

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626 Art 59(2)

627 The right to speedy trial in this context means the speedy disposition of the case not necessarily by trial but also by any other means at early stage of the proceeding because it is only when each criminal process is speedily decided that the case can be finally disposed of speedily.

628 These are grounds that are provided for both in the Code and Proc. No. 434/2005, *supra* note 97, Arts 67(c) and 4(4) (b), respectively.

to undertake specific investigative activities the investigating police officer is seeking to undertake and with a view to disable the arrestee from tampering with evidence and interfering with witnesses. In such situation, it means the investigating police officer knows that there is a specific type of evidence which she wants to gather and she needs only a short time to gather that evidence.

Third, the mere fact that she is a proper suspect does not justify her initial arrest or continued detention; nor is the existence of a specific and identified witness not examined or evidence not gathered the investigating police officer. In order to protect the integrity of the case in progress, the court must be convinced by a clear and convincing proof that the arrestee is likely to interfere with witnesses or tamper with evidence.

Unlike the procedure for bail, where the public prosecutor is given a copy of the application for her comment, the law does not envisage any kind of role for the arrested person in remand. That certainly is an unfair aspect of the law on remand. Thus, the court must hear the arrestee's part of the story why she should not be remanded because the decision consequently affects her.

Once the court is convinced that remand is justified, the next issue is for how long the arrestee may be remanded. Art 59(3) provides that the maximum period for each remand is fourteen days. This does not mean the court has to grant all the fourteen days. The court, when it inquires into the propriety of granting remand, heard the investigating police officer why she needed the remand. The court can reasonably fix the period which is sufficient to enable the investigating police officer to undertake that part of the investigation in respect of which remand is requested. This could be a day or two; it could be seven days or it may even take all the fourteen days. The discretion is broad.

The last point is for how many times remand is to be granted. The law does not fix the period within which the investigation is to be completed. The courts have a sufficiently clear guideline with respect to the subject matter. The Constitution provides that the period of remand must be "strictly required to carry out the necessary investigation" having regard to the liberty of the suspect and her right to speedy trial; likewise, the Code also provides for "a sufficient time to enable the investigation to be completed."[629]

[629] Art 59(3)

Furthermore, the investigating police officer has the obligation to complete the investigation without unnecessary delay.[630] The remand is not granted until all the investigation is completed; but only to allow the completion of that part of the investigation that justifies the remand.

However, it is also a matter of common sense that the investigation has to come to an end at some stage and the right of the arrestee is much more important than a single case; the public has much trust in the faire administration of the criminal justice than in keeping every suspect behind bars. If the investigating police officer comes back and requests for further remand in order to undertake investigation for which remand was already granted, should the court grant remand? Once remand is granted and the investigating police officer requests further remand, the judge must examine the police investigation diary and must be satisfied that she made progress in her investigation. Where the investigating police officer has not undertaken the investigative activities for which remand is granted and another remand was requested on the same ground, the court must be able to properly examine the matter and only in exceptional cases a second remand may be granted. Without any concrete progress the court must not grant any further remand for investigation. Such unscrupulous grant of remand is only punishing the innocent.

Another major problem of our criminal process is that there is no law governing the situation after the investigation report is sent to the public prosecutor as the power of the court ends there. The practice is different in this situation. Many judges decide that "remand is not granted." But that they do not order the release of the arrested person. In fact, the law does not expressly provide that the court orders the release of the arrestee. The *a contraro* interpretation is the police do not have power to continue detaining the suspect. Taking advantage of this vagueness, however, police do not release the person on the ground that the court did not order the release of the arrestee. Some judges make use of Art 93 and remand the person into custody "until the public prosecutor makes appropriate decision after evaluation of the police investigation report." Art 93 is provided for in the section dealing with preliminary inquiry and thus, it is exclusively the power of the court that conducts of preliminary inquiry and not of the court before which the person appears by virtue of Art 29 cum. Art 59. Unfortunately, the public prosecutor, at least at the federal level, has a significantly huge

630 Art 37

number of cases that it takes long before a police investigation report is reviewed by the public prosecutor.[631]

In a case where the Imperial High Court decided that Art 59 does not govern the situation after investigation is completed, the Imperial Supreme Court once decided disagreeing with this interpretation of the High Court. The Supreme Court reasoned that "although the police investigation is said to be completed, if the public prosecutor has power either to order further investigation or where he finds the investigation completed, he has the power to draw a charge and file it before the court having jurisdiction; the provisions of Art 59 should be interpreted in a manner enabling the public prosecutor discharge his responsibilities"[632] Thus, the court concluded that the provisions of Art 59 have to be interpreted broadly in order to accommodate the power of the public prosecutor under Arts 38 and 109. Unfortunately, such precedents did not have binding effect in our legal system and this case is very much less known among judges.[633] The fact that arrestee are detained indefinitely sometimes more than the eventual sentence[634] is appreciated by court authorities.[635]

According to the law as it stands now, where a person is detained after police investigation is completed, provided other prior investigations were conducted in accordance with the law, the remedy for the arrestee is *habeas*

631 Ali, *supra* note 88, at 43-45; Baseline Study Report, *supra* note 84, at 185, 186

632 *Alemu, et al.*, *supra* note 142

633 The then Supreme Court itself agreed to this point. Thus, in *Public Prosecutor v. Rugga Asbie* (Imperial Supreme Court, 1968) Crim. App. F. No. 295/61, the accused was sentenced to life by majority in his absence, which on appeal, again in his absence, was sentenced to death. Subsequently, an amnesty law (Proc. No. 29/67 e.c.) was promulgated. When the defendant appeared, he raised that he is covered by the amnesty law. The Supreme Court decided the amnesty law covers only those that are not charged and not those already convicted and he was sentenced to death. The public prosecutor claimed similar interpretation of the same proclamation in *Public Prosecutor v. Bekele Chiko* (Supreme Court Panel Bench, 1983) Crim. App. F. No. 156/75, wherein the defendant was convicted and sentenced to death. The Supreme Court held that the Court is not bound by the decision of another bench because circumstances differ. Therefore the convicted person is covered by the amnesty law and, thus, the Supreme Court acquitted the respondent.

634 Baseline Study Report, *supra* note 84, at 192

635 Minutes, *supra* note 142, at 13

corpus not bail. Bail is a conditional release of a person who is arrested in accordance with the law; in this case, the arrestee is detained contrary to the law.

What is important is that, the law provides that persons on remand are to be detained on the conditions prescribed by the law relating to prison. The ideal condition of prisons is that there is food for prisoners, there is enough space to sleep, there is medical care etc.[636] In practice, however, arrestees are detained in police stations until the police investigation is completed.[637] The police stations are meant only for a short stay and do not have budget allocated for such duration; as the number of arrestees is not predictable, it is also difficult to allocate budget for police stations. Further remand into police custody at police stations is very likely to result in prolonged interrogation and involuntary confessions.

[636] The Baseline Study, supra note 84, at 116

[637] *Id*., at 120

Chapter 9

Jurisdiction of Courts

Introduction

Jurisdiction is the power of a court to subject persons to its authority or the power to hear and decide on cases. It has three elements: judicial jurisdiction, jurisdiction over offences and local jurisdiction. *Judicial jurisdiction* is whether Ethiopian courts have power to see a given case. Stated otherwise, it means whether a person is subject to Ethiopian criminal law. Whether or not a person is subject to the criminal law depends on 1) the place where the offence was committed, 2) the nationality of the accused, and 3) the kind of the offence alleged to have been committed. Where Ethiopian courts are said to have jurisdiction, such jurisdiction is either principal or subsidiary. *Principal jurisdiction* exists as to an accused who is (a) charged with the commission of an offence in Ethiopia, or (b) charged with the commission of certain offences against Ethiopia in a foreign country, or (c) charged with the commission of an offence in a foreign country where she possesses immunity against prosecution by virtue of her status as an Ethiopian official, or (d) charged with the commission of certain offences in a foreign country while being a member of the Ethiopian Defence Forces. *Subsidiary Jurisdiction* exists as to an accused who is (a) charged with offences committed in a foreign country against international law and certain offences against public health or morals; or (b) charged with certain offences committed in a foreign country against Ethiopian nationals; or (c) charged with certain serious offences committed in a foreign country against any person. It also exists with respect to Ethiopians charged with certain offences committed in foreign countries and with respect to members of the Defence Forces who commit offences in foreign countries against the

ordinary law of that country, where such person escapes into Ethiopia. The difference between principal and subsidiary jurisdiction is that in principal jurisdiction Ethiopia is "most affected"[638] by the crime and thus the trial of the suspect in another country is no bar to her trial before an Ethiopia court. Accordingly, the limitations upon the exercise of principal jurisdiction are significantly different from those imposed upon the exercise of subsidiary jurisdiction.

Once it is determined Ethiopian that courts have jurisdiction over the matter, the next question is which level of court has jurisdiction over the matter. Currently, Ethiopia has a federal structure in the organization of the government; thus, we have Federal Supreme, High and First Instance Courts at the federal level and State Supreme, High and First Instance Courts on regional/state level in every region of the country. *Jurisdiction over offences* is discussed at two levels. First, it is discussed at the level of apportionment of jurisdiction between the federal courts on the one hand and state courts on the other. Second, it is discussed how jurisdiction is allocated among the federal courts on federal matters and among the state courts on state matters. The apportionment of jurisdiction over offences between the Federal and State Courts is two types, which rival against each other. The principle is that Federal Courts have jurisdiction over cases based on: a) law b) parties and c) places. Thus, to determine whether a particular case is the jurisdiction of the Federal Courts, we must first ascertain that it arises under the Federal Constitution, the federal laws and international treaties, or, the parties must be persons specified in the federal laws to be subject to the jurisdictions of the Federal Courts, or the case arises in places specified in the Constitution or in the federal laws as federal jurisdiction. The other form of apportionment of jurisdiction is the law lists cases, which are the exclusive jurisdiction of Federal Courts. By *a contrario* interpretation the residual power is given to State Courts. Apart from apportionment of jurisdiction among the Federal and State Courts, there is delegation of power. As there are no Federal Courts in some parts of the

[638] R. A. Sedler (1965) "Criminal Jurisdiction in Ethiopia: A Commentary" *II JEL No. 2*, at 473. The provisions of the Criminal Code are verbatim copy of the provisions of the 1957 Penal Code. Therefore, Sedler's commentaries are still valid for in-depth discussion on judicial and local jurisdiction. The major difference as a new phenomenon in the Ethiopian legal system is the apportionment of jurisdiction between Federal Courts and State Courts based on federal and state matters, respectively.

nation, the Federal First Instance and Federal High Courts' jurisdiction are delegated to State High and State Supreme Courts, respectively.

The last and the final issue in relation to jurisdiction is local jurisdiction. *Local jurisdiction* refers to the particular local court which the case is to be tried. If jurisdiction over the offence is in the Federal First Instance Court, for instance, the question is thus which particular First Instance Court has jurisdiction over the case. Each of these points is separately discussed in this Chapter.

9.1 Judicial Jurisdiction

Public law is territorial in nature. Therefore, criminal law is applicable to offences that are committed within the territory of Ethiopian as defined in the FDRE Constitution. However, in exceptional circumstances where the offence seriously affects Ethiopia's interest, such offences committed outside the territory of Ethiopia could be prosecuted before the Ethiopian courts where Ethiopian authorities are able to lay hands on the offender. However, whether a suspect is subject to the jurisdiction of Ethiopian courts is dependent on any of the three grounds: the place of the offence, the nationality of the offender and the nature of the offence.[639]

Therefore, once the public prosecutor has decided that she has sufficient evidence to justify conviction and thus the suspect has to be charged for the alleged offence, she has to determine before which court the charge would be filed. In fact, the decision of the public prosecutor with respect to jurisdiction comes later as the police had to address this issue earlier during investigation. The *Federal Police Commission Proclamation* provides that the Federal Police Commission has power to "investigate crimes that fall under the jurisdiction of the Federal Courts."[640] Likewise the Addis Ababa Police Commission Establishment Council of Ministers Regulation provides that the Commission "[e]xcept the jurisdiction given to Federal Criminal Court in line with Article 4 of the Federal Courts Proclamation No 25/1998 (as amended), has a power to . . . investigate any crime in the city of Addis Ababa."[641] These provisions are based on the presumption that the issues whether Ethiopian courts have jurisdiction and whether the crime falls under the Federal Courts jurisdiction are clear or the police have

639 *Id*., at 468

640 Proc. No. 313/2003, *supra* note 193, Art 7(1)

641 Reg. No. 96/2003, *supra* note 279, Art 6(1)

to sort it out anyway. The police do not go to the public prosecutor in order to seek guidance to determine whether the crime committed is within its jurisdiction. That is for various reasons, but there is at least one practical reason: in circumstances where immediate action is required, the police act and whether the courts have jurisdiction is an objection to be raised by the accused later in the proceeding. Furthermore, as discussed in the following chapters, the communication between the public prosecutor and the investigating police officer is only at the end of the investigation process. But jurisdiction only raises a host of questions.

9.1.1 Principal Jurisdiction

A. Offences Committed in Ethiopia

Crim. C., Art 11.—Crimes Committed on Ethiopian Territory: Normal Case.

> *(1) This Code shall apply to any person whether a national or a foreigner who has committed one of the crimes specified in this Code on the territory of Ethiopia . . . .*
> *(2) Nothing in the provision of sub-article (1) of this Article shall affect immunities of persons enjoying an official status as sanctioned by public international law.*
> *(3) If the criminal has taken* refuge *in a foreign country, his extradition shall be requested so that he may be tried under Ethiopian Law.*

Art. 104.—Place of trial of offence committed outside Ethiopia on an Ethiopian ship or aircraft.

An offence committed outside Ethiopia on an Ethiopian ship or aircraft shall be deemed to have been committed in Ethiopia.

Crim. C., Art 12.—Special Case: Delegation.

> *(1) Where a foreigner who has committed a crime in Ethiopia cannot be tried or punished, because he has taken* refuge *in a foreign country and his extradition cannot be obtained, the Ethiopian authorities may request that he be tried in the country of* refuge.

In conformity with the rules of territoriality of the criminal law, Crim. C., Art 11(1) provides that a person, whether a national or a foreigner, is subject to Ethiopian criminal law insofar as she is in the territory of Ethiopia and thus

subject to the jurisdiction of Ethiopian courts. The territories of Ethiopia are defined in the FDRE Constitution.[642] Ethiopian ships and aircrafts are Ethiopian by nationality and thus considered as Ethiopian territories wherever they may be located. However, persons in Ethiopia who enjoy diplomatic immunity under international law cannot be prosecuted before Ethiopian courts.

Where such person who was subject to Ethiopian criminal law at the time of commission of an offence escapes into a foreign country, Ethiopia can request the country of refuge to extradite such suspect to Ethiopia. Where such person is a foreigner and cannot be extradited, Ethiopia could request the country of refuge to prosecute such person. From the readings of this provision, it appears that Ethiopia cannot request an Ethiopian national to be tried in the country of refuge. As can be gathered from the readings of the provisions of Crim. C., Art 16(1), however, the country of refuge is not precluded from trying such Ethiopian national who committed an offence in Ethiopia and escapes to it.

B. Offences Committed Outside of Ethiopia

Crim. C., Art 13.—Crimes Committed against Ethiopia Outside Its Territory.

This Code shall apply to any person who outside Ethiopia has committed one of the crimes against the State of Ethiopia, its safety or integrity, its institutions, essential interests or currency as defined in Book III, Title I, Chapter I, and under Title V of this Book (Art. 238-260 and Art. 355-374).

Crim. C., Art 14.—Crimes Committed in a Foreign Country by an Ethiopian Enjoying Immunity.

(1) Subject to the provision of Article 13, this Code shall apply to a member of the Ethiopian diplomatic or consular service, an Ethiopian official or agent who cannot be prosecuted at the place of commission of the crime by virtue of international principles of immunity, where he committed in a foreign country a crime punishable both under the Ethiopian Code and under the law of the country where it was committed.

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642 FDRE Const., Art 2 provides that "The territorial jurisdiction of Ethiopia shall comprise the territory of the members of the Federation and its boundaries shall be as determined by international agreements."

(2) Where, according to either the foreign law or this Code, the crime is punishable upon a formal complaint no proceedings may be instituted where such complaint has not been lodged.

Crim. C., Art 15.—Crimes Committed in a Foreign Country by a Member of the Defence Forces.

(1) Where a member of the Ethiopian Defence Forces in such capacity commits crime against the ordinary law in a foreign country he shall be subject to the ordinary law and territorial jurisdiction if he is arrested and tried in the country where the crime was committed.

If he has taken refuge *in Ethiopia, he shall be tried in accordance with the provision of Article 21(2) of this Code.*[643]

(2) In cases of crimes against international law and specifically military crimes as defined in Article 269-322, the member of the Defence Forces shall remain subject to national law and be tried under the provisions of this Code by Ethiopian military courts.[644]

The general rule of territoriality of the criminal law has been alluded to earlier. However, there are circumstances where an offence committed in a foreign country is subject to the principal jurisdiction of Ethiopian courts either because of the nature of the offence or the identity of the offender. Therefore, the Criminal Code lists certain offences the commission of which seriously affect Ethiopia's interest (Arts 238-260); where such offences are committed in a foreign country the offender is subject to Ethiopia's principal jurisdiction whether she was an Ethiopian national or a foreigner. Such offences fall under two categories. The first category is offences related to the constitutional order, political independence and territorial integrity of the country Crim., C., Art 238-260, 355-374, such as, *Outrages against the Constitution or the Constitutional Order,* Crim. C., Art 238; *Armed Rising or Civil War,* Crim., C., Art 240; *Violation of Territorial or Political Sovereignty,* Crim., C., Art 242; *Treason*, Crim., C., Art 249; and *Espionage*, Crim., C., Art 252. The second category relates to Ethiopian currencies and documents, Crim. C.,

643 Crim. C., Art 21(2) provides that "No Ethiopian national having that status at the time of the commission of the crime or at the time of the request for his extradition may be handed over to a foreign country. However, he shall be tried by Ethiopian courts under Ethiopian law."

644 See *Defence Forces Proclamation No. 27/1996* ("Proc. No. 27/1996"), Art 25 et seq.

Arts 355-374, such as, *Making* [counterfeit currencies], Crim., C., Art 356; *Forgery*, Crim., C., Art 357; *Falsification or Improper Use of the Seals of the State*, Crim., C., Art 363; *Endangering of the Currency, Bonds or Security Documents, or Official Marks, Stamps or Seals*, Crim., C., Art 370.

Further, as Ethiopia is precluded from prosecuting diplomatic personnel enjoying diplomatic immunity under international law, Ethiopian diplomats elsewhere are similarly protected under international law. Such members of the Ethiopian delegation are, however, subject to Ethiopia's principal jurisdiction. There are, however, further requirements that: a) the offence in respect of which the Ethiopian diplomats are suspected of must be a crime both under Ethiopian law and the law of the place of commission; and b) where the offence is punishable only upon compliant, such person cannot be prosecuted without such complaint having being filed.

The situation with respect to the members of the Defence Forces based outside Ethiopia is different. First, they are subject to Ethiopia's principal jurisdiction with respect to specifically listed offences which are tried courts based on Ethiopian laws by Ethiopian military courts. Those provisions include breaches to International Humanitarian Law, such as, *Genocide*, Crim., C., Art 269; *War Crimes against the Civilian Population*, Crim., C., Art 270; *War Crimes against Wounded, Sick or Shipwrecked Persons or Medical Services*, Crim., C., Art 271; *War Crimes against Prisoners and Interned Persons*, Crim., C., Art 272; *Pillage, Piracy and Looting*, Crim., C., Art 273; *Use of Illegal Means of Combat*, Crim., C., Art 276; *Breach of Armistice or Peace Treaty*, Crim., C., Art 277; and *Hostile Acts against International Humanitarian Organisations*, Crim., C., Art 281; and Military Crimes and Crimes against the Defence Forces and the Police, Crim., C., Arts 284-322. Second, members of the Defence Force are subject to the ordinary law of the country to which they are commissioned. Accordingly, where such member of the Defence Forces escape into Ethiopia, she is subject to the subsidiary jurisdiction of Ethiopian courts. Crim. C., Art 21(2) makes it abundantly clear that Ethiopian national cannot be extradited to a foreign government.

C. Limitations to the Exercise of Principal Jurisdiction

Crim. C., Art 12.—Special Case: Delegation.

(1) . . .
(2) The accused foreigner cannot be retried in Ethiopia for the same crime if he has been tried and acquitted in the foreign country by a

judgment which has become final or if he has been granted pardon or amnesty or if the prosecution or sentence has been barred by limitation.

(3) Where the criminal has not undergone his punishment or only undergone part of it in the foreign country, the whole or the unexpired part thereof shall be enforced in Ethiopia, if he is apprehended and the enforcement of the penalty is not barred by limitation under the provisions of this Code.

Should the punishments differ as to their nature or form, such punishment as is the closest to that imposed in the foreign country shall be enforced.

Crim. C., Art 16.—Effect of Foreign Sentences.

(1) Where a criminal who is subject to Ethiopia's principal jurisdiction (Arts. 11, 13, 14 (1) and 15 (2)) has been sentenced in a foreign country, he may be tried and sentenced again on the same charge in Ethiopia, if he is found in Ethiopia or was extradited to it.

(2) His discharge or acquittal in a foreign country shall be no bar to a fresh trial or sentence being passed in Ethiopia in accordance with this Code.

(3) Where by reason of the crime committed, the criminal has already been convicted in a foreign country and has undergone the whole, or part of the punishment, the Court shall deduct the punishment already undergone from the new sentence to be passed.

Art 12(1) provides that, where a foreign national commits an offence in Ethiopia and escapes to a foreign country, Ethiopia would request the country of refuge to extradite the person to Ethiopia or where the latter refuses to extradite the offender, Ethiopia requests the country of refuge to prosecute same. Where a foreign national is tried in the country of refuge such person cannot be prosecuted in Ethiopia for the same offence whether, by a final judgment, such person is convicted or acquitted, she is granted pardon or amnesty or where the prosecution or sentence has been barred by a period of limitation.

Likewise, where she is charged for the crime and is sentenced but she has not undergone the punishment or undergone only a part of the punishment, the whole or the remaining punishment, as the case may be, may be enforced where such person is apprehended in Ethiopia provided such enforcement is not barred by a period of limitation. Where the punishment imposed by the

court in the country of refuge differs from what is provided for in the Ethiopian Criminal Code, the punishment as is the closest to the one pronounced by the trial court is enforced. Both with respect to prosecution and execution of punishment the law makes reference to period of limitation. Which country's period of limitation is applicable in this case? Presumably, the courts in Ethiopia would apply the period of limitation incorporated in the Criminal Code.

It is provided for in the law that where Ethiopian courts have principal jurisdiction unless the person is prosecuted in the country of refuge, any trial elsewhere outside Ethiopia is no bar to trial before Ethiopian courts. Ethiopia could request the country of refuge to prosecute the offender only if she is a foreign national. What if the offender is an Ethiopian national? The law neither precludes the country of refuge from prosecuting the same nor Ethiopia from participating in the process. However, where such trial is undertaken elsewhere without a request from Ethiopia for an offence committed on its territory or in a foreign country, it is no bar to another trial in Ethiopia but the sentence that she has undergone in a foreign country will be deducted. For example, X, a Kenyan citizen had been to Ethiopia and committed an offence in Ethiopia and escaped into Kenya. Ethiopia can request extradition of X to Ethiopia for prosecution. Where Kenya refuses to extradite X, Ethiopia may request Kenya to try X before its own courts. Once X is tried and, by a final judgment, she is convicted or acquitted, or pardon or amnesty is granted or otherwise prosecution or execution of sentence is barred by period of limitation, X cannot be prosecuted for the same offence should she be apprehended in Ethiopia.

However, suppose Y is Ethiopian national. Ethiopia can request extradition of Y to her jurisdiction but she cannot request Kenya to prosecute Y. Where, Y is prosecuted in Kenya, however, whether Y is Ethiopian national or a foreigner, the part of the sentence Y has undergone in Kenya would be deducted from the sentence that may be passed by Ethiopian courts after her trial.

9.1.2 Subsidiary Jurisdiction

Crim. C., Art 17.—Crimes Committed Outside Ethiopia against International Law or Universal Order.

(1) Any person who has committed outside Ethiopia:

(a) a crime against international law or an international crime, specified in Ethiopian legislation, or an international treaty or a convention to which Ethiopia has adhered; or

(b) a crime against public health or morals specified in Articles 525, 599, 635, 636, 640 or 641 of this Code;

shall be liable to trial in Ethiopia in accordance with the provisions of this Code and subject to the general conditions mentioned hereinafter (Arts. 19 and 20(2)) unless a final judgment has been given after being prosecuted in the foreign country.

(2) Nothing in this Article shall affect the provisions of Articles 14 and 15(2).

Crim. C., Art 18.—Other Crimes Committed Outside Ethiopia.

(1) This Code shall also apply to any person who has committed a crime outside Ethiopia against an Ethiopian national or to any Ethiopian national who has committed outside Ethiopia a crime of another kind than those specified in the foregoing Articles, if the criminal was not tried in the foreign country for the crime, provided that:

(a) the act to be tried is prohibited by the law of the State where it was committed and by Ethiopian law; and
(b) it is of sufficient gravity under the latter law to justify extradition.

(2) In the case of all other crimes committed outside Ethiopia by a foreign national, the criminal shall, save as otherwise expressly provided, failing extradition, be prosecuted and tried only if the crime is punishable under Ethiopian law with death or with rigorous imprisonment for not less than ten years.

Subsidiary jurisdiction is all about offences committed outside Ethiopia or those offences committed outside Ethiopia but not expressly provided to fall under the principal jurisdiction of Ethiopia. Those offences committed outside Ethiopia falling under the subsidiary jurisdiction of the Ethiopian courts are five categories. a) Those international crimes included in the Ethiopian criminal law whether such power emanates from an international agreement or custom which vest universal jurisdiction in Ethiopian courts, such as, violation of international humanitarian law by persons other than members of the Defence Forces, the crime of genocide etc. See, for instance, Crim. C., Arts 269-283;[645] b) those offences against public health and moral

[645] Those offences when they are committed by the Ethiopian Defence Forces in a

as provided for under Crim. C., Arts 525, 599, 635, 636, 640, or 641; c) a crime committed by any person against an Ethiopian national; d) any crime other than those specified above committed by Ethiopian national provided such offence is prohibited by both the law of the sate where it was committed and Ethiopian law and it is of sufficient gravity to justify extradition under Ethiopian law had the suspect been a foreign national;[646] e) where a crime other than those stated above is committed by a foreign national provided she is not extradited and the offence entails rigorous imprisonment for not less than ten years or death. Where those offences are committed, Ethiopia exercises jurisdiction only where the offence is not tried in the country where it was committed.

Pre-Conditions and Limits to Exercising Subsidiary Jurisdiction

Crim. C., Art 19.—Conditions for Subsidiary Application.

(1) This Code shall apply where:

a. the complaint by the victim or his dependants was lodged when it is a condition for prosecution under the law of the place of commission of the crime or under Ethiopian law;
b. the criminal is within the territory of Ethiopia and has not been extradited, or extradition to Ethiopia was obtained by reason of the crime committed; and
c. the crime was not legally pardoned in the country of commission and that prosecution is not barred either under the law of the country where the crime was committed or under Ethiopian law.

(2) The conditions specified under sub-article 1 (a) and (c) of this Article need not necessarily be satisfied as regards the kinds of crimes provided for under Article 17 and 18(2) of this Code.

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foreign country, they are subject to the principal jurisdiction of Ethiopia courts as provided for under Art 15(2).

646 The requirement whether an offence justifies extradition is not clear. However, in the normal course of things, extradition is to be made based on new or prior agreement. Therefore, whether a given case is extraditable or not is to be decided based on such treaty. Sedler, *supra* note 638, at 475. However, where there is such treaty and the state refuses to extradite the suspect, it would be a violation of the treaty unless exceptional grounds exist.

(3) The prosecution shall consult with the Minister of Justice before instituting proceedings.
(4) In case of disparity between the punishments prescribed under this Code and the law of the country of commission, the punishment to be imposed shall be the one which is more favourable to the accused.

Crim. C., Art 20.—*Effect of Foreign Sentences.*

(1) In all cases where Ethiopian courts have a subsidiary jurisdiction only (Arts. 15(1), 17 and 18), the criminal cannot be tried and sentenced in Ethiopia if he was regularly acquitted or discharged for the same act in a foreign country.
(2) If the criminal was tried and sentenced in a foreign country but did not undergo his punishment, or served only part of it in the said country, the punishment, or the remaining part thereof, may be enforced according to the forms prescribed by this Code, if it is not barred by limitation under this Code or the law of the country of commission. The provisions of Article 12 (3) shall apply mutatis mutandis to this Article.

Subsidiary jurisdiction is exercised by Ethiopian courts over a person who has committed any of the offences falling in any of the five categories discussed above outside Ethiopian territory; and where such person is in Ethiopian territory by the time Ethiopian courts are requested to exercise jurisdiction. Unlike principal jurisdiction, however, there are certain specifically provided preconditions to be met before Ethiopian courts exercise jurisdiction. First, there must be compliant filed either by the victim or her dependant in accordance with the law of the place of the commission of the offence where such complaint is a condition for prosecution under the laws of the place or under Ethiopian law; second, the person is in Ethiopia either because she is apprehended and she is not extradited to the other country where the crimes is committed, or she is extradited to Ethiopia from another country apparently for a different reason because she cannot be extradited to Ethiopia for the same offence over which Ethiopia has subsidiary jurisdiction; third, as in the case of principal jurisdiction, the crime is not legally pardoned in the country of commission and the prosecution is not barred by period of limitation both under the law of the place where the crime was committed and under Ethiopian law.

A glance of those requirements indicate that those offences in respect of which Ethiopian courts have subsidiary jurisdiction are less serious offences. This can be gathered from the requirements of complaint, for

instance, because compliant offences are minor offences under Ethiopian law. This is strengthened by the provisions of Crim., C., Art 19(2) that in respect of serious offences such requirement is not the case. Furthermore, it is provided that those requirements are not necessary for offences falling under Crim. C., Arts 17, 18(2). Crim., C., Art 17 covers international criminal law and specific crimes against public health and morality while Crim., C., Art 18 covers offences that entail rigorous imprisonment for not less than ten years or death.

Where the public prosecutor decides to institute a charge against a person who allegedly committed an offence falling under the subsidiary jurisdiction of Ethiopia, she needs to 'consult' the Minister of Justice. The meaning of the term 'consult' is not clear. Certainly, such cases involve international relations and where the suspect is a foreign national it even gets politically sensitive. Such consultation appears to be seeking authorisation or tacit approval because the Minister of Justice is the head of the prosecution bureaucracy.

Unlike principal jurisdiction, where the person is tried before Ethiopian courts whether she is acquitted or convicted by a final judgment in a foreign country, she cannot be tried again in Ethiopia for the same offence. Where she has not undergone part or all of the punishment imposed, it may be enforced in Ethiopia provided such enforcement is not barred by period of limitation as provided either under Ethiopian law or the law of the place of the commission of the crime. Where the punishment under Ethiopian law differs from the one imposed in another country, the punishment as is closest is enforced. Further, where there is a disparity between the punishment under Ethiopian law and the law of the place of commission of the offence, the law prefers the one which is favourable to the accused be applied.

9.2 Court Structure and Apportionment of Jurisdiction between Federal and State Courts

9.2.1 Court Structure

FDRE Const., Art 78 Independence of the Judiciary

1. *An independent judiciary is established by this Constitution.*
2. *Supreme Federal judicial authority is vested in the Federal Supreme Court. The House of Peoples' Representatives may, by two-thirds majority vote, establish nationwide or in some parts of the country only, the Federal High Court and First-Instance Courts it deems*

necessary. Unless decided in this manner, the jurisdictions of the Federal High Court and of the First-Instance Courts are hereby delegated to the State courts.

3. *States shall establish State Supreme, High and First—Instance Courts. Particulars shall be determined by law.*
4. *Special or ad hoc courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not fol1ow legally prescribed procedures shall not be established.*
5. . . .

FDRE Const., Art 79 Judicial Powers

1. *Judicial powers, both at Federal and State levels, are vested in the courts.*

The Constitution establishes the judiciary as an independent third part of a government in which judicial power is vested. The Constitution establishes only the Federal Supreme Court and requires the establishment of State Supreme Courts, State High Courts and State First Instance Courts (commonly known as Woreda Courts) in the respective regions. The establishment of Federal High Courts and Federal First Instance Court in some or all parts of the country is left to the decision of the House of Peoples' Representatives (HPR) two-thirds majority decision. Accordingly the HPR promulgated the Courts' Proclamation. The Courts' Proclamation, however, does not expressly provide for the establishment of Federal Courts. It only distributes jurisdiction *arguably* between Federal and State Courts as well as among Federal Courts on different level and further provides that Federal Courts sit in Addis Ababa and Dire Dawa. However, the courts were organized based on the allocated jurisdiction in the Courts' Proclamation. Therefore, there are Federal First Instance Courts and High Courts in Addis Ababa and Dire Dawa. In 2003 the HPR for the first time established Federal High Courts in the states of Afar, Benishangul-Gumuz, Gambela, Somali and Southern Nations, Nationalities and Peoples.[647] Until such time as the HPR decides to establish Federal Courts in the respective regions, the jurisdictions of the Federal High Court are delegated to the State Supreme Courts and that of Federal First Instance Courts are delegated to State High Courts by the Constitution.

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[647] *Federal High Court Establishment Proclamation No 322/2003* ("Proc. 322/2003"), Art 2

9.2.2 Apportionment of Jurisdiction between Federal and State Courts

FDRE Const., Art 80 Concurrent Jurisdiction of Courts

1. *The Federal Supreme Court shall have the highest and final judicial power over Federal matters.*
2. *State Supreme Courts shall have the highest and final judicial power over State matters. They shall also exercise the jurisdiction of the Federal High Court.*
3. *. . .*
4. *State High Courts shall, in addition to State jurisdiction, exercise the jurisdiction of the Federal First-Instance Court.*

FDRE Const., Art 55 Powers and Functions of the House of Peoples' Representatives

5. *It shall enact a Penal Code. The States may, however, enact penal laws on matters that are not specifically covered by Federal penal legislation.*

FDRE Const., Art 79 Judicial Powers

7. *. . . . The House of Peoples' Representatives shall allocate compensatory budgets for States whose Supreme and High courts concurrently exercise the jurisdiction of Federal High Court and Federal First-Instance Courts.*

Courts' Proclamation, Art 3 Principle

Federal Courts shall have jurisdiction over:

1) *cases arising under the Constitution, Federal Laws and International Treaties;*
2) *parties specified in Federal Laws;*
3) *places specified in the Constitution or in Federal Laws.*

The Constitution provides that the Federal Supreme Court has the highest and final judicial power over Federal matters and State Supreme Courts

also have the highest and final judicial power on State matters.[648] However, as Federal Courts are established only in few states, in those states where there are no Federal Courts, understandably, the Constitution delegates the jurisdictions of the Federal High Courts and Federal First Instance Courts to that of the respective State Supreme Courts and State High Courts for which compensatory budget is allocated by the Federal Government to states courts. What issues are Federal matters and what issues are state matters are not expressly provided for in the Constitution. What can be abstracted from the provisions of the Constitution is that the HPR promulgates federal penal legislation that fall under the Federal Courts jurisdiction and states promulgate penal legislation on matters that are not covered by the federal penal legislation. Thus, it can be understood that the Federal Government issues laws on selected matters that are of national concern while states have residual power. Based on such legislations, jurisdiction is divided between Federal and State Courts. Accordingly, the Courts' Proclamation Art 3 allocates jurisdiction to Federal Courts on three grounds each of which are rational allocation of jurisdiction to Federal Courts.

1) cases arising under the Constitution, Federal Laws and International Treaties

The first ground of allocation of jurisdiction to federal courts is the nature of the law violated. Therefore, where the crime committed violates the Constitution, or any other federal law or international treaties, it is the jurisdiction of the Federal Courts. "Federal laws" are laws issued by the Federal Government including "all previous laws in force which are not inconsistent with the Constitution and relating to matters that fall within the competence of the Federal Government as specified in the Constitution."[649] The Constitution also provides that the HPR has the power to promulgate federal criminal law; offences against international law, insofar as they are included in the federal criminal law are also within the Federal Courts' jurisdiction.[650] The logical conclusion of these provisions is that the Criminal

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[648] State matters are sent to the Federal Supreme Court on cassation and the Constitutional provision that the State Supreme Courts have the final judicial power on state matters my not be that sound.

[649] Courts' Proclamation, Art 2(3)

[650] FDRE Const., Art 55(5)

Code is adopted by the HPR and is thus federal law. Crimes committed contrary to the Criminal Code are the jurisdiction of Federal Courts.[651]

2) Parties specified in Federal Laws

The second index of allocation of jurisdiction to the Federal Courts is based on the identity of the parties. Where the accused or the victim is a foreign national,[652] or employee of the Federal Government[653] or issues of "diversity" arises, such as, where the accused is permanent resident of another state (region)[654] or the case involves conflicts between various nations, nationalities, ethnic, religious or political groups[655] or the case falls under different states' jurisdiction,[656] then it is the jurisdiction of Federal Courts whether the applicable law is federal law or state law. Where the case is governed by state law, the federal court applies such state law.[657]

3) Places specified in the Constitution or in Federal Laws

The third index of allocation of jurisdiction to Federal Courts is based on the place where the offence is committed. The law either expressly provides that offences committed in specified places fall under the jurisdiction of

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651 Abebe Mulatu, "THE COURT SYSTEM AND QUESTIONS OF JURISDICTION UNDER THE FDRE CONSTITUTION AND PROCLAMAITON 25/1996" *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution* (Addis Ababa: ECSC, 2000), at 129, 130; Wondwossen, *supra* note 104, at 41

652 *Id.*, Art 4(9)

653 *Id.*, Art 4(12); "Employees of the Federal Government," according to the Courts' Proclamation, "includes all employees, other than those referred to under sub-Article (1) [Federal Government Officials] engaged in the activities of the Federal Government."

654 Art 5(2) provides on civil jurisdiction of Federal Courts that where the parties are permanent residents in different regions, the Federal Courts have jurisdiction. If this is in order to avoid "possible prejudice" it certainly is needed in criminal jurisdictions. Abebe, *supra* note 651, at 133. The possible way of seizing the Federal Courts is by way of change of venue.

655 *Federal Courts (Amendment) Proclamation No. 321/2003* ("Proc. No. 321/2003"), Art 4(13)

656 Courts' Proclamation, Art 4(11)

657 Despite the states' laws do not fall under *Federal Negarit Gazeta Establishment Proclamation No. 3/1995*, Art 3(2), it is seen in relation to cassation over cassation that the federal courts have the tendency to judicially notice states' laws.

the Federal Courts or where it provides that those places are under the administration of the Federal Government, then offences committed in such places fall under federal courts' jurisdiction. Such two places that are specified in the Constitution and the federal laws are Addis Ababa and Dire Dawa. In fact, Addis Ababa is the seat of the Federal Government with a right to self-administration.[658]

Such allocation of jurisdiction to the Federal Courts is a rational scheme. However, the allocation of jurisdiction to the Federal Courts using those three indices is effectively nullified by two factors in the law. First, the HPR has the power to adopt a federal criminal code. States have also the power to promulgate criminal law on matters that are not covered by the federal criminal code. Unfortunately, the HPR adopted the Criminal Code in a comprehensive manner leaving little or no subject for states to promulgate law on. Following the analysis of the constitutional provisions and Art 3 of the Courts' Proclamation, those crimes covered under the federal Criminal Code are therefore the jurisdictions of the Federal Courts. States Supreme Courts and High Courts have delegated jurisdiction and no inherent jurisdiction. It is a necessary conclusion therefore that, in the absence of state criminal law and lack of delegation of federal criminal matters, it is a matter of reason that states first instance courts do not have criminal jurisdiction.[659] Second, the Federal Courts' Proclamation Art 4 (as amended by Proclamations No 138/1998 and No 321/2003) lists cases over which the Federal Courts have jurisdiction. They are:

1) *offences against the Constitutional order or against the internal security of the state;*
2) *offences against foreign states;*
3) *offences against the law of nations;*
4) *offences against the fiscal and economic interests of the Federal Government;*
5) *offences regarding counterfeit currency;*
6) *offences regarding forgery of instruments of the Federal Government;*
7) *offences regarding the security and freedom of communication services operating within more than one Region or at the international level;*
8) *offences against the safety of aviation;*

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658 FDRE Const., Art 49(1), (2) & (3)

659 Wondwossen, *supra* note 104, at 42

9) *without prejudice to international diplomatic law and custom as well (*sic*) other international agreements to which Ethiopia is a party, offences of which foreign nationals who enjoy privileges and immunities and who reside in Ethiopia are victims or defendants; without prejudice to Sub-Article (3) of Article 12 and Sub-Article (3) of Article 15 offences of which foreigners are victims or defendants which entail more than 5 years rigorous imprisonment;*
10) *offences regarding illicit trafficking of dangerous drugs;*
11) *offences falling under the jurisdiction of courts of different Regions or under the jurisdiction of both the Federal and Regional Courts as well as concurrent offences;*
12) *offences committed by officials and employees of the Federal Government in connection with their official responsibilities or duties;*
13) *offences connected with conflicts between various nations, nationalities, ethnic, religious or political groups;*
14) *Without prejudice to Sub-Article (3) of Article 12 and Sub-Article (3) of Article 15 offences committed against the property of the Federal Government and which entail more than 5 years rigorous imprisonment.*

The content of this provision is understood and applied by courts and law enforcement agencies as the only subject matter over which the Federal Courts have jurisdiction. This is the practice and frequent mention is made to the contents of Courts' Proclamation, Art 4 in other legislations both expressly as well as impliedly as crimes that fall under the jurisdiction of the federal courts.[660] The State Councils (state lawmakers) established State Courts and apportioned jurisdiction among the different tiers of their respective courts. In doing so, they considered what are provided for under the Courts' Proclamation, Art 4 to be the only jurisdiction of the Federal Courts and the rest of the subject matter in the Criminal Code fall under the jurisdiction of State Courts. Accordingly, the Southern Nation, Nationalities and Peoples' Regional State Courts' Proclamation under Art 3(1),[661] for instance, provides that "without prejudice to Article 62 of the Regional Constitution, Regional Courts shall have jurisdiction over regional matters except those expressly reserved to Federal Courts under Proclamation No.

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660 Abebe, *supra* note 651, at 137; Proc. No. 4/1995, *supra* note 181, Art 34(2); Proc. No. 313/2003, *supra* note 193, Art 7; SNNPRS Proc. No. 43/2002, *supra* note 156, Art 3(1); Reg. No. 96/2003, *supra* note 279, Art 6(1)

661 SNNPRS Courts Proc. No. 43/2002, *id*.

25/1996." It also distributes jurisdictions among its own courts. Art 6(1) provides that the state High Courts shall have "first instance jurisdiction over matters falling under the jurisdiction of the High Courts pursuant to the . . . . criminal procedure code." Art 7 further provides that "the Woreda Court shall have jurisdiction over matters falling under the jurisdiction of Awraga (sic) and Woreda Courts pursuant to the . . . criminal procedure code" (sic).

Likewise, the Tigray Courts' Proclamation under Art 4 provides that "save those cases specifically granted to Federal Courts, Tigray Courts have jurisdiction over state matters as well as those granted to them by Art 80 of the Federal Constitution." Art 5 further provides that "Tigray National Regional Government Courts shall have jurisdiction to see cases according to the provisions of the Criminal Procedure Code (and the Civil Procedure Code) both on first instance and on appeal" [Translation mine].

