Definition, Nature, Purpose, and Development of Criminal Procedure

Definition

The rules governing the mechanisms, under which crimes are investigated, prosecuted, adjudicated, and punished.

It includes the protection of accused persons' constitutional rights.

Models of Criminal Justice Systems: the „Due Process“ and the „Crime Control“ Models

Models of Criminal Justice

- Law is broadly divided into **substantive and adjective**. The latter is also divided into **procedural and evidence**. The substantive law **defines rights, duties, and liabilities**. But, its implementation calls for the adjective laws. **Procedure and evidence laws** are corollaries of substantive rules. Hence, criminal procedure is part of adjective laws.

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

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

- Human rights are **birth rights** of every person. A state has the responsibility to respect and protect them. Limitations are permitted only for the sake of protecting the rights of others and public life in accordance with the law.
- Given the value attached to human rights, they have **constitutional significance in any society**. That is why it is common to find bill of rights in most modern constitutions. They do have the nature of **limiting state power**. There should not be loss of **life, liberty, and property** without due process of law. This principle is a manifestation of rule of law. Thus, rule of law imposes upon a state the duty to respect and protect human rights.

- **Due process of law has two major components**. These are **substantive and procedural**. The former refers to the laws governing **rights, duties, and liabilities**. The legal provisions set a limit for their application. Their substance can also be **subject to dispute**. For instance, **vague, ambiguous, discriminatory, or unreasonable criminal laws** may be challenged on the grounds of their constitutionality. On the other hand, the latter pertains to the means of implementing them. It does not concern with the essence of the laws enforced. Rather the issue surrounds their mode of application. The **substantive justice is more of an end**.

- But, the procedural one is mainly a means to achieve that end. Nevertheless, **procedural matters** may be ends in themselves. Fair trial, the right to be heard, etc are rights to be upheld for their own sake besides their **instrumentality in attaining a fair result**. In addition, the formulation of substantive rules could affect procedural issues. For example, the penalty provided in the law is taken into account to decide **bail or punishment**. Thus, the distinction between substantive and procedural justice is elusive.

- **Criminal procedure and criminal law** developed side by side. The primitive society relied on self-help. This was changed to compensating victims through **public process**. Then there was a shift in the perception of crimes. They have been viewed as wrongs **against the public** instead of the person affected. This has made government to take the responsibility to have those in **contravention of the criminal law** to be judged through the efforts of government institutions. The protection of the rights of a suspect or accused has got attention through time. Thus, **the development of criminal procedure rules is inseparable from the growth of substantive criminal law.**

- Therefore, criminal procedure rules govern the process of **detecting, arrest, investigation, adjudication, punishment, and execution**. It is connected with the **enjoyment of human rights**. Consequently, it is prohibited to restrict human rights without **due process of law**. For the promotion of rule of law, constitutional and other legal limitations have to be respected.
- In general, **procedural due process requires** the following:
- 1. **Notice of the proceedings**
- **2. A hearing**
- **3. Opportunity to present a defense**
- **4. An impartial tribunal**
- **5. An atmosphere of fairness**

Sources of Criminal Procedure

- A source of law could refer to the legally **competent authorities to enact it or the formal sources into which the provisions of the law are found**. They are two sides of the same coin. The legal instruments cannot be valid without enactment by the **proper government organ**.
- Sources of criminal procedure rules are **inseparable from the political and legal system of a country**. Thus, **the sources of criminal procedure laws** have to be seen in the context of the **political and legal set up of nations**.

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

- The other major sources of criminal procedure rules are a myriad of **statures enacted by parliament and delegated legislations**. The role of **court rulings** based on common law power and interpretation of legislations cannot also be **undermined**.
- In **France**, the sources of criminal procedure rules are mainly **the constitution, legislations and decisions of the constitutional court**. As United Kingdom and France are unitary state, the **criminal procedure rules tend to be uniform**. The situation is quite different in **Germany and the United States**. These countries have adopted a **federal arrangement**. In a federation, there are **two or more sovereign orders of government** sharing legislative and executive power with the federal government. Each tier of government has to exercise the powers delimited in **a federal constitution**. Accordingly, in a federation, one has to identify the role of the different orders of government over the functioning of the criminal justice system.

- Thus, **the political system has an implication over the nature and application of criminal procedure**. In Germany, the sources of **criminal procedure are the basic law (constitution of Germany), decisions of the constitutional court**, **federal statutes, and Lander laws**. The federal arrangement is also well reflected in the **United States criminal justice system**. At the federal level, **the federal Constitution, federal legislations and case laws are the primary sources of criminal procedure**. At the state level, **the federal constitution, federal laws, state constitution, state legislations and case laws of both Federal Supreme Court as well as state courts** regulate the criminal justice system.

- When we come to our country, the **FDRE Constitution has formally adopted a federal system**. The level of government having the responsibility of enforcing the **criminal law has to be distinguished**. The FDRE Constitution lacks clarity in this regard. Enacting a criminal law is the mandate of the Federal government pursuant to **Art 55/5 of the FDRE Constitution**. But, regions can **enact criminal law on matters not covered by federal criminal law**. However, the constitution is not clear about the jurisdiction of the two tiers of government over the **implementation of the criminal law**. Different arguments are forwarded. Some argue that the federal government should have the mandate to apply the **criminal law it has enacted**. Others say that even though the federal government enacted it, the regions have the responsibility to **apply it**. According to Art 52/2/g of the FDRE Constitution, the regions have the power to organize police force and maintain law and order. These functions are highly connected with the **application of the criminal law**.

- Unlike the criminal law, the FDRE Constitution is silent about the layer of government having the mandate to **enact criminal procedure rules**. It might be argued that the level of government responsible for the enforcement of the criminal law should have also the mandate to proclaim **criminal procedure rules**.
- Like other federations, **criminal procedure rules are found in regional constitutions**. Some regions have also enacted criminal procedure rules. For example, **Tigray Regional State** has issued a proclamation empowering **social courts to entertain petty offences**. Addis Ababa City Administration has also enacted a similar proclamation. At the federal level, the sources of **criminal procedure rules are the FDRE constitution, federal legislations, sentencing guideline to be enacted by the Federal Supreme Court, Federal Supreme Court cassation division decisions, criminal justice and prosecution policies to be enacted**, etc. At state level, besides the federal sources mentioned, the sources include **regional constitutions, policies and legislations**.

- The procedures for crime control, the processing of criminal defendants, and the sentencing, punishment, and management of convicted offenders are closely linked to the guarantees and prohibitions found in the bill of rights and interpretations of those provisions by the Supreme Court. Interestingly, however, the major criminology and criminal justice textbooks used during the first half of the 20th century make no mention of either the Bill of Rights or the United States Supreme Court. Not until the 1960 publication of the crime, justice, and correction by lawyer-sociologist W. Tappan did Supreme Court decisions begin to creep in to discussion of criminal justice processing. Actually, this should not be surprising. As will become apparent throughout this book, concerted Supreme Court activity in matters of criminal justice did not begin until the early 1960s. Since then the court has been extremely active. Its decisions can be understood within the context of two competing models of criminal justice: the due process model and the crime control model. Since these models underlie much of the discussion in later chapters, it is important to look at them more closely here.

The Due Process Model

- This **model stresses** the **possibility of error** in the stages leading to trial. It therefore emphasizes the need to **protect procedural rights** even if this prevents the legal system from operating with **maximum efficiency**.

The Crime Control Model

- This model emphasizes efficiency and is based on the view that the most important function of the criminal process is **repression of criminal conduct**.
- Proponents of this model put a premium on speed and finally, and can not understand why obviously guilty defendants should go **free simply because of errors by police or court personnel**.

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

- How many innocent people do you believe it is acceptable to convict? Bear in mind that if you answer —none‖, the chances are that protections against this may have to be **so strong** that very few guilty people will be **convicted either**.
- Would it be acceptable for 10 percent of innocent people to be convicted if that means 50 percent of the guilty were also convicted?
- If that 10 percent seems totally unacceptable, does it become more reasonable if it means that 90 percent of the guilty are convicted? It is not an easy choice to make.

- Looking at the balance which a criminal justice system seeks to strike, and how well that balance is in fact struck, is a useful way to **assess the system‘s effectiveness**.
- In recent years this balance has been the subject of much debate and disagreement as regards our criminal justice system, with the police, magistrates and the government claiming that the balance has been tipped too far in favour of suspects‘ rights, at the expense of convicting the guilty. On the other hand, civil liberties organizations, many academics and the lawyers involved in the well-known miscarriages of justice feel that the system has not learned from those miscarriages, and that the protections for suspects are **still inadequate**.

Systems of Criminal Procedure: the Adversarial/Accusatorial, the Inquisitorial, and the Mixed Systems

- **Adjudicatory Processes**
- The process of adjudication is typically either adversarial (also called accusatorial) or inquisitorial in nature…
- Both systems have the finding of truth as a fundamental aim, and each is guided by the principle that the guilty should **be punished and the innocent left alone**…
- The differences between the two are in their assumptions about **the best way to find the truth**.
- The adversarial system in time, the accuser moves from being the **individual to being the state** .
- The setting for the accusation is before an impartial official serving as **referee (judge).**
- Because the disputing parties (the state and the accused) behave in a manner **similar to a contest**, they are considered adversaries.

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- The inquisitorial process also shows societal evolution but along a **different path**.
- Here, the wronged person is eliminated as a private accuser and replaced with a **public official**.
- Unlike the adversarial process, the inquisitorial process does not keep the pubic **official in the role of accuser**. Instead of accusation, there is now, **investigation.** Because the parties are not engaged in a contest, a referee is not necessary.
- Instead, the impartial official (judge) serves as **an inquisitor actively** seeking to determine what transpired.
- the common legal tradition uses the adversarial process, whereas the civil legal tradition follows one of inquisition. Because of its civil roots, **the socialist tradition** also exemplifies the inquisitorial process.
- The Islamic legal tradition offers a unique combination relying on the **private accusation in an inquisitorial-type setting.**

The Adversarial System

- The **adversarial system is often compared to a game or contest in which both sides are trying to win and a neutral umpire decides two things:**
- **(1) whether they are playing by the rules and**
- **(2) which side wins. Often, the judge acts as umpire for both these aspects of the contest.**
- **In some cases, the judge‘s chief responsibility is to make decisions that ensure a fair contest, while a jury declares the actual winner.**

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- Advocates of the adversarial systems of justice believe that the competition between the two parties is the best process for **obtaining truth**.
- Advocates of the non adversarial system, believe that **judicial control** of the investigative process is the best way to **uncover the truth**.
- These fundamental beliefs create the differences in the role of **witnesses, attorneys, and judges** found in the common and civil law systems…

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- In the adversarial system, most of the procedural advantages are on **the side of the accused**.
- The right to an **attorney, the right to remain silent, the right to be free of unwarranted searches and arrests, the right to compel witnesses to appear for the defense, the right to confront one‘s accuser, the right to appeal- these and other rules of criminal process** help keep the prosecutor from automatically winning a case.
- These rules have been developed over centuries as a response to **abuses of citizens by monarchs and governments in dealing with their citizens**, and these rules recognize that arbitrary government action remains real possibility.

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- There is concern that correct criminal procedure has become so extreme that **predatory criminals who learn to manipulate the rules of the system are likely to win the game despite their obvious guilt**.
- Such criticism often does not take in to consideration mitigating factors that counteract excessive manipulation of criminal procedure. In the first place, a vast majority of cases that occur in common law countries are settled **through guilty pleas rather than through court trials**. Students of criminal justice in the United States are well aware of the importance of plea bargaining and sentence bargaining in the settlement of criminal cases. In these cases, the accused agrees to plead guilty in return for various concessions, such as a lesser charge or a reduced sentence. On an aggregate basis, it is estimated that over 90 percent of criminal cases are settled through plea bargains in the United States.
- once a guilty plea is accepted and made before a judge, no further trial is held.

- The decision to plea guilty rather than use the full weaponry of the adversary system to make the state prove one‘s guilt **weakens the system in a significant way**.
- The motivation for pleading guilty may be varied honest remorse, overwhelming evidence of guilt, a desire to achieve a guaranteed outcome, a belief that a judge will deal more leniently with a person who does not go to trial but the result is the same. Many more cases can be processed than could be under a —pure‖ adversarial system, and the intricacies of adversarial criminal procedure are largely evaded.

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- A further factor that must be considered in discussing the supposedly **dysfunctional nature of the adversarial** process is that this process is in no way as complex in most common law systems as it is in the United States. For example, **the exclusionary rule**, which is the target of much criticism in the United States, does not exist in England in the case of most violations of search and seizure rules. In the United States, illegally obtained evidence, no matter how incriminating or useful, may not be produced at trial. In England, by contrast, only evidence that has been obtained through undue pressure on the accused is barred.

The Inquisitorial System

- One way to anger a scholar of the civil law is to claim that a major contrast between Common Law and Civil Law criminal procedure is that in the former the accused is innocent until proven guilty while in the latter **the accused is guilty until proven innocent**. This is indeed not necessarily true, since both kinds of procedure are theoretically based on a presumption of innocence.
- Nevertheless, the extensive pretrial investigation that characterizes Civil Law systems gives rise to the feeling that defendants who actually are brought to trial are most likely to be guilty.

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

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- to the extensive pretrial investigation and interrogations that are designed to ensure that no innocent person is **brought to trial**. Even to this extent, inquisitorial is a misleading term that does not truly describe the rather hybrid procedure that developed in civil law systems, often in emulation of common law procedural rights, during the nineteenth and twentieth centuries.
- Many countries of the world can be classified as having inquisitorial systems, including our model countries of France, Germany, China, and even, in some respects, Japan. But there are important disparities in criminal procedure among them. France and Germany have long civil law traditions but differ from each other with respect to some aspects of criminal procedure, such as the use of a prosecutor in Germany and an examining magistrate in France. Italy another civil law country, changed much of its pretrial process in 1988, and its system now resembles Common Law procedures in many ways. The Italians call this —**process Perry Mason**.‖

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- As we have explained on several occasions, an essential characteristic of the common law is the importance of precedent, form, and procedure in the passage of cases through the courts. Indeed, it was the —common‖ procedural rules that brought this rather amorphous body of law together in the thirteenth and fourteenth centuries. In the Civil Law, it is the substantive rules of the law-the rules that explain what is the lawful and what is not-rather than how one makes a case in court, that have tended to predominate. The procedure for effecting legality is changed quite simply, usually through legislation. In England and the United States, by contrast, although criminal procedure rules are often modified by legislation, they have a certain continuity because of their constitutional and common law status.

The Mixed Court

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

- The mixed court in civil law countries developed in the nineteenth century when some European countries attempted to imitate the Anglo-American criminal jury system. It reflects the importance that civil law countries place on nonprofessional participation in the court process… One of our model countries, Germany, uses lay judges, called Schoffen, extensively in courts of appeal for cases of limited jurisdiction (minor offenses) and for first-level cases of general criminal jurisdiction (criminal offenses). Some countries employ all-lay tribunals. In this form, the courts usually have one person who is legally trained to work with and provide advice to laypersons in matters that are considered less serious or during administrative or arbitration hearings.

- China employs lay judges, called lay assessors, in its people‘s courts to serve as adjudicators in serious criminal cases of first instance. Lay assessors in China must be twenty-three years of age and eligible to vote; they are either elected or temporarily invited to sit on the court. The United States and England also use a derivation of this method in their lower courts. Many small towns in America have a person called a justice of the peace, who carries out many legal functions, including traffic violations, some misdemeanors, small civil claims, and some domestic matters. In England, in the lower magistrates‘ court, at least two lay judges must hear all summary (minor) offenses.

