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BAHIR DAR UNIVERSITY
FACULTY OF LAW

Law of Criminal Procedure

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July 2006

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Contents

Course Introduction.....5
CHAPTER ONE.....6
General Notions.....6
1.1. Meaning.....6
Purpose of the Criminal Procedure Law.....7
1.2. The Orientation Standard:.....7
1.3. Overview of the Criminal Justice Process.....8
1.4. Sources of the criminal procedure law.....11
1.5. Historical Roots of Modern Criminal Procedure.....11
1.6. Systems of Criminal Procedure.....12
CHAPTER TWO.....14
Commencement of the Criminal Justice Process.....14
2.1 Setting Justice in Motion.....14
2.2 How is Justice Set in Motion?.....14
2.2.1. Accusation.....14
2.2.2. Complaint.....15
2.3. Forms of accusation and complaint.....17
2.4. Flagrant Offenses.....19
2.5. Effects of flagrancy.....21
CHAPTER III.....23
Investigation I.....23
3.1. Summons And Arrest.....24
3.2. Summons.....24
3.3. Arrest with Warrant.....27
3.4. Arrest without warrant.....33
3.5. Effecting Arrest.....37
3.5.1. Assistance to arrest.....41
3.5.2. Post arrest procedures.....42
3.6. Remedies to Illegal Arrest.....44
3.6.1. The preventive measures:.....45
3.6.2. Remedial Measures:.....45
CHAPTER IV.....51
Post Arrest Investigation.....51
4.1. Interrogation.....51
4.1.1. Confession given freely.....55
4.1.2. Confession on the course of interrogation:.....56
4.2. Confessions given to courts.....60
4.2.1. The need for collaborative evidence.....62
4.3. The Law of Search and Seizure.....65
4.3.1. Search with warrant.....66
4.3.2. Search without warrant.....71
4.4 Remedies for Illegal Search and Seizure.....75
CHAPTER V.....78
First Court Appearance.....78

5.1. Remand of the case of the suspect....78
5.1.1. Grounds of Remand....79
5.1.2 Rights of persons remanded in custody....80
5.2. The right to be released on bail....81
5.2.1. Factors to be considered in deciding on bail....84
5.2.2. Amount of the Bail Bond....86
5.2.3. Effect of Bail Bond....88
5.2.4. Appeal on the court□s decision on bail....88
CHAPTER VI....91
The Powers and Duties of the Public Prosecutor....91
6.1. Decision to institute proceedings....91
6.2. Preliminary Inquiry....94
6.3. Preparing the Charge....99
6.3.1. The Charge in General....99
6.3.2. Form and Content of Charges....100
6.3.3. Alternative and Concurrent Charges....102
6.3.4. Charging Aggravated Offences....104
6.3.5. Charging Concurrent Offences....105
CHAPTER VII....107
Jurisdiction and Venue....107
7.1. Judicial Jurisdiction....107
7.1.1. Principal jurisdiction....108
7.1.2. Subsidiary Jurisdiction....110
7.2. Subject Matter Jurisdiction....112
7.2.1. Federal Subject Matters....113
7.2.2. Criminal Jurisdiction of State courts....117
7.3. Local Jurisdiction....117
7.3.1. Place of Trial....118
7.4. Change of Venue and Withdrawal of Judges....121
7.4.1. Change of Venue....121
7.4.2. Withdrawal of Judges....124
7.5. Amendment to and withdrawal of charges....125
7.5.1. Amendment of the Charge....126
7.5.2. Withdrawal of charges....129
CHAPTER VIII....131
The Trial....131
8.1 Aspects of Fair Trial □ General....131
8.1.1 The right to counsel....132
8.1.2. The Right to speedy Trial in Open Court....133
8.1.3. Right of Access to Evidence....134
8.1.4. Presumption of Innocence....135
8.2. Objections to the Charge....136
8.3 The Production of Testimonies....139
8.3.1 Examination of Witnesses....140
8.3.2. Examination □ in Chief....140
8.3.3 Cross □ Examination....141

8.3.4. Re-Examination.....142
8.4. The Role of the Judge in Examination of Witnesses.....143
8.5. The Production of Additional Evidence.....143
8.6 □No Case□ Motion.....145
8.7 The Judgment.....147
CHAPTER IX.....149
Special Procedures.....149
9.1 Appeal.....149
9.1.1 The right to appeal.....149
9.1.2. Procedures on appeal.....150
9.2. Stay of execution.....151
9.3. Special Provisions for Young Offenders.....151

Course Introduction

Hello Dear Student!

This is the course on the Ethiopian Law of Criminal Procedure. The course focuses on the laws and rules governing the investigation and prosecution of crimes. The criminal procedure law, being the realm of the law where the concern of human rights is greatly involved, much of the discussion in the module revolves around the rights of the accused recognized under the FDRE Constitution and International instruments. Accordingly, an attempt would be made to enable you grasp the necessary Knowledge on the rules of criminal procedure involved in the pre-trial, trial and post-trial stages of the criminal proceeding. Accordingly, we would be sifting through the laws and rules governing the criminal proceeding as they appear in the present day Ethiopia.

As a necessary accompaniment to the course, you are required to have the criminal procedure code, with you. In addition, it is advisable that you have the FDRE constitution. That would make it easy for you to be better acquainted with the topics covered under the course.

I would conclude the course introduction wishing you a happy academic season

Teshager Worku
July, 2006

CHAPTER ONE
General Notions

Introduction

Criminal Procedure, also called "the code of honest people", refers to those laws and rules that govern the criminal justice process. The chief task of the system is to provide effective procedures for accurately selecting out of the community those who have Offended against the penal law, and seeing that they are subjected to the prescribed sanctions / treatment. We will look each of these procedures in the proceeding chapters of this module. Before that, however, the need arises to deal with some general features of the criminal justice system. Accordingly, this chapter is devoted to the treatment of the following issues: -

- The concept of criminal procedure in general; meaning and definition.
- The important goals of the criminal justice system. On distinguishing the different systems of criminal procedure
- The historical and theoretical backgrounds of the criminal justice system.

Dear student, this chapter is intended to acquaint you to understand those concepts so that you would be able to have background knowledge in the discussion of the subject in the proceeding chapters.

1.1. Meaning

Procedural laws are those laws prescribing the means of enforcing rights or providing redress of wrongs. Substantive laws define and regulate legal rights and duties to be effective, however, the law must go beyond the determination of rights and obligations to an indication of how these rights and obligations can be enforced. When doing so, it must do this in a systematic and formal way. For the maintenance of social peace, the numerous disputes that arise in a complex society should be handled efficiently, fairly and without the appearance of favoritism. This systematic and formal way is procedural law. Therefore, procedural law constitutes the sum total of legal rules designed to ensure the enforcement of rights by means of the courts. Because procedural law is only a means for enforcing substantive rules, there are different kinds of procedural laws, corresponding to the various kinds of substantive law for example, for rights recognized under the civil code, there is the civil procedure law and in case of administrative law, there are administrative procedure laws.

Dear student, do you understand what procedural laws are? Well, then, what is criminal procedure law?
Criminal law is the branch of substantive law dealing with punishment for offenses against the public. As its corollary, we have criminal procedure, which indicates how the sanctions of criminal law must be applied. Hence, the law of criminal procedure is the set of rules that specifies the steps (procedures) to be followed in criminal cases in order to give effect to the substantive law (penal law).

Specifically, it regulates the modes of apprehending, charging, and trying suspected offenders; the imposition of penalties on convicted offenders; and the methods of challenging the legality of conviction after indictment is entered.

Purpose of the Criminal Procedure Law

The most basic goal of the criminal procedure law with in the criminal justice process is helping the society to screen out the offender. As regards the goals of the justice system, however, there are several competing philosophies, each with their own specific goals for the system. Some of the most commonly accepted goals are classified based on different standards; the orientation standard, pragmatic standard and abstract standard.

1.2. The Orientation Standard:

In this approach, criminal justice professionals are oriented towards one of the two opposite directions "law and Order" or" individual rights." The "law and order" orientation stresses the need to solve the criminal problem. The "individual rights" orientation stresses the need to protect the individual's rights and considers this need greater than the need to punish offenders. The "law and order" goal of the criminal justice system do have the purpose of screening criminals from the society. Hence, whatever is laid down under the criminal procedure law; should target at the means of achieving this purpose in the individual rights orientation, however, a caution is needed to give protection to individual rights of the accused through out the proceeding. Too great emphasis on individual rights will restrict law enforcement and allow offenders to escape punishment. Arbitrary police practices that may occur under the "law and order" orientation may infringe on human and constitutional rights. Therefore, there is a need to strive the balance between the two; the law of criminal procedure should intend to accommodate these twin goals at the same time.

Dear student, do you think these goals are incorporated under the Ethiopian criminal procedure code?
We will see to it later on.

The pragmatic standard:

The pragmatic standard has many goals that ought to be achieved through the criminal justice system. These goals include:

Preventing crime: This goal includes providing potential criminals with conventional opportunities for success before they start a career of crime, building stronger social control units such as the family, providing guidance and counseling and developing better environmental conditions in the neighborhoods that faster law abiding behavior.

Diverting offenders: This goal refers to the efforts to take offenders out of the system and place them in non-punitive treatment programs. The purpose of this effort is to correct the offender without placing the stigma of a criminal conviction on the offender.

Deferring crime: The justice system attempts to defer crime by making potential criminals believe that the punishments received for criminal behavior outweigh any potential benefit (i.e., crime does not pay)

Controlling criminals: by this goal, the system attempts to control the behavior of known criminals by incarcerating the more serious offenders and placing the less serious ones in community correction programs.

Rehabilitating offenders: According to this, an objective of the system is to provide rehabilitation treatment to offenders in order to reduce the likelihood of future involvement in criminal behavior.

The abstract standard:

These are the underlying principles up on which the justice system of most of the countries in the world is based. The most common goals include:

Fairness: This provides that the justice system should seek to ensure that all persons involved in the criminal justice system are treated fairly and humanely. More specifically, socio economic status and ethnicity should not determine the type of treatment or form of punishment one receives from various criminal justice agencies.

Efficiency: The system should be organized and managed in a manner to ensure maximum utilization of personnel and resources.

Effectiveness: The goal of effectiveness is that the justice system should operate in an effective and efficient manner.

Justice: Justice is considered as the "ideal" of all government and the disposition of a criminal matter in a manner that the best interest of society is served. It is not measured solely by its application to the accused. Justice is the broad concept of reward and punishment currently accepted as proper by a society. A certain court judge in the U.S has defined "justice" as follows:

"It is the dictate of right, according to the common consent of mankind generally or of that portion of mankind who may be associated in one government, or who may be governed by the same principles and morals".

Dear student, these are the different views on the purpose of the criminal justice system as a whole. Whatever the purposes of the system and importantly, the substantive law may be, the tasks of the criminal procedure are basically the same. No modern state fails to attend to the very important functions of the criminal procedure code in the detection, apprehension, prosecution, guilt determination, and punishment of offenders publicly, ceremonially, and in away likely to reinforce rather than undermine the legitimacy of the laws of the state. There is also a conciliatory and peace - restoring component within these tasks.

1.3. Overview of the Criminal Justice Process

Whatever one believes, the main purpose of substantive criminal law and its sanction to be, whether it is the public condemnation of very serious acts of wrongdoing or the prevention of those acts through deterrence, incapacitation or reform, the procedural task of proceeding persons accused of crime from arrest to disposition is basically the same. This process can be broken in to six tasks which modern criminal procedure must perform to be complete.