As the case may not be appealed to federal courts, such state courts jurisdiction over those federal matters is exclusive.[662] Some consider the content of the provisions of Art 4 as unconstitutional,[663] while others consider them as restrictions over the general principles under Art 3.[664] Having regard to the discussion made on the Courts' Proclamation, Art 3, the jurisdiction of Federal Courts is already made clear and the provisions of Art 4 are superfluous. However, as there are no federal courts in some parts of the nation, jurisdictions of the federal courts are delegated to state courts. Thus, where state courts are granted jurisdiction to the extent of denying the federal courts jurisdiction over federal matters, it is unconstitutional.[665] However, the provisions of Art 3 and 4 may be interpreted harmoniously both to each other and with the Constitution where those offences listed under Art 4 are treated as matters that may not be delegated to state courts.

The positive understanding of the provisions of Art 4 would, however, be that the Federal Courts have jurisdiction over all offences in the Criminal Code. In states where there are no federal courts established, the jurisdictions of federal courts are delegated to state courts according to Art 80(1), and (4) of FDRE Constitution. However, those offences listed under Art 4 are not delegable to state courts even though they are committed in states where

662 Abebe, *supra* note 651, at 37

663 Wondwossen, *supra* note 104, at 42

664 Abebe, *supra* note 651, at 130, 135, 137

665 Wondwossen, *supra* note 104, at 42

there is no federal court. There are federal high courts in five states—the states of Afar, Benshangul, Gambella, Somali and Southern Nations, Nationalities and Peoples.[666] Furthermore, "federal courts at any level may hold circuit hearings in any Regional Administration, on matters falling under their jurisdiction, when this is found necessary to render efficient administration of justice."[667]

9.2.3 Jurisdiction over Offences

Art. 4.—Jurisdiction as regards offences.

(1) The courts mentioned in the third column of the First Schedule to this Code shall have jurisdiction to try the offences mentioned in the first and second columns and impose the punishments provided by law.
(2) . . . impliedly repealed.

Courts' Proclamation, Art 8.—First Instance Jurisdiction of the Federal Supreme Court

The Federal Supreme Court shall have exclusive first instance jurisdiction over the following:

1) offences for which officials of the Federal Government are held liable in connection with their official responsibility;
2) without prejudice to international diplomatic law and custom, offences for which foreign ambassadors, consuls as well as representatives of international organizations and foreign states are held liable;

Courts' Proclamation, Art 12.—First Instance Criminal Jurisdiction of the Federal High Court (as amended by Proclamations No 138/1998 and No 321/2003)

The Federal High Court shall have first instance jurisdiction over the following criminal cases:

1) Criminal cases specified under Sub-Articles (1), (2), (3), (8), (10) and (13) of Article 4;

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666 Proc. No. 322/2003, *supra* note 647, Art 2

667 Proc. No. 254/2001, *supra* note 167, Art 2(2)

2) *Criminal cases falling under Sub-Article 9 concerning foreign nationals and Sub-Article 14 of Article 4 and falling under the jurisdiction of High Court pursuant to other laws in force;*
3) *Other criminal cases arising in the Cities of Addis Ababa and Dire Dawa and falling under the jurisdiction of the High Court pursuant to other laws in force.*

Courts' Proclamation, Art 15. Criminal Jurisdiction of the Federal First Instance Court (as amended by Proclamations No 138/1998 and No 321/2003)

The Federal First Instance Court shall have jurisdiction over the following criminal cases:

1) *Criminal cases specified under Sub-Articles (4) (5) (6) and (7) of Article 4;*
2) *Criminal cases falling under Sub-Article 9 of Article 4 concerning foreign national and falling under the jurisdiction of Wereda and Awraja Courts;*
3) *Without prejudice to judicial power vested in other organs by law, other criminal cases arising in cities of Addis Ababa and Dire Dawa and falling under the jurisdictions of Wereda and Awraja courts.*

Once it is determined that a case falls under the Federal Courts or State Courts as the case may be, the next question is determination of which level of court has first instance jurisdiction over the matter. In almost all legal systems such power is divided into two and the court at the apex (usually, a Supreme Court) has only appellate jurisdiction. Likewise, the Criminal Procedure Code under the First Schedule allocates jurisdiction to the Woreda, Awradja and High Courts. Such allocations are made based on various variables, such as, making optimal use of resources by allocating as many offences as practicable to lower courts because the number of lower courts is always bigger and they take less resources; the seriousness and complexity of the offence, as the less serious and less complex offences are, they are allocated to lower courts and with a view to maintaining the constitutional right of the accused to her case reviewed on appeal. One can see that the number of offences allocated to the Woreda and Awradja courts is really big compared to those allocated to the High Court.

Contrary to such basic principles of allocation of jurisdiction to courts, the Courts' Proclamation allocated first instance jurisdiction over certain

offences to the Federal Supreme Court. Therefore, all levels of the Federal Courts have first instance jurisdiction. The Federal Supreme Court has first instance jurisdiction on matters where the officials of the Federal Government are held liable in connection with their official responsibilities. "Officials of the Federal Government" is defined to include "members of the House of Peoples' Representatives and the House of the Federation, officials of the Federal Government above ministerial rank, ministers, judges of the Federal Supreme Court and other officials of the Federal Government of equivalent rank."[668] The Federal Supreme Court also has first instance jurisdiction on foreign ambassadors, consuls as well as representatives of international organisations and foreign states without prejudice to international diplomatic law.

Giving further validity to the content of the provisions of Art 4 of the Courts' Proclamation, those offences are apportioned between the Federal High and the Federal First Instance Courts. Thus, the Federal High Courts have jurisdiction to see those falling under sub-articles (1), (2), (3), (8), (10) and (13) of Art 4 of the Courts' Proclamation. It also has first instance jurisdiction under sub-articles (9) and (14) provided they fall under the jurisdiction of the High Court under other laws, those other laws being the First Schedule of the Criminal Procedure Code. It also follows that all those jurisdictions given to the high courts under the first schedule of the Criminal Procedure Code are granted to the Federal High Court where those offences are committed in Addis Ababa and Dire Dawa.

The Federal First Instance Courts have fist instance jurisdiction over crimes specified under Sub-Arts (4), (5), (6) and (7) of Art 4 of the Courts Proclamation. Likewise, where it falls under the jurisdiction of the Woreda or Awradja Courts, offences specified under sub-article (9) also fall under first instance jurisdiction of the Federal First Instance Courts. Finally, those offences under the jurisdiction of the Woreda and Awradja Courts in the first schedule of the Criminal Procedure Code are allocated to the Federal First Instance Court where such offences are committed in Addis Ababa and Dire Dawa because Awradja is eliminated from the administrative structure.

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668 Courts' Proclamation, Art 2(1). Also note that there is a distinction between federal employees who are subject to federal courts' jurisdictions only and federal government officials who are subject to the jurisdiction of the Federal Supreme Court.

9.3 Local Jurisdiction

After the level of court that has first instance jurisdiction is determined, then comes the determination of the local jurisdiction. Local jurisdiction deals with the question of which court of the Federal

First Instance or High Court as there are many Federal First Instance and High Courts. Or where the matter falls under the jurisdiction of Federal First Instance Court, which locality Federal First Instance Court has jurisdiction to try the case.

Crim. C., Art 25.—Place and Time of the Crime.

(1) A crime is committed at the place where and at the time when the criminal performed or failed to perform the act penalized by criminal law.

An attempt is committed at the place where and at the time when the criminal performed or failed to perform the preliminary acts which constitute such an attempt.

Art. 6.—Area of jurisdiction.

Courts shall exercise local jurisdiction in accordance with the provisions of Art. 99-107.

Art. 99.—Ordinary place of trial.

Every offence shall be tried by the court within the local limits of whose jurisdiction it was committed.

The Criminal Code defines the place where an offence is committed or attempted. Thus, a crime is committed at the place where the alleged offender acted or failed to act what is proscribed or prescribed by the law. Likewise, attempt is committed where the essential facts that constituted attempt are committed. Art 6 provides that, local jurisdiction of courts is governed by Arts 99-107. The basic principle is provided for under Art 99. Accordingly, the court in whose locality the offence is committed has jurisdiction to try the case. This resolves not only local jurisdiction problems but also problems of apportionment of jurisdiction between Federal and State Courts.

Crim. C., Art 25.—Place and Time of the Crime.

(1) . . .

(2) With regard to non-instantaneous crimes where the act and the criminal result do not coincide the crime is deemed to have been committed both at the place of the unlawful act and that of its result.

Similarly, an attempt is deemed to have been committed both at the place where the criminal attempted the crime and the place he intended the result to be produced.

For purposes of prosecution, the jurisdiction of the place where the result was achieved is subsidiary to that of the place of commission.

(3) When a combination or repetition of criminal acts is an element of an ordinary or aggravated crime as provided under Article 61,[669] *or when the act is pursued over a period of time, the place where and the time when the crime is committed shall be the place where and the time when one of the combined or repeated acts or part of the acts pursued is committed.*

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[669] Crim. C., Art 61 Unity of Guilt and Penalty

(1) The same criminal act of a combination of criminal acts against the same legally protected right flowing from a single criminal intention or negligence, cannot be punished under two or more concurrent provisions of the same nature if one legal provision fully covers the criminal acts.

(2) Successive or repeated acts against the same legally protected right flowing from the same initial criminal intention or negligence constitutes one crime; the criminal intention shall be punished for the same crime not for each of the successive acts which constitute it.

Similarly, where the repetition or succession of criminal acts of the habitual or professional nature of a crime constitutes an element of an ordinary or aggravated crime, or where the criminal act is pursued over a period of time, the criminal shall be regarded as having committed a single crime and not concurrent material crimes.

(3) In cases where the criminal is regarded to have intention to commit a specific crime, in particular where he committed a crime on property to obtain unlawful enrichment or he made counterfeit currency, used it or put it into circulation or executed a forged document and used it, the subsequent acts performed by the criminal himself after the commission of the main crime for the purpose of carrying out his initial criminal scheme shall not constitute a fresh crime liable to punishment and are merged by the unity of intention and purpose.

Art. 100.—Accused triable in place where act is done or where consequences ensued.

Where a person is accused of the commission of any offence by reason of anything which has been done and of any consequence which has ensued such offence may be tried by a court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued.

Art. 101.—Place of trial where act is an offence by reason of relation to other offence.

Where an act is an offence by reason of its relation to another offence a charge of the first mentioned offence may be tried by a court within the local limits of whose jurisdiction either act was done.

Art. 102.—Trial where place of offence is uncertain.

(a) where it is uncertain in which of several local areas an offence was committed; or
(b) where an offence is committed partly in one local area and partly in another; or
(c) where an offence continues to be committed in more than one local area; or
(d) where an offence consists of several acts done in different local areas, it may be tried by a court having jurisdiction over any of such local areas.

Art. 103.—Offence committed on a journey.

An offence committed whilst the offender is in the course of performing a journey or voyage may be tried by a court through or into the local limits of whose jurisdiction the offender or the person against whom or the thing in respect of which the offence was committed passed in the course of that journey or voyage.

Art. 107.—Public prosecutor to direct place of trial

In cases under Art. 100-104, 116 or 117 the public prosecutor shall decide the court in which the charge shall be filed and on the filing of the charge in accordance with such decision the court shall have jurisdiction.

Certain activities may not be crime in themselves. Their criminal nature may be established only upon looking at them in combination with other activities. In such cases, the case can be tried by a court in whose local jurisdiction either act occurs.Where an offence is committed partly in one local area and partly in another local area, or where the offence is committed on a journey or voyage involving two or more local jurisdictions or where the office consists of different acts which are committed in different local areas, each of the courts in those local areas have jurisdiction to hear the case. In such cases, the public prosecutor decides which local court must hear the case by filing the charge before any of the courts having competing jurisdiction. The court, thus, exercise jurisdiction by virtue of such decision of the public prosecutor and no objection can be made against such jurisdiction. This does not preclude requests for change of venue where any of those requirements are met. Second, where those local areas involved in the crime are found in different regions, the case falls under the jurisdiction of the Federal Courts.[670]

The place of commission of an offence is not always clear—cut; the act may be committed in one territorial jurisdiction and the result ensued in another. The Criminal Procedure Code puts both the place of commission of the offence and the place where the result ensued in the same footing. The Criminal Code, however, for the purpose of prosecution, provides that the place where the result ensued is subsidiary to that of the place of commission of the act. In terms of specificity, the Criminal Code is substantive law and the Criminal Procedure Code governs the procedure. On the other hand, the criminal law is later in time. Likewise where the place of commission of an offence is factually uncertain in which of the several local areas it was committed, the case can be brought before any of the courts that have jurisdiction in those local areas. Remember that identification of the place of commission is an essential part of the charge sheet.[671]

[670] Courts' Proclamation, Art 4(11)

[671] Art 111(1)(c)

THE PUBLIC PROSECUTOR

Chapter 10

Power of the Public Prosecutor

10.1 Power of the Public Prosecutor in General

The public prosecutor is strategically placed as a pivotal point in the administration of the criminal justice system. The magnitude of cases that is continuously reported to the police is huge.[672] The police undertake investigation on those cases, even where the information given to them is open to doubt. Once investigation begins the law requires that it must be completed. Whatever outcome the investigation reveals, the police investigation report is forwarded to the public prosecutor. Because the flow of reported cases to the police is huge and the police do not have power to close investigation files, the flow of cases from the police to the public

[672] For instance, 4,000 completed police investigation reports were being sent to the Addis Ababa Prosecution Office every month up until 1996 E.C. Ali, *supra* note 88, at 44. In 2002 (G.C.) the Addis Ababa Prosecution Office received 63,424 completed police investigation reports through its eight branches. Baseline Study Report, *supra* note 84, at 186. Admittedly, the Addis Ababa Federal Prosecutors' Office did not have capacity to review all those police investigation reports in due time. There were about 62,000 police investigation reports that were not reviewed by the public prosecutor in Addis Ababa Public Prosecutor's Office. Ali, *id*., at 43, 44; the number cases that were rolling over to the following Ethiopian calendar year without being reviewed by the public prosecutor were 27,790 cases for 1991; 28,629 cases for 1992; 27,649 cases for 1993; 27,177 cases for 1994 and 29,442 for 1995. Baseline Study Report, *id*., at 186. Also see note 699, *infra*.

prosecutor is also unavoidably huge. Not all cases go to trial; it is only a fraction of those investigated cases that goes to trial. The public prosecutor is the sole authority to decide the fate of those cases because she is located between the police and the court. She can properly seep those *relevant* cases by leaving out the *irrelevant* ones—those which have sufficient cause and that deserve the public resources to proceed with from that which does not have merit. Ideally, this is done both by properly guiding the investigation process as well as by framing charges on those cases that have high likelihood of conviction.

This power of the public prosecutor is to be exercised on the continuum of the proceedings. As seen in Part II, police investigation involves arrest, interrogation, search and examination of witnesses; while the investigation is in progress, the public prosecutor supervises those investigative activities. She can order the discontinuance of an investigation; or she can close police investigation files. Once investigation is completed and after examining the investigation report, she may also refuse prosecuting a suspect on grounds provided for in the law, for instance, where there is no sufficient evidence, or she can withdraw charges.

As indicated under Pen. C., Art 216, prosecution of cases with "a view to a judgment and the enforcement of the penalty is a public proceeding and is instituted by the [public prosecutor] in all cases where the law does not provide expressly otherwise." The contents of these responsibilities indicate that the public prosecutor acts representing the public. Thus, there is a functional separation of the prosecution service, which is judicial and more professional, from the government advisory service, which is more political. There was even institutional separation between the Attorney General's Office, which is the prosecution arm of the government, and the Ministry of Justice, the advisory body until the adoption of Attorneys' Proclamation in 1993.[673] That was done with a view to maintaining effectiveness of both institutions and in order to insulate the prosecution service independent from government intervention in its activities and to make it less political.

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[673] The transitional period *Central Attorney General Office* was established by Proc. No. 39/1993, *supra* note 178, replacing the Procurer Office established by Proc. No. 11/1987 both of which were independent entities. That was, however, repealed immediately by Proc. No. 74/1993, *supra* note 180, which is in operation.

10.2 Power of the Prosecutor during Investigation

10.2.1 Supervision of Arrest and Interrogation of the Suspect and Search

One of the essential responsibilities of the public prosecutor is supervising the investigation process. This responsibility of the prosecutor is less appreciated because it is less exercised. As discussed in Part II, investigation is principally conducted by the investigating police officer. The investigating police officer, during investigation also undertakes arrests and interrogations, searches, and other activities in furtherance of the investigation. Such activities are, however, closely supervised by the prosecutor. This is done both by directing the investigating police officer to undertake the investigation in compliance with the law, the Constitution, the Code and other relevant legislations, and to undertake specific investigations. This responsibility of supervision of investigation is shared by the judiciary which is an essential aspect of due process of law.

Art. 8.—Powers of public prosecution department.

(1) The Advocate General, the Deputy Advocate General and the public prosecutors shall be responsible for carrying out the duties imposed on them under this Code.
(2) The public prosecution department may in the discharge of its duties give the necessary orders and instructions to the police and ensure that the police carry out their duties in accordance with law.

Art. 10.—Police public prosecutors.

Where a member of the police force is appointed as a public prosecutor he shall carry out the instructions of the public prosecution department.

There are various duties and responsibilities vested on the public prosecutor in the Code and elsewhere in other laws. Those obligations are to be discharged in conformity with her constitutional obligations. The Ethiopian Constitution under Art 13(1) impose the duty to respect and enforce the provisions of Chapter Three, the chapter dealing with fundamental rights and freedoms, on both state and federal executive, legislative and judicial organs. The prosecutor assumes this obligation as the principal organ of the executive and as the law enforcement organ of the government. The prosecutor is therefore expected to avoid unlawful activities by law enforcement agents in the investigation process, such as, illegal arrest,

interrogation and search. The prosecutor, ideally, is also expected to make sure that the evidence obtained are obtained in a lawful manner, and when she finds out that they are obtained contrary to the Constitution, not to make use of them either in her decision whether to prosecute the suspect or before the court once the suspect is accused. It is with this in mind that the prosecutor is given the power to supervise investigation and gives directives to the investigating police officer.

Governing the relationship between the public prosecutor and the police, the provisions of Art 8 of the Code are, however, "obsolete". This is because for many decades, the relationship between the public prosecutor and the police 'need not' be governed by law thus the provisions of the Code need not be invoked. The law in force governing this relationship is the provisions of Proc. No 4/1995, Art 34.[674] Sub-article 4 provides that the Ministry of Justice "instruct for investigation where it believes that a crime, falling under the jurisdiction of the Federal Courts, has been committed; order the discontinuance of an investigation or instruct for further investigation on good cause."[675] Despite such vague provisions, however, the role of the public prosecutor in supervising and giving direction to the police investigation activities in the current state of affairs is said to be minimal or "poor."[676] Such "permanent lack of supervision" by the public prosecutor makes the police "an autonomous institution that is independently operating in criminal investigation without a competent criminal authority . . . executing control and supervision over it."[677]

Some even contend that this provision is not good enough to address the issue of power of the public prosecutor with respect to investigation. This claim is not based on the provisions of Art 23 only; the public prosecutor had extensively listed power under the repealed proclamation, Proc. No

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674 Proc. No. 4/1995, *supra* note 181

675 The fate of Art 23(3) does not seem to be clear after the Federal Police is made to be accountable to the Ministry of Federal Affairs. Nevertheless, with respect to the administration of the criminal justice system it may be of little import if the public prosecutor remains the one who is in control of investigation activities. However, it still raises the question whether the Federal Police is actually under the public prosecutor.

676 Baseline Study Report, *supra* note 84, at 15, 16. The research further recommends that "Police—prosecutor relationships should be improved and co-operation between them enhanced." *Id*., at 29

677 *Id.*, at 101, 183

39/1993.[678] Art 11 of the proclamation provides for the power of supervision of organs of investigation in detailed manner. Accordingly, with respect to supervision over organs of investigation the Office of the Central Attorney General had the following powers and duties:

1. *to ensure that all organs of investigation conduct their activities in accordance with the law, and to issue directives to such organs as may be necessary;*
2. *to issue instructions for investigation where it believes that a crime has been committed; to order discontinuance of an investigation or to issue instructions for further investigation on good cause;*
3. *to supervise the reporting of arrest of a person for criminal investigation to the appropriate office of the Central Attorney General within 24 hours pursuant to the manner prescribed by law;*
4. *to transfer any case from one organ of investigation or investigator to another or to carry out the investigation itself, as may be necessary; . . .*

The fact that those powers of the prosecutor that are listed under Proc. No 39/1993, Art 11 are not reproduced in the subsequently adopted Attorneys Proclamation and in Proc. No 4/1995 is wrongly understood to be a revocation of those powers of the public prosecutor. A review of the latter two proclamations shows that their statement of the powers of the public prosecutor is narrow. However, it is only a poor draftsmanship and there is no indication to restrict the power of the public prosecutor. Thus, it is provided that the public prosecutor has "the power to represent to Central Government in criminal cases falling under the jurisdiction of the Central Courts and any civil and criminal cases concerning the Central Government."[679] It later corrected, without repealing the prior proclamation that the Ministry of Justice has the power to "represent the Federal Government in criminal cases falling under the jurisdiction of the Federal Courts."[680] It is also provided that it also has the power to "instruct for investigation where it believes that a crime, falling under the jurisdiction of the Federal Courts, has been committed; order the discontinuance of an investigation or instruct for further investigation on good cause."[681] The public prosecutor is vested with the power to discontinue the investigation only based on the

678 Proc. No. 39/1993, *supra* note 178

679 Proc. No. 74/1993, *supra* note 180, Art 7

680 Proc. No. 5/1995, *supra* note 3, Art 23(2)

681 *Id.*, Art 23(4)

presumption that she is supervising and have knowledge about the police investigation. Furthermore, these powers vested on the Ministry of Justice or the public prosecutor can be meaningfully discharged only if they are understood broadly. Thus, the public prosecutor must be able to carry out the necessary activities in order to effectively discharge its responsibility of representing the federal government before the federal courts. To indicate that the public prosecutor has wider latitude of power, the Draft Criminal Procedure Code, Art 41 provides that "[w]here he finds it necessary for the efficacy of the investigation, the public prosecutor may order the transfer of investigation from one investigating police officer, investigation department or police station to another."

Despite these, however, there are few issues that cannot easily be addressed by the existing law. It is discussed in Part II on investigation that crimes that fall under the jurisdiction of the Federal Courts are to be investigated by the federal police. It is to be noted that Federal Police is located only in few parts of the country. Where federal offences are committed in such places where there are no federal police, the crime is unavoidably investigated by the state police. There is no law governing the relationship between the state police and federal prosecutors and such supervision may be difficult.

10.2.2 Other Duties of Supervision of Legality

Arbitrary arrest is prohibited. The Constitution further provides that persons held in custody have the right to treatments respecting their human dignity. With a view to enforce legality in law enforcement and protection of the rights of the suspect/accused, the public prosecutor is supposed to visit places of detention. The current state of facts indicates that at least the federal prosecutor is not doing such visit at all.[682] This is because of the reason stated above—the public prosecutor does not have the legal basis to undertake such visit to prison. Proc. No 39/1993, Art 12 provides in a detailed and clear manner that the Office of the Central Attorney General with respect to the administration of prisoner and detainees have the following powers and duties:

1. *to supervise the legality of the imprisonment or detention of the prisoner, detainees, inmates held in prisons, temporary centres of detention and correction or medical institutions, and ensure that their rights are duly respected;*

[682] Ali, *supra* note 88, at 31; Baseline Study Report, *supra* note 84, at 17, 198

2. *to ensure that the rights of any individual under custody are respected;*
3. . . .
4. . . .
5. *to visit, at any time convenient to it, prisons or centres of detention or other places where prisoners are held;*
6. *to order the release of persons detained or imprisoned in violation of the law;*
7. *to ensure that penalties are executed and protective measures are taken in respect of prisoners in accordance with the law and prison regulations, and that prisoners are properly treated; to cause the rectification of irregularities that it may come across.*

The Central, Regional and Zonal Attorney Offices had the same power within their respective jurisdiction.[683] There is no equivalent provision in the subsequently adopted proclamations replacing proc. No 39/1993. The repeal of this provision without a substitute is understood as revoking the power. Some prosecutors state that they have the power, but they do not exercise it for various reasons. In order to indicate the fact that the public prosecutor has a constitutional duty to supervise the legality of police investigative actions, the Draft Code includes similar provisions. Thus, Art 42 which provides that "[t]he public prosecutor may visit arrestees any time, up on application of any person or on his own motion to ascertain the legality of the grounds or conditions of arrest." This is in line with the recommendation made for the amendment of Art 23 of Proc. No 4/1995 in order to give power to the public prosecutor to: a) supervise the legality of imprisonment and handling of inmates wherever housed; b) give pertinent legal orders and direction with respect to federal inmates; and c) order the immediate release of those held unlawfully.[684]

10.2.3 Plea Bargain

Our prosecution system is called compulsory prosecution in that there is very little room left for the public prosecutor to exercise discretion after the police investigation is completed. Thus, there is no such a thing as plea bargain in the criminal justice administration. However, a tiny plea bargain is introduced in the *Anti-Corruption Special Procedure and Rules of Evidence Proclamation*. Thus, if a person, who is involved in corruption offence,

683 Arts 13(1) and 14(1), respectively

684 Baseline Study Report, *supra* note 84, at 26

agrees to provide "substantial evidence" before the case is taken to court, she may be given immunity from prosecution, either by the Commissioner or by the Head of the Appropriate Organ.[685] "Substantial Evidence" is defined to be one a) sufficient to bring conviction; or b) that serves as a basis to lead to other evidence; or c) corroborating other evidences, sufficient to bring conviction and in its absence conviction is unlikely. The immunity is to be certified in writing. Where the suspect fails to provide the evidence or give testimony according to the agreement, however, the decision to give immunity would be revoked. It is evident that such plea bargain is made by the Anti-Corruption Commission prosecutors in corruption cases only. The law even goes further and provides that the testimony of the person who has been given immunity from prosecution shall have equal weight as the testimony of ordinary witness.

10.3 Power of the Prosecutor after Investigation is Completed

Art. 38.—Action by public prosecutor on receiving report.

(a) On receiving the report under Art. 37 the public prosecutor may: prosecute the accused on a charge drawn up by him under Art. 109-122; or
(b) order that a preliminary inquiry be held under Art. 80-93;
(c) or order further investigations; or
(d) refuse to institute proceedings under Art. 42.

It is a practical matter that the police learn about the commission of an offence. Thus, the investigating police officer conducts the investigation and sends the investigation report to the appropriate public prosecutor. As the relationship between the investigating police officer and the public prosecutor is only based on the police investigation report, the power of the public prosecutor is exercised only upon receipt of the police investigation report. In the current criminal process, unlike what was the case in Proc. No 39/1993, Art 11(3), there is no obligation on the part of the investigating police officer to report to the public prosecutor the arrest of a person short of sending the investigation report.[686] As discussed below, the power of the

685 Proc. No. 434/2005, *supra* note 97, Art 43(1). The appropriate organ is defined to be an organ which is empowered to investigate and/or prosecutor corruption offences. *Id*, Art 2(3)

686 Art 11(3) provides that the Office of the Central Attorney General had the power "to supervise the reporting of arrest of a person for criminal investigation to the

public prosecutor even after receiving the police investigation report is limited. As listed under Art 38 et seq., the powers of the public prosecutor are to order further investigation, to refuse to prosecute the suspect, to order preliminary inquiry be held in certain category of cases and to prosecute the suspect where there are no bars against prosecution.

10.3.1 Closing the Police Investigation File

Art. 39.—Closure of police investigation file.[687]

(1) The public prosecutor shall close the police investigation file where the accused:

(a) has died; or
(b) is under nine years of age; or
(c) cannot be prosecuted under any special law or under public international law (diplomatic immunity).

(2) The provisions of Art. 43-45 shall not apply where the case file is closed under this Article.
(3) On closing the case file, the public prosecutor shall send a copy of his decision to the Advocate General, the private complainant, if any, and the investigating police officer.

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appropriate office of the Central Attorney General within 24 hours pursuant to the manner prescribed by law"

687 Actions by the public prosecutor and closure of police investigation file have somehow mingled content. Their content is refined in the draft. Art 45(1) provides for actions the public prosecutor on receiving police investigation file may take. Thus, the public prosecutor may "(a) close the investigation file . . . ; or (b) order further investigation on matters singled out for clarification; or (c) request that preliminary inquiry be held . . . ; or (d) refuse to institute proceeding . . . ; or (e) institute a charge drawn up by him . . . before a court having jurisdiction." Subsequently, Art 46(1) provides for closure of police investigation files where "(a) the suspect has died; or (b) the suspect was under age when he committed the alleged offence; or (c) the act in respect of which complaint/accusation is made is not a crime; or (d) the suspect has immunity under international law against prosecution in domestic courts; or (e) the prosecution is barred by limitation or the offence is subject of a pardon or amnesty; or (e) the accused has previously been charged with and convicted or acquitted of the same offence."

This article lists the grounds for closing the police investigation file. These grounds are specific enough as to bring the case to an end. Such is the case where the accused has died, where she is under the age of nine, or where because of a special law, such as, diplomatic immunity, cannot be prosecuted. Because the investigating police officer does not have the power to close the investigation file, where she is able to properly establish the existence of such fact, she may send the investigation report to the public prosecutor without the need to complete the investigation so that the latter could close the investigation file.

The public prosecutor upon satisfying herself that such fact exists can close the police investigation file; and this kills the matter forever. The public prosecutor needs to send a copy of her decision to the complainant, among others, stating the reason why the investigation file is closed. Unlike police investigation files closed for lack of evidence under Art 42 (1) (a), she does not have to authorize private prosecution.

10.3.2 Ordering Further Investigation

One of the powers of the prosecutor upon receipt of the police investigation report is to order further investigation where she believes such is needed. This power is vested on her on the assumption that as soon as she is in receipt of the police investigation report she would examine it. Where she finds that certain facts are not supported by evidence or that there are certain items of evidence which should be gathered, she gives order to the investigating police officer specifying same. As the investigating police officer has given it what she could, the prosecutor needs to be specific in her instructions to the investigating police officer. It is stating the obvious that because of insurmountable case backlog the public prosecutor examines the police investigation report after it is too late and the police could do very little by way of further investigation. The response of the police to the request of the public prosecutor also "occurs only after a delay," sometimes taking five months and even more.[688]

10.3.3 Requesting Preliminary Inquiry be Held

It is indicated in Section 8.1 that preliminary inquiry be held in two situations.[689] The first category of offences, in respect of which preliminary

[688] Baseline Study Report, *supra* note 84, at 184, 100

[689] See the discussion on Preliminary Inquiry, Chapter 7

inquiry is compulsorily required to be held, is first degree murder (aggravated homicide) and aggravated robbery. The second category of offences in respect of which preliminary inquiry is optional is offences that fall under the jurisdiction of the High Court, where the public prosecutor believes preliminary inquiry is necessary. In both cases the public prosecutor has to evaluate the police investigation report. Where it is discretionary, there is no guideline under what circumstances the public prosecutor could order preliminary inquiry to be held, but it is apparent from the nature of the process. If the purpose of preliminary inquiry is recording and preservation of prosecution evidence, then it has to be undertaken in circumstances where the trial is likely to come long after the investigation is completed. Thus, where the trial is to be held immediately after the investigation is completed, the prosecutor need not order such process be had; because even in those cases where preliminary inquiry is mandatorily required, it can even be dispensed with where the public prosecutor can convince the High Court that the trial would be held soon. In practice, however, where the police identify key witnesses that she suspect may not be available at the hearing either because of lack of fixed abode or they reside elsewhere, the police alerts the public prosecutor to request the court that preliminary inquiry be held.

10.3.4 Refusing to Prosecute

At least at the federal level, the structure of the public prosecutor office is a hierarchical bureaucratic structure. All prosecutors are accountable to the Minister (of Justice) but a prosecutor is also accountable to her immediate superior.[690] This responsibility hierarchy is also entrenched by the hierarchy of title, such as, Assistant Attorney General, Deputy Assistant Attorney General, Higher Prosecutor, Prosecutor One, Two and Three, and Candidate Prosecutor, in their order.[691] There is also an important procedure of petition. Thus, where a person is not satisfied with the decision of a prosecutor, she has the right to petition to the superior of the prosecutor who has the power to "amend, suspend, alter, revoke or confirm" the decision of the prosecutor

690 Reg. No. 44/1998, *supra* note 184, Art 10. This provision is a verbatim copy of Proc. No. 74/1993, *supra* note 180, Art 5.

691 *Id.*, Art 3. The hierarchical structure of the prosecution office is always in place. For instance, Proc. No. 39/1993, *supra* note 172, had introduced the hierarchy of central, regional and zonal attorney offices respectively. Thus, the zonal prosecutor was subordinate to the regional prosecutor who in turn was subordinate to the central prosecutor.

against which petition is filed.[692] While this is a rational approach to accountability of each prosecutor to the public, it is taken beyond the limit that no line prosecutor decides on the merit of a case by herself without the approval of her immediate superior. Thus, the decisions of the public prosecutor, whether to prosecute or otherwise, has to be approved by her superior. It is succinctly put that "if the prosecutor decides to discontinue a case, s/he is required to send a detailed report giving the reasons for this decision and s/he must receive a signed approval from the head of prosecutors. After giving the approval not to institute proceedings, the head of the public prosecutor also sends the file to the Minister of Justice of the Head or Justice Bureau, each of whom has the authority to reverse the decision."[693] The orders of the superior prosecutor have to be complied with at the pain of sanctions.[694] The grounds for refusing to prosecute are very limited because we have compulsory prosecution.

Art. 42.—Cases where proceedings shall not be instituted

(1) No proceedings shall be instituted where:

(a) the public prosecutor is of opinion that there is no sufficient evidence to justify a conviction; or
(b) there is no possibility of finding the accused and the case is one which may not be tried in his absence; or
(c) the prosecution is barred by limitation or the offence is made the subject of a pardon or amnesty; or
(d) repealed by art 24 (2) of Proclamation No 39/1993.

(2) On no other grounds may the public prosecutor refuse to institute proceedings.
(3) The public prosecutor shall institute proceedings in cases affecting the Government when so instructed by the Minister.

Art. 41.—Doubtful cases.

Where it is not clear whether proceedings should be instituted, the public prosecutor shall refer the matter for instructions to the Advocate General.

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692 Proc. No. 74/1993, *supra* note 180, Arts 9, 10

693 Baseline Study Report, *supra* note 84, at 100

694 Reg. No. 44/1998, *supra* note 184, Arts 34, 75(1)(n)

The public prosecutor has limited or no discretion in our criminal justice system. She distinguishes cases that can be prosecuted from those that cannot be, either because of permanent limitations, such as, where the case is barred by period of limitation, which is more or less similar to those falling under Art 39, or, where the suspect cannot be found and the offence is one which cannot be prosecuted in absentia. The major ground for the public prosecutor not to prosecute a suspect is where there is no sufficient evidence which is likely to bring about conviction of the accused. After the examination of the facts and the evidence, the public prosecutor decides whether she could be successful in obtaining conviction should she institute a charge against the suspect. Stated otherwise, the public prosecutor can decide not to institute a charge against the suspect where she is convinced that the evidence is not likely to justify a conviction. Where there is sufficient evidence in the judgment of the public prosecutor, however, she does not have the discretion not to prosecute. The law is clear that "on no other grounds" can the public prosecutor refuse to institute proceedings against the suspect.

Where the public prosecutor is in doubt as to what to decide in a given case, she normally requests advice, instruction and guidance from her immediate supervisor. Art 42(3) appears, however, to be absurd in that the public prosecutor institutes a charge in cases that affect the interest of the Government where the Minster of Justice so orders. It can properly be understood to mean that unlike cases wherein the individual is the victim and has the right to undertake private prosecution or complain to the superior prosecutor, there may not be a specific person to actively seek remedy in those damages. It is only in those situations that the Minster may order the public prosecutor to undertake prosecution. The public prosecutor, however, can still refuse to prosecute the suspect on those grounds that were provided for other cases.

Art. 43.—Form of refusal.

(1) A refusal to institute proceedings under Art. 42 shall be in writing and shall record clearly the reasons for such refusal.
(2) A copy thereof shall be sent to the appropriate person mentioned in Art. 47 and to the investigating police officer.

Art. 44.—Effect of refusal.

(1) Where the public prosecutor refuses to institute proceedings under Art. 42 (1) (a) in relation to an offence punishable on complaint only, he shall authorise in writing the appropriate person mentioned in Art.

47 to conduct a private prosecution. A copy of such authorisation shall be sent to the court having jurisdiction.

(2) repealed by art 24 (2) of Proclamation No 39/1993.

Art. 45.—Form of and decision on application

(1) Impliedly repealed because Art 44 (2) is repealed.

(2) repealed by art 24 (2) of Proclamation No 39/1993.

The refusal to institute a charge for any of the reasons discussed above has to be made in writing and supported by the reasons for such decision. A copy of the letter is sent to the investigating police officer and where such refusal is based on insufficiency of evidence, it should also be communicated to those listed under Art 47 who could pursue private prosecution should they choose so. Where the refusal to institute a charge is based on insufficiency of evidence, the public prosecutor shall authorise those individuals listed under Art 47. A copy of the authorisation letter would also be sent to the court having jurisdiction to hear the case. It is, however, unfortunate that the public prosecutor is not informing such persons in the current practice and there is virtually no private prosecution exercised by a victim of a crime or her representative (See Private Prosecution, Section 11.8 *infra.*). Furthermore, when the public prosecutor closes the investigation file because she believes there is no case to proceed with either because of lack of evidence or otherwise, she does not give other related orders. This is particularly so in relation to police bond and conditions of arrest of the suspect, exhibits, etc. they are all subjects of separate judicial process. Like other inactions by the public prosecutor discussed above, this inaction on the part of the public prosecutor to give further necessary orders regarding the case is also for lack of clear provisions in the law. In contrast, in a dangerous vagrancy case there is an express provision that provides, where the public prosecutor refuses to institute proceedings as per Art 42(1)(a), she also causes the release of the suspect and report same to the court.[695]

10.4 Decision for Prosecution

Proc No 4/1995, Art 23

The Ministry of Justice shall have the powers and duties to:

[695] Proc. No. 384/2004, *supra* note 98, Art 8(2)

2. *represent the Federal Government in criminal cases falling under the jurisdiction of the Federal Courts;*

Art. 40.—Duty to institute proceedings.

(1) Subject to the provisions of Art. 42, the public prosecutor shall institute proceedings accordance with the provisions of this Chapter whenever he is of opinion that there are sufficient grounds for prosecuting the accused.

The last and widely exercised power of the public prosecutor is prosecution. After examining the police investigation report, the public prosecutor decides to prosecute where she thinks there is a case to proceed with. This provision seen along with the provisions of Art 42(2), the public prosecutor has limited or no discretion but to charge the accused.

Conclusion

Prosecutorial power is to be exercised in a continuum of the case—from the beginning of investigation to after judgment. However, because of continuous revision of the law and the reorganization of the police and the prosecution office, the legal framework of the police-public prosecutor coordination is so vague that prosecutors focus only on traditional powers of deciding on police investigation reports. Thus, the widely exercised power is based on whether there is sufficient evidence to obtain a conviction of an accused. In a bureaucratic operation of the prosecution office, all the decisions of the public prosecutor have to be approved by her immediate supervisor. The role of the prosecutor in the life of a given case is so minimal that the case goes to court with minimal selection process.

Chapter 11

Prosecuting the Accused

Introduction

Where, after the examination of the police investigation report or the records of the preliminary inquiry, if the public prosecutor is convinced that there is sufficient evidence to justify conviction against the suspect, she may draw a charge and file before the court having jurisdiction within the following fifteen days. The Constitution provides that the accused has the right to be informed of the charges against her with sufficient particularity. She is informed by handing her a written charge. In order to comply with the requirements of the law, the charge has a certain form and content. Thus it has four parts—the caption, the statement of the offence, the particulars of the offence and the list of evidence.

Although all four parts are important, as the case is to be decided based on the law, the facts and evidence the last two parts of the charge are particularly important. Thus, the particulars of the offence need to state in clear terms the law and the facts of the case in conformity with the law, such as, the nature of the offence alleged to have been committed by the accused, the time and place of commission and the victim. In certain cases, where it is essential, the law requires that the circumstances of the case must also be stated. Where two or more offences are committed or two or more defendants were involved in the commission of the alleged offence, the charge may be framed joining such crimes or defendants. Furthermore, each of the facts must be supported by evidence. When the accused is served on with the charges, she is served with all the above. Short of such a charge, the court may not hear a case.

However, where there is a mistake or failure to state a fact in the charge, such error has to be corrected at the earliest time so that the accused could be able to defend herself properly or so that unnecessary delay may not occur.

11.1 Charging the Accused

FDRE Const., Art 20

> 2. *Accused persons have the right to be informed with sufficient particulars of the charge brought against them and to be given the charge in writing.*

Art. 108.—Principle.

> *(1) No person may be tried for an offence other than a petty offence unless a charge has been framed in accordance with the provisions of this Chapter.*
> *(2) The provisions of this Chapter shall apply to charges framed:*
>
> > *(a) by the public prosecutor, whether the case is to be tried by the High Court or a subordinate court; and*
> > *(b) by a private prosecutor, where he has been authorised to conduct a private prosecution.*

Art. 109.—Framing, filing and service of the charge.

> *(1) The public prosecutor shall within fifteen days of the receipt of the police report (Art. 37) or the record of a preliminary inquiry (Art. 91) frame such charge as he thinks fit, having regard to the police investigation or preliminary inquiry, and shall file it in the court having jurisdiction.*
> *(2) If, before the trial by the High Court, the prosecutor is of opinion upon the record of the preliminary inquiry received by him that the case is one which is to be tried by a subordinate court, he shall, notwithstanding the decision of the committing court, frame such charge as he thinks fit and shall file it in the subordinate court having jurisdiction.*
> *(3) . . .*
> *(4) A copy of every charge shall be given to the accused free of cost.*

Art. 110.—Charge wrongly filed.

Where the public prosecutor files a charge in a court having no jurisdiction the court shall refuse to accept such charge and shall direct the public prosecutor to file the charge in a court having jurisdiction and shall so specify in writing in the charge sheet:

The previous Chapter discusses the power of the public prosecutor. In that discussion the power of the public prosecutor to charge the suspect comes last because it has to pass many hurdles, such as, conducting further investigation and preliminary inquiry. Thus, upon receiving the police investigation report or the records of the preliminary inquiry, where the prosecutor believes she has sufficient evidence to obtain conviction, she draws a charge and file before the court that has jurisdiction.

A charge is a formal document containing an allegation that a person named therein has committed an act prohibited (or failed to act what has been prescribed) by the criminal law by describing the necessary facts, both under the statement of the offence and particulars of the offence, supported by evidence, proving directly or by necessarily implying that such person deserves punishment as provided for under the relevant article that is said to be violated. The charge is an essential document that except in petty offences and cases against juveniles where the court has not given contrary order as per Art 172(3), a person cannot be tried without one. The charge has two functions—first, it is a means by which the accused is informed of what charges she has to answer to in order to make a rational decision whether to plead guilty or not guilty and to defend herself if she wishes so. Second, it is an instrument that initiates a case before the court for trial whether the prosecution is conducted by the public or a private prosecutor.

The public prosecutor draws and files the charge before the court having jurisdiction within the following 15 days of her receipt of the police investigation report or the record of the preliminary hearing. This period is shortened to 10 days in the vagrancy control proclamation in respect of vagrancy cases.[696] This requirement of the law is less respected and the prosecutor takes much longer than what is provided for in the law. There are various factors aiding the practice; first the courts do not take any measure to encourage the public prosecutor to fulfil their obligations by filing the charge within such 15 days period because the law "is silent" as to what the

[696] *Id.*, Art 8(1)

consequences of such failure would be.[697] The silence of the law is not only whether the courts have to take measures when the public prosecutor fails to file the charge within the time fixed by the law, but also on the nature of the measure. The public prosecutors, on the other hand, have huge burden of work[698] with significant shortage of human and material resources.[699]

However, it is clear! Where the law requires that a charge has to be drawn and filed within 15 days, it means it has to be complied with. Where the charge is not drawn and filed within such 15 days, it is a violation of the law and effect should not be given to an act that is contrary to the law. Thus, the charge drawn and filed after the 15 days period provided for in the law is not a valid charge and the accused may not be tried on the basis of such charge. The law-maker fixes such 15 days for drawing and filing the charge anticipating that there is a strong link between the investigating police officer and the line prosecutors that they exchange information on the matter so that they know what the next action is. Where the public prosecutor is in close follow up of the case, fifteen days is enough for the public prosecutor to make any of those decisions that are laid down under Art 42. The fact that there is poor relationship between the investigating police officer and the public prosecutor or the fact that the latter has a huge case load to screen may not in any way be reflected on the right of the accused. It is a matter of common sense that while the law enforcement institutions are strictly enforcing those other provisions which are operating against the interest of the suspect because it is a "public interest" it is equally a public interest that the provisions that are favourable to the individual, such as, Art 109 are enforced strictly. This significantly affects those who are denied bail because the offence they are suspected of is considered to be 'non-bailable.'