The Convergence of Systems

Each country develops its own code of criminal procedure, at least partially as a result of its own history, and we would have to scrutinize them all to identify all the difference among them. The classification in to adversarial and inquisitorial systems, however, seems to be increasingly a matter of style and history rather than major differences in procedure. Civil law countries have adopted many of the rules of procedure that protect the accused from arbitrary action by the state. Common law countries have modified the excesses of the adversarial system by allowing for pretrial investigations, by allowing judges to participate in trial if they choose to do so, and by making various arrangements for avoiding trial through the use of plea bargains. Convergence can also be seen in Islamic and Socialist legal systems. In Saudi Arabia, Islamic law reflects the inquisitorial system through strong cooperation between the judge and the investigator. In addition, the defense attorney is less adversarial than in common law trials. At the same time, Islamic law includes provisions for the right to confront accusers and to remain silent and for the presumption of innocence… And with the changes in the role of judges and in the standard of proof, the Chinese may actually have moved from a strict inquisitorial to a semi-adversarial model…

- The end result seems to be a certain homogenization of criminal procedure among the legal traditions. This process was predicted by legal scholar John Merryman, who over thirty years ago wrote of the blending of the inquisitorial and adversarial systems:
- *In a sense, it can be said that the evaluation of criminal procedure in the last two centuries in the civil law world has been away from the extremes and abuses of the inquisitorial system, and that the evolution in the common law world during the same period has been away from the abuses and excesses of the accusatorial system.*
- The two systems, in other words, are converging from different directions toward roughly equivalent mixed systems of criminal procedure…

Contrasting Adversarial and Inquisitorial Processes

1. The inquisitorial systems emphasize the screening phase of the criminal process with the idea that a careful investigation will determine factual guilt. The adversarial systems emphasize the trial phase, where the idea that complex rules of evidence to produce substantive results will ensure the defendant a fair trial.
2. The adversarial systems are much more likely to restrict the involvement of the judiciary in both the investigatory and adjudicatory process. The direct involvement of the judge in inquisitorial systems contrasts with his or her more indirect involvement in adversarial systems.

3. Because the inquisitorial system assumes that all involved persons are seeking the truth, the defendant is expected (though not required) to be cooperative. That cooperation includes supplying information to investigators and answering questions at trial. The adversarial systems, on the other hand, neither expect nor require the defendant to assist investigators. The burden of proof is no the prosecutor, who assumes that the defendant will maintain silence.
4. The role of the judge in adversarial proceedings is primarily one of referee. The attorneys develop and present their respective cases, and then a jury decides between the two versions of the facts. The court in an inquisitorial system is another investigator with the added power of being able to decide the case. The judges ask most of the questions and develop the facts while the attorneys exist more to argue the interpretation that the court should give those facts…

Ingraham believes that the main objectives of the inquisitorial system are a search for truth and the achievement of procedural justice. Are these objectives different from those of the adversarial system? The adversarial approach differs in the sense that the quest for truth and justice officially begins at the trial stage because information from the investigation is not considered until presented in court. Then each side presents its own private version of the truth, and the judge or jurors must decide who is the most convincing. As a result, the importance of how a person is adjudicated seems a more important objective in the adversarial process than determining whether the accused actually committed the crime. This point is similar to the distinction made…in terms of legal guilt versus factual guilt. One might argue that although each system seeks to determine both types of guilt, the inquisitorial emphasize the latter (factual guilt) while the adversarial highlights the former (legal guilt).

- Just as common law and civil law systems borrowed aspects of codification and precedent from each other, so too have the inquisitorial and adversarial systems exchanged procedures. For example, the common law systems adopted a public prosecutor to file criminal charges without relying on a grand jury. Rules of discovery compel some sharing of evidence between the opposing sides, resulting in a —search for the truth‖ more similar to an inquisitorial than adversarial process. Also, the role of the common law judge has increased in areas like plea negotiation and what evidence the jury will be allowed to hear. The results of this cross-pollination are systems where each contains elements of the other … The resulting mixture is not, however, as complete as that found in Islamic law.

A Mixed System

Islamic procedural law is a mixed system combining adversarial and inquisitorial aspects. Because the Shari‘a is a religious law based on divine command and revelation, it did not develop through judicial precedent or legislative codification. Furthermore, it does not require administration of justice to be a combined office (for example, the inquisitorial judge) or divide in to many (for example, the adversarial attorney, judge, and jury). Identifying Islamic procedural law is not so easy. Though the sacred law prescribes penalties for criminal acts, it does not specify the means used to apprehend the offender and bring him to justice. The matter is left to the discretion of the state…

Because of this discretion, Islamic law has features of both procedural types. The inquisitorial process seems to predominate, because historically there has been little division between the judge and the investigator. In addition, the defense attorney‘s role is not so much adversarial as it is one of presenting favorable evidence, safeguarding against improper incrimination, and overseeing the criminal judgments. Simultaneously, such adversarial provisions as the right to confront accusers, maintain silence, and a modified presumption of innocence reflect adversarial interests.

A peculiar twist given procedural law by Islamic justice is the differing provisions for separate categories of offenders and its impact on the presumption of innocence. Shari‘a judges place suspects in to one of three categories; —(1) the accused is from the pious and righteous group; (2) he is among the disobedient and immoral; or (3) his character is unknown though neither righteous nor immoral‖… These categories help judges decide the appropriate procedures to follow when a person is accused of a crime. When presented with a person of the first category, jurists usually give no credibility to the accusations. After all, the person is pious and righteous and therefore deserves the benefit of doubt. Because accusation against the sinful and immoral person are more likely to be true, given his or her lifestyle, limiting the accused‘s rights and freedoms in the quest for truth is permissible. Persons in the third category are generally placed with the moral and subjected to the same restrictions.

As these examples from several countries show, there is greater diversity among nations in terms of procedural criminal law than we found on issues of substantive criminal law. However, this focus on the adjudicatory process might lead us to believe that procedural law issues are essentially differentiated on the basis of which legal tradition a country follows. That assumption would be incorrect because there are differences in procedural law both among and between the legal traditions. One area of variation is linked to the concept of judicial review. As we considered that topic, we will see that procedural criminal law shoes variation beyond that which is explained by legal tradition affiliation.

Structure and Fundamental Principles of Modern Criminal Procedure

The Status of the Public Prosecutor

- The crown prosecution service in England and Wales is comparatively new and its **status is comparatively deprived**.
- It has no power to direct the police during the investigation, and prosecutors did not even have the right to appear in the crown court to present the case against **defendants accused of serious offences.**
- In continental Europe the public prosecutor is a long-established office, the status of which is **considerably higher**.
- The public prosecutor has, in principle at least, the right to give the police directions when offences are being investigated and it is he, not they, **who decide if someone shall be prosecuted**.
- .In three of the countries in this study- France, Belgium and Italy, public prosecutors enjoy what is called in

- In France, Italy and Belgium it is customary to refer to both judges and prosecutors to **gather as a single group**: la magistrature in France and Belgium, in Italy-public prosecutors enjoy a number of legal purposes they are **equated with judges**.
- in all three countries both groups are initially **recruited and trained together- in France**, at a special _judges-school‘, the Ecolenationale de la magistrature…
- To many English lawyers this looks alarming, because of the risk that there will be too much **professional solidarity between judges and prosecutors**.
- These fears are sometimes expressed by critics on the continent as well.

- However, on the credit side, giving prosecutors le statut do magistrate is thought to help **ensure the recruitment** of suitable people and to maintain high professional standards and a degree of detachment and impartiality in carrying out the task of prosecuting.
- the high status of prosecutors in Italy is certainly part of what made it possible to abolish the Italian equivalent of the juge d‘instruction and to transfer to the public prosecutor a large part of the corresponding responsibilities and it is also something that makes it politically possible for various people seriously to advocate the same type of reform in France.

The Status and Organization of the Police

- In the four continental countries in this study, police forces are differently organized than they are in England, and in several ways their status is different.
- In England and Wales there are at present **forty-three different police forces**, all organized and **administrated locally**.
- In continental Europe, by contrast, the trend is **to organize police forces on a national basis**.
- In France there are two national forces that operate in parallel-the police nationale under the **direction of the home office**, and the gendarmerie that exists under the wing of the **Ministry of Defense and these two main organizations are supplemented by a number of local police forces in the bigger towns**.
- A broadly similar arrangement exists in Italy; in Germany, by contrast, police forces are organized **by the different Lander**.

The Status, Recruitment and Training of Judges

- In England and Wales, as in the rest of the common law world, professional judges are recruited from the ranks of successful legal practitioners (**and predominantly from the bar**).
- The consequence is a professional judiciary that is **predominantly male and universally middle-aged**.
- In Europe generally, there is a **career judiciary**.
- Those who wish to become judges apply to do so at the end of their law studies at university, which leads to their sitting an examination, on the basis of which they are **selected or rejected**.
- A period of training follows, which in France even takes place at a **special residential college**, the Ecole nationale de la magistrature.
- The continental judge then starts in a lowly post, from which he or she hopes to move upwards by a series of **regular promotions**.

- One consequence of this is that the **continental jud**iciary is, on average, very much younger than the judiciary in **England and Wales**.
- In Germany, for example, you will meet the jurist _who enters the judicial profession while still in **his twenties.**
- The different method of recruitment leads to other subtle differences, too. One of these is the different relationship that exists between **Bench and Bar**.
- The English method of recruiting judges from the ranks of successful middle-aged practitioners is, of course, extremely expensive, and it is probably true that this costly system is only tolerated in England and Wales because (in sharp contrast to the situation in continental Europe) over 90 per cent of all criminal cases are tried by lay magistrates, who give their services free and who have formal legal training.

Legal Status of the Victim

- In English law, the person claiming to be the victim of the offence **has no special status** in the criminal proceedings brought in relation to it.
- Like any other citizen, he has the right to **bring a private prosecution**. He has no right to any kind of **help from the state if he decides to do this**, however-and a private prosecution is fraught with a number of serious hazards…the risk of having to pay the successful defendant‘s costs if the proceedings **result in an acquittal**. If the police and the Crown Prosecution Service decide to bring proceedings, **the victim has no legal right to join in**. He has no legal means of making sure that the court hears his side of the story, and no right to ask the court to order the convicted defendant to pay compensation (although the court does indeed have power to make a compensation order).

- In the other systems in this study, the defendant has (at least in theory) **considerably greater rights**.
- In France and in Belgium the victim can make himself a **partie civile**, and as such either institute proceedings or make himself a party to them if the public prosecutor **has started them already**.
- In Italy and Germany the victim has **second of these rights, but not the first**… Although the position of the victim is theoretically stronger on the continent than in England, it is debatable question how much (if at all) the victim is **really better off.** Compensation orders are a case in point.
- In England the victim has **no right to ask the court for one**, and unlike in continental Europe the sums so awarded are usually small because they are always geared to the defendant‘s ability to pay.
- On the other hand, where a French or Belgian court awards a partie civile damages against the defendant, it is the partie civile who then has the thankless task of trying to make the **convicted defendant pay**; whereas in England, compensation orders are enforced automatically by the same court machinery as is used to make the defendant pay his fines.

The Fundamental Principles of Procedure (England)

- English law has traditionally been rather short on public pronouncements about the fundamental principles of criminal procedure, whether in **statutes, case law or books**.
- However, from two of the ancient Acts of parliament that are regarded as having constitutional status‘ certain basic principles are usually derived. The first of these is Magna **Carta 1215, clause 29, which is as follows:**
- No freeman shall to be taken or imprisoned, or be diseased of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we pass upon him nor condemn him, unless by the lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right. From an early date, this provision has been taken-rightly-as establishing the **principle of legality:** the notion that citizens are only to be punished to the extent and in the ways that **the law allows**, and in accordance with **due process of law**.

- This clause also had an important influence on the development of **habeas corpus, the procedure under which any person physically detained is entitled to have the legality of his detention examined by a judge**.
- Historically, the main importance of habeas corpus was that it became the vehicle for **challenging the arbitrary imprisonment of the king‘s potential opponents**.
- Within criminal procedure, it also served an important function at one time as the mechanism by which defendants in **ordinary cases** could challenge the refusal by the justices of the peace to grant them **bail, and excessive periods of pre-trial detention** although such challenges are now made by using different legal machinery, and in modern books on English criminal procedure habeas corpus hardly gets a mention.
- From clause 29 of Magna Carta it is also possible to derive the principle that cases must be tried within a **reasonable time- although the only defendant who has tried** to invoke it in this sense in modern times was unsuccessful.

- The other _constitutional‘ status in this area is the **Bill of the Rights Act 1688**, a clause of which provides _that **excessive bail ought not to be required nor excessive fines imposed nor cruel and unusual punishment inflicted**‘.
- This was passed in reaction to the **very server penalties (including mutilations)** which the courts had earlier imposed in potential cases.
- It is possible to read within this provision the germ of a more general notion of **proportionality, at least as regards the sentence**.

- **Case law**: among the basic principles that could be found spelt out there were the **presumption of innocence**, the principle that **trials must take in public**, the principle that in contested trials the evidence of key witness must be **given orally**, the principle that the defendant has the right to challenge the prosecution witnesses by means of **cross-examination**, and the principle that English criminal procedure is ‗accusatorial' in the sense that the calling and examination of witnesses at trial is a matter for prosecution and defence, and not the judge.
- But now that the Human Rights Act has incorporated the European Convection into UK law, the search for fundamental principles normally takes place within the framework of the Convention. Recent as it is, the impact of this Act on English criminal procedure is already evident. Thus in one recent case, it led the House of Lords to put a narrow construction on a provision of an Act of parliament, which, if interpreted literally, would have reversed the burden of proof in drugs cases. In another case it affirmed the defendant's right to a ‗fair trial' under Article 6 of the Convention by restrictively construing a recent Act which, in the interests of victims, sought to limit the questions that defendants could ask complaints during cross-examination in sex cases.

Fundamental Principles of Procedure (France)

- The fundamental principles of procedure are mainly principles that presently have **constitutional value**.
- The principles are more numerous: **equality in the eyes of the law** (… article 2 Constitution); judicial guarantee of **individual liberty** (article 66, Constitution); **security of persons and property**… the dignity of the person (preamble to the constitution of 1946); protection of legal rights and of the **separation of powers**…, the consequence being the right to appeal before the courts of law.
- In criminal law, there is also the **non-retroactivity of laws**…; the principle that punishments should only be imposed where new laws softening the harshness of a rule, and **proportionality**); the **individual nature of penalties**…; in criminal procedure, the presumption of innocence…; the right of defence, and its corollary, the adversarial principle…

- Criminal procedure should **be fair and adversarial [contradictoire] and preserve a balance between the rights of the parties**.
- It should guarantee a separation between those authorities responsible for prosecuting and those responsible for judging.
- Persons who find themselves in a similar situation and prosecuted for the same offences should be judged according to the.
- The judicial authority ensures that **victims are informed** and that their rights are respected throughout any criminal process.

- Every person suspected or prosecuted is **presumed innocent** as long as guilt has not been established.
- Attacks on his presumption of innocence are proscribed, compensated and punished in the circumstances laid down by statute. He has the right to be informed of changes brought against him and to be legally defended. The coercive measures to which such a person may be subjected are taken by or under the effective control of judicial authority. They should be strictly limited to what is necessary for the process, proportionate to the gravity of the offence charged and not such as to infringe human dignity. The accusation to which such a person is subjected should be brought to fine judgment within a reasonable time. Every convicted person has the right to have his conviction examined by a second tribunal.

