Evidence law

Chapter one

1.1 What is meant by Law of Evidence?

❖ **Is there any difference between the Law of Evidence and Evidence?**

- ✓ Evidence is derived from the Latin word **`evidentia'** meaning:-
  - to show clearly
  - to make clear to the sight to discover clearly
  - to ascertain or to prove

❖ Evidence has been defined in different ways. Examples are;

- ✓ **Evidence is something, which serves:-to prove or disprovethe existence or non-existence of an alleged fact.**

➢ **Evidence is;**

- ✓ **the means of satisfying the court of the truth or untruth of disputed**
- ✓ **it is also the foundation of proof.**

Taylor defines evidence as:

- ✓ **All legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact; the truth of which is submitted to judicial investigation"**

Philpson states that

- ✓ **Evidence means the testimony, whether oral, documentary or real(physical evidence such as knife, gun..), which may be legally received in order to prove or disprove some facts is dispute.**

- ✓ **What about presumption?**

According to Cross

- ✓ **Evidence is the testimony, hearsay, documents, things, and facts, which a court will accept as evidence of the facts in issue in a given case.**

Aguda states,

- ✓ **Evidence is the means by which facts are proved but excluding inferences and arguments**

Draft Evidence Rules (DER) defines evidence,

- as " **a means whereby** any alleged matter of fact, the truth of which is submitted to investigation, is proved and **includes;**
    - Statements by accused persons, admission, Judicial notice, presumptions of law, and observation by the court in its judicial capacity.
    - No documentary evidence is cited. Why?

What communality can you discern from the above stated definitions?

- **Facts – disputed facts(excluding mere arguments, inferences..)**
- **Proving or disproving such factsbased on(eg, admission, confession, judicial notice, presumption, witness, documents, real,..)**

Take for example an aggravated Homicide case

evidences,

- **Witness**
- **Confession**
- **Exhibits (dagger, a cloth stained with blood..)**
- **Expert testimony which warrants the cause of the death of the deceased**

❖ **All this are evidences that are very relevant to proof whether a crime of aggravated homicide is committed or not**

➢ **So all facts traditionally considered as evidences may not be evidence in the eyes of evidence law**

So, what is then law of evidence?

❖ **When we come to the definition of law of evidence, there is no one size fit all definition.**

Mc. Cormick

✓ **The system of rules and standards by which the admission of proof at the trial of a lawsuit is regulated (what kind of proof?)**

Generally the law ofEvidence relates to,

a) **What facts need to be proved and produced** and **what facts need not be proved** to the court and

b) **Who may prove / Which of the partieshave the burden of proof**

c) **How to prove such facts**

d) **The required standards of proof to win the case**

e) **Relevancy, Admissibility, Credibility and weight of evidence**….

1.2 Nature of Evidence law

❖ **Where is the place of Evidence of Law?**

- Laws may broadly be classified in to **Substantive** and **Adjective**
- The first **defines right and duties** while **the later** deals with **the manner of enforcing the rights and duties defined**
- **Adjective laws :- Law of Evidence and Procedural Laws (both criminal and civil procedure)**

Argument:-

- **The first argument THE** LAW of Evidence should be incorporated under procedural laws
  - ✓ Similarity in purpose
  - ✓ Both are the means to an end

The second argument

- The mere fact that law of evidence is a means to the enforcement of substantive law does not make it fall under the category of procedural laws
- There are certain issues **procedural laws neveraddress** and are left to evidence law
  - ✓ Eg.**the standard of proof**, **facts to be proved or need not be proved** and **the value to be given to each term of evidence, relevancy, admissibility**etc
- Additionally, categorizing law of evidence as one part of adjective law **helps to establish more effective system of adjudication of cases** before the court

of law

WHICH LINE OF ARGUMENT IS MORE TENABLE? WHY/WHY NOT?

❖ **Consensus**,

- ✓ Evidence law is not strictly speaking procedural law,
- ✓ however it shares the commonality with procedural laws in the sense that both are means to the enforcement of the substantive law
- ✓ Thus, evidence law suitably falls within **the general category of Adjective laws,** which deal with the enforcement of the substantive law.

❖ However, some countries do not have a codified law of evidence the problem that you would face is whether law of evidence is part of procedural or substantive law

- Rule of evidence are dynamic. Interact with, substantive, procedural, judge's perception, advocates skill, witness'scredibility…

1.3 Purpose /significance of Evidence law.

List some of the significances of evidence law?

- ➢ Is the "Key" which a court needs to render a decision.
- ➢ **Without evidence there can be no proof.**
- ➢ It **regulates the process of proof and the conduct of litigation**

- Has amoral purpose- establish and regulate the process of proof in the proceeding of courts eg public interest,
- **Protect the accussed's right to a fair trial**Eg, prohibiting evidence of defendant's character and previous conviction **Art. 138 of CPC and rule -145 of DER**

> - **Should evidence law regulates the relevancy of evidences or no exclusionary rule has to be adhered?**
> - **Should judges be given discretionary power or limited power on determining relevancy of evidence?**

- ***With regard to regulating the questions of relevancy, there is no consensus***.

❖ **Bentham**and **William Twiningadvocate**–

- ✓ **FREE PROOF**(a judge should be provided full access of all evidences)—theyadvocate abolition of all laws operating to exclude evidence
- ✓ Bentham felt laws of evidence were needed only to the extent of preventing '*vexation, expense or delay*'

❖ **Second Approach**-

- ✓ **A judge should not be given unlimited discretion**. **(undesirable and chaotic)**
- ✓ **There should be ground rules** for the admission of evidence so that common standards are applied between all courts and tribunals

- ✓ **Having rules of relevancy would help to give timely and effective justice**
- ✓ In some instances the rule provides for the mandatory exclusion of evidence.
- ✓ In **other instances discretion is given to the judge** to exclude relevant evidence in circumstances were fairness demands it
- ✓ a number of rules relating to **admissibility and use of evidence are directed towards minimizing the risk of wrongful convictions**
- ✓ **Verdicts of the court to have amoral legitimacy, trials must uphold basic human and constitutional rights**

1.4 Development of Evidence Law

- ➢ **The present rules** and principles of evidences are **the outcome of the successive development**, conducted in different stages of human civilization
- ➢ in early times there **was <u>no distinction between civil and criminal</u> cases with regard to evidences**
- ➢ **<u>The accused</u>** was **<u>under obligation to proof his innocence</u>**
- ➢ Generally, **evidences were gathered by; <u>proof by ordeal and oath</u>**

I. Proof by ordeals

- ✓ Ordeal is about **subjecting somebody to undergo a painful experience** like:- walking **on fire**, **holding glowing with heat**, **put hands in to boiling** water…
- ✓ If the suspect **<u>goes unharmed</u>** after going through ordeal he **<u>is said to be innocent</u>**. **<u>If not he is guilty</u>**

- ✓ This was mainly based on **spiritual power**.
- ✓ Such kind of evidences were used until 15th century

II. Proof by oath

- ✓ Is mainly based on religious notions
- ✓ The accused/ defendant is required to take an oath before his testimony in his own case
- ✓ **Oath** was considered as best evidence as perjury was a sin and subject to punishment from God.
- ✓ Later court required the testimony of **supporting witnesses** (**compurgators**) to attest whether the oath is true or not and not on the merit of the fact
- ✓ **Gradually**,the above ancient ways of proof had begun to be **replace by the new and modern concepts of evidence rules.** (writings of scholars, judicial decision, development of laws in different legal systems played a great role).

1.3.1 Traditional mechanism of proving in ancient Ethiopia

- ➢ **Oath** and the **testimony of witness** were widely used by FithaNegest
- ➢ **In the absence of evidence, two types of methods were used**

1. *"**Laeba Shai**"*

- ✓ **Reporting of a crime** to the government
- ✓ **Lebashai administrator**
- ✓ **a person was made to drink some herbal solution that would intoxicate him**
- ✓ the owner of a home where a lebashai enters and falls is considered as guilty and was prosecuted **without any additional evidence**

- ✓ This was criticized and replaced by,

2. ***Afersata" or " awchachigh".***

- ✓ The wrong doer was made to be identified by **a public gathering**
- ✓ The public was sequestered in a group gathering until the wrong doer was **identified**
- ✓ **Birds, stones**,

1.5 Evidence in civil and common law legal systems

1. Separation on the organization of the rule of evidence	
Common law The Anglo - American	Civil law The continental
• Have separate rule or code of evidence • The rules determine admissible and inadmissible evidences • Jury (separate law exists because of mistrust of juries)	• **No separate Code of Evidence law** • are sparsely distributed in both substantive and procedural laws ---judge • the existence of professional judges
2. **Difference regarding the sources of evidence rules**	
• Laws made by the parliament plus Judges can make laws-including evidence stare decisis • precedent system	• Laws are enacted by the parliament. • WHAT ABOUT ETHIOPIA? **proclamation No 454/2005-art.2(4)**
3. **The difference regarding the system of inquiry**	
✓ Employ the ***"Adversarial system"*** ✓ a **party-lead system** in which the judge has no investigative role ✓ judge acts as an **impartial umpire** ✓ judge has no investigative role	✓ Employ the ***"Inquisitorial System"*** ✓ The trial **judge plays a far more active role** (question witness, direct police, … ✓ Evidence is generally extracted **in a more humane and natural**