First, some method must be devised where by reports of criminal activity are brought to the attention of officials and the offender is taken in to custody for investigation or prosecution. In this regard, governments might follow either a reactive or proactive approach. If government adopts a purely reactive attitude towards crime suppression, it will simply provide officials with whom complaints may be registered and will invest them with authority to issue summons and make arrests. If government also takes a proactive stance, it may authorize its officials to ferret out criminal activity through investigations, informer networks, and traps set for willing but unwary offenders. Intake procedures are essential to all formal systems that have progressed beyond the stage of legalized self-help and private retaliation. They involve the making and filing of complaints with appropriate authorities, the making of arrests and searches with or without warrants, and the detention of suspects or accused persons during investigation or pending trial. In proactive intake systems, because of the difficulty of learning about crimes committed in the context of exchange transactions(for example, victimless crimes or business crimes committed by or with in an organization) where there is not likely to be a complainant or voluntary informant, there is a growing realization that procedures must exist to control and regulate police activities which

1. lay traps for unsuspecting criminals ("sting" operations"),
2. intiltrate organizations with spies (paid informers and undercover police agents) and
3. purchase information and evidence from members of the public and the criminal underworld, by offering informer fees and rewards to the first group and withdrawals from prosecution to the second group.

Second, it is necessary to sift and screen these complaints and reports of crime to determine their factual validity, to decide what laws have been violated and whether sufficient evidence exists to support criminal charges to separate the prosecutable from the unprosecutable complaints, and finally to divert to other social control agencies the unprosecutable cases or cases which do not involve sufficiently public interests. It is generally believed that this task should be performed as early as possible, before formal charges are made, so that official energies are not wasted in litigating groundless or trivial accusations and accused persons detained or otherwise inconvenienced because of them. This siting or screening may take place at various stages of the process before trial, but ideally, should be completed before the prosecutor files his formal complaint. In the American system of criminal procedure, the process of screening cases prior to formal accusation is carried on by three different official bodies:

1. the police, when deciding whether to arrest,
2. Prosecutors, when deciding which of these cases received from the police should be prosecuted, and
3. Magistrates or grand juries when deciding whether the prosecutor has adduced sufficient evidence to warrant a prosecution. In inquisitorial systems, in addition to screening by police and prosecutors, an investigatin may be performed by judge or other official, by the grand jury or preliminary hearing in American criminal procedure.

The third task is to formally charge the defendant and to provide him some procedural protections for his defense, such as protection from:

1. Prolonged detention pending trial without sufficient cause,
2. illegal searches and seizures of his person and property
3. ignorance of the nature of the charges and evidence against him,
4. ignorance of the procedural law and lack of means to defend himself properly,

5. coerced self incrimination,
6. secret proceedings,
7. redundant proceedings, and
8. arbitrary and unjust proceedings. Included here would be procedures.

Limiting the time and the grounds for an accused persons pre - trial detention; procedures limiting the government's right to invade the suspect's privacy or seize his property as evidence; procedures prescribing the form and content of the government's accusation, the method of giving defendant notice of the charges and of the evidence against himself, and some method of responding to the charges procedures indicating when and whether defendant shall be allowed the assistance of legal counsel; procedures limiting the government's right to interrogate the accused and to compel him to give evidence against himself; procedures requiring public trial and public participation in the adjudication process; procedures limiting the government's right to prosecute and punish the defendant more than once for the same effense; procedures permitting the defendant to challenge improper or illegal acts committed by his prosecutors and to have these acts reviewed by other disinterested officials with the power to correct and remedy them; and so on.

In the performance of these tasks, procedural systems throughout the world differ radically. This is because different nations take different positions with respect to and accused person's standing before the bar of justice.

The fourth task is to provide a method or procedure where by the actual guilt or innocence of the accused may be determined. Procedures may differ as to who is to make this determination, how faiths are to be presented to the decision maker, and the amount and kind of proof necessary for conviction. However, most trials are usually a review of facts collected by someone else (for example, by police, prosecutors, investigators, investigation judges or other officials, and defense lawyers) and presented to the decision maker in open court or through a written record. It is rare in modern criminal proceedings in any country for facts to be discovered for the first time at the trial stage. Thus, the significance of the trial is that it is a final, authoritative resolution of disputed facts and law by decision makers who are other officials than those who have collected the facts and who are presumed to be impartial add to represent the indgement of the community. Procedures at the trial stage usually include:

1. rules governing the reception of evidence, the order and burden of proof, competency of witnesses to testify, and so forth (rules of evidence)
2. rules governing the selection and duties of participants in the process (judges, jurors; attorneys; witnesses; and judicial assistants, such as clerks, bailiffs, and others); and
3. rules governing the way the official decision of conviction or acquittal is made and registered.

The fifth task of a system of criminal procedure is to prescribe how criminal sanctions are to be imposed and administered.

For example, in the American system there are rules governing sentencing of convicted criminals, the administration of prisons and jails, judicial or administrative supervision of correctional administration, early release from confinement (parole, pardon, commutation of sentence), and civil disqualification.

The sixth and last task is to provide means by which decisions as to guilt or innocence and any other pretrial or post communication official decision regarding the accused may be reviewed by higher authorities to make certain that justice has been done and the laws complied with. Review may be direct or collateral, interlocutory or post conviction, judicial or administrative.

Generally, these tasks or functions of a criminal procedure may be classified as

1. Intake,
2. screening (investigation),
3. charging and protecting,
4. adjudication,
5. sanctioning, and
6. appeal.

In each of the six areas, there are different procedural rules contained. The whole purpose of this course is to aquint students with such rules as enshrined under the system of criminal procedure in Ethiopia.

1.4. Sources of the criminal procedure law

Dear student, here, we are not interested on the historical context in which the rules governing a criminal proceeding have evolved. By source, we are referring to the rules and regulations to which a judge or public official would resort to in making a decision in a criminal proceeding.

The sources of criminal procedure law are:-

1. International instruments:- various international instruments ratified and acceded to by Ethiopia have incorporated provisions giving recognition to many of the rights of an accused person. The important instruments in this regard are: the international convention on civil and political rights, the Universal declaration on human rights, the African charter on human and peoples right, the convention against torture and other cruel, inhuman or degrading treatment.
2. The FDRE constitution:- The Ethiopian constitution in its chapter three lists down the fundamental rights and freedoms given recognition. The provisions from Article 14 - 28 deal with the various rights that should be given recognition in the course of criminal proceedings.
3. Other legislations: - Detailed procedures of the proceeding are contained in various acts of the parliament out of these, the most important one is the criminal procedure code. In addition to this, there are various legislations dealing with some aspects of the procedural law. The federal courts establishment proclamation and the proclamation for the establishment of the office of the public prosecutor are some instances of such legislations. There are also regulations and directives governing various aspects of prison administrations.

1.5. Historical Roots of Modern Criminal Procedure

At the primitive society, individuals and groups have always committed wrongs against other individuals and groups and these have given rise to sufficient conflict between them to disturb the public peace and to harm others who are not immediately involved in the dispute. At this time, unilateral or bilateral methods of dispute resolution, such as socially sanctioned self-help, retaliation, or negotiation used to dominate. Through the course of time, a level of political

organization is reached usually under a tribal chief, or early king", supported by powerful clan headmen - where arbitration and adjudication of interpersonal or inter familial disputes are possible.

The disputing parties and their supporters may wish to submit their disputes to tribal courts or popular assemblies or to the "king" himself for an authoritative resolution.

Under the impact of an ideological revolution which was religious in nature, the nature of crime altered and hence, acts formerly regarded as private wrongs now were viewed as damaging to public interests as well.

The intervention of third - party adjudicators was no longer the solicited arbitration of disruptive private disputes but became the suppression of morally wrongful behavior (sin) or of behavior deemed contemptuous of royal authority.

This change demanded an official inquiry to determine the existence of such behavior, official action to suppress it, and an accurate determination through investigation of what had happened. An assessment of the culprit had to be made to determine the extent of his sin (his culpability) and the degree of his dangerousness (the intentionality of his behavior).

Thus, procedures and methods of proof had to be invented to distinguish between individuals who were guilty and dangerous in this sense and those who were not.

The public interest was involved in a major way since crime as sin threatens divine retribution or at least the destruction of social and political order.

The central authority - king or emperor, pope or bishop - now bears the primary responsibility for seeing to it that substantive justice is done and that God is satisfied. This can no longer be left to the disputants themselves who are too concerned with private satisfaction to concern themselves with these more general and distant interests.

Therefore, as they appear today, rules governing the manner of proceedings together with institutional structures to enforce them began to be established. In Ethiopia the procedural law was comparatively well developed before the Italian occupation of 1936. This procedural law included the 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. Before the advent of modern criminal procedure rules in the code, there were the old procedural laws of Ethiopia in crime investigation ("leba shay", "afersata", arada "zebegna", "Mistire Zebegna"), prosecution (by the "Ligaba"), presentation of arguments (T"at'a"yye q, "Bela Libeleha") giving opinion and rendering judgement (By judges or assessors ("Techewoch") and Appeal (to "shaleqa wembers" and "ras wembers"). (For more explanation, read Legal History of Ethiopia, by Aberra Jembere. Pages 237 - 258).

1.6. Systems of Criminal Procedure

There are two dominant systems of criminal procedure in the world: the inquisitorial and adversarial systems of procedure.

The inquisitorial system is typical of countries that base their legal systems on Civil or Roman law. It emphasizes abstract truth and substantive justice, believing that justice is impossible without truth. Accordingly, the pretrial hearing for bringing possible indictment is usually under the control of a judge whose responsibilities include the investigation of all aspects of the case, whether favorable or unfavorable to either the prosecution or defense. Witnesses are heard, and the accused, who is represented by the counsel, may also be heard, though he is not required to speak and, if he does, he is not put under oath. In Germany, the prosecution participates in the investigation; while in France the prosecution presents its recommendations only at the end of the hearing. In both France and Germany, the investigating magistrate will recommend a trial only if he is sure that there is sufficient evidence of guilt. The entire dossier of the pretrial proceedings is made available to the defense.

At the trial the judge, once more, assumes a direct role, conducting the examination of witnesses, often basing his questions on the material in the dossier. Neither the prosecution nor the defense has the right to cross - examine, but they can present effective summations. The jury does not consult the dossier, instead relying on the facts brought out in the trial.

The other is the adversarial" also called accusatorial procedure. This is observed primarily in countries in which the Anglo - American legal system of common law predominates. It stresses the autonomy and dignity of the litigant (even if he is morally in the wrong) and insist on a "fair fight" under procedural rules that are so designed that there is a fair distribution of wins and losses, regardless of merit. Hence, each side is responsible for conducting its own investigation. In criminal proceedings, the prosecution represents the people at large and has at its disposal the police department with its investigators and laboratories, while the defense must find its own investigative resources and finances.

In any adversary trial, the opposing sides present evidence, examine witnesses, and conduct cross-examinations, each in an effort to produce information beneficial to its side of the case. Skill full questioning can often produce testimony that can raise doubts under cross - examination.

In adversary proceedings before juries the judge functions as moderator and referee on points of law, rarely taking part in the questioning unless he or she feels that important points of law or fact must be made clearer. In a bench trial (without a jury) the judge makes findings of fact as well as of law.