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697 Wondwossen, *supra* note 104, at 34; Baseline Study Report, *supra* note 84, at 185

698 See *supra* note 1. Despite the bulk of cases that are constantly flowing into the public prosecutor's office, each prosecutor in Addis Ababa Prosecution Office was able to dispose only 30 cases per month which is the highest in the country. Close to 80% of federal cases are handled by Addis Ababa prosecutors' office. Ali, *supra* note 88, at 44.

699 The Baseline Study Report, *supra* note 84, at 186, indicates that over five year's period, there were about 140,000 cases that were not examined by the public prosecutor out of which 70,000 cases were discontinued because of laps of period of limitation. In order to make it more specific, the research took the Paulos branch. The branch disposes 3,500 cases per year while the inflow of cases ranges from 6,000 to 10,000 leaving the public prosecutor with a backlog of at least 2,500 cases per year.

In such cases the suspect is detained contrary to the Constitution because she is detained both without a charge and a conviction.

It is discussed else where that the committal court conducts preliminary inquiry in respect of cases that fall under the jurisdiction of the High Court. However, where the record of the preliminary inquiry indicates that the crime committed falls under the jurisdiction of the Woreda (First Instance) Court, the public prosecutor may files the charge before such court having jurisdiction. The charge need to contain the law, the facts and the evidence with sufficient particularity that enables both the court and the defendant to understand the facts of the case. The charge is to be given to the accused free of charge.

Finally, where the public prosecutor files the charge before a court which has no either material or local jurisdiction such court would refuses to accept the charge and would advice the public prosecutor before which court she should file the charge.

11.2 Form and Content of the Charge

Art. 111.—Contents and form of the charge.

(1) Every charge shall be dated and signed and shall contain:

(a) the name of the accused; and
(b) the offence with which the accused is charged and its legal and material ingredients; and
(c) the time and place of the offence and, where appropriate, the person against whom or the property in respect of which the offence was committed; and

(2) The law and article of the law against which the offence is said to have been committed.
(3) The charge shall be in the form set out in the Second Schedule to this Code or shall conform thereto as nearly as may be.

Art. 112.—Description of circumstances.

Each charge shall describe the offence and its circumstances so as to enable the accused to know exactly what charge he has to answer. Such description shall follow as closely as may be the words of the law creating the offence.

When the public prosecutor draws up the charge there are certain formal and substantive requirements she is required to comply with as provided for in

the Second Schedule. A charge has four parts: the caption, the statement of the offence, particulars of the offence and the list of evidence. *The caption* sets the date, the court before which the case is brought, the accuser,[700] the accused and her address. *The statement of the offence* is normally written as a title. It describes the offence in a concise form and makes reference to the relevant law creating the offence also stating that it has been violated by the accused, such as, Aggravated Homicide contrary to Art 539 of the Criminal Code, Attempted Homicide contrary to Art 27 and 539 of the Criminal Code, Robbery contrary to Art 670 of the Criminal Code, Theft contrary to Art 665 of the Criminal Code, or Breach of trust contrary to Art 675 of the Criminal Code.

Particulars of the offence is the significant part of the charge and it describes all the elements of the offence and the circumstances of the commission of the offence as are required under Arts 111 and 112 to enable the prosecutor to show the court the commission of the offence and the connection to the accused. Finally, there is *list of evidence*. It is a rule of reason and practice that each allegation be supported by evidence without which it remains only an allegation. Traditionally, however, as the schedule does not include the list of evidence as part of the charge sheet, the accused is served on the allegation part of the charge without the list of evidence. This is based on the belief that the accused, if she is informed of the name of witnesses or the nature of the evidence, she would intimidate witnesses and interfere with other evidence that witnesses change their testimony later in the process. Regarding the constitutional rights of the accused to have access to evidence against her as per Art 20(4), it was argued that if the accused is given the chance to conduct cross-examination during the hearing that is sufficient.[701] Recently, the courts in Addis Ababa are ordering the public prosecutor to give list of evidences annexed to 'the charge' to the accused on her first appearance after the charge is filed before the court. Sometimes,

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[700] In the normal course of things it is the public prosecutor who institutes a charge whether it is an offence punishable with or without formal complaint or the private prosecutor as authorized by the public prosecutor on her refusal for insufficiency of evidence.

[701] One of the grounds of denying the accused bail is the justifiable belief based on evidence that she might tamper evidence or interfere with witnesses. Apart from the fact that access to those evidence is a right of the accused, there is no reason why the accused should not have access to same when she is charged, where there is such high degree of protection afforded for the integrity of evidence. See the discussion on arrest and bail in Chapters 5 and 8 respectively.

mere list of the evidence is attached and sometimes a caption is included as to what each item of evidence is meant to prove.

Thus far is discussed about the formality of a charge. The content of a charge is provided for under Arts 111 and 112. The content of the charge pertains to the particulars of the offence although other parts are also required to be incorporated. One of the rights of the accused as enshrined in the FDRE Constitution is the right to be informed of the charges with sufficient particularity in writing. Thus, the charge contains all the legal, material and moral elements of the offence as supported by evidence with sufficient particularity so that the accused can understand the charge against her and defend herself. Basically, it is the characterization of an offence and the association of it with the offender.

1. **Name of the Accused**:—as it is pointed out in the discussion in relation to making arrest, establishing the identity of the person is very much important; it thus, goes without saying that the identity of the accused is indispensable in drawing the charge. The name, however, has to be the proper name of the person. In some instances, the person may not have or may not use her proper name; she may rather prefer a nickname with which she is better identified. In such cases, the public prosecutor needs to indicate this and use her nickname, too, because in her preliminary objection the accused may deny her proper name and uses her nickname, prove same to the court and evade justice successfully.
2. **The Crime**:—the purpose of instituting a charge is to have the accused punished should she be found deserving of punishment. A punishable offence as provided under the Criminal Code is an act/omission a fact what is prohibited by the law when done/left undone with a required mental element. Therefore all the ingredients of the offence with which the accused is charged have to be stated in the charge with sufficient particularity in order to address each element that constitutes the crime.
3. **The Place and Time of the Crime**:—offences are committed in a certain space of time and place. The Criminal Code provides that "[a] crime is committed at the place where and at the time when the criminal performed or failed to perform the act penalized by criminal law." Likewise, "[a]n attempt is committed at the place where and at the time when the criminal performed or failed to perform the preliminary acts which constitute such an attempt."[702] In non-instantaneous offences

[702] Crim. C., Art 25(1)

"where the act and the criminal result do not coincide, the crime is deemed to have been committed both at the place of the unlawful act and that of its result." Likewise, attempt of such offence is "deemed to have been committed both at the place where the criminal attempted the crime and the place he intended the result to be produced."[703] Also, where an act is an element of a crime as provided under Crim. C., Art 61 or where it is committed over a period of time, "the place where and the time when the crime is committed shall be the place where and the time when" any one of such act is committed.[704] Although the place of crime is relevant for determination of jurisdiction of the court, from the defendant's perspective, as part of the charge, it is also relevant in her defence.

The charge has to include both the time and place of the offence without which there is no valid charge. The time has to be stated in terms of year, month, date, hour and minutes where possible. Likewise, the place of commission of the alleged offence has to be stated in a specific way. Normally, the Woreda and Kebele have to be stated; where the offence is committed indoor, the house number has to be stated. If it is committed outside, however, the place has to be described as specifically as possible by referring to the street name, and the name of the place commonly known, such as, Ayalew Music Shop, Aratkilo Post Office or Kazanches Total. Where the offence is committed on a journey, the start and the destination of the journey and the place where the offence is said to be committed must be mentioned.

There are only a few exceptional circumstances wherein it is difficult to state the specific time at which the offence is committed. Suppose the crime is embezzlement of money by a treasurer/casher of an institution for her personal use. It is easy to prove that there is some loss of specific amount of money by such person but it is difficult to prove the time at which such embezzlement is committed. This is because she is the only person that has access to such safe box, unless it is opened by two people which does not make any difference where the crime is committed by both, conniving, as the initial amount of cash that was in her hand and the remaining balance after all transactions were conducted is clear. However, it is possible to prove the range of time within which such embezzlement is committed because such finance is audited at certain intervals. The issue of proof of the moral element is outstanding.

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703 *Id.*, Art 25(2)

704 *Id.*, Art 25(3)

The whole purpose of such specification of time and place is with a view to enable the defendant know what charges she has to answer to without restricting her right to defence, and in order to properly inform the court and to prove the case before the court. If the place and time is not stated sufficiently, it restricts the right of defence of the accused. Such is the case with the defence of *alibi* and for preliminary objection based on period of limitation, for instance. If A is charged with a crime of murder at a place called X in Y year, month, date and hour and if she denies this allegation she may defend herself by stating that she was at a different place than X at the said time, Y.

4. ***Corpus Delicti***:—it is a matter of logic that where there is allegation of crime against a defendant, it must be proved that such offence is actually committed; thus, the law demands that "where appropriate" the person against whom or the property in respect of which the offence is said to have been committed be stated in the charge. Suppose X is charged for the murder of Y. In order to convict X for the murder of Y, the latter must actually be shown to have died without which, however strong the evidence produced against X may be it is not possible to convict X for the murder of Y. The phrase "where appropriate" is not necessary because, without a crime there is no criminal.
5. **The Law**:—those discussed above are facts that need to be incorporated into the charge. The relevancy of those facts, however, is tested by the law that creates the crime. Therefore, the charge should contain the Article which is alleged to have been violated by the accused with the possible specificity to the extent of specifying the sub-article if the offence is created, or aggravated by such sub-article.
6. **Description of Circumstances**:—under certain circumstances the description of dry facts as listed under Art 111 and the law creating the offence may not be found sufficient to enable the accused (and the court alike) to properly understand the manner of commission of the offence. Art 112, therefore, requires that each charge has to describe the offence and its circumstances in which it is committed in order to enable the accused what charges she has to answer to. In describing the circumstances and manner of commission of the offence, the public prosecutor must endeavour to reduce (if possible, to avoid) irrelevancy to the extent possible as she is dealing with facts that are not necessary elements of the offence but they are so connected to the fact in some way that their description enables the accused and the court to properly understand the alleged offence. This is particularly so in serious offences and offences committed in aggravated circumstances.

11.3 Alternative Charges

Art. 113.—Where it is doubtful what offence has been committed.

(1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed the offence which appears the more probable to have been committed and he may be charged in the alternative with having committed all other offences which the facts which can be proved might constitute.

After going through the police report or the records of the preliminary inquiry, the public prosecutor may be in doubt as to which particular provision of the law is violated; stated otherwise, under which article the offence falls, or which particular facts may be proved by the evidence obtained because it is only those facts that are proved to which legal consequences are attached. In such cases, the public prosecutor may institute charges in the alternative in the same charge sheet. The one, which appears more probable to have been committed, is stated first as a substantive charge and the other offence, when the facts proved might constitute, would be stated next as an alternative charge. It must be noted that the doubt of the public prosecutor may not relate to the occurrence or non-occurrence of those facts; the doubt may rather be one of application of the provisions of the substantive law to the existing facts—whether all the required facts for the application of a particular provision are in existence or not. Should the accused found to be guilty of the offence, however, she would be convicted only for one of the alternative charges and not for both as it is not a multiple count charge.

In such cases, the charge sheet has one caption and one list of evidence as both are against the same accused. The alternative charges have their own statement of the offence and particulars of the offence. In practice, alternative charges are not common because the public prosecutor charges the accused on the more grave offence. For instance, where the public prosecutor is in doubt whether the accused has committed aggravated homicide or ordinary homicide, the public prosecutor charges the accused for aggravated homicide because where the court is convinced that the accused is guilty of ordinary homicide, it changes the provisions of the law and convicts her accordingly by virtue of Art 113(2).

11.4 Charging for Aggravated Crimes

Art. 114.—Aggravated offences how charged and procedure.

(1) Where an accused person may be charged with an aggravated offence by reason of previous convictions, he shall be charged with the unaggravated offence and the charge shall be filed in the court having jurisdiction to try the aggravated offence.
(2) Where the accused is convicted of the unaggravated offence the public prosecutor may, after conviction and before sentence, prove the previous convictions of the accused which, had they been proved at the trial, would have resulted in his conviction of the aggravated offence. The court may sentence him as though he had been convicted accordingly.

Art. 138.—Antecedents of accused.

(1) Unless otherwise expressly provided by law, the previous convictions of an accused person shall not be disclosed to the court until after he has been convicted.

A defendant may have prior criminal conviction record. Where she is subsequently charged for another crime and if she would be convicted under aggravated provision because of her prior criminal record, the public prosecutor is required to draw the charge un-aggravated, i.e., without indicating prior conviction of the defendant. Because a copy of the record of the preliminary inquiry would be sent to the court that ultimately hears the case, such prior conviction may not be included even in the record of the preliminary inquiry. The main reason is in order to avoiding prejudice in the mind of the judge against the accused and to enable the court to comply with the principle of presumption of innocence.

Once the court found the defendant guilty as charged, un-aggravated, it calls upon the public prosecutor to prove previous conviction(s) of the accused which, had they been proved at the trial, would have resulted in the conviction of the defendant under a different article for aggravated offence. It must be noted that the content of this provision is not aggravation of penalty by virtue of prior conviction which is the normal practice after conviction before sentence; it is rather conviction of the defendant under a different article than the one she was initially charged with.

Where the two articles fall under different courts jurisdictions, the public prosecutor files the charge before the court having jurisdiction to hear the

aggravated crime. However, in such cases, the court does not have to be told to know that there exists a prior conviction of the defendant. The purpose of non-disclosure of prior conviction is defeated if the public prosecutor inescapably files the charge before a court that has no jurisdiction to hear the matter.

11.5 Joinder of Charges

Art. 109.—Framing, filing and service of the charge.

> *(3) Where the preliminary inquiry discloses offences some of which are to be tried by the High Court and some by a subordinate court, the prosecutor shall frame such charges as he thinks fit and shall file them in the High Court which shall have jurisdiction to try all offences thus charged.*

Art. 116.—More than one charge.

> *(1) A charge may contain several different counts relating to the same accused and each offence so charged shall be described separately.*
> *(2) All charges may be tried together but where the accused is likely to be embarrassed in his defence, the court shall order the charges to be tried separately.*

This provision governing situations where a person alleged to have committed concurrent[705] or different offences which are violations of different provisions of the Criminal Code that she would be charged for each of them as constituting separate counts either in the same or different charge sheets. This particular provision is not clear whether such offences stated in different counts should be related or unrelated, such as, in terms of time and place. Apparently, it does not matter insofar as the suspect is going to be charged and tried for each of those offences. The drawing and filing of multiple counts in a single charge sheet is referred to as joinder of charges and each of the charges is referred to as count. Thus, such charges have the same caption as the defendant is the same, and it has as many statements of the offence and particulars of the offence as the number of counts because each count constitutes a distinct charge containing all the required elements of the offence which the accused is expected to answer to. Finally, there is one list of evidence attached to the charge sheet.

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[705] *Id.*, Arts 60-67

In the discussion on jurisdictions, it is stated that first instance jurisdiction of courts is divided between the Federal First Instance Courts and Federal High Courts, many of the cases being assigned to the former. However, where two or more offences are committed by the same defendant and the public prosecutor is of the opinion that one of the offences falls under the jurisdiction of the lower courts and others fall under the jurisdiction of the higher court, she may file the charge before the higher court having jurisdiction to see all the charges. The purpose of the law is that, all such charges may be tried together in order to save time and resources. However, if the court is convinced that it is likely to create difficulty for the accused in her defence, it may order the charges be separately tried. However, the Federal Supreme Court has first instance jurisdiction in few cases. The fact that the accused is tried before such court restricts her constitutional right to appeal. In order to mitigate such effect and where the offences are not committed concurrently, it is advisable that the public prosecutor files her charges separately before the courts according to their jurisdictions.

11.6 Joinder of Offenders

Art. 117.—Joinder of charges.

(1) All persons accused of having participated in whatever capacity in the offence or offences even at different times shall be charged and tried together.
(2) Nothing in this Article shall prevent the court from ordering separate trials where separation is required in the interests of justice.
(3) Where several persons have committed different offences connected with the same criminal activity they may where necessary be charged and tried together.

The title and the content of this article are not in harmony; the article is wrongly entitled "joinder of charges" while the content is about joinder of offenders. Looking into the substance of the provisions, crimes may be committed by two or more persons each of which have participated in the same or different capacities as principal, as an instigator, as an accomplice etc. in the commission of the offence(s).[706] In such cases, whatever the capacity of their participation may be, the offenders shall

[706] *Id.,* Arts 32-41 on participation

be charged and tried together. This is because the provisions of the law that are violated, the court having jurisdiction over the matter, the facts involved in the case and the evidence that would be produced, at least in the majority of cases, are more or less the same. Also, persons who have committed *different offences* but which are connected with the same criminal activity may, where it is found to be necessary and convenient, be charged and tried together. Thus, the fact that those persons are tried together is a matter of convenience and saving resources. However, like in the case of joinder of offences, if the charging and trying of those offenders jointly affects them in their defence or is against the interest of justice, the court may order separate trials. Likewise, where the number of the defendants is many, making the case unmanageable, the court may split the case into two or three putting those defendants which are charged for related offences and against whom similar or related evidence is tendered together.

Under the comment joinder of charges it is stated that where two or more offences are committed by the same accused and the public prosecutor is of the opinion that one of the offences is within the jurisdiction of the lower courts and others are in the jurisdiction of the higher courts, she can file the charge before the higher court having jurisdiction to see all the charges. However, there is no similar provision where those offences are committed by two or more persons subject to different courts jurisdictions. For instance, in *Tamirat, et al.*, the Federal Anti-Corruption Commission filed the charge against all defendants both who were Federal Government Officials and those who were not before the Federal Supreme Court. Those who were not federal government officials raised objection on the ground that the Federal Supreme Court, as the apex of the judiciary, should not entertain the case because it would restrict their right to appeal should they be convicted, an objection the court rejected.

11.7 Error or Omission in the Charge

Art. 118.—Effect of errors.

No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded as material and no charge containing such errors or omissions shall be regarded as invalid unless they relate to essential points or the accused was in fact misled by such error or omission or justice is likely to be thereby defeated.

Art. 119.—Alteration or addition to charge.

(1) Where the accused is brought to trial on a charge containing essential errors or omissions or such errors or omissions that the accused has been or is likely to be misled, the court may at any time before judgment of its own motion or on application order the charge to be altered or added to or a new charge to be framed, as the case may be.
(2) . . .
(3) The provisions of this Article shall also apply in the case of errors or omissions within the meaning of Art. 118.

Art. 122.—Withdrawal of charges.

(1) Repealed by proc. No 39/1993.
(2) Repealed by Proc. No 39/1993.
(3) Where no new charge is framed under the provisions of Art. 119 the accused shall be discharged.
(4) Repealed by Proc. No 39/1993.
(5) The withdrawal of a charge under the provisions of this Article is no bar to subsequent proceedings.

The above discussion is all about form and content of the charge. Sometimes there are errors or omissions in statement of facts. Such errors or omissions may be related to the caption, the statement of the offence or the particulars of the offence. However, the mere fact of existence of such omissions or errors does not invalidate the charge unless it relates to an essential point or misleads the accused or is likely that justice may be defeated thereby. Separate discussion on all the three points is necessary.

i. *Error/Omission Relating to an Essential Point*:—it does not seem to be clear what an essential point is and to what it is essential. Insofar as a charge is supposed to contain certain matters of fact and law, such has to be stated and stated correctly in the charge. Their essentiality seems related to their materiality, which is determined by having regard to the law that creates the crime or the facts, which constitute the crime under the said provision. The omission on this statement of those facts or laws in the statement of the offence or particulars of the offence is one of the grounds for invalidation of the charge.
ii. *Error/Omission Misleading the Accused*:—a charge is required to follow a certain form and contain certain elements in order to properly inform the accused what charges she has to answer to; this is her constitutional

right. If the misstatement or omission in stating the offence or particulars of the offence misleads the accused, such charge is invalid.

iii. *Error/Omission Likely to Defeat Justice*:—again, if such errors or omissions are likely to defeat justice, though they are not essential or do not mislead the accused, the charge is invalid. It does not seem to be clear how such errors or omissions in stating the offence or particulars of the offence defeat justice. Perhaps misleading the court is one of the possibilities.

The positive statement of this rule is that, where the error or the omission is related to an essential point, or that it misleads the accused or that it is likely to defeat justice, the court may order the public prosecutor to amend her charge by correcting such errors or by stating such omission short of which the court considers the charge invalid and cannot proceed to try the defendant. The amendment of the charge may be ordered by the court either up on its own motion or on the application of the parties any time before judgment by altering the charge or adding to or framing a new charge as the case may be. Where such error or omission is typographically minor, the court presumably orders the alteration or addition of those items which the court believes need to be altered or added, respectively. If such error or omission cannot be remedied by such alteration or addition, the court may order the framing of a new charge upon its discretion.

Where the court orders the framing of a *new charge* and the public prosecutor does not frame such new charge, the law clearly provides that the accused would be discharged reserving the right of the public prosecutor to institute a new charge whenever she makes such amendments. It may be argued that such reservation of the power of the public prosecutor to institute the charge when she draws a new charge or amends the same is contrary to the right of the accused to be tried speedily as enshrined in the Constitution and the provisions of the Criminal Procedure Code.

Art. 119.—Alteration or addition to charge.

(2) Every such alteration, addition or new charge shall be read and explained to the accused.

Art. 120.—Effect of alteration or addition.

(1) Where a charge is altered or added to or a new charge is framed, the court shall ask the accused to state whether he is ready to be tried on such altered, added or new charge.

(2) Where the accused declares that he is not ready, the court shall consider the reasons he gives. If proceeding immediately with the trial is not likely, in the opinion of the court, to prejudice the accused in his defence the court may proceed with the trial as if the altered, added or new charge had been the original charge.
(3) If proceeding immediately with the trial is likely in the opinion of the court to prejudice the accused in his defence or the prosecutor in the conduct of the case, an adjournment shall be ordered (Art. 94).

Art. 121.—Recall of witnesses.

Whenever a charge is altered or added to or a new charge is framed after the beginning of the trial, the prosecutor and the accused shall be allowed to recall and examine, with reference to such alteration, addition or new charge, any witnesses who may have been examined and may also call any further evidence which may be material.

Once such alterations or additions are made or a new charge is drawn and filed "such alteration, addition or new charge shall be read and explained to the accused" and she is asked whether she is ready to be tried on such altered, added or new charge. Such question is based on the view that the accused needs sometime to prepare her defence and questions for cross-examination. Where the accused answers that she is not ready for the trial, the court would ask her reasons and evaluate their justifiability. The general tendency seems to be for immediate trial of the charge. In so doing, the court considers those reasons and if conducting the trial immediately is not likely to prejudice the accused in her defence, the court may proceed with the trial as if the altered or added to or the newly framed charge had been the original charge. This issue of convenience is not limited to the accused; if the immediate trial prejudices the prosecutor in the conduct of prosecution it may not be held immediately. Thus, if the immediate trial affects the interest of either party, the court may adjourn the case for such time which it deems sufficient to enable the parties to prepare their case.

Furthermore, where such amendment of charge is made after the beginning of the trial, i.e. after all or part of evidence are examined, the prosecutor and the accused would be allowed to recall and examine any witness who may have been examined, in respect of those facts relating to the alteration, addition or newly framed charge. The parties may also call any further evidence which is not called before but which may have been produced in respect of such new facts.

Art. 113.—Where it is doubtful what offence has been committed.

(2) Where the evidence shows that the accused committed an offence with which he might have been charged in the alternative and the offence is within the jurisdiction of the court, he may be convicted of such offence notwithstanding that he was not charged with it, where such offence is of lesser gravity than the offence charged.
(3) Nothing in this Article shall prevent the court from applying the provisions of Art. 6 and 9 Penal Code.

Art. 115.—Person charged with an offence may be convicted of an attempt or as accessory or instigator.

(1) Where the accused is charged with an offence, he may be convicted of having attempted to commit the offence although the attempt is not separately charged.
(2) Where an accused is charged with an offence as principal, he may be convicted as an instigator or as an accessory, although he was not charged as such.

It is not always the case that the accused is proved to have committed the offence as charged. While she is charged as a principal, the evidence may prove she was involved in the offence only as an accessory. While she was charged for commission of the offence, the evidence may prove she only attempted the offence. Likewise, while she is charged for a serious offence, the evidence may prove that she had committed only the less serious offence. Thus, where the accused is found guilty as an accessory, or for attempting the offence or for a less serious offence, the court accordingly convicts the accused changing the article to which she is proved to have violated despite the fact that she was not charged under such article or that it is the jurisdiction of the lower court. However, for the court to change the article and to enter conviction under the article the defendant is not charged with, the latter must be of lesser gravity and one with which the accused would have been charged with in the alternative charge.

The above interpretation of Art 113(2) is not disputed. However, in *Public Prosecutor v. Abebe W/Semayat* the Supreme Court examined the application of Art 113(2).[707] In that case the respondent was a defendant for a criminal

[707] *Public Prosecutor v. Abebe W/Semayat* (Supreme Court 1988) Crim. App F. No. 165/80

charge for first degree murder before the High Court. The evidence showed, however, that the defendant was proved to have only taken a wristwatch from the victim in violation of Pen. C., Art 667 for which the defendant was not charged. The High Court acquitted the defendant by virtue of Art 141. The public prosecutor lodged an appeal to the Supreme Court on the ground that where the court is convinced that the defendant is proved to have committed another offence, it should have changed the article and convict thereunder as per Art 113(2). The Supreme Court with a contradictory reasoning[708] accepted the argument of the pubic prosecutor and remanded the case to the High Court to require the respondent to enter her defence under Pen. C., Art 667. Although the offence under which the defendant was required to enter her defence was of less serious, the Supreme Court erred in that the defendant could not have been charged for this crime in the alternative.

11.8 Private Prosecution

11.8.1 Persons Conducting Private Prosecution

Art. 44.—Effect of refusal.

(1) Where the public prosecutor refuses to institute proceedings under Art. 42 (1) (a) in relation to an offence punishable on complaint only, he shall authorise in writing the appropriate person mentioned in Art. 47 to conduct a private prosecution. A copy of such authorisation shall be sent to the court having jurisdiction.
(2) repealed by Proclamation No 39/1993.

Art. 46.—Liability of private prosecutor.

The private prosecutor authorised to conduct a private prosecution under Art. 44 (1) shall conduct the private prosecution at his peril and at his own expense.

Art. 47.—Persons entitled to conduct private prosecutions.

No person other than:

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[708] The reasoning is contradictory in that the Court held the High Court is not obliged to do so; however, because it is expedient to enter judgement in a case wherein evidence is already heard in stead of filing another charge. The court is making a balance between law and economics and it chose the economic approach.

(a) the injured party or his legal representative; or
(b) the husband or wife on behalf of the spouse; or
(c) the legal representative of an incapable person; or
(d) the attorney of a body corporate may conduct a private prosecution.

Where the examination of the police investigation report or the record of preliminary inquiry reveals that the evidence is not sufficient to obtain conviction, the public prosecutor may refuse to charge the suspect. There are two categories of offences—complaint and non-compliant offences. Where such decision concerns complaint offences, however, Art 44(1) requires the public prosecutor to authorize the person that has the right to conduct private prosecution. It is not clear whether the certificate of authorization is granted automatically or on the request of such person who has the right to conduct private prosecution. The list of persons that have the right to conduct private prosecution is exhaustive—that other persons are excluded from conducting private prosecution. Thus, those individuals that can conduct private prosecution are the injured person herself or her legal representative, her spouse, where she is incapable, her legal representative and the attorney of a body corporate.

It is clearly provided that the private prosecutor undertakes prosecution at her expenses and at her own peril. Furthermore, Art 221(2) further provides that where "the accused is acquitted and the court is of the opinion that the charge was not made in good faith, it may order the private prosecutor to pay the whole or any part of the costs incurred by the accused."

11.8.2 The Procedure

Art. 150.—Filing complaint and charge.

(1) Where a private complainant has been authorised under Art. 44 (1) to conduct a private prosecution, he shall within fifteen days file his complaint and the charge in the court having jurisdiction.
(2) Where a charge is not in accordance with the authorisation the court shall require the private complainant to amend the charge to conform to such authorisation.

Art. 151.—Attempt to reconcile the parties.

(1) When the complaint and the charge have been filed the court shall summon the complainant and the accused to appear.

(2) Before reading out the charge to the accused the court shall attempt to reconcile the parties. Where a reconciliation is effected, it shall be recorded by the court and shall have the effect of a judgment.

Art. 152.—Security for costs.

Where a reconciliation has not been effected, the court shall decide whether the private prosecutor should give security for costs. Where an order for security is made, the sum to be secured and the nature of the security shall be stated in the order.

Art. 153.—Hearing and judgment.

(1) Where the private prosecutor has complied with the order, if any, under Art. 152, the case shall proceed in accordance with Art. 123-149, the parties having the same rights and duties as in public proceedings.
(2) The court shall give judgment as in ordinary cases.

Art. 48.—Stay of proceedings in private prosecution pending institution of proceedings by public prosecutor.

Where the evidence in a private prosecution discloses that a more serious offence has resulted than has been charged in a private prosecution, the public prosecutor may apply to the court to stay the proceedings pending the institution of fresh proceedings by the public prosecutor and the court shall thereon stay the proceedings.

Like the public prosecutor, the private prosecutor is allowed to file her charge before the court that has jurisdiction to hear the case within fifteen days of the receipt of such authorisation from the public prosecutor who refused to charge the suspect. The public prosecutor also sends a copy of the authorisation certificate to the court having jurisdiction to hear the case. The content of the charge have to conform to the authorization by the public prosecutor; where the charge is not in accordance with the authorization, the court requires the private prosecutor to amend the charge to make it conform to such authorization. This conformity of charge with the authorization is a matter of substance and not form.

After ascertaining that the charge conforms to the authorisation, on the day the case is adjourned, the court summons both the private prosecutor and the accused to appear. Before reading out and explaining the charge to the accused and asking the accused to plead, the court would attempt

to reconcile the parties. Should the effort be effective and reconciliation is effected, it would be recorded by the court to have the effect of a judgment. Where the court is unable to reconcile the parties, the court continues to hear the case. In such cases the court considers whether the private prosecutor should give security for costs or not. What grounds may be taken into account by the court in making such decision is not provided in the law nor is there a well-developed practice as private prosecutions are not customarily conducted. But if the court decides that security has to be produced, the sum to be secured and the nature of the security would be stated in the order to produce security. Once the private prosecutor complies with the order of the court with respect to security for costs, the court proceed hearing the case in accordance with the provisions of Arts 123-149 as ordinary prosecutions conducted by public prosecutor. Thus, the parties have the same rights and duties as in public proceedings. Likewise, after the evidence for the defence is concluded, the court enters judgment as in ordinary cases prosecuted by the public prosecutor.

Where in the course of the proceeding evidence proves that a more serious offence other than the one in respect of which a criminal charge is instituted is committed, however, the public prosecutor may apply to the court to stay the proceedings so that she could institute a fresh proceeding and the court would therefore stay the proceeding. However, there are no private prosecutions in practice at least for two major reasons: first, the private prosecutor is conducting the prosecution at her own expense and at her own peril. Therefore there is no incentive for her to conduct such investigation gathering of evidence and prosecution which is a difficult job for ordinary citizenry. Second, where the public prosecutor who is an experienced professional with the power to order further investigation and with all the human and material resources at her disposal refuses to prosecute because of lack of evidence, the chance of success for the private prosecutor is slim.

Art. 165.—Absence of private prosecutor.

(1) Where the private prosecutor fails without good cause to appear on the the (sic) date fixed for the hearing, the court shall strike out the case and order the discharge of the accused.

(2) Where a case has been struck out under sub-art. (1), the private prosecutor may, within fifteen days of such striking out, apply to the court to have a fresh hearing date fixed. No application shall be granted unless the private prosecutor satisfies the court that his failure to attend on the day of the hearing was due to causes beyond his control.

> *(3) Where no application is made within fifteen days or it is dismissed. The striking out shall be final with regard to the private prosecutor.*

During the proceeding both the accused and the private prosecutor have the obligation to attend the proceeding. As private prosecution is conducted only in respect of offences that are punishable only upon complaint, not covered by the provisions of Art 161(1)(a), the accused cannot be prosecuted in her absence should she fail to appear before the court. However, the court may order the prosecution be suspended until such time as the accused may appear provided it is not barred by period of limitation. Where the private prosecutor fails to appear, however, the court strikes out the case from the list and discharge the accused. The private prosecutor may, however, apply to the court to restore the case to the list and have a fresh hearing date fixed within fifteen days of striking out of the case. The court grants the application where the private prosecutor is able to show to the court that she failed to appear on the date fixed for the hearing for reasons beyond her control. This, she can do either in person or through her representative. Where there is no such petition filed in those fifteen days after striking off of the case, the decision would be final in respect of the private prosecutor

TRIAL AND HEARING

Chapter 12

Pre-Hearing Matters

Introduction

The trial[709] includes all the process before the court in which the charge is filed excluding pre-trial matters—matters before the case appears before the court. It is at this stage the court frames the issue and resolves the same. As the criminal trial is known for its inequality, the law devises certain mechanisms for the attainment of fairness in the criminal process. The idea of fairness during a trial has something to do with equality of arms of the parties. In criminal proceedings things are considered as a biblical fight between that little shepherd David and the mighty warrior Goliath. The accused almost always does not have knowledge of the law and is inexperienced. The public prosecutor, on the other hand, is a professional, trained and skilled in law, and is the prosecuting arm of the government. She has all the government power and resources at her disposal to conduct the investigation and the prosecution. The concept of "fair trial" is, thus, devised in order to reduce this unbridgeable gap of power and resources between the two parties and in some way to level the ground so that there

[709] The Code uses the terms 'hearing' and 'trial' loosely suggesting they are interchangeable. In this material, effort is made to consistently use the term 'trial' to refer to all the processes before the court while the term 'hearing' is used to refer only to the actual hearing of evidence before the court as is used in the Amharic version. That is why this Chapter is referred to as "Pre-Hearing Matters" in stead of "Pre-Trial Matters" which is used in preceding chapters to refer to processes before the charge is filed before the court, mainly related to investigation.

could be a "fair" hearing. These mechanisms are mainly by "granting" certain rights to the accused and by imposing certain "burdens" and "obligations" on the public prosecutor.

Once these things are met, the court frames and begins to resolve the issue in the presence of both parties save in exceptional circumstances where trial in absentia is allowed. On such day fixed for the trial, after ascertaining the identity of the accused, the court reads out and explains the charge to the accused where after it would ask the same whether she has objections to the charge mainly relating to the form rather than content of the charge. After resolving the issue of the objection to the charge, the court asks the accused to plead. If the accused denies the charge or admits with reservation, the court enters a plea of not guilty. If the accused admits the charge without reservation, however, a plea of guilty would be entered where after, depending on its conviction and the nature of the offence, the court may require the public prosecutor to corroborate such plea.

Where the accused denies the charge or the court orders the corroboration of a plea of guilty by the accused, the public prosecutor produces evidence. If the evidence produced is oral, the public prosecutor conducts the examination-in-chief and the accused or her counsel, where she so desires to do, may conduct the cross-examination. Finally, the re-examination, if any, is to be conducted by the public prosecutor. After the examination of witnesses for the prosecution and going through other evidence, if any, and if the court is convinced that the case has not been proved to the required degree, the accused would be acquitted without entering her defence. If the public prosecutor proves her case to the satisfaction of the court, on the other hand, the latter may call upon the accused to enter her defence. The case for the defence follows almost the same procedure as that of the prosecution, except the fact that the proactive role is played by the accused or her counsel.

After going through the evidence produced, the court enters judgment. The judgment contains summary of the facts and the evidence produced with the reasons why an item of evidence is admitted or rejected. Where the judgment is a conviction, it also includes the article under which the accused is convicted and the sentence imposed. Where the judgment is acquittal and the accused is in custody, the court gives an order of release. This Chapter deals with those procedural guarantees that are meant for approximation to fair-trial while the next Chapter deals with the actual hearing of the case and judgment.

12.1 Pre-Hearing Matters and Aspects of Fair Trial

The idea of fairness during a trial is related with equality of arms of the parties to the case. Criminal processes are afflicted by the false ideas of "fairness" and "equality of arms" of the parties. If the case is between an individual and a state (government) with the power to tax and to arrest, then there is essential inequity. The accused is weak no matter what;[710] she almost always does not have knowledge of the law. Often, it is her first time to appear before a court of law. She does not know what her rights are and even when she knows little of them, she does not know at what stage they would be exercised; she does not know which evidence is relevant to her case, etc. Where the crime is "serious" or the accused is considered "dangerous" she may not even be granted release on bail which consequently makes her unable to gather evidence or seek for witnesses in her defence. This is worsened by the fact that majority of the cases are heard without a counsel.

The public prosecutor, on the other hand, is a professional, trained and skilled in law, and is the prosecuting arm of the government. She has all the government power and resources to conduct the investigation and the prosecution. The investigating police officer is under the order of the public prosecutor who even takes instructions as to investigations which are to be complied with. She is using the public fund to prosecute. Irrespective of the economic strength of the country, this power and resource is boundless when seen in light of the poor accused.[711] Fair trial

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[710] The major objection to the evidence raised by the former Prime Minister, Tamirat Layine, *Tamirat, et al.*, *supra* note 76, was that he gave confession under coercion. The trial of former *Dergue* officials also had many complaints on the process of the hearing and their handling in the prison including access to their lawyers. Again, the 3rd and 4th defendants in *Assefa, et al.*, note 127, *infra*, Siye Abreha and Tamirat Layine, respectively during the preparatory hearing complained to the court that they were denied access to materials with which they could write petition to the court and take notes during court hearings. This is a good indication that however big the accused had been, at the end of the day when she is faced with the 'justice system' she is totally powerless and she needs the protection of the law in order to effectively defend the case against her.

[711] Cases may be delayed for lack of human and material resources but no case has ever been closed for lack of resources once the charge is filed before the court. Cases are regularly rolling to the following year and the period of limitation is suspended or interrupted. Crim. C., Arts 220(1), 221.

is, thus, an effort to reduce this unbridgeable gap of power and resources between the two parties and in some way levelling the ground so that there could be a relatively fair hearing. These mechanisms are mainly by "granting" certain rights to the accused, such as, presumption of innocence, the right to remain silent the right to counsel, pre-trial access to evidence, and open court trial, as well as by imposing certain "burdens" and "obligations" on the public prosecutor, such as, the constitutional obligation to respect the rights and privileges of the accused, the obligation to prove the charge and to prove it beyond reasonable doubt. In this part of the discussion, effort is made with a view to highlight some aspects of fairness in the process but this in no way is an exhaustive list of those procedural guarantees of fairness.

12.1.1 The Right to Counsel

FDRE Const., Art 20

> 5. *Accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense.*

FDRE Const., Art 21

> 2. *All persons shall have the opportunity to communicate with, and to be visited by . . . their legal counsel.*

Art. 61.—Detained persons right to consult advocate.

Any person detained on arrest or on remand shall be permitted forthwith to call and interview his advocate and shall, if he so requests, be provided with the means to write.

Where an accused deals with the criminal justice system without a counsel, more often than not, her rights are compromised including her right to faire trial and the right to be heard. The accused most probably "is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and the knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hands of counsel at every step in the proceeding against him . . . . If that be true of men of

intelligence, how much more true is it of ignorant and illiterate . . ."[712] Thus, the Constitution recognises the right to be assisted by a counsel. The issue of who may request for assistance of a counsel may be clear. However, for some reason, where the suspect is under detention, "when" and "how" such right may be exercised is always an issue in our criminal justice system.

Although the constitutional recognises that the right to be assisted by counsel is a constitutional right, it does not provided where such right may be exercised. However, other provisions make it clear. FDRE Constitution., Art 20 provides for the rights of persons detained whether on charge or after conviction. Thus, sub-article 2 provides that persons under detention have the right to communicate with and be visited by their legal counsel. It does not put time restriction. Furthermore, Art 61 of the Code provides that a person arrested has the right "to call and interview his advocate." Therefore, the right to counsel attaches ever since summons is sent to her because that is "a critical stage."[713] Receipt of police summons is a critical stage in the criminal process because it results in arrest and subsequent interrogation where the accused needs aide. Where the investigation is not properly conducted, the outcome would be tainted. It is discussed in relation to police interrogations and confessions that the statements of the arrestee given to the police per Art 27(2) are given substantive evidentiary value by the courts. Where the accused cannot have a lawyer at the earlier stage, she may not be able to prepare her defence effectively. The significance of assistance by counsel, or lack of it, is seen in some of cases discussed in this material. For instance, one of the objections of the former Prime Minister, during his trial is that he made confessions after he was denied access to his lawyer.[714] Where the accused requires the investigating police officer that she wants to speak to her lawyer, therefore, during the interrogation or at any stage of the proceeding, such investigating police officer would

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712 *Powell v Alabama,* 287 U.S. 45

713 The US Supreme Court further held in Powell v. Alabama that where the accused does not have the means to have an attorney, the state has the obligation to appoint one beginning from a "critical stage of the proceeding." Such critical stage in Powell was arraignment. However, through time such critical stage is elaborated to include a wide range of processes, when the accused is confronted an adversary charge, such as, "1) arraignment where pleas are entered or notice of defences given; 2) preliminary hearings; 3) certain sorts of pre-trial identification procedures; 4) interrogations by the police; 5) interrogations by prosecutors." [Footnotes omitted]. Donovan, *supra* note 104, at 44,45

714 *Tamirat, et al., supra* note 76

have to stop the interrogation until her counsel is summoned or where the suspect is an indigent, take her to a court of law so that the court may appoint a lawyer for her. The circular question is, if the suspect/accused is not told that she has the right to counsel does she request for one? There is no answer to that. However, the investigating police officer, unlike in the American legal system, does not have the obligation to inform the arrestee that she has the right to counsel.

Once the stage at which the right to counsel attaches is determined, the next question is how that right may be exercised. In the criminal process, there are generally two categories of persons—those who can afford to hire an attorney and those who cannot. The above discussion may well work for a suspect who affords to have a counsel. Where the suspect is one who is not able to hire an attorney, there are two constitutional requirements in order for her to get a state appointed counsel. First she must be able to show to the court that she does not have sufficient means to pay for an attorney; and second, she must show that miscarriage of justice would result should the state fail to appoint one for her. If the rich can obtain counsel beginning from police interrogation, the Constitution also guarantees that the indigent also gets the same rights. Art 25 of the Constitution provides that individuals are equal before the law and have the right to equal and effective protection of the law without discrimination based on wealth, among other grounds. One would certainly raise the question how this right may be exercised in the absence of a strong and viable public defender's office. A research indicated that, "[a]lmost no (remand) prisoner can afford to pay a defence lawyer, which means that legal aid is virtually absent in the Ethiopian criminal procedure."[715] One certainly recognises the resources limitation we have in Ethiopia that we cannot have a state appointed counsel to every accused while we do not have sufficient number of judges and prosecutors. However, it is also not acceptable that a system with a power to detain without bail for serious offences does not afford a counsel.