✓ parties have complete autonomy ✓ parties legal rep. collect the evidence and decide what evidence should be presented	**manner** ✓ Witness are considered as witness of a court ✓ WHAT ABOUT ETHIOPIA?
4. **The differences on the types of evidences they emphasized**	
✓ **great weight and importance is given to oral testimony** of parties and their witness (**oath**) ✓ The physical presence of the witness affords the judge the opportunity of observing the witness demeanor ✓ **cross examination is widely used** ✓ Documentary evidence is generally regarded as being inferior to oral evidence.	✓ **emphasis** is given **to written evidence** ✓ There are Registration offices like offices of notary ✓ Documents do not lie while people can ✓ Risk of loss of memories ✓ Risk of unavailability of witness. ✓ Cross examination is not widely used
5. **Are parties themselves competent witnesses in their own case?**	
✓ **Parties themselves are competent witnesses in their own case**. ✓ The defendant is **not a competent witness for the prosecution but is a competent witness in his own defence** ✓ **The defendant may choose whether or not to give evidence on oath**	✓ it is considered best if no one is a witness in his own case ✓ **A party cannot nominate itself as testifying** to the accuracy of its assertions. (neutrality) ✓ Sometimes the exclusion extends to spouses, relatives and …
	what about in Ethiopia, • **Civil Case Art. 261(3) yes he can** • **Criminal case-** **Art. 20(4) of FDRE con,** o Accused persons have the right to produce any evidence including his own testimony in his own defense

	○ Presumption of innocence **C.P.C 142(3) CPC** ○ **No oath** ○ **no cross examination** ○ **but, the court can ask question**
6. Is hearsay evidence admissible as a rule?	
✓ **Exclude hear say evidence** ✓ **The evidence must be direct**	✓ there is no rule which excludes ''hearsay' evidence ✓ the discretion isgiven to the judge
7. cost **more costy**	**less costy**

Evidence in Ethiopia

Is there any code of evidence in Ethiopia?

- No
- evidence rule are **found scattered** in **substantive and procedural laws**
- This has attributed to the fact that **Ethiopia shares both the civil and common law features**
- **Substantive** – weight is given to documentary evidence from the civil law eg. **Notary, registration**..
- **Procedural** -from the common law eg. **Cross examination, impeachment of witness**....
- The present day Ethiopian evidence system **is the hybrid of civil law and common law features.**
- Gaps are filled by judges

❖ **The Draft Rule of Evidence of 1967**

- ✓ Still not ratified
- ✓ Copied from the **Indian evidence Act**
- ✓ Have also included some **unique features of Ethiopian evidence**

Generally the sources of evidence in Ethiopia are;

1. **Scattered Evidence rules** found in the sub and procedural codes
2. **Modern and internationally accepted principles of evidences**
3. **publishing and distribution of case reports—**case laws

1.6 Evidence law in civil and criminal cases

Civil case	Criminal case
➢ Instituted by individuals	➢ Instituted by government
➢ **No mandatory rules of Exclusion of evidence in civil cases** • evidence that is relevant and probative of a fact, which needs to be proved to the court, will generally be admissible	➢ **Exclusionary Rule-** • The right to fair-trail of the accused • Un equality of resource • Harsh consequence eg death penality..
➢ **Proof-** • **Preponderance of evidence** or probabilities **''*he who asserts must prove* (usually the plaintiff)**	➢ **Proof-** • Beyond **Reasonable doubt**. • The burden of proof **lies on the public prosecutor (presumption of innocence)**
ETHIOPIAN CONTEXT ❖ **Much emphasis** is **on documentary E.**	❖ **Emphasis on witnesses** (emphasis on lay and expert)
✓ **Failure to deny facts will be presumed as admitted** (Art. 83, 242) ✓ **Specific denial is required** ✓ **Art.83 ……each party shall**	✓ **Silence-** if the accused says nothing then **plea of not guilty Art. 133(1),** ✓ Admitting in reservation- plea of not guilty Art. 133(2)

deal specifically with each allegation of fact of which he does not admit the truth except damages. ✓ **Facts which not specifically denied, are presumed as admitted** ✓ **Judicial admission is conclusive see. Artr 242 of the civil p. code** ❖ **Is a decision of criminal bench admissible in similar cases of civil bench? Why/why not?** ✓ **See art. 2035, 2149 and 145** ❖ A party can be a witness in his own case, oath, cross-examination	✓ A right not to answer questions asked by the pp **Art. 27(2)** ✓ **Failure to cross-examine on a particular point does not constitute an admission of the truth Art. 140** • **Judicial admission is not conclusive) a judge can order additional evidence- see art. 134(2)** ❖ **Is a decision of criminal bench admissible in similar cases of civil bench?** ✓ **See Art. 159 of the Cri.p.c** ❖ **The accused can make a statement against the charge (on oath, no cross-examination**

1.6. Classification of Evidence

✓ Different authors classify evidence in different ways such as;

- Direct and Indirect Evidence
- Direct and Hearsay Evidence
- Direct and circumstantial
- Oral and Documentary Evidence
- Primary and Secondary Evidence
- Personal and Real Evidence

Direct vs. Circumstantial

❖ **Direct Evidence**-:
- ✓ establish evidences directly-
- ✓ Which can be perceived by sense organ, Eg.
  - What you hear with your ears
  - What you see with your eyes

- What you smell with your nose
- What you touch with your hand or body
- What you taste with your mouth or tongue

✓ Is also called positive evidence

✓ oral, documents, photograph-

❖ **Circumstantial** evidence-:

✓ is also **indirect evidence** or **oblique evidence**

✓ is based on inference rather than personal knowledge or observation

✓ tends to establish a conclusion by inference

✓ When you put them together, they form a chain leading to a logical conclusion.

✓ circumstances should be taken cumulatively and not in isolation

❖ <u>Primary Evidence</u>

- The best evidence, original evidence,
- affords the greatest certainty of the fact in issue
- specific and definite and carrying on its surface no indication that a better evidence lurks behind.

❖ <u>Secondary Evidence</u>

✓ Evidence of hearsay;

✓ Testimony of Contents of a lost document

❖ Oral Evidence

➢ Also called “panel evidence”,

➢ evidence given orally – a verbal testimony of a witness

❖ Documentary Evidence

- Is that evidence which is supplied by a writing or other document.

❖ Personal Evidence;

✓ This is the evidence which a competent witness under oath or affirmation gives a trial or in an affidavit or deposition

❖ Real Evidence

➢ This is the physical evidence that plays a direct part in the incident in question.

➢ Consists of production of any object used in committing a crime, e.g. gun, knife, pen.

Chapter –Two

Facts, which may be proved other than by evidence

- **General Rule**-; a party who claims the existence of a fact need to proof it (evidential and legal burden)
- **Exception-;** certain allegation of facts need not be proved before a court
    - the court may treat a fact as proven without the need for evidence
- **Facts need not be proven**;-
    1. **Where a party admits a fact by making a formal admission**
        - ✓ **waives the production of evidence** by conceding that the fact asserted by the opponent is true
        - ✓ **Is stated under rule 3 of DER and Art. 2002 of the civil code**
- **Differences in terminology in criminal and civil cases**
    - Some use **admission for civil cases** and **confession for criminal cases**
    - Others use admission **for both** civil and criminal cases
    - Ethiopia, see article 134(**1), 19(5) admission is used in criminal cases**

- However, one can hardly see the term **confession in civil cases**
- **So confession can be** defined as **an admission made at any time by the person charged with a crime stating the inference that he committed the crime**

❖ **Rationale** (why admitted facts need no proof?)