Dear reader, where do you categorize the Ethiopian system of criminal procedure? You have to be able to give answers to this query after examining the Ethiopian law of criminal procedure.

All the next chapters of the text are devoted to the treatment of the system of criminal procedure as incorporated under the Ethiopian laws.

CHAPTER TWO

Commencement of the Criminal Justice Process

Dear student, in this chapter we will be dealing with the first step in the criminal justice process. We will examine some of the early screens in the process those mechanisms by which citizens are initially selected out of the population and subjected to the criminal process.

Objective

At the end of this chapter, you are expected to be able to:-

- Understand the concept and modes of setting justice in motion.
- The various facets of flagrancy
- The distinction between accusation and complaint.

2.1 Setting Justice in Motion.

The concept of setting justice in motion refers to the bringing to the attention of the police the commission of a crime. The assumption is that justice is always in motion. When a crime is committed, it is interrupted. As soon as its commission is reported to the police, it begins to be in motion. That is why the naming "setting justice in motion" is employed here.

2.2 How is Justice Set in Motion?

It is evident that for the police to start investigation, they need to have information as to the commission of an offence, which is punishable under the Ethiopian penal law. The information may be communicated to the police by an informant (in an indirect way) or it may be obtained by personal observation (Directly). The informant may communicate such information either in the form of accusation or complaint.

2.2.1. Accusation

Accusation is the manner of communication of information to the police as envisaged under Article 11 of the criminal procedure code. It is not defined under the criminal procedure code. The draft criminal procedure code, however, under Article 1, defines it to be "information given to a competent authority by any person about the commission of an offense". Under the 1965 criminal procedure code, Article 11 deals with it as follows;

Article 11, Accusation in general

1. *Any person has the right to report any offense whether or not he has witnessed the commission of the offence with a view to criminal proceedings being instituted.*
2. *There shall be a duty to report in the cases provided in Art. 267, 344 and 438 penal code.*

As envisaged under Article 11, citizens have the right to report the commission of the crime. Hence, individuals are not obliged to report the commission of a crime. Exceptionally, however, individuals are obliged to report the commission of certain kiends of crimes. This is in the situation stated under sub Art. 2 of Article 11. Accordingly, citizens are obliged to report the commission of crimes stated under Articles 267, 444 and 438 penal code. (Art, -238 and 443 of the revised penal code) what do you think is the reason for the law to impose an obligation in such cases? It is due to the gravity of the nature of the crimes. As you can see it from the penal code the crimes of outrages against the constitution or constitutional order (life imprisonment or death) are serious crimes punishable with severe penalities.

2.2.2. Complaint

This is the second way of setting justice in motion. It is governed by Article 13 of the criminal procedure code which reads as follows:

> Article 13: offences punishable up on complaint.
>
> *In the case of offences which under the law may be prosecuted and punished only up on a formal complaint by the injured party or those deriving rights from him, the provisions of Article 217 - 222 and 721 penal code shall apply.*

Certain kinds of crimes have a peculiar feature in that, as opposed to the majority of crimes, they are of a private nature and hence, can only be initiated by the injured party himself/ herself or persons with a special relationship with him/ her. Complaint, as you can see from Article 13 is the application of an injured party with a view to criminal proceedings being instituted against a person committing against him/her crime of private nature. In such cases, there would necessarily have to be a complaint lodged so that the police would make an investigation to the crime.

Why does the law make such a distinction between crimes to be initiated by an accusation and others by complaint?

This relates to the nature of crimes in general. As regards this, the Ethiopian penal code under Article 1 states that "the purpose of the criminal law is to ensure order, peace and the security of the state and its inhabitants for the public good". Prohibited behavior of the individual for the interest of the community at large. Whosever has violated such prohibitions or obligations is answerable to the community because his acts are targeted at the general interest of the community. Therefore, every member of the community would have an interest in the prosecution of such a crime. Therefore, the state, representing the community at large, would proceed in to the investigation and prosecution of these crimies at its stance or when it receives information from any member of the community . Whether the individual victim of the crime agrees or not certain category of crimes, however, do not jeopardize the order, peace and security of the state and its inhabitants in general. They are targeted at a private interest of individuals. Their harmful effect doesn't extend to the society at large and is confined to the individual there by injured.

The obligation of the state to investigate and prosecute crimes doesn't extend to such kind of crimes unless the victim or his relatives lodged a complaint to the effect that the offender be

prosecuted. Hence, the consent of the individual victim is required to initiate the criminal justice system.

Why is the consent of the injured party required?

There are two reasons for such a requirement. The first reasons relates to the aforementioned distinction between crimes affecting the public and private interest. Such crimes do not involve the public interest. Secondly, the injured party may sustain damage more in the institution of the proceeding than in its commission. This is because, it might draw the attention of society to certain facts, such as his spouses unfaithfulness or his child's dishonesty and weighting between the interest of the victim in the prevention of such publicity and the curtailment of his interest by the act of the offender, he might still choose the latter. Therefore, the law, by giving him the option as to whether to institute a criminal proceeding or not, is giving him the opportunity to weight this interest. If the person doesn't lodge a complaint, the presumption is that he has given more weight to the prevention of publicity at the pain of the effect of the crime, and the law would give due recognition to this by not allowing the initiation of the preceding.

Dear student, what is the critera to distinguish between crimes to initiated upon complaint and accusation?

There is no complet list of the crimes punishable only up on complaint; Article 212 of the revised penal code confines itself to making reference to the special part of the code or any other law defining "offences of a predominantly private nature which can not be prosecuted except up on a formal accusation or request, or a complaint in the strict sense of the term, of the aggrieved party or those claiming under him".

There are so many provisions in the special part of the penal code which prescribe that "whosoever ------ is punishable, on complaint, with -------" these are Articles 380 (2) (destruction of documents belonging to a relative); 399 (breach of professional secrecy); 401 (disclosure of scientific, industrial or trade secrets) 556(1) (common willful injury not in aggravating circumstances); 559 (common injury caused by negligence); 560 (assault) 280 (intimidation) 581 threat of accusation or disgrace) 583 (deprivation of powers of decisions; 593 (1) ascendant abducting a child); 603 (violation of the right of freedom to work) 606 (violation of the privacy of correspondence); 613 (prescribing that all offences against property committed within the family are punishable on complaint if they do not involve violence or coercion); 667 (abstraction of things jointly owned), 679 (misappropriation of lost property).

When such kinds of crimes are committed, no action may be taken except on the initiative of the person qualified under the law for making the necessary complaint. When these crimes are committed, it is up to the injured or related person to set justice in motion. This is so even in cases where such crimes are found to be flagrants (Read Article 21).

Who are "persons deriving rights from the injured"? The procedure code doesn't specifically mention who these persons are but these should be persons highly related with the injured, and hence have felt the effect of the crime. This, probably includes persons listed under Article 47 of the criminal procedure code.
Article 47 . persons entitled to conduct private prosecution
No person other than:

(a) the injured party or his legal representative; or
(b) the husband or wife on behalf of the spouse; or
(c) the legal representative of an incapable person; or
(d) the attorney of a body corporate; may conduct a private prosecution.

What is the effect of a certain offence being regarded as punishable up on complaint and the lodging of a complaint there of?

Even if crimes up on complaint are of a private nature, the lodging of a complaint by the victim or his relatives would impose the obligation upon the police to investigate the crime and the public prosecutor to prosecute you don't have to confuse this with the concept of private prosecution incorporated under Article 44 of the criminal procedure code.

As provided by Article 40 of the criminal procedure code, it is the obligation of the public prosecutor to institute proceedings whenever he is of opinion that there are sufficient grounds for prosecuting the accused.

2.3. Forms of accusation and complaint.

After an individual has decided to report the commission of the crime either through accusation or complaint, Article 14 provides in what form should such accusation or complaint adhere to Article 14. Form of accusation or complaint

(1) Any accusation (Article 11) or complaint (Article 13) shall be reduced to writing by the person to whom it is made and when completed shall be read over to the complainant who shall sign and date it.
(2) Where an accusation or complaint is made by more than one person (Article 219 penal code), all such persons shall sign it.

Dear student, what would be the effect of non - compliance with such formality requirements? For example, the person who has made the accusation or complaint has refused to put his signature or disclose his identify for security reasons, does it mean that justice is not set in motion?

There are many reasons for people not to report the commission of a crime or after reporting, not to disclose their identity. Some of these reasons may be; fear of retaliation by the offender or his supporters, reconciliation between the offender and his victim, unwillingness of the victim to involve himself in official proceedings, lack of faith in the ability of officials to render effective aid, feelings of guilt or uncertainty about one's own role in the commission of the offense, and so forth. In such instances, it can not be a matter of indifference to authorities whose duty is to preserve public order and protect people from victimization. The public objective of preventing the continuation of similar activities would not be defeated by the individual concern of security or failure of the person receiving the report to adhere to certain formalities.

Persently, no nation can safely ignore even unreported crime and must do what it can do to stimulate reporting by members of the public and to search out and discover crime likely to be hidden from public view of course, it goes without saying that not everything labeled as a crime can be or should be processed, especially, in the circumstances where the information is

unreliable. Any existing criminal justice apparatus would be incapable of managing the resulting monstrous over load.

That is why the Ethiopian criminal procedure code deals with anonymous accusations in the following manner.

Article 12 anonymous accusations

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

Anonymous accusations are those accusations whose source is not disclosed to the police. Usually, this is done by individuals through the use of means of communications like telephone, e - mail or letters for fear of retaliation by offenders. In such cases, the police would go in to investigation of the truthfulness of the accusation in the following situations:

1. If the accusation discloses serious breaches of the law
2. If such accusations are on their face circumstantial and credible.

Dear student, what kind of offenses are offenses of "serious breach of the law?" The employment of the term under Article 28 and other provisions of the criminal procedure seems to suggest that this relates to crimes punishable on rigorous imprisonment.

Another issue arises as to the competent authority to receive accusations or complaints. Under Ethiopian law the police and public prosecutor having jurisdiction in the place are the concerned organs to receive accusations or complaints. This is dealt with under Article 16 as follows;

Article 16*: Authority for receiving accusation or complaint.*

(1) Any accusation (Article 11) or complaint (Article 13) may be made to the police or the public prosecutor. An accusation or complaint regarding a young person shall be made in accordance with Article. 172.

(2) Where it is made to the public prosecutor, the public prosecutor shall forward it to the competent police officer with a view to an investigation being made under Article 22 et seq.

At the moment of receipt of accusation or complaint, the police officer is obliged to proceed in to investigation (Article 22 cripr. Code). As the immediate purpose of accusation or complaint is to initiate police investigation, what will the action of the public prosecutor be where an offence is reported to it? This is answered by Art. 16(2) the prosecutor shall forward it to the competent police officer with a view to an investigation being made.

Another issue in this regard arises when the accusation or complaint is made to the person having no authority. This happens in three circumstances; first, the person receiving the information may not be a police or public prosecutor. Secondly, such a person may be a person in authority or a public officer, but not a member of the police or public prosecutor. Thirdly, such a person may be

a police or public prosecutor, but have no jurisdiction over the place. In such instances Article 17 provides that such person, authority or prosecutor shall without delay forward the accusation or complaint to the appropriate police authority or public prosecutor.