The Fundamental Principles of Procedure (Germany)

- The constitutional norms are imposed on the three branches of government, which are bound by the principle of legality (Gesetzlichkeitsprinzip: article 20, para3, GG).
- The Grundgesetz specifies in its First Title, concerning fundamental rights (die Grundrechhte), various principles relating to the respect and protection of human rights. They are all derived from the principle of the inviolability of human dignity (article 1, GG) and are directed towards respect for the liberty (article 2, GG) and equality of persons (article 3, GG). These civil liberties, in the sense of the French Declaration des droits de l'homme et du citoyen of 789, are designed to protect the individual from the State and are therefore binding on all the organs of the State endowed with any portion of sovereignty. The articles following this set out various general rights, but few govern criminal procedure. Attention can nevertheless be drawn to the principles of inviolability of privacy of correspondence (article 10, GG), the inviolability of the home (article 3, GG, regulating searches) or even the restriction of the examination of nationals (article 16, Para. 2 GG).

- Furthermore, the Grundgesetz contains certain rules in Title IX concerning judicial organization, which are fundamental rights of a legal character (Justizgrundrechte or grundrechtsgleiche Rechte), such as the principle of the legitimate judge (Grundsatz des gesetzlichen Richters (article 1101, GG)), the right to a hearing by a judge (article 03, Para. 1, GG; Recht auf rechtliches Gehor), legality (non-retroactivity of offences and principle of clarity and definiteness of a law constituting an offence (article 103, Para. 2, GG: Ruckwirkungsverbot and Bestimmtheitsgebot))… and the necessity of the intervention of a judge for all measures that restrict individual liberty (article 104, GG). In addition there is the prohibition of the death penalty (article 102, GG).

- More generally, the law must be in accordance with the principles of a ‗republican, democratic and social' State where the rule of law prevails (article 28, GG). From this statement constitutional case law derives, for example, the presumption of innocence (Unschuldsevermutung), which makes it obligatory for the public prosecutor to investigate a case and search for evidence of innocence as well as guilt… that remand in custody must only be used where necessary.

History of Ethiopian Criminal Procedure

Criminal Investigation and Models of Litigation

- The body of law that was indigenous to Ethiopia and that marked a significant development in the last decades of this century was the regime of law known in modern legal science as civil and criminal procedure laws. It had been transmitted from generation to generation by oral tradition. Before the Italian occupation in 1936, it was the procedural law that was comparatively well developed and that had attained a high degree of excellence. It was also the same law that was more popular among the people than the substantive law, a fact that tends to show how much the people of Ethiopia give due respect and importance to the proper administration of justice. Judges and all other persons engaged in the administration of justice were respected and honoured. They were expected to live up to the then standard of justice and aspire to the attainment of this lofty goal.

- This procedural law included the law of evidence, which incorporated techniques of investigation and highly sophisticated interrogation and cross-examination procedures, methods of interpretation of law and framing of issues, including principal and side issues (obiter dictum). All these fell under the administration of justice process of Ethiopia.
- Criminal investigation devices
- In criminal cases, court proceedings were often preceded by the investigation of the commission of the alleged crime.
- There were three types of devices of crime investigation or detection under the old procedural law of Ethiopia. These were known as *leba shay, afarsata, and the investigations undertaken by the —market guards‖ (arada zabagna) and secret guards (mist'ir zabagna).*

(i) The Leba Shay: device for detecting criminals (c. 1900-1922)

- Leba Shay was a method employed to identify a thief by using a young boy who had not attained the age of puberty. He was made to drink a beverage made of a certain herb. One end of a strip of a cloth would be tied around the waist of the boy and the chief of leba shay would follow the intoxicated boy wherever he went by holding the other end. Since it was believed that water would neutralize the effect that the herb would have no the boy, great care was taken to keep him away from it. In the house where he collapsed, he would again be made to drink the beverage so that he could identify the particular individual from among the inhabitants of the house. The boy would push aside any one he meets entering the house of the suspected culprit. Any person on whom he laid his hand would be taken as a suspect and brought before a court of law. At some stage of its development, supplying information to the boy was made a part of the practice. This brought more harm than the service it rendered, for it could easily be manipulated to serve individual interests.

- During the reign Empress Zewditu (r. 1916-1930) an investigation for a thief who had stolen a garment from the palace was conducted by leba shay. The chief of leba shay hinted to the intoxicated boy to indicate someone as the person who had stolen the garment. The person thus picked was a well-known personality among the imperial courtiers but he was not on good terms with the chief of leba shay. This incident triggered a lot of controversy among the imperial courtiers, particularly when it was later discovered that the garment had been found after it was offered for sale at the market and that it had been stolen by a maid of the palace. Blaten Geta Mathteme-Sellassie recounted that this particular incident revealed the disadvantages of the institution, as a result of which Empress Zewditu abolished leba shay as a technique of criminal investigation. Indeed leba shay is not by any standard a modern method of criminal investigation. Nonetheless, in the absence of such modern institutions as a police force and crime investigation, the institution of leba shay must, at the time, have served as a psychological deterrent in the minds of potentially dangerous people.

(ii) the Afarsata: gathering to screen criminals (c.1900-1960)

- The afarsata was a device by which all male members of a community would assemble to identify an offender.
- Whenever a person or a group of persons reported to the local chief or other official that cattle had been stolen, that they had been robbed or that one of their relatives had been murdered, the local chief (chiqa shum) or the village shum (dug) would call on all male members of the community in that locality to assemble in assemble in a fixed place on a given date. In the assembly, the elders would call upon each person to tell whom he suspected. Every person would declare the identity of the person he suspected or what had been told to him by the —singing bird‖. The person who would testify as to the identity of the criminal under oath was kept secret and referred to as —bird‖. The person thus identified as the offender would be prosecuted and convicted before a court without having the chance to confront the witnesses for the prosecution. In what is now the Gonder region, the person who said that he saw the commission of the crime was known as a —bird‖ (wof), while the one who testified as having heard it from another person was referred to as a —stone‖ (dingay). A prosecution would take place against the person who was identified as the offender by the testimony of the —bird‖ or the —stone‖. It was an established practice not to allow anybody to go home until the identity of the criminal was established. As a result, a great deal of harm was done to innocent people. The following comment given by an elderly person on this institution leads to the same conclusion.

- In a certain place, there were three well-known thieves who brought about untold harm to the people of the community. Their names were Lemma, Bitwe and Jenber. They lived in the community pretending to be law-abiding citizens. The people tolerated them quite a long time for fear of vengeance. However, in one of the public meetings, a certain witty man declared that in out community, the thief is flourishing (lemma), he better stop it (bitew yettew), if he does not, are we supposed to be kept on jammed in such a meeting every day (jenber bessereqe qutter).
- Thus the witty man revealed the names of the thieves by the use of ambiguous phrases. A law regulating afarsata meetings was issued on August 2, 1933. This law provided that gatherings be conducted on Sundays only. The person who revealed the identity of the suspect, pursuant to this law, was made to testify before the court. Hence, this law made it possible for the accused to confront witnesses for the prosecution. A person who failed to attend such gathering would be liable to a payment of a fine (adafagen). If the people failed to identify any person responsible for the alleged crime, the entire community would be liable to make the damage good. If the offence committed was homicide, members of the community had to contribute to redress the damage inflicted on the relatives of the deceased.

- Later on, a circular letter was issued by the Ministry of Interior that required the attendance of a policeman in all such meetings. Furthermore, when the investigation was over, the so-called —bird‖ was required to testify openly before the court.
- In times when modern techniques of criminal investigation were not sufficiently developed or totally absent, techniques such as the afarsata must have had their own reason deter. After the adoption of modern techniques of investigation and other rules of criminal justice, the decision to maintain such an institution was unwarranted, particularly when it is seen in the light of its negative effects. It was not deemed wise to maintain such an institution because it was not only a psychologically and socio-economically damaging practice, but also an ineffective method of screening criminals from amongst innocent persons. In fact, it allowed a great deal of lee-way for abuse and even corruption. Even where it was correctly applied, the very nature of the procedure went against the principle of due process of law. Since the leba shay assembly, by its nature, passed in to decline and since it was, at least by implication, repealed, there was nature, passed in to decline and since it was, at least by implication, repealed, there was no justification for its continuity after the promulgation of the 1955 Revised Constitution.

(iii) Market guard and secret guard (1909-1936)

- The market guard (arada Zebagna) was very close to what we now refer to as the metropolitan police force. The main responsibilities of the market guard were:
- 1) to maintain peace and order in the city of Addis Ababa,
- 2) to guard at night the shops in the market places (arada), and
- 3) to detain any person who acted contrary to the law and the accepted ways of behavior, and cause such person to appear before the competent municipal court.
- The market guard also had the power to arrest persons found committing, or suspected of committing, a crime. After the necessary investigation, the market guard could bring such 64
- persons before the market court. An appeal from the decisions of the market court was taken to the lord mayor of the city.

- Where a person instituted a civil action for battery, the market court required a prior payment of the court fee. This was controversial. One person remarked: —what justice where the one injured is required to pay beforehand.‖
- The secret guard (mist‘ir zabagna) was a unit of the market guard that was charged with the responsibility of crime prevention.
- The secret guard was charged with the crime prevention by moving around public squares, and in hotels and bars where alcohol was served. The inscription —Secret Guard‖ was engraved on the front of their identity (and —secrecy‖), this was done to have a deterring effect on would-be criminals aware of their presence. The secret guard remained a device of crime prevention and control during the period before 1936. It maintained peace and order, gave due warnings, reprimanded offenders who committed petty offences, and brought before a court of law those persons who were accused of committing serious crimes. In short, the institution can be said to have served as useful technique for the enforcement of enacted laws and customary laws.

Public prosecutor and legal Counselor

- Not much is known regarding the establishment and development of the institution of public prosecutor in Ethiopia for the earlier period. One may find scattered facts that indicate the existence of a public prosecutor before the eighteenth century, the most vivid account of which was given by James Bruce, the eighteenth-century Scottish traveler who lived in Ethiopia for some years and wrote a book on his quest for the source of the Nile…
- … the chief administration of prisons were customarily required to act on behalf of the government as a public prosecutor. This practice was operative until finally a law establishing the office of public prosecutor was issued in 1943. According to this law, a public prosecutor should possess a sound knowledge of law or should have judicial experience. No person was to be appointed a public prosecutor other than those who had been an advocate, government official, or police officer who has above the rank of assistant inspector of police. According to this law, all prosecutions other than private complaints were to be conducted by a public prosecutor who could plead in any court where a criminal case was instituted.

- Before 1943, the initiation of criminal proceedings was to a very large extent left to the aggrieved party or to his representative. It must have been the outcome of this procedure that the framing or handling of issues of fact or law required no special skill. Any person who attended court sessions and was gifted in oratory was considered as person skilled in the art of advocacy. Without the need to fulfil any formality, such a person could practice law both in civil or criminal proceedings. Legal counselors were free to enter in to contractual arrangements with individual litigants to be paid a fixed sum of money or to be given a plot of land in return for the services they rendered. In cases in forma pauperis, any person attending court litigation had the right to offer his legal service, known as voluntarily without payment (belich‘egnannet), but such offer had to secure the consent of the accused party. Legal skill was, in those days, acquired through frequent attendance at law courts and practice. As a result, except for complicated cases, every person who satisfied the minimum requirement could argue his case without the need of legal aid. The existence of such laissez-faire practice in the legal profession has accentuated the degree of refinement attained in the modes of litigation known as —be interrogated‖ (tat‘ayyeqser‘at), which is demonstrated below.

Features of court proceedings

- Litigation, at its initial stage, was a voluntary and spontaneous form of arbitration. A party to a dispute was entitled by law to call upon any passer-by to decide his case. If the parties to the alleged dispute were satisfied by the rulings of the road-side courts, the matter would be considered settled. However, if a decision could not be obtained which was satisfactory to both parties, they would go to the regular court. Sometimes the person who acted as the road-side judge would take them to the lowest official judge.
- Assessors (techewoch) stood next to the judge in order of importance. Some of them were selected by the contending parties, and some by the court from among those people attending court session.

- The third typical feature of the judicial process was the production of guarantee (wass). The most frequent forms of guarantees were: (a) yesene-ser‘al wass (a guarantee produced by both parties at the time of initiation of a case to ensure respect and fulfillment of all procedural requirements of the court and also to ensure the appearance of the party in question on the day fixed for the hearing); (b) yedagnennet wass (a guarantee produced by both parties at the initial stage of a proceeding for securing the payment of the court fee by the party who lost the case); (c) yewurered wass (a guarantee entered in to at the time of court proceeding to secure the payment of a wager or bet payable by the loser on and at the time of settlement of the issue under consideration; and (d) yebesselle wass, a guarantee to secure the payment of the value claimed in a civil suit, produced at the time of pronouncement of judgement).
- The fourth and last element in a legal process involved in this system was the institution known then as nagarafaj (advocate or lawyer) that pertained to a person who usually had a fair knowledge of the law and who had agreed to represent a person before a court.…

- In principle, a witness was not required to tender an oath before his testimony. He would, however, be warned to testify to the truth and only the truth. Failing this, the party against whom the witness testified had the right to request the court to require the witness to tender an oath. This was done during Holy Mass particularly, when the Holy Communion was offered. The witness would close the door of a church or hold the Holy Bible and say:
- May he perforate me like his cross,
- May he erase me like his picture,
- May he chop me down in to pieces like his flesh,
- May he spill me like his blood, and
- May he choke me up as his alter is closed,
- If I am not telling the truth.

- In case of perjury a penalty, short of death sentence, would be imposed on him in secular courts. In ecclesiastical courts on the other hand, a clergy who is proved swearing falsely was expelled or deposed, according the provisions of the Fetha Negest.
- If a witness had already testified out of court, the other party could impeach the credibility of his testimony or might claim that it could not be admissible at all. Consanguineous relationships and other relationships such as godfather, adopted child, godchild and the like were grounds that could be invoked to bar a person from testifying or to discredit his testimony. The party who called the witness would, before asking him to testify, warn him as follows:One may go to hell after death;
- One may be reduced to bones, laying sick in bed;
- One may also be a permanent inmate of a hospital;
- All the same, one is obliged to tell the truth.

- In a similar manner, the defendant would advise the witness to tell the truth and ask him to testify that he did not know what was alleged by the plaintiff.
- After the witnesses had given their testimony, the party that felt the most of the witnesses had testified in his favour would pray for judgement to be entered in the following manner: —threshing ground would go to the one who prepared it, judgement should be made in favour of one who had proved right‖.
- There were instances where each party to the suit would claim that the testimony given stood in his favour. In such a situation, contentions were settled by mere allocations of the testimony to this or that party by persons selected as new observers (irtibe emagne).
- Later on, however, a rule was made that required the witness who gave the testimony that had become the object of contention to be recalled to state whom his testimony favoured. His answer would automatically settle the matter.

Appeal

- Judicial and administrative functions were entrusted to governors and local chiefs such as grant land-holders (bale-gult), the head of a monastery or church, or the shum (chief) of court of first instance (yesir dagna) on matters of **extra- contractual liabilities and matters connected with contract** such as those arising out of **betrothal or marriage relationships**.
- An appeal against the decision of these courts was lodged to the **destrict court (akaldagna).**
- In regions administered by the officials of the palace (gann-geb), provincial governors (shaleqas) or persons appointed by them as representatives (messlenes)or as local officials (duges) used to have jurisidiction at the district level as a district court.
- Appeals from the district court were taken to the **governor‘s (shaleqa-wambar) at the province level**.
- From this it used to go to the provincial governor **himself for review**. Appeals from the provincial governor‘s judgement were lodged with the chief **justice and his judges**.
- Cases of injury to the human body, **arson and homicide** were adjudicated by the chief justice and the senior judges (ras wambars) and not by local governors.