- ✓ **a person does not make himself liable** by admitting facts **against himself** unless those allegations are true
- ✓ **the admission might be due to repentance of parties**
- ✓ **scarcity of resource and time**
- ✓ ART. **242** of civ-p.c and Art **134 of cri.**p.c**required the court to pass judgment on the admitted facts**
- ✓ **Exception** Art.**235(2) in cases of person with disability and art 134(2) of Cri. P.c plea of guilty**

❖ **Admission by co-offenders** –

- **Criminal case**
  - ✓ the confession of one **is not applicable on the other co-offender**
  - ✓ See DER 27, Art 27(2) of cr.p.c and Art 19(2) of the constitution

    unfair

- **Why does the admission of one will not be brought as evidence against the other offender?**
  - **an accused person should first be told that he has the right to remain silent and his statement will be brought against him (see art. 20 (1) and 27(2)-**
  - **the co-offender is not a witness(no oath and cross-examination)**
  - **the statement might be made to save oneself by incriminating the other**

- **Civil case**
  - ✓ **indispensable party**
  - ✓ **Should the admission of one be considered as admission by the other party? See civil procedure art.**

❖ means of Admission: Formal and Informal admissions

a. Formal Admission

- ✓ **Admission in pleading (**in statement of claim or defence)
- ✓ **In counter claim**
- ✓ **In court (at first hearing or at trial)**
- ✓ **Criminal case to the police Art. 27, to the court**

b. Informal Admissions

- ✓ **is a written or an oral statemen**t made by a party or by a person connected with the party
- ✓ **is most commonly made in** a **letter**, **fax** or an **e mail**, during cross-examination
- ✓ **out-of-court admissions** to a person **who are not authorized** to accept admissions
- ✓ **it may be disproved or explained (corroborated)** by other evidence at the trial
- ✓ **Its weight is left to the discretion of the court**

❖ Classification of Admissions: Judicial and Extra- Judicial

- **Judicial admission**
  - ✓ a**dmissions made as part of the proceeding in the lawsui**t
  - ✓ it should be given **before the court, which handled the case**,
  - ✓ and not in other courts
  - ✓ **is concussive**

❖ Ways of making judicial admission in civil cases

- **Facts expressly admitted in parties pleadings**. (Art, 80,**83,242.Civ-p-c**

- ✓ **Eg a plaintiff may admit accepting 10 sacks of teff while claiming the rest 10 sacks**

- **<u>Facts admitted by implication</u>** (**Art 83,235 of civ-p-c**)
  - **Failure to specifically deal with statement of claim in defence and counter-claimduring pleading is considered as admission see art. 235.**
  - **Exception Art. 235(2) disabled persons (**minor's, insane persons, judicially interdicted persons)
  - **Argument for and against.<u>What if these persons are represented by legal representative and failed to deny each fact?</u>**
  - **Eg. Im not liable for the contract.**
- **<u>Admission during Pre-trial hearings and at the trial (during investigation)</u>**
  - Art **241 (during investigation) and 242**
- **<u>Facts admitted by a party who testifies before a commission</u>**
  - Art 122 and 124 of civ. P.c the commissioner (either a court or a person) may examine the parties themselves and may receive their admissions which are considered as judicial admission.
  - **<u>Is it a judicial admission? Can it be conclusive?</u>**
- **<u>Admission by testimony of the party on the stand or by statement of his counsel</u>**
  - ✓ **See art. 261 of the civil procedure code-** a party can be a competent witness in his own case
  - ✓ **A party may admit a fact while giving a testimony**

- ✓ **Will silence during cross-examination be considered as admission in civil cases? Why/why not?**

- **Admission by agreement of the parties**
  - ✓ **See art. 251 of the civil code**

- **Extra-Judicial Admission**(evidentiary admission)
  - ✓ is an admission **made outside of the court****either orally or in a written form(letter**, **fax** or an **e mail**….)
  - ✓ **are not made in the course of court proceedings**
  - ✓ **has to be corroborated with other evidences by witness**
  - ✓ **are not conclusive**

❖ **What is Estoppel? -: a legal bar to alleging or denying a fact because of one's own previous action or words to the contrary. Read rule 27 and 90 of The DER**

2. Presumption

- ✓ **Is the second condition in which a party is relived from producing evidence**
- ✓ is **an inference made about one fact** from which **the court is entitled to presumecertain other facts** without having those facts directly proved by evidence
- ✓ **the proof of one fact is taken as the proof of the other fact**
- ✓ a party who wants to benefit from **presumptions must go half way**

- **EG.** A **child born in a marriage**Art. **126 of the RFC**
  - marriage **basic fact**
  - the husband is the father of the child **the presumed fact**
  - A child born while spouses live separately by agreement-art 169 of the RC
    - ✓ living separately **-the basic fact**
    - ✓ **The husband is not the father of the child-a presumed fact**

- ✓ The possessor of the **corporeal chattels** as the owner thereof (see **art 193 of civil** code).

❖ Why Presumptions

- ✓ To save time and resource
- ✓ For procedural convenience (eg. Presumption of **capacity, sanity**..)
- ✓ To give solution for practically difficult matters – dying simultaneously
- ✓ To protect public interest (wedlock, common property of marriage..)

❖ **Are all presumption *depend on the proof of the basic fact?*** ‘

- ✓ No- presumption of innocence
- ✓ Argument – this are rather **mandatory rules of law** or **initial allocationof burden of productionthan presumptions**.

❖ Types of presumption

1. **Presumption of fact (permissive inferences)**
   - ✓ Are about **logical inferences that can be made from a proved fact**
   - ✓ **Give discretionary power to the judge to presume facts by his own will**
   - ✓ The court may make inference form **the experience, the common course of natural events, from proved facts…**
     - eg. Close relatives testimony on the other
     - objecting judges not to preside over cases in which they are a party
   - ✓ **are not mandatory, rather they are permissive**
   - ✓ **are not prescribed by law**
   - ✓ **can be rebutted**

- ✓ if for instance a son is called to testify in favor of his father, one may presume that it is difficult to get a neutral testimony from such witness.
- ✓ If, for instance, the distribution of rain is good, one may presume the harvest to be good

2. **Presumption of law.**
   - ✓ **It is the law which require** the judge to presume a certain fact
   - ✓ Where the law requires the court to presume certain fact **the court cannot refuse to presume.**
   - ✓ **May require a party to prove** the existence or non-existence of a certain fact
   - ✓ **Or may not need any proof**
     - **Presumption of innocence**
     - **Presumption of sanity (criminal case0**
     - **Presumption of capacity (civil case art. 196**
   - ✓ are of two types: **Rebutable** and **Irrebutable presumptions**

I. Rebuttable Presumption

- ✓ The party relying on the presumption **bears the legal and evidentiary burdens of proving the primary fact**
- ✓ It does not give discretion to the court like the first one
- ✓ Once a party proves the existence of a certain fact, **the court is under obligation to presume the existence of a fact** unless rebuted by other party
- ✓ **shifts the burden of proof to the other party**
- ✓ Is identified by words " **shall be deemed/presumed**"
  - **Eg. Art. 1147(1)1. Unless the contrary is proved, he whobegan to possesson behalf of another person shall be regarded as a mere holder.**

- **Art. 168 of the RFC (if no sexual intercourse between the 300 and 180 days before the birth of the child**

✓ some rebutable presumptions are **rebutable on <u>unlimited grounds</u>** while **<u>others on limited grounds</u>**

- **<u>example of limited ground</u>Art 2006 of civil code** statements contained in written instrument may be challenged by those who signed it only by tendering on an oath to the party who avails himself thereof
- sub (2) **No proof by witness is allowed**
- **on <u>unlimited grounds</u>**Art 1147(1) of civil code provides" unless the contrary s proved, he who began to possess on behalf of another person shall be regarded as a mere holder
- Sub (2) of this Article says "**proof to the contrary may be adduced by any means.**

II. <u>Irrebuttable Presumption</u>

✓ **Once the existence of the certain fact is proved, then no other evidence will rebut the presumption**

✓ if "X" is true consequence "Y" must follow

- **Art. 4 of the civil code**
  - ✓ **Achild shall be deemed to be viable where he lives for forty-eighthours after his birth, notwithstanding any proof to the contrary.**
  - ✓ For instance, under Art **2024** of civil code debts due in respect of rents for house or agricultural estate **<u>shall be deemed to have been paid where two years have elapsed</u>**
  - ✓ If the fact in dispute is the one which is covered by the mandatory legal presumptions, the court shall apply such presumptions irrespective of the fact that whether the given fact is denied or not by the defendant**.<u>(see የኪራይቤቶችአስተዳደርድርጅት Vs Mr. Byronic</u>**

Areca, fed. Sup. Court cassation bench File No 1768/1997.E.C)

- Some argue that irrebutable presumptions are rather mandatory rules of law than presumptions. Do you a gree? Why/Why not?

✓

III. Permissive Presumptions

- ✓ **Like presumption of law they are prescribed under the law**.
- ✓ **like presumption of fact, they are not mandatory**
- ✓ are identified by words which say **`may presume'**
  - **Art. 22. - Medical examination.** Where 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
- ✓ **A party cannot enforce the court to reach to such conclusion**.
- ✓ **It is up to the discretion of the court.**

- ✓ *Is permissive presumption a rebuttable presumption*?

1) Once the court considers the disputed fact as established; the other party doesn't have the right to rebut it-like irrebutable presumptions.