Here, as you can see an individual to whom an accusation or complaint is communicated is obliged to forward this to the police or public prosecutor. How would you make this compatible with the assertion of Article 11 (1) that individuals have the right to report any offence? As we have seen it, except in cases of serious crimes listed under (2), there is no duty to report the commission of a crime. Under Article 17, however, such a right is leveled to be a duty imposed upon individuals to whom, such a person having the option to report or not has chosen to report to.

Dear student, how do you see this in light of the principle of equal treatment of citizens by the law?

The last issue relates to the effects of false accusation. Though individuals have the right to report the commission of a crime, it would cause a penalty to make false accusation or complaint. As stated under Article 18, false accusation communicated to an individual would result in the penalty under Article 580 while false accusations communicated to the police or public prosecutor is punishable under Article 441.

False accusation or complaint may also cause civil liability (Read civil code Article 2044). Those are penalities imposed by the law on the person who lodged a false accusation. This is done by the law for the following reasons;
This is done:

1. To discourage individuals from reporting crimes for which they are uncertain thereby, saving the public resource to be invested in the investigation of frivolous accusations.
2. To achieve the purpose of the criminal procedure law in ensuring that the innocent are not disturbed by the operation of the criminal Justice process.
3. To ensure the constitutional right of individuals to honour and reputation (Read Article 24 of the constitution)

2.4. Flagrant Offenses

Certain kinds of crimes may not be reported to the police for different reasons. Indeed, victims may be unaware that they have been victimized or their failure to complain may be based on some selfish motive indifferent to the public objective of preventing the continuation of similar activities. Crimes, known in the united states as "white collar crimes" (business crimes such as employee theft, consumer fraud, regulatory violations), "victimless crimes" (transactions in prohibited drugs, prostitution, corruption of youth) and "political crimes" (espionage, subversive activities) are rarely reported to authorities and yet may cause great injury to public interests. Due to this, no nation can safely ignore unreported crime and would do its best to search out and discover crime likely to be hidden from public view.

Flagrancy refers to the circumstance in which justice is set in motion through the receipt of information by the police, not through third parties, but, directly by himself. Here the police do have direct information as to the commission of the offence, and hence, no need to wait for the lodging of accusations or complaints.

In the instances previously discussed, the police doesn't have any knowledge other than the information communicated to him by the complaint. Therefore, justice would be set in motion after the complaints or accusations are lodged with the fulfillment of the requirements discussed. In flagrant offences, however, justice would be set in motion automatically as the police has received first-hand information.

What are flagrant offenses?

Articles 19 and 20 of the Ethiopian criminal procedure code also gives definition to Flagrant offences in the following way:-

Article 19 :- *Flagrant offences.*

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

Article 20*:- Assimilated cases*
An offence shall be deemed to be flagrant and to fall under the provisions of Art. 19 when
(a) the police are immediately called to the place where the offence has been committed, or
(b) a cry for help has been raised from the place where the offence is being or has been committed.

Here, there are three situations categorized by the 2 provisions as instances of flagrancy:-

1. Purely flagrant offences
2. Quasi - flagrant offences, and
3. Assimilated cases of flagrancy.

The first instance listed under Article 19(1) is that if the offender is found committing the offence, attempting to commit the offence or has just committed the offence". In the circumstances mentioned, the proximity in time between the commission of the offence and the time the police witnessed it has caused it to be regarded as a purely flagrant offence.

The prefix under the third element of Article 19 (1) "has just committed" indicates the much proximity in time between the completion of the crime and when the offender is caught. But, how proximate should it take to be the difference in time between the two incidents?

An offender who is caught "Attempting to commit an offence" is also regarded as a person caught in flagrant. This is so for two reasons; first, attempt as defined under Article 27 is an offence itself. Second, the law provides that an attempt, if recognized in the process, is a flagrant offence. The other instance of pure flagrancy is when the offender is caught while committing the offence.

Dear student, how is this different from the first instance of flagrancy that the offender is caught after he "has just committed" the offence?

Practically, the distinction seems to be blurred. Still, however, the distinction lies in the proximity of time between the apprehending of the offender in the two instances.

Article 19 (2) mentions quasi - flagrant offenses in such cases, the crime has already been committed. It deals with a time after the completion of the commission of the crime strictly speaking; it is not a flagrant offence in that the police do not still witness the commission of the crime. But, the chasing or the raising of a hue and cry before the apprehension of the suspect presupposes the much proximity in time of the completion of the crime. In such cases, the likely hood of confusing the identity of the suspect is remote. Here, an issue arises as to what the element of chasing is assume, for example, a pick - pocket has snatched money out of the pockets of Mr. A. witnesses, Mr.X and Y have been chasing him. Then, he disappeared for a meanwhile and after a little search he reappeared somewhere. X and Y began to chase him and by then, a police officer apprehended the suspect. Here, the offender has been out of the visionary sight of the witnesses for a certain period of time. Here, there might be a possibility of confusing the offender with other innocent individuals. If suppose the ground of identity is the clothe, color or height, e.t.c. of the offender again, the person against whom a hue and cry has been raised may come out to be a person hurrying for his personal business. In the normal course of things a crowd of people has the tendency to mob and riot. Sometimes irrationality may dictate our hue and cry. But the purpose of the criminal law and criminal procedure is to keep the peace and order of the public and the state. So, one may say, if a hue and cry is raised by chasing "that person" and if the arrest (because proceeding begins by arrest without accusation in flagrant cases) of the person would bring peace and order, it might be a case where that person needs to be arrested. But still, there is a need to apply maximum caution as the arrest affects the person's liberty.

In the two instances of quasi - flagrancy mentioned, care has to be taken considering the constitutional right to liberty. The element of chasing should be construed to include the situation in which there is no interruption between the time when the chasing has began and the suspect is apprehended. In as much as possible he should be with in the visionary sight of witnesses chasing him to avoid any confusion.

The cases mentioned under Article 20 are far more being recognized as flagrant or quasi - flagrant offences. But, for policy reasons, the legislature has chosen to assimilate the flagrant cases. Therefore, where the police is called to the place immediately after the offence has been committed, as not to give time not to lose sight of the offender it may be assimilated to the category of quasi-flagrant offences. It is the continuation of or related to the chasing of the offender or raising a hue and cry. Actually, in quasi-flagrant circumstances the offender has not moved at all or has been chased and caught. If a cry for help has been raised from the place where the offence is being or has been committed it is not a matter of assimilation. It is rather a "true" flagrant offence.

The policy reason behind this is that though the facts under the circumstance are far from being flagrant, assimilating them to cases of flagrancy would serve the purpose of the criminal procedure code in enabling the state to screen out offenders. With a view to achieving this purpose, other legal systems have gone to the extent of expanding the concept of flagrancy to include cases of being found with the fruits, instrumentalities, or evidence of the crime in ones possession.

2.5. Effects of flagrancy

Once an act is regarded as a flagrant act on any one of the grounds mentioned, what would be the effect? As Article 21(1) of the criminal procedure code indicates, the effect is that proceedings may be instituted without an accusation or complaint being lodged, unless the offence can not be prosecuted except up on a formal complaint. In such cases of flagrancy, the situation in which the offender is found is the source of information and hence, no need to expect further evidences. Therefore, the police or private individuals under the circumstances of Article 51 would begin to effect the arrest of the suspect.

Article 21: Effect as regards setting in motion of proceedings or arrest

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

(2) An arrest without warrant may in such cases made on the conditions laid down in Article 49.

Article 50 Arrest without warrant in flagrant cases.

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

Here, Article 21(1) should be understood in line with your understanding of the distinction between accusation and complaint we previously discussed. Complaint sets justice in motion, in cases where the offence may be prosecuted and punished only up on a formal complaint. (Article 13) however, Article 21(1) contains the phrase " --- without accusation or complaint being lodged, unless the offence cannot be prosecuted except up on a formal complaint." You should concentrate on the employment of the term "complaint" before the exception which in turn is related to it. In effect the rule avoiding report of an offence to initiate proceedings apply only to accusation. It can not in any way apply to offences punishable up on a formal complaint only. If so, there is no need to make use of the term complaint in the sub - article.

Dear student, these are the mechanisms for the intake of information by the police. Justice may be set in motion in any one of the mechanisms discussed in this chapter. Up on a receipt of such information, the proceeding would transfer in to the next step: investigation. In the next chapter we would examine rules of criminal procedure governing the modes of investigation.

CHAPTER III
Investigation I

Up on a receipt by the police of information about the commission of a criminal act on any one of the mechanisms discussed under the previous chapter, the police would have to proceed in to investigation of the crime. Investigation is the process of screening out cases which do not merit criminal prosecution. This process goes on from the moment a crime first comes to the attention of the police to the time the prosecutor makes a decision to file a formal accusation in a court of appropriate jurisdiction.

Dear student, under this chapter, you will learn about the concept of investigation of crimes. After thorough reading of the chapter, you are expected to be able to understand the following concepts:-

- The duty of the police to investigate crimes.
- The modes of securing the physical attendance of a suspect before the police station.
- The concepts of arrest and search conducted with or without the control of the court.

In the literatures and actually in legal systems of the world as a whole, there is a split of authority as to who should conduct investigation. Some say that this power should not be given to the police while others stress on the necessity of giving such power to the police. Those arguing in the negative say that police interrogation in secret by its character and as such open to abuse of power. However, the police should be given the power by attaching some procedural safeguards against its exercise. Some goes to the extent of requiring the existence of an impartial body that observes and certifies the results of the investigation.

Therefore, investigation is the second step in the criminal proceeding.

In some legal systems, an obligation is imposed up on the police to proceed in to investigation after the receipt of information about the commission of a crime. This is to avoid the danger that decisions not to investigate may be made for improper reasons, reasons which are extraneous to the accomplishment of the systems major goals. Different systems have devised various mechanisms of ensuring that no offender will escape from the criminal justice system.

For example, the French inquisitorial procedure, the investigation judge has the greatest control over the investigative and screening phase of the criminal procedure. Under the system, the police must report all offenses to the prosecutor who must then open a file a dossier and refer the matter to a judge for "examination". Police are placed at the disposal of the examining judge,

who must decide whether there is enough evidence to justify prosecution. To that end, he is given the power to order arrests and searches, take testimony under oath, and interrogate the accused all the while recording the results of the investigation in the dossier. The critical investigative and charging decisions are to be made by the judge, or authorized and reviewed by him. And non - judicial officers have no authority to decide not to investigate, terminate a case reaching a certain level of evidentiary sufficiency, or even to determine the seriousness or number of the charges on which a dependant is ultimately tried.

Under Ethiopian law, if the police received any information about the commission of a crime, he has to proceed to investigate even if he doubts the truthfulness of the information as to the commission. This is expressed under Articles 22 and 23 of the criminal procedures as follows:

Article 22: principle

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

(2) Investigation in to offenses committed by young persons shall be carried out in accordance with instructions given by the court under Article 172 (2)

Article 23 - Duty of police to investigate.

> *Investigating police officers shall carry out their duties under this chapter not with standing that they are of opinion that the accusation, complaint or information they may have received is open to doubt.*

Dear student, as you can gather from Articles 22 and 23, the police can refuse to investigate only if he is sure that the offense has not been committed. In all other cases, no matter how the information is doubtful, he has to make the investigation and the truth can be discovered afterwards. This is because of the assumption that no one will make false accusations for fear of punishment stated under Article 18 of the criminal procedure code. After individuals have lodged an accusation or complaint, the police would elicit from the person making the accusation or complaint all relevant facts and dates, the name or description of the offender, the names and addresses of principal witnesses and all other evidence which may be available and shall record them. This is to make the necessary preparations for the investigation of the crime in the next stage of the proceeding.