Looking at the dire situation of the criminal justice system some opined for judicial vigilance. It is contended that the judge has both the power, as provided for in the Criminal Procedure Code, and the obligation as provided

[715] Baseline Study Report, *supra* note 84, at 199. It is further stated that the problem of lack of counsel is obvious both for those on remand and convicted. In some places the only legal aid service they get is from prisoners' committees. *Id*., at 121

for in the Constitution, to be active and vigilant.[716] Looking at the procedure law, the practice of our courts and the role of the judge in the criminal process, one would argue it is easier to demand vigilance because the courts have power to put questions to either party, including calling witnesses not called by the parties and order any evidence be presented when the interest of justice so requires. It is in this background that the circumstances wherein the judge may have to be so vigilant are listed. They are: "1) appearances where violations of constitutional and statutory restraints on pre-trial incarceration are alleged; 2) appearances where prolongation of pre-trial incarceration is in issue; 3) appearances where pleas are entered; 4) appearances where notice of defenses is given; 5) preliminary hearings; 6) hearings where the prosecutor seeks to introduce evidence of pre-trial identifications, obtained by the police, of the accused; 7) hearings where the prosecution seeks to introduces confessions or other *statements* obtained by police interrogation; 8) hearings where the prosecution seeks to introduce confessions or other statements obtained by prosecutorial interrogation; 9) court appearances involving legal argument on technical procedural points, such as, the legal validity or propriety of an indictment; 10) court appearances requiring legal arguments on the admissibility of evidence; 11) hearings requiring an ability by the accused to marshal and present facts; 12) hearings where the accused person is denying or attempting to controvert the facts alleged by the prosecutor; 13) court appearances necessitating an ability by the accused to understand and present legally adequate mitigating circumstances; 14) taking of witness testimony, whether in the courts of trial or otherwise."[717]

Judicial vigilance is always necessary, particularly in legal systems like ours where the judge has the duty to do so. It is understood that the judge cannot be in the police station while interrogation is conducted but the judge can control the evidence when it is presented to her. It is also understandable that in the absence of a lawyer, the judge must do more than what she would be asking would there be a lawyer. But there are cases that certainly should not be tried without the assistance of a counsel no matter what! Thus, in order to clarify the existing vagueness and to set the minimum standard, the Draft Criminal Procedure Code provides as follows:

Article 115 Defence Advocate and Conditions Making Defence Advocate Necessary

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716 Donovan, *supra* note 104, at 27

717 *Id*., at 46,47

1. *Any person accused or suspected of an offence has the right to counsel at any stage of the proceeding beginning from investigation. Where he does not have sufficient means to pay for it upon his application the court may appoint him one if it believes miscarriage of justice would result should the case be tried without an advocate.*
2. *The following cases in particular shall not be tried without a defence advocate:*

    a) *a charge against a person who cannot defend himself because of mental or physical defect; and*
    b) *where the crime alleged to have been committed carries rigorous imprisonment for more than ten years or death penalty.*

3. *In cases provided for under sub-article (2) of this Article, the accused shall be assisted by a counsel right from the beginning of the interrogation.*
4. *The attorney appointed at State expense has the obligation to represent the accused before the appellate court too.*

12.1.2 Open Court Trial

FDRE Const., Art 20

1. *Accused persons have the right to a public trial by an ordinary court of law . . . The court may hear cases in a closed session only with a view to protecting the right to privacy of the parties concerned, public morals and national security.*

Courts' Proclamation, Art 26

1) *All cases shall be heard in open court.*
2) *Notwithstanding the provisions of sub-Article (1) hereof and without prejudice to procedural laws relevant to adjudication, cases may be heard in camera in consideration of the following:*

    a) *public and state safety and security; or*
    b) *public morality and decency.*

In the normal course of things, trial is conducted in open court before an ordinary court.[718] By public trial the law anticipates two aspects: first, the

[718] The concept "ordinary court" presupposes certain qualities and characters of the

public nature of the trial has positive psychological impact on the judges in order to maintain some level of fairness in the process as well as it makes the accused feel that she is not victimized by the court in particular and the system in general. Second, it gives the public access to see what is going in the courtroom particularly in criminal cases, as it would want to see the offender punished and the innocent released unhurt so as to establish the public confidence in the courts. The public access to such hearing is not only enforcement of its constitutional values, but also that is what each one of the members of the public expects should she appear as a suspect or as an accused. As indicated in the preliminary part of this material, open court trial is more of legal politics than enforcement of law because the discussion has a lot to do with public confidence in the judiciary than it has to do with fairness.[719]

The usage of the phase "open court trial" appears to be limited to the trial and particularly the hearing of witnesses and examination of evidence. In fact, the trial is just a few days' theatre. There are many pre-trial appearances of the accused person, such as, bail and remand, recording of confessions and statements. As indicated in the discussion on preliminary matters, inasmuch the outcome of the case is important, the process is as important. Thus, the public need to have access not only to the outcome of the case but also to the process. Those processes, although most of the time they are ex-parte hearings, they are important supervision of law enforcement by law enforcement agents. However, as the final decision is made by the court, it is also a procedure for accountability of the court.

Those pre-trial processes are also granted to Addis Ababa and Dire Dawa Cities Courts. Unfortunately, the newly established Addis Ababa City Courts, for example, do not have sufficient space. Therefore, there is no access for the public to attend such hearings. This is also the case in many benches of

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court that it would be professionally competent, institutionally independent and impartial in its judgment.

719 With respect to public confidence in the justice system, it is often contended that long adjournments make it impossible for the public to appreciate whether the courts function properly because the public cannot see the lifespan of a case in one court session. Menberetsehai, *supra* note 83, at 4, 15, 25. However, it is a matter of common sense that public confidence cannot be established by merely showing swift judgment on cases; it is rather by showing faire process. This is greatly intertwined with the discussion on the economics of criminal justice system as discussed in Background of the Criminal Process.

the Federal First Instance Court. Not only the preliminary processes are held in the office of the judges; sometimes hearings are conducted in the office of the judges. There are questions that are debatable to answer—whether the accused can validly challenge the hearing on such ground; whether the suspect/accused can lodge her appeal against such decisions based on such grounds; whether resources limitation can be a justification for restriction of rights of the suspect/accused. The *Dergue* trial, for example, was limited only to 50 members of the public in addition to the families of those accused. This restriction is because of space limitations, a justifiable restriction, which is different from total preclusion of the public from attending the hearing.

When the law provides that the public has the right to attend court hearings, it is not necessarily restricted to physical presence of the public. Reporters would attend trials and hearings and make report on such proceedings. Usually, members of the media are not admitted or they are not allowed to bring in recorders in those few cases where there is limited space in the courtroom. However, the courts preclude reporters and journalists and prohibit almost any public discourse on pending cases. Sometimes, defence lawyers demand cases not be reported or such reports be recanted. The justification is said to be "in order not to influence the handling and outcome of the cases." Such justification is valid in common law legal systems where the fact-finder is not a professional judge but lay-jurors. In our case, however, there are no jurors; the judges are professionally trained. Thus, it is difficult for them to be influenced by news reports. Furthermore, where the court believes either party's right to privacy, public morals and national security requires it, it may decide to hear cases in camera (closed-court).[720]

[720] The fear of the court is that the newspapers are not properly reporting cases and misquoting statements giving false image of the process. While the purpose precluding reporters from the trial court was with a view to avoid improper reporting or misquoting of cases and decisions, it also seriously strained public attendance or public discourse on cases. In some cases, the court is seen responding to allegations in newspapers comments. A very good example is *Coalition for Unity and Democracy v. Prime Minister Meles Zenawi* (Federal First Instance Court, 2005) F No. 54024, where the court addressed the issues item by item. That could have been handled by a press officer on the media, a proper forum, rather than by a judge on the bench.

12.1.3 The Right to Speedy Trial

FDRE Const., Art 19

> *4. . . . . In determining the additional time necessary for investigation, the court shall ensure that the responsible law enforcement authorities carry out the investigation respecting the arrested person's right to a speedy trial.*

FDRE Const., Art 20

> *1. Accused persons have the right to a . . . trial . . . within a reasonable time after having been charged . . .*

Although the English version appears to restrict the right to speedy trial to the process before the court, the right is of broader application. This is particularly apparent from the Amharic version of the concept "*betolo yemedagnet mebt*." Thus, beginning from the time the police receives information about an alleged offence, the right is exercised at many stages of the process until the suspect is deselected by the criminal process or judgment is entered. This is apparent from the provisions of the law. For instance, the Constitution provides that the court in granting additional time for investigation considers first whether such time is *strictly necessary* and second it "ensures that the responsible law enforcement authorities carry out the investigation respecting the arrested person's rights to a *speedy trial*."[721] [Emphasis added]. The law also requires the investigating police officer to complete her investigation without unnecessary delay.[722] Upon receiving the police investigation report, the public prosecutor makes her decision as appropriate. Where she decides to prosecute the suspect, however, she draws and files the charge within the following 15 days before the court having jurisdiction.[723] In respect of vagrancy cases such period is reduced to 10 days.[724] Once the charge is filed before the court, the latter has the duty to try the case 'within a reasonable time.' Some argue that the right provided for in the Constitution is "trial within a reasonable period" not a "speedy trial." Both phrases don't mean different things. The accused has the right to speedy trial as regards the process before trial. Once the

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721 FDRE Const., Art 19(4)

722 Art 37(1)

723 Art 109(1)

724 Proc. No. 384/2004, *supra* note 98, Art 8(1)

charge is filed before the court, the court must try the case in a reasonable period.[725] The Constitution requires a reasonable diligence on the part of the justice system that both phraseologies were geared towards a speedy disposition of the case. Once the case is motioned, the frequency and length of adjournments are strictly regulated. However, as in case of other provisions, those provisions regarding the right to speedy disposition of cases are not complied with. Investigations take much longer period than they should; further investigations are even longer.[726] The public prosecutor takes longer period before she reviews the case; and that many cases are discontinued because they are barred by period of limitation.[727] Once the court records how the accused pleads, it adjourns the case for a long time (often 6 months) in order to hear prosecution evidence.[728] The courts grant unlimited number of and lengthy adjournments each of which are dealt with in section 13.6.

12.1.4 Pre-trial Access to Evidence

FDRE Const. Art 20

> 4. *Accused persons have the right to full access to any evidence presented against them, to examine witnesses testifying against them, 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.*

Art. 92.—Contents of the record.

> *(1) The record [of the preliminary inquiry] shall contain the following particulars: . . .*
> *(2) The same particulars shall appear in the copy of the proceedings sent to the public prosecutor and the accused.*

Art. 97.—Exhibits.

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[725] The Constitution rather uses the phrases "*betechale fitinet*" for 'speedy trial' and "*tegebi behone achir gize*" for 'trial within a reasonable time' under Arts 19(4) and 20(1), respectively.

[726] Sometimes, investigations take 5 years. Baseline Study Report, *supra* note 84, at 17, 184

[727] *Id*., at 186

[728] *Id*., at 99

All exhibits including depositions and statements under Art. 27 and 30 shall be marked and numbered by the registrar of the court. Such exhibits shall be kept by the registrar in a safe place and shall not be withdrawn without an order of the court.

Art. 143.—Additional witnesses.

> *(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.*

Pre-trial discovery (access to evidence) is an essential part of fairness and manifestation of the truth based on relevant and reliable evidence. Thus, the Constitution provides that the accused has the right to full access to any evidence presented against her, the right to examine witnesses testifying against her and to obtain and produce evidence in her defence. This provision indicates that access to evidence has two important aspects. First it is the constitutional right of the accused to examine the evidence presented against her. Such access to evidence is part of the preparation of her defence; if she cannot properly examine the evidence tendered against her, she cannot prepare effective defence. Second, only relevant and reliable evidence may be presented against her. Thus, she is the right person to test the reliability of the evidence presented, which is a significant assistance to the administration of justice. Therefore, she needs to have access to that evidence in a reasonable time before the trial. Where the accused or his counsel is given access to evidence that are going to be produced against her at the trial, it creates some sense of fairness in the mind of the accused even if judgment is entered against her, and, it assists the court in the ascertainment of truth and reliability of those evidences. Furthermore, it enables the accused determine how to plead.

Ideally, access to evidence is to be exercised at various stages of the proceeding. Where the offence is one in respect of which preliminary inquiry is required and such preliminary inquiry is held, at the conclusion of the proceeding, the record of the preliminary inquiry would also be given to the accused having the same content as the one given to the public prosecutor. The record is given to the suspect before even the public prosecutor decides whether to prosecute her. In all other cases where there is no preliminary inquiry, once a charge is filed before the court having jurisdiction, the charge along with the list of evidence and a copy of those evidence that may be copied is given to her save those exhibits where it is not physically possible

to make copy of. Furthermore, all the records and evidences, including exhibits, are to be submitted to the registrar. The registrar receives, mark them and keep them in a safe place until trial. The content of the record that is given to the registrar includes all depositions, including, witness statement and confession of the accused whether it is given to the police by virtue of Art 27 or to a court by virtue of Art 35. Whatever is included in those documents, the accused have access to them by some procedure because whatever is given to the court, an identical copy would be given to the accused. Where the public prosecutor wants to call additional witnesses that were not originally included in the list of evidences given to the accused, she is required to give such new list of witnesses she wants to call to the accused in writing before she calls them.

Those provisions of access to evidence or pre-trial discovery were not introduced by the Constitution in 1995; they were part of the Code since 1961. The practice however, is different from what is provided for both in the Constitution and the Code for various reasons. Unlike the civil process, the criminal process is shadowed by secrecy. The charge sheet served on the accused complies with the Forms of Charges as annexed in the Second Schedule rather than the substance of the law. It has only the three elements of the charge—the caption, statement of the offence and particulars of the offence. The list of evidence is not considered to be part of the charge sheet; there are no list of evidence, "no written statements, no results of police investigation are given to the defendant"[729] and the constitutional obligation has never been regarded.

The main reason the public prosecutor raises for not giving the list of evidence to defendant is the likelihood of the accused to tamper with the evidences and to intimidate witnesses. However, what matters ultimately is what the court decides. So far, the court accepts the argument of the public prosecutor and denied the accused access to evidence in all of the cases. This argument is contrary to the Constitutional provision of pre-trial access to evidence and weakens the administration of the criminal justice as the evidence are not properly tested by defendant who knows better. Furthermore, preservation of the integrity of the evidence is the responsibility of the law enforcement agencies. Such effort is assisted by the various provisions of the law, such as, remanding defendant into custody for investigation purposes, and the use of extra-judicial statements of witnesses

[729] *Id*., at 99

where they change their statements.[730] Else, the state also has the duty to put witness protection schemes in place which is not new to any criminal justice system.[731]

The practice with regard to access to evidence is changing; in some federal first instance courts, the accused was allowed to take copies of the evidence submitted to the court after having paid the necessary photocopy expenses. Recently, the charge sheet is being served on defendants along with list of evidence in few benches in Addis Ababa. However, for lack of storage, exhibits are being placed with the police; and thus access is limited. The courts are also active and passive participants of such unconstitutional practice.

12.1.5 Presumption of Innocence

FDRE Const., Art 20

> 3. *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.*

The investigation, prosecution and trial of an offence are endeavours to ascertain whether the alleged offence is actually committed and whether it is committed by the accused. Until such time as the court is convinced by the prosecution evidence and convicts the accused, the latter is presumed to be innocent and treated as such. However, the presumption of innocence and the treatment as such have to be actual and meaningful, and it is not limited to the trial stage only. Simple as it may seem, this concept of presumption of innocence is elusive and deceptive as we can see it from various activities of the legal actors. For instance, in order to send summons to the suspect, the police officer need to balance the evidence she has; sending summons without a sufficient evidence to create a reasonable suspicion that the person summoned has committed the office is contrary to the principle of presumption of innocence. Likewise, in the

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730 Arts 67(c), 144, 145

731 Proc. No. 4/1995, *supra* note 181, Art 34(6) provides that the Federal Ministry of Justice has the power and duty to "see to it that witnesses to a criminal case are accorded protection as necessary." In its earlier days, the Anti-Corruption Commission prepared draft legislation for witness protection which is also applicable to non-corruption criminal processes. The draft remained a draft though.

determination of bail and remand, the court has to tend more to releasing the detained person. A repeated remand is contrary to the principle of presumption of innocence for it amounts to punishing the accused before she is found guilty. In fact, *a priori* denial of bail is not in conformity with the presumption of innocence. Thus, the way the detained/accused person is treated is the index against which her right to be presumed innocent is complied with.

12.2 Change of Venue and Withdrawal of Judges

Change of venue and withdrawal of judges is different from those rights of the accused/the suspect discussed above. The change of venue and withdrawal of judges are, however, other forms of guarantees of both institutional and personal fairness and impartiality. These remedies are available both to the public prosecutor and the accused.

12.2.1 Change of Venue

Art. 106.—Change of venue.

Whenever it is made to appear to the High Court by application before a trial has started either by the public prosecutor or by the accused:

- *(a) that a fair and impartial trial cannot be held in any criminal court subordinate thereto; or*
- *(b) that some question of law of unusual difficulty is likely to arise; or*
- *(c) that an order under this Article will tend to the general convenience of the parties or witnesses; or*
- *(d) that such an order is expedient for the ends of justice or is required by any provision of this Code, it may make an order against which no appeal shall lie to the effect that:*

    - *i. any offence be tried by any court not empowered under the provisions of Art. 99-104 of this Chapter but in other respects competent to try such offence;*
    - *ii. an accused person be committed for trial to itself.*

Courts' Proclamation, Art 8.—First Instance Jurisdiction of the Federal Supreme Court

The Federal Supreme Court shall have exclusive first instance jurisdiction over the following:

3) application for change of venue from one Federal High Court to another or to itself, in accordance with the law.

Venue is the place of trial and thus change of venue is changing the place of trial. Where any of the grounds listed under the law that affect the fairness of the court occurs, either party may request the higher court to order change of venue from one locality to another. Originally, change of venue was allowed only from one lower court to another and such application would be filed to the High Court. The implication is that no change of venue application can be filed in respect of cases that are pending before the High Court. That part of the provision of Art 106 which gives such impression is modified by the Courts' Proclamation that a change of venue application may be filed before the Federal Supreme Court, Art 8(1). Where the case is pending before a Federal First Instance Court, the application for change of venue is to be filed before a Federal High Court; where the case is pending before a Federal High Court the application is to be filed before the Federal Supreme Court. Likewise, where a federal criminal case is pending before a State High Court by delegation, such application for change of venue may be filed before the Federal High Court in the locality. In the absence of such Federal High Court in the locality, the application may be filed before the State Supreme Court. Where a federal criminal case is pending before a State Supreme Court, such application for change of venue may be filed before the Federal Supreme Court. The application for change of venue is to be made before the hearing begins. Once the hearing begins, the party may lodge an appeal from the decision of such court rather than interrupting such hearing. Also, like *habeas corpus*, such application is to be filed before a civil bench.[732]

The grounds for granting for change of venue are limited. The first ground is where "a fair and impartial trial cannot be held in any criminal court." Certainly, if this is to occur, change of venue could be the best remedy. However, what are the possible situations for this to happen? The allegations have to be strong for the party challenging the power of the state and its ability to be fair and impartial. Suppose X is a very recognized and respected person in the locality. She is appearing before the local court where only one judge presides. If, for instance, the local people are unhappy and protest against her trial obstructing the process, it may not be easy for the judge to live peacefully and secured among this community should she, based on the evidence, convict this person. Her future insecurity puts serious

[732] Courts' Proclamation, Art 11(2)

restraint on fairness and impartiality. This is because the lower courts are particularly 'local'. It is, however, doubtful whether this can happen to the High Court.

The other ground for change of venue is where "some question of law of unusual difficulty is likely to arise." Change of venue is possible where the case is being tried by lower courts, such as, First Instance Court and Federal High Court. However, as the jurisdiction of cases are allocated to them based on the assumption that those cases have such level of complexity which the respective courts can handle, it is difficult to anticipate what kind of issues are "unusual difficulty."

The third ground is where "an order under this Article will tend to the general convenience of the parties or witnesses." This ground tends to the general convenience of parties and witnesses particularly where, for instance, the offence is committed on a journey. In such cases, each of those local courts whose localities traversed during the commission of the offence have jurisdiction to try the offence. However, some are more convenient than others because of distance between the place of trial and residence of witnesses and the accused. In such cases, change of venue is justified by the convenience of the accused and the witnesses.

The fourth ground of change of venue is where "such an order is expedient for the ends of justice or is required by any provision of this Code." This provision is even vague.

The court, before which such application for change of venue is filed, where it is satisfied with the reasons as presented by the party, may either: 1) order that such case may be tried by other court, which is competent in other respects to try the offence although it lacks local jurisdiction. Thus, if the case is pending before the First Instance Court sitting in Lideta, it may transfer it to another First Instance Court sitting in Arada; from the Federal High Court sitting in Dire Dawa it may be transfered to another Federal High Court sitting in Addis Ababa. Or, 2) the court before which the petition is filed may order the accused person be committed for trial to itself. However, this does not seem to be advisable for applications before the Federal Supreme Court for it restricts the right of the accused to have her case reviewed on appeal should she be convicted. Such decision on granting or denying the petition on change of venue is final from which no appeal lies.

In *Behlbi Abreha,*[733] petitioner while in detention in Dessie, South Wollo, requested the court to transfer his case from Amhara State Court to Federal Court in Addis Ababa as per Art 106 and Proc No 322/2003, Art 3(2).[734] The grounds of his claim were (a) before his arrest, he was working and living in Addis Ababa and his family is in Addis Ababa. Therefore, they could not regularly visit him because of the distance and expenses; and (b) because he could not afford to hire a lawyer, his cousin agreed to represent him *pro bono*; however, the latter could not shuttle back and forth to represent him. The public prosecutor objected to the claim on the ground that the evidence is found in the region where he is facing the charges. The court rejected the petition reasoning that the petition did not fall under Art 106 and Proc. No. 322/2003 was not relevant to the case. In a related issue, one would raise the question whether there is a possibility of obtaining change of venue from state courts to federal courts based on identity of the defendant. In civil matters where the parties are permanent residents of different regions, the suit falls under the jurisdiction of the federal court.[735]

Like the federal courts, states courts also have their own change of venue procedure. For instance, the Debub Nations, Nationalities and Peoples' Regional State Supreme Court has the power to entertain change of venue requests in respect of cases pending before any of the Regional State High Court. Also the State High Courts have jurisdiction of such request in respect of cases pending before any of the State Woreda Courts. Such court before which the application for change of venue is filed, can order the case be seen by other equivalent courts (High Court or Woreda Court) or it commits the case to itself.[736]

In areas where there are two or more benches in the same locality, there are instances where a case is administratively assigned from one bench to another, particularly where there are more than one bench of equal jurisdiction in the same area, such as, Federal First Instance Courts and Federal High Courts in Lideta. Whether such re-assignment of cases from one bench to another could be considered as change of venue is not

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733 *Behlbi Abreha v. Special Public Prosecutor* (Supreme Court, 2007) Crim. App. F No. 31274

734 Proc. No. 322/2003, *supra* note 647

735 Courts' Proclamation, Art 5(2)

736 SNNPRS Courts Proc. No. 43/2002, *supra* note 156, Arts 5(1)(b), 6(1)(c), respectively.

clear. This is not part of the administrative power of the president of the court.[737]

12.2.2 Withdrawal of Judges

Courts' Proclamation, Art 27

1) No judge of a Federal Court shall sit in any case where:

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

2) The judge concerned shall withdraw as soon as he is aware that he should not sit, in accordance with sub-Article (1) hereof, and shall be replaced by another judge.

Courts' Proclamation, Art 28

1) Where a party to a case is of the opinion that a judge should not sit for one of the reasons specified in Article 27 hereof, he shall submit a written application to the court requesting that the judge be removed.
2) The application shall be made before the trial opens or soon after the party becomes aware of the reason for making such an application.
3) Where the judge is sitting alone he shall, after considering the application, either withdraw or refer the matter for decision to another division of the same court or, where there is no other division, to the court in which appeal lies from the decision of his court.

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[737] Proc. No. 254/2001, *supra* note 167, Art 18

4) *Where the judge is sitting with other judges, he shall withdraw and the remaining judge or judges shall hear the application and give a decision thereon.*
5) *A decision given under sub-Articles (3) and (4) hereof shall be final and subject to no appeal.*
6) *A judge shall forthwith comply with a decision given under this Article.*

Courts' Proclamation, Art 29

The costs of application under Article 28 hereof shall form part of the costs in the case. Where the application is dismissed, however, the costs shall be borne by the applicant irrespective of the outcome of the case.

Courts' Proclamation, Art 30

Where a party makes an application under Article 28 hereof without good cause the court may, in addition to dismissing the application, impose a fine not exceeding Birr five hundred (500).

Unlike change of venue which concerns the particular locality court, withdrawal of the judge is related to the individual judge. Therefore, where facts that are provided for in the law relating to one of the presiding judges exist, such judge either withdraws herself from the bench or either party may apply for her removal. The grounds for the withdrawal or for the removal of judges are evident as provided for under Art 27(1) of Courts' Proclamation. Therefore, if the judge is "related to one of the parties or the advocate thereof by consanguinity or by affinity" or the case relates to one of the parties she "acted as tutor, legal representative or advocate" or she "has previously acted in some capacity in connection with the case or the subject matter of the dispute" or she "has a case pending in court with one of the parties or the advocate thereof," she cannot preside over such case. Furthermore, if any of the grounds stated above exists, the judge should withdraw as soon as she is aware that she should not sit, and be replaced by another judge. If she fails to do so, however, or where either party is of the opinion that the judge should not sit for one of the reasons specified above, the latter submits a written application to the court requesting that the judge be removed. Furthermore, where the party or the judge herself is aware of other relationships with either party that is not listed from (a) to (d), but the relationship certainly affects her fairness and impartiality, she must withdraw or would be removed. A party may establish a relationship by affinity or consanguinity based on the family law. There are both federal

family code and the respective states have their own family codes. The law governing such relationship regarding federal judges is presumably the federal family code.

The petition for the removal of the judge would be filed before the trial opens or soon after the party became aware of the reasons for making such an application. Where the judge is sitting alone, she shall either withdraw or refer the matter for decision to another division of the same court or where there is no another division, she shall refer the matter to a court in which appeal lies from the decision of her court. If the judge is sitting with other judges, however, the remaining judges without the judge against whom the application is made, hear the application and give a decision on the matter. Such decisions on the removal of a judge are not appealable and the judge forthwith complies with the decision.

The cost of application forms part of the costs in the case. Where the application is dismissed, however, the costs shall be borne by the applicant irrespective of the outcome of the case. Where a party makes the application without good cause, the court may impose a fine not exceeding 500 Birr in addition to dismissing the case.

The President of the Federal Supreme Court has the power "in consultation with the Federal High Court and the Federal First Instance Court, place, assign and administer judges of Federal Courts."[738] The president of the Federal Supreme Court may "delegate part of his powers and duties to the president of the Federal High Court or of the Federal First Instance Court."[739] Going beyond authorising delegation, the law further provides that the president of each court has the power to "assign and administer judges of the Court pursuant to the delegation and in accordance with the directives given by the President of the Federal Supreme Court."[740] Based on these provisions, there is re-assignment of judges from one bench to another almost every year without having regard to the disposition of the case the judge is presiding over. Despite the fact that such reassignment of judges has the same effect as withdrawal/removal of judges, whether this re-assignment of judges is actually removal/withdrawal is not clear.

738 Courts' Proclamation, Art 16(2)(b)

739 Proc No. 138/1998, *supra* note 164, Art 2(4)

740 Proc. No. 254/2001, *supra* note 167, Art 2(1)

Chapter 13

The Hearing

13.1 Pre-Hearing Matters

The hearing is the stage at which the case is heard by the trial court and decided. The case passes through many stages to come to the hearing. The police investigate the case and the public prosecutor decides to prosecute the accused finding a case against the latter. The hearing does not begin with the initial filing of the charge by the prosecutor. There are procedures to be complied with before the actual hearing begins. The court fixes the initial appearance of the parties, serves the charge to the accused and reads and explains same to her.[741] If she has objections as to forms and content to the charge, she raises her objection at this stage. Where she has objection to the charge, the hearing does not follow; the parties prove their case on the objection and the court makes its ruling. Where evidence is needed, the case may be adjourned. Once the objection is settled, the accused may be required to plead. On such date, the court does not require the parties to

[741] There is a debate as to the time at which the accused is served with the charge. There is no express provision at what stage the charge is to be served to the accused. However, there are only indications that the accused has information that she is charged for an offence because of the preliminary inquiry process and other investigating activities, such as, her arrest and search of premises, if any. She does not have actual knowledge of the specific charge that is pressed against her until she is served with the actual charges. Such charge is given to her, in practice, before the court and in some cases as introduced recently, earlier along with summons for her initial appearance before the trial court.

call their witnesses and produce their evidence because the accused may admit and the whole process may be irrelevant. From this whole process, there is one thing clear that there are missing procedures for the effective application of the provisions of Arts 123 and 124.

It is indicated in Chapter 7 that there is no preliminary hearing on the guilt of the accused in order to determine the justifiability of the continued detention of the arrestee. Here again, there is a gap in that there is no pre-trial conferencing in order to determine the trial plan, i.e., whether the parties have their evidence in order and they agree on the issue to be litigated before the court and to decided the date on which the parties are ready to present their evidence. Despite the gap in process that exists in the law, a sensible practice has evolved. The charges are given to the accused, read over and explained by the court and asked whether she has objections. It is only after such objections are settled that the accused is asked to plead. After the plea of the accused is entered, the court adjourns the case to hear prosecution evidence. This part is dealing with pre-hearing matters. It is not necessarily restricted to hearing related matters but it is related to any thing that is a preparation for the hearing. Thus, many issues are jumbled in this section. The following section deals with the actual hearing, judgment and sentence.

13.1.1 Attendance of the accused

FDRE Const. Art 20

> 7. *They have the right to request for the assistance of an interpreter at state expense where the court proceedings are conducted in a language they do not understand.*

Art. 123.—Trial to be fixed.

When the charge has been filed under Art. 109, the court shall forthwith fix the date of trial and cause the accused and the public prosecutor to be summoned to appear on the date and at the time fixed by the court. It shall take such steps as are necessary to secure the attendance of the accused, if in custody.

Art. 124.—Witness summonses.

> *(a) So soon as the date of the trial has been fixed, the public prosecutor and the accused shall give the registrar a list of their witnesses*

and experts, if any, whose presence is necessary. The registrar shall forthwith issue summonses in the form prescribed in the Third Schedule to this Code.

(b) The public prosecutor and the accused shall be responsible for ensuring that all exhibits to be produced at the trial shall be in court on the day fixed for the trial.

Art. 125.—Bench warrant.

Where an accused person or a witness, who has been duly summoned and there is proof of service of such summons, has failed to appear as required, the court may issue a bench warrant and such accused person or witness shall be brought before the court by the police.

Art. 126.—Opening of hearing.

(1) The court shall sit on the day and at the hour fixed for the hearing.

(2) Where an interpreter is required for the purposes of any proceedings, the court shall select a qualified court interpreter. Where none is available it will select a competent interpreter but no person shall be selected who is a relative to the accused or prosecutor or is himself a witness.

(3) The case shall be called and the accused shall be produced.

Art. 127.—Attendance of accused.

(1) The accused shall appear personally to be informed of the charge and to defend himself. When he is assisted by an advocate the advocate shall appear with him.

(2) The accused shall be adequately guarded and shall not be chained unless there are good reasons to believe that he is dangerous or may become violent or may try to escape.

Those provisions as reproduced above are meant to secure the attendance of the parties before the court. Art 123 provides that when the charge is filed by the public prosecutor as per Art 109, the court fixes the date for the trial and cause the accused and the public prosecutor to be summoned to appear on such date and at the time fixed by the court. Where the accused is in custody, the court takes such steps that are necessary to secure her attendance. The accused is personally present to be informed of the charges against her. She also has the right to defend herself; it means she has the

right to object to the content of the charge and to produce her own evidence. She can do so effectively when she is represented by a counsel. Thus, where she is assisted by an advocate, the advocate also appears with her. Where the accused is not able to speak the language of the forum, a qualified interpreter would be appointed for her. Persons who are involved in the case because they are relatives of the accused or the prosecutor or themselves witnesses in the proceeding cannot be appointed as interpreters.

The accused is to be adequately guarded. The law provides here that the accused is not to be chained unless there are good reasons to believe that she is dangerous or may become violent or may try to escape. The use of handcuff is a serious problem in our criminal justice system as is in many other systems. The Constitution, however, under Art 18 provides that individuals have "the right to protection against cruel, inhuman or degrading treatment." The use of handcuff may be considered as a degrading treatment.

Art 123 further provides that as soon as the public prosecutor and the accused are informed of such date, they would give list of witnesses and experts to the registrar whose attendance is necessary. The registrar accordingly sends them summons according to the Third Schedule, Form IX and X of the Code. It is discussed in relation to Arts 35(4), 91, 97 that depositions, other records and exhibits are forwarded to the registrar of the trial court to be kept in a safe place until the date of the trial. The registrar has thus the obligation to bring them during the trial. However, the public prosecutor and the accused are responsible for ensuring that all such exhibits are produced at the trial. Art 124 also provides that where an accused or a witness duly summoned fails to appear as required by the court, the latter may issue a bench warrant so that such evidence may be brought before the court by the police.[742]

Those provisions are important provisions for the enforcement of the attendance of the accused and the witnesses. However, the above batch of provisions gives two false impressions. The first false impression that those provisions give is that, on the first day the accused appears before the court, the evidence is produced. The second false impression that it gives is that on such day, both the prosecution and the defence are produced.

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[742] This bench warrant is different from arrest warrant in that, it is issued by the court for immediate execution and for the purpose of securing attendance at the trial and not for the purpose of investigation.

First, production of evidence on the first day of the party's appearance before the court is not valid because there are many pre-hearing matters that need to be resolved. For instance, once the accused appears before the court, after the charge is read and explained to her, before she is required to enter her plea, she is asked whether she has an objection based on form or content of the charge as per Arts 130 and 131. Where an objection cannot be resolved forthwith for lack of evidence, the case would have to be adjourned and witnesses would have to go home to come some other time. Furthermore, even after the objection is raised and disposed immediately, the accused may plead guilty and the need to produce prosecution evidence may not be necessary. Therefore, in such circumstances it is not reasonable to call witnesses and produce other evidence on such first day of appearance of the parties.

Second, even on the date the prosecution evidence is produced, the accused is not required to produce her defence until such time the court is convinced that defendant must enter her defence as per Art 141 (See the comment on Art 141). In the Malayan Code, the main source of our Code, evidence is not produced on the first appearance of the parties; the court orders the production of such evidence only "when the Court is ready to commence the trial . . ."[743]

The problem of these provisions is presumably because they were drafter by a person with common law, jury background. In a system where there is a jury trial, the continuity of the trial is essential in order to enable the lay jury decide on the facts before memories fade. However, before the jury hears the matter, many of the issues are well spelled out by discovery and conferences both of which are missing in our criminal justice system.[744] Thus, the practice has its own remedy that those provisions are implemented in a manner that is consistent with reason and practicality.

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[743] See The Malayan Code, Sec. 178(i), 186(i) and 202(i). The full content of the provision is "when the Court is ready to commence the trial, the accused shall appear or be brought before it and the charge shall be read and explained to him and he shall be asked whether he is guilty of the offence charged or claims to be tried."

[744] Such is the understanding of the provisions of the Malayan Code from which many of the provisions of the Code are taken. This can be read from the provisions of Sec 141 and other provisions, such as, Sec. 178 for trials before the Court of a Judge without assessors, Sec 186 for trials before the Court of a Judge without the aid of assessors, Sec 202 for trials by jury before the Court of a Judge. *Id*.

13.1.2 Reading of and Objections to the Charge

Art. 128.—Verification of identity.

When the accused has been brought into the dock his identity, age and trade shall be established.

Art. 129.—Reading out of charge.

The charge shall be read out to the accused by the presiding judge who shall then ask the accused if he has any objection to the charge.

Art. 130.—Objections to the charge.

(1) If the accused has anything to say as to the form or contents of the charge, the provisions of Art. 119 et seq. shall apply.
(2) The provisions of Art. 131 shall apply where the accused states:

(a) that the case is pending before another court; or
(b) that he has previously been acquitted or convicted on the same charge; or
(c) that the charge against him has been barred by limitation or the offence with which he has been charged has been made the subject of pardon or amnesty; or
(d) that he will be embarrassed in his defence if he is not granted a separate trial, where he is tried with others; or
(e) that no permission to prosecute as required by law has been obtained; or
(f) that the decision in the criminal case against him cannot be given until other proceedings have been completed; or
(g) that he is not responsible for his acts.

(3) Where no objection is raised under this Article immediately after the accused has been required by the court to state his objections, the accused shall be barred from raising any such objection at any later stage in the trial, unless the objection be such as to prevent a valid judgment being given.

Art. 131.—Settlement of objections.

(1) The court shall take down any objection that may have been raised under Art. 130 (2) and shall ask the prosecutor whether he has any statement to make in relation to such objection.

(2) The court shall decide forthwith on the objection where the objection can be disposed of by reference to the law or the facts on which the objection is based are not disputed by the prosecutor.
(3) Where a decision cannot be made forthwith owing to lack of evidence. The court shall order that the necessary evidence be submitted without delay.
(4) The court shall make its decision forthwith upon the necessary evidence having been produced.

Once the accused appears, the court first establishes the identity of the accused. Thus, her name, address, occupation, age and other information relating to her identity as may be relevant, may be established. If any of these does not fit to what has been alleged by the public prosecutor in the charge, it may not be necessary to consider the merit of the case at all because the person before the court is not the same person who the public prosecutor wants to prosecute.

After establishing the identity of the accused, the court reads out and explains the charge(s) to the accused. Making sure that the accused understands what charges she has to answer to, the court asks the accused whether she has any objection to the charge. The objection may be based on the form or content of the charge or any other substantive matters. Where the objection is based on the form and content of the charge, the provisions of Art 119 et seq., the provisions dealing with alteration of and addition to charges and their effects, apply.

Sub-article 2 further lists grounds of objections. Certainly those listed under this sub-article are grounds of objections some of which do not allow the court to consider the merit of the case. Those which deny the court to consider the merit of the case are: where (a) identical case involving the same set of facts is pending before another court; or (b) that the accused has previously been tried for the same offence whether the result is acquittal or conviction; or (c) that the charge against her is barred by limitation or is the subject of pardon or amnesty; or (g) that she is not responsible for her acts.

The other listed grounds of objection under Sub-article 2 do not preclude the court from considering the merit of the case; they are rather preconditions or precautions, such as, (d) that the accused will be embarrassed in her defence if she is not granted a separate trial, where she is tried with others; or (e) that no permission to prosecute as required by law has been obtained; or (f) that the decision in the criminal case against her cannot be given until

other proceedings have been completed. The continued question is whether the listing is exhaustive. Looking at the tendency of the courts that seems to be the case; however, there are many issues to be considered. First, the separate reading of sub-article (1) does not restrict the grounds of objection to those listed under sub-article (2); second, the provisions of sub-article (2) do not define the content of the provisions of sub-article 1; third, the provisions of sub-article (2) themselves do not suggest such list is exhaustive in nature; fourth, if there are mandatory provisions of the law which are not complied with, certainly they have to be addressed.

One such instance is where preliminary inquiry is not held as required by law. While the provisions of the preliminary inquiry are mandatory for a couple of offences, they have not been consistently implemented for many years. There are instances where the accused and her counsel raised the objection that preliminary inquiry has not been held, and therefore, the trial cannot be conducted. Having regard to the nature of such preliminary inquiry, the strategic wisdom of objection to the hearing because such preliminary inquiry was not held does not seem to be clear.[745]

Where such objections are raised by the accused or her counsel, the court takes down such objection and asks the prosecutor whether she has anything to say in relation to the objection. The court then before entering into the merit of the case decide forthwith on the objection where such objection can be disposed of by reference to the law or facts on which the prosecutor raised no dispute. Such is the case, for instance, in relation to period of limitation that date of commission of the alleged crime is stated in the charge and therefore the court is able to decide immediately by having regard to date and the relevant provision of the law. It is possible that the public prosecutor admits the objection as appropriate and was not subject to dispute. Where the decision cannot be made based on the record for lack of evidence, however, the court may order that the necessary evidence be produced. If the objection is made based on the fact that the case is pending in another court, for instance, the accused must produce the appropriate evidence to show such alleged fact. The court then makes its decision as soon as the necessary evidence is produced.

Unlike civil proceedings, preliminary objections not raised during this time are not totally precluded from being raise later in the proceeding. The accused is however required to show to the court that should the court

745 *Kidanemariam, et al., supra* note 136

proceed without entertaining the objection no valid judgment can be given. Certainly, those grounds of objections which would preclude the court entering into the merit of the case without addressing those objections, were they raised at the beginning of the proceeding, are of the nature that prevent valid judgment from being given. Suppose the accused has been convicted and sentenced for the offence before, the objection has to be accepted at any stage of the proceeding as the rejection would have the consequence of subjecting the person to double jeopardy which is unconstitutional whatever the outcome of the case may be. The same goes to objections based on cases pending in another court. Those other precautionary objections are also of the nature which needs to be considered in the course of the proceeding; for instance, where there are many defendants and the case gets complex, it is up to the defendants to raise the objection that they should not be tried together because issues are jumbled and they are not able to properly defend themselves.

Objections based on the form and content of the charge may be raised any time before judgment. This can be read in conjunction with the provisions of Arts 118 et seq. However, what kind of objections are those which do not "prevent valid judgment being given" which the accused is barred from raising later in the trial stage is not clear.

13.1.3 Plea of the Accused

Art. 132.—Plea of accused.

(1) After the charge has been read out and explained to the accused, the presiding judge shall ask the accused whether he pleads guilty or not guilty.
(2) Where there is more than one charge the presiding judge shall read out and explain each charge one by one and shall record the plea of the accused in respect of each charge separately.
(3) The plea of the accused shall be recorded as nearly as possible in the words of the accused.

Art. 133.—Plea of not guilty.

(1) Where the accused says nothing in answer to the charge or denies the charge, a plea of not guilty shall be entered.
(2) Where the accused admits the charge with reservations, the court shall enter a plea of not guilty.

Art. 134.—Plea of guilty.

(1) Where the accused admits without reservations 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 evidence.

Art. 135.—Amendment of plea.

(1) Where a plea of guilty has been entered and it appears to the court in the course of proceedings that a plea of not guilty should have been entered, the court may change the plea to one of not guilty.
(2) The conviction, if any, shall then be set aside.

After objections are settled and that such objections are not bar to considering the merit of the case, the court then proceeds to asking the accused to enter her plea. The charge is already read before the preliminary objections. It appears the court reads the charge to the accused once again; the practice is, however, once the charge is read and explained to the accused and any objections are settled, the court asks the accused how she pleads. Where there are two or more charges, the presiding judge reads and explains each charge one by one separately and asks the accused to enter her plea separately. Such plea of the accused, whether it is one of guilty or not guilty, is recorded as nearly as possible in the words of the accused.

The accused may remain silent, or pleads guilty, or pleads not guilty, or she admits commission (omission) of the offence with reservation. Where the accused denies the charge or admits the charge with reservation whatever the degree of the reservation may be or the accused says nothing, a plea of not guilty is entered. A plea of guilty would be entered only if the accused admits the charge without reservation either by stating the offence in its terms (theft, robbery, murder) or by admitting every ingredients of the offence charged. The accused may not know what elements constitute the offence. In explaining the charge to the accused, the court must explain the offence to the accused and when the accused admits committing the offence the court must make sure that the admission of the accused is based on knowledge. Thus, the court may be required even to ask the existence of every elements of the offence only after which the plea of guilty may be entered.