2) Has the effect of shifting the burden of proof to another party, which enables him to rebut it. (are not mandatory unfair and against the sprit of evidence law)

3) The third argument is the one which consider permissive presumptions as rebutable presumptions even though the right of the party to rebut the presumption is depend on the discretion of the court unlike reputable presumptive

3. Judicial Notice

- ✓ **Is the third ground in which a party is relived from producing evidence**
- ✓ Is a circumstances in which **the judicial system assumes a factual proposition to be true even without proof**
- ✓ a judge can be called up on to receive and to act up on either from his know ledge of them or from enquires to be made by him self
- ✓ Covers **those facts that are so well known and notorious**eg,**Eg. Addis abeba is the capital city of Ethiopia, Ginbot 20,**
- ✓ **Are left to the discretion of the court**
- ✓ But, sometimes the law may require **judges to take some facts eg. Laws of the country** published on Negarit gazeta, **the territories under the government of Ethiopian,** the seals of all ministers,**42 (2) of DER**
- ✓ **a criteria of '*indisputability*'If there is the slightest doubt as to whether the fact is true the party may be required to submit proof to the court**.

❖ **There are three kinds facts in which a judge can take notice. There are;**

1. **Matters of common knowledge**
   - ✓ refers to knowledge that is **commonly shared by all people**

- ✓ This are facts which **are notoriously known**
- ✓ **not something one knows**(the judge) because of his academic background
- ✓ **does not have to be universally known** to be true or everywhere
- ✓ Facts may be well-known in the locality where the judge presides
- ✓ **name of places, Custom of the locality** can also be included here
- ✓ **the yard stick** for a fact to be a common knowledge whether in a particular territory or nationwide **differ from case to cases**

2. **Matters of public knowledge**
   - ✓ These are facts which **are not notorious** or part of common knowledge but are facts that can indisputably be ascertained by reference to authoritative means
   - ✓ These are facts that can be undiputabilty verified by **science**, **history**(**battle, art**…, **natural disaster**), if the date in which the Ethio-Eritrea war had commenced is in dispute
   - ✓ **The judge can verify**these facts by **referring authoritative** books or…
     - Eg. The judge may not need any evidence whether Kenya neibours Ethiopia on the south or not..
     - **Stamp, seal of high officials**

3. **Matters prescribed by the law**
   - ➢ **This are facts which are prescribed by the law**
   - ➢ **The judge is simply required to take judicial notice of facts by the law**
   - ➢ **Are conclusive**
     - **For example, the FDRE, national language, higher government officials and their positionStamp, seal of high officials**

- **Laws of the country officially enacted by ther Negarit Gazetta**
  - **Art. 2(3) of proclamation No. 3/1995 federal Negarit gazeta establishment proc.**
  - all federal or regional legislative, executive and judiciary organ as well as any natural or judicial person s**hall take judicial notice of laws published in federal negaritgazeta**
  - **eg. Admission-** the plaintiff is not expected to mention the specific article
  - **relatively easy in civil than common law countries**

CHAPTER THREE

Relevance and Admissibility of Evidences

- **After completion of this chapter, students will be able to** ;
  - Elaborate what fact denotes under evidence law
  - define what fact in issue mean
  - define what relevancy denotes under evidence law

- pinpoint the relevancy of individual items of evidence like-;
  - ✓ relevancy of character evidence,
  - ✓ circumstantial evidence,
  - ✓ judicial judgments and similar occurrences
- Denote what admissibility connotes under evidence law
- Identify conditions under which relevant facts might not be admitted as evidence

3.1 Facts in issue

- **What do we mean by fact in issue?**
- **What distinguish fact from fact in issue?**

❖ **Difference between fact and fact in issue**

- **Factmeans**
  - **anything** or **relations of thingscapable of being perceived by the senses** and **includesany mental conditions** of which a person is conscious
  - **so could be -;**
    - **Mental (**internal or psychological) like intention, negligence, good faith**…. How** can it be inferred?
    - **Physical** (external facts) - that can be perceived by our five senses.
- **Fact in issue-** ,
  - is a fact**which is disputed between the parties and to be resolved by the help of evidence**
  - **DER** 2-: **the matter which is in dispute** or **which forms the subject of the investigation** and fact from which, either by itself or in connection with other **facts, the existence, non-existence;** nature or extent of any right, **liability or disability**, **asserted or denied in any proceeding**

- **DER 6** where someone has to prove something before a court **he has to prove either facts in issue or facts relevant to facts in issue**

❖ **What facts need to be facts in issue**

- **In criminal cases** **elements of the crime** are stated under the criminal code
- **In civil cases**- **what is stated in the pleading** – it will be framed by a judge at the first hearing (Art. 80, 246 0f Civ. P. c)
- Differentiate between facts in issue and collateral facts?
  - ✓ which is not of direct relevance to the outcome of the case, but which may nevertheless be raised at the trial
  - ✓ is a fact which proves the minor issue which is relevant to the major fact in issue. Eg competence of witness

3.2 Relevant Facts

❖ **Overriding principles**

✓ **For any evidence to be brought to courts, two conditions must be fulfilled**

a. **First the evidence has to be Relevant**
b. **The relevant evidence has to not be prohibited by the law**

❖ **When is a certain fact said to be Relevant?**

- **When it directly or inferentially enables the court to decide the existence or non-existence of a disputed fact (factin issue)**
- Or when it has a "tendency to make the existence" of the fact to be proved **"more probable or less probable"**

- **See, DER 2**
- **The relevancy** of any item of evidence **is seen in relation with facts in issue**
- **And it is determined by the logical connection that exists between two facts. These facts are-**
    - **an item of evidence**
    - **Facts need to be proved or disproved**
- Does the item of evidence tend to prove the matter sought to be proved/disproved?
- **Its assessment is governed by** the cannons of **logic, general experience and common sense**
- **To be admissible,** anyitem of evidence**must be relevant to a fact in issue**

❖ Relevant evidence has two components: **Materiality and Probative value**

1. **Material Relevancy**:-

- Refers a**logical relationship**between**the evidence and facts in issue**
- refers the existence of **a direct or in direct connection** between **the evidence and facts in issue**
- **If no relationship then immaterial**
- See article **137 of cr. P, c and Art. 263** of civ. P.C (**question put in examination in chief shall only relate to facts in issue)**
- **Volume Cassession**

2. **Probative Value**

- Requires relevant facts to have **Capacity to prove**
- A mere connection but **without probative value does not serve any purpose**.
- While conclusiveness is almost never attainable sufficiency is

> ''*A brick is not a wall".* A party's entire case is the wall; each evidentiary item is a single brick with a limited function. Relevant evidence need only alter the probability of a material proposition.

❖ Facts Relevant to facts in issue

- Not all categories of facts are stated by the law
- relevancy is always a **relative term**
- both substantive and procedural laws of Ethiopia do not specifically state **what relevant facts are and what facts are irrelevant**

- **But see article 137 and 142 of the Cri. P. C**

  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.**

- **See volume 13, cass. No. 75922, Afework Vs. SNNPR, 2004**
- **Art. 263(1)**

  Questions put in examination-in-chief shall only relate to **facts relevant to the issues** to be decided and only to such facts of which **the witness has direct or indirect knowledge**.

ART. 138-: Thecourt mayat any stage ofthe suit reject anydocument whichitconsiders **irrelevant or otherwise inadmissible**, recording thegrounds of such rejection.

- ❖ The question then is how can courts determine relevant and irrelevant fact?
  - Discretion
  - Recognized principles
  - However, DER gives hint as to which connection of facts should not be disregarded as irrelevant

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

- ✓ **DER 6** Facts which, though not in issue, are **so connectedwitha fact in issue** as to **form part of the same transaction** are relevant, whether **they occurredat the same time and place** or at different times and places.
- ✓ **Res-Gestsae (ተዛማጅማስረጃ)** is a Latin term, which means-;
  - **Things done or said** in the course of a transaction**.**
  - **Is a common law doctrine**
  - To be relevant, facts need to form **part of the same transaction** and should occur **at the same time(contemporaneously) or immediately before or after the event**
  - **Forexample,** in murder case;
    - ✓ Whatever was **said or doneby both the deceased and the killerat the time** of shooting
    - ✓ Whatever was said before or after the shooting
      - ➢ I will show you!,
      - ➢ Have mercy please!,
      - ➢ I'm relived now!
      - ➢ Escaping (running of the shooter)

- ✓ The actions of by staders oh the man is killed!