The first step in investigation is interrogation. In interrogation, the police calls the suspect and ask him whether he has committed the offence. The suspect should go to the police station and give his statements. This raises a very important issue; how do the police bring the suspect to the police station? Summons and arrest are the two possibilities to secure the presence of the suspect to the police station. In the next section, we would see details about the concepts of summons and arrest.

3.1. Summons And Arrest

In this topic, we will be dealing with the procedural legal regimes governing the two mechanisms of attendance to the police station; summons and arrest. The two concepts are highly interrelated.

Arrest, importantly, is the means of deprivation of one's right to liberty. Hence, we are also concerned with the constitutional rights of a suspect. There fore, we would resort to the F.D.R.E. constitution and international instruments when the need so arises.

3.2. Summons

Summons is one of the mechanisms of securing the attendance of the offender for examination. It is a letter requesting the suspect to willingly appear before a police station to answer for the accusations or complaints lodged against him. Basically, there must be some kind of ground for subjecting a person to a criminal proceeding. This is one of the earliest stages of screening mechanism. Hence, there has to be some ground for singling out and calling an individual for examination.

Article 25 Summoning of accused or suspected person

> *Where the investigation police officer has reason to believe that a person has committed an offence he may by written summons require such person to appear before him.*

In both legal systems, the common law and civil - law, issuance of summons is under the jurisdiction of the courts. This is to extend control mechanism in case of calling an alleged offender. In doing so the system would try to ensure that one purpose of the criminal procedure; that innocents are not disturbed, is achieved. In Ethiopia, however, the power to issue summons is given to the police. This being the rule, however, there is an exception on which the court may issue summons, instead of the police. This is found under the provision of the code governing petty offenses.

Article 167 - Summoning of accused

> *(1) where a petty offence has been committed, the public or private prosecutor shall apply to the court having jurisdiction to summon the accused to appear.*

Dear Student, in all circumstances, the police can issue summons if he has a reason to believe that a person has committed an offence. In case of petty offenses, however, he can't issue a summon even if he has such a belief. He can only request that the court issue summons. Hence, in case of petty offences, summons is judicially controlled.

Why would the law make such a distinction? In all other legal systems, the situation is in the reverse i.e, the court would issue summons in case of ordinary offenses while in petty offenses, the police may make the issuance. The rational in these legal systems is that the interference of the court is more demanding in case of ordinary offenses than petty offenses as the latter are less serious offenses.

The only limitation up on the issuance of summons by the police is that he should have 'reason to believe" that the accused has committed the offense. This is requiring that the police, instead of simply issuing a warrant because an accusation or complaint has been lodged, would have to make further investigation until he has developed a reason to believe that the person has

committed a crime. Hence, you can say that Article 25 prohibits the summoning of the accused where the evidence is of very questionable reliability. A person should not be summoned in situations like of ambiguous information, hearsay unsustained by factual investigation, etc.

Of course setting this criteria may solve some of the problems, but not all concerns. In the hands of the police this discretion, which may entail severe consequences to the accused, is likely to be abused than left with the judiciary. The decision as to whether or not there is sufficient "reason to believe" to justify issuance of a summons collected against the right to presumption of innocence. there has to be evidence which is believed to be capable of at least casting a shadow of doubt on the presumption of innocence recognized under Article 20 (3) of the constitution. It is the normal jurisdiction of courts to make such evaluation of evidences. This judicial mind to weight evidences against the right of the accused in an impartial manner is absent with the police.

Summons differs from arrest in that it draws one in to the police station "voluntarily" rather than by force in practice, however, many Ethiopian police officers use the summons in place of an arrest warrant (court authorization to arrest a person). Apparently, the police comes to the suspect's home or work place armed with a summons filled out to "request" his /her immediate presence at the police station. The police officer then escorts the 'summoned" suspect. Of course, this procedure which distorts the spirit of the summons is tantamount to arrest with out warrant and should be so treated. Hence, there would have to be developed a clear distinction between summons and warrant of arrest.
The manner of summons (form and content) is not provided under the criminal procedure code; can we analogize this with the form of summons under the civil procedure?
For how long should the person summoned under Article 25 stay in the police station? Can we interpret Article 29 to make it applicable in situations covering this circumstance too? If the police, after summoning the individual before the station, detained him for a reasonably long period of time without the individual's voluntariness, that may amount to arrest. Therefore in such instances, the rule under Article 29 of the criminal procedure, which states that the arrested person must be brought before "the nearest court within forty - eight hours of his arrest or so soon thereafter as local circumstances and communications permit would also be applicable to the person summoned.

As it involves the attendance of the suspect voluntarily, summons is the most preferred mode of bringing the suspect to the police station. Arrest, involving as it does the possible use of force, is a drastic procedure to be avoided if possible. Among the inherent disadvantages of arrest are: -

(a) the use of time and energy on the part of the police who must physically go to 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 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.

But, there are circumstances in which issuance of summons may not be successful. These are:

I. The suspect, even if duly summoned, may fail to appear without lawful excuses in such instances, if the police proves that the individual has failed to comply with the

summons duly served, that would constitute a criminal act falling under Article 442 of the old penal code. But the summons must be a written one as required by Article 25 of the criminal procedure code. Disobedience to an oral summons is probably not punishable under the penal code.

II. In case of serious offenses, issuance of summons may not be advisable because that would incite the suspect to escape the criminal justice system. In such instances, issuing summons may amount to warning the suspect that his criminal activities are brought to the attention of the police hence, summons may not achieve its purpose in this case Under these two circumstances, the police, instead of issuing summons, would devise other mechanisms of securing the suspects attendance, i.e arrest. Hence, he would take the necessary steps that would lead to the arrest of the person.

3.3. Arrest with Warrant

The term "arrest" has various meanings. Literally one may define arrest as a deprivation of one's right to liberty with a view to institute a criminal proceedings. In other words, arrest is the taking of a person in to custody so that he or she may be held to answer for the commission of an offense. Hence, arrest is placing of a person in custody or under restraint, usually for the purpose at compelling obedience to the law. While all arrests involve restraint of a person's liberty, not all restraints are considered as arrests. We will see the important features distinguishing arrest from other restraints later on.

Under the Ethiopian law, no provision gives definition to the term "arrest". However, Article 56 (3) of the criminal procedure code provides the following in relation to the manner of arrest "He (the police officer effecting arrest) shall then actually touch or confine the body of the person to be arrested unless there be a submission to his custody by word or action". This sub - article tells only the manner of effecting arrest and not the definition of the notion of arrest. As indicated above in the definition of arrest in other jurisdictions, not all kinds of physical touch or restraint (confinement) or submission by word or action constitutes arrest in the legal sense of the term. What makes these activities arrest is the person's (the one effecting arrest) having the legal authority to effect arrest. He may be a police officer or an ordinary citizen but must be empowered by the law. Besides, the arrest must be effected with a view to institute a criminal proceeding and to ensure the appearance of the arrestee before the court, and in flagrant cases to prevent further offenses. Therefore, arrest is more than just a restriction of liberty of a person. In its nature, however, arrest is fundamentally a restriction up on individual□s right to liberty recognized under Article 17 of the FDRE constitution.

Article 17 of the FDRE constitution right to liberty

1. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law
2. No person may be subjected to arbitrary arrest, and no person may be detained without a charge or conviction against him. Similar provisions to the one stated under the constitution do also exist under Articles 9 of the universal declaration of human rights and the international covenant on civil and political rights.

The provision indicates that arrest, being an exception to the principle of liberty, would have to be made on substantive and procedural grounds established by law. If the arrest is not made with

such substantive and procedural grounds the arrest would be arbitrary arrest prohibited under Article 17 (2) of the constitution.

The substantive ground of arrest is that the individual must be suspected of having committed a crime. The requirement of a procedural ground is that the criminal procedure code must provide that in that specific offence the individual is suspected, arrest can be made. When does the Ethiopian criminal procedure code require individuals suspected of a crime to be arrested?

The issue of arrest is governed by the provisions of the criminal procedure code under Articles 26 and 49 - 58.

Article 26 reads:

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

The wordings of Article 26 (1), which says " -- such as to justify arrest" indicates that there are offenses that do not justify arrest. This, intact seems to depend on the nature of the offence. In petty offenses, for example, their commission doesn't justify arrest.

When the police officer intends to effect arrest at this stage, he would have to be sure as to whether warrant is needed or not depending on the requirement of warrant, there are two kinds of arrest, recognized under the criminal procedure codes; Arrest with warrant and arrest without warrant. According to Article 49 of the criminal procedure code, all arrests have to be made with court warrant.

Article 49 reads,

> *Save as is otherwise expressely provided, no person may be arrested unless a warrant is issued and no person may be detined in custody except on an order by the court. An arrest without warrant may be made on conditions laid down in this section.*

The Article shows that arrest with warrant is the principle. Moreover, it indicates that exceptionally the law may dispense with the condition /requirement of securing a warrant. The exceptional situations in which arrest is permitted without prior and court authorization will be discussed later on.

A warrant is an authorization in writing empowering a person to perform an act. The term is applied to a great variety of documents, most commonly judicial or quasi - judicial warrants, of which the most common are for arrest or search. It is a means of judicial control over restraint to individual’s liberty. A warrant is necessary if an arrest is to be considered legal, except in situations in which arrest without warrant is recognized by law Under Ethiopian law, Article 49 suggests that arrest with warrant is the principle while without warrant is the exception.

The manner of issuing warrant is governed by the provisions of the criminal procedure code (under Art. 52 et seq.)

The court to which any investigating police officer has applied is empowered to issue the warrant. Art. 53 doesn't specify the particular court that may have jurisdiction on issuing the warrant. It simply provides any court to have such a power.

Article 53 Issue of warrant:-

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

Recognizing the exreme 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 up on the application of an investigating police officer.

Dear Student, if the investigating police officer applied to a court for the issuance of arrest warrant, should the court give the warrant automatically? Why?

The court should not issue the warrant automatically. Otherwise, it would be non - sense to give the power to the court. It is given to the court because it is deemed to be impartial. The court is going to check the power of the investigating police officer. In any legal system, an arrest warrant is issued by the court on showing of a probable cause that a criminal offense has been committed and that the person charged in the warrant is probably guilty.

Article 54 when warrant of arrest to be issued.

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

The court would have to be satisfied of the following two facts to issue a warrant of arrest:-

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 can not be obtained in any other way. The burden of proof of these facts is on the police.

The meaning of these criteria and the method of proving their satisfaction in any particular case are not explained. You can not even trace articulated standards for these requirements in foreign sources. These criteria for the decision to grant or refuse an application for an arrest warrant are peculiar to our code. In the absence of further legislative guidance, it is for the courts to decide how best to administer these requirements in keeping with the spirit and the code.

How can the police officer prove the stated facts?