After the accused pleads guilty and this has been recorded, the court, on its own discretion, either convicts the accused forthwith or demands the prosecutor to corroborate the plea with evidence. It all depends on the degree of conviction of the court. If the court is convinced that the crime has actually been committed and it has been committed by the accused for the latter has made convincing statements and shows that it was her and none else had committed the crime as charged, it may convict her forthwith. Where the accused says only "yes," however, when asked whether she pleads guilty and gives no further explanation, there is a big gap to be bridged between the plea of guilty and conviction. Thus, even though the accused pleads guilty, the court has to demand corroboration. The belief that "no one pleads guilty unless it is true" is only a myth that defendants admit crimes they did not commit.[746] Although the law is not clear whether the nature of the offence has an impact on the exercise of the discretion by the court, it is wise to take it into consideration. For instance, plea of guilty in aggravated homicide cases cannot be sufficient to enter conviction without corroborating evidence unlike less serious offences, such as, petty theft.

Plea guilty of the accused may be amended by the court either on its own motion or upon the application of the accused if the court, in the course of the proceeding, believes that the plea of not guilty should have been entered than the plea of guilty and the conviction, if any, would be set aside.[747] The law provides that the plea of guilty may be amended to one of a plea of not guilty; the law is silent as to whether a plea of not guilty can be amended to one of a plea of guilty. The practice is that it may not be so amended.

13.2 Examination of Evidence

FDRE Const., Art 20

> 4. *Accused persons have the right to full access to any evidence presented against them, to examine witnesses testifying against them . . . .*

Art. 136.—Opening of case and calling of witnesses for prosecution.

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746 Richard A. Leo (2007) "THE PROBLEM OF FALSE CONFESSION IN AMERICA" *31-DEC Champion 30*

747 It is to be noted that the process on determination of guilt and determination of sentence are separate. Thus, after determination of guilt and before determination of sentence the court may come to the conclusion that a plea of not guilty should have been entered or that the accused may change her mind.

(1) After the plea of the accused has been entered, the public prosecutor shall open his case explaining shortly the charges he proposes to prove and the nature of the evidence he will lead. He shall do so in an impartial and objective manner.
(2) The public prosecutor shall then call his witnesses and experts, if any. The witnesses and experts shall be sworn or affirmed before they give their testimony.
(3) They shall be examined in chief by the public prosecutor, cross-examined by the accused or his advocate and may be re-examined by the public prosecutor.
(4) The court may at any time put to a witness any question which appears necessary for the just decision of the case.

Art. 137.—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.
(3) Questions put in cross-examination shall tend to show to the court what is erroneous, doubtful or untrue in the answers given in examination-in-chief. Leading questions may be to a witness in cross-examination.

Art. 139.—Re-examination.

The public prosecutor, the accused or his advocate may on re-examination only ask questions for the purpose of clarifying matters which have been raised in cross-examination.

Art. 140.—Absence of cross-examination.

Failure to cross-examine on a particular point does not constitute an admission of the truth of the point by the opposite party.

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.

Where the plea of not guilty has been entered or where the plea of guilty has been entered but the court orders the plea to be corroborated with evidence, the court calls upon the prosecutor to produce her evidence. On such day and hour as fixed by the court for the hearing, all the evidence submitted to the registrar of the court, both records, depositions, exhibits and/or other evidence are produced. Witnesses and experts, if any, must be present.[748] In making her case, the public prosecutor makes an opening statement. That opening statement relates to the charges she proposes to prove and the nature of evidence she tenders in respect of each fact. In so doing, the public prosecutor is expected by law to be impartial in not only in making her opening statement but also in presenting her entire case.[749]

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[748] Because of lack of organized evidence law, the criminal process is strangely haphazard with respect to organization, presentation and examination of evidence except with respect to examination of witnesses which is not complete. Generally, the types of evidence that may be produced during the trial, to which the law makes express reference, include oral evidence, documentary evidence and exhibits. In practice, there are problems of proper appreciation of the various types of evidence. For instance, with respect the nature of a given item of evidence, see note 756, *infra*. However, in the absence of a comprehensive and detailed law on the subject, the argument on evidence remains only a view.

[749] The *Federal Prosecutors' Administration Council of Ministers Regulations No. 44/1997*, Art 11(1) provides for the content of an oath that every federal public prosecutor makes as follows: *I _____solemnly swear that I shall be loyal to my country and pledge to abide by the Constitution of the Federal Democratic Republic of Ethiopia and other laws, to work for the supremacy of law, to execute existing laws and those to be enacted in future by the Government, to carry out my responsibilities on the basis of the law, to respect human dignity and safeguard human right and that I shall discharge my duties honestly, sincerely, diligently and impartially without seeking personal gain and without fear or favour of any kind.*

The readings of Art 98(1)(g) presupposes that the opening statement is also to be submitted to the court in writing.

She then call her witnesses one by one, whether lay or expert witness, who tenders an oath or makes an affirmation before giving testimony. The public prosecutor then conducts the examination-in-chief to her witness. The purpose of the examination-in-chief is to enable the witness tell the court whatever she knows about the offence in her own words. Thus, the questions may be related to any fact that is directly or indirectly related to the offence that is to be proved. During the examination-in-chief, however, leading questions are prohibited. This is because what the court wants to hear is the testimony of the witness and not that of the public prosecutor; rather, neutral questions only directing her as to what the witness should testify may be put to her to make her feel free to use her own words and explain the facts in her own way.

Although not all of them are provided for in the law, there are few exceptional circumstances wherein leading questions may be put to the witness during the examination-in-chief. (a) Leading questions are believed to affect the testimony of the witness because they are leading to the answer and thus where leading questions are put to the witness by the party who called the witness, the other party normally objects to it. Where the accused or her advocate gives her permission, however, the court may not deny it. (b) Leading questions are precluded in respect of the subject matter. Therefore, where such leading question is related only to introductory matters, such as, the name, occupation and address of the witness and not the substance of the testimony, it may not be objected to. (c) It is not always the case that our witnesses are mature with good command of their language and expressions; sometimes, particularly in domestic crimes, the only witness the prosecutor has is a minor. In such cases, it may be appropriate to assist child witnesses. However, as children are susceptible to manipulation, such assistance to child witnesses requires greater care. (d) When the case appears for hearing, it may be too late after its commission, and in not few cases, because there was no good communication between the prosecutor and her witnesses, the latter may not know as to where to start from; thus, with a view to refreshing the memory of the witness, the public prosecutor may ask leading questions only in order to enable to give the witness a grip of idea on the issue the court is to decide. (e) In the normal course of things, a proponent calls a witness believing that she would testify in her favour. Exceptionally, however, the witness turns out to be hostile to the person who called her. Had the proponent known before the witness is hostile to her case she would not have called her. But it just happens before the court

only after she is called to the witness stand. When this happens and takes the proponent by surprise, she may, up on the permission of the court, put leading questions during examination-in-chief. It is examination-in-chief only in form and it is basically cross-examination. The fact that the witness testified against the interest of the party who called her does not make her hostile; it must be shown that she has displayed a hostile character towards that party one of which is unwillingness to properly address the question as put to her. In the anti-corruption special procedure law, the fact that the witness is unwilling to 'tell the truth' or has given contradictory statements is a ground for putting leading questions during examination-in-chief.[750]

There is one transcending rule in the practice of examination—the scopes of pool of facts on which the witness may be questioned are determined based on the purpose of the examination. Thus, the scope of facts in examination-in-chief is determined by the fact that it is meant to enable the witness tell all what she knows about the case under examination. The Code therefore provides that the witness may testify about "facts, which are relevant to the issue to be decided and to such facts only of *which the witness has direct or indirect knowledge*" [Emphasis added]. However, this scope is further defined by the Constitutional right of the accused to conduct cross-examination on witnesses against her. Direct knowledge is a knowledge acquired by a witness through personal observations, i.e., depending on the nature of the fact, the witness must observe the fact in any of or any combination of the five sense organs. If the fact is one that can be seen, heard, smelt, touched/felt or tested, the witness must personally have seen, heard, smelt, touched/felt or tested the fact. If she has heard about the fact from another person who had observed the fact and does not personally observe it, it is an *indirect knowledge*. As this issue can be seen

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[750] Proc. No. 434/2005, *supra* note 97, Art 44 provides that:

1) *The court may allow the party who called the witness to raise leading question to a prosecutor or defence witness who, being unwilling to tell the truth, has given a statement contradictory from his previous statement.*
2) *The court shall, before allowing the leading question, ask the witness whether he has given contradictory statement or not. If he admits, the leading question shall be allowed.*
3) *The court shall decide whether or not the witness has given a contradictory statement where the witness denies that he has given contradictory statement.*

Seen in light of Art 145 of the Code, sub-article 2 of this article seems to be short-sighted.

only with a background of cross-examination, it is appropriate to first see the purpose and scope of cross-examination.

Once the prosecutor is over with the examination-in-chief, the accused or her advocate may conduct cross-examination. The purpose of cross-examination is to destroy what has been established during the examination-in-chief by showing that the testimony was not true; it was contradictory or that it was not reliable. Some judges sustain objections that the questions raised in the cross-examination must only be related to the facts raised in the examination-in-chief; if the fact is not raised in the examination-in-chief, it cannot be raised in cross-examination. That is not provided for in the law; and it is contrary to logic. Thus, the questions that may be raised in the cross-examination may be related to any fact that is relevant for the achievement of the purpose of the cross-examination, and unlike the practice it may go beyond the facts that were raised during the examination-in-chief. Where a witness had been convicted of perjury and this fact is not raised in the examination-in-chief, it certainly is appropriate to raise it during cross-examination to show to the court that the witness is not a truth-telling person.

As the witness is hostile to the adverse party, though not always, the accused may put leading questions to the witness during cross-examination. However, when the witness is discharging her civic obligation in assisting the administration of justice, every question must be put to her with all due respect to her and she should not be harassed by both parties and the court.

The accused has the constitutional right to cross-examine the witness testifying against her and proper cross-examination in view of its purpose discussed above, can be conducted only when the witness who personally has observed the fact appeared before the court. Where the witness is not the one who observed the incident, there cannot be cross-examination.[751]

[751] A test of cross-examination is whether the witness has observed, whether she properly recollects the same and whether she can properly communicate the same to the court. The test of observation is a test of the senses: whether the witness has the biological capacity to see, smell, taste, feel and hear. Where the witness does not have the specific capacity which the nature of the fact demands to be perceived by, a test by cross-examination whether there is such capacity is a proper taste of veracity of the testimony. A person with hearing disability (without her hearing aid) cannot claim to having heard an insult; nor can a visually impaired person (without her visual aid) claim to having seen an incident.

Thus, the person who has not observed the incident personally or who does not have direct knowledge is not a qualified witness and she cannot be called as a witness; where she is called and heard, her testimony can effectively be struck off of the court's record. This is not only for constitutional reason; rather, it is also for evidentiary reason that it taints the subsequent effort on the manifestation of the truth.

The court in *Sgt. Geberehana*[752] case made a correct interpretation of the provisions of Art 137(7) in light of the provisions of FDRE Const., Art 20(4). In that case, the court considered whether the police statement given by a witness that was not available was admissible in evidence. The court held that the testimony was given by witnesses under oath before the court in order to dispose an issue before it. The police statement, apart from the fact that it was given contrary to this procedure, was given to the police in a circumstance where the accused did not have the opportunity to cross-examine the witness contrary to the provisions of FDRE Constitution, Art 20(4). Thus, the witness's statement given to the police was rendered inadmissible in evidence.

However, the provisions of Art 137 and FDRE Const., Art 20(4) are not always correctly applied by the courts. For instance, in *Girmay Moges,*[753] the petitioner was charged for first degree murder allegedly committed early in 1981. The case was initially heard by Tigray High Court and the accused was convicted and sentenced to life imprisonment. The evidence includes statements of a witness given to the investigating police officer who did not later appear before the court, a statement allegedly written by the accused entitled "life history and self-criticism" and a confession made to a court as per Art 35 on his second appearance. The convict appealed to the Tigray Supreme Court and the decision was affirmed; he again petitioned to Tigray State Supreme Court for a review on cassation and the decision was again affirmed. He finally petitioned to the Federal Supreme Court for review by cassation. His major ground of objection was that hearsay evidence is not admissible under Ethiopian law.

Although the case appeared to involve matters of fact, it also involves matters of law. Therefore, the court framed the issue whether hearsay evidence is

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752 *Public Prosecutor v. Sgt. Gebrehanna Seife* (Federal First Instance Court, 2001) Crim. F No. 303/88

753 *Girmay Moges v. Tigray Regional State Prosecutor* (Supreme Court Cassation Bench, 2007) F No. 22254

admissible under Ethiopian law. The testimony of the three witnesses against which the objection was raised was summarised by the Court as follows: the witnesses arrived at the scene of the crime immediately after the alleged murder and they saw two corpses. On further personal inquiry they learnt that the petitioner and the two victims were together the previous evening and they (all the three of them) spent the night in one Abay W/Simeon's house. The petitioner after shooting the two victims to death took both his and the victims' guns and went to Axum. This, the witnesses learnt from the owner of the house where the petitioner and the victims spent the night and other persons in the village. The Supreme Court then looked at the provisions of Art 137(1); it looked at the similarity with the provisions of Civil Procedure Code Art 263 and concluded that in both cases a witness can testifies on matters she knows both directly and indirectly. The Supreme Court further reasoned, these witnesses testified not what they know directly, but rather what they learnt from persons some of whom were identified and others who were not identified. Thus, their testimony is hearsay; hearsay is admissible in Ethiopia law.[754] The court held that the decision of the appellate and cassation bench of the Tigray Supreme Court does not have fundamental error of law and affirmed the respective decisions. As reproduced above, the reasoning of the court that is not consistent with the Constitution resulted in such gross misinterpretation of the provisions of Art 137(1) and FDRE Const., Art 20(4). The court should have regard to the provisions of the Constitution rather than to the provisions of the Civil Procedure Code which has a totally different objective and rationale.

Cross-examination is a right of the accused person; whether a party puts questions for cross-examination or not is a strategic choice the accused and her counsel have to make having regard to the over all outcome of the case. Therefore, it is at the option of a party whether to conduct cross-examination. The fact that cross-examination is not conducted at all or no question has been put to the witness during cross-examination in respect of certain facts does not constitute an admission of the truth of the point by the person who would have cross-examined the witness.

After the cross-examination is over, if there is any, the re-examination follows. This is to be conducted by the person who conducted the

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754 The Supreme Court actually went on a comparative discussion of admissibility of hearsay evidence in other legal systems without looking at the legal culture, the normative and institutional qualities of the two—common law and civil law—legal traditions.

examination-in-chief, in this case by the public prosecutor. The purpose of re-examination is to re-establish what might appear to have been discredited during the cross-examination or to clarify what has been confused during the cross-examination. In view of its purpose, therefore, the facts that may be raised during the re-examination are limited to those, which were raised during the cross-examination. If there is no cross-examination at all, again, there cannot be a re-examination as nothing has been destroyed by cross-examination from what has been established by the examination-in-chief. Leading questions may, however, be put to the witness during the re-examination. Furthermore, during the examination of a witness the court may put any question any time to the witness "which appears necessary for the just decision of the case." In such process, all witnesses of the prosecution are to be examined and the testimony is to be recorded following the procedure.

The witnesses that appear before the court are not only those that are called by the parties; there are also "court witnesses" who are called by the court on its own motion whose attendance the court deems necessary in the interest of justice any time before giving judgment. It does not seem to be clear who conducts the examination-in-chief, but as they are court witnesses it would be conducted by the court and the party against whom they are testifying may conduct the cross-examination. The practice in this regard is very much limited.

Either party may call a material witness whose name does not appear in the list of witnesses presented by the party. Such witness may be summoned when the court is satisfied that such witness is a material witness and such request by the party is not made with a view to delay the proceeding. Likewise, where the case is heard by the High Court after the required preliminary inquiry is conducted, the prosecutor later in the proceeding may call a witness who did not give testimony at the preliminary inquiry. However, the witness must be a material witness and the request is made not with a view to delay the proceeding. There is also a further requirement that the public prosecutor informs the accused in writing of the name of the witness she proposes to call and of the nature of the testimony the witness would give. From the reading of these provisions, two points are inferred: first, where the trial is conducted by first instance court, no additional witness is called under this provision; rather such witness may be called under Art 143(2); second, the accused may have given a list of witnesses she intends to call as per Art 89(3). However, she is not bound by the provisions of Art 143(3) and she can call any witness that is not included in the record of the preliminary inquiry provided she complies with the requirements of Art 143(2).

Before a witness gives her testimony, the law provides that, such witness enters an oath or makes an affirmation and such indication is to be made in the record of the court. Even though the practical significance is not clear, the legal effect of absence of such oath or affirmation is clear. Because entering an oath or making an affirmation to tell the truth is a mandatory requirement, unsworn evidence is not admissible. As such, absence of oath or affirmation is a ground of objection to admission of such testimony. However, in *Ahmed Hussein,*[755] the appellant contended, among other things, that prosecution witnesses did not enter an oath according to their faith as required by law. The Regional Supreme Court held "although it is a matter of technicality (formality), because the Appellate [Regional Supreme] Court does not believe the [State High] Court would hear witnesses without making them enter an oath, this Court does not accept the allegation." The record of the Regional Supreme Court shows that it did not even care to look into the records of the State High Court.

As pointed out earlier, the evidence that may be produced before the court for the proof of a fact, the commission of an offence by the accused, is not only witness. It may be documentary evidence[756] or exhibits which are numbered and marked by the Registrar of the court (in the existing practice by the investigating police officer) and kept in a safe place until the date of trial. Such exhibits are presented along with testimony of witnesses and often witnesses explain those exhibits because those exhibits may not have intrinsic explanation of their connection to the facts under inquiry.[757]

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755 *Ahmed Hussein v. Public Prosecutor* (Benishangul-Gunuz Supreme Court, 1995) Crim. App. F No. 43/87

756 It is fully in the realm of evidence law; but it is important to point out that, in practice, defendants statements made before the police as per Art 27(2) and before the Woreda (Federal First Instance) Court as per Art 35 are produced as documentary evidence by the public prosecutor at the hearing. See for instance, *Diguma Negewo v. Public Prosecutor* (Supreme Court Panel Bench, 1986) Crim. App. F No. 205/77; *Public Prosecutor v. Ayitenew Wubet, et al.* (Supreme Court Circuit Bench, 1987) Crim. App. F No. 128/78; *Tamirat, et al., supra* note 76. Defendants' statements are reduced into writing by the police or by the court as the case may be. However, such statement of the accused is only physically presented in a written form; the content of the statement, as it is prepared *ex post facto*, cannot be treated as documentary evidence within the meaning of evidence law. Such labelling of those statements as documentary evidence unjustifiably inflates their evidentiary value even in the minds of the learned judges.

757 Although there is no express provision on the manner of presentation of exhibits,

Other Evidences

Art. 144.—Depositions taken in preliminary inquiry may be put in evidence.

(1) The depositions of a witness taken at a preliminary inquiry may be read and put in evidence before the High Court where the witness is dead or insane, cannot be found, is so ill as not to be able to attend the trial or is absent from the Empire.
(2) The deposition of an expert taken at a preliminary inquiry may be read and put in evidence before the High Court although he is not called as a witness.

Art. 145.—Statements made in police investigation may be put in evidence.

(1) The court may, on the request of the accused or the prosecutor, refer to statement made by a witness to a police officer in the course of police investigation.
(2) It may then, if it thinks it expedient in the interests of justice, direct the accused to be furnished with a copy thereof and such statement may be used to impeach the credit of such witness.

It is discussed in relation to the police investigation and preliminary inquiry proceedings that prosecution witnesses may be heard at the respective stages. Such witnesses may not, however, be available for the hearing for reason, such as, where such person is dead, insane, or not in the state territory. There are always those issues whether such evidence obtained from witnesses either by the police or by the committing court during preliminary inquiry can be used by the trial court because the accused has the right to cross-examine witnesses that appear against her. In such cases, the accused may not have a chance to cross-examine those witnesses whose statement is tendered in evidence because they are not available before the trial court.

During the preliminary inquiry, the accused is informed that the preliminary inquiry does not constitute a trial, Art 85(2), and if she so wishes, she can only give list of her witnesses that she intends to call at her trial and they are not to be heard at the preliminary inquiry, Art 89(3). This gives the

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there is extensive reference to them in the Code. See, for instance, Arts 33(3), 91(1), (2), 97, 98(1), (5), 124(2) and 190(1).

impression that the examination of witnesses during the preliminary inquiry is of little significance. The provisions of Art 144, however, provides that where the witness, whether a lay or an expert witness, "is dead or insane, cannot be found, is so ill as not to be able to attend the trial or is absent from the Empire" her testimony during the preliminary inquiry could be read and put in evidence before the trial court. This process is a little murky but it is not fully unconstitutional for the accused had an opportunity to conduct cross-examination during the preliminary inquiry. This is not expressly provided for but, if evidence at the preliminary inquiry is to be recorded in the manner evidence at trial is recorded (Art 88 makes reference to Art 147), Art 147 (3) provides that the evidence is to be divided into "evidence-in-chief, cross-examination, and re-examination" from which the opportunity and possibility of cross-examination is inferred. Where the accused is assisted by counsel, certainly she knows the consequences of (not) putting questions for cross-examination and that only in such circumstances that the making use of such evidence at trial may be justified. Otherwise, leaving the fact that the preliminary inquiry is exclusively for the record of the prosecution which is grossly unfair, it is unwise to make use of such testimony wherein the court "deceives" the accused that the preliminary inquiry is not a trial as a consequence of which she may have failed to conduct cross-examination. As this provision could turn out to be circumstantially unconstitutional, the trial court needs to ascertain whether the accused was assisted by a counsel during the preliminary inquiry and whether there was an opportunity for cross-examination. In the absence of both, it is patently unconstitutional and unfair to make use of the testimony given by witnesses during the preliminary inquiry.

What is important to remember in the discussion of preliminary inquiry is that it is conducted only in respect of aggravated homicide, aggravated robbery and other serious offences that are within the jurisdiction of the High Court. Apart from that, statements recorded by the court are taken seriously and they are less susceptible to challenge. In fact, there are many practical problems the High Court needs to address having regard to the institutional and personal competence of the Woreda Courts in the regions, but at least there has to be minimum compliance with the Constitution.

Likewise, as part of the investigation process, the police may have examined witnesses, Art 30. Art 145(1) provides that up on the request of either party, the court may have regard to such statements made by the witness to the police in the course of investigation. This sub-article is not standing alone; sub-article (2) provides that where the "court finds it expedient in the interest of justice" whatever the meaning of this statement may be, it is "used to

impeach the credibility of such witness." The whole idea of this provision is that, the witness, whose statement was given to the police which is sought to be introduced before the trial court, must appear before the trial court, and the purpose of introduction of such statement is impeaching the testimony of the witness before the trial court for she has given contradictory or inconsistent statement to the police during investigation. Therefore, the statement given to the police is introduced not for the proof of facts, but for the proof of veracity of the witness. Such statements made by witness during investigation in and on itself cannot be taken as evidence as such to prove facts. This is for two reasons: the most important reason is this statement as made extra-judicially is not subject to cross-examination as per FDRE Const., Art 20(4). Secondly, the witness did not enter an oath or make an affirmation and thus, cannot qualify as testimony which in turn means, it cannot be admitted in evidence.

The practice of the courts is not consistent; some of them apply the law properly while the majority do contra. For instance, in *Assefa Abreha, et al.*[758] one of the prosecution witnesses testified before the court contrary to the statements he gave to the police during investigation. The public prosecutor requested the court to introduce the police statement given by the witness as per Art 145 which the court granted. The statement was admitted as documentary evidence.[759] The witness admitted the signature on the statement is his but denied he made such statement. The witness was also called as defence witness. The police statement of the witness was admitted in evidence substantively because, apart from other similar statements, the court, in its final judgment held that the court gives more weight to the statement of the witness made before the court under oath." The reasoning of the court in this case clearly indicates that the court missed both the purpose and interpretation of the provisions of Art 145(2).

In *Sgt. Gebrehanna Seife*[760] case, on the other hand, where the defendant was charged for Disturbance of Possession contrary to Pen. C. Art 650 (1) (b), the court interpreted and applied the provision of Art 145 correctly. In that case, the list of prosecution evidence includes four witnesses and documentary evidence. As the three witnesses did not appear before the court, only one of them was heard. The public prosecutor, however, produced

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758 *Assefa, et al., supra* note 127

759 This is also the case in *Tamirat, et al.*, *supra* note 76. The approach to such statements is much like the statement of the accused as discussed in note 48 above. Also see Wondwossen, *supra* note 104, at 42, 43

760 *Sgt. Gebrehanna*, *supra* note 752

statements of the witnesses given to the investigating police officer during investigation who did not appear before the court. The court framed the issue whether such statements may be recorded into evidence as per Art 145. The court succinctly reasoned that, "the accused has the right to cross-examine witnesses testifying against him as per Art 137(3) which is incorporated in the FDRE Constitution Art 20(4). The purpose of cross-examination is to show to the court what is erroneous, doubtful or untrue in the answer given by witnesses. However, as the defendant did not have a chance to cross-examine the witnesses on their statement, he was not able to show what is erroneous, doubtful or untrue. The statement of an absent witness could be introduced in evidence where such witness gave testimony before the committal court according to Art 144. Such cases are covered under Arts 80-93; and according to the provisions of Art 88, the circumstances stated under Art 147 exist in order for the accused to cross-examine. The court could look into the statements given to the investigating police officer as per Art 145 where the witness appears before the court and gives a different testimony than he gave to the investigating police officer and in order to explain the difference. In general, statements of the three witnesses given to the police was not based on oath and was not subject to cross-examination and was, therefore, contrary to the provisions discussed above as well as it seriously restricted the rights of the accused. Thus, the court decided not to admit the statement in evidence as per Art 146." Based on the evidence admitted, the accused is found to be not guilty.

Art. 146.—Objection to evidence.

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.

Art. 147.—Recording of evidence.

(1) The evidence of every witness shall start with his name, address, occupation and age and an indication that he has been sworn or affirmed.
(2) The evidence of each witness shall be taken down in writing by the presiding judge or, if, for some reason, he is unable to record the evidence, by another judge or clerk under his personal direction and superintendence.
(3) The evidence shall be divided into evidence-in-chief, cross-examination and re-examination with a note as to where the cross-examination and re-examination begin and end.

(4) The evidence shall ordinarily be taken down in the form of a narrative:

Provided that the presiding judge may, in his direction, take down or cause to be taken down any particular question and answer.

The best strategy of a defence is to preclude an item of evidence from the very beginning. Thus, the defendant or her counsel may object to the introduction of an item of evidence or the putting of a specific question to a witness where she thinks is irrelevant, immaterial, illegal, or for whatever grounds of objection available to her. Likewise, the prosecutor may have such objections where the defendant enters her defence. The court decides on such objections immediately and such objections as raised by the parties and the ruling of the court is entered in the record as it is raised. The provisions of Art 98(1)(i) indicate that such note regarding objections raised and rulings made is to be entered in the court record "at the time the objection was raised" and where the objection is "made during the giving of evidence by a witness, record of the evidence shall be interrupted and the note inserted in the record at the point where such evidence was interrupted."

The court record has literally everything that is submitted to the court and the claims rose by the parties and the rulings made by the court. Therefore with respect to witnesses, the record starts with the name, address, occupation and age, and with an indication that the witness has been sworn or affirmed to tell the truth. The evidence is to be taken in writing by the presiding judge, or by another judge or clerk under her personal direction and superintendence. It is to be made in a narrative manner. The record shall be divided into evidence-in-chief, cross-examination and re-examination with a note as to where each examination begun and end. In the normal course of things, it is not possible to write every thing during the hearing. Therefore, the judge writes only the answers of the witness (as it presupposes what the questions were) in the form of narration, provided the judge takes down or causes it to be taken down under his direction any particular question and answer which he finds to be important for whatever reason. Recently, however, some courts' proceedings are being recorded on tape and later transcribed; that makes the recording much simpler and accurate. There is emphasis on the accuracy and completeness of the record of the court. This is because, where the party raising the objection against the introduction of such evidence or the putting of such question to the witness lodges an appeal against the final decision of the trial court, she may base her appeal, among other issues, on such ruling of the court on evidence. The record of the trial court is, thus, essential for the review

of the appellate court in deciding on such matters of fact. The full record of the court includes those listed under Art 98.

Art. 98.—Contents of record.

(1) The record of a trial shall be signed by the court and shall contain:

(a) a copy of the complaint or accusation:
(b) the record of the preliminary inquiry, if any:
(c) the date of the warrant of arrest, if any, or on which the accused was first arrested;
(d) the date on which the accused was first brought before a court;
(e) the charge filed by the public or private prosecutor and any alterations or additions thereto and in the case of a private prosecution the certificate of the public prosecutor shall be attached:
(f) the plea of the accused;
(g) a copy of the opening address of the public or private prosecutor;
(h) a full record of the evidence of all the witnesses including the cross-examination and the re-examination:
(i) a note of any objection made by the prosecutor or the accused, and the ruling given thereon. Such note shall be made at the time the objection was raised and where made during the giving of evidence by a witness, the record of the evidence shall be interrupted and the note inserted in the record at the point where such evidence was interrupted;
(j) a note of the exhibits admitted as evidence and the number attached thereto including whether the exhibit has been put in by the prosecutor or the accused;
(k) a full note of any submission on points of law and the ruling thereon. Such note shall be included in the record at the time when the submission was made;
(l) a note of all adjournments granted and the date to which the trial is adjourned together with a note of the reasons for granting such adjournment;
(m) a note that the prosecutor and the accused have been informed of their right of appeal.

(2) The record of the trial at each hearing shall start with:

(a) the name of the case and number;
(b) the date and time;

(c) the names of the prosecutor and defence advocate;
(d) the names of the judges.

(3) The record of the trial at each hearing shall close with a note of the time of closure and the date and time to which the hearing is adjourned.

This provision lists what the court record is supposed to contain; it is more or less clear that it demands less comment. However, few comments are appropriate only on selected elements of the record. The record of the trial court needs to contain the copy of the complaint or the accusation. As discussed in the chapter dealing with Setting Justice in Motion, the complaint is the basis on which the court passes a valid judgment. Where the preliminary inquiry is undertaken, it is also included because the trial court may look at such record and put the contents in evidence as per Art 144. The date of arrest is very much important in that, where the accused is finally convicted and sentenced, the court passes a sentence that is to be reckoned from the date on which the accused is first arrested. The trial certainly cannot be completed in one day. The law thus provides that at the beginning of each hearing, the record shows the name of the case and the number, the date and the time, the name of the prosecutor and the defence advocate, and the names of the judges. Likewise, the record of each hearing is to be closed with a note of the time of closure and the date and time to which the hearing is adjourned; the date and the reasons for the adjournment are also included in the record. Although time is frequently stated in the law, the courts, at least those in Addis Ababa, have consistently failed to comply with. For instance, where the court adjourns five cases to examine before noon of a particular date, customarily, all of the parties to those cases are required to appear at 8:30 a.m. while each case could be adjourned for a different hour depending on the reasons of the adjournment with sufficient time interval.

13.3 The Ruling of the Court

Art. 141.—Acquittal of accused when no case for prosecution.

When the case for the 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.

This provision is unique to the criminal process; it provides for the determination of guilt of the accused only after the conclusion of the

prosecution evidence. Thus, once the evidence for the prosecution is completed, the court evaluates whether the evidence shows a *prima facie* case that the accused is guilty of the offence as charged or any other lesser offence; i.e., whether the prosecution evidence, short of any defence evidence, is sufficient to convict the accused. Where, after evaluation of the prosecution evidence the court is not convinced that the accused has committed the alleged offence, it acquits her without requiring her to enter her defence and give an order of release of the accused if she is in custody. Where the court is convinced that the prosecution evidence established a *prima facie* case for the alleged offence or an offence that the accused may have been charged with in the alternative, it orders her to enter her defence so specifying. The consequence is that, should the defendant have no evidence to produce in her defence, she would be convicted of the offence. Furthermore, this article suggests when read in conjunction with Art 113(2) that, even if the prosecution evidence proves the accused committed another offence which is not related to the one for which she is charged, the court may not demand her to enter her defence; rather she is to be acquitted.[761]

A related issue arises where the nature of the crime makes it possible that a given set of facts could possibly fall under different categories, it is an unfortunate fact that it is often observed that the public prosecutor brings a charge under a more serious offence than what her evidence suggests.[762] For instance, where the case is homicide, the proper evaluation of the evidence may have suggested the suspect committed homicide by negligence contrary to the provisions of Crim. C., Art 543, or ordinary homicide contrary to the provisions of Crim. C., Art 540, the prosecutor may draw the charge under Ordinary Homicide, Crim. C., Art 540 or Aggravated Homicide, Art 539, respectively. Likewise while the evidence suggests that the suspect committed Common Wilful Injury, Crim. C., Art 556, the public prosecutor may draw and file the charge under Grave Wilful Injury, Art 555.[763]

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761 See the comment on Art 113 under Section 11.3, 11.7, *supra*.

762 See the discussion on bail, Art 63, and alterative charges, Art 113, Section 11.7, *supra*.

763 This might occur at least for two reasons: first, it is considered as a safety net because where the accused is charged for a less serious office but the evidence later shows she committed a more serious offence, the court cannot change the article to a more serious crime and convict the accused. Second, the public prosecutor takes as the case is first labelled by the investigating police office and she has very little time to review the investigation report. Unfortunately, such practice

Where the court is convinced that the public prosecution evidence show the accused committed other offence than what she is charged with but she would have been charged in the alternative, the court need to fix the article in its ruling under which that the accused enters her defence. The purpose of the charge is to inform the accused what charges she is required to answer to. Where the court changes the article under which she enters her defence, however, the charge may not be of help in determining her defence. Thus, even though it is not for in the law, the court needs to let the defendant know the article under which she would have to enter her defence. This would enable the defendant to properly marshal her defence against the article she is proved to have violated. However, where the charge is changed in the course of the proceeding, such as, by addition or correction as is provided for under Arts 118 et seq., the public prosecutor has the obligation to correct and give a copy to the accused. In such a case, the court may exercise its discretion whether to inform the accused under what provisions she may enter her defence because she is already informed of the charges.

There is no express provision governing the degree of proof of cases in general and criminal cases in particular. The law only indicates that there are differences in the degree of proof in civil and criminal matters. Art 158 in relation to civil claims of victims of a crime provides that "where the accused is acquitted or discharged, the court . . . shall inform the injured party that he may file a claim against the accused in the civil court having jurisdiction." Civil Code, Art 2149 also provides that in deciding whether a tort has been committed the court is not bound "by the acquittal or discharge by a criminal court." Likewise, the anti-corruption special procedure in respect of order of forfeiture of benefits from corrupt practices provides that "the standard of proof required to determine any question whether a person has benefited from criminal conduct, or the amount to be recovered shall be that applicable in civil proceedings."[764]

Customarily, however, our courts use the phase "beyond reasonable doubt" although it is not consistently used,[765] and sometimes the word is not even

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sometimes denies defendant the opportunity to be released on bail. For instance, aggravated homicide contrary to the provisions of Crim. C., Art 539 is considered non-bailable. Thus, where defendant is charged with aggravated homicide, she would stay under detention for the whole process is completed.

764 Proc. No. 434/2005, *supra* note 97, Art 33

765 The phrase "beyond reasonable doubt" is not, however, consistently used. Other

properly used.[766] Proof of cases beyond reasonable doubt is a common law concept presumably introduced to our legal system by the British after the liberation.[767] As it is indicated in the introduction of this text, crime is a social fact; as we are dealing with such past facts, absolute certainly is inexistent; there are always doubts. But the courts only determine whether those "doubts" are significant as to constitute "reasonable." In order for the court to conclude the accused is guilty, not only should the evidence show the guilt of the accused, no other significantly important evidence should indicate the innocence of the accused. Such conclusion on guilty is a matter of proof and not of conjecture. The judge should not thus feel discomfort with respect to the innocence of the accused when she rules "the accused is guilty."[768]

The last issue that may be raised under this provision is the issue of adjournment. It is discussed earlier that the provisions of Art 123 et seq. give a false impression that both the prosecutor and the defence present their evidence on the same day. However, it is also repeatedly discussed that our criminal process lacks post-arrest, pre-trial screening as well as discovery and pre-trial conferences where the issues for trial may be set. In a process where the accused is not given any prior judicial access and effective discovery procedures, it does not make any sense at all to require the accused to enter her defence. Furthermore, even after the evaluation of the prosecution evidence, the accused may still be acquitted. It is only when the prosecution evidence establishes a *prima facie* case that defendant may be required to enter her defence. The literal reading of the provisions

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clauses, such as, "the accused is proved to have committed the offence as charged;" or "prosecution evidence is convincing" or "the prosecutor has proved her case as included in the charge;" still others use the clause "defendant could not disprove prosecution evidence," or words of similar content.

766 Sometimes such clauses as "beyond any shadow of doubt" are used.

767 It is indicated in the preliminary part that Sir Charles Matthew prepared the final version of the Criminal Procedure Code in the present form. Before he came to Ethiopia in 1957, he was the Chief Justice of Malayan Federation. On his way to Ethiopia as a judicial advisor for the Ethiopian government, Matthew brought his assistant William Buhagiar, who became our High Court president. The introduction of those common law concepts such as "proof beyond reasonable doubt" is only natural to Buhagiar.

768 This is well stated in the French C. Crim. P, Art 427 which provides that "the judge decides according to his innermost conviction." The phrase "innermost conviction" is also used in relation to jurors. *Id.*, Art 304

of Art 123 et seq. nullifies the constitutional principle of presumption of innocence. Thus, the court should adjourn the case for another date on which the accused should produce her defence evidence.

FDRE Const., Art 20

> *4. Accused persons have the right to . . . 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.*

Art. 142.—Opening of case for defence.

> *(1) Where the court finds that a case against the accused has been made out and the witnesses for the injured party, if any, have been heard it shall call on the accused to enter upon his defence and shall inform him that he may make a statement in answer to the charge and may call witnesses in his defence.*
> *(2) The accused or his advocate may then open his case and shortly explain his defence stating the evidence he proposes to put forward. He shall then call his witnesses and experts, if any, who shall be sworn or affirmed before they give their testimony.*
> *(3) The witnesses for the defence may be called in any order:*
>
> *Provided that, where the accused wishes to make a statement, he shall speak first. The accused may not be cross-examined on his statement but the court may put questions to him for the purpose of clarifying any part of his statement.*

Where the prosecution evidence shows the defendant has committed the alleged offence or an offence that she would have been charged in the alternative, the court orders the defendant enters her defence. Therefore, the accused or her advocate opens the case for the defence by making opening statement. The opening statement is explaining the defence stating the evidence she proposes to put forward. As in the prosecution proceedings, she calls her witnesses and experts who will be sworn or affirmed before they give their testimony. She may produce documentary evidence or exhibits whether they are different or ones produced by the prosecution. She also has the constitutional right of compulsory process of witnesses in her favour.

Like the prosecution witnesses, defence witnesses may be called in any order the accused or her counsel desires. If the accused wishes to make any statement, however, she speaks first. This is another problematic area

in the criminal process. The law provides that the accused is not sworn or make an affirmation and nor is she subject to cross-examination. The purpose of the law seems to reinforce the right to remain silent because both oath/affirmation and cross-examination are coercive. While she makes her statements, however, for the purpose of clarifying any part of her statement, the court may put questions to her. It seems the court should take certain degree of precaution so that such questions for clarification would not turn out to be cross-examination. There are, however, few outstanding issues: whether this statement of the defendant made entering her defence is different from the statement made by her when she pleads; and whether both are given equal evidentiary value and whether the statement by defendant entering her defence may be treated as 'testimony'.

Where a person does not enter an oath or make an affirmation and the other party is not given the opportunity to put questions for cross-examination, such person is not a witness nor her statements a testimony. However, in light of the special nature of the defendant's statements, she need not fall under the category of "witness" so that her statements are given substantive value in the determination of guilt or establishing defence. The law does not provide for what value the court should attach to the statement of the accused made before her witnesses are called upon to testify in her favour. However, the law would not bother to provide for such statement if it were to be given no value. Unlike what is provided for in the Civil Procedure Code, Art 261(1), where the party-witness enters an oath or makes an affirmation and is subject to cross-examination by the other party, the criminal defendant is protected from such processes. Despite lack of clarity as to the effect of defendant's statement in her defence, one thing is clear—that her statements must be given value by the court in the assessment of the defence evidence.

However, the practice of courts does not show this. The court often state the contents of defendant's statements in its judgment but it does not indicate the value such statement is given. Ironically, while defendant's unsworn statement before the police is admitted in evidence as valuable in entering conviction corroborated by other evidence even for serious crimes, her statement before the court denying that she made such statement voluntarily is not accepted (See Chapter 5). In *Tesfaye Engidayehu* the court expressly states its mistrust to such statements.[769] This is because there is a deep seated suspicion that defendants are making self-serving statements. But

[769] *Tesfaye, supra* note 404; *Tamirat, et al*., *supra* note 76.

so does the victim or her relatives when they appear as witnesses against the accused. However, the fact that it is unsworn statement because of the constitutional protection of the accused does not make her statement totally irrelevant; although the courts do not find it as gratifying as the statements of admission by the accused given to the police and the court under Art 27 and 35, respectively, it certainly has a value.

Otherwise, the defence proceeding in general is more or less similar to that of the prosecution proceedings with necessary modifications. For instance, with respect to examination of witnesses, the examination-in-chief, having the same purpose and scope as in the prosecution case, is conducted by the accused or her advocate; the cross-examination, if any, is conducted by the prosecutor and the re-examination, if there is any, again, is conducted by the accused or her counsel. If there is any person who should have been called as a witness or any evidence not produced, the court may order such person be called as a witness or such evidence be produced where the interest of justice requires.

There could also be objections raised by the prosecutor against the introduction of certain evidences or putting certain types of questions to witnesses. The court decides on the admissibility of such evidences or the propriety of such questions forthwith. After the defence evidence is completed, the court proceeds to hear the final address by the parties.

Art. 148.—Final addresses.

(1) After the evidence for the defence has been concluded the prosecutor may address the court on questions of law and fact.
(2) The accused or his advocate shall then address the court on questions of law and fact. He shall always have the last word.
(3) Where there are more than one accused the presiding judge shall decide in which order the accused or their advocates shall address the court.

The final address is like the opening statement made by the public prosecutor and the defendant or her counsel in their respective proceedings. In the final address, the public prosecutor addresses the court on questions of fact and questions of law short of conclusion on the establishment of guilt which is the power of the court. Likewise, the defendant or her counsel addresses the court on questions of fact and questions of law in a manner indicating her innocence. The law made it clear that the accused makes her final address last. However, where there are two or more defendants, the

court decides in which order the defendants and their advocates address the court. In practice, the court hears such final addresses in their order as stated in the charge. It is a matter of necessity that such final address be made orally. But there is no prohibition in the law whether the final address is made in writing or whether such writing is additionally submitted after the oral submission is made. After the final address, and after the court evaluates both the prosecution and defence evidences, the court makes its final judgment with respect to guilt of the accused.

It is discussed in relation to Art 141 that the public prosecutor needs to prove her case beyond reasonable doubt that the accused committed the alleged offence. In her defence, unlike the public prosecutor, the accused is not required to prove her case beyond reasonable doubt or to disprove all the facts that were proved by the public prosecutor. It is a rule of reason that she is required to prove her case *only by creating a doubt that is reasonable*. If the accused or her counsel creates such reasonable doubt as to her guilt the court then acquits the accused. Where the defendant is acquitted, the court enters judgement complying with the provisions of Art 189(1) and makes an order of release of the defendant where she is in custody and makes other consequential orders. Where, on the other hand, the accused is not able to create such doubt that is reasonable, the court convicts the accused with the offence she is charged or she would have been charged in the alternative. Then, the court proceeds to the sentencing stage.

13.4 Sentencing

Art. 149.—Judgment and sentence.

(1) . . .
(2) . . .
(3) Where the accused is found guilty, the court shall ask the prosecutor whether he has anything to say as regards sentence by way of aggravation or mitigation. The prosecutor may call witnesses as to the character of the accused
(4) Where the prosecutor has made his submissions on sentence the accused or his advocate shall be entitled to reply and may call witnesses as to character. Where the accused does not admit any fact regarding his antecedents, the prosecutor shall be required to prove the same.