- The court of the chief justice was therefore the **supreme judicial body** for all civil and criminal matters save crimes punishable by death.
- Sentences other than capital punishment passed by the chief justices were executable **without the need for confirmation by the emperor**.
- In some exceptional situation, however, the decisions of the chief justice were **appealable to the Crown Court**.
- Sentences of capital punishment were **passed by the emperor** only after the assessors gave their option in the crown court on every point of the case and the relevant provisions of the Fetha Negest which were read and interpreted by scholars.
- An appeal could be based on any **substantive or procedural issues**, including interlocutory matters.
- Every complaint lodged against the **judgements or interlocutory** decisions of a court was examined not only by judges sitting in higher courts, but also by **korqwaris (king of assessors) attending the court session**.

- Appeals made on **interlocutory orders** were **not very frequent**. However, whenever one of the parties felt such interlocutory decisions would be **prejudicial to the principal issue**, he was justified in making an interlocutory appeal.
- Another matter that was taken to a higher court, particularly that of the Chief Justice, was the **question of interpretation of the law**.
- A dispute over who had the right to prove an allegation, and questions of interpretation of law were submitted to **the Chief Justice**, who was assisted by the **senior judges**.
- For **instruction or guidance** as to how a set of facts or questions of law was to be interpreted, it was to this court that judges of lower rank had to **make reference**.

Cont…

- In those days (before the Second World War), everyone had a chance to take his case on appeal as far as **the emperor**, when s/he was not satisfied with decision of **lower courts**.
- Regarding the procedure applicable in the Crown Court, for the earlier period, th**e Ser‘ate Mengist**, which is believed to have been an **old legal text**, provided the following order for **assessors to speak**:
- The first ones to give their options are **Shaleqas**. Then follow **Seyoum Musse**. Then the **Bejirond of Anbessa** Bet and Bejirond of the palace followed suit.
- Next to them come **Lique-Mequas, Balambaras, Fitawrari, Gerazmach, Blaten Geta of first rank, Tsehafi Te‘ezaz, Ras Masserea and Basha**.
- The next that would be allowed to speak are **Dejazmach of Damot, of gojjam Amhara, Begameder, Semien and after them follows the Nebure-ed of tigray**, than comes Akabe **Ser‘at, Blaten Geta** and finally Ras.

Cont…

- Criminal cases brought from various lower courts were read in the **presence of the accused**.
- Where a case is sufficiently dealt with, the accused will be asked as to whether **he admits or not**.
- If he **admitted all** that had been said and if the case was instituted by **a private complainant**, the aggrieved party would plead that the **verdict be given**.
- If the accused requested that his case be **further investigated**, then everybody attending the court would be allowed to ascertain the truth by way of **examination and cross- examination.**
- All persons **skilled and experienced** in this matter will make use of every bit of their **wits and intelligence**.
- After conviction, the private complainant or official of the government demands that the accused be **sentenced to death** or to this and that type of punishment, while the accused pleads that his case does not carry such sentence or simply prays for mercy.

Cont…

- After this, **the process of the sentencing starts**.
- Every person attending the court, starting from those who are standing and the **shambles**, would give his opinion when requested by **the usher (agafari).**
- After those who have stood gave their opinion, those who sat do the same starting from the **lowest to the highest rank.**
- Then follow the **judges (wambars)** in their order of rank. The **Betwededs** and **Dejazmaches** would give their opinion coming just before the judges of the **first devision**.
- Then, the chief justice (**afe-negus) gives his opinion**. Everybody had to remain standing in the **entire process, except for the emperor.**
- Raising his head, the **Emperor listens** to them **all attentively**.
- The scholars having cited the appropriate provision from the **Fetha Negast would read and translate and interpret it for the public** and would decide whether the accused deserves **capital punishment, imprisonment or any other punishment or no penalty at all**.
- If the emperor finds any problem as to the interpretation of the cited provision, he may **adjourn the case for the morrow**. If the interpretation suggested is **favoured, judgement would immediately be given** and when the death sentence is pronounced, one hears the cheering of the family of the **victim and the cry of the family of the condemned**.

- Judgements in **minor criminal cases** were executed then and there as the decision was made by lower courts.
- Serious criminal offences such as **homicide, injury to the human body and arson**, however, after being decided by the competent courts, would be sent to **administrative bodies** that had the responsibility and power to execute them.
- After the judgement had been rendered, an instruction is issued to the office of the **ligaba [Lord Chamberlain] to execute the sentence**.
- The ligaba would, on his part, according to the judgement, order the **convicted person to face a firing squad, to be for life or for a given period.**

- Immediately after a sentence of flogging is pronounced, the person‘s hands and legs would be **tied with a rope**.
- Then, he would be pegged in the middle of a field where he would receive **utmost forty lashes**.
- The sentence of flogging was executed by an **authorized person**.
- Capital punishment, when confirmed by the emperor, was executed around the area where the **present Addis Ababa Qirqos Church is located**.
- Later, it was executed in a building in the neighbourhood of the present **ammunition factory**.

- A convict against whom the death sentence had been passed and confirmed used to be given three days leave to take the **traditional medicine against tapeworms** (kosso, i.e. the plant Hagenia abyssinica).
- It was within this time that he was required to **leave his will and to make a confession**, if he wanted to do so.
- Places where sentences of impersonment were executed were prisons known as government prisons (weheni bet), provincial prisons **(isir bet) and gaols (zebetteya).** Thieves found in the market place in Addis Ababa were detained in the gaol.
- Many popular couplets (losing all flavour in translation) expressed the common feelings about the goal, e.g., —the market is nice, for eating meat and drinking mead (tej) but what makes one afraid is that one might have to spend a night in gaol.

- In the period under discussion, persons accused of committing serious crimes were often kept in prison for undefined periods. Such persons used **to petition the court to determine** their status. The court had the right to release such prisoners when it deemed it appropriate.
- Detainees who had no relatives to bring them food were permitted, under guard, **to go to the house of their relatives, friends and acquaintances in search for food and drink**.
- Persons who could not pay the agreed amount of blood money (guma) would try to raise the required amount of money by going **from village to village accompanied by a guard**. To symbolise their distress, they used to tie their hands with iron chains.
- Depending on the gravity of the crime committed, a prisoner could be sentenced to three different types of imprisonment.
- The first one was known as imprisonment by chaining leg and hand (igir teworch). Upon habitual **murderers and bandits**.
- **shackle (igir beret)** was a measure taken against murder, mutilator of human body and persons who committed arson.
- **chaining by the leg (igire mook)**.

Historical Introduction to the Criminal Procedure Code, 1961

- Prior to the **1960 CPC there was no systematic body of legislation** in the field.
- In the early 1950‘s the Ethiopian government decided to adopt new codes in all major **areas of the law**, and for that purpose to call in foreign experts to do the drafting in **close consultation** with local Ethiopian and expatriate colleagues.
- The task of drafting the criminal procedure code Professor Jean **Graven of Geneva**.
- He was then also engaged in drafting the Ethiopian **Penal Code of 1957**.
- formal discussions of the CPC began on **August 13, 1955-the date of the first process verbal**-in a ―commission of codification of procedure‖ presided over by the **Minister of Justice**.
- Notes of all commission discussions were taken by **M. Philippe Graven**, son of Professor Jean Graven and at that time an advisor to the Ministry of Justice.
- Virtually all of the codification materials were originally drafted in the **French language, and French and Amharic** were probably the languages of discussion at the commission sessions.

- The commission‘s first discussions took place **until October, 1955**; there was then a break until they **resumed in July, 1956**; they then carried on more or less continuously **through February, 1957**, when there was another hiatus.
- They resumed in August, **1958 and occurred through October of that year**.
- After submission of the code in **November, 1960**, parliament amended the draft in some respects; **it was promulgated in 1961**.

- There was some difference in views between those commission members who were **trained in common law procedure**, and those who were trained in **continental procedure**.
- It contributed to **the creativeness** with which the drafters approached the task, as they it, of **constructing a truly Ethiopian procedure,** which would not simply copy either **continental or common law procedure**.
- Be that as it may, in October, 1958, the commission agreed to give Professor Graven‘s avant-project to sir **Charles Matcew for examination and proposed amendment.**
- Sir Charles was a distinguished English jurist who had had wide experience in **East Africa, Ethiopia** (during the post-Liberation period), and Malaya prior to his renewed tenure in Ethiopia as Advisor to the Ministry of Justice.
- Sir Charles was asked to review Professor Graven‘s draft with a view to **simplifying it, and to making it less —inquisitorial‖** and more —adversary‖ than it was.
- referral to an English lawyer and the instructions given was that the Ethiopian courts had **British-influenced, adversary procedures since 1941 at least**; substantial alternation in procedure might have caused confusion to Ethiopia‘s **judges and advocates**.

- It appears that Professor Graven submitted his texte definitif to the commission from abroad, and that the whole movement towards a more adversary procedure and away from some of the continental institutions of his draft occurred after **his departure from the scene**.
- Knowledge of this background to the code makes it easier to **understand the code‘s structure and sources**.
- The unique organization is essentially based on Prof. Graven‘s avant-project.
- The Code‘s sporadic(Irregular) relationship to Malayan, and therefore, ultimately, Indian law, derives from the influence of Sir **Charles Mathew‘s drafts**.
- The overall flavor of the law is adversary, but the **adversary system often contains fragments of ―inquisitorial‖** procedure retained from the avant-project.

SETTING JUSTICE IN MOTION: IN TAKE PROCEDURES AND INVESTIGATIVE ACTIVITIES

- Making the justice machinery **start operating** with respect to a particular offence.
- The operation of criminal procedure begins with the reception of information about the **commission of a crime**.
- The information could reach the police through **different channels.**
- These are **complaint, accusation and the occurrence of flagrant offences**.
- They serve as **condition precedents** to set criminal justice in motion.
- Once the criminal justice is triggered, it is often followed by investigation to substantiate the case with **evidence to prove guilt**.
- **Arresting the suspect** could also be made whenever the law requires or **circumstances justify**.
- The investigation may be made **before the arrest** of a suspect or after the arrest.
- The police are supposed to hear witnesses and gather other real evidences like **exhibit, finger print, blood test**, etc.
- The gathering of evidence sometimes requires **search and seizure**.
- The information source could be either from the **suspect or out of the suspect**.
- The process of undertaking the criminal investigation **raises the constitutional issues** of the right to life, liberty, privacy, against self-incrimination, etc.

Joining private actions to public prosecutions

- **Relevant Laws**
- Art 11-21, 50, 150-153,165-166, CPC
- Art 101-102, 211-213, 254, 255, 443, 447, 448, CC
- Art 2027-2065, Civil Code
- In France and Belgium, a civil claim can take place either through **the initiation of proceedings, or through intervention** once the public prosecutor has started a public prosecution.
- In the German and Italian systems, on the other hand, **the legality principle has prevailed**.
- There the public prosecutor is under an **obligation to act once he receives a complaint**. These systems allow civil claims to be joined to existing public prosecutions, but do not allow prosecutions **to be started by private citizens**.
- Prosecutions may be [and if the legal conditions are fulfilled must be] initiated **solely on the impetus of the public prosecutor.**

Prosecuting Criminal Offences Punishable only upon Complaint

The Complaint (strafantrag)-Germany

- Any minor offence or offence affecting the **privacy of the individual requires a prior complaint**… for example, insults, criminal damage and so on.
- The victim [or his beneficiaries] has three months after discovering the **offence to notify the public prosecutor that he wants the offences to be prosecuted**.
- Such a report, **unlike an ordinary report**, does not merely inform the public prosecutor, but **sets the criminal law in motion**.
- If the public prosecutor tries to drop the charges, the victim can compel him to prosecute by using the procedure to enforce prosecution.
- The purpose of criminal law is to **ensure order, peace and the security of the state and its inhabitants for the public good**.‖
- The Criminal code achieves this purpose by laying down **prohibitions from acting or act** whenever it is in the **general interest** that one should act or retain from acting.

- Whosoever commits a criminal offence by disregarding these prohibitions or obligations is **answerable, therefore, to the community**.
- Hence the principle that criminal offences are prosecuted and punished, on behalf of the public, by the **state acting as the agent of the citizens**.
- There are offences, however, **which do not jeopardize the order, peace and security of the state** and its inhabitants but are contrary solely to the **rights of a given individual**.
- There are offences of a purely private or personal character, **the effect of which does not extend beyond the individual there by injured**.
- In such cases, the state, though it is generally responsible for instituting criminal proceedings whether or not the victim of the offence agrees thereto, **will not carry out this duty unless the victim indicates affirmatively that he wants the offender to be prosecuted.**
- The prior consent of the **injured party is required**, **firstly,** because **public interests are not at risk** as the offence does not endanger the society at large, and **secondly**, because the institution of proceedings, against **the will of the injured party**, might often be **more harmful to** him than the commission of the offence, for it might draw the attention of society to certain facts, such as **his spouse‘s unfaithfulness or his child‘s dishonesty**, which are precisely what he does not want known publicity.

Prosecuting Criminal Offences Punishable only upon Complaint

- In these situations, the institution of criminal proceedings is **conditional upon a complaint** first being made by the individual concerned.
- Where he makes a request to this effect, the state then acts, **not on behalf of the public**, but as the custodian of his rights for the purpose of prosecution and punishment insofar as this is possible.
- This raises two questions: which are these offences so **punishable on complaint** and what are the effects of such a **complaint being made**.

- whosoever… is punishable, on complaint, with…‖these are Articles 388(2) **(destruction of documents belonging to a relative); 407 (breach of professional secrecy); 409 (disclosure of scientific, industrial or trade secrets); 539(1) common willful injury not in aggravating circumstances); 543(3) (common injury caused by negligence); 544 (assault); 552 (intimidation); 553 (threat of accusation or disgrace); 555 (deprivation of powers of decision); 563 (1) (ascendant abducting a child); 570 (violation of the right of freedom to work); 573 (violation of the privacy of correspondence); 587 (prescribing that all offences against the honour are punishable on complaint; see, however, Articles 256, 276 and 278); 593 (sexual offences without violence against women in distress); 596 (seduction); 612 (indecent publicity); 614 (fraud and deceit in marriage); 618 (adultery); 625 (failure to maintain one‘s family); 629 (prescribing that all officers against property committed within the family are punishable on complaint if they do not involve violence or coercion); 632 (abstraction of things jointly owned); 643 (misappropriation); 644 (unlawful use of the property of another); 645 (misappropriation of lost property), 649 (damage to property caused by herds); 650 (1) (disturbance of possession not in aggravating circumstances): 653 (damage to property in aggravating circumstances); 661 (fraudulent exploitation of public credulity); 665 (incitement to speculation); 666 (incitement of minors to carry out prejudicial transactions); 671-676 (offences against intangible rights); 680 (fraudulent insolvency); 681 (irregular bankruptcy) and 721 (1) (a) (petty offences of a private nature).**

- Whenever an offence is committed in violation of any of the above mentioned provisions, no action may be taken except at the initiative of **the person qualified under the law of making the necessary complaint.**
- If the offence is a flagrant one**, the offender may not**, it seems, be arrested without a warrant **unless a complaint is first made**.
- Article 21 of the CPC states (1) that, in cases of **flagrant or quasi-flagrant offences**, proceedings may be instituted without an **accusation or complaint (in the general sense of information) being made**, unless the offence is punishable on complaint (in the technical sense of the term) and
- (2) that the offender may in such cases be arrested without a warrant in accordance with Articles 49 ff.
- It may be argued that sub-article (2) dealing with arrest is as general as it could be and that had it been intended to prohibit an arrest without a warrant from being made when the flagrant or quasi-flagrant offence is **punishable on complaint**, this prohibition would have been expressly laid down in sub-article (2) or, like the prohibition from **instituting proceedings**, in sub-article (1) of the said Article 21.

- There are however, a number of reasons which militate towards a different construction of this Article:
- Firstly, 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 offices** 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 complaint would be inconsistent with the principle that it is for **the injured party to set justice in motion**.
- Thirdly, one of the purpose 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 purpose of the complaint, that is, **to avoid scandal when the injured party does not want certain things known**.