The second criteria is taking about summons. If the presence of the person can be secured in any other manner (summons). The court should not issue warrant. It is encouraging the police to give summons feasible summons. 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 Article 54 .Of course, if the accused has already been summoned and has deliberately failed to appear, the investigating police officer has the duty to arest him by applying for an arrest warrant, if necessary. This may be gathered from Article 26 (1) of the criminal procedure code.
Article 26 Arrest

> *1. Where the accused or the suspect has not been arrested and the offense is such as to justify arrest or where the person summoned under Article 25 fails to appear, the investigating police officer shall take such steps as are necessary to effect his arrest.*

Hence, the suspect must first be given the chance to appear voluntarily.
When Article 54 talks about other alternatives, I don't think it envisages "arrest without warrant" think the court should not reject the application by saying "you can arrest without warrant"

As we have seen it in our discussion of Article 25, however, it may, sometimes not be advisable to urge the police to issue summons. This is in case of serious (grave) offenses. In such instances, issuing summons would obviously defeat the purpose because the suspect, knowing that the police has got information about the commission of the crime, might attempt to abscond the criminal justice system.

In some imaginable cases too, the court might be justified in issuing an arrest warrant even though the summons method had not been tried. If the police officer could by reliable evidences convince the court that summoning the suspect would be completely futile, the court would be justified in ordering arrest. It may for example, be that the suspect had already planned or began to flee the empire. In such cases, warrant of arrest should be issued because the accussed's attendance could not "otherwise be obtained". But still, unless such exceptional circumstances are shown, the police should always first proceed by summons.

The other important element for the issuance of arrest is "the presence of the suspect is absolutely necessary". The court is not supposed to automatically issue warrants to arrest who so ever the police suspects of an offence. In case of arrest with out warrant under Article 51(1) (a), any member of the police is allowed to arrest any person whom he ---" reasonably suspects of having committed an offence punishable with imprisonment for not less than one year". Here, even when the police is going to arrest the suspect with out warrant, he must have reasonable suspicion. That is, there must be prima-facie evidence. In case of arrest with warrant under Article 52 however, the power of determining whether there is reasonable suspicion is transferred to the court. It is a fair interference in that, as a minimum standard, the court must be satisfied that there is sufficient evidence to believe that the suspected person has probably commited the offence. The police officer is required to produce some credible evidence to support that belief. There should be a possibility of charge and prosecution and at least a prima facie evidence for that possibility. This infact, is an important and impartial check on the weighty power of arrest given to the police.

Here, the evidence is not conculsive evidence. The investigation leading to a conclusive evidence is still to be conducted. But there must be sufficient evidence able to create reasonable suspicion justifying arrest. The application of the investigating police officer for a warrant to arrest a person as to whom there is shown no substantial evidence or criminal activity should not be granted. In such cases, no prosecution is justified and there fore, the presence of that individual before the court is not "absolutely necessary." But, it is "absolutely necessary that every probable offender against whom criminal proceedings are contemplated appear before the court.

Dear reader what possible evidence can the police officer present at this stage?

It is obvious that substantial evidence indication the suspect's guilty is not required at this stage. By what means the police officer should prove the reasonableness of his suspicing on the particular person is not provided by the code. Stanley Z. Fisher, an authority on the Ethiopian law of criminal procedure suggests the following sorts of proof:

1. A copy of the accusation or complaint as recorded under Article 14).
2. The presence in court of the party who signed the accusation or complaint, and his / her availability for questioning by the judge;
3. Copies of any other statements obtained from witnesses during police investigation (Article 24 and Article 30 (3) of the criminal procedure code)
4. Written statements of the results of any other investigator activities conducted by police such as searches (Articles 32 and 33 of the code) and physical examinations (Article 34 of the code). The provision of such evidences by the police might show the court a probable cause that a criminal offense has been committed and that the person charged in the warrant is probably guilty. This is necessary for the court to obtain physical jurisdiction and control over him. Hence, the court would be convinced that the appearance of the person is absolutely necessary.

It is important to note that the "absolutely necessary" and "otherwise obtained" criteria's should exist cumulatively. The existence of one of the requirements without the other wouldn't result in the issuance of warrant.

Another issue concerns the form and time of application for an arrest warrant. As regards this, Articles 53(2) and Article 55 provide the following. Article 53(2)
A warrant may be issued at any time and on any day of the year.
Article 55 Application for warrant in urgent cases

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

Normally, an application for the issuance of warrant of arrest is made in writing. There is no other requirement as to the contents and form of the application. But as Article 55 (1) provides, an application for warrant may be made by telephone or telegraph. This is in urgent cases where arrest should be effected as quickly as possible in situations where the suspect is about to escape. For example, the police might found in a bus station a person up on whom an investigation has been undertaken after an accusation has been lodged against him. In such instances, the possibility of the suspect to escape is wide and hence, to expect the police to make a written

application to the court would result in the possible escape of the suspect. Hence, the law has devised a mechanism of requesting warrant through telephone or telegraph.

Article 55 raises many issues. First who is going to determine as to whether there is urgent need? Should the court determine whether the circumstance is really urgent? Second, should the court require the fulfillment of the requirements under Article 54 even in such circumstances? I think, the judge must assertain whether the circumstance is urgent. He must be convinced that there is urgent situation. As long as he is satisfied that the situation is urgent, I don't think that the requirements under Article 55 should be proved before the court at this stage. What do you think dear reader?

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How would the court give permission of the individual's arrest? Through a written warrant or orally? The urgency of the circumstance seems to necessitate the fact that warrant should be given orally. This, however, would go against the very important purpose of warrant. Warrant is, let alone the mechanism of getting permission for the arrest of the suspect, but also has the purpose of notifying the suspect the reasons for arrest by the police. This is the idea incorporated under Article 56 (2), when the police made an arrest.

Article 56 (2)

> *Where the arrest is made with warrant, the police officer shall read out the warrant to the person to be arrested and shall show it to the person arrested if he so requests.*

This idea also relates to the right of individuals to be notified of the charges against them up on arrest. This is a right recognized under Article 19 (2) of the FDRE constitution.

Article 19 (1)

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

Hence, in situations where a warrant is necessary in urgent cases, a certain police officer may request warrant by telephone and keep a water over the suspect till another officer brings the warrant to him.

Can the police officer request a warrant orally?

Article 55 (1) refers to the use of telephone or telegraph in urgent situations. If the police officer requests warrant with the same situation and same purpose of Article 55 (1) there seems no reason to refuse issuance where it is requested orally.

If an application through telephone or telegraph is allowed, for stronger reason, we must conclude that an application may be made orally.

In instances where an application is made by telephone or telegraph, Article 55(2) requires that the application be confirmed in writing with in 24 hours. This is made a mandatory requirement Although the law puts forth a mandatory requirement, it doesn't provide the sanction in case the police failed to adhere to such a requirement. This is a legal gap to be filled by judicial construction. You may raise two possible arguments;

1. making the arrest effected illegal
2. Forcing the police officer to confirm even after the 24thhour by taking disciplinary measure on him.

If we made the arrest illegal, the effect is that the individual will be released from the arrest. This, however would defeat the very purpose for which warrant has been given. The practical reasons necessitating confirmation may be satisfied by an obligatory order to that effect even after the time set by the law. Again, the police officer may be penalized for his non - respect of the law. This is the better solution balancing both the interest of the public in the offender's being arrested and the respect for the law.

A final issue concerns the content of warrant of arrest. In other legal systems the warrant must identify the person to be arrested, but, if the person's name is unknown, a fictitious name may be substituted (a so called John Doe Warrant); in such cases, a physical description of the person is required. Under the criminal procedure code, the form and content of the warrant of arrest is laid down under the third schedule form VI. The form seems to require that the name of the suspect be mentioned on the warrant.

To summarize, the Ethiopian law seems to require the fulfillment of stringent requirements for the issuance of warrant of arrest. Issuance is not automatic to an application by the police simply stating that "the individual is wanted for investigation". Though such strict requirements are set by the law, one may doubt the application of their action in light with the wide power to the police by Article 51 (a). We will see the details of this in the next section when we discuss about arrest without warrant.

3.4. Arrest without warrant

More numerous and of greater practical importance are arrests without warrants. It is the principle of modern criminal procedure that arrests without prior court authorization are properly the exceptions to the law of arrest.

Arrest without warrant is permitted under the criminal procedure code in two circumstances; Flagrant offenses (Article 21 and 50 of the code) and other circumstances mentioned under Article 51. As regard flagrant offenses, Articles 21 and 50 provide the following.

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

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

Article 50 Arrest without warrant in flagrant cases

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

We have seen what acts are regard as flagrant acts under our discussion of Articles 19 and 20. In such instances, the law authorizes arrests without prior court authorization. On this point, the Ethiopian criminal procedure code has support at the ultimate source of the concept "flagrant offence" in continental arrest law. As early as 1849, the Swiss Constitution provided that " where there is a flagrant offence, any person may arrest the offender". Similarly, many present-day continental and continental - inspired constitutions and codes allow arrest without warrant for flagrant offences and commonly define the concept in language very like that found in the Ethiopian criminal procedure code. Of course, common law statutes do not contain such language.

The special rules of procedure governing flagrant offences are usually applied only to "serious" flagrant offences, not to "minor" ones. In France, for example, an arrest without warrant may be made in the case of "a flagrant felony or a flagrant misdemeanor punishable by imprisonment". Minor flagrant offenses, such as misdemeanors are not punishable by imprisonment, and all petty offenses are not subject to such arrest. Hence, under France law, arrest without warrant is allowed for flagrant felonies and certain flagrant misdemeanors but not for flagrant petty offenses.

Dear student, as you can learn from the Articles of the Ethiopian criminal procedure code listed above too, arrest without warrant is not allowed in all cases of flagrancy.

Under its sub - article (1), Article 21 of the code states that in the case of flagrant offences justice may be set in motion without a formal accusation unless the offence is punishable up on complaint. Sub article (2) goes on to state that the offender may in such cases be arrested without warrant.

One may construe sub article (2)'s "--- such cases ---" as applying to offences punishable up on complaint too and hence, argue that arrest without warrant may be made in up on complaint cases too.

However, a number of reasons may be raised against interpreting the article in the way stated above. 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 offences without exclusion. It seems that they refer only to those offences where proceedings may be instituted without accusation or complaint. That is, to all cases where the offence is not punishable up on complaint. The exclusion of offences punishable up on complaint must again be read in sub - article (2).

Secondly, if you are to permit arrest without warrant in all cases of flagrant offences, an inconsistency will be created. If so, when a flagrant offence is committed, justice is going to be set in motion by the mere fact of the arrest. But, to allow an arrest without a warrant when offence is punishable on complaint would be inconsistent with the principle that it is for the injured party to set justice in motion. You have previously studied that complaint of the injured sets justice in motion in relation to such offenses. This is held without distinction as to whether the offence is

flagrant or not. Now, permitting arrest without warrant defeats this basic feature of offences punishable up on complaint.

Thirdly, one of the purposes of arrest without 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 doesn't disturb public order. Such offences have a private rather than public nature. So, it is unlikely that public order will be affected by offences punishable up on complaint. Then, arrest without warrant is not necessary in such cases.

Finally, to permit an arrest with out warrant when the flagrant offence is punishable on complaint is problematic. It would as often as not result in defeating one of the main purpose of the complaint. That is to avoid scandar when the injured party does not want certain things to be known. As we see it in our previous discussion, offences punishable up on complaint are dependent up on the will of the injured in making the commission there of known to the public. Arresting without warrant creates a public feeling without the wish and will of the injured. This is probably the strongest argument against taking the said Art. 21. to mean that such an arrest is permitted.

For instance, it is undesirable, to say that a member of the police or a private person (see Article. 50 of the code) should be entitled, to grab by the neck and bring to the nearest police station in public, 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 the request of the injured spouses.