The two processes, judgment and sentencing, are included in one article, Art 149. The two processes, however, need to be separately discussed for two reasons. First, even at the sentencing stage there are facts that may have

to be proved both by the prosecutor and the defendant, if they are to be of consequence, either by way of aggravation or mitigation of the sentence. As the guilt has to be met by an appropriate sentence, the antecedents and character of the accused have to be proved. Second, regarding the sentence, the Criminal Code provisions provide for a wide range of sentence from which the court has to choose. For instance, Outrages against the Constitution or the Constitutional Order entails rigorous imprisonment from 3 to 25 years, Crim. C., Art 238; likewise, Ordinary Homicide entails rigours imprisonment from 5 to 20 years, Crim. C., Art 540. The determination of whether a convict deserves 3 years sentence or 20 years is really a painstaking process taking wide range of factors into consideration in order to match the sentence with the guilt of the accused and in order to be able to achieve the objectives of punishment and in order to reduce arbitrariness. In doing so, the court needs the assistance of the parties. Thus, beyond the establishment of guilt, the subsequent establishment of the degree of guilt is also essential. As seen under Art 136 the public prosecutor is supposed to present her case in an objective and impartial manner. Likewise, she is not asking for aggravation of sentences for the sake of aggravation; she may also request the court to mitigate the penalty and present the evidence supporting the fact on the basis of which she justifies her mitigation claims.

At the sentencing stage, character of the defendant is an important quality.[770] The antecedents of the accused are important at this stage of the proceeding (see Art 138.) Where the public prosecutor makes submissions on character or other facts, such as, antecedents of the accused, the accused has the right to reply. The content of the provision is that for each allegation the public prosecutor makes, the accused has the right to reply. However, the accused has the right to address the court on matters of law and fact whether the public prosecutor addresses that issue or not. Where facts as alleged by the prosecutor are denied by the convict or her counsel, the public prosecutor has the duty to prove it. This makes the criminal hearing a two stage process. However, in an ideal situation everything is included in the investigation of the matter since complaint is filed before the investigating police officer and the public prosecutor has everything in order by the time she goes to court. Where the defendant denies prior conviction, the prosecutor needs to have a certified copy of the conviction handy.

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[770] The French say, "One judges the man, not the facts" because there is much emphasis on the character of the accused beginning from investigation. Pugh, *supra* note 272, at 10. In our criminal process, character is not much investigated into. Minutes, *supra* note 142, at 14

It is only when guilt and the degree of guilt is established that the court would be in a position to give its judgment. It is an important process to stand in its own; like the record of the court, a detailed and reasoned judgment is important both for the purpose of informing the parties the outcome of the case and to the appellate court should the case be appealed by either party to the next higher court.

13.5 Judgment of the Court

Art. 149.—Judgment and sentence.

> *(3) When the final addresses including the addresses under Art. 156, if any, have been conduced, the court shall give judgment. The judgment shall be dated and signed by the judge delivering it. The judgment shall contain a summary of the evidence, shall give reasons for accepting or rejecting evidence and shall contain the provisions of the law on which it is based and, in the case of a conviction, the article of the law under which the conviction is made.*
> *(4) Where the accused is found not guilty, the judgment shall contain an order of acquittal and, where appropriate, an order that the accused be released from custody.*
> *(5) . . . .*
> *(6) . . . .*
> *(7) The court shall then pass sentence and shall record the articles of the law under which the sentence has been passed.*
> *(8) Nothing herein contained shall affect the provisions of Art. 195 and 196 Penal Code.*
> *(9) After delivery of judgment the prosecutor and the accused shall be informed of their right of appeal.*

Whether the accused is acquitted or convicted, it is all based on judgment. Judgment is a logical conclusion of the law and fact as major and minor premises, respectively. Although the issue of fact is a minor premise in this syllogism, it is a major issue more appropriately addressed by evidence law. The court, however, has to include in its judgment, a summary of the facts and the evidences, the reasons for accepting and or rejecting each item of evidence and, where the accused is convicted, the provisions of the law under which she is convicted. In so doing, the court breaks the provision of the law into its constituent elements and address whether each of the elements of the offence are proved and proved to the required degree. The court also includes the sentence in its judgment and the provisions of the law considered in fixing the sentence. Where the accused is found not guilty,

however, the court orders the immediate release of the accused from custody or where she is released on bail that such bail bond is discharged.

Where there were exhibits produced at the trial, the court should also make order on the fate of those items, whether they may be returned to the person from whom they were taken or whether they would be disposed off if it is an illegal item. The judgment finally includes the fact that the parties have the right to appeal from the decision of the court.

The law also provides that the provisions of Art 149 do not affect the provisions of Arts 195, 196 of the 1957 Penal Code dealing with "Suspension of Pronouncement of the Penalty, Suspended Sentence" and "Suspension of Enforcement of the Penalty" respectively.[771]

13.6 Adjournments

Art. 94.—Adjournment.—Conditions.

(1) The court may of its own motion or on the application of the prosecution or the defence adjourn any hearing at any stage thereof where the interests of justice so require.
(2) An adjournment may not be granted unless:

(a) the prosecutor, public or private, or the accused fails for good cause to appear; or
(b) witnesses for the prosecution or the defence are not present; or
(c) in a trial other than that of a case committed on preliminary inquiry to the High Court, the prosecution require time for investigation; or
(d) further evidence requires to be produced; or
(e) evidence is produced either by the prosecution or the defence which takes the other side by surprise and the production of which could not have been foreseen; or
(f) the charge has been altered or added to and the prosecutor or the accused requires time to reconsider the prosecution or defence; or
(g) the accused has not been served with a copy of the charge or of the preliminary inquiry or has been served too short a time before the trial to enable him properly to prepare his defence; or

[771] These provisions are replaced by Crim. C., Arts 191, 192, respectively.

(h) prior sanction for a prosecution is required before the trial may start; or
(i) a decision in the trial cannot be given unless other proceedings be first completed; or
(j) the mental stability of an accused requires to be established by an expert; or
(k) the court considers that the accused, if a young person, should be placed under observation;
(l) or the trial cannot be completed in one day and is adjourned to the following day.

(3) No adjournment under paragraphs (a) and (f)-(h) inclusive shall be granted for more than one week.

Art. 95.—New adjournment and summonses.

(1) Subject to the provisions of sub-art. (3) of Art. 94, the court shall adjourn the hearing for such time only as is sufficient to enable the purpose for which the adjournment was granted to be carried out.
(2) Where the purpose for which the adjournment was granted has not been carried out for a reason not attributable to the fault of the prosecution or the defence, a further adjournment of the same or less duration shall be granted.
(3) Where a hearing has been adjourned under paragraphs (c) or (i)-(k) of Art. 94 (2), the court shall, when the purpose for which the adjournment was granted has been carried out, issue new summonses to the parties and witnesses.

Art. 96.—Effect of adjournment.

(1) On granting an adjournment, the court shall make such order as is necessary to ensure that the purpose for which the adjournment is granted is carried out. This shall include the issue of warrants on the conditions laid down in Art. 33, 53 and 125.
(2) Where an adjournment has been granted under paragraphs (j) or (k) of Art. 94 (2) the court shall order that the accused be remanded to a place where his state of mind can be examined into by an expert.

The accused has the right to speedy trial. The right to speedy trial, as indicated in earlier discussions include speedy investigation by the police and speedy action by the public prosecutor. There is also the need for speedy disposition of the case by the court. However, for certain essential reasons

that are expressly stated by the law, the case may be adjourned either on the request of the parties or by the court on its own motion. The adjournment is granted only if it is in the interest of justice. The interest of justice in this case may be a correct and fair outcome of the case inasmuch as for speedy disposition of the case. Therefore, even when there is a ground stated in the law, where the court is not convinced that such adjournment is in the interest of justice, it may deny such request.

The grounds for adjournment of the case are exhaustively listed under Art 94(2). Those grounds are self-explanatory and do not want further explanations. However, there are few points that need some focused discussion. Art 94(2)(a) provides that the case may be adjourned where the prosecutor (public or private) or the accused fails to appear for good reason. Even though the content of "good reason" is not defined, where such person fails to appear for an insufficient reason, the case is either closed or the trial continues in the absence of the accused. This is a special procedure—trial in absentia. However, Art 94(2) (c) provides that where the case is one which is not committed for preliminary inquiry, the prosecution may require time for investigation. The *a contrario* reading is that, in cases that are committed on preliminary inquiry to the High Court, the public prosecutor cannot request for adjournment for investigation. This may be because the preliminary inquiry is conducted after the police investigation is completed and the process has already taken long.

Generally, those grounds of adjournment could be classified into three categories: (a) those grounds of adjournment in respect of with the law have restricted the length for adjournment; (b) those in respect of which the court is given discretion; and (c) those which are governed by circumstances. The first category includes adjournments because the prosecutor, whether the public prosecutor or the private prosecutor, or the accused failed to appear, or because the charge needs to be altered as per Art 118 et seq., or where the accused has not been served with the charge or the records of the preliminary inquiry, or she was served with the charge or the records of the preliminary inquiry too short a time before the trial to enable her to prepare her defence or where there are preconditions to be met by the prosecutor to conduct the prosecution. The adjournment can be granted for a maximum of one week. Regarding the other two categories, such adjournment may be granted at the discretion of the judge only for such a period that is sufficient to enable the purpose for which the adjournment is granted to be carried out. Such is the case when further evidence is required to be produced during the hearing or evidence, the production of which

could not have been foreseen, is produced by either party which takes the other party by surprise.

Where adjournment is granted for further investigation in cases in respect of which preliminary inquiry is not held, or in cases where decision in the trial cannot be given unless other proceedings are completed or the mental stability of an accused is required to be established by an expert, or where the court considers the accused, if a young person, should be placed under observation. In such cases, because the court cannot determine the date on which the purpose for which the adjournment is granted would be completed, the case is adjourned indefinitely. The court issues a new summons to the parties and witnesses and the hearing continues once the purpose for which the adjournment was granted is carried out.

Furthermore, along with the adjournment, the court may have to grant other orders ensuring the purpose for which the adjournment is granted is carried out. For instance, where the adjournment is on the ground of further investigation, the court may grant search and arrest warrants, as the case may be. Where the adjournment is granted because the witnesses or the accused fails to appear for good reason, the court may grant bench warrant as per Art 125. Likewise, where the adjournment was granted for medical examination of the mental stability of the accused or the young person is placed under supervision, the court order that the accused be remanded to a place where the state of mind can be examined into by an expert. Where the purpose for which the adjournment is granted is not carried out in respect of those adjournments the length of which is fixed by the law, another adjournment may be granted. This provision suggests that in order to be granted another adjournment, the party, in whose favour it was granted, should prove to the court the purpose for which the adjournment was granted is not carried out for no fault of hers. From the reading of the provision, it appears that no more than two adjournments may be granted for the same purpose.

13.7 Joinder of Civil and Criminal Cases

Introduction

It is the practice in many civil law legal systems that the criminal court, where it convicts the accused, also orders her to pay compensation to the victim of the crime or a person who has a right from her. This part of the Code is uniquely civil law. It is a matter of common sense that where a person is accused of a criminal act which also entails her civil liability, it

is only appropriate that the court jointly address the issue save where there is any reason that makes it contrary to the purpose of jointly addressing the issue. Thus, where the victim wants to claim compensation, she can claim it either along with the criminal proceeding joined with the criminal charge, the victim or her agent appearing as a civil party, or separately before a civil court. This is all a matter of calculation of costs and effectiveness for the claimant.

The law provides that the victim who sustained damage or a person claiming under her can claim compensation while the case is in progress for the criminal matter. Depending on the nature of the parties or the complexity of the case, the court may deny the petition for joinder of the civil claim to the criminal proceeding.

The joinder of civil and criminal cases is not practiced in our justice system for reasons not known to the author. The possible reasons are that the public prosecutor does not work with the victims often times and that the victims do not know what time the public prosecutor institutes the charge. Furthermore, although many of the victims are called as prosecution witnesses they do not know they have the right to claim compensation because traditionally compensation is paid by the offender only after the dispute is amicably resolved and it replaces prosecution.

Crim. C., Art 101.—Restitution of Property, Compensation for Damages and Costs.

Where a crime has caused considerable damage to the injured person or to those having rights from him, the injured person or the persons having rights from him shall be entitled to claim that the criminal be ordered to make good the damage or to make restitution or to pay damages by way of compensation.

To this end they may join their civil claim with the criminal suit. Such claim shall be governed by the provisions laid down in the Criminal Procedure Code.

Art. 154.—Principle.

(1) Where a person has been injured by a criminal offence, he or his representative may at the opening of the hearing apply to the court trying the case for an order that compensation be awarded for the injury caused. The application shall be in writing and shall specify

the nature and amount of the compensation sought. He shall not on filing his application pay the prescribed court fees as though it were a civil case.

(2) The person making the application shall be shown the list of the witnesses to be called by the prosecution and defence and shall be asked whether he wishes additional witnesses to be called. Where he wishes additional witnesses. to be called, he shall be required to pay the prescribed fees for the issue of witness summonses as though it were a civil case.

(3) The provisions of this chapter shall apply to public and private prosecutions.

(4) Where the person making the application acts in the capacity of private prosecutor, he shall specify which witnesses he calls in support of the prosecution and which he calls in support of his civil claim. The provisions of sub-art. (1) and (2) shall apply.

The principle of joinder of criminal and civil cases is found in the Criminal Code that where the crime allegedly committed causes 'considerable damage' to the injured person or persons having rights from her, such person is entitled to claiming compensation along with the criminal charge. This provision is not a source of tort liability; the sources of liability of the offender are found in the Civil Code. The sources of extra-contractual liability of a person are stated under Civ. C. Art 2027.[772] As can be read from the provisions of Civ. C., Art 2035 crime is a fault and it entails civil liability of the offender, which earns compensation to the victim of the offence because crime is violation of a legally protected right.[773] As the criminal punishment imposed on the offender may not be that important to the victim the latter may claim compensation for the injury she sustained. Thus, the principle in the criminal procedure is, where a person, such person being a private

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772 Civ. C., *Art. 2027.—Sources of extra-contractual liability.*

(1) Irrespective of any undertaking on his part, a person shall be liable for the damage he causes to another by an offence.

(2) A person shall be liable, where the law so provides, for the damage he causes to another by an activity in which he engages or by an object he possesses.

(3) A person shall be liable where a third party for whom he is answerable in law incurs a liability arising out of an offence or resulting from the law.

773 Civ. C., *Art. 2035.—Infringement of a law.*

(1) A person commits an offence where he infringes any specific and explicit provision of a law, decree or administrative regulation.

(2) Ignorance of the law is no excuse.

person, physical or corporate, or a government institution, suffers injury of any kind that is compensable,[774] she or her representative may apply to the court trying the criminal case at the opening of the hearing so that the court may order also compensation be paid to the person who suffered injury. The injury may be material, be it future or present, and/or moral. As a separate claim, separate from the criminal liability of the accused, the victim can institute her suite anytime before the period of limitation expires.

The procedure is that such petition is to be filed before the trial court at the time of the opening of the hearing of the criminal case. As in a separate proceeding on civil matters, the petitioner indicates the nature and amount of the compensation (remedy) she requests. However, she is not required to pay court fee as in civil matters. Up on filing her application, she is shown the list of witnesses of the prosecutor and the defence. She is then asked whether she wishes to call additional witnesses, and if she so chooses, she is required to pay the prescribed fee for issuance of summons to the witnesses as though it is a civil case. The one caveat here is that, if the discussions as had in this text are accepted with respect to the provisions of Arts 123, 124 and 141, the defence evidence are to be revealed only after the court orders the accused to enter her defence that the defence evidence cannot be shown to the civil plaintiff. Practically, therefore, she can be shown only prosecution evidence, because, unless preliminary inquiry is conducted and the accused gave list of witnesses to be summoned in her defence during the trial, until she is called upon to enter her defence after prosecution case is concluded, the defence witnesses and evidence are not known. Where the applicant, the person claiming compensation, is satisfied with the evidence to be sufficient to prove her claim for compensation, the court proceeds examining the evidence already produced. These procedures are the same whether the prosecution is private or public. If the person claiming the compensation is the one who is conducting the private prosecution, she is required to specify the witnesses she is calling in support of the prosecution and which she calls in support of her civil claim. By doing so, again, the person is not required to pay a court fee upon filing such civil claim; rather she covers only the prescribed fee for the issuance of witness summons in respect of those witnesses whom she calls in support of her civil claim. The

[774] Please note that the Crim. C., Art 101 provides that the joinder of civil claims along with the criminal charge where the crime caused "considerable damage to the injured person or those having rights from him" suggesting that where the injury is not "considerable" is to be seen separately. This is not in line with the spirit of the provisions in the Criminal Procedure Code.

identification of such witnesses enables the court also to decide whether to grant such joinder of cases or not.

As alluded in the introduction, compensation could be requested separate from the criminal proceeding. Where there is no criminal case in progress such claim for compensation could be filed as a separate claim before a civil court. However, proof of facts could be more onerous for plaintiff in separate proceedings than it would be in a joint proceeding with a criminal charge. In joined proceedings, the plaintiff takes advantage of the investigation undertaken by the police and the prosecution undertaken by the public prosecutor, assuming the latter properly carried out their tasks. In fact, a very convenient process to the civil party could be brining the civil action after the criminal charge is disposed of provided the accused is convicted because a conviction for a criminal case is a conclusive proof of civil liability ensuing from the same action or omission that entailed the criminal responsibility.

There are, however, two major risks the principal being period of limitation. Civ. C., Art 2143 provides that the period of limitation for action for compensation is two years from the date the injury is sustained.[775] It is true that court proceedings take at least few years in our criminal justice. Should the accused be acquitted or discharged the right to bring a civil claim against the tort-feasor in a civil court expires. Secondly, compensation has to be claimed in good faith. The fact that the civil claim came too late after it is sustained may be considered contrary to this requirement.

Art. 155.—Application dismissed.

(1) The court shall consider the application and shall of its own motion or on the request of the prosecution or the defence refuse the application where:

(a) a young person is the accused: or
(b) the accused is being tried in his absence: or
(c) the injured party has instituted proceedings in a civil court having jurisdiction; or

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[775] Civ. C. *Art. 2143. Period of limitation*

(1) The action shall be brought by the victim within two years from the time when he sustained the damage for which he is claiming compensation.

(2) Where the damage is caused by a penal offence in respect of which the penal law prescribes a longer period of limitation, the latter period shall supply to the action for compensation.

(d) the person making the application is not qualified for suing; or
(e) the claim for compensation cannot be determined without calling numerous witnesses in addition to those to be called by the prosecution and defence; or
(f) the court is of opinion that the hearing of the injured party's claim for compensation is likely to confuse, complicate or delay the hearing of the criminal case.

(2) The application shall be dismissed where the amount of compensation claimed exceeds the pecuniary jurisdiction of the court.
(3) Where the court dismisses the application its decision shall be final and no appeal shall lie against it. The injured party shall be informed by the court that he may file a claim against the accused in a civil court.

Upon receiving the application of the civil plaintiff requesting the court to try the civil matter along with the criminal charge the court first decides whether to grant such claim. The court can dismiss the petition on its own motion or on the application of the parties based on specific grounds. Those grounds are where the accused is a young person or where the accused is being tried in her absence or where the civil claim is already pending before a civil court. The court can also dismiss the petition to jointly try the civil claim where the person requesting for compensation is not qualified to sue the accused for lack of *locus standi* or otherwise. The law further provides that where the proof of the civil claim demands many more witnesses than those already in the prosecution and the defence witnesses, the court can dismiss the petition. The civil party is working jointly with the prosecution. As it is already indicated above, the number of witnesses that is material for such decision should be that of the prosecution and not of the defence. Where the number of witnesses for the civil matter is large, it is possible it complicates or confuses the issue in the criminal matter or delay the hearing. This is another ground for dismissing the petition. However, the court can also dismiss the case on the ground that the amount of compensation is beyond the material jurisdiction of the court were it to resolve such claim in its civil jurisdiction. This is the case where the criminal charge is brought before the Federal First Instance Court, for instance, whose material jurisdiction in civil matters is up to Birr 500,000 and the amount of compensation claimed is more than Birr 500,000. The court does not have material jurisdiction and thus has to dismiss the petition.

The decision of the court to dismiss the petition is final from which no appeal lies. However, the court informs the petitioner that she can file her claim before a civil court that has jurisdiction.

Art. 156.—Application not allowed.

(1) Where the application is allowed the injured party shall be entitled to take part in the proceedings and shall have with regard to evidence all the rights of an ordinary party.
(2) The court shall at the close of the case for the defence permit the injured party or his representative to address the court in person or by advocate on the question of the amount of compensation to be awarded. The accused or his advocate shall have the right to reply.

Art. 157.—Injured party may withdraw.

An injured party may at any time before the close of the case for the defence withdraw his application and thereupon he may file a claim against the accused in the civil court having jurisdiction.

The title of Art 156 is misleading in that while it reads 'application not allowed' the content of the provision deals with the consequences of granting the petition to entertain the civil claim by the court trying the criminal charge. Thus, once the court grants the petition, the civil party has all the rights of an ordinary party; she calls her witnesses supporting her claim, examines-in-chief the prosecution witnesses, cross-examine defence witnesses or challenge the admissibility of defence evidence, etc. on the amount of the compensation. The civil party can do such in person or through her advocate. After the conclusion of the case for the defence, she is entitled also to address the court personally or through representative on questions of whether compensation should be granted and the amount of compensation to be awarded. The accused or her advocate has the right to reply and always has the last word.

The injured party or the person claiming under her also has the right to withdraw her case at any stage of the proceeding before the close of the case for the defence, and may file her claim against the accused in a civil court having jurisdiction.

Art. 158.—Acquittal or discharge.

Where the accused is acquitted or discharged, the court shall not adjudicate on the question of compensation and shall inform the injured party that he may file a claim against the accused in the civil court having jurisdiction.

Art. 159.—Order on award of compensation.

(1) The court when awarding compensation to an injured party shall order that:

(a) the amount of compensation so awarded be paid to the injured party or his representative; and
(b) costs as provided for civil cases be paid to the injured party or his representative; and
(c) the accused pay the court fees as if it were a civil case.

(2) Judgment shall be given as in an ordinary case.

It is alluded earlier that the degree of proof required in a civil case and in a criminal case are different. Because the degree of proof required in a criminal case is higher (beyond reasonable doubt), the fact that the accused is acquitted or discharged of from her criminal charge does not mean that she is not civilly liable.

Civil cases, however, need to be proved by preponderance or by clear and convincing evidence as the case may be. That evidence which can prove cases beyond reasonable doubt certainly prove civil matters which are required to be proved, at least, by a preponderance or clear and convening as these are proofs within the range of beyond reasonable doubt. The reverse, however, is not necessarily true. Therefore, the fact that a person is not convicted for lack of proof beyond reasonable doubt does not mean that she is not subject to civil liability, if there is any such claim, as that evidence may possibly prove those facts by preponderance or by clear and convincing evidence. Therefore, where the accused is acquitted or discharged, the court does not adjudicate on the issue of compensation. It would rather inform the petitioner that she can file her claim before a civil court having jurisdiction. This apparently may operate as a ground interrupting the period of limitation as per Civ. C., Art 2143.

Where the accused is convicted, on the other hand, the court adjudicates the issue of compensation and expenses. Therefore, the court awards the civil plaintiff the amount of compensation that the court deems appropriate and all other costs she incurred in relation to the proceeding. The court would also order the accused to pay court fees as if it were a civil case. Such court fee is not paid to the plaintiff as she has not paid in the beginning.

Rather, it is to be paid to the court. The court gives judgment as in ordinary cases—the summary of facts, evidence produced by both parties, those evidence which were admitted in evidence and those which were not, the reasons for admitting or not admitting such evidences and the provisions of the law relied upon per Art 149.

SPECIAL PROCEDURES

Chapter 14

Special Procedures

Introduction

The previous chapters discussed the regular procedure in a given criminal case. However, there are procedures that are considered "special." They are special in that they are deviations from the regular procedure discussed so far. Such is the case with respect to trial in absentia and in cases regarding juveniles. The attendance of the accused is an essential requirement in criminal proceedings in order to be personally informed of the charges and to defend herself. There are, however, circumstances wherein the accused may not appear either because she is not found for service of summons or she flees away. The mere fact of absence of the accused makes the procedure 'special' in that evidence produced by the prosecutor which would have been critically tested by the accused is not that tested because it is an ex-parte hearing. In such cases, because the offence is of serious nature the public has the right to have the case heard, the case is tried in the abscess of the accused. On her re-appearance, the accused, where she is able to prove that she has not been served on summons or she was served on summons but she was not able to appear before the trial court for reasons beyond her control, she can apply to the court that gave the final judgment to set aside her conviction.

Likewise, age is relevant factor in all juridical acts including for criminal responsibility and the type of procedure to be applied. Thus, the administration of the criminal justice system has four age classifications. The first category of persons is infants—those who have not attained the age of nine. Infants are not criminally responsible for their acts. The second

category of persons is young persons or juveniles who are between the age of nine and fifteen. This category of persons is the subject of this Chapter. The third category of persons is post-juveniles, those between the age of fifteen and eighteen. This category of persons is subject to the criminal law and procedures that are applicable to adults save in few circumstances, such as, in sentencing. The fourth category is adults—those who are above the age of eighteen to whom the regular criminal procedure law is applicable.

The criminal process for young persons is very different from the one for adults; it is flexible and informal beginning from the initiation of the case to judgment and sentence. The provisions of the criminal law are very much lenient in terms of the penalties that may be imposed on the juvenile should she be found delinquent. The substantive law is significantly modified having the educational and reformative nature of the measures that may be imposed on the juvenile delinquent. The major forms of measures are admission to curative institutions, supervised education, reprimand, school or home arrest. Generally, there is no imprisonment save in exceptional circumstances for serious offences. The procedure has to conform to the substantive law. Thus, there is no arrest on summons or arrest warrant, no police investigation without court directive, nor is there criminal charge for initiation of the case; no adversarial hearing as in other criminal hearings.

14. 1 Trial in Absentia

14.1.1 The Procedure Trying a Person in Her Absence

Art. 160.—Principle.

(1) The provisions of this Chapter shall apply where the accused fails to appear whether the prosecution is public or private but shall not apply to young offenders.
(2) Where the accused does not appear on the date fixed for the trial and no representative appears satisfactorily to explain his absence, the court shall issue a warrant for his arrest.
(3) Where the warrant cannot be executed, the court shall consider trying the accused in his absence. Where an order to this effect is made the provisions of the following articles shall apply.

Normally, at the hearing of the case the parties are required to be present on the day fixed. The accused has not only the right to personally attend the proceedings but also the right to be personally informed of the charges,

to defend herself, and to challenge the evidence presented against her which also significantly assists the court in the manifestation of truth. Furthermore, should the accused found to be guilty of the offence with which she is charged, the sentence can be executed only if she is personally present. Where the law says personal presence, it means only *personal presence* and not appearance through a representative. Thus, the fact that the advocate appears for her client, for instance, does not mean the accused has appeared. We can make such inference from the provisions of Art 127 (1), which provides for the personal appearance of the accused and the possibility of being assisted by an advocate; i.e., the accused shall be personally present but she may be assisted by her advocate. The advocate is there to assist the accused and not to replace her in any way; they are distinct persons in the eye of the law in criminal cases unlike in civil cases. A representative, however, has been envisaged by Art 160 (2) but this representative appears before the court only to explain the reasons why the accused failed to appear and to request for adjournment of the case until such date on which the accused would be able to appear, such as, where the accused falls seriously sick.

Where she fails to appear on the date fixed for the trial and somebody appears to explain the absence of the accused to the satisfaction of the court the case may be adjourned by virtue of Art 94(2) (a). Where no representative appears to explain the reason why the accused failed to appear on such date to the satisfaction of the court, the court shall issue a warrant for her arrest. Such person where she fails to appear for unjustified reason, it is more likely that she is hiding herself from the court and the execution of arrest may be without effect. Where the warrant cannot be executed because the whereabouts of the accused is not known or that she flees away, for instance, the court shall consider whether it can try the case in her absence. This proceeding, trying the case in the absence of the accused, is called trial in absentia or default proceeding.

Art 160(1) further provides that the provisions of this Chapter dealing with trial in absentia is applicable where the accused fails to appear whether it is a *public* or *private* prosecution. This provision is improperly broadly crafted; offences that are prosecuted by private prosecutors are only compliant offences.[776] However, the provisions on trial in absentia are applicable only in respect of those offences that are punishable without complaint when it is seen in light of the provisions of Art 161(2). Complaint offences are

[776] Arts 44(1), 47 and 150-153

only minor crimes that none of which are punishable by 12 years rigorous imprisonment; and none of those offences covered by the provisions of Penal Code Art 354-365 are complaint offences.[777] This sub-article further provides that the provisions of trial in absentia are not applicable to young persons.

Art. 161.—Conditions for trying accused person in his absence.

(1) Where the accused fails without good cause to appear on the day fixed for the hearing, the court shall record his absence and may direct that he be tried in his absence in accordance with the provisions of this Section.
(2) No accused person may be tried in his absence under the provisions of this Section unless he is charged with:

(a) an offence punishable with rigorous imprisonment for not less than twelve years; or
(b) an offence under Art. 354-365 Penal Code punishable with rigorous imprisonment or fine exceeding five thousand dollars.

Art. 162.—Publication of summons.

Where the court decides to hear the case in the absence of the accused it shall order the publication of the summons which shall show the date fixed for the hearing. It shall contain a notification to the accused that he will be tried in his absence if he fails to appear.

Once the court ascertained that the accused failed to appear on the date fixed for the hearing and the arrest warrant subsequently issued by the court cannot be executed, the court considers whether to try the case in the absence of the accused. Trial in absentia is not held in respect of all offences indiscriminately. The provisions of Art 161 indicate that the accused could be tried in her absence only if the offence is of such serious gravity that the public has special interest in the trial and outcome of the case. Such offences are not complaint offences. It is only in respect of offences that are either punishable with (mandatory) rigorous imprisonment for not less than twelve years or offences that are provided for under Arts 354-365 of the Penal

[777] The corresponding provisions of Pen. C., Art 354-365 are Crim. C., Arts 343-354

Code (Offences against the Fiscal and Economic Interests of the State) of the Penal Code, which are punishable with rigorous imprisonment or fine exceeding five thousand birr where they are committed. Therefore, where the offence with which an accused is charged is punishable by imprisonment which is possibly less than 12 years imprisonment as a mandatory sentence the case may not be tried in the absence of the accused.

Thus, where the crime is Outrages against the Constitution or the Constitutional Order, Crim. C., Art 238(2), where it results in "serious crises against the public security and life" it may be triable in the absence of the accused because it entails life imprisonment or death sentence. However, if the crime falls under Crim. C., Art 238(1) it is not triable in absentia as the penalty the law provides for is from 3 years to 25 years imprisonment. Likewise, Armed Rising or Civil War, Crim. C., Art 240(1), does not justify trial in the absence of the accused for the penalty is between 10 to 25 years imprisonment; however, where the crime entails "serious crises to the public security or life" it is triable in absentia because it entails imprisonment for life or death, Crim. C., Art 240(2). Equally, Soliciting Corrupt Practices, Crim. C., Art 427(3), and Ordinary Homicide, Crim. C., Art 540, do not justify trial in absentia because the respective penalties provided for in the Criminal Code are 2 to 15 years and 2 to 25 years rigorous imprisonment respectively. In those cases where the mandatory sentence is less than 12 years imprisonment, it is not possible to try the accused in her absence because until she is proven guilty she is presumed to be innocent and until it is proved it is not known whether she would be subjected to a penalty for more than 12 years imprisonment.

Despite the clarity of this provision, problems in interpretation and application of the provisions on Art 161(2)(a) are observed. For instance, Asmare Abate and Kebede Kiros, respondents before the Supreme Court[778] were defendants before the Federal High Court where a charge as per the Special Penal Code (Proclamation No. 214/1982), Art 23(1)(a) was filed against them along with other four co-defendants. The crime with which defendants were charged was punishable by imprisonment not less than 3 years and not more than 15 years of imprisonment. Where Asmare and Kebede failed to appear for trial the hearing continued for the other four co-defendants. The public prosecutor proving that defendants have already fled the country requested the court publication of summons in

[778] *Federal Ethics and Anti-Corruption Commission v. Asmare Abate and Kebede Kiros* (Federal Supreme Court, 2006) Crim. App. F No. 18127

the newspaper and for trial in absentia which the court denied. The court reasoned that according to Art 161(2)(a), trial in absentia is granted only in cases that are punishable with 12 years rigorous imprisonment. The case against the defendants entails punishment not less than 3 years and not more than 15 years. There is a possibility that defendants, should they found to be guilty, may be sentenced to less than 12 years imprisonment.

The public prosecutor appealed to the Supreme Court. The latter reversed the decision of the High Court on the ground that "while the public prosecutor had shown the court that defendants have already fled the country, the court's inaction is not appropriate. For a person who fled the country and cannot be found at her address for service of process, the last remedy is publication of summons as per Art 161(1). The provisions of Art 161(2)(a) need to be seen in light of Art 161(1); the law principally provides for summons. Therefore, the High Court's interpretation that defendants may be sentenced to less than 12 years imprisonment is inappropriate." However, the plain reading of the provisions made it clear that the High Court's interpretation of the provisions of Art 161(2)(a) is more tenable than that of the Supreme Court.

In the above discussion it is shown that the court considers whether to hear the case in the absence of the accused only when the following conditions are met. First, the accused must be charged with a serious offence (either by the gravity of the punishment as not to be less than 12 years imprisonment as provided for in the law creating the offences, or by express reference to the offence as justifying trial in absentia) and the accused fails to appear on the date fixed for the trial without good cause. However, this second requirement is vague for implementation and thus created a serious divergence in the practice of the courts. In *Alemtshai Wondimu,*[779] defendant was charged for corruption offences but process could not have been served at her address as she could not be found. The public prosecutor requested the court to order that the summons be published in the newspaper and defendant be tried in her absence. The court denied the request. It reasoned that "publication of summons in the newspaper is not for the purpose of service of process; it is rather for the purpose of notifying the accused that she was serviced with process but for no good reason fails to appear on the date fixed for the hearing that the case would be tried in her absence." The prosecutor appealed to the Supreme Court against the decision of the High Court. The

[779] *Federal Ethics and Anti-Corruption Commission v. Alemtsehai Wondimu* (Federal Supreme Court, 2006) Crim. App. F No. 20903

Supreme Court in reversing the High Court's decision reasoned "where it was shown to the court that it was not possible to serve summons to the accused at her address, the court should have ordered the publication of summons in the newspaper or employ other mechanisms; its inaction on the matter is not proper. The law does not prohibit publication of summons or service of process by other means where the accused is not found in her address."[780] The Supreme Court, thus, ordered the High Court to order the publication of summons and where the accused fails to appear on the date fixed for the hearing to hear the case in hear absence. Here again, the interpretation of the High Court is more tenable and logical than that of the Supreme Court which tries to be more practical (do you think the high court's reasoning re the purpose of publication is correct?). The only limitation of the interpretation of the High Court is that, it establishes one more requirement for trial in absentia—that the accused be served on summons and failed to appear—a requirement that is not in existence in the law.

The examination of these two requirements by the court is for the determination of whether the case can be tried in the absence of the accused. The court orders publication of summons only after it decides to hear the case in the absence of the accused whether the defendant was already served on summons or not. The publication of summons thus appears not to be an element of the evaluation whether the case can be heard in the absence of the defendant. Where the court decided in the affirmative, it orders the publication of the summons, which shows a) the date fixed for the hearing; and b) that the hearing would proceed in her absence. The Amharic version also includes that the notice need to contain the offence the accused is charged with. The publication of summons in the newspaper is notice to the accused that the hearing date is fixed and that she can take advantage of the process and challenge the evidence that may be produced against her by the public prosecutor which would be heard in her absence.

The process in the progressive evaluation of circumstances and decision on matters is missed in *Awotash Woldegiorgis*.[781] In that case, the High Court ordered the publication of summons fixing the date for the hearing. On such date the accused did not appear. The public prosecutor thus requested

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[780] The Supreme Court held in the same manner in *Federal Ethics and Anti-Corruption Commission v. Eyasu Tesfa* (Federal Supreme Court, 2006) Crim. App. F No. 20031

[781] *Federal Ethics and Anti-Corruption Commission v. Awotash Woldegiorgis* (Federal Supreme Court, 2006) Crim. App. F No. 19049

the court to order the case be heard in the absence of the defendant. The court denied the request on the ground that publication of summons in the newspaper is not service of process. The Supreme Court reversed the decision and ordered the High Court to hear the case in the absence of the defendant. The decision of the Supreme Court is appropriate in that the High Court after ordering the publication of the summons erred in going backward and refusing to try the case in absentia.

Where the court believes the publication of summons would be ineffective and could come up with other mechanisms by which summons could effectively be served on the accused, the court may order such other mechanisms be employed. However, there is no further guideline as to what those alternative mechanisms could be. Furthermore, the Amharic version of Art 161 has additional Sub-Article 3 that is not in the English version which more or less translates to mean 'where the accused takes refuge in a foreign country and the latter is not willing to extradite the accused to Ethiopia, the provisions of Art 12 of the Penal Code [Crim. C., Art 12] shall be complied with;' that is Ethiopia requests the country of refuge to try the accused.

Art. 163.—Hearing and judgment.

(1) Where the accused fails to appear after publication of the summons in accordance with Art. 162 the case shall continue as in ordinary cases.
(2) The prosecution witnesses shall then be heard and the public prosecutor shall make his final submission.
(3) The court shall give judgment as in ordinary cases.

On the fixed day as stated in the summons published, after ascertaining the fact that the accused has not appeared, the court continues to hear the case as in ordinary cases save it is an ex-parte hearing. Thus, the prosecution witnesses would be heard; other evidence would be examined and the prosecutor makes a final address if she wishes to. There is no defendant to cross-examine the prosecution witnesses, but the court may put questions to the prosecution witnesses as per Art 136(4), where it believes such question is "necessary for the just decision of the case." There are doubts whether this question by the court is equivalent to and replaces the cross-examination by defendant's counsel, but it certainly is an inquiry into the facts of the case and test of the veracity of the testimony. Once the hearing of the witnesses is concluded and after evaluating the evidences that were produced by the prosecutor the court enters judgment either convicting or acquitting the

accused as in ordinary cases. Where the court acquits the accused, the public prosecutor may lodge an appeal to the court having jurisdiction.[782] Where the court convicts the accused, however, it also fixes sentence and issue an order that such person be arrested and serve the sentence.

This Chapter of the Code provides for situations where the accused can be tried in her absence. Regarding those offences not covered under Art 162, Art 38(d) provides that the public prosecutor may refuse to institute proceedings under Art 42. One of those situations is where the "there is no possibility of finding the accused and the case is one which may not be tried in his absence."[783] Thus, initially the public prosecutor decides whether the case can be tried in the absence of the accused; where the public prosecutor files a charge in a case that is not covered by the provisions of Art 161, the court may refuse to hear the case.

14.1.2 Setting aside Judgment given in Default

Art. 164.—Setting aside of judgment.

An application to set aside the judgment may be made on the conditions laid down in Art. 197-202.

Art. 197.—Court having jurisdiction.

An application to set aside a judgment given in default may be made by the person sentenced in his absence to the court which passed the judgment.

Art. 198.—Time and form of application.

An application under this Title shall be made within thirty days from the date on which the applicant became aware of the judgment given in his absence and shall contain the reasons on which he bases his application.

Art. 199.—Grounds for granting application.

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782 Those offences provided for in Art 161(2)(a) fall under the jurisdiction of the Federal High Court while those of Art 161(2)(b) offal under Federal First Instance Court. Thus, the appeal in respect of cases falling under Art 161(2)(a) would go to the Supreme Court while in respect of those cases falling under Art 162(b) would go to the High court.

783 Art 42(1)(b)

No application under this Title shall be granted unless the applicant can show:

(a) that he has not received a summons to appear; or
(b) that he was prevented by force majeure from appearing in person or by advocate.

It is provided for in the law that trials in absentia may be held where the accused fails to appear for no sufficient reason; however, because the accused does not appear before the court whether after or without service of process, she could not challenge the conclusion of "no good reason." The insufficiency of the reason for failure to appear before the trial court is presumed from the fact that neither the accused appeared before the trial court nor anyone else appeared to explain why she failed to appear. If the court decides to try the case in her absence, the accused may challenge such presumption only when she re-appears before the court that rendered the judgment of conviction. Such application to set aside the judgment rendered in default is to be filed before the court that rendered the final judgment—the judgment ripe for execution.

The procedure is, first, the application to set aside conviction in default must be made within thirty days from the date on which the applicant (the convict) became aware of the judgment given in her absence. Where the convict became aware and is not able to file her application within those thirty days, her advocate may file the application and the convict may have afterwards a sufficient time to appear before the court as her personal presence is necessary. Second, the application should contain the reasons on which the application is based. Such reasons are only two; that is, either a) the accused has not received summons to appear; or b) she has received the summons but prevented by *force majeure* from appearing in person or by advocate. A strict interpretation of the provisions suggest that only the first reason appears to be acceptable in the majority of cases, if at all it is acceptable, and the second seems to be very much unlikely. An accused who has received summons may communicate to the court that she is not able to appear before the court on the fixed day for reasons beyond her control not only through her advocate or her member of the family but also through the police officer who has served her with the summons if she had a chance to know the reasons ahead of time. By communicating the fact to the court that she would not appear on such day, the accused may request an adjournment until such day she would be able to appear before the court. Where summons has not been served on the accused because she made the service of summons difficult or impossible, however, the court may proceed

trying the accused and the accused may not be able to request the court to set aside the judgment later, as she would not have good reason to show the court she failed to appear on such fixed day for the trial. However, the accused has a constitutional right to personally attend and be informed of the charges and to challenge the evidence that may be presented against her. Where she knowingly makes service of process impossible she waived her right; but the court need to interpret the requirements very lightly that an ex-parte hearing is essentially unfair for the judicial process too.

Where the person is not able to file her petition within such period, she still has the opportunity to file her petition to the Supreme Court for review by cassation provided the judgment of the trial court has fundamental error of law (see Section 15.2 *infra.*). Wrong conviction is most likely a matter of fact, but the practice of the Supreme Court's cassation bench indicates that often matters of fact are also considered as questions of law. Therefore, there is a possibility that the court may interpret such wrong conviction because of untested evidence as a question of law and the case is reviewable.

14.1.3 The Procedure

Art. 200.—Action up on filing of application.

(1) On the filing of the application, a copy thereof shall be sent to the public prosecutor and the applicant and the public prosecutor shall be informed of the hearing date.
(2) Where the applicant, having been duly summoned, fails to appear on the hearing date the application shall be dismissed.

Art. 201.—Hearing.

(a) The applicant or his advocate shall speak in support of the application and the public prosecutor shall reply. The applicant shall have the right to reply.
(b) The court shall then give its decision on the application.

Art. 202.—Judgment.

(1) Where the application is allowed under Art. 199, the court shall order a retrial and the public prosecutor shall file the charge in a court having jurisdiction.
(2) Where the application is dismissed, the court shall make such consequential orders as the circumstances of the case require.

> *(3) No appeal shall lie against a decision dismissing the application but nothing shall prevent the applicant from appealing against sentence only within fifteen days of the dismissal of the application.*

Upon receiving the petition to set aside the conviction given in default, the court would send a copy to the public prosecutor and both parties are informed of the date for the hearing. If the applicant fails to appear on the date fixed for the hearing, her application would be dismissed. Where the applicant appears on the fixed date, however, the applicant speaks first in support of her application and may produce evidence to show to the satisfaction of the court that the reasons stated in her petition actually existed. The public prosecutor then speaks in response and the applicant is given a chance to reply if she wishes to. The court then enters decision whether the reasons in the application to set aside the conviction entered in default are acceptable. Whether such hearing is conducted on summary and whether the parties can make written submissions is not clear. Despite the matter focuses only on a single and clear issue of fact, which parties would have to support with evidence, there is no reason why parties may not make written submissions.