- This is probably the strongest argument against taking the said Article 21 to mean that such an **arrest is permitted**.
- It is undesirable, to say the least, that any one whether a member of the police or a private person (see Article 50 of the CPC) **should be entitled**, for instance, to **grab by the neck and bring to the nearest police station,** two persons he finds in the act of **committing adultery**.
- It seems that an arrest should not be made in such a case except by, or **at her request of, the injured spouse**.
- For obvious reasons of convenience, the complaint should then be made **orally to the police**, and not in writing as required by Article 14 of the CPC, so that the arrest, if to be made by the police, may be made forthwith.
- This oral complaint should thereafter be **confirmed in writing**.

- It must be clear that the sole purpose and effect of the complaint is to enable the public prosecutor **to institute proceedings**.
- It may not be held that offences punishable on complaint are offences which may be prosecuted **only by the injured party**.
- The bringing of the public action obviously means the institution of proceedings **by the public prosecutor**.
- A private prosecution may be instituted with regard to **offences punishable on complaint**, but this is permissible only after the public prosecutor has found himself **unable to carry out his duty to institute proceedings**.
- As noted above, the public prosecutor will act as **custodian of the injured party‘s rights insofar as is possible**; only when this is not possible may the injured party substitute himself for the prosecutor.

- When the public prosecutor institutes proceedings with respect to an offence **punishable on complaint**, the ordinary provisions regarding the charge and the trial will apply (Articles 94 ff. of the CPC) or, where appropriate, those regarding petty offences.(Article 67-170 of the same code).
- However, as the public prosecutor prosecutes only because the injured party has expressly requested him to do so, it follows that, where the complainant declares that he no longer wants the offender to be prosecuted, the public prosecutor is compelled to **withdraw the charge**.
- The accused may not, as a rule, object to such withdrawal and demand that the case should be **carried forward**.

- If the public prosecutor refuses to institute proceedings with respect to an **offence punishable on complaint, proceedings may nonetheless be instituted**, depending on the reasons upon which this refusal is based.
- If the public prosecutor refuses to prosecute for any of the reasons set out in Article 42 (1) (b)-(d) of the CPC, his refusal is final (as it is, also, when the offence is not punishable on complaint).
- But if the prosecutor refuses to institute proceedings because he is of the opinion that there is **not sufficient evidence to justify a conviction**, that is, he considers in accordance with Article 42 (1) (a) of the CPC that he is unable to prove that the offender is guilty of the offence to which the complaint relates, a remedy is available to the injured party.

- The remedy consists of providing the injured party with **a certificate specifying the offence** to which the refusal relates, stating that public proceedings will not be instituted with regard to such offence, and authorizing the injured party to conduct a private prosecution with respect thereto (Article 44 (1) of the CPC) **at his peril and at his own expense (Articles 46 and 221 of the same code)**.
- A copy of the certificate, will be sent to the court having jurisdiction, enabling it to ascertain, in accordance with Article 150 (2) of the CPC, that the offence charged by the private prosecutor actually is the offence in respect of which he has been authorized, under the certificate, **to institute private proceedings**.

- the certificate is **to be automatically** issued upon the public prosecutor‘s refusal to prosecute.
- Since the public prosecutor may, in no case, object to the institution of private proceedings after he has declined to prosecute on the ground **of lack of evidence**, it is of little importance whether the certificates is issued automatically or on application.
- the public prosecutor must, prior to issuing the certificate, decide **as to the court in which the complainant** will file his charge, and such court ought, therefore, to be mentioned in the certificate.
- This interpretation is confirmed by Article 44 (1) of the said code which, as has been seen, compels the public prosecutor to send a copy of the **certificate to the court having jurisdiction**.
- the case will then proceed in accordance with the provisions of Article **150-153** of the CPC.

- According to Article 48 which a private prosecution may be stayed **at any stage thereof at the request of the public prosecutor**, if it appears in the course of such prosecution that the accused committed a **more serious offence than that for which the certificate had been issued under Article 44 (1) of the said code**.
- An example would be if the certificate were issued with regard to an offence of **unlawful use of the property of another** and it were disclosed during the trial that the accused actually had the intention of obtaining an **unlawful enrichment** and should, therefore, have been charged with an offence of theft in violation.
- the public prosecutor may not interfere in private proceedings unless the case clearly is not one in which only **private interests are involved**.

- **Duty to report vs. confidentiality**
- **Duty to report vs. false accusation**
- **Requirement of knowledge**
- **Willful blindness**
- **Under reporting- diffusion of responsibility/bystanders**
- **Shift of responsibility from community to police**
- **Risk of self incrimination**

- Relevant Laws
- Art 3, 5, 8, 9, 11, and 12, UDHR
- Art 9 and 14, ICCPR
- Art 16-21, 26, 32, FDRE Constitution
- Art 19-21, 49-59, CPC
- Art 420, 423, 425-426, CC
- Art 2027-2065, Civil Code

Warrant or Summons Issued on the Complaint

- If there is **probable cause** to believe that an offense has been committed and that the **defendant committed it**,
- either a **summons or an arrest warrant** will be issued for the defendant‘s appearance in court.
- If the defendant is already before the court, **no summons or warrant is necessary.**
- Once the summons or warrant is issued, the law enforcement officer must **serve the summons or execute the warrant** by arresting the defendant and bringing the defendant before a judicial officer as commanded in the warrant…

- From the gravity of the charge that a **summons would not suffice to secure the attendance** of an accused person, he should be arrested, in order to bring him before a Court.
- **(a) By warrant**
- Special authorization for arrest always takes in modern times the **form of a written warrant**.
- In **cases of political crime** by a **secretary of state** or any other privy Councilor, or,
- in any criminal case whatever, by **a judge of the queen‘s Bench Division** or (as usually happens) by a **justice of the peace**.
- When executing the warrant, if demanded, be shown to the person **arrested as soon as is practicable**.
- Since the charge is not a civil but a criminal one, he is allowed to **break open even the outer doors of a house**, if he cannot otherwise seize the person who is to be arrested (e.g., if those in the house will not give him up).

- If the charge be one of **treason, violent felony, or dangerous wounding**, he may, moreover, **use any degree of force that may be necessary to effect** the arrest, or prevent the escape, of the accused; even to **the infliction of wounds or death upon him**.
- If, on the other hand, the accused, knowing the authority or intent of the arrester, should kill the arrester, he may be guilty of murder, even if innocent of the charge.
- But if a constable attempts to arrest offenders illegally (e.g., on a void warrant) they may be guilty only of manslaughter if, in resisting such as arrest, they kill the constable

- **At common law.**
- **Even when no warrant has been issued,** the common law often permits an arrest to be effected, a permission accorded not only to a constable but **even to private persons**.
- Firstly, at common law a private person, without any warrant, may arrest any person who, **in his presence, commits a treason or felony or dangerous wounding**.
- The law does not merely permit, but requires, the **citizen to do his best to arrest such a criminal**.
- And as he is thus acting not only by a right but under **an imperative duty,** he may **break outer doors in pursuit of the criminal.**
- And for a treason or a violent felony he may use whatever force is necessary for **capturing the offender,** as, **for instance, shooting at him**, if he cannot otherwise be prevented from escaping, so that if the felon‘s death results, the case will be one **of justifiable homicide**.
- Besides this power to arrest, with a view to **permanent detention,** every private citizen has also the right to prevent such crimes, **by seizing any man who is about to commit a treason or felony or even a breach of the peace, and detaining him temporarily**, until the danger is over. Strangely enough what constitutes a ‗breach of the peace‘ has not been authoritatively laid down.

- A police constable, even when acting without a warrant, has powers still more **extensive than those of a private person**.
- He is entitled to call for the assistance of any **able-bodied bystander if necessary,** and it is an offence at common law for a **person so called upon to refuse to assist** when reasonably able to do so.
- It is doubtful whether in the case of all crimes for which arrest without warrant is permissible a police officer may **enter premises in search of material evidence**.
- a police officer may enter private premises to **prevent a breach of the peace**, and to prevent the commission of any offence that he believes to **be imminent or likely to be committed.**

Fresh Pursuit

- Under the common law and most statutes, law enforcement officer may make a lawful arrest without a warrant **beyond the border of their jurisdiction in cases of fresh pursuit**.
- Fresh pursuit means an officer‘s **immediate pursuit of a criminal suspect in to another jurisdiction after the officer has attempted to arrest** the suspect in the officer‘s jurisdiction.
- The common law allowed a **warrantless arrest in fresh pursuit** only in felony cases, but to day most states allow warrantless arrests for both felonies and misdemeanors.
- For a warrantless arrest in fresh pursuit to be legal, all of the following **conditions must be met**:
- The officer **must have authority to arrest** for the crime in the first place.
- The pursuit must be of a **fleeing criminal attempting to avoid immediate capture**.
- The pursuit must begin **promptly and be maintained continuously**.
- The main requirement is that the **pursuit be fresh**. The pursuit must flow out of the act of attempting to make an arrest and must be a **part of the continuous process of the apprehension**.
- The pursuit need **not be instantaneous**, but it must be made without unreasonable delay or interruption.
- There should be **no side trips or diversions, even for other police business**. However, the community of pursuit is not legally broken by unavoidable interruptions connected with the act of apprehension, such as **eating, sleeping, summoning assistance, or obtaining further information**.

- Any member of a duly organized state, country, or municipal law enforcing unit of another state of the United States who enters this **state in fresh pursuit**, and continuous within this state in such fresh pursuit, of a person in order to arrest the person on the ground that the person is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized state, country, or municipal law enforcing unit of this state, to arrest and hold in custody a person on the ground that the person is believed to have committed a felony in this state.
- Iowa Code Ann. 806.1. Because some states extend the privilege to make an arrest in fresh pursuit to out of state officers only on a **reciprocal basis**, a law enforcement officer must be familiar with not only the statutes in his or her own state but also the fresh pursuit statutes of all **neighboring states**.

- A law enforcement officer who makes an arrest in fresh pursuit under such a statute in a neighboring state must take the arrested person **before an appropriate judicial officer in that state without unreasonable delay**.
- Some states allow an arresting officer from another state to take a person arrested in fresh **pursuit back to the officer‘s home state** after the arrested person is brought before an appropriate judicial officer.
- Other states allow this only upon **extradition or waiver of extradition**.
- **Extradition** is a procedure whereby authorities in one state [the demanding state] demand from another state [the asylum state] that a fugitive from justice in the demanding state, who is present in the asylum state, be delivered to the demanding state.
- Most states have adopted the Uniform criminal Extradition Act, which provides uniform extradition procedures among the states.

“On-scene” Arrests

- A substantial percentage of arrests for a wide variety of crimes are **of the —on-scene‖ variety.**
- These are arrests made during the course of the **crime or immediately thereafter** either at the place where the crime occurred or in its **immediate vicinity**.
- **Ordinarily on-scene arrests** will be based on the **officer‘s own observation** although they will sometimes be based on the **directive of a witness who has just viewed the crime**.
- For some offenses, **on-scene arrests** typically are the product of **proactive pre arrest** investigative activities designed to place the police in a position where they will be able to view the crime as **it is committed**.
- That usually is the case, for example, with so called—**victimless crimes** (i.e., crimes which do not involve an interaction with another person, such as **possession of a weapon**).
- For many other offenses, most on scene arrests occur, with basically no patrol responds to an event that calls **the crime to his attention** (e.g., a victim‘s call for assistance, a **burglar alarm, or an observation**).
- Thus, one study concluded that 42% of all arrests for **nonviolent property** crimes (basically theft and burglary) were such on-scene arrests, made within **5 minutes of the commission of the offense**.

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

- **The law of arrest: importance**
- The immediate efficiency and utility of any system of criminal procedure must be measured **according to two goals**, each equally important to society:
- the extent to which the system facilitates the **enforcement of the criminal law**, by bringing offenders to **speedy justice**, and
- the extent to **which innocent citizens are left undisturbed**.
- In fact, the chief task of the system is to provide effective procedures for **accurately selecting out of the community** those who have offended against the criminal law, and seeing that they are subjected to the **prescribed sanctions**.
- At the same time, the methods employed by the state to enforce the penal law must be of a sort to **safeguard other, equally important, values of society, chief among which is human dignity, and to engender in people attitudes of trust in the government**.
- no system will the selection process be completely **accurate-some offenders will be left undisturbed**, and some innocent persons will be mistakenly selected and subjected to the **unpleasant ordeal of criminal proceedings**.
- most procedural systems provide various **post-arrest —screening devices the most rigorous of which is the trial hearing itself in order to —de-select‖** or sift out of the criminal process those who, because they are innocent, ought not originally to have been brought in to it.

- Thus, for example, Anglo-American system provide two **post-arrest, pre-trial —screens‖** for the arrested accused in **serious cases**.
- **First, an arrested person** will **immediately be brought before a court**, which after a —**preliminary hearing‖** may order his discharge if upon the evidence the court finds that there is **no sufficient ground to believe him guilty of any crime**.
- If the accused is not —de-selected‖ out of the criminal process he will either **remain in custody or be released on bail** until the public prosecutor decides whether or not to institute proceedings against him by framing a charge.
- **the second** opportunity, now at prosecutor‘s discretion, to secure the discharge of an innocent accused before trial.

- **In the continental systems**, too, post arrest-judicial screens play a vital part in **serious criminal cases**.
- In France, a **preliminary judicial hearing**, to determine whether or not the accused should be committed for trial
- a **second screening by the —Chambre d‘accusation‖ of the court of Appeals**, which must ratify the examining magistrate‘s decision to commit.
- **whether legal case exists or not**, once in custody the innocent accused in Ethiopia possibly has no opportunity to win a discharge at any time pr**ior to the trial itself**, should the public prosecutor decide to institute proceedings.
- In such a case, during **the months or possibly years** which elapse between arrest and trial an innocent accused ordinarily might have no access to any judicial forum before which **he might demonstrate his innocence**, or the prosecution be compelled to justify his selection of innocence.

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

The criterion of absolute necessity

- How can the court decide whether or not the attendance of a person before it is —**absolutely necessary**‖?
- these words imply a **very rigorous test**, and the court is to exercise a **screening function**;
- it is not supposed —**automatically to issue warrants** to arrest whomever the police suspect of an offence.
- It is a fair inference that, as a minimum standard, the court must be satisfied that there is **sufficient evidence to believe** that the suspected person has **probably committed the offence**.
- After the court is satisfied that the suspect is a proper target for criminal prosecution, then it becomes necessary for the court to **obtain physical jurisdiction and control over him**.

- the police has to summon a suspect to appear, —**reason to believe that he has committed an offence**.
- It remains to consider by what means the applicant might demonstrate the **reasonableness of suspecting a particular person to the court**.

(a) a copy of the accusation or complaint (**as recorded under Article 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 **witness during the police investigation (Arts. 24, 30(3));**

(d) written statements of the results of any other investigatory activities conducted by police such as searches (Arts. 32, 33) and physical examinations (Art. 34).

Cannot otherwise be obtained - The second requirement of Art 54

- **Among the inherent disadvantages of arrest are:**

(a) the **use of time and energy** on the part of the police who must physically go find the accused and bring him to court under supervision;

(b) possible **embarrassment to an innocent accused** in being publicly arrested and escorted by the police; and

(c) **the possibility of resistance to arrest** with attendant injuries to the accused and others.

- For these reasons the Code prefers that the accused‘s presence in court be obtained by —**polite means,** reserving the use of arrest for those cases where it is the only practicable alternative.