Generally, all the above reasons go for the arrest without warrant of a person committing offence punishable up on complaint only. That is, it is only after an application (reporting) by the injured that the offender may be arrested without warrant.

The other instance of arrest without warrant in flagrant offences recognized by the law is in the cases covered under Article 50. Under this Article, arrest without warrant may be made if the following situations are fulfilled cumulatively:-

1. The offence is flagrant as defined in Article 19 and 20 of this code.
2. The offence is punishable with simple imprisonment for not less than three months.

This Article imparts the idea that private individuals can effect arrest on person found committing an offence. In addition to this, the Article requires that arrest should not be effected in all cases of flagrancy where the offence carries a maximum punishment of at least three months simple imprisonment or of rigorous imprisonment or of death; the person committing the offence may be apprehended without warrant. But in all other cases, i.e. if the offence punishable with less than 3 months simple imprisonment arrest would have to be made through warrant. This is very close to the French rule which prohibits arrest without warrant for contraventions punishable by imprisonment for not more than two months and a fine of not more than 2,000 france.
Article 50 of the Ethiopian criminal procedure code, however, seems to slightly be ambiguous in saying "simple imprisonment for not less than three months" For instance, when the offence under Article 643 (Indecent publicity and advertisement), punishable with "simple imprisonment for not less than one month, and fine", the doer would be subjected to arrest with out warrant under Article 50 eventhough the penalty ultimately imposed might be only one month simple imprisonment. This is because, the offence is still punishable by up to three years simple imprisonment (penal code Article 106)

In flagrant offences, arrest without warrant has advantage over arrest with warrant on three grounds: prevention, detection and certainty.

i) prevention applies where immediate arrest is the only way to prevent the offender from carrying off the fruits of his crime.
ii) Detection refers to the need for arrest in order to stop the offender from escaping, and to preserve evidence which might grow stale or disappear during a delay after the occurrence.
iii) Certainty refers to the fact that where an offender is found “red - handed" there is no possibility that he is innocent. So there is no need for such judicial safeguards as a warrant.

The policy allowing arrest with out warrant in such cases can be justified by the certainty which "publicity of the commission" lends. It is also often justified by the need promptly to restore disturbed public order and tranquility by removing the cause from the scene. Such prompt action might also be necessary in some cases, to avert further public distrurbance in the form of lynching (killing a suspect with out trial) or other violence committed by the offender or his pursuers. This publicity together with the opportunity to terminate resulting disturbance qualifies as an exception to the rule of arrest with warrant.

Hypothetical case

give answers to the following question: Ato Y was murdered in his own home on yekatit 1, 1997 E.C. His wife, who arrived on the scene just afterwards, caught a glimpse of the killer as he escaped through a hole in the back fence, but she fainted before she could raise an alarm. On yekatit 10, 1997 E.C the widow was shopping for tomatoes in the merkatto when, seeing Ato X stroll by with another man, she screamed, "That's the one who killed my husband?" and began chasing him. Ato Z, a tomato seller,
together with four or five other passers - by, joined the chase after X, who was now running. Z took a running leap at X, throwing him to the rocky ground and cracking open his skull. Now X's widow is suing Z for 80,000 compensation and Z defends on the ground that he was executing a legal arrest. The judge asks you to advise him on the question whether the arrest by Z was legal. What would be your advice? Would the case have been different if Z were a police man?

The other grounds of arrest without warrant allowed by the law are those listed under Article 51 of the criminal procedure code.

Article 51: Arrest without warrant by the police.

1. *Any member of the police may arrest without warrant any person:*
   - *(a) Whom he reasonably suspects of having committed or being about to commit an offence punishable with imprisonment for not less than one year;*
   - *(b) Who is in the act of committing a breach of the peace;*
   - *(c) Who obstructs a member of the police while in the execution of his duties or who has escaped or attempted to escape from lawful custody;*
   - *(d) Who has evaded or is reasonably suspected of having evaded police supervision;*

(e) *Who is reasonably suspected of being a deserter from the armed forces or the police forces;*
(f) *Who has in his possession with out lawful excuse any thing which may reasonably be suspected of being stolen or otherwise obtained by the commission of an offence;*
(g) *Who may reasonably be suspected of being a dangerous vagrant with in the meaning of Article 471 penal code.*

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

As you can see the lists under Article 51, the police is given wide power in arresting suspected individuals without warrant. Under sub - article (a), if the offence with which the suspect is accused is punishable with at least one year of imprisonment, the police can effect arrest with out warrant.

Dear student, How many offenses are punishable for at least one year imprisonment?

This article doesn't make distinction between rigorous and simple imprisonment. Given this, the police need not go before court fulfilling the two strict requirements needed to secure a warrant . The law is allowing the police himself to see whether there is reasonable suspicion. Even, it is doubtful whether this is complied by the police in the majority of cases.

Can the suspect challenge by saying that he is arrested with out there being reasonable suspicion?

There are also other situations under sub (b) - (h) where warrant is not necessary. They include diversified types and stages of commission of an offence some of them are flagrant offences. Examples may be the ones under Article 51 (1) (b) and 5 (1) (c). These are already covered under Articles 21 and 50. it is difficult to find a common justification for the permission of arrest without warrant in the cases under Article 51 and that of Articles 21 (2) and others.

Stanley Z. Fisher says this is a confusion that has arisen due to an eclectic approach to codification (bringing concepts from different legal systems i.e. civil law and common law). The power of arrest given to the police under Article 51 is taken from the common law. But, flagrancy is a continental law concept. No arrangement is made by the drafters of the criminal procedure code to avoid the confusion. Most of them are covered under Article 50. There is no need of mentioning them under Article 51 of course, petty offences under Article 51 are not covered by Article 50.

Dear student, don't you think that Article 51 (1) (a) coupled with Article 50 are sufficient?

Therefore, in most cases, you don't see the police going before courts and require warrant of arrest. Under Article 51 (1), there is no strict requirement. The only requirement is reasonable suspicion. There is no judicial determination of arrest. Though there is an attempt to incorporate judicial determination under Article 54, it is a failure as Article 51 curtails the power of the court. The independent power of the police could have been investigation. But Articles 50 and 51, coupled with the power of the police to issue summons, have rendered Article 54 to be of very much limited scope.

In light of this, many people tend to argue that though the position in the general jurisprudence is that arrest with warrant is the principle while with out warrant, the exception, and Article 49 also tends to reflect this, the situation in Ethiopia is the reverse, i.e. arrest with out warrant the principle while it is exceptionally that arrest is made with warrant. This is because the Ethiopian law of criminal procedure allows the police to effect arrest with out warrant in most of the times.

3.5. Effecting Arrest.

Dear student, under this section, we are going to examine the question, how does the investigating police officer effect arrest?

There are certain requirements that have to be fulfilled in effecting arrest. In foreign jurisdictions, certain elements need to exist to ensure when the arrest does take place. The four essential elements required for an arrest are as follows:

1. Intention to arrest
2. Authority to arrest
3. Seizure and detention
4. An understanding by the arrestee that he or she is being arrested.

As regards the first element, it is requiring that there must be intent to arrest the person. The police cannot accidentally arrest an individual. Since this is a subjective requirement, it is often difficult to establish in court unless the police officer's action clearly indicated that the officer intended to arrest the individual.

The second requirement is providing that the individual making the arrest must have the authority to arrest. Authority to arrest distinguishes an arrest from a false imprisonment or kidnapping. As seen above, there are two types of arrests those with a warrant and those without a warrant. The courts in the foreign countries have demonstrated a bias toward arrests with warrants. An arrest with a warrant is presumed to be legal unless the contrary is established. An arrest with out a warrant is presumed illegal. Accordingly, the prosecution has the duty to establish the legality of an arrest with out a warrant.

Thirdly, there must be a seizure and detention of the person. The seizure and detention may be an actual seizure such as handcuffing a person, or constructive when the individual submits without the use of force more words do not constitute an arrest. Merely telling a person that "you are under arrest" is not an arrest unless it is accompanied by an actual seizure or by submission of the individual to the officer's will and control. The submission may be implied by the individual merely going with the police officer.

Lastly, the person detained must understand that he or she is being arrested. Normally, the understanding is conveyed through words such as "you are under arrest". Sometimes the understanding is conveyed by actions of the police, such as hand cuffing of an individual. If the accused is too drunk, drugged, insane, or unconscious to understand that he or she is being arrested, then the understanding element is excused. The test used by those foreign courts in these situations is: would an individual with normal facilities understand that he or she is being arrested?

When we come to the Ethiopian criminal procedure code, Article 56 is concerned with the procedure for execution of arrest. Arrest would be deemed to be effected legally if those procedures are fulfilled.

***Article 56**:- Arrest how made.*

1. *The police officer making an arrest shall first establish the identity of the person to be arrested.*
2. *Where the arrest is made with a warrant, the police officer shall read out the warrant to the person to be arrested and shall show it to the person arrested if he so requests.*
3. *He shall then actually touch or confine the body of the person to be arrested unless there be a submission to his custody by word or action.*
4. *If such person forcibly resists the endeavors to arrest or attempts to evade the arrest, such officer may use all means proportionate to the circumstances to effect the arrest.*
5. *The provisions of this Article shall also apply to bench warrants.*

Under sub - article 1, the law is requiring the identity, to be established. This sub article uses the noun 'the police officer" this seems restrictive in the sense that it is only the police that effects arrest. But, we have seen the situation under Article 50, where private individuals are also allowed to effect arrest if the offence is flagrant and punishable with greater than three months simple imprisonment. This has not been corrected on the draft code either. It is advisable to incorporate the manner, of arrest by private individuals to be regulated by Article 56 through analogy.

Hence the arresting authority would have to comply with the obligations stated. As we have seen it, the first obligation is to establish the identity of the person to be arrested; the name, sex, age, address and other factors which will serve the purpose of distinguishing the individual. This is to avoid irreparable wrongs to the innocent person. This procedure safeguards the right to liberty of innocents who have similar identity with a suspect.

The second obligation is the duty to notify that he is arrested and the reasons of arrest. The arresting officer should read out the arrest warrant and if the person requires to see it, he has to show him. This is to make things smooth. Through this, he may get relaxed, feel comfort and the suspect might submit him self easily as he knows that it is issued by the appropriate authority (court). This is a constitutional right recognized under Article 19(1). Though the heading of this Article seems to make it to persons arrested, it should also be interpreted to include the pre - arrest stage.

Article 19.

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

The criminal procedure code, by stating that "where the arrest is made with a warrant, ---" seems to associate the obligation to inform with arrest by warrant only. Further more, it is not clear as to whether the obligation to inform is dependent on the request of the person to be arrested and also whether the request relates to the obligation to show the warrant. Under the constitution the right to be informed is recognized as an absolute right in the sense that no condition is attached to its existence. Thus, at least constitutionally, the person to be arrested has always the right to be informed of the reasons for his arrest whether he is arrested with warrant or with out warrant. If this is not fulfilled, the arrest turns out to be unconstitutional. It is with such a conviction that the draft criminal procedure code prepared by the ministry of justice made some changes to

Article56(2) Accordingly, it provides that if the arrest is to be made under circumstances of urgency where it is not possible for the police to secure an arrest warrant but made an application by telephone or other means of communication, he shall state this fact to the person to be arrested. It is further provided that □where a police officer makes an arrest with out a warrant, he shall state to the person the reasons for his arrest."