After hearing both sides, where the court grants the application, the court orders the retrial of the case and the public prosecutor institutes a charge before the court having jurisdiction. Such court is the court which rendered the judgment in default and which granted the application to set aside the conviction entered in default. Where a case is seen on appeal, and the appellate court remands the case to the trial court, it is not going to the same bench. Thus, although the law is silent, after setting aside the judgment entered in default, the High Court in *Haider*[784] case ordered the case be heard by "another court." Accordingly, the case was pending before another bench of the High Court. The applicant filed his appeal before the Supreme Court based on the content of the phrase "anther court" whether it is meant to refer to another bench of the High Court or another court that has no jurisdiction over the matter. The Supreme Court held that "the provisions of Art 202(1) are clear that the spirit of the law is that where the court sets aside the judgment rendered in default and orders the public prosecutor to file the charge before the court having jurisdiction, the objective of the law is, instead of the case being tried by the bench that already entertained, it is better if the case is seen anew by an equivalent court having jurisdiction.

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[784] *Haider Kebbir Seid v. Federal Ethics and Anti-Corruption Commission* (Federal Supreme Court, 2007) Crim. App. F No. 28390

Thus, the phrase 'another court' does not mean another court without jurisdiction; it rather refers to an equivalent court having jurisdiction. Thus, because the court having jurisdiction is the Federal High Court, the case may be heard by another bench in the Federal High Court."

Art 202(3) provides that where the application is rejected or dismissed, however, the rejection is final and no appeal against such decision lies. However, the petitioner may lodge her appeal to the next higher court against the sentence that was fixed and rendered by the trial court in her absence within fifteen days of the dismissal of her petition. This provision basically meant for restriction of re-trial of the case by the appellate court. However, it also happens to be effectively nullifying constitutional right to appeal. Therefore, it can effectively be argued that this particular provision is not valid as per Art 9(1) of the Constitution.

14.2 Procedures Relating to Young Persons

Background

When tried and found to be delinquent, young persons (juveniles) are not subjected to the same punishment as adults are. The Criminal Code provides that the measures that may be imposed on young offenders are the following: Admission to Curative Institution, Art 158; Supervised Education, Art 159; Reprimand or Censure, Art 160; School or Home Arrest, Art 161; and Admission to Corrective Institutions, Art 162. In Exceptional circumstances, however, fine may be imposed where the young person understands the nature of the measure. Where the young person committed an offence that is "normally punishable with a term of rigorous imprisonment of ten years or more or death" the court may order such person be sent to either a corrective institution or a penitentiary detention institution.[785] Where those measures are imposed on a young person, they are not "regarded as having been sentenced under the criminal law."[786] The substantive law restricted the effect of penalty on the young person on the ground that such person is not fully grown to appreciate the nature and purpose of the punishment. The law taking into consideration 'the best interest of the young person' rather replaces the penalty with educative and reformative measures than the punitive measures. Furthermore, the juvenile is as tender in age as she is, she can easily be reformed by such measures while she is among the society.

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[785] Crim. C., Art 168

[786] *Id*., Art 165

Matching the substantive law, the procedure has special rules. There is no arrest of the juvenile whether on summons, on warrant or for flagrant offences; there is no police investigation save with court authorisation; hearings are initiated without a formal charge and they are conducted like an ex-parte proceeding making the process less adversarial and the case is heard in closed chamber.[787]

The procedure regarding juveniles is a mini-procedure by itself. However, the Chapter on the procedure on cases involving juveniles includes only 10 Articles leaving other provisions elsewhere in the Code that are meant to exclude the application of specific provisions to this process. As the procedure regarding juveniles cannot effectively be covered by those provisions, regard may be had to the provisions regarding adults. There are two cautions though. First, those provisions that are expressly excluded cannot be applied. Second, the basic framework of the criminal process is laid down in the Constitution. Those provisions are also applicable to juveniles based on the principle of equality. The provisions specifically dealing with juveniles are believed to afford a better protection to juveniles than the ordinary process applicable to adults. Therefore, where there is a gap in the procedure for juveniles, resort may be had to that applied to adults provided it is in conformity with the constitutional protection afforded to suspects and the accused.

14.2.1 Young Person, Definition and Effects

Art. 3.—Interpretation

"Young person" shall mean a person between the ages of nine and fifteen.

Crim. C., Art 52.—Infancy: Exoneration Provisions from Criminal Provisions.

Infants who have not attained the age of nine years shall not be deemed to be criminally responsible. The provisions of this Code shall not apply to them . . . .

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[787] For in-depth discussion see S. Z. Fisher "Criminal Procedure For Juvenile Offenders in Ethiopia" *2 JEL No. 1*, 1970. Save few changes in the Constitutional provision and the new Criminal Code, the rest of the law is not changed neither the practice.

Crim. C., Art 53.—Special Provisions Applicable to Young Persons.

> *(1) Where a crime is committed by young persons between the ages of nine and fifteen years, the penalties and measures to be imposed by the courts shall be only those provided in Articles 157-168 of his Code . . . .*

Crim. C., Art 56.—Criminals Over Fifteen but Under Eighteen Years of Age.

> *(1) If at the time of the commission of the crime the criminal was over fifteen but under eighteen years of age, he shall be tried under the ordinary provisions of this Code.*

For the purpose of determination of criminal responsibility and application of specific procedure to a particular criminal process, the Criminal and the Criminal Procedure Codes have four classifications based on age. Infants, those who have not attained the age of nine, are not criminally responsible for their acts. The Criminal Code provides that appropriate measures are to be taken by the parents, family, guardians and schools. The nature of such measure is not, however, clear.[788] Juveniles or young persons who are between the age of nine and fifteen are the subject of this section. Post-juveniles,[789] those between the age of fifteen and eighteen are subject to the criminal law and procedures that are applicable to adults save in few circumstances, such as, sentencing.[790] Adults are those who are above the age of eighteen to whom the full force of the Criminal Procedure Code and the Criminal Code are applicable.

The relevant time for the determination of the age of the young person is the time of the commission of the alleged offence. For instance, if the offence is committed by the time the juvenile was fourteen and the case is brought after she attained the age of fifteen, she would be tried according to those provisions applicable to young persons. The ascertainment of age of such person for the proper application of the special procedure is a matter of evidence. Although the law provides for the registration of a newly born child it is much less implemented.[791] Thus, when a suspect is 'detained,' she is sent

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788 Art 39(1)(b); Crim. C., Art 52

789 Fisher, *supra* note 788, at 119

790 Crim. C., Arts 56(2), 157

791 Civ. C., Art 99 et seq.

to the nearest medical centre for the ascertainment of age, a determination which may not always be correct. The ascertainment of age in such manner thus defies the purpose of the special nature of the procedure.

Art. 5.—Persons to be tried.

(1) No young person (Art. 53 Penal Code) may be tried together with an adult.

Art. 80.—Principle.

(3) The provisions of this Book shall not apply to offences coming within the jurisdiction of the High Court which have been committed by young persons.

Art. 108—Principle

(3) The provisions of this Chapter shall not apply in cases concerning young persons unless an order to the contrary be made under Art. 172.

Art.155.—Application dismissed.

(1) The court shall consider the application and shall of its own motion or on the request of the prosecution or the defence refuse the application where:

(a) a young person is the accused;

Art. 160.—Principle.

(1) The provisions of this Chapter shall apply where the accused fails to appear whether the prosecution is public or private but shall not apply to young offenders.

Art. 171.—Principle.

Criminal cases concerning young persons shall be tried in accordance with the provisions of this Chapter.

The procedure applicable to juveniles is special in that it is different from what is applied to adults. The special nature of the procedure is seen from two perspectives. The first perspective is that the Criminal Procedure

Code provides for the special procedure governing young persons in the administration of the criminal justice as discussed in this section. The second perspective is there is an express exclusion of certain procedures applicable to adults. Those provisions partly reproduced above are selected from different parts of the Code that exclude the application of particular process from being applied to juveniles.

When two or more persons are charged with the same offence, whatever their degree of participation may be, their case may be heard together unless there is a strong case against it.[792] Here, the law expressly provides that, when a juvenile is suspected of a crime along with an adult, such juvenile may not be tried along with the adult. Likewise, having regard to the seriousness of the crime there are other special procedures. For instance, where the crime committed is first degree murder or aggravated robbery the law requires that preliminary inquiry be held unless the public prosecutor can show to the High Court that the hearing will be conducted soon that the later dispenses with the process. Likewise, where the crime committed is within the jurisdiction of the High Court, the public prosecutor, having regard to certain circumstances, may request preliminary inquiry be held. In the same manner, where the crime committed is punishable by at least 12 years of rigorous imprisonment or falls under certain category, and the accused cannot be found, she may be tried in her absence. With respect to the juvenile, however, those procedures are not applicable. Thus, despite the gravity of the offence the young person is suspected of (charged with), there is no process of preliminary inquiry nor can the case be tried in her absence.

The manner of initiation of the case against the juvenile is by presenting a compliant or accusation before the Woreda court. This limits the traditional activity of the police—investigation. In such cases, the police produced the juvenile to the nearest Woreda (First Instance) Court which may give instructions as to the investigation process. A closer reading of other provisions, such as, Art 172 implies that such investigative instructions are not routinely given to the police. The court may exhaust the investigation itself in cases where all the witnesses are present and/or where the case does need an in-depth investigation.

It is discussed in greater length under Art 108 that a case may not be tried without a formal charge against the accused, the charge having multifaceted purposes in the administration of the criminal justice. With respect to

[792] Arts 116(2), 117(1),(3)

juveniles, however, the case is different. Thus, the law provides that the public prosecutor may not draw and file a charge against the young person unless it is ordered by the court otherwise.[793] It is also discussed in Section 13.7, *supra*, that where the victim of the crime has suffered pecuniary damage, she may file her claim for civil damages along with the criminal charge and the court hears both claims and decide. Such joinder of criminal and civil cases is not applicable in proceedings against a young person.

The Chapter dealing with young persons rather begins with a provision that the process regarding juveniles is governed by the chapter covered by Arts 171-180. A mini-procedure cannot be fully covered by 10 articles and gaps are inevitable. Thus, regard may be had to the provisions of the Code *mutatis mutandis*, where the law so indicates expressly or by implication so long as it is not violating the constitutional guarantees and serves the purpose of the special nature of the process.

14.2.2 Case Initiation and Investigation

Art. 16.—*Authority competent for receiving accusation or complaint.*

> *(1) . . . An accusation or complaint regarding a young person shall be made in accordance with Art. 172.*

Art. 22.—*Principle.*

> *(2) Investigation into offences committed by young persons shall be carried out in accordance with instructions given by the court under Art. 172(2).*

Art. 172.—Institution of proceedings.

> *(1) In any case where a young person is involved, he shall be taken immediately before the nearest Woreda Court by the police, the public prosecutor, the parent or guardian or the complainant.*
> *(2) The court shall ask the person bringing the young person to state the particulars and the witnesses, if any, of the alleged offence or to make a formal complaint, where appropriate, and such statement or complaint shall be recorded. The court may give the police instructions as to the manner in which investigations should be made.*

[793] See the comments on Art 172(3)

The criminal process for adults begins with accusation or complaint to the police; after the investigating police officer conducts her own investigation if she finds a reason to believe that the crime is committed by the suspect she sends out summons to such suspect or requests an arrest warrant from the nearest court. That is not the case with respect to the process in young persons. The process is that the police, the public prosecutor, the parent, guardian or the complainant may take the young person to the nearest Woreda Court.[794] The term 'complainant' is conspicuously missing from the Amharic version of sub-article (1) as one of the persons that takes the young person to the nearest Woreda (First Instance) Court whether such offence is flagrant or otherwise. The fact that the complainant can take the young person to the nearest court can be abstracted from the provisions of sub-article (2) because the courts ask the person that brought the young person to the court whether she makes formal complaints or not.

The readings of Pen. C., Art 218, indicate that the complaint could be lodged either by the victim or her legal representative where she is not in a position to lodge complaint or she is not able to express her will. The person that brought the young person before the Woreda Court is asked whether she wants to file formal complaint and is asked about facts and particulars and witnesses as the investigating police officer does under Art 24 when recording complaint or accusation. In juveniles' cases, it is the court that records the compliant or accusation. The Court then gives appropriate order on the investigation or otherwise of the matter to the investigating police officer. Unlike the English version, the Amharic version makes it mandatory to the Court that it gives order about investigation by the investigation police officer. Certainly, the case cannot be tried short of investigation, but such order by the court to the police officer as to the investigation of the matter may be given where such investigation is necessary. Such investigation may not be necessarily the case as to the facts of the case but it need to be made with respect to the character, behaviour, education and circumstances of the of the young person once she is found to be delinquent for the purpose of determination

[794] If the 'taking to the nearest Woreda Court' may be treated as equivalent to arrest in the ordinary process, one could argue that this process is unconstitutional for the following reasons. First, the taking of the young person is effected immediately without prior investigation. Second, the Woreda Court to which the young person is taken hands over the young person "to the care of a reliable person who shall be responsible for ensuring his attendance at the trial." Thus, the right to liberty of the young person is restricted without a justifiable ground.

of the type of measure to be imposed. Thus, the courts' instruction to the investigating police officer may come at the end of the hearing.

14.2.3 The Complaint or Charge and the Rights of the Young Person

Art. 40.—Duty to institute proceedings.

(2) The public prosecutor shall not institute proceedings against a young person unless instructed so to do by the court under Art. 172.

Art. 172.—Institution of proceedings.

(3) Where the accusation relates to an offence punishable with rigorous imprisonment exceeding ten years or with death (Art. 173 Penal Code) the court shall direct the public prosecutor to frame a charge.
(4) Where the case requires to be adjourned or to be transferred to a superior court for trial the young person shall be handed over to the care of his parents, guardian or relative and in default of any such person to a reliable person who shall be responsible for ensuring his attendance at the trial. The witnesses shall be bound over to appear at the trial.

Art. 173.—Summoning of young person's guardian.

Where the young person is brought before the court and his parent, guardian or other person in loco parentis is not present. The court shall immediately inquire whether such person exists and shall summon such person to appear without delay.

Art. 174.—Young person may be assisted by counsel.

The court shall appoint an advocate to assist the young person where:

(a) no parent, guardian or other person in loco parentis appears to represent the young person, or
(b) the young person is charged with an offence punishable with rigorous imprisonment exceeding ten years or with death.

Art. 176.—Hearing.

(3) The accusation or complaint under Art. 172 (2) or the charge under Art. 172(3) shall be read out to the young person and he shall be asked what, has to say in answer to such accusation or charge.

The Right of the Young Person to be Informed of the Charge against Her—it is discussed in Sections 11.1 and 11.2 that it is the constitutional right of the accused to be informed of the charges and to have the charge in writing, a copy of which is given to the accused a reasonable time before the date of the trial.[795] The constitutional provision is clear and there is no exception. Accordingly, Art 108(1) provides that no person may be tried without a proper charge being framed. The provisions of Art 108(3), however, provides that this and related rules are not applicable to young persons unless a contrary order is made as per Art 172. Art 172(3) further provides that the court instructs the public prosecutor to frame a charge against the young person where she is accused of an offence that entails rigorous imprisonment of at least ten years or with death. The earlier interpretation of these provisions, the provisions of the Criminal Procedure code before the adoption of the Constitution, would be that the young person in all other offences than those stated under Art 172(3) is tried without a formal charge. After the adoption of the Constitution, to which all subsidiary laws have to conform, those provisions of the Code have to be interpreted in conformity with the constitutional provision. Because there is no preliminary inquiry and even when the police investigates such offence it is on specific instructions from the court and the investigation report is sent to the Woreda Court, the public prosecutor does not have the investigation report and thus cannot institute charge against the accused. The outstanding question is if the public prosecutor is precluded from framing a charge and appearing at the hearing, who is to prepare the charge? From the readings of the provisions of Art 172, the declaration of the person who brought the young person before the Court plays a significant role even if such person is not an expert in law. As discussed below, the court informs the young person the nature of the charge orally. This is contrary to the constitutional right of the young person to equal protection of the law unless other reasons are forwarded for maintaining this provision of the Code. Where the Court directs the public prosecutor to frame a charge against the young person, however, the hearing begins with the reading of the charge. In such cases, the juvenile is also served on with the charge as drawn by the public prosecutor.

On a related issue, where the court orders the public prosecutor to draw and file a charge, the public prosecutor may refuse to institute a charge against the young person where there is no sufficient evidence that justifies conviction of the young person.[796] However, it is not clear whether the

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[795] Art 109(4); FDRE Const. Art 19(1)

[796] Art 42(1)(a)

public prosecutor may also exercise other powers that are essential for the prosecution purpose, such as, ordering further investigation on the subject as per Art 38(c) in the face of the requirement that investigation is conducted by the investigating police officer only up on the Court's instruction.

The Right of the Young Person to be Represented by Counsel—the Constitution is clear in that the accused has the right to be represented by a counsel of her choice. Where she is not able to afford one, and where the court believes 'miscarriage of justice' would result, one would be appointed for her at state expense.[797] This requirement of the Constitution is not well defined that it very much depends on how the judge appreciates the situation which may not be accurate. The Code provides that the court appoints a counsel for a young person where she is not represented by "parent, guardian or other person in loco parentis" or is charged with an offence punishable with rigorous imprisonment exceeding ten years or death. Seen along with the provisions of Art 172(3), it is a case wherein the public prosecutor is ordered by the court to draw a charge that the Code makes it compulsory to have state appointed counsel for the young offender. The point that is not convincing is where the young person is accompanied by a parents or guardians. Does it mean that the parents are trained in law and therefore they are good counsel for the young person? Certainly not! It can be validly argued that whether the young person is accompanied by parents or guardians, so long as she is charged for such serious offence and is not represented by counsel because parents could not afford one, miscarriage of justice is likely to occur. The court thus has to appoint counsel for the accused juvenile.

The Right of the Young Person to be Released on Bail—where a person is arrested suspected of a crime she has the constitutional right to be released on bail. However, in exceptional circumstances provided for in the law, the court may require adequate guarantee or deny her bail pending investigation or the hearing. With respect to the young person, however, she may not be arrested from the very beginning. Once she is brought before the Woreda Court, whether the hearing is adjourned for another date or the case is one to be heard before the High Court after the public prosecutor draws and files the charge, the Amharic version is much clearer that, during this period, the young person is not staying in prison or police station; the juvenile is to be "handed over to the case of his parents, guardian or relative and in default of any such person to a reliable person who shall

[797] FDRE Const., Art 20(5); also see section 12.1.1 *supra*.

be responsible for ensuring his attendance at the trial." The person taking custody of the young person has the obligation to maintain the wellbeing of such young person and to bring her before the court on the date and time as fixed by the court. There is no bond, however, on to such person into whose custody the young person is entrusted. Thus, there is no sanction should the responsible person fail to bring the young person before the court on the date the case is adjourned.

14.2.4 The Hearing

Art. 94.—Adjournment.—Conditions.

(k) the court considers that the accused, if a young person, should be placed under observation;

Art. 175.—Removal of young person from chambers.

Where any evidence or comments are to be given or made which it is undesirable that the young person should hear, he shall be removed from the chambers while such evidence or comments are being given or made.

Art. 176.—Hearing.

(1) Where the young person is brought before the court all the proceeding shall be held in chambers. Nobody shall be present at any hearing except witnesses, experts, the parent or guardian or representatives of welfare organisations. The public prosecutor shall be present at any hearing in the High Court.
(2) All proceedings shall be conducted in an informal manner.
(3) The accusation or complaint under Art. 172 (2) or the charge under Art. 172(3) shall be read out to the young person and he shall be asked what, has to say in answer to such accusation or charge.
(4) If it is clear to the court from what the accused says that he fully understands and admits the accusation or charge, the court shall record what the young person has said and may convict him immediately.
(5) If it is clear to the court from what the accused says that he fully understands and does not admit the accusation or charge, the court shall inquire as to what witnesses should be called to support such accusation or charge. The young person, his representative or advocate may cause any witnesses to be summoned.
(6) All witnesses shall be examined by the court and may thereupon be cross-examined by the defence. All depositions shall be recorded.

(7) When the evidence is concluded, the defence may sum up and there-after the court shall give judgment.

Hearing in Closed Chambers—it is a constitutional rule that trials are conducted in open-court. In respect of few cases either for the interest of the public or the parties, a given case could be heard in closed chambers. The trial of young offenders is one case where the court tries cases in a closed chamber. Accordingly, nobody is admitted other than witnesses (both lay and expert) parents or guardians and representatives of child welfare organisations. Where the offence in respect of which the accused is charged entails at least ten years of rigorous imprisonment or death penalty, it is heard by the High Court and thus the Court instructs the public prosecutor to institute a charge against the young person. Therefore in such proceedings, the public prosecutor attends the proceeding. It is further provided that, there are things that the young person need not hear and thus may be excluded from the hearing. This is not contrary to the spirit of the Constitution; having regard to the best interest of the young person, it is only to protect her from certain words that are considered to be immoral and offensive to the young person.

Examination of Witnesses—the procedure for adults is often adversarial, particularly where the accused is represented by counsel, that on the date fixed for the hearing, the charge is read and explained to the accused and she enters her plea. Where she denies committing the alleged crime, the prosecutor produces her evidence. In examination of witnesses, the public prosecutor examines her witnesses in chief and the accused cross-examines if she wants to. Where there is cross-examination there is also a possibility of re-examination of the witness by the prosecutor. Once the evidence for the prosecution is completed, the court evaluates whether there is a *prima facie* case against the accused. Where there is no such *prima facie* case, the accused is acquitted; where there is a prima facie case on the other hand, the accused enters her defence, which gives the court a second chance to evaluate the evidence in its entirety.

In the case against juveniles, the hearing is less adversarial and less formal in order not to intimidate the young person. Where the case is being tried by the Woreda/First Instance Court, the accusation or complaint as recoded by the Court would be read over to the young accused; where the case is being tried by the High Court, because there is a charge drawn and filed by the public prosecutor, such charge would be read over to and explained to her; presumably she would have a copy of it. It appears from the readings of the provisions of Art 176 (4) and (5) that the court makes sure that the

young accused fully understands the complaint or charge against her. The court then asks her if she has anything to reply. Where it is clear that the young accused *fully understands* and *admits* the accusation or the charge, the court enters conviction immediately. It is not clear whether the plea may be amended either by the court or the young person as is the case with adult defendants.[798] Where the accused young denies the complaints or the charges against her, the court decides what witnesses to be called in support of such accusation or charge. Such witnesses are not only prosecution witnesses; they are also defence witnesses. The young person, her representative or advocate may also cause witnesses be summoned, apparently defence witnesses, for the young person.

Once witnesses are called, they are examined by the court as they are court witnesses and the defence may put questions for cross-examinations as it is the constitutional right of the accused.[799] Certainly, the young person or her parents or guardian may not be in a position to conduct cross-examination; where she is assisted by a counsel such counsel conducts cross-examination. The special procedure dealing with young persons does not provide whether witnesses enter oath or make affirmation. It is a matter of reason that the special nature and informality is only in respect of the young person and not for everyone else that appears before such court in relation to such cases; therefore, witnesses would enter an oath or make an affirmation. Such informality of the process is the same even when the case is pending before the High Court and the public prosecutor files the charge having regard to the objective of the procedure in juveniles' cases.

Adjournment—it is not also clear whether the court starts hearing the case forthwith after the young person appears before the Woreda Court. It is clear that the hearing may not be completed in one day particularly where the court finds it necessary to see other evidence or orders the police to conduct investigation of the matter. Even after entering conviction of the accused young person of an offence, the court may order medical and scientific examination or it may be necessary to hear many more witnesses before it makes an order as to the type of measure to be imposed.[800] Where the case is adjourned, it may be adjourned on grounds and in accordance with provisions applicable to ordinary cases as per Arts 94, 95.

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798 Art 135

799 FDRE Const., Art 20(4); also see section 12.1.4 *supra.*

800 Art 94(2)(j) and (k); Crim. C., Art 54

14.2.5 Judgment and Order of the Court

FDRE Const. Art 36

(1) Every child has the right:

(e) To be free from corporal punishment or cruel and inhumane treatment in schools and other institutions responsible for the care of children.

Art. 177.—Judgment.

(1) The judgment shall specify the provisions of the law on which it is based. Where the young person is found not guilty, he shall be acquitted and set free forthwith. Where he is found guilty, the court shall impose the appropriate measure or penalty under Art. 162 et seq. Penal Code.
(2) The court may call before it any person or representative of any institution with a view to obtaining information concerning the character and antecedents of the young person so as to arrive at a decision which is in the best interest of the young person.
(3) After these person's have been heard, the defence may reply and call his witnesses as to character, who shall be interrogated by the court and thereupon the defence shall address the court as to sentence.
(4) Judgment shall be given as in ordinary cases. The court shall explain its decision to the young person and warn him against further misconduct.

Crim. C., Art 54. Expert Evidence and Enquiry.

(1) For the purpose of assessing sentence the Court may require information about the conduct, education, position and circumstances of the young criminal. It may examine his parents as well as the representatives of the school, guardianship authorities and the institutions concerned.

The Court may require from the abovementioned persons and institutions the production of any files, particulars, medical and social reports in their possession concerning the young person and his family.

(2) The Court before passing penalties or measures may order the young criminal to be kept under observation in a medical or educational centre, a home or any other suitable institution.

The Court may require the production of expert evidence regarding the physical and mental condition of the young person. The Court shall put such questions as may be necessary to any expert for the purpose of informing itself as to the physical and mental state of the young person and inquire what treatment and measures of an educational, corrective or protective kind would be most suitable.

(3) In reaching its decision the Court shall be bound solely by definite scientific findings and not by the appreciation of the expert as to the legal inferences to be drawn.

Art. 178.—Orders which may be made against parents and guardians.

Where it thinks fit the court may warn, admonish or blame the parents or other person legally responsible for the young person where it appears that they have failed to carry out their duties.

Like ordinary cases, the judgment of the court is based on assessment of the facts against evidence produced and ruling on the guilt of the accused. Although the law is silent, where the court finds no case against the young person, it closes the file and acquits the young person. Where, on the other hand, the court finds the juvenile delinquent, either based on her admission or evidence, it also determines the type of *measure* to be imposed on the young person. Corporal punishment is abolished both in the Constitution and the Criminal Code. The types of measures from which the court chooses are provided for in the Crim. C., Arts 157-168. Where the young person is a first time offender, the court chooses from the menu of ordinary measures. Those measures are Admission to Curative Institution, Supervised Education, Reprimand or Censure, School or Home Arrest, and Admission to Corrective Institutions. In Exceptional circumstances, however, fine may be imposed where the young person understands the nature of the measure. Where such measure is attempted but failed or where the young person committed an offence that is "normally punishable with a term of rigorous imprisonment of ten years or more or death" the court may order such person be sent to either a corrective institution or a penitentiary detention institution.

The principal purpose of those measures is reforming and educating the young person. Thus, after finding the young person delinquent and in order to properly select the appropriate measure the court may look into both the antecedents "conduct, education, position and circumstances of the young person" and the present mental and physical state. Thus, the court may examine parents of the young person, representatives of her

school and similar institutions. Such persons and institutions may also be required to produce documents regarding medical and social reports in their possession concerning the young person. The court may also place such juvenile under observation in order to inquire into her mental and physical state. Furthermore, the court may require the attendance and examination of experts in order to inform itself of the physical and mental condition of the young person in order to properly select the appropriate treatment and educational, corrective or protective measure most suitable to the juvenile. The court is bound by the scientific findings of the experts.

After the persons called by the court are heard, the defence may reply and call her witnesses as to the character of the young person. Such persons may be "interrogated" by the court. Then, the defence addresses the court as to the nature of the measure that may be imposed on the young person. Finally, the court gives its judgment as in ordinary cases. The examination of Art 149 indicates that the court summarises the facts of the case, the evidence proffered, those which are admitted and those which are not and the reasons for accepting or rejecting such evidence, the article which the young person is said to have violated and the measure imposed on the young person. Such judgment must also be dated and signed by the judge delivering it. What is unique about this judgement in juveniles' case is the court explains its decision to the young persons and warns her against further misconduct. The content and element of the warning is not clear.

When the young person commits an offence, it is generally believed that parents fail to properly raise their child. Therefore, where the court is convinced that there is such parental failure and such order is appropriate, the court may warn, admonish or blame such parent. However, this is a measure provided for in the Code that is not supported by the substantive Criminal Code and it may not be appropriate.

14.2.7 Appeal and Cost of Upkeep

Art. 179.—Cost of upkeep of young person in certain circumstances.

(1) The parents or other person legally responsible for the care of a young person may be ordered to bear all or part of the cost of his upkeep and training where owing to their failure to exercise proper care and guardianship the court has ordered the young person to be sent to the care of another person or to a corrective or curative institution.

(2) The scope and duration of such obligation shall be specified in the judgment.

Art. 180.—Variation or modification of order made in respect of young person.

Any court which has sentenced a young person to a measure may at any time of its own motion or on the application of the young person, his legal representative or the person or institution to which he was entrusted, vary or modify such order if the interest of the young person so requires.

Art. 185.—*Appeal against conviction and sentence.*

(4) An appeal by a young person or by an incapable person shall be through his legal representative.

The court selects the type of measure that is most suitable to the young person. Such measure may be admitting the young person to a curative or corrective institution, or handing the young person over to another person for supervised education, or school/home arrest. The scope and duration of the obligation of such person is specified in the judgment. Such person or institution into whose custody the young person is placed has the obligation to maintain the wellbeing and education of the young person. Such responsibility is costly; thus, such person or institution has the right to be reimbursed all or part of her expenses as the court deems appropriate. It does not seem clear, though, out of whose coffer this reimbursement is paid. Such expense is covered by parents or persons legally responsible for the care of the young person where the young person is found delinquent because of their failure to exercise proper care and guardianship.

The type of the appropriate measure is selected based on the need of the delinquent young person to reform. Thus, the measures that are imposed on the young person are believed to be suitable for the correction and education of the young person. Where such measure is found to be unsuitable or other measures are more suitable than the one already imposed, however, the court, on its own motion or on the application of the young person, her representative or the person to whom the young person is entrusted may modify such order where it is in the best interest of the young person.

Finally, at the conclusion of the trial, where the adult defendant is acquitted, the public prosecutor may lodge her appeal to the next higher court within the following fifteen days. Such appeal in juveniles' cases is not provided

for in the law. This is the case both where the case is heard by the Woreda (First Instance) Court with a charge or in cases where the public prosecutor is ordered by the court to draw and file a charge. This is for an apparent reason that it is contrary to the objective and purpose of the process; therefore, where the decision of the court is acquittal of the young person, the case is finally disposed of because the young person need not grow on the court floor. Where, on the other hand, the court finds the young person delinquent and imposes a specific measure on her, she, through her representative, may appeal to the next higher court. Where the young person is represented by counsel either because of the seriousness of the offence or because she was not accompanied by her parents or guardians, such counsel represents her in her appeal too.

POST JUDGMENT REMEDIES

Chapter 15

Post Judgment Remedies

Introduction

At the conclusion of a hearing, the trial court may enter a judgment of conviction or acquittal; where the judgement is conviction the guilt is meted with appropriate punishment. Such judgment is not necessarily satisfactory for both parties. The public prosecutor may believe the court erred in acquitting the accused or convicting her for an offence of a lesser gravity than which she was charged with or a lesser penalty is imposed on her. The accused on her part may believe the court erred in convicting or convicting her for an offence which is graver than she believes she should be convicted for and/or the penalty is more than what she believes she deserves. Either or both party may believe that there is some element of 'unfairness' in the process or the result of the process. The Constitution provides that a party has the right to have her case reviewed by another court. The trial court cannot review its own decision; the decision of a court is reviewed in two ways—on appeal to the next higher court or in cassation before the Supreme Court.

Appeal is a constitutional right of an accused. Where a party lodges an appeal, the court of appeal reviews such matters both in terms of issues of law and issues of fact. A party may call new witnesses not heard at trial and produce other evidences. Where there is no appeal either because a party has exhausted her appeal right or the case was tried by the highest judicial organ on first instance or the periods within which appeal is to be filed has expired, she can take her case to the cassation court for review on matters of law. Cassation is not a right. It is just a means of correcting such

grave error in the interpretation and application of law—once a case has been finally disposed of. As the petition is based exclusively on matters of law, the court decides exclusively on the record of the trial or the appellate court because the law requires that the facts be taken for granted to have already been ascertained by the court that rendered the final decision from which review by cassation is sought. Review by cassation is exclusively the jurisdiction of the supreme courts both at the federal and state level because they are the highest and final judicial powers in their respective realm. It, thus, has two main objectives. First, it is a procedure that is meant to afford a mechanism for the justice system to rectify errors of law that are fundamental in nature; and second, it is meant for the correct and uniform interpretation and application of law with a view to create some kind of fairness in the law. The decisions of the Federal Supreme Court cassation bench are binding precedents as though they were law where such decisions are rendered by a bench presided at least by five judges.

Likewise, where the convicted person discovers new evidence which should have been considered by the trail or appellate court and which she was not able to produce during the trail or appeal, or that the final decision of the court was based on false testimony or incorrect interpretation of a document etc. she can lodge her application for a review of the judgment she is serving. Unfortunately, this is not in the law in force; it is, however, included in the various draft criminal procedure codes prepared so far. There is a tendency to include it in a final draft, should we have one. It is referred to as "Re-opening of a case after Final Judgment" commonly known as "Re-trial" in the common law system.

15.1 Appeal

Introduction

Structure of courts in all legal systems is pyramid shape; there are many trial courts at the lower level; there are few appellate courts and almost always there is one supreme organ at the apex, usually a supreme court, a court of last resort for cases involving serious errors or policy matters. Thus, cases are generally classified into two—ordinary crimes and serious crimes. Those ordinary crimes, diverse and large in number, fall under the jurisdiction of the trial court, which is always the lower court. Those few serious crimes fall under the first instance jurisdiction of the appellate court. Because trials are expensive and time consuming legal systems do their best to make the first decision correct; thus, the trier of fact examines the evidence and has better knowledge of the case. However, as part of the

principle of fairness, there is always one chance of review of decision by the next higher court.

It is already indicated that appeal is a constitutional right. Courts follow the federal structure; thus, federal matters are seen in Federal Courts and state matters are seen by State Courts. Ideally, therefore, the Federal First Instance and High Courts are trial courts on federal matters and Woreda and State High Courts are trial courts on state matters. From the decision of the Federal First Instance Courts, appeal goes to Federal High Court; from the decision of the Federal High Court, either reversing or modifying the decision of the Federal First Instance Court or from a decision on matters in its original jurisdiction, appeal goes to Federal Supreme Court. This process of appeal is more or less similar in states on state matters. However, where the case is seen by State Courts by delegation, it may be appealed to Federal Courts. Likewise, cases delegated to State Supreme Courts may be seen by the Federal Supreme Court on appeal.

However, there are few cases assigned to the Federal Supreme Court and State Supreme Courts as their first instance jurisdiction in their area of competence. In such cases, because the respective supreme courts are the highest judicial body, there is no appeal from such decision. Such assignment of jurisdiction by the lawmaker to the supreme courts is contrary to the constitutional provision of the right to appeal.

15.1.1 Appeal, Definition the Right and Courts having Jurisdiction

FDRE Const., Art 20

> *6. All persons have the right of appeal to the competent court against an order or a judgment of the court which first heard the case.*

Art. 181.—Principle.

> *(1) An appeal shall lie in accordance with the provisions of this Book from a judgment of a criminal court whether it be a judgment convicting, discharging or acquitting an accused person.*
> *(2) A second appeal shall lie in accordance with the provisions of Art. 182.*[801]

[801] This sub-article is irrelevant because the provisions of Art 182 are repealed but second appeal is also provided for elsewhere in different scenario.

FDRE Const., *Art 80*

5. *Decisions rendered by a State High Court exercising the jurisdiction of the Federal First-Instance Court are appealable to the State Supreme Court.*
6. *Decisions rendered by a State Supreme Court on Federal matters are appealable to the Federal Supreme Court.*

Courts' Proclamation, Art 9[802]

The Federal Supreme Court shall have appellate jurisdiction over:

1) *decisions of the Federal High Court rendered in its first instance jurisdiction;*
2) *decisions of the Federal High Court rendered in its appellate jurisdiction in variation of the decision of the Federal First Instance Court.*

Courts' Proclamation, Art 13

The Federal High Court shall have appellate jurisdiction over decisions of the Federal First Instance Court.

Appeal is a constitutional right of a person to have her case reviewed by the next higher court in the hierarchy. This constitutional provision necessarily demands that allocation of first instance jurisdiction of courts take the right to appeal into consideration. Therefore, because the Federal Court structure is only three tiers, the first instance jurisdiction may be allocated only to the Federal First Instance and High Courts in order to maintain the right to appeal. However, the courts' Proclamation allocates first instance jurisdictions to all tiers of courts at the federal level (see jurisdiction, Chapter 9). This allocation of first instance jurisdiction to the Federal Supreme Court nullifies the constitutional right to appeal. Thus, in *Tamirat, et al.*[803] the defendant objected the fact that the Federal Supreme Court entertains the case in first instance nullifies his constitutional right to appeal, and thus, the court does not have jurisdiction. The Court ruled that the provision is not unconstitutional and rejected the objection. Some

802 Arts 182, 183 of the Code provide for courts having jurisdiction and appeal to *Zufan Chilot* both of which are repealed.

803 *Tamira, et al., supra* note 76

even argue that the opportunity to seize the Supreme Court's first instance jurisdiction is a better opportunity than the right to appeal. This argument is hardly convincing having regard to the nature of the right as a constitutional right which cannot be abrogated by any subsidiary rule. This problem is also shared by those states, which allocate first instance jurisdiction to state supreme courts on state matters.[804]

It is already indicated that appeal is heard by the next higher court in the hierarchy; therefore, cases that are first heard by Federal First Instance Court are reviewed by the Federal High Court in its appellate jurisdiction; and cases decided by the Federal High Court either in its first instance jurisdiction or reversing or varying the decision of the Federal First Instance Court may be reviewed by the Federal Supreme Court in its appellate jurisdiction. The bulk of criminal cases are allocated to Federal First Instance Court and to Federal High Court. Thus, the Federal High Court has both first instance jurisdiction and appellate jurisdiction. The Supreme Court would have only appellate jurisdiction save those few cases assigned to it by the courts proclamation for its first instance jurisdiction. Where such jurisdiction is exercised by State Courts, the decisions of the State High Courts are reviewed by State Supreme Courts and the decisions of the State Supreme Courts are reviewed by the Federal Supreme Court. In the five regions where the Federal High Court is already established, the decisions of State High Courts are appealable to the Federal High Courts instead of State Supreme Courts.

Appeal appears to follow similar procedure in state courts. For instance, in the Southern Regional State Courts, the State Supreme Court has "appellate jurisdiction over decisions of the High Court rendered in its first instance jurisdiction as well as decision of the High Court in its appellate jurisdiction in variation of the decision of the Woreda Court"[805] while the State High Court has appellate jurisdiction over the decisions of the Woreda Court.[806] The Tigray Courts' Proclamation is not very much clear. It provides that "save those matters expressly reserved to the Federal Supreme Court, Tigray

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[804] 'Officials of the Regional State' is defined to include "members of the State Council and Council of Nationalities, Officials of the Regional State above the Bureau Head rank, Heads and Deputy Heads of Bureaus and other Regional State Officials of the equivalent rank, and judges of the Regional Supreme Court" SNNPRS Courts Proc. No. 43/2002, *supra* note 156, Art 2(3)

[805] *Id.*, Art 5(2)

[806] *Id.*, Art 6(2)

courts have jurisdiction on other matters granted to them by virtue of the state constitution and Art 80 of the Federal Constitution."[807] [Translation mine]. In practice, appeal follows the procedure the Federal Courts follow.

Appeal is governed by the Courts' Proclamation. The provisions of the Code Art 181 appear to be obsolete because some of the provisions dealing with appeal are impliedly repealed.

15.1.2 Grounds of Appeal

Art. 184.—No interlocutory appeals.

No interlocutory appeal shall lie from a decision of the court:

(a) granting or refusing an adjournment under Art. 94; or
(b) regarding an objection under Art. 131; or
(c) regarding the admissibility or non-admissibility of evidence under Art. 146, but any such decision may form the subject of a ground of appeal where an appeal is lodged against conviction, discharge or acquittal.

Art. 185.—Appeal against conviction and sentence.

(1) A convicted person may appeal against his conviction and sentence;

Provided that no appeal may be lodged by a convicted person who has pleaded guilty and has been convicted on such plea except as to the extent or the legality of the sentence.

(2) The public prosecutor may appeal against a judgment of acquittal, discharge or on the ground of inadequacy of sentence.
(3) Where a prosecution is conducted by a private prosecutor the private prosecutor may appeal in the same manner as is provided in sub-article (2).
(4) An appeal by a young person or by an incapable person shall be through his legal representative.

Appeal is a right; and is an essential part of due process of law. Its purpose is to give second thought to the case and to avoid incorrect outcome and thereby unnecessary damage, among other things. In order to make appeal

[807] Tigray Courts' Proc. No. 30/90, *supra* note 287, Art 4

efficient and effective, not only the procedures should be defined but also certain matters must be excluded from being grounds of appeal. These are called interlocutory matters. Therefore, whether the court granted or refused adjournment during the trial, it cannot be a ground of appeal. Likewise, Art 130 provides for preliminary objections to a charge. Such objections may be raised by a party and where they are granted or denied by the trial court under Art 131 such decision of the trial court could not be a ground for appeal. Same is true with the court's ruling on admissibility of an item of evidence.

When those matters are excluded from being grounds of appeal, it only means they cannot be in themselves grounds of appeal before the case is finally disposed. Where the case is finally disposed, they can be grounds of appeal along with other grounds of appeal, if any. The restriction of the grounds of appeal is in the nature of procedure that it is meant to address issues of cost both in material costs and time. Such objections and requests for adjournment are unlimited numbers and they cannot be fully governed by law; thus, if those rulings could be grounds of appeal it only means there would be unlimited number of appeal and no case could finally be decided by the trial court. In order to restrict the frequency of appeal, the law restricts the grounds of appeal. Furthermore, the fact that appeal is not lodged at this stage of the proceeding on the ground of interlocutory decisions does not mean that they are totally precluded. They will be grounds of appeal when the case is finally disposed of by the trial court. Third, even when each ruling is made against a party, it does not mean she loses the case; thus, it is wise to wait until the final outcome of the case is revealed.

The grounds of appeal as are provided for under Art 185 appear to be restricted; the grounds of appeal for a convicted person appears to be appeal against her conviction and sentence and for that of the prosecution is against the judgment of acquittal, discharge and inadequacy of sentence whether it is conducted by the public or private prosecutor. This can be seen in light of the power of the appellate court as provided under Art 195. Whether these grounds of appeal which are not precluded by Art 184 but which are not also covered by Art 185 could be grounds of appeal is not clear. However, appeal is not restricted to final decision of the court because the restrictions on the grounds of appeal are specifically listed under Art 184. Thus, any ground not precluded by the provisions of Art 184 may be a ground of appeal before the case is finally disposed of.

Where the conviction of the person is entered based on her plea, such plea operates as estoppels that the convicted person is precluded from appealing

against her conviction. She can however appeal against the sentence because conviction and sentence are separate grounds that can be raised either separately or jointly. Practically, it is reasonable. However, whether it is compatible with the constitutional right to appeal is doubtful.

15.1.3 Procedure and Content of Appeal

Art. 187.—Notice of appeal and memorandum of appeal.

(1) Notice of appeal against a judgment shall be given by the appellant or his advocate within fifteen days of the delivery of the judgment appealed against. On receipt of such notice of appeal, the registrar shall cause the judgment appealed against to be copied and handed to the appellant or his advocate and where the appellant is in custody the copy shall be sent to the superintendent of the prison in which he is confined for service on the appellant. Such copy shall be dated when completed and the date on which it is handed to the appellant or his advocate or is sent to the superintendent of the prison shall be certified by the registrar.
(2) The memorandum of appeal under Art. 189 shall be filed within thirty days of the receipt of the copy of the decision appealed against. The notice and memorandum of appeal shall be filed in the registry of the court which gave the judgment appealed against.
(3) Where the appellant is in custody the superintendent of the prison in which he is confined shall forward the memorandum of appeal without delay to the court against whose decision an appeal is made.
(4) A copy of the memorandum of appeal shall be served on the respondent to the appeal.