- The statements must **relate, explain, or characterize** an event or transaction
- Facts must be **so closely related** so **as to form part of the transaction**.
- Transaction consist both **physical facts** and **verbal facts** (words spoken).
- **Physical facts**-; can easily be identified
- **Verbal facts**

  - ✓ Have to be **spontaneous declarations** to the existing occurrence (***it is the event itself which speaks not the person*** due to the act)
  - ✓ no high time interval (fabrication)
  - ✓ not **a result of reflection of thought**

N.B Res gestae is based on the belief that because certain statements are made **naturally**, **spontaneously**, and **without deliberation** during the course of an event, they **carry a high degree of credibility** and leave little room for **misunderstanding** or **misinterpretation**

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

Rule 8 of DER reads as follows:-

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

i. **Occasion**

- ✓ If " **time, place and condition"** do not exist together, the possibility of a creation act to take place is less probable
    - Eg.A and B are Engineering staffs. B heard that A is HIV victim from other staff. One day while A andB were arguing over a silly matter, B said A, after all you are HIV victim. Why should I argue with you?
    - A then gone mad and threw B from the ground plus 2 buildingas a result of which B `s two legs were broken
    - The fact that B heard A is HIV AIDS victim from other staffs **is the occasion or(አጋጣሚምክንያት)**
    - B`s insult is the **cause(መነሻምክንያት)**
    - *The injury B sustained is the **effect***
- ✓ **occasion inquires** in to the existence of **a favorable environment** for the alleged fact to exist or not
- ✓ occasion alone may not help much unless there is an opportunity
- ✓ Where you show occasion and opportunity you are heading towards the proof of the truthfulness of the alleged theft.

*ii.***Effect**

- ➢ logical causal connection
- ➢ marks on the ground produced by the **struggle or the blood spots at the place where the murder was committed**

iii. State of things.

- ➢ Can be understood when you **compare facts the way they were before and after an act.**

- For example, if the issue is whether a property is stolen from your room or not, the present state of **things has something to say about what has happened, and that is relevant.**

C. Motive, preparation, and previous and subsequent conduct

❖ **Motive**

- ✓ Motive is the **compelling force to do a certain act**.
- ✓ There can be **no action without a motive**, which must exist for every voluntary act
- ✓ **Motive precedes intent** that if you are given the motive you can prove intent

- **Eg.** where A is tried for the murder of B, the fact that **B knew that A had murdered C,** and that B had **tried to take money from A** by threatening to make his knowledge public, are relevant,

❖ **Preparation**

- Motive **leads to a specific intent** the realization of which may be preceded **by preparation**
- normally refers to **things you do**
- Where a person prepares to kill someone **he may buy poison, knife, etc**.
- Thus, proofing the fact of preparation is relevant..
- All the surrounding circumstances have to be taken in to account to avoid mistaken inference.

❖ ***Conduct (previous or subsequent)***

- ✓ The behavior of a person is usually dominated by **what he wants to do**and **what he has done**

- ✓ **Previous**. In a murder case; **displace his family**, **sell out his property**
- ✓ **Subsequent;**abscond or hide or disguise himself

E. When facts not otherwise relevant become relevant.

- ➢ Some facts though **not directly important** to prove/disprove facts in issue, in some instances facts **not otherwise relevant can become relevant**.
- ➢ This facts are **inconsistent with facts in issue**
- ➢ Though inconsistent, this facts can prove or disprove the existence or non-existence of certain facts.
- ➢ Example, **Alibi evidence**

F. Existence of course of business when relevant.

- When there is a question whether a particular act was done, **the existence of any course of business**, according to which it naturally would have been done, is a relevant fact.
- Business represents trade, profession and occupation. It can also be said **`means of earning likelihood**
- **Read page** 113 of yemasrejahigmeseretehasaboch'

3.3 Relevancy of Confession

❖ **Definition of confession**

- **DER 24.** 1.A **confession is an admission made** at any time by a person charged with a crime, **stating or suggesting the inference that he committed that crime**
- **Voluntary confessions relevant against maker-** confessions, if voluntary, are deemed to be relevant facts asagainst the persons who make them only.

- To be famous
- To protect otherseg family
- Unless a given confession is true **it shall not be relevant evidence**
- Volume 14 **caccession No. 77842Sami Husein Vs. federal public p 2005**

    - ***Admission should not be evasive***
    - *The accused`s confession should* ***be related with particulars of the crime***

✓ **Confession** made by an accused person **is irrelevant if it is the result of any inducement, threat, promise or any other improper method**

✓ See **Art. 31 of the Cri. P. c and DER 25*ART 134(2)*Art 19(5) of the constitution**

✓ Confessions made to other persons **other than person in authority** are **irrelevant/inadmissible**.

✓ **Volume 12, cass. No 57988 p. 96A public prosecutor can make an accused person a witness if he wants to.**

a. Relevancy of Circumstantial Evidence

❖ Definition

- **is an evidentiary fact from which an inference may be drawn rendering the existence or non-existence of a fact in issue more probable**

✓ If a witness testifies what he **directly perceived he is said to give`direct testimony' or `direct oral evidence**

✓ difficulty where there is no available witness or because it is impossible for a person directly to perceive what is in issue

- ✓ resort to **indirect evidence**
- ✓ it **allows a fact in issue to be proved inferentially** rather than **directly**, so it is `indirect' evidence
- ✓ Enables us **to make inferences about the existence and non-existence** of the alleged or disputed fact
- ✓ **Two things has to kept in mind**;

  - You may **draw inferences and conclusions only** from facts that have been proved to you
  - Any **inferences** or **conclusions** which you draw**must be reasonable and natural**, (facts should be consistent with one another and together they should establish the defendant's guilt beyond a reasonable doubt

- ✓ Should reduce the possibility that anyone else could have committed the offence, and so indirectly identifies the accused.
- ✓ As far as such circumstances have **sufficient connection with the disputed fact they are relevant**
- ✓ **Volume 13,**cass.**No. 75922** Vs. simachew Vs customes authority, p. **332, 2004**
- ✓ See art. 137 of the Cri.P.C

What do you think is the difference between Direct and indirect evidence?

- **Advantage ofDirect evidence**

  - ✓ Deals directly with the fact to be proved

- **Disadvantage**

  - ✓ Its value depends entirely on whether that witness is truthful or accurate
  - ✓ Or whether that item of physical evidence is authentic.

- **Advantage of Circumstantial evidence**

  - ✓ It comes from several different sources, which can be used as a check on each other

- **Disadvantage**

  - ✓ It is indirect: you must piece it all and determine whether it leads to a reasonable conclusion about the fact which is to

be proved

Generally, we can classify circumstantial evidences in to three

1. **Prospectant Evidence,**

   - Refers**the existence of previous thing or mental status**
   - **the former infer the later**,
   - is based on the forwards looking probabilities.
   - Eg. If the issue is the speed of a car on the time when an accident occurred, the speed of the car before the accident is a prospectant evidence
   - Gold was stolen from a shop, evidences that the gurad was found dead, the key was unlocked….. all are prospectant evidence.
   - **Rain in the afternoon (the existence of cloud in the morning**)….

2. **Concomitant evidence**

   - If the occurrence or not of a certain fact **at a specific time is in issue**, the occurrence of other facts **at the same time by the same person are** relevant as a concomitant evidence
   - Specific time, place, condition
   - Res gestea
   - Eg.if the question is whether "A" committed murder at Gondar in specific minutes of an hour and day or not, the fact that, on the day and minutes of the hour, "A" was at Bahirdar is relevant

3. **Retrospectant evidence**

   - ✓ is the opposite of prospectant evidence

- ✓ the existence of **the later fact** refer **the existence of the former**
- ✓ is **based on back ward looking style of reasoning**
- ✓ **eg**in the robbery case before, all those facts happened after the gold was stolen, eg, **running**, absconding from the place, **hiding of the gold, selling it to another person…**

3.6 Relevancy of similar Occurrence

- ➢ Refers **similarity to the fact in issue or disputed fact**
- ➢ The fact that, he had done similar acts **before does not justify the conclusion that for whatever of similar acts, the accused is responsible**
- ➢ **But, may increase the probability**
- ➢ evidence of similar occurrence may produce an unfair bias

❖ **When does evidence of similar occurrence relevant?**

- ✓ **Is left to the discretion of a judge. But,**
- ✓ Similar occurrences to be relevant, there must have **the same characteristics** with the act in question

  - **Selling of butter mixing with banana- doing the same act**
  - **Trying to buy goods with forged money for the second time..**
  - **Look Art. ``16 and 17 of the DRE**

3.7 Relevancy of Judicial Decision

- ➢ **Criminal conduct may entail civil liability (extra-contractual liability) as well**
- ➢ **Such instances give two options to the victim- either to institute a civil claim in a criminal court or civil court**
- ➢ **Civil case- affect personal interest**

- ***Is civil court judgment relevant as proof of guilt in criminal case****?*

  - Generally, judgments of civil court are not relevant and binding evidence on criminal courts.