- The preferred method is for the police **to summon the accused** —voluntarily‖ to appear at the police station, a method which has none of the cited disadvantages of arrest.
- As a general rule, then, the court may not issue a warrant of arrest unless the accused has **already been summoned without success**.
- For, until a summons has been tried it is possible that the accused‘s attendance in court can —**otherwise be obtained**‖ and therefore resort to arrest is forbidden by Art 54.
- Of course if the accused has already been summoned and has deliberately failed to appear the investigating police officer has the duty to arrest him by applying for **an arrest warrant if necessary**, and the court should issue it, assuming that — absolute necessity‖ has been shown.

- There are, however, cases imaginable in which the **court would be justified** in issuing an arrest warrant even though the summons method had not been tried.
- If, for example, the applicant could **by reliable evidence convince** the court that summoning the accused would be completely futile because the latter had already **planned or begun to flee the empire**, or
- because receipt of a summons **would likely induce him to flee**, the court would be justified in ordering arrest because the accused‘s attendance could not —otherwise be obtained.‖

- **But unless such exceptional circumstances are shown, the police should always first proceed by summons**. According to Lord Devlin, —[t] the distinction between the process begun by arrest and that begun by summons is that the latter leaves the accused **completely at liberty until he is convicted.**‖
- In England, perhaps, but not in Ethiopia. For, although, as we have said, the summons method is free from many of the **coercive aspects of arrest**, under Ethiopian law it leads just as surely to immediate custody, with perhaps no possibility of discharge before trial.

- Even assuming the summoned accused‘s readiness and ability to convince the police of his absolute innocence of the offence with respect to which he was summoned, **the Code does not permit the police to discharge him**.
- Rather, they have the option to **release him conditionally on bond or bring him before a court**.
- summons differs arrest under Ethiopian law only in that it draws one into **custody —voluntarily** rather than by force; it is, once the accused arrives at the police station and is **detained there involuntarily, transformed in to arrest**.

- The only limitation imposed by Article 25 is that the investigating police officer should have **—reason to believe,** that the accused has committed an offence.
- While that standard is not precise it can at least be said that Article 25 prohibits the summoning of an accused where the evidence is of very questionable reliability-such as **anonymous or ambiguous information, hearsay un sustained by factual investigation**, etc.
- It calls for a weighing of the evidence of criminal guilt **against the presumption of innocence** and the right to freedom.
- prone to resolve **doubts in favor of the government**, not the individual.

- the Code omits to authorize police discharge of a summoned accused for a **very sound reason**: that the rank and file police officer is not sufficiently **educated and trained in law to exercise this discretion competently**; that we cannot —trust‖ him to decide which accused to discharge and which to hold or bound for further investigation.
- If the change were made, the police would have three options at their disposal for dealing with a summoned accused,

- one of which would have to be acted for dealing with a summoned accused within forty-eight hours of his **voluntary appearance at the police station**:
- discharge,
- conditional release on bond, and presentation before the nearest court.

- **The Code: flagrant offences**
- Code Art 19-21 and 50 define flagrant offences and declare that any person may arrest a flagrant offender.
- The French law adopts a bi-partite division of flagrant **offences in to —flagrant‖ and —assimilated‖ ones**.
- To these the Ethiopian code adds a third category, —**quasi-flagrant‖ offences**.
- One should note, however, that these labels are of **no functional consequence**, since the Code treats all three categories in exactly **the same way.**

(i) **Definition**

- To the standard definition of —flagrant offence‖ as one which —is being committed or has just been committed‖ Art 19 (1) has added flagrant attempts. This probably is not a substantial change in the old formula because an attempt to commit an offence is in itself a penal offence, and **therefore needs no separate mention**.
- Another —addition‖ to the traditional concept is found in Article 19 (2), which includes situation where a —**hue and cry‖ has been raised**. This, again, is not a substantial addition, since it merely duplicates the first part of the same sentence —when… the offender **who has escaped is chased by witnesses or by members of the public**.‖
- As for the Ethiopian Code‘s seeming omission of important circumstance covered by the French law, where the suspect is —**found in possession of objects**, or **presents traces or indications**, leading to the belief that he has participated in the felony or misdemeanor.

- **The —assimilated cases**
- Although the Ethiopian provision covers a bit more ground than the French, it serves the same object of allowing immediate action where attention is called to the offence at **a time soon after its occurrence**.
- Having in Art 19 and 20 established the definition of —**flagrant offence**‖ the code goes on in Articles 21 and 50 to state the procedural consequences thereof:
- in the case of ordinary flagrant offences proceedings may **be instituted without an accusation being lodged**; and, both ordinary and compliant offences, if flagrant, subject the offender to arrest without warrant by any police officer or private citizen if the offence carries a possible **maximum punishment of three months simple imprisonment or a more sever penalty**…

(ii) Application: immediacy and publicity

- phrases as “**has just committed the offence**, “after it has been committed, “the **police are immediately called**, and “**a cry…has been raised.**”
- The obvious crucial questions are, How long a time is “after”? How soon is “immediate”?
- If, two weeks after the **commission of theft**, the victim thinks he recognizes the offender walking on a public thoroughfare may he legally **invite passers-by to chase the suspect and arrest him**? Or does “after it has been committed” in Article 19(2) mean “immediately after…? Does Article 19(1) (in combination, always, with Article 50) authorize a police officer to arrest without warrant an offender who re-appears at the scene of the crime **twelve hours after commission of the offence**? twenty-four? forty-eight? The answering of such questions demands a line-drawing which is never easy.

- Appropriate guides might be sought not only in **foreign law** but by reference to the **purposes of the provisions in question**.
- Why does the law permit these exceptions to the general rule that no one may suffer arrest without **prior court scrutiny and approval of the grounds thereof**?
- The obvious advantages of arrest without warrant over arrest by warrant is that the former allows prompt action by avoiding that **delay involved in traveling to the court and applying for a warrant**.
- According to continental writers, flagrant offences require or permit the omission of such time-consuming formalities on three grounds: **prevention, detection and certainty**.

- **Prevention** applies where immediate arrest is the only way to prevent the offender from **carrying off the fruits of his crime**.
- **Detection** refers to the need for arrest in order to stop the offender from **escaping, and to preserve evidence**.
- **Certainty** refers to the fact where an offender if found “red-handed” there is **no possibility that he is innocent**, so there is no need for such judicial safeguards as a warrant.

- It would be best if the proximity in time required by Art 19and 20 were **interpreted narrowly**, that is, a matter of only a few hours at most after the commission of the offence.
- “publicity” implies the **need promptly to restore disturbed public order and tranquility** by removing the **cause from the scene**.
- In some cases, to **avert further public disturbance** in the form of lynching or other violence committed by the offender or his pursuers.
- Thus it is easy to understand why the concurrence of a “public” offence, together, frequently, with an opportunity to terminate a resulting disturbance while it is in the course of happening, should qualify as an exception to the rule requiring prior court approval of all arrests.

- proper interpretation of every requirement under Art 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 Art 19 or Art 20 reasonably appears to be satisfied in any particular case the power of arrest without warrant granted by **Art 50 must be seen in law as applicable, even if it should later develop that the test was not actually satisfied.** Similarly, the converse must be true of arrests without warrant which do not reasonably appear legal at the time of execution but which are justified, post facto, by the results. In those cases the arrest must be seen as illegal, and the officer held liable for his misconduct.
- For, in order to protect innocent citizens, one cannot allow arrests which, from the point of view of the arresting party at the time of the arrest, were legally unjustifiable**, even though subsequent developments justify prosecution and conviction of the arrestee**. The proper test of the legality of any arrest under Art 50 must be the **apparent, not actual, existence of a flagrant offence**.

Real Time Dispatch

- Adopting **“next day justice”** as called in the United Kingdom by 2006 will bring about a huge improvement…
- **Effect of Illegal Arrest**
- The power of a court to try a person for crime is not impaired by the fact that he had been brought within the court’s jurisdiction by reason of a “**forcible abduction.”**
- Due process of law is satisfied when one present in court is convicted of crime after **having been fairly apprised of the charges** against him and after a fair trial in accordance with constitutional procedural safeguards.
- There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because **he was brought to trial against his will**.

- The doctrine that the manner in which a defendant is brought to trial does not affect the power of the court to try him or her is known as the **Ker-Frisble doctrine**.
- Its principle was previously enunciated in the 1886 U.S. Supreme Court case of Ker v. Illinois in which the court declared that "**forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such a court**."

- However, although an illegal arrest does not affect jurisdiction to try an offender, **the exclusionary rule may affect the trial adversely**.
- The **exclusionary rule**, as it relates to arrest, states that any evidence obtained by exploitation of an unlawful arrest will be **inadmissible in court** in a prosecution against the person arrested.
- Therefore, if the only evidence that the state has against an armed **robbery suspect is a gun, a mask, and a roll of bills** taken during a search incident to an unlawful arrest, the offender will very likely go free because these items will **be inadmissible in court**…

- A confession obtained by exploitation of an **illegal arrest** will also be **inadmissible in court**.
- In Brown V. Illinois, the defendant was illegally arrested in a manner **calculated to cause surprise**, **fright, and confusion and taken to a police station**.
- He was given **Miranda warnings,** and he **waived his rights** and made **incriminating statements**, all within two hours of the illegal arrest.
- The court held that officers could not avoid the effect of the illegal arrest by simply giving the arrested person **the Miranda warnings**.

- The court said:
- The Miranda warnings are an important factor, to be sure, in determining whether the confession is **obtained by exploration of illegal arrest**.
- But they are not the only factor to be considered.
- The **temporal proximity of the arrest and the confession**,
- **the presence of intervening circumstances**, … and, particularly, **the purpose and flagrancy of the official misconduct are all relevant**….And the burden of showing admissibility rest, of course, on the prosecution.

- The prosecution has a difficult burden in **curing the effect of an illegal arrest on a subsequent confession.**
- **In Taylor v. Alabama**, police made an **investigatory arrest without probable cause**, based on an uncorroborated informant's tip, and transported the defendant against his will to the station for interrogation in the hope that something would turn up.
- The defendant was in police custody the entire time, and the police **repeatedly questioned him, took his fingerprints, and subjected him to a lineup without counsel present**.
- The court held that there was no meaningful intervening event to break the causal connection between **the arrest and the confession**, even though;

- (1) **six hours elapsed between the arrest and the confession and**
- **(2) the confession may have been voluntary for purposes of the Fifth Amendment in the sense that Miranda warning were given and understood, the defendant was permitted a short visit with his girlfriend, and the police did not physically abuse the defendant.**
- Many factors must be considered to determine whether a confession is obtained by exploration of an illegal arrest; thus**, it is difficult to predict how a particular court will rule**. For example, despite only a two-hour lapse between an illegal arrest and a confession, in People v. Vance, 185 Cal. Rptr. 594 (Cal. 1982), the court held the defendant's confession **admissible because of the following circumstances**.

- **Proper Miranda warnings were given,**
- **the defendant was confronted with information that tied him to the crimes,**
- **the defendant was allowed to speak privately with his common law wife, and**
- **there was no purposeful or flagrant police activity.**
- Because circumstances in the **police's control often determine the admissibility of a confession following an illegal arrest**, officers should do everything possible to ensure that a confession is a product of the **suspect's free will**.
- If the evidence is not the product of the illegal arrest, however, the **exclusionary rule does not apply**. The indirect fruit of an illegal arrest should be suppressed only when they **bear a sufficiently close relationship to the underlying illegality**. In New York v. Harris, 495 U.S. 14,

- police officers, who had probable cause to believe that the defendant committed murder, entered his home **without first obtaining an arrest warrant in violation of Payton v. New York**…
- The officers read him his Miranda rights and obtained an **admission of guilt**.
- After the defendant was arrested, taken to the police station, and given his Miranda warnings, he **signed a written statement**. The first statement was inadmissible because it was obtained in the defendant's home by exploitation of the **Payton violation**. The statement taken at the police station, however, was admissible. That statement was not the product of being **in unlawful custody**; neither was it the fruit of having been arrested in the home rather than someplace else.

- The police had a justification to question the defendant prior to his arrest. Therefore, his subsequent statement was not an **exploitation of the illegal entry in to his home**.
- Moreover, suppressing a station house statement obtained after a Payton violation would have **minimal deterrent value**, since it is doubtful that the desire to secure a statement from a suspect whom the police have probable cause to arrest would motivate them to **violate Payton**.
- The court therefore held that "**where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of Payton**."
- Finally, a law enforcement officer may be subject to civil liability for **false arrest or false imprisonment if an arrest is illegal or is made with excessive or unreasonable** force.

Pre Arrest Investigation

- Various distinctions are used in grouping **pre arrest investigatory** procedures.
- Lawyer tends to group procedures according to the **governing legal standards:**
- (1) the **agency involved** (distinguishing primarily between the investigative activities of the police and the prosecutor) and
- (2) the focus of the procedure (distinguishing primarily between activities aimed at solving **past reported crimes** and activities aimed at **unknown but anticipated crimes**).
- Those distinctions create **three basic groups of pre arrest investigative procedures**:
- (1) police procedures that are aimed at solving specific past crimes known to the police (“**reactive” procedures**),
- (2) police procedures that are aimed at unknown but anticipated ongoing and future criminal activity (“**proactive**” **procedures**), and (3) prosecutorial and other non-police investigations conducted primarily through the use of **subpoena authority**…

- **Reactive investigations:** 85% of all police officers in the country, traditionally have devoted the vast majority of their investigative efforts to **reactive investigations**.
- This is an "**incident driven" or "complaint-responsive**" style of policing.
- The police received a **citizen report of a crime** (typically from the victim or an eyewitness), or they discover **physical evidence** indicating that a crime has been committed, and they then proceed to initiate an investigation responsive to that "**known crime**."
- This involves:
- (1) determining whether there **actually was a crime committed**,
- (2) if so, determining **who committed the crime**,
- (3) **collecting evidence** of that person's guilt, and
- (4) **locating the offender** so that he can be taken in to custody.

- A **wide variety of investigative activities** may be utilized to achieve these objectives. Those activities include:
- (1) the **interviewing of victims**;
- (2) the interviewing of **witnesses at the crime scene**;
- (3) **canvassing the neighborhood** for (and interviewing) other wise witnesses;
- (4) the **interviewing of suspects**, which may require a physical stopping of the suspect on the **street and a frisk of the suspect** (i.e., pat-down of the outer clothing) for possible weapons;
- (5) the **examination of the crime scene** and the **collection of physical evidence** found there;

- (6) checking departmental **records and computer files**;
- (7) seeking information from informants;
- (8) **searching for physical** evidence of the crime (e.g., stolen property or weapons) in places accessible to the suspect (e.g., his home or automobile) and seizing any evidence found there;
- (9) **surveillance of a suspect** (including electronic surveillance) amid at obtaining leads to evidence or accomplices; and
- (10) **using undercover operatives** to gain information from the suspect.

Post Arrest Investigation

- The initial post-arrest investigation by the police consists of **the search of the person (and possibly the interior of the automobile)…**
- In some cases, such as where the arrestee was caught "**red-handed,"** there will be little left to be done.
- In others, police will utilize many of the same kinds of investigative procedures as are used before arrest (e.g., **interviewing witnesses, searching the suspect's home, and viewing the scene of the crime**).
- The police may seek to obtain an **eyewitness identification of the arrestee** by placing him in a **lineup**, having the witness view him individually (a "show –up"), or

- **Taking his picture and showing** it to the witness (usually with the photographic line up”).
- They may also require the arrestee to provide **handwriting or hair samples** that can be compared with evidence the police have found at the scene of the crime.
- The arrest similarly facilitates **questioning the arrestee at length** about either the crime for which he was arrested or other crimes through to be related (although warnings must be given prior to the custodial interrogation).
- **Releasing the arrestee** at this point and then re arresting him when and if that evidence is obtained),
- **decide against prosecution** if the arrestee will participate in a **diversion program**, or

- simply decide against **prosecution without condition**.
- A prosecutorial decision not to proceed commonly is described as a **“rejection,” “declination” or “no-paper” decision**.
- That decision most often is based on **anticipated difficulties of proof** (e.g., the **evidence is insufficient**, the victim is **reluctance to testify**, or key **evidence was obtained illegally** and therefore **will not be admissible**).
- However, the prosecutor may decide against proceeding, even though the evidence clearly is **sufficient, because other alternatives** (e.g., **diversion, probation revocation, or prosecution in another jurisdiction**) are preferable, or special circumstances render prosecution not “in the interest of justice.”