Art. 189.—Contents of memorandum of appeal.

(1) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the judgment appealed against without any arguments and such grounds shall be numbered consecutively. The memorandum shall be accompanied by a copy of the judgment appealed against. The memorandum of appeal shall state the nature of the relief that is sought.
(2) The memorandum of appeal shall be signed by the appellant and his advocate, if any.

Art. 190.—Record and exhibits to be forwarded to court of appeal.

(1) On receipt of the memorandum of appeal the court against whose judgment an appeal has been filed shall prepare without delay within fifteen days a copy of the record and forward it together with the appeal record (if any), the notice and the memorandum of appeal and all exhibits to the court of appeal.
(2) The court of appeal may dispense with the making of a copy of the record where the 'making of such copy may delay unduly the hearing of the appeal and the Court may order the original file to be produced.

Where a party wishes to lodge an appeal against a final judgment, she files a notice of appeal before the court of rendition within 15 days of delivery of the judgment. The date of the judgment of the case is the date after which the court would not examine the case. For instance, it is discussed under section 13.6 that where the court enters conviction after both parties are heard, the case may be adjourned for hearing. Defendant may not file her notice of appeal because the case is not finally disposed of. The case may be finally disposed of in this case on the date sentence is fixed and the case is closed.

For instance, in *Elias Abdella*[808] case, petitioner was found guilty by the Federal High Court for the crime as charged. However, after finding the accused guilty, the High Court gave further order in order to fix the appropriate penalty. After all the process is completed, the defendant was sentenced to 7 years imprisonment. Defendant appealed to the Supreme Court to have the judgment reversed. The Supreme Court rejected the appeal on the ground that the notice of appeal was not filed within the 15 days period after judgment. Elias petitioned to the cassation bench against this decision of the Supreme Court appellate bench. The cassation bench reversed the decision of the appellate bench reasoning that the term "judgment" should not be understood only as the conviction but it should also be understood to including the sentence. Thus, the 15 days period is to be reckoned as of the date the sentence is pronounced on the convicted person by the trial court.[809]

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[808] Petitioner*: Elias Abdella* (Supreme Court Cassation Bench, 2005) Cass. F No. 18005

[809] A similar petition by Birhanu Hailu was filed before the cassation court and the court decided in identical manner invoking the decision in Elias Abdella. (Petitioner*: Birhanu Hailu* (Supreme Court Cassation Bench, 2005) Cass. F No. 17474). This practice of invoking prior cases could be in compliance with the

Upon receipt of the notice of appeal, the registrar then prepares a copy of the judgment and hands without delay to the convicted person or her lawyer. Where she is in prison, it is to be submitted to the superintendent of the prison where she is confined in. The date on which such copy of judgment is handed to the convicted person, her lawyer or the superintendent of the prison where she is confined in has to be certified by the registrar of the court. This certification is important because the memorandum of appeal is to be filed within the following thirty days of the receipt of the copy of the judgment of the trial court.

The appellant in her memorandum of appeal should incorporate the grounds of objections to the judgment of the trial court without argument. Each grounds of objection have to be separately stated and numbered consecutively. Matters of guilt and matters of sentence have to be stated separately.

The memorandum of appeal should also state the nature of the relief sought in clear terms, whether it is a request for discharge, acquittal, reduction of sentence or change of article under which the conviction is entered, etc. Because the points of objections are stated without argument, the nature of relief sought makes things clear. The memorandum of appeal has to be accompanied by a copy of the judgment that was handed to the convicted person. Finally, it must be signed by the appellant and his advocate, if she has any. This is seen from the convict's perspective. The public prosecutor does more or less the same thing.

Both the memorandum of appeal and the copy of the judgment shall be filed "in the registry of the court, which renders the judgment appealed against." Where the appellant is in custody, the superintendent of the prison wherein the appellant is confined forwards the memorandum of appeal without delay to the court against whose decision an appeal is made. The law envisages an integrated work between the different levels of courts that the court which renders the judgment against which the appeal is made forwards such memorandum of appeal as accompanied by the notice of appeal and the copy of the judgment to the court of appeal. The registry of the trial court upon receipt of the memorandum and notice of appeal prepares within fifteen days a copy of the record and forward both to the court of appeal. Where the making of copy is so cumbersome and would unduly delay the hearing

provisions of Proc. 454/2005, *supra* note 168, Art 2(1); however, the case is not published in the Supreme Court case compilations for distribution.

of the appeal because of its bulk or otherwise, the court may dispense with the making of a copy and order the original record be produced. Where there were exhibits during the trial, they are also forwarded to the appellate court. This is a sensible approach that appellate courts are located in few central places. Where the trial was conducted in other places, it is cumbersome for the convict to lodge her appeal particularly where she is detained in a different place than where she is, and we have a terribly poor and unreliable means of transportation.

15.1.4 Stay of Execution

Art. 188.—Stay of execution.

(1) Repealed.
(2) Where an accused person is released on bail pending the hearing of his appeal the sentence of imprisonment shall not commence until the court of appeal delivers its judgment.
(3) Any measures which have been ordered by the court against whose judgment an appeal has been filed shall be carried out notwithstanding an appeal.
(4) There, shall be no stay of execution in respect of the payment of compensation or costs.
(5) An application for stay of execution may be made to the court of appeal at any time before the appeal is heard or at the hearing of the appeal.

It is discussed in relation to bail that the law tries to minimise irreparable damage by unjustifiably restricting the liberty of the person. Likewise, here after a judgment is given by the trial court, where irreparable damage is likely to occur, the appellant may also request the appellate court to order stay of execution. Such application for stay of execution of judgment may be filed either along with the request for review or latter in the proceeding of the appeal. Those orders of the court in respect of which stay of execution could be requested appear to be restricted. In fact, the reading of the provisions sub-article 2 makes it clear that a stay of execution of sentences may be requested only in respect of a sentence; i.e., the appeal is against acquittal, for instance, the public prosecutor cannot request for stay of execution. Therefore, where the convicted person lodges her appeal, she may also request the appellate court to stay execution of the sentence. Where the application is granted and the appellant is released on bail, the execution of sentence cannot commence until the appellate court renders its decision.

There is no guideline on what grounds the court has to grant or deny the application for stay of execution. There are few things the appellate court needs to take into consideration in order to decide on the petition for stay of execution; first, when the court receives the memorandum of appeal and the petition for stay of execution, it can examine the record in order to make a preliminary decision on whether there is a case merits a review. The fact that the case is worth-reviewing suggests there is a possibility that the case may be reversed rendering the service of sentence an irreparable damage. Second, the appellate court need to consider the factors on the basis of which bail is granted or denied. The only ground that is valid here is whether the petitioner is likely to appear before the appellate court and for the execution of the sentence, should the court affirms the judgment or varies the sentence. Where the appellant was attending trial on bail, she should not in anyway be detained until the final judgment is rendered.

Other measures ordered by the trial court are to be carried out. The law in particular made it clear that such additional measures, such as, payment of compensation to the victim and costs relating to the criminal proceedings cannot be stayed.

Art. 191.—Application for leave to appeal out of time.

(1) Where notice of appeal or a memorandum of appeal is filed out of time, the court against whose judgment the appeal is filed shall refuse to accept such notice or memorandum and shall require the person submitting such notice or memorandum to apply in writing to the court of appeal for leave to appeal out of time.
(2) The application shall state clearly the reasons why the appeal should be heard out of time and the reasons which occasioned the delay.
(3) The court of appeal shall not give leave to appeal out of time unless it is satisfied that the delay was not occasioned by the default of the applicant.
(4) Where leave to appeal out of time is given the court of appeal shall fix the date by which the memorandum of appeal is to be filed.

Sometimes a person may not be able to file the notice or memorandum of appeal within the specified periods. Where such notice or memorandum of appeal is filed after the period within which it should have been filed expired, the court dismisses the application. In such cases, the appellant may file an application for leave to appeal out of time before the appellate court. Upon consideration of the delay, the appellate court may grant the application to appeal out of time if it is satisfied that the delay was not

caused by default of the appellant. *Fitsume Worku*[810] was tried and convicted by the High Court. Before he filed his memorandum of appeal, however, the petitioner had fallen ill. After 8 months he petitioned the Supreme Court to file memorandum of appeal out of time. The court examined the medical record of petitioner both at the prison and at Black Lion Specialised Hospital and concluded that the delay occurred not because of the default of petitioner but by a cause beyond his control. It is to be noted that the law does require that "the delay was not occasioned by the default of the application" and not necessarily because of reasons that are not within the power of the appellant. Thus, the Supreme Court in *Lt. Girma Admassu* case held that it was not possible to opine that "the delay occur because of the default of the petitioner."[811] Where the application is granted, the court shall fix the date within which the memorandum of appeal is be filed. If the court, however, finds the reasons occasioned the delay, as stated in the application for leave to appeal out of time, unsatisfactory or the appellant failed to file her memorandum of appeal within the date fixed by the court, the application would be dismissed.

Art. 193.—Absence of a party to the appeal.

(1) Where the appellant or his advocate is not present on the day fixed for the appeal and he has been notified of the hearing date the appeal shall be struck out:

Provided that the appeal may be restored to the list where the appellant or his advocate can show that he was not present owing to circumstances beyond his control.

(2) Where the respondent or his advocate is not present the appeal shall proceed in his absence.

It also happens that a party to a case fail to appear on the date fixed for the hearing. Thus, where the appellant or her advocate fails to appear, the case shall be struck out. This is the same whether the party who failed to appear is the public prosecutor or the convict. However, where the party is able to show to the court that she failed to appear because of circumstances beyond

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[810] *Fitsum Worku v. Public Prosecutor* (Supreme Court, 2007) Crim. App. F No. 26684

[811] *Lt. Girma Admassu v. Public Prosecutor* (Supreme Court, 2007) Crim. App. F No. 30214

her control then the case may be restored to the list. Where the party that failed to appear is the respondent, the case proceeds in her absence. She cannot avoid the hearing by merely failing to appear before the court.

15.1.5 Hearing and Decision of the Appellate Court

Art. 192.—Hearing.

The president of the court of appeal shall fix a day on which the appeal will be heard and the parties to the appeal shall be notified. The appellant shall open the appeal, the respondent shall reply and the appellant shall be entitled to reply.

Art. 194.—Additional evidence.

(1) 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.

Art. 195.—Powers of court of appeal.

(1) At the hearing of an appeal the court of appeal shall dismiss the appeal where there is no sufficient ground for interference.
(2) Where it considers that there is sufficient ground for interference, the court of appeal may:

(a) on an appeal from an order of acquittal or discharge reverse such order and direct that the accused be retried by a Court of competent jurisdiction or find him guilty and sentence him according to law; or
(b) on an appeal from conviction and sentence:

i. reverse the finding and sentence and acquit the accused; or
ii. with or without altering the finding, maintain, increase or reduce the sentence;

(c) on an appeal from conviction only reverse the finding and sentence and acquit the accused;
(d) on an appeal from sentence only maintain, increase or reduce the sentence.

(3) Where the court of appeal confirms the conviction but alters the sentence or vice versa a second appeal shall lie only in respect of the conviction or sentence which has been altered.

Upon receipt of the memorandum of appeal, whether it is filed as an ordinary appeal or appeal out of time, a copy of the memorandum of appeal would be served on the respondent. The court of appeal fixes the date of the hearing and such date is notified to the parties. Unlike appeals on civil matters, petition for review of a case on appeal may not be rejected by the appellate court without calling both parties. On such day fixed for the hearing, the appellant opens her case by stating what her objections to the judgment of the trial court are and her grounds of objection. The respondent replies; the appellant is entitled to another reply. The appeal may be based only on the records of the court or the appellant may want to introduce additional evidence that was not produced before the trial court.

In examining the appeal, the appellate court examined the record of the trial court. Where the court believes the record is sufficient to address the issues of the case, the court makes its rulings based on the record of the trial court. Where the court, however, finds additional evidence is necessary, either on its own motion or on the application of the parties, it may take such evidence after recording its reasons; and such evidence shall be taken as if it were taken at the trial in the first instance. Two questions could be raised here with respect to the possible reason for the court to take additional evidence and the essence of treating the evidences taken during appeal as if it were taken by the trial court in first instance. However, in the criminal process, unlike civil matters, there is no procedural impediment to taking of additional evidence save certain provisions for the protection of the rights of the individual. The fact that the appellate court has the power to take additional evidence makes things evident that the court has the power to review both matters of fact and matters of law.

After hearing both parties, where there is no ground for interfering in the decision already made by the trial court, the appellate court "dismisses the appeal." The statement does seem to be misleading; it rather needs to be understood to mean the court confirms the decision of the trial court. This statement, when seen in light of the provisions of Arts 192 and 195(2), such decision is given only after both parties are heard no matter the content of the memorandum of appeal.

The reading of these provisions indicate that the grounds of appeal and the power of the appellate court are further restricted that there are appeals against acquittal or discharge, conviction and sentencing or against conviction only

or against the sentence only. However, if the grounds of appeal are restricted under Art 184, further restriction of the grounds of appeal does not appear to be necessary. Thus, those listings under Art 195 may only be considered as an indication of what possible appeals could be lodged and what the appellate court could do. Even those interlocutory appeals are precluded only until such time that the trial court renders final decision.

On the other hand, where, after hearing both parties, finds a reason to interfere in the decision of the trial court, it can change such decision. Accordingly, on an appeal from an order of acquittal or discharge by the trial court, the appellate court can reverse such order and direct that the accused be retried by a court of competent jurisdiction or find her guilty and sentence her according to law. Similarly, from an appeal from conviction and sentence it may reverse the finding and sentence and acquit the accused; or with or without altering the finding maintain, increase or reduce the sentence. On an appeal from conviction only reverse the finding and sentence and acquit the accused; or in an appeal from sentence only maintain, increase or reduce the sentence.

Where the court confirms the decision appealed against, there is no second appeal. If the Federal High Court sees the appeal and the appellate court reverses or varies the decision of the lower court be it on guilt or sentence or both, a second appeal lies to the next higher court and for federal crimes to the Federal Supreme Court.

Art. 196.—Where one appeal in case concerning several convicted persons.

(1) Where a court of appeal hears an appeal which concerns several convicted persons but only one of them appeals, it may direct that its judgment be applied to those other accused as though they had appealed where:

(a) the judgment is to the benefit of the appellant, and
(b) had the accused appealed they would have benefitted similarly.

(2) No order made to the prejudice of an appellant may be applied to a person who has not appealed.

Art. 186.—Appeal where injured party claims compensation.

(1) Where the court refuses to grant compensation under Art. 100 Penal Code the injured party may appeal against such decision.

(2) Where the court grants compensation the accused may appeal against such decision.
(3) An appeal shall lie against the amount of compensation awarded in accordance with the provisions of Art. 2153 Civil Code.
(4) An appeal under this Article shall be heard by the criminal court of appeal where there is an appeal against conviction or sentence, but shall be heard by the civil court of appeal where there is no appeal against conviction or sentence or such appeal is withdrawn.

It is possible that while two or more individuals were convicted by the trial court, only one of them could lodge an appeal. At the conclusion of the hearing where the appellate court finds the judgment is to the benefit of the appellant and had the accused appealed they would have benefited similarly, the court also orders that its judgment be applied to those convicts who have not appealed as though they have appealed. The appellate court is, however, precluded from applying its judgement to others who have not appealed where its judgment is made to the prejudice of the appellant. The *a contrario* interpretation is that the court can enter adverse judgment against the appellant convict.[812] The author did not come across a case where the court increased a sentence on an appeal lodged by the convicted appellant. However, the Draft Code provides for a guideline for the nature of the grounds of appeal. Accordingly, it includes the following provisions.

> *Article 201 Increasing Sentence or Convicting With Aggravated Offence Prohibited*
> *Where the appeal has been lodged by the convict, the court of appeal in its judgment shall not increase the sentence or convict the appellant with an aggravated offence than the offence with which he had been convicted by the lower court.*

In the discussion on joinder of civil and criminal cases where the victim of the crime claims compensation, it is discussed that the court trying the criminal case can also order compensation be paid to the victim where such petition is filed before the trial court. In such cases, where the application for joinder of civil and criminal cases is granted, the court adjudicates also on matters whether to grant compensation and if it is granted what the

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[812] Art 201 of the Draft Criminal Procedure Code provides that "[w]here the appeal has been lodged by the convict, the court of appeal in its judgment shall not increase the sentence or convict the appellant with an aggravated offence than the offence with which he had been convicted by the lower court."

amount should be. Thus, in its decision where the court refuses to grant compensation to the victim, the latter may appeal against such decision. Where the court grants the compensation, however, the convicted person may lodge her appeal against such decision of granting compensation to the victim. The legality of the granting or refusing such compensation is based on the Law on Extra-contractual Liability. Once compensation is granted, again, either of the parties may lodge her appeal on the grounds as provided for under Art 2153 Civ. C.[813]

Such appeals wherein the claim of compensation is adjudicated along with the criminal case, may be entertained by the appellate criminal court along with and if there is an appeal against the sentence or the conviction. If there is no appeal on the latter issues or such an appeal is withdrawn, it only means, the appeal in respect of the civil claim be it on the issue of granting or refusing compensation or on the amount of compensation that is granted, would be heard by a civil court.

The content of the judgment of the appellate court varies depending on the practice of each court. What is unique in the decision of the appellate court is that when it 'dismisses' the petition for appellate review, most often it states as "we have examined the petitioner's claim against the conviction and sentence passed by the court in light of the law and the evidence, and we found no reason to interfere in the judgment of the lower court. We therefore, affirm the decision of the lower court as per Art 195(2)(a) or (b)." This does not give a reason for rejecting the appeal save the judges keep the reason for themselves. Short of such reason for rejecting the appeal, the appellant cannot be satisfied with the decision of the court. Thus, the Draft Criminal Procedure Code provides as follows:

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[813] Art. 186(3)

Civ. C., Art 2153 (2) Exceptions.

The provisions of Art. 2152 shall not apply where:

(a) the court has considered circumstances which it should not have taken into account or has failed to consider circumstances which it should have taken into account; or

(b) the amount of compensation fixed by the court is manifestly unreasonable and could only have been inspired by prejudice or anger; or

(c) such amount is due to an error of calculation on the part of the court.

Civ. C., Art. 2152 1. Principle

No appeal shall lie against the judgment of the court of first instance relating to the amount of compensation.

Article 199 Contents of the Judgment of the Court of Appeal

1. *The judgment of the court of appeal shall contain:*

    a. *the time and place where the decision is given;*
    b. *the name of the appellant, the respondent, the court of appeal and the judges;*
    c. *the judgment against which the appeal lies, the opinion of the appellant and the respondent; and*
    d. *the decision of the court of appeal.*

2. *Where the appeal has been dismissed, the judgment shall record the reasons for not accepting the reasons presented by the appellant.*
3. *Where the judgment against which the appeal lies has been reversed, confirmed or varied, the reasons for doing so shall be recorded.*

15.2 Cassation

The last procedure for correcting errors in the judgment as incorporated in the law is review by the cassation court. Review by cassation is exclusively the jurisdiction of supreme courts both at the federal and state level because they are the highest and final judicial power in their respective realm. Unlike appeal, cassation is not, however, a constitutional right. Cassation has two main objectives. First, it is a procedure that is meant to afford a mechanism for the justice system to rectify errors of law that are fundamental in nature; and second, it is meant for the correct and uniform interpretation and application of law with a view to create some kind of fairness in the law. The decision of the Federal Supreme Court cassation bench is a precedent binding as though it is law where it is rendered by at least five judges presiding.[814] Unlike other systems where cassation is a jurisdiction by the highly specialised bodies, the Ethiopian cassation bench is only ideal in that it is those judges who sit in the regular benches that are also sitting in cassation.

15.2.1 Purpose of Cassation and Jurisdiction

FDRE Const., *Art 80 Concurrent Jurisdiction of Courts*

[814] Proc. 454/2005, *supra* note 168, Art 2(1)

1. *The Federal Supreme Court shall have the highest and final judicial power over Federal matters.*
2. *State Supreme Courts shall have the highest and final judicial power over State matters . . . .*
3. *Notwithstanding the Provisions of sub-Articles 1 and 2 of this Article;*

    (a) *The Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law. Particulars shall be determined by law.*
    (b) *The State Supreme Court has power of cassation over any final court decision on State matters which contains a basic error of law. Particulars shall be determined by law.*

Courts' Proclamation, Art 10

In cases where they contain fundamental error of law, the Federal Supreme Court, shall have the power of cassation over:

1) *final decisions of the Federal High Court rendered in its appellate jurisdiction;*
2) *final decisions of the regular division of the Federal Supreme Court;*
3) *final decisions of the Regional Supreme Court rendered as a regular division or in its appellate jurisdiction*
4) . . .

It has been alluded to in the discussion on appeal that cases have a limited life in the courts. Thus, a case initiated before the Federal First Instance Court could end at the Federal High Court where the latter affirms the decision of the Federal First Instance Court. Where the decision of the Federal First Instance Court is varied or reversed by the Federal High Court, a second appeal lies before the Federal Supreme Court. Cases appearing before the Federal High Court could be seen by the Federal Supreme Court on appeal and there is only one appeal on such cases. Federal matters delegated to states' courts are seen by the respective State Courts and appeal is seen parallel to the one discussed here. There are also cases allocated to the first instance jurisdiction of the Federal Supreme Court. Leaving aside the constitutionality issue of such first instance jurisdiction, the decisions of the Federal Supreme Court cannot be appealed against before any court because the Federal Supreme Court is the highest judicial organ. Cassation lies only in respect of such finally decided cases from which there is no

appeal. Thus, those final decisions fall under three categories. According to Art 10 of the Courts' Proclamation, they are those cases finally decided by the Federal High Court in its appellate jurisdiction, those finally decided by the Federal Supreme Court in its regular jurisdiction (appeal or first instance), and those finally decided by State Supreme Courts in its regular division in its delegated jurisdiction.

Review of cases by cassation is available only in respect of cases that have fundamental error of law. The purpose of cassation is not stated in the Constitution nor is it stated in the Courts' Proclamation. However, when cassation was initially used in the present sense, it is meant for the uniform application of law in the country.[815] This objective of review of cases by cassation can also be abstracted from the provisions of the Constitution that the Federal Supreme Court may review cases finally decided where they contain fundamental error of law. This view is strengthened by the provisions of Proc. No. 454/2005, Art 2(1) which provides that "[i]nterpretation of a low (sic) by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on federal as well as the regional council at all levels. The cassation division may however render a different legal interpretation some other time." The Amharic version refers to 'courts' in stead of 'councils'

Review of cases by cassation is not a right. Previously, cases were reviewed on cassation where either the president of the Supreme Court decides or the Procurator General submits petition for such review.[816] Now, a party

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[815] The purpose of review of cases by cassation is not clear from the provisions of the law providing for the process. However, it is argued that the purpose of cassation may be understood from the objectives of those organs that are empowered to enforce the law. Thus, a case would be reviewed by cassation either on the order of the president of the Supreme Court or at the request of the Procurator General. For instance, one of the objectives of the Procurator General's Office was "to ensure that laws, regulations, orders and directives of the People's Democratic Republic of Ethiopia are correctly and uniformly applied in all places . . . ." This is seen in light of the power of the then Supreme Court such as "to issue directives to ensure with the view to improving the administration of justice and ensuring the uniform application of laws." Yoseph Gebre'egziabher (1989) "THE HEARING OF FINAL JUDGMENT BY THE SUPREME COURT BY WAY OF CASSATION: ANOTHER RIGHT OF APPEAL GRANTED TO ANYONE FOR THE PARTIES?" *14 JEL No. 1*, at 163, 164.

[816] *Supreme Court Establishment Proclamation No. 9/1987* cited in Yosef, *id*., at 161

who claims a fundamental error of law in a final judgment can petition the cassation bench for review. This is, however, an opportunity for the supreme judicial body to correct such grave errors for the integrity of the justice system. Accordingly, the power of cassation is granted to the Federal Supreme Court and the State Supreme Courts have the highest and the final judicial powers in their respective jurisdictions. However, the extent of the power of the Federal Supreme Court is vague. Whether its cassation jurisdiction is limited to federal matters or it also extends to state matters is not clear from the provisions of both the constitution and the courts proclamation. The Constitution under Art 80(3)(a) provides that the "Federal Supreme Court has a power of cassation over *any final court decision* containing a basic error of law" [emphasis added]. On the other hand, Art 80(3)(b) provides that the "State Supreme Court has power of cassation over any final court decision on *State matters* which contains a basic error of law." [Emphasis added.] The restriction on the cassation power of state supreme courts to state matters is not included in the cassation power of the federal courts to federal matters. Based on the phrase "any court final decision" many believe that cases finally decided by the State Supreme Courts in cassation can also be seen by the Federal Supreme Court in its cassation jurisdiction; the Federal Supreme Court actually rendered decision on the merit of those cases some of which are discussed in this material.

A closer examination of the jurisdiction of the provisions indicates that it is illogical and impractical that the Federal Supreme Court exercises such jurisdiction on state matters, if not illegal. First, as provided for under FDRE Const., Art 80(1), the Federal Supreme Court has "the highest and final juridical power over Federal matters." If the ordinary judicial power of the Federal Supreme Court is restricted to federal matters, it is illogical for the Constituent Assembly to grant such power of cassation over such state matters. Second, the objective of cassation power is for the uniform interpretation and application of law. If it is a state law, the application of that law is restricted to that particular state. Thus, the uniform interpretation and application of such state law concerns only that state. Accordingly, that state's Supreme Court has cassation power regarding the state's law. This objective cannot be achieved by having reviewed the case by the Federal Supreme Court nor has the latter such concern in the state's cases. The cassation power of the Federal Supreme Court could validly be exercised only on matters that have national application. The issue is more complicated where the working language of the State Supreme Court from whose decision cassation is sought to the Federal Supreme Court is other than Amharic. In such cases, petitioners

from states whose working language is other than Amharic must have their documents translated into Amharic.[817]

Some members of the constituent assembly, referring to the drafting history of this provision state that, initially the power of cassation was granted to the Federal Supreme Court. Later, it was agreed that states Supreme Courts also need to have cassation power in their respective jurisdiction. Unfortunately, however, when Art 80(3)(b) was included, the phrase "any court final decision" in Art 80(3)(a) was not corrected. The history could be logically valid only if the cassation power of the Federal Supreme Court is limited to federal matters.

However, the dilemma of this argument in respect of criminal matters, as seen in the discussion in relation to jurisdiction, is there is only one federal Criminal Code and the uniformity may still appear to be appropriate. However, if federal criminal code were to include only federal crimes and states are left with subject matters on which they could legislate, review of state matters by cassation would ended at the state supreme court level. That also properly illustrates cassation over cassation is not logically justified.[818]

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[817] In an attempt to address the matter, the Draft Criminal Procedure Code, Art 204 provides that:

The Federal Supreme Court have cassation power over the following matters having fundamental error of law:

1. *final decisions of the Federal Supreme Court in its first instance or appellate jurisdiction; and*
2. *final decisions of the Federal High Court rendered in its appellate jurisdiction.*

Likewise, unavoidably Art 205 provides that:

State Supreme Courts shall have power of cassation over the following state matters having fundamental error of law:

1. *final decisions of State Supreme Court in its first instance or appellate jurisdiction over state matters; and*
2. *final decisions of a State High Court rendered in its appellate jurisdiction over state matters.*

It is a provision providing for the States Courts, in the federal law. It surely is arguable that it is unavoid*a*ble in order to provide for states courts' jurisdiction on cassation.

[818] For the debate on the justifiability of cassation over cassation, see Muradu Abdo (2007) "REVIEW OF DECISIONS OF STATE COURTS OVER STATE MATTERS BY THE FEDERAL SUPREME COURT" *1 Mizan L. Rev. No. 1*

The practice of review by cassation by states' Supreme Courts is more or less a replica of the Federal Supreme Court in many respects. Therefore, the respective states Supreme Courts have jurisdiction to review cases on cassation on state matters in their respective jurisdiction. Accordingly, the SNNPRS courts' Proclamation Art 5(3), for instance, provides that the States Supreme Court has cassation power "over any final court decision on state matters which contain fundamental error of law." The manner of filing the petition, the preliminary selection of such cases for cassation and other procedures are exactly similar to that of the Federal Supreme Court.[819] The procedure in Tigray State courts is a little bit different in that such case could be initiated by the President of the Supreme Court, or a bench in the Supreme Court apart from the request of either party.[820]

15.2.2 The Procedure

Courts' Proclamation, Art 21

> *2) Without prejudice to the provisions of Sub-Article (1) of this Article, the following cases shall be heard by a division with not less than five judges sitting:*
>
> > *(c) cases referred to under article 10 of this Proclamation, where determined that they be heard in cassation.*

Courts' Proclamation, Art 22

> *1) A decision shall be heard in cassation by the Federal Supreme Court, pursuant to article 10 herein, subject to prior ruling as to the existence of fundamental error of law qualifying for cassation, by a division wherein three judges of the Federal Supreme Court sit.*
> *2) The applicant for a hearing in cassation shall state the reasons for alleging the decision to contain a fundamental error of law.*
> *3) The applicant shall together with his application submit a copy of the decision protested and of the decisions of lower courts.*
> *4) An application for a hearing in cassation shall be made to the Federal Supreme Court within 90 days from the date on which the final decision protested is rendered.*

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819 SNNPRS Courts Proc. No. 43/2003, *supra* note 4, Art 17

820 Tigray Courts' Proc. No. 30/90, *supra* note 287, Art 13.2

Courts' Proclamation, Art 10[821]

4. *Interpretation of a low (sic) by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on federal as well as regional council (sic) at all levels. The cassation division may however render a different legal interpretation some other time.*
5. *The Federal Supreme Court shall publish and distribute decisions of the cassation division that contain binding interpretation of laws to all levels of courts and other relevant bodies.*

Cassation is a process of review of final decisions of an appellate court or cases that have no appeal either because they have been reviewed by the supreme judicial organ or because the date for lodging an appeal have expired. Thus, for the Supreme Court to review a case by cassation (a) petitioner must first exhaust her appeal and no appeal lies from the decision of the court against which review by cassation is sought; (b) the case must be finally disposed of; and (c) decision against which review is sought must contain fundamental error of law. Thus, the petition for review by cassation must state the reasons why she contends that the final judgment against which review is claimed contains fundamental error of law in which it is implicit that appeal has been exhausted and the case has been finally decided.

The application has to be filed within 90 days from the date of the final judgment against which review is claimed is rendered and be accompanied by copies of such judgment in respect of which review is sought and the judgment of the lower court if there was another hearing. A panel of three judges of the Federal Supreme Court makes preliminary review whether a final judgment against which petition for cassation is filed has a *prima facie* case of fundamental error of law that is worth the time and resources of the Federal Supreme Court. The panel also sees whether appeal is exhausted or the petition is filed before the expiry of the 90 days period. Where the panel of three judges decides there is a *prima facie* case in the petition, a copy of the petitions is sent to the respondent. The law provides that the review by the cassation is to be had by a court constituted of at least five judges of the Federal Supreme Court.

After hearing both parties, the cassation court either rejects petition or grants. The cassation court may grant the petition of the applicant only if

[821] These provisions are added by Proc. No. 454/2005, *supra* note 168

there is *fundamental error of law*. The content of clause 'fundamental error of law' is not defined anywhere both in the law and in the practice of the Court.[822] It is, however, clear that both from the express provisions of the law and the purpose of cassation that the cassation court considered only matters of law. Furthermore, it is not any kind of error in the interpretation of law that is the subject matter; such error in the interpretation law must be fundamental. Such law may be procedural or substantive. However, the difficulty of discerning matters of law from matters of fact, as well as those fundamental ones from those that are not, is reflected in the judgment of the Court. For instance, in *Minale Azeze*[823] petitioner claimed that while the High Court did not consider his defence of self-defence where it convicted him under Pen. C., Arts 27(1) and 523 and sentenced him to 4 years imprisonment. He appealed to the Supreme Court both against the conviction and the sentence. The Supreme Court affirmed the judgment of the High Court. The petition to the cassation bench was based on those facts. The cassation court varied the decision of the High Court reasoning that the facts proved against petitioner rather constitute a violation of Pen. C., Art 538(b) not Pen. C., Arts 27(1) and 523; and accordingly reduces the sentence to two and a half years. Likewise, in *Dimetros Alemseged, et al.*[824] petitioners were charged and convicted under Pen. C., Art 522(1)(a). The decision was affirmed by the appellate court. Their ground of petition for cassation was that the decision of the lower courts was based on "contradictory testimony of witnesses." After examining the records of the lower courts, the cassation bench held "the court's conviction of petitioners under Art 522(1)(a) in the absence of proof of moral element for aggravation is a fundamental error of law." It thus varied the decision as per Art 113(2) and convicted them under Pen. C., Art 523.

It is difficult to draw a distinction between matters of fact and matters of law. However, from the readings of those cases of the cassation court discussed here and also others, it is possible to make a general statement that an

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[822] Please note that the Constitution uses the term 'basic' while the Courts' Proclamation uses the term 'fundamental'. The Amharic version of both terms is identical "*meseretawi*". Insofar as the use of the term does not indicate any difference in both usages and the working language is Amharic, both terms are used interchangeably.

[823] *Minale Azeze v. Public Prosecutor* (Supreme Court Cassation Bench, 2002) Cass. F No. 5844

[824] *Dimetros Alemseged v. Public Prosecutor* (Supreme Court Cassation Bench, 2005) Cass. F No. 16761

error relating to the law in the final judgment affecting the judgment of the court without which the outcome of the case would have been different is a fundamental error. If, for instance, a person is convicted under a wrong provision or sentence has been passed on her more/less than what her guilt warrants, that mistake is fundamental as it affects the outcome of the case. If there is a mistake in the application of a given provision but does not affect the case substantially or it does not affect the outcome of the case, then the mistake is not fundamental.

The interpretation and application of law by the cassation division are binding precedent where such decision is rendered by at least five judges presiding.[825] The law further provides that the Federal Supreme Court publishes and distributes such cases that contain binding interpretation of law. There are many cases that were decided by the cassation bench with five judges presiding but not published. The interpretation of this provision appears that the fact that interpretation of the law is made by the Supreme Court cassation bench with at least five judges sitting is not sufficient; the decision must be published and distributed in order to be binding. However, it is not clear who decides whether a given decision of the cassation bench containing interpretation of the law is to be published. Thus, the law leaves open whether the binding nature of the decision of the cassation court is judicial or administrative.

Furthermore, the Courts' Proclamation, Art 21(2)(a) provides that cases that are first instance jurisdiction of the Federal Supreme Court are to be heard at least five judges presiding. The only option of review for such cases is cassation. The case is first to be reviewed by a panel of three judges. The question is whether those judges who preside over the hearing can also sit for the preliminary selection. The second question is once the case is said to contain a prima facie case, for cases both one originally heard by the Supreme Court and those heard on appeal, whether those judges who undertook the preliminary screening may also sit in the final hearing of the cassation. The extent of application of the provisions of Art 27(1)(c) of the Courts' Proclamation is not clear.

The law does not provide what the decision of the cassation court would be. That could be one of the reasons why the hearing of the cassation court often is similar to that of appeal save, no new evidence is admitted. The cassation bench consistently cites the provisions of the Code relating to appeal,

825 Proc. No. 454/2005, *supra* note 168, Art 2(1)

particularly Arts 195 and 113(2). At the conclusion of the hearing, it is a matter of reason that the cassation court can vary the decision of the court that rendered the final judgment. To the extent it finds fundamental error of law, the cassation court may reverse or modify the decision challenged or it may confirm the final decision against which petition is filed where it finds no fundamental error. As the decision is exclusively based on the record of the court, the cassation court is in a position to make the decision itself. Thus, it makes the interpretation of the law and it orders its application. However, where retrial is found to be necessary, it could remand the case for re-trial.

15.2.3 Stay of Execution and Judgment of the Cassation Court

In case of appeal where the appellant files her petition of appeal she can also file petition for stay of execution. It is a common practice and it is a matter of common sense that where there is likelihood of irremediable damage the cassation court could grant the application and thus the execution of a sentence could be suspended until the appeal is decided. This is not, however, expressly provided for in the law in force. The Draft Code provides that where the petition for cassation is accepted, that there is a *prima facie* case of fundamental error of law, then the petitioner can also request for stay of execution of the sentence. Thus, Sub-Article (4) of Art 206 provides that "where the applicant believes the execution of the judgment of a lower court entails an irreversible damage, he may apply, stating his reasons therefore, for a stay of execution of judgment."

15.2.5 The Procedure in the Plenum of the Federal Supreme Court

Apart from addressing each particular case, the Plenum of Federal Supreme Court is established with a view to address matters relating to "problems encountered in the administration of justice"[826] in order to work out remedies to such problems and to examine and approve directives and decisions that help improve the judicial practices of the Federal Courts, among others.[827]

The Plenum is composed of the President, the Vice-President and Judges of the Federal Supreme Court, the Presidents of the Federal High and the

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826 Courts' Proclamation, Art 33(1)

827 *Id.*, Art 33(2), (3); Also Proc. No. 454/2005, supra note 168, Art 2(4) authorises the Federal Supreme Court to issue procedural directives necessary for its functions those are consistent with laws that are in force.

Federal First Instance Courts and the presidents of the State Supreme Courts as voting members. In order to maintain the independence of the judiciary, but in order to enable them know what is going on in the courts, the Minster of Justice participates as a non-voting member like other judges, deans of law faculties, representatives of other institutions, etc., which may be invited to participate without the right to vote.[828]

15.3 Re-Trial

The Civil Procedure Code, Art 6(1) provides that " . . . any party considering himself aggrieved by a decree or order from which an appeal lies, but from which no appeal has been preferred, or by a decree or order from which no appeal lies, may, on payment of the prescribed court fee, apply for a review of judgment to the court which gave it where: (a) subsequently to the judgment, he discovers new and important matter, such as, forgery, perjury or bribery, which after the exercise of due diligence, was not within his knowledge at the time of the giving of the judgment; and (b) had such matter been known at the time of the giving of the judgment, it would have materially affected the substance of the decree or order the review of which is sought." Accordingly, the court in the matter of *Abebech Bejiga v. Dr. Tesfaye Akalu, et al*.,[829] for instance, considered whether a previous judgment was rendered based on a forged document. There are no similar provisions for criminal matters. Appeal is one such major procedure that is meant for the proper interpretation and application of law to facts and for the proper evaluation of evidence. When there is an error in the interpretation of law, the interested party may petition the Supreme Court to review the case by cassation. Where there is error in facts, there are no procedures to rectify such error in criminal cases.

There is no information whether there are wrong convictions. There is no information whether convicts serving sentence under a after a final judgment, both appeal and cassation exhausted, sought review of their cases but were denied process for lack of governing law. This is probably because no one would attempt under the circumstances. Certainly, in a very weak fact finding and evidence evaluation process, as exists in our criminal justice system, there certainly would at least be some cases.

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828 Courts' Proclamation, Art 32

829 *Abebech Bejiga v. Dr. Tesfaye Akalu, et al*. (Supreme Court Cassation Bench, 2007) Cass. F No. 08751

However, it is almost a universal practice that there is procedure of retrial of cases for instance where new evidences are discovered. The need for such procedure is appreciated for many decades and it was included in the draft prepared by the then Ministry of Law and Justice in 1984 taking after the Soviet legal system. This procedure was also included in the subsequent draft that was finally submitted to the House of Peoples' Representatives in 2003. The following is a discussion based on the provisions of the Draft Criminal Procedure Code, the Chapter "Re-opening of a Criminal Case after a Final Judgment," and the FDRE Constitution.

Article 210 Principle

1. *Notwithstanding a final judgment is given in a criminal case, an accused person, provided either of the reasons stated under Article 211 of this Code exists, may apply to the court which gave the judgment or which rendered judgment on appeal for a retrial of the case.*
2. *After the case has been tried in the court of cassation and a judgment is give thereon and the reasons stated under Article 211 exist, the application for retrial shall be lodged to the court which gives the final decision against which an application for cassation has been presented.*

Article 211 Conditions for Retrial of a Case

A case may be retried and judgment may be rendered where:

1. *a new evidence is produced and the accused proved to have endeavoured to produce such evidence before judgment but he was not able or it was not within his reach to do so; or*
2. *the accused proved that the decision has been based on false testimony, expert opinion, document or translation and, he endeavoured to discover such fact before judgment but was not able to do so;*

and such evidence is sufficient to reverse or vary the judgment.

Where the convicted person or her lawyer found new evidence or later discovered the court entered conviction based on false testimony, false or incorrect expert opinion, incorrect document or translation and that the convicted person or her lawyer endeavoured during the trial and it was not within her reach, she can petition to the court to review the case. Such review is filed before the court that gave the final decision being executed

whether it is first instance or appellate court. Where the case is reviewed on cassation, as the cassation court does not have power to review matters of fact, the petition is to be filed before the court that rendered the final decision from which cassation is lodged.

FDRE Const., Art 23 Prohibition of Double Jeopardy

No person shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the criminal law and procedure.

Article 212 Content of the Application and Period of Limitation

1. *The application to be presented in accordance with this Chapter shall be in the form the memorandum of appeal being presented. It shall also contain evidence for the existence of the reasons stated under Article 211.*
2. *The applicant who has requested the retrial of the decision shall present his application within sixty days from the day he came to know the existence of the new evidence, the presentation of the false testimony, expert opinion, document or translation.*

Article 213 Procedure and Judgment

1. *The court before allowing the retrial of the case, shall send a copy of the application and the evidence to the public prosecutor and order him to present his objection, if any, on the fixed date.*
2. *The court after the evaluation of the applicant's evidence and the rebuttal evidence by the public prosecutor, if any, shall decide on the application,*
3. *The court shall give order for stay of execution of the judgment where it decides to retry the case and is of the opinion that an irreversible damage would be caused should the judgment be executed.*
4. *Where the court refused the retrial of the decision, a single appeal may be lodged against such decision as provided for under Article 180 of this Code.*

Article 214 Persons Having the Right to Apply in the Name of the Convict

Where the convicted person is unable to express his will, the persons who have the right to lodge application in his name shall be his guardian, spouse, parents or descendents as the case may be.

The procedure is that such petition is to be prepared in the manner memorandum of appeal is prepared; the grounds of objection to the judgment are to be listed without argument. Such petition is to be accompanied by the judgment that is being executed and the newly discovered evidence, false testimony, incorrect translation, etc. Such petition need to be filed within sixty days from the day the petitioner came to know that such evidence exist or testimony is false or the translation is incorrect. It is indicated in relation to cassation that the petition is based on fundamental error of law. Likewise, the evidence, the translation of the document or the false testimony that is discovered by the convicted person on which the petition for reopening of a case after final judgement is based must be one that is essential; i.e., it must be able to justify reversal or modification of the judgment that is under execution.

The court before which such petition is filed sends a copy of the petition to the public prosecutor and fixes the date on which she produces her objection, if she has any. Where the court is convinced by the evidence produced by the convicted person or her representative that it is true or correct, it grants the application. Where the court grants the petition, it orders the case is to be re-tried before the court that rendered the final judgment which is under execution. Where the court grants the retrial and it also believes irremediable damage may be caused to the convicted person, the court may grant the petitioner stay of execution. Such stay of execution could be granted in a manner that is provided for in appeal cases.

Where the court denies the petition for re-trail, the Draft Code provides for appeal. As discussed in relation to appeal. Such provision is included only to comply with the constitutional right to appeal. Furthermore, where such convicted person is not able to file her petition for whatever reason, or is unable to express her will, such person who has the legal power to conduct private prosecution have the power to file the petition on behalf of the convicted person.

The right to file a petition for a re-opening of a case after final judgment is given only to the convicted person because while the law tries to correct errors in the administration of justice, there is also the constitutional provision that prohibits double jeopardy.

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