- *Is criminal court judgment relevant in civil cases dealing with the same matter?*

  - ✓ Difference in common and civil law
  - ✓ Common law

    - Proof of conviction or acquittal by a criminal court is not relevant in a civil court suit dealing with the same matter.Reasons,

      - civil court should be as capable as the criminal court
      - difference in the degree of evidence require to prove both cases

  - ✓ **Civil law**

    - In civil law tradition (especially France and Italy) the judgment of criminal court is binding on civil court
    - Civil court is bound to accept the criminal court Judgments as evidence.
    - In france the injured party can institute actions for damage either in the criminal or civil court as he wishes
    - If action for damages is instituted in the criminal bench, the case will be tried based on civil procedure

- What about the case in Ethiopia?
- Which approach does Ethiopia follow? civil or common law?

- ❖ can a criminal bench in Ethiopia entertain a civil matter?
- ❖ Does the accused's acquittal or convictin make a difference?

- ❖ **Is evidence of the criminal court judgment admissible in a civil case in Ethiopia dealing with the same matter?**

- Joined suits and non-joined suits

- **In joined suits of criminal and civil case**
  - ✓ Read Art. 154 and 155of the Cri.P.C
  - ✓ Joinder is allowed by the permission of a court
  - ✓ In this case criminal liability has to be first determined
  - ✓ the criminal conviction will have a direct relevancy to determine the civil liability of the accused (beyond reasonable doubt)
  - ✓ If the accused is acquitted, the civil case can be instituted separately. See ART. 158 of thrCri.p.c
- **Non-Joined suits**
  - ✓ This is the case when the civil and criminal suits are instituted independently
  - ✓ acquittal or discharge of the accused , Art 2149 of civil code specifically provides that the criminal court judgment shall not have abiding effect up on the civil court
  - ✓ even though the act is a crime, the accused may be acquitted due to the fact that the alleged act is made through **necessity, self-defense or unforeseeable accident**
  - ✓ In extra-contractual liability the principle is *every damage caused shall be good*".
  - ✓ Standard of proof also matters here
- **2149 of the civil code** Effect of criminal on civil action.

- In deciding whether an offence has been committed, the court shall not be bound by an acquittal or discharge by a criminal court.

- **Art. 158 of the Cri.p.cAcquittal or discharge.**
  - Wherethe accused is acquitted or discharged, the court shall not adjudicate on the question of compensation and shall inform the injured party that hemayfilea claim against the accused in the civilcourt havingjurisdiction.
- See also article 145 of the civil pro.c thecourt, it may of its own motion or on the application of any of the parties to a suit requires the production of records or judgments of criminal court.

- **regarding conviction**, no specific rule, however,
  - **beyond reasonable doubt**
  - **Art 2035** of civil code the accused is extra contractually liable by the **mere fact that he infringes the provision of criminal code**
  - **Accontrario reading of Art. 158 of the Cri.p.c**

See cassession decision file No.78470

- **አንድሰው በ ፍ/ብሄር ጉዳይ ተከሶ ሃላፊነት የለበትም ተብሎ የመጨረሻ ፍርድ ከተሰጠ ቦሃላ በተመሳሳይ ማስረጃ በወንጀል ጉዳይ ተከሶ ተጠያቂ ነው ለማለት የሚያስችል የህግ አግባብ ስለለመኖሩ**
- **Art. 2149**
- **Volume 9 Cassesion no 37184, customes Vs. brhane2001 p.166**
- **Volume 13, cass. No. 46386 Atohailutesfeu V. atobrhanmebratu, 2004. P. 259**
  - ✓ Conviction in the criminal court should be relevant in a civil court when,
    - Same kind of evidences are heard in both courts and
    - When there is similarity in the fact in issue of the criminal and civil mater

-

3.8 Relevancy of Character Evidence

- ✓ **Every relevant evidence may be brought before the court merely because it is relevant.**
- ✓ One of the examples of relevant evidence that has **to arouse sympathy or hostility is character evidence.**
- ✓ **Becauseof this both the laws of the procedure and evidence rules fight against its presentation.**
- ✓ **Character is;**
  - **A** compendious summery of a person,s past action, good and bad.
  - **One may make a conclusion about a character of a person based on his moral and mental qualities which in fact are derived from what a person says and does.**
  - **what a person is**
- ✓ **Character**" includes both "***disposition***" and "***reputation***
- ✓ **Reputation is;**
  - **a character known in a particular community**
  - **Character is what a person is, reputation is what** the community thinks he is
  - the community opinion not the opinion of a particular individual that determines reputation
  - **Affords the basis for an inference as to the actual character;for behind a good reputation usually there lies a good character, and behind a bad reputation a bad character**
  - **Is relevant to show character than disposition**
- ✓ Dispositionis

- a character trait known **by a close friend or someone with special relation such as work**,…
- the one which may be known by someone who had enough experience with the individual than by the community in general

❖ **The relevancy of character evidence is different in civil and criminal cases.**

✓ In civil cases, character is **generally irrelevant unless character itself is in issue**

✓ Egcharacter is not relevant to determine the existence or non existence of contract.

✓ However it is relevant to for example in case of defamation where the defendant can produce evidence of bad character of the plaintiff. See article 2047 of the civ.p.c

3. In criminal cases

➢ good character of the accused is always relevant (presumption of innocence)

➢ In principle the fact that the accused person has **a bad character is irrelevant in criminal cases**. (see Rule 47(2) of DER), article 138 and 149 of the cri.p.c

➢ Art 138 and Art 149 of the criminal procedure code prohibit the disclosure of the character or antecedents of the accused **before conviction**

➢ **After conviction for aggravating punishment-art. 149**

3.9. Relevant but inadmissible facts

✓ **Relevancy is a necessary condition for admissibility**

✓ **If no relevancy, no admissibility**

✓ **However it is not a sufficient condition** to guarantee fact to be admissible in court of law

✓ there are **legal prohibitions against some relevant facts to be produced as evidence for social and public policy**

❖ factors determining admissibility

- **Waste of time – in cases where ten witnesses testify the same fact the court**may exclude evidence which in the context of the litigation is merely repetitious or time consuming.
- **Consideration of undue delay-** concerned withhow long the trial must await the evidence eg. Hearing an evidence in the middle of a trial (discretion)
- **No document which is not annexed** or mentioned in the pleading be brought unless with permission of the court –art. 137(3,4) and 256- for adjournment
- **No previous conviction of** the accused is allowed to be brought before a court before conviction**= art. 138 of cri. P. C**

4. **Admissibility is a question of law** than a question of fact

- **Admissibility is, therefore, abroad concept under which rules for exclusion of evidence irrespective of its relevancy arte governed**.

3.9.2 Public policy and privilege

a. Public policy

✓ Is **one justification to make a relevant evidence inadmissible**

- ✓ if they are disclosed, **the national interest** and **governmental secrecy** or the **administration of judicial processmay be affected**
- ✓ **the public interest prevails over the individual interest**
- ✓ there are three categories in this regard, evidence as to affairs of state, in formation for the detection of crime and helical disclosure

i) i) evidence as to affairs of state

- ➢ No one shall be permitted to produce any unpublished official records relating to affairs of state unless with permission of the concerned organ
- ➢ This is particularly where such evidences are against public interest
- ➢ Eg. government secrets or public security, information concerning the stand and organization of military force, and other internal security matters

ii) ii) Information for the detection of crime

- No police officer shall be compelled to point out the person or the ways from which he got any information as to the commission of any offence
- Cases of whistleblowers

iii) **iii) Judicial disclosures**

- No judge shall be compelled to disclose the judicial process of a given case or judgment.
- Independence of the judiciary

b. Privilege

- ✓ Is meant to protect certain social interest which prevails over individual interest
- ✓ Eg spousal privilege, professional secrecy,
- ✓ privilege is one of the grounds of inadmissibility of relevant evidences

5. Parole evidence rule

- ✓ restricts the use of extrinsic evidence be it oral or written
- ✓ **requires that the party proves his case exclusively by the evidence of the contents of a writing**
- ✓ **prohibits** consideration of any **evidence which contradicts, alter, vary, change, and modify any of the terms or provisions of the written agreement**
- ✓ Parties by reducing their agreement to writing are regarded as having intended the writing they signed to include the whole of their agreement.
- ✓ Art 2006(2) of the civil code provides for the parole evidence rule for contracts.