- Assuming the prosecutor decides to charge, **pre-filing screening presents another important prosecutorial decision-setting** the level of the charge.
- Although an arrest was made on a felony charge, **the prosecutor may decide to go forward on a lesser charge**.
- Prosecutors most **often reduce** the **recommended charge** because they believe that the evidence only supports a **lower charge**, but reductions also may be based on the prosecutor's determination that the penalty for **the higher charge is too severe for the nature of the crime** or that the additional process costs involved in proceeding on a felony (rather than a misdemeanor) are not justified.

Confession

- **The Right to Remain Silent (Common Law)**
- “No person…shall be compelled in any criminal case to **be witness against himself**….”
- Thus the states must prove its case **without the help of the accused** if the accused chooses not to give that help.
- designed **to protect individuals against forced confessions obtained through torture, threats, or other undue pressures**.
- accused can remain silent throughout the **pretrial or trial phase of his or her criminal proceedings**.
- the state must prove that an individual is guilty with **out the help of that individual.**

- the right to protection against self-incrimination achieved its real definition during the period of **religious conflict in the sixteenth and seventeenth centuries**.
- At that time, those accused of crimes were required to **take an oath** to tell the truth without having been informed of the charges against them or of the identity of those who accused them.
- Religious dissenters call on to take the oath faced a serious problem. If they **acknowledged their religion, they were subject to state sanctions**. If they denied their religion, they were going against their conscience and, in their view**, risking eternal punishment**.

- Some dissenters chose to deal with this dilemma by refusing to take the oath and refusing to testify, **claiming that the authorities had no right to require individuals to testify against themselves**.
- Unfortunately, **many of them suffered sever punishments** as a result of their refusal to take the oath. One of the most famous of these dissenters, **the Puritan John Liburne**, defied both king Charles I and Oliver Cromwell and became a popular hero although he was tortured and spent a large part of his life in person or in exile.
- finally **legitimized by Parliament** in the latter seventeenth century.

The Right to Remain Silent (Civil Law)

- In addition to requiring the presence of an attorney, French law requires that the accused be informed of his or her right to remain silent **during the pretrial proceedings.**
- The French process of inquiry appears to be principally concerned with the attempt to obtain an admission of the truth of the charge from a person reasonably believed to be guilty.
- If the accused chooses to make a statement at trial, he or **she is not under oath**, as in common law procedure, and is **not subject to cross-examination**.
- Any confession in the pretrial or trial process is treated as **part of the evidence included in the dossier**. This is a major difference from many common law countries, especially in the United States, **where plea bargaining is the norm**.

Police Interrogation

- … false confessions do not only occur where the suspects are **physically threatened.**
- there were four situations in which people **were likely to confess to crimes they did not commit**.
- First, a minority may make confessions quite voluntarily, **out of a disturbed desire for publicity**, because they can not distinguish between reality and fantasy.
- Secondly, **they may want to protect someone else**, perhaps a friend or relative, from interrogation and prosecution.
- Thirdly, they may be **unable to see further than a desire to put the questioning to an end and get away from the police station**
- Finally, **the pressure of questioning**, and the fact that the police seem convinced of their case, many temporarily persuade the suspect that they must have done the act in question.

The Privilege against Self-Incrimination

- (a) **The Schmerber Case**
- In Schmerber v. Cal. (1966), **the court upheld the taking of a blood sample by a physician at police direction** from a defendant over his objection after his **arrest for drunken driving**.
- violated his Fifth Amendment privilege not to "**be compelled in any criminal case to be a witness against himself.**"
- The court, in a 5-4 decision, rejected this contention and held that "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the **state with evidence of a testimonial or communicative nature**."
- As the court later put it, the privilege only protects one from being compelled to express the "**contents of his mind**."

- In defining the scope of the privilege, the Schmerber majority noted that many identification procedures were not protected by the Fifth Amendment.
- both federal and state courts have usually held that it offers **no protection against compulsion to submit to fingerprinting, photographing or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture**."
- **(b) Application to pretrial identification**
- It is thus not surprising that the court has subsequently relied upon Schmerber in holding that several identification practices **do not conflict with the privilege**: requiring the defendant to appear in a lineup and to speak for identification, or to provide handwriting exemplars.
- The **dissenters argued** that Schmerber was wrongly decided, in that the privilege is designed to bar the **government from forcing a person to supply proof of his own crime**, and that even assuming the correctness of Schmerber the instant cases were distinguishable because each defendant was required "actively to cooperate to accuse himself by a volitional act."

- **(c) Consequences of failure to cooperate**
- what if the suspect will not cooperate? One possibility, “an accused may be jailed- indefinitely until he is willing to” cooperate. Indeed, some courts have utilized civil contempt and criminal contempt as a means to coerce or punish the suspect who failed to comply with a court **order to participate in some identification proceeding**.
- Another possibility is that the prosecution may be permitted t**o comment at trial on the lack of cooperation**.
- **(d) Change in appearance**
- If a suspect drastically alters his appearance between the time of the crime and of identification procedures, **this is admissible at trial as an indication of consciousness of guilt**.

- Guidelines for Lineup Identifications
- In general, the decision to conduct a lineup is made at the discretion of the police or prosecution. Although the police, the prosecution, or the court may grant a suspect’s request for a lineup, there is no requirement that a request be gained. United States v. Harvey, 756 F.2d 636 (8th Cir. 1985). The following are guidelines for the law enforcement officer in conducting a lineup identification procedure.

Fruit of Poisonous Tree Doctrine

- The exclusionary rule is not limited to evidence that is the direct product of illegal police behavior, such as a **coerced confession or the items seized as a result of an illegal search**.
- The rule also requires exclusion of evidence that is obtained indirectly **when one's constitutional rights are violated**.
- This type of evidence is sometimes called derivative evidence or secondary evidence.
- The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used **before the court but that it shall not be used at all**.
- Thus, the prosecution may not use in court evidence **obtained directly or indirectly from an unconstitutional search**.
- The prohibition against using this derivative or secondary evidence is often called the rule against admission of "**fruit of the poisonous tree**."

- **exclusionary rule to unconstitutional searches,** it has been applied equally to evidence obtained as the indirect result of other constitutional violations.
- Thus, evidence may be inadmissible if it is acquired indirectly as a result of **an illegal stop, an illegal arrest, an illegal identification procedure, or an involuntary confession.**
- The fruit of the poisonous tree doctrine applies only when a person's **constitutional rights have been violated**.
- Nevertheless, the fruit of the poisonous tree doctrine may apply in different ways depending on the type and severity of the underlying violation of constitutional rights.

Current Issues: Involuntary Confessions and Art 35

- **Coercive interrogation: ineffective and unlawful**
- accused's confession of guilt which has been procured through **physical violence, psychological intimidation, or improper inducements or promises cannot be considered in evidence against him at trial**.
- The primary reason why involuntary confessions are excluded from evidence is that they are **unreliable indices of truth**: men have been known to admit crimes of which they are innocent, **simply to escape the pain of torture or to obtain an irresistible benefit.**
- The exclusionary practice also expresses society's condemnation of police **"third degree" methods**, which not only violate the accused's privilege against self-incrimination, but, **by inflicting harm on one merely suspected, not convicted, of crime, nullify his constitutional right to the presumption of innocence**.

- CPC frowns severely upon the use of coercion against persons being investigated under **suspicion of crime**.
- The CPC states quite clearly that "***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***."
- Violation of this command subjects the police officer to both **civil and penal sanctions**.
- the **courts do not allow** into evidence confessions which have been obtained by force.
- But, it must be asked, are **the exclusion of coerced confessions** and the threat of sanctions having their **intended effect**?
- In many cases in the High Court, **convictions are based wholly or in part upon confessions** given by the accused to the police while in their custody.
- And, in many cases, the accused repudiates his confession at trial, **claiming it was the result of coercion**, while the police in truth insist it was not.
- how is the trial court to distinguish between the **free confession and the forced one**?
- It seems that cases are rare in which the accused is able to convince the court to exclude the confession, and no wonder: When the police interrogate a **suspect there are no witnesses, no friends, no family present**.

- Foreign **“solutions” to the third degree**
- This problem of distinguishing voluntary from involuntary confessions is **not unique to the Empire**.
- It has been faced in many other countries, and **“solutions” worked out**.
- In England, for example, the rule **excluding involuntary confessions was not**, by itself, felt sufficient to deter the police from coercive methods.
- The police must inform a suspect of his **privilege against self-incrimination** as soon as the police officer decides in his mind to charge him, and, **once the suspect is in custody, he may not be questioned at all**.

- Extraction of a confession in violation of the Rules confers upon the trial court a **discretion to exclude it from evidence**.
- Thus the English system tries to avoid the possibility of improper police interrogation**, by forbidding all interrogation of the accused while he is in custody-the time when the "third degree" generally takes place**.
- **The Americans** have resorted to other means of deterring the police from using improper methods.
- In addition to the rule excluding involuntary confessions from evidence, the federal courts automatically exclude any confession, "voluntary" or "involuntary," which is **obtained while the police are unlawfully holding the accused-e.g., during a period of "unnecessary delay" between his arrest and his appearance in court**, if his right to **counsel was denied at that time**.

- Under the Indian Criminal Procedure Code the **police are permitted to question a suspect at length**, and **need not caution him to remain silent**.
- But generally, no confession the accused makes to the police, to be admissible it **must be made before a magistrate.**
- To discourage police coercion, then the **Indians do not recognize as evidence the results of police interrogations**.
- **The Ethiopian approach; Art 35**
- The drafters of Ethiopian's Code were to some extent looking **towards the Indian system**.
- In India confessions so recorded BY magistrate are **admissible in evidence at trial**.
- It was the intention of drafters of our CPC.
- police wish to have **proved at trial, recorded and certified "voluntary" under Article 35**.
- Confessions not so recorded should **be inadmissible against the accused, as they are in India.**

Miranda v. Arizona

- The warning of the right to remain silent must be accompanied by the **explanation that anything said can and will be used against the individual in court**.
- This warning is needed in order to make him aware not only of the privilege, but **also of the consequences of forgoing it**.
- not only that he has the right to **consult with an attorney**, but also that if he is indigent a lawyer will be **appointed to represent him**.
- "Presuming waiver from a **silent record is impermissible**.
- The record must show, or there must be an allegation and evidence which show, that **an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waive**r."

- To summarize:

- He must be warned as he has the **right to remain silent**,
- anything he says can be **used against him in a court of law**,
- he has the right to the **presence of an attorney**,
- Opportunity to exercise these rights must be afforded to him **throughout the interrogation**.
- After such warnings have been given, and such opportunity afforded him, **the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement**.
- But unless and until such warnings and waiver are **demonstrated by the prosecution at trial, no evidence obtained** as a result of interrogation can be used against him.

No. 759. Miranda v. Arizona.

- *On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to "Interrogation Room No. 2" of the detective bureau. There he was questioned by two police officers. The officers admitted at trial that* ***Miranda was not advised that he had a right to have an attorney present****. Two hours later, the officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and "****with full knowledge of my legal rights, understanding any statement I make may be used against me****."*
- *At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years' imprisonment on each count, the sentences to run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's* ***constitutional rights were not violated in obtaining the confession and affirmed the convicti****on. 98 Ariz. 18, 401 P. 2d 721. In reaching its decision, the court emphasized heavily the fact that Miranda* ***did not specifically request counsel.***

The final judgments

- **We reverse.**

- From the **testimony** of the officers and by the **admission of respondent**, it is clear that:
- **Miranda was not in any way appraised** of his **right to consult with an attorney** and
- to have one **present during the interrogation**,
- nor was **his right not to be compelled to incriminate himself effectively protected in any other manner.**
- **Without these warnings the statements were inadmissible.**
- 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…**
- Therefore, in accordance with the foregoing, the judgments of the Supreme Court of Arizona in No. 759… **reversed**

Abebe Esubalew vs Public Prosecutor

- **Facts-** The appellant was accused of **killing his wife violating** Art 522/1/a of the PC and **discarding her corpse transgressing** Art 487/2 of the PC.
- He **pleaded not guilty** and the **evidence of the prosecution was heard**.
- There were two prosecution witnesses. One of the witnesses testified that he saw the appellant and the **deceased going to a forest one day**.
- The other witness, chairman of the rural kebele, expressed that the appellant told him that **his wife had absconded stealing 50 birr** denying guilt for her disappearance and then **searching the forest a human bone was found**.
- There were also two documentary evidences:
- The first was **the confession of the appellant administered** in accordance with Art 35 of the CPC in the wereda court.
- The second was expert evidence proving that the bone **found is that of a human being**.
- Then the accused was **told to defend**. His defense was based on alibi and proving the **use of force before the confession in the wereda court**.
- He had four witnesses. Two of them **proved the alibi**. The remaining testified the torture committed on the appellant at the police station to make him confess in the wereda court.

- The High Court found him guilty under Art 523 and 487/2 of the **PC and sentenced him to 15 years rigorous** imprisonment. He appealed to the Supreme Court.
- Issue- Whether the accused is guilty of the two offenses?
- Decision- **The Central Supreme Court reversed the judgment and sent the appellant free**.
- Reasoning of the Supreme Court- The Court argued that evidences other than the confession were not sufficient to warrant conviction. **As regards the confession, the appellant had proved the use of force to obtain it**. He had told to one of the prosecution witness before the confession that he had no responsibility for what happened. The Court determined unconvincing the content of the confession alleging that he killed his wife as a result of her communication to the appellant the fact of secret love affair and giving birth to one child in that relationship. The Court said that it is unthinkable to expect a woman exposing such kind of affair to her husband. It took it for granted that the appellant was coerced to speak.
- **The Court asserted that it would have accepted the confession, had the appellant shown the corpse of the deceased and instruments utilized for the crime**. What matters is the fruit of the **third degree**. The bone was found by another person. As a result, **the confession could not be admissible.**
- The **Court also touched the problem of rejecting a confession administered by wereda court**.
- It underlined the **possibility of coercion following return from the wereda court to the police station**.
- Hence, the justification for rejecting confession given to the wereda court.

Search and Seizure

- Search and seizure is a legal procedure used in many civil law and common law legal systems whereby police or other authorities and their agents, who suspect that a crime has been committed, **do a search of a person's property and confiscate any relevant evidence to the crime.**
- Most countries have provisions in their constitutions that provide the public with the right to be free from "**unreasonable**" search and seizure.
- This right is generally based on the premise that everyone is entitled to a **reasonable right to privacy**. democracies.
- Though interpretation may vary, this right usually requires law enforcement to obtain a **search warrant** before engaging in any form of search and seizure.

Canada

- In Canada, For a search to be "**reasonable**“:
- it must be **authorized by law**,
- the law itself **must be reasonable**, and
- the **manner in which the search** was carried out must be reasonable.
- This means that the officer must be acting **within the power of a valid statute**, and
- it must be performed on the basis of there being "**reasonable and probable grounds**" that a crime has been committed.