    - No proof by witnesses or any presumption is admissible against statements contained in a written instrument.
    - However,according to Art 1722, a contract made in a special form shall be varied in the same form. This means if the original contract was made in written form, the parties can vary its contents by another written contract
    - even though proof by witness or any presumption is in admissible proof ,by another written contract is admissible against statements contained in written instrument under Art 2006(see Art 1722 of Civil code.do you agree

Chapter Four

Oral Evidence

- after facts in issue and relevant facts are framed, the next step is **how to prove** or **methods of securing their consideration**
- **means-:**

  - ✓ ***Verbal evidence****:*
  - ✓ *which is given by* ***word of mouth****:*
  - ✓
  - ✓ *the oral testimony given by witnesses in court*
  - ✓ statement made by **a competent witness,** under **oath or affirmation**

- a witness is defined as;

  - Someone who has **firsthand knowledge**about a crime or dramatic event through their senses (e.g. seeing, hearing, smelling, touching) and can help certifies important considerations to the crime or event

- **Expert witness**-: Not only testifies what he has seen, heard, smelled… but also **gives an opinion applying his expert knowledge** of facts he has not personally observed

4.3 Importance of Oral Evidence

- Helps to have rectitude or correctness of decision making
- Helps to achieve a degree of evidences required for the case at hand
- The credibility of the witness can be checked by **cross-examination**
- In the absence of documentary evidence, it will help the court to pass a decision

6. Common law gives much weight to oral evidence than civil law

7. Competence of witnesses

- ✓ **Who can testify to a court**/who can be a witness?
- ✓ **A competent witness is one who is fit and commonly gives his testimony** before courts or a judicial proceeding under oath or affirmation.

A) Types of Competency of Witnessesdivided into two -:

- **General competency and Special competency**

1. General competency

- ✓ Refers to the witness` ability to testify to facts he has observed

- ✓ as a matter of fact, **everybody is presumed to be competent**
- ✓ General competency **is presumed**.

2. **Special Competency**

- ✓ refers to the ability **to analyze facts** about which one testifies
- ✓ Unlike general competency of witnesses, special competency **is not presumed**
- ✓ Special competency of witnesses is subdivided in to two: **layman's opinion**, and **expert opinion** given as testimonies.

❖ Grounds of incompetence

- ➢ Competency is the rule,
- ➢ incompetence the exception, and **that incompetence lies within a very narrow compass**
- ➢ **Grounds of incompetence are**;

i). Mental incapacity

ii) **Physical incapacity**

- ✓ covers persons, who have visual, hearing, and speaking deficiencies
- ✓ physical incapacity is no bar to a witness's competency as long as he can understand the questions put to him and give rational answers

❖ Examination of witness

a. Examination –in-chief

- ✓ is **a question put by the calling party** to the witness so that the latter will tell the story about the fact he is asked
- ✓ See, Art. **137** of Cri. P.c and **263** 0f the civ. P. c
- ✓ **Questions** shall only relate to facts to which the witness has direct and indirect knowledge
- ✓ **Asking leading question is prohibited(see. art**137(2) of Cri. P.c and 263(2) 0f the civ. P. c

b. Cross-Examination

- **Is asked to weaken the testimony of a witness**
- **is an absolute right** and not merely a privilege
- **See. Art137(3)** of Cri. P.c and **263(3)** of the civ. P. c
- Is asked to show **what is erroneous**, **doubtful** or **untrue** in the answer given in examination-in-chief
- **Leading question can be asked**

c. Re-examination

- Is allowed to **repair any damage**done during cross-examination
- **Art. 139** of Cri. P.c
- **civil procedure code Article 263(4)** the re-examination shall be **directed to the explanation of matters referred to in cross-examination** and new matter may not be introduced in re-examination except by permission of the court

• Hearsay Evidence

- ✓ **Is one kind of oral evidence**
- ✓ Is **out-of-courts statement** offered to prove the truth of the matter asserted in a civil suit or criminal charge
- ✓ Is a type of **evidence given by a witness based on the information he has attained** from -:
  - The **statements made by others**
  - **Does not depend on direct knowledge** and **observation of facts**
  - is **a mere narration** and **repetition of what has been said** by another who is not in court to ascertain the fact

✓ Hearsay.

✓ as a matter of principle, is in admissible

Why is hearsay evidence excluded from being admissible? justifications

- **is a derived knowledge**
- **not a direct knowledge**
- **Lack of cross- examination**
- **Absence of oath (the declarant does not testify at the time**

of speking..)

- **Testimonial infirmities**
  - ✓ **(**the person who made the statement may have wrongly perceived the events in question)
  - ✓ **The** memory of the person who heard the statement, may be affected and finally there may be distortion of events.

Is hearsay evidence admissible in Ethiopian as a rule?

Argument 1. Yesit is admissible

- Reasons-: Art. 137(2) of the cri. P. c and art. 263(1) of the civ.p.c State…***such facts onlyof which the witness has direct or indirect knowledge''***
- ***It is admissible as a rule and not as anexception.***

Argument 2. No it is not admissible as rule.

- ✓ It **should only be admissible as an exception**
- ✓ ***indirect knowledge'*** implies the **circumstantial evidences rather than hearsay evidence**
- ✓ **contradict constitutional rights** of the accused to confront his accusers as provided under **Art.20 (4)** of the FDRE constitution

- **practice**
  - **no uniform application**
  - some courts accept it while others reject it
  - however, the DER **admit hearsay evidence as an exception**- see DER 29

- **Exception to Hearsay Evidence**
  - **This are exceptional situation which make hearsay evidence admissible**

a. Dying Declaration

- ✓ **Rule 29(a)**
- ✓ **Is made by a person who** is **certain as to his death**
- ✓ **A person will not lie at the verge of his death** (no motive)

- ✓ As to Melin, the dying declaration is only admissible in so far as;
  - It details the cause of death
  - indicates the circumstances of the transaction which resulted in death
  - **the declaerant,** must have **had an adequate opportunity to observe** the facts, which he details (he must be a competent witness)
  - **there should be absence of evidence except the dying declaration)**

b. Statements made in the ordinary course of Business

- ✓ Rule 29 (b)
- ✓ if the statement is made **in the current routine of business**, it is more likely to be trust worthy than otherwise
- ✓ it is more likely to be trust worthy than otherwise
- ✓ Fewer motives to lie in the day-to-day aspects of ordinary business transactions than in exceptional private situations.
- ✓ **Additional requirements**
  - **any entry or memorandum** made by him in books kept in the ordinary course of business
  - **an acknowledgement written or signed by him** of the receipt of money; goods , securities
  - **document used in commerce written** or signed by him

c. Declarations Against Interest

- ➢ Defined in rule **29(c) of DER**
- ➢ **When it is against the pecuniary or proprietary interest of the person making it,**
- ➢ or when, **if true, it would expose him or would have exposed him to a criminal prosecution** or to a suit for damages.
- ➢ **a person is not likely to make statements against his interest** lightly or with causal regard for truth

d. Statements of opinion as to the existence of a public or general right or custom.

- ✓ **Defined in rule 29(d)**

4.8 Exclusionary rule: Privileges

➢ What do we mean by privilege?

- As a matter of principle everyone is under obligation to testify or give any evidence required by the court
- **However, there is exception to this principle -- privilege.**
- Thus, **privilege is a freedom from compulsion to give evidence**,
- if no privilege, parties will be compelled to testify or give any evidence required by a court
- **Privilege therefore;**
  - ➢ **Interfere**with truth- seeking function of the law
  - ➢ **Operates to exclude good proof** due to some social objectives

➢ **Why privilege?**

- ✓ **To promote(protect) certain kinds of special relationships**
- ✓ **To promote confidential communication** within the socially desirable relationships
  - Attorney-client,
  - physician-patient,
  - psychotherapist-patient, and
  - Husband-wifeare examples.

RATIONALE

- ✓ These relationships would not accomplish their purposes, or would accomplish them far less effectively, without legal protection
- ✓ **to avoid futile efforts to coerce testimony**
- ✓ to **avoid likely perjury** if so coerced; or
- ✓ to serve commonly shared principles of **privacy, fairness, or morality**

- ✓ **to advance economic policies,** such as those protecting trade secrets

❖ Types of Privileges

- ✓ **The right against self- incrimination as is provided under the FDRE Con. It encompasses two privilages;-**
  - **a.** a right not to take the witness stand
  - **b. if he takes the stand a right to turn away impeachment questions,**

1. **<u>Governmental Privilege</u>**
   - ➢ **Certain government records are open to the public, these are called** required report privilege."
   - ➢ However, some records are excluded from being available to the public to protect state or military secrets, official information, and the identity of informers
2. **<u>Professional Confidentiality</u>**
   - ➢ Attorney-client,
   - ➢ physician-patient
   - ➢ **Marital privilege**
     - ✓ **Confidential communication- <u>prevents disclosure of confidential info</u>** regardless of whether the testimony is for or against the spouse **(can apply in civil and criminal matter)**
     - ✓ **adverse spousal testimony**
       - **(entirely prevent the spouse from taking the stand as a witness adverse to other connubial partner in criminal matter)**
       - **Destroyed by divorce**

Chapter Five
Real Evidence

- This is the physical evidence that plays a direct part in the incident in question.
- Consists of production of **any object** used in committing a crime, e.g. **gun, knife, pen**.
- **Is one mechanism of proof like that of oral evidence**
- is a type of evidence for which the court can personally inspect and make inferences and conclusions on the existence or non evidence - existence of fact
- comprises of documents and physical objects in various forms
- is devided in to two-: demonstrative and documentary evidence
- both evidences to be relevant must satisfy the test of **authentication** and **corroboration**

5.1 Demonstrative Evidence

- ✓ is any evidence introduced in a trial in the form of a physical object, intended to prove a fact in issue
- ✓ can conceivably include all or part of any objec
- ✓ **demonstrate the existence or non existence of a fact to the court**
- ✓ **in a murder case it can include;-**
  - DNA left by the attacker on victim's body,
  - the body itself,
  - the weapon used,
  - pieces of carpet spattered with blood,
  - or casts of footprints or tire prints found at the scene of the crime.