United States

- The Fourth Amendment to the United States Constitution ensures citizens' right to "**be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures** ..."
- "no warrant 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**."
- a **valid warrant is required for a valid search**.
- There are, however, several **exceptions to this rule**.
- For instance, the owner of the property in question **may consent to the search**.
- When an individual does not possess a "**reasonable expectation of privacy**“
- . For example, a writing on the outside of an envelope sent through the **mail or left for pick-up in an area where others might view it.**

- Courts have also established an "**exigent circumstances**" exception to the warrant requirement.
- "Exigent circumstances" simply means that the **officers must act quickly**.
- police have a **reasonable belief** that evidence is in **imminent danger of being removed or destroyed**.
- Exigent circumstances may also exist where there is a **continuing danger**
- where officers have a reasonable belief that **people in need of assistance.**
- Certain limited searches are also allowed during an investigatory **stop or incident to an arrest**. These searches are **called refined searches.**

- The primary remedy in illegal search cases is known as the "**exclusionary rule**".
- There are some narrow exceptions to this rule.
- For instance, if police officers **acted in good faith**--perhaps pursuant to a warrant that turned out to be invalid, but that the officers had believed valid at the time of the search--evidence may be admitted.
- Further, under the "fruit of the poisonous tree" doctrine, additional evidence discovered as a result **of illegally obtained evidence is also inadmissible**.
- **Stop-and-Frisk** and Other Brief Detention
- frisk could be undertaken upon facts which **would not support an arrest and full search.**

Administrative Searches

- the U.S. Supreme Court held that "**inspections" by health department** officials were not searches within the meaning of the Fourth Amendment because the amendment was primarily concerned with **searches for evidence of criminal activity**, and only peripherally concerned with the right of privacy.
- only when the individual is **suspected of criminal behavior**.
- the Fourth Amendment was applied to a **public school official's search for cigarettes that violated the school's no smoking policy**.
- administrative inspections are relevant to the criminal justice system when **evidence of criminal activity** is discovered in the course of an inspection conducted by a civil agency Search of the person **after arrest.**

Execution of Search Warrant

- When assessing the constitutionality of a search the courts have considered
- (1) the time at which the **search is conducted**,
- (2) the **manner of entering** the defendant's premises, and
- (3) the **scope of the search conducted by the police officers.**
- federal search warrants must be executed **within ten days of their issuance**.
- most courts recognize that a search warrant executed **beyond the statutory period is an illegal search**.
- Some jurisdictions also have statutory provisions regulating whether a search warrant may be executed during the day **time or night time**.

- **The manner of entering the defendant's premises**. In most situations, police officers must seek admittance by **announcing their presence, identifying themselves as police officers, and stating their purpose**.
- This procedure is commonly referred to as **the knock and notice requirement**.
- Some states specifically provide for the issuance of **no knock warrants in certain cases, most commonly, drug offenses.**
- These exceptions apply when:
- (1) announcing their presence would allow **suspects to escape**, or
- (2) giving notice would be likely to **result in the destruction of the evidence** sought to be seized.
- Failure to comply with the knock and notice requirement, or to establish a recognized exception, renders the **search unconstitutional**.
- **The scope of the search**.
- police may only search the premises **described in the warrant and may only search for the items listed in the warrant**.

Effect of Illegal Search and Seizure

- **the exclusion of the evidence** obtained from use in court against the person whose rights were violated…
- Another possible effect of an illegal search and seizure is the **civil or criminal liability** of the officer conducting the search and seizure.
- As with an illegal arrest, the consequences for the officer depend on the circumstances of each case, including the officer's **good faith, the degree of care used, the seriousness of the violation, and the extent of injury or intrusion suffered by the defendant**.

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

3.1. Remand

- **Initial Appearance**
- Due process requirements mandate that within a reasonable (**not extreme or arbitrary**) time after arrest, the accused person must be brought before a magistrate and **given formal notice of the charge**.
- Such notice occurs at the **initial appearance**.
- At this time the accused is also **notified of his or her legal rights**.

- **Release on recognizance** (ROR), a substitute for bail, can also occur, typically at the recommendation of the magistrate, when **there seems to be little risk that the accused will fail to appear for trial**.
- For some kinds of minor offenses, such as being drunk and disorderly, or in cases in which a simple citation has been issued, **summary trials and sentencing are conducted at this initial appearance**, with no further court processing.

The Judicial Decision to Release

- An arrested person must promptly be taken before a magistrate, who is a judge at the **lowest level of the judicial hierarchy and who makes a determination that probable cause exists**.
- The magistrate must also repeat the Miranda warning and then whether to release the defendant on bail; or to **detain the defendant** in jail pending further proceedings.

3.2. Release on Bail

- Bail
- Persons accused, convicted or under arrest for an offence may be granted bail, which means they are **released under a duty to attend court or the police station at a given time**.
- Bail need not be granted where there are substantial grounds for believing that, unless kept in custody, the **accused would fail to surrender to bail, or would commit an offence, interfere with witnesses or otherwise obstruct the course of justice**.
- In assessing these risks, the court may take account of the **nature and seriousness of the offence and the probable sentence, along with the character, antecedents, associations and community ties of the defendant**.

- The Criminal Justice Act 2003 has given the police the power to grant bail at the **place of arrest**. This is called **“street bail**”. It means that the police do not have to take suspects to the police station and undertake **lengthy paperwork**. A form is completed on the street and later entered in police records. The power is unlikely to be used much until compulsory ID cards have been introduced.
- **Methods of Pre Trial Release**
- Financial Bond Both financial bonds and alternative release options are used today
- **Fully secured bail-** The defendant posts the full amount of bail with the court.
- **Privately secured bail-** A bondsman signs a promissory note to the court for the bail amount and charges the defendant a fee for the service (usually percent of the bail amount).

- **Deposit bail-** The court allow the defendant to deposit a percentage (usually 10 percent) of the full bail with the court.
- **Unsecured bail-** The defendant pays no money to the court but is liable for the full amount of bail should he or she fail to appear.

Alternative Release Options

- **Release on recognizance (ROR)-** The court releases the defendant on the promise that he or she will appear in court as required.
- **Conditional release-** The court releases the defendant subject to his or her following specific conditions set by the court, such as **attendance at drug treatment therapy or staying away from the complaining witness**.
- **Third party custody-** The defendant is released into the custody of an individual or agency that promises to assure his or her appearance in court. No monetary transactions are involved in this type of release.
- **Citation release-** Arrestees are released pending their first court appearance on a written order issued by law enforcement personnel.

Forms of bail

- the common forms of bail include:
- • **Recognizance** — a promise made by the accused to the court that he/she will attend all required judicial proceedings and will not engage in illegal activity or other prohibited conduct as set by the court. Typically a monetary amount is set by the court, but is not paid by the defendant unless the court orders it forfeited; this is denominated an unsecured appearance bond or release on one's own recognizance.
- • **Surety** — when a third party agrees to be responsible **for the debt or obligation of the defendant**.
- • **Conditions of release** - many varied non-monetary conditions and restrictions on liberty can be imposed by a court to ensure that a person released into the community will appear in court and not commit any more crimes.

- **Protective order**-a court order requiring the defendant to **refrain from criminal activity** against the alleged crime victim, or stay away from and have no contact with the alleged crime victim.
- Violation of the order can subject the defendant to automatic **forfeiture of bail and further fine or imprisonment**.
- • **Cash — typically** "cash-only," where the only form of bail that the Court will accept is cash.
- • **Combinations** - courts often allow defendants to post cash bail or bond, and then impose further conditions, as mentioned above, in order to protect the community or ensure attendance.

Bail by a court

- The main reasons for refusing bail are that the defendant is accused of an imprison able offence and there are substantial grounds for believing that the defendant:
- 1. will abscond;
- 2. will commit further offences whilst on bail; or
- 3. will interfere with witnesses.
- The court should take into account:

1. **the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it),**
2. **the character, antecedents, associations and community ties of the defendant,**
3. **the defendant’s bail record, and**
4. **the strength of the evidence.**

The court may also refuse bail:

- **for the defendant's own protection;**
- **where the defendant is already serving a custodial sentence for another offence;**
- **where the court is satisfied that it has not been practicable to obtain sufficient information;**
- **where the defendant has already absconded in the present proceedings;**
- **where the defendant has been convicted but the court is awaiting a pre-sentence report, other report or inquiry and it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody;**
- **where the defendant is charged with a non-imprisonable offence, has already been released on bail for the offence with which he is now accused, and has been arrested for absconding or breaching bail.**

Failure to Comply with Bail

- Failing to comply with bail conditions is not an offence, but may lead to the defendant being arrested and brought back to court, where they will be remanded into custody unless the court is satisfied that they will comply with their conditions in future.

Habeas Corpus

- A prisoner can challenge the legality of detention by petitioning for a writ of **habeas corpus**.
- Such a writ orders the person holding the prisoner to produce him or her in court and justify depriving the person of his or her liberty.
- It is available where the court sending the petitioner to prison was powerless to do so or where such detention violated the prisoner’s constitutional rights.
- The **writ of habeas corpus is available**, either by statute or constitutional provision, in every state, but it is generally considered an extraordinary remedy, to be used only when other adequate procedure exists to protect the petitioner’s rights. It is not a second chance to litigate the case or a substitute for normal appeal procedures

- Habeas Corpus (Ethiopia)
- Habeas Corpus (literally, in Latin, “you have the body”) is the procedure by which a **person illegally detained may obtain release from such detention**.
- It **is a civil remedy**, although in most cases the person seeking release from custody will have been detained on a charge of committing a **criminal offence** from arbitrary restraint by government officials. (177ff)

PROSECUTION AND PRELIMINARY INQUIRY

- Prosecution is not the exclusive business of the **public prosecutor**.
- Other organs of the state are also involved in **one way or another**.

The Continuation or Discontinuance of the Prosecution

- Several different actors in the process have a **unilateral power to bring the proceeding to an end**.
- First, the police can drop the case in the **early stages**. They may decide to **caution the offender instead of prosecuting him** or, more simply, they may decide to take no further action.
- Secondly, once the file has reached the hands of the prosecutor may decide to drop the proceedings by issuing a '**notice of discontinuance**'
- Finally, at common law the prosecution may also halt the proceeding by simply refusing to call **evidence usually at the outset of the trial, but occasionally even after it has begun**.

- Lastly, the court itself has various **powers that enable it to terminate the proceedings**.
- One of these is the common law power to terminate the proceedings for what is called '**abuse of processes**'.
- **Agreement between the victim and the accused**

Termination of the Procedure

- The decision to drop the charges on legal grounds… is pronounced by the public prosecutor if the proceedings for the offence **alleged are legally unfounded** [absence of the constituent elements] or
- procedurally barred [**time- barred, death of the accused, unknown perpetrator, and so on**].
- Dropping a case does not finally dispose of it unless and until the **prescription period elapses**…

The Discretion to Prosecute

- The code indicates that the decision to prosecute must be **made in two stages**.
- The prosecutor must first be satisfied that there is enough **evidence to provide 'a realistic prospect of conviction**'; if not, he must not proceed with the case.
- Secondly, even where there is a realistic prospect of conviction, he must be satisfied that it is in **the public interest to bring a prosecution in this case**. With this in mind, the code lists a series of factors that should weigh in favour of a prosecution, and a number of other factors that should weigh against. The courts have subsequently held that, in extreme cases, a decision made in disregard of the principles contained in the code can be the subject of judicial review.

Decision to Charge

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

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

- In Ethiopia, the decision to prosecute or not has now been left to the **public prosecution office**.
- Anyone aggrieved has to follow the hierarchical channel till the general attorney, now head of the Ministry of Justice and justice bureau heads at the federal and regional levels, respectively.
- It appears that there is **no judicial review**.
- The possibility for court intervention in the process is **debatable**.
- The CPC contains provisions regulating the manner of deciding whether to **charge or not**.
- As the law stands, there is no law clearly empowering the public prosecutor to drop charges. Art 122 of the CPC has been repealed by Proclamation No. 39/93. Art 23/3 of Proclamation No. 471/2005 allows withdrawal based on a law.

The Preliminary Inquiry (Article 80-93, CPC)

- **Function of the Preliminary Hearing**
- **(a) Screening.** The preliminary hearing, also known as the “preliminary examination” or the “probable cause” or “bind over” hearing, is a judicial proceeding, hearing, is a judicial proceeding, commonly conducted by a magistrate and **available only in felony prosecutions**. At that proceeding, the prosecution in an open and adversary hearing must establish that there is **sufficient evidence supporting its charge to “bind the case over”** to the next stage in the process (either review by the grand jury or the filing of information in the trial court).
- Preliminary hearing screening is said to serve to prevent **hasty, malicious, improvident, and oppressive prosecutions**, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and **to save the defendant from the humiliation and anxiety involved in public** prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based.
-

- **(b) Discovery.** The defendant may obtain even more discovery by **cross-examining the prosecution's witnesses at the hearing and by subpoenaing** other potential trial witnesses to testify as defense witnesses at the hearing.
- The extent of the discovery obtained in this manner will depend up on several factors, including: (1) whether the prosecution can rely entirely on hearsay reports and thereby sharply limit the number of witnesses it presents…; (2) whether, even assuming hearsay cannot be used, the bind over standard may be satisfied by the presentation of a minimal amount of testimony on each element of the offense…; (3) whether, notwithstanding the ease with which the standard is met, the prosecution still follows a general practice of presenting most of its case; (4) whether the defendant is limited, both in cross-examination and in the calling of witnesses, to direct rebuttal of material presented by the prosecution… ; and (5) whether the defendant is willing to bear the tactical costs that may be incurred in utilizing his subpoena and cross-examination authority for discovery purposes.

- **(c) Future impeachment.** the more likely that there will be some inconsistency between their trial testimony and their serious statements.
- **(d) The Perpetuation of testimony.** the hearing perpetuates the testimony of witness, ensuring that it may be used even if the witness should die, disappear, or otherwise become unavailable to testify.
- **(e) Other functions.** gain release, plea bargaining process, educational process,

THE CHARGE

- After the public prosecutor decided that there is **sufficient evidence to warrant conviction**, the next step is preparation of a charge/indictment.
- The charge has to fulfill **technical and legal requirements to facilitate the trial process**.
- The provisions relating to “charges” are intended to provide that the **“charge” shall give the accused full notice of the offence charged against him**.
- The purpose of a charge is:
- to tell an accused person as **precisely and concisely as possible of the matter with which he is charged** and
- must convey to him with **sufficient clearness and certainty** what the prosecution intends to prove against him and of which he will have to clear himself.

Indictment Consists of Three Parts

- an indictment is '**a plain, brief, certain narrative of an offence committed**'.
- An indictment now consists of three parts: (a) **the commencement, (b) the statement of offence, and (c) the particulars of offence**…
- **(a) The commencement**
- This states the place of the **court's jurisdiction, usually a particular county or area**.
- (b) **The statement of offence**
- The statement of offence, with which every count must begin, merely names the crime charged , e.g. 'murder', 'manslaughter', 'cruelty to a child, contrary to sect. I of the Children and Young Persons Act, 1933'.
- Under the Act of 195 it must use **ordinary language, avoiding technical terms** as far as possible, and **need not set out all the essential elements of the offence**.
- If the offence be a statutory one**, the statute and the particular section must be specified in the statement.**
- **(c) The particulars of offence**
- The particulars of offence follow, in order to inform the accused as to the circumstances-e.g**. time, place, conduct, subject matter-of the crime which has thus been alleged against him**, in fact, such particulars as may be necessary for giving reasonable information as to the nature of the charge.

- Here again, ordinary language is to be employed, and the use of **technical terms is not to be necessary**.
- But they must be sufficient to indicate to the accused ‘with **reasonable clearness**’ the **occasion and the circumstances of his crime**.
- This is necessary for that he may be able to know what **defense to offer** and, moreover, he may be able to know whether he be prosecuted **a second time for this same misdeed**, to protect himself by showing…that the identical charge has already been dealt with.