- ✓ is evidence in the form of a representation of an object. Examples include photos, x-rays, videotapes, movies, sound recordings, diagrams, maps, drawings, graphs, animations,
- ✓ **When complex, can be clarified by expert witness**

A. General Rules

I. **<u>There must be some other piece of evidences</u>**: a fact, an object, or testimony that needs to be illustrated or demonstrated

- Demonstrative evidence is intended to be an **<u>adjunct to testimony</u>**

II. THE SECOND is the foundation requirnmnet which is "laying the foundation"

- Certain preliminary steps must he followed such as authentication and accuracy

❖ Authentication;-

- ➢ demonstrative evidence should convey what it is meant to convey.
- ➢ What it conveys must not alter, distort, or change the appearance or condition of something in any significant way

❖ **Representational accuracy—**

- ➢ the demonstrative evidence should fairly depict the scale, dimensions, and contours of the underlying evidence.
- ➢ A photograph or chart with some small section of it enlarged to focus in on is probably inadmissible

❖ Identification

- ➢ the demonstrative evidence must be an exact match to the underlying evidence or the testimony illustrated

III. demonstrative evidence must pass the "three hurdles" of admissibility: relevancy; materiality; and competency

IV. demonstrative evidence must pass an additional balancing test for relevancy__ a weighing of what is probative/ prejudicial.

- This rule necessary favors the defendant, in rooted in the principle of fundamental fairness, and protects them from unwarranted inferences about bad character or habit.

5.2 Documentary Evidence

- ✓ DER defines it as;- **any** matter expressed or described upon any substance by means of letters figures, marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.
- ✓ all documents product for the inspection of the court
- ✓ is a type of written proof that is offered at a trial to establish the existence or nonexistence of a fact that is in dispute.
    - Letters, contract, deeds, license, certificate, ticket, or other writing are documentary evidence

❖ **The difference between documentary and physical evidence**

documentary Evidence	Physical Evidence
✓ usually the document is submitted for examination of the content of the document	✓ if the document is submitted for other purposes than examining the content of the letter, it could be physical evidence.
✓ is any evidence introduce at a trial in the form of hard or soft(electronic) documents	
✓ include any media by which information can be preserved, photographs, tape recording, film, and printed emails are all forms of documentary evidence. ✓	
✓ is subject to specific forms of authentication, usually through the **testimony of an eyewitness** to the execution of	

the document	
✓ is also subject to the best evidence rule, which requires that the original document unless there is a good reason not to do so	
✓ authentication- is done to ascertain who the author of the document and its genuineness ✓ Unless a documented is authenticated it may not be admitted as proof.	

5.3 Modes of Authentication

A) Admission of authorship by the writer- articles 2007 and 2008 of the civil code on proof in relation to contracts.

B) Proof of signature or handwriting

- article 1727 (2) of the civil code) require a document to be attested by witnesses whose signature will be included in the document
- the testimony of these witness is sufficient to prove

C) Comparison of signature /writing with others admitted or proved

- The court will compare two writings/signatures of the same person and may reach to the conclusion
- Authentications by lay witness- who are well acquainted with the writing of a person
- Authentication by expert witnesses

5.4 Best Evidence Rule

Authentication + Best Evidence (**the contents of a document can only be proved by adducing the original document itself**)

❖ **Best Evidence rule**

- Is a 18 c. common law rule
- Contend that secondary evidence, **such as acopy or facsimile**, will be not admissible **<u>if an original document is available</u>**
- **<u>Exception</u>** -;If the original document **<u>is unavailable for reasons other than serious misconduct of the proponent</u>**, **secondary sources of evidence** (such as **oral testimony**) can be used in place of the original
- In Ethiopia DER 53-; contents of a document may be proved either by primary evidence (this is the best evidence) or by way of exception by secondary evidence
- **<u>Primary Evidence</u>**,
  - **<u>Rule 54</u>** of the draft evidence rules defined it as **<u>the document itself (the original) produced for the inspection of the court</u>**
- **<u>Secondary Evidence;</u>**
  - is defined under **Rule 55**
  - how to apply it also stated under Rule 56

CHAPTER SIX:BURDEN AND STANDARD OF PROOF

6.1 Meaning and concept of Burden of Proof

❖ **Burden of Proof**

- ✓ Refers the obligation to prove allegations, which are presented, in a legal action
- ✓ Or refers to an obligation in a particular context to defend a position against a prima facie other position

- ✓ Facts in issue- burden of production (burden of going forward with Evidence)- burden of persuasion (Discharging or preventing the discharge of these burdens is the goal of introducing evidence)

Burden of production VS. **Burden of Persuasion**

Burden of production	Burden of persuasion
✓ Refers burden of going forward with Evidence (evidential burden) ✓ A party who has **a claim** or an allegation bears the burden of producing evidence ✓ *is the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue*	✓ comes when the plaintiff shows a **prima-facie evidence** ✓ Refers the obligation **to persuade the court to the standard required by the nature of the case** using the evidence produced by either party. ✓ is determined by rules of substantive laws ✓ is simply adducing **enough evidence**
✓ **determines whether or not the person who shoulders the burden of production will lose the case** ✓ passing the Judge" as any failure to satisfy the evidential burden means that the issue will never reach the Jury ✓ **if there is no an evidence on an issue**, the case will be decided in favor of the other party	Rrefers**preponderance of evidence** (civil) and **beyond reasonable doub**t (criminal cases) ✓ The party can win the case when only he proves persuasively the existence or non-existence, or occurrence or non-occurrence of the fact in issue
✓ Has nothing to do with **weighing evidence.**	✓ producing evidence be it circumstantial or prima-facie evidence or any other evidence is not an end by itself unless the party persuades the court as to the fact in issue
✓ the burden of production **may shift to the other party** if the party makes a prima-facie case on the issue	✓ **can't shift at any stage**
✓ can be rebutted by the other	

party	

❖ **Up on whom does burden of proof lies?**

- ✓ On a party who allege the existence of a fact
- ✓ On the Plaintiff in civil and on the public prosecutor in criminal cases
- ✓ The burden of production may shift from one party to the other during the course of the trial.
- ✓ The same party may bear both evidential burden and legal burden at the same time. i.e. where the party produce sufficient evidence to make a case he/she shall again establish a fact so as to persuade the tier of fact

6. 1.3 Burden of proof under the Evidence Law of Ethiopia

- ✓ **No clear cut distinction between burden of production and persuasion**

A. Burden of proof in civil actions

- A party who alleged the existence of a certain fact has to prove it.
- Usually burden of proof lies on the plaintiff
- Counter-claim- the burden of proof lies on the defendant

B. Burden of proof in criminal cases

- ✓ Burden of proof lies on **the public prosecutor** –see art. 136(2)
- ✓ Article 20(3) of the FDRE constitution - presumption of innocence
- ✓ Burden of production lies on the public prosecutor- if no case acquittal of the accused person Art. 141
- ✓ If the Public prosecutor makes a case then the accused must rebut the evidence produced against him Art. 142

❖ **Burden of proof in case of presumptions**

- Rebuttable and irrebutable – the same in civil and criminal cases

❖ Standard of proof

- Is the **level of proof required in a legal action** to discharge the burden of proof

❖ Preponderance of Evidence–

- ✓ Is also called as a balance of probabilities
- ✓ lowest level of proof,
- ✓ 50+1
- ✓ used mainly in civil trials
- ✓ is met if the proposition is more likely to be true than not true
- ✓ he plaintiff must prove each element of the claim, or cause of action, in order to recover.
- ✓ No such specific rule in ethiopia

❖ Clear and convincing evidence

- Is employed by US civil procedure
- The party must convince that **it is substantially more likely than not** that the thing is in fact true
- Is in the middle of Preponderence and BRD

❖ Beyond a reasonable doubt -

- Is the highest level of proof,
- used mainly in criminal trials
- Lies on the government
- Proof- there is no "reasonable doubt" in the mind of a reasonable person
- Beyond- to the exclusion of reasonable doubts

- **Rationales-**
  - ✓ **The existence of presumption of innocence –art. 20 (3)**
  - ✓ **The unbalanced position of the parties**
  - ✓ **He grave nature of criminal punishment**