However, the arrestee can not object to his arrest on the ground that his right to be informed is not respected if:

a. the offence is so obvious that he has to know the reasons for his arrest.
b. He makes it practically impossible to let him know the reasons for his arrest such as by trying to resist arrest by creating violence or by trying to fled away, he is told the reasons.

Dear reader, when is it the case that the offence is so obvious that he has to know the reasons for his arrest?

This, probably is in circumstances of flagrancy. When the police informs of the charge to the arrested individually in circumstances at flagrancy there could arise possibility of misstatement of the offence. For example, police might arrest individuals participated in a group duel on the crime of bodily injury. But the public prosecutor might file charges on murder. Would this misstatement of the offence regard the arrest illegal?

The wruter doesn□t think that this could be raised as an objection by the accused to challenge the legality of the arrest. The police is an expert at the carrying out of investigations. After all the fruits of investigation are transferred to the public prosecutor, the public prosecuter would shoulder the responsibility and discretion to determine whether a crime has been committed, which crime has been committed and the weight of the evidence collected. Therefore, the final determination of with which offence to charge lies on the public prosecutor and normally, the police is not expected to exactly state the crime, especially in such related offences.

As regards the obligation of the police, the fact that it is a requirement for the constitutionality of the arrest and the right under the constitution implies that the police has the duty to enforce it automatically (Article 13 (1) of FDRE constitution). Hence, the "upon request" requirement under Article 56(3) applies not to the notification, rather to the showing of the warrant.

After the notification is made in the way stated, the next step is to "confine" or actually "touch the body" of the person. Unless the person to be arrested shows his consent either by word or conduct, the body of the person will be touched or confined. Dear student, what does "actually touch" or "confine" mean?

It is not clear as to what "actual touch" or "confinement" means. But, it is easy to learn that the words represent the act of practically arresting the person. Theoretically, if the person runs away before you touch or confine his body, he is not arrested. There fore, he is arrested:

1. When he gives his consent by word or action
2. In the absence of consent, when he is touched or his body is confined. The fact that the person would be touched doesn't refer to the grabing by the neck as some police officers. In fact, "actual touch" or "confinement" as relates to the use of force is clarified by sub - article (4) of Article 56. The subarticle provides that if the person who has demonstrated his unwillingness under sub (3) forcibly resisted the endeavors to arrest, or

attempts to evade the arrest, such officer may use all means proportionate to the circumstances to effect the arrest. (emphasis mine) here, two issues would arise:

1. What does the sub article imply in allowing the police officer to use all means proportionate to the circumstances?
2. What is the test of proportionality as it applies to the use of force in effecting arrest?

The point in the first issue is, can the police officer use deadly force in effecting arrest? The phrase "all means" under sub-article 56 (4) includes the use of force. But this force should be proportionate to the circumstances. Some authorities contend that the gravity of the offence with which the arrestee is suspected is the measure of proportionality of the use of force. Others say that the measure is the danger that the suspect poses to the person effecting the arrest. It is, however, better that some how, both have to be taken in to consideration jointly. Whatever the circumstance, however, the force used must result in effecting an arrest. As death is not the means of effecting arrest, the police may not use a deadly means in the course of effecting arrest. The ultimate goal is to effect the arrest.

Whoever is effecting arrest is discharging a legal obligation. So long as his activities are in conformity with the law, these legal acts can not be grounds for his liability. If there be any resistance that has to be broken by force so as to maintain the rule of law, force has to be employed to avert that danger or to break the resistance. Thus the degree of force may be increased proportional to the degree of danger posed to the person effecting arrest or the degree of resistance put up by the arrestee. More over, it is likely that a person who is suspected of serious crimes puts strong resistance. This again is the measure of the proportionality of force. This in turn means, taking the seriousness of the offence in to consideration in measuring the proportionality of force used to effect arrest. But this doesn't in any way mean that the police should use or intend to use force for the mere reason that the person is suspected of a serious crime.

Hypothetical Case:

On patrol one night in Addis Ababa policeman P heard cries of "stop thief" coming from a large compound, the home of a coffee merchant. He ran to the gate, and saw a man climb over the compound fence and run toward some nearby woods. The man was carrying a sack on his shoulder. P shouted "stop, or I'll shoot" and fired a shot in to the air, but the man kept running. P took him and shot him in the shoulder, causing a wound from which the man subsequently died. Was P's act legal? Would your answer be different if the suspected offence were negligent homicide? Petty that?

A last point worth consideration in connection with effecting arrest is the requirement of notice. We have seen previously that the police officer has to notify the person of the reasons for his arrest. But now, the issue is not about this notice. Should the arresting officer give notice of the person to be arrested? Should he knock at the doer or does he immediately break in to the house? Can he suddenly enter in to the house to arrest the person while his wife and children are peacefully sleeping?

Assume that X is committing an adultery with Y and a complaint is made by the wife of X. Should the police show his presence at the time when the two were making sexual inter course?

In most jurisdictions, the requirement of notice is mandatory. Sometimes, there could be a possibility of escape or destruction of evidences and in such circumstances, he can effect the arrest without giving notice. So, in principle, notice should be given, exceptionally there are circumstances where notice is not necessary.

Under the Ethiopian criminal procedure code, there is no specific law regarding this. Showing the arrest warrant, using proportionate means, □.. are specifically given. No clear provision exists as regards notice. But, it is very important.

Dear student, how should the issue be resolved in our law?

3.5.1. Assistance to arrest

Sometimes the person to be arrested may overpower the police officer in the officer in the effort to evade the arrest and hence, assistance may be required from other individuals in the near by area the law obliges the person requested to extend the required assistance under Article 57.

> *Article 57 Assistance may be required to effect arrest.*
> *Where the police call for assistance in making an arrest with or with out warrant there shall be a duty to assist where assistance can be given with out risk (Article 761 penal code).*

Two things would have to be fulfilled for the obligation to materialize;

1. The request should come from the arresting officer.
2. the assistance should not bring risk hence, if the assistance may create serious danger to the person and property of the individual, the obligation wouldn□t exist. If, however, in the absence of risk, the person refused assistance, that constitutes a crime.

3.5.2. Post arrest procedures

After the police has the suspect in custody, he will have two available options. Release on bond or bring the suspect to court with in 48 hours. The police would utilize these options after proceeding in to interrogation or just before interrogation. We would discuss about interrogation later on. The issue of release on bond is governed by Article 28 of the code while the Forty eight hours requirement is governed by Article 29.

Article 28 *- Release on Bond.*

1. *Where the offence committed or complained of is not punishable with rigorous imprisonment as a sole or alternative punishment; or where it is doubtful that an offence has been committed or the summoned or arrested person has committed the offence complained of, the investigating police officer may in his discretion release such person on his executing a bond with or with out sureties that he will appear at such place, on such day and at such time as may be fixed by the police.*
2. *Where the accused is not released on bond under this Article, he may apply to the court to be released on bail in accordance with the provisions of Article 64.*

Under this Article, the police may release the person in custody on band, with or with out surety of one of the following conditions are fulfilled;

- The offence committed or complained of the have been committed by the suspect is not punishable with rigorous imprisonment as a sole or alternative punishment;
- it is doubtful that the crime is committed at all; or
- That the arrested person has committed the offence complained of.

As the requirements are alternative, the fulfillment of one of the conditions would result in the possible release of the suspect on bond. If the crime for which the arrestee is suspected is punishable by any amount of rigorous imprisonment even alternatively, the police can not release on bond. Again, if there is an evidence as to the commission of the crime or the arrestee's committing it, there shall be no release on bond. But, in the latter case, to prohibit release on bond, it is not an evidence absolutely showing the commission of the crime that should be expected. If one of these requirements is fulfilled, the police may release the arrested person upon his discretion by execution a bond with or with out sureties.

The bond is about money to be deposited while surety is the additional person to be presented by the arrestee.

Dear student, Article 28(1) provides " ---------- may in his discretion release ---------- a bond with or with out sureties ---------" Does the discretion relate to the requirement of surety (over and above the bond) or the decision to release on bond?
clear requirements being set for the exercise of the power, it doesn□t seem that the law would allow the police to have full discretion on whether to release or not. In fact, the police would exercise some form of discretion in fixing the amount of bond by having regard to the likelihood of the appearance of the person at a place and time to be fixed by the police. The amount of bond should always be compared to the financial position of the person. An amount which may secure the appearance of a poor may not be sufficient to release the rich. But still, the amount to be fixed should not amount to prohibition of release on bond. When the person has week financial capacity, you may require additional person as a surety in practice, it is reported that some police officers make the bond cumbersome for fear of assuming the risk of blame by their authorities and by courts alike should the person fail to appear. However, the police should fix a justifiable amount. The non- appearance of the person will be taken care of by other legal mechanisms.

An issue would arise in connection to Article 28 as to whether the police can release the arrested person if he is well aware that the individual is an innocent person having similar names with the actual suspect. So, can the police unconditionally release the individual in such cases?

Under our criminal procedure code, the only type of release by police after arrest is on bond. There is no reference to unconditional release. Actually, the judicial control in arrest may minimize the possibility of being found innocent after arrest. But still, it can not be avoided. Release on bond, having the said disadvantages to the innocent individual, can not be a substitute for absolute release. Here too, you may intact argue that there is no need for an express legal provision to the effect that an innocent be released without bond. The fact that an innocent be released without any condition must be taken fore granted. After all, Article 28 (1) covers situations in which the police officer is doubtful as to the innocence of the suspect. The contraire understanding of the Article would imply that the police officer may release the arrested person unconditionally if he is certain about his innocence.

An other issue relates to the duty of the police to bring the suspect before 48 hours. This right exists under Article 29 (1) of the criminal procedure code and 19 (3) of the constitution.

Article 29 *- procedure after arrest.*

1. *Where the accused has been arrested by the police or a private person and handed over to the police (Article 58), the police shall bring him before the nearest court with in forty eight hours of his arrest or so soon there after as local circumstances and communications permit. The time taken in the journey to the court shall not be included.*
2. *The court before which the accused is brought may make any order it thinks fit in accordance with the provisions of Article 59.*

Article 19 of FDRE constitution - right of persons arrested.

3. *Persons arrested have the right to be brought before a court with in 48 hours of their arrest. Such time shall not include the time reasonably required for the journey from the place of arrest to the court. On appearing before a court they have the right to be given prompt and specific explanation of the reasons for their arrest due to the alleged crime committed.*

This right is intended to ensure judicial control of courts over the individual. The constitution has incorporated the right to be told of the reasons for arrest when the arrestee is brought to court. This means the person must be told of the reason for his arrest by the arresting person as well as the court before which he may be brought. Therefore, if the arrestee is not released on bond or unconditionally before 48 hours, he would have to be brought before a court of law. He may be brought to any nearest court regardless of jurisdiction over the crime. Most of the times, he will be brought to the court which has issued the arrest warrant when the arrest is made with warrant.

The forty eight hours requirement is dependant on conditions stated under both the constitution and the criminal procedure code. It may be extended to more than Forty - eight hours if the conditions stated exist. The time the journey takes from the police station to the court is one condition under the constitution. Accordingly, the forty - eight hours requirement may be extended for the time reasonably required for such a journey, the police can not arbitrarily delay the time of bringing the arrested person to the court. Therefore, the police must use the faster mode of transport possible and if, for reasons out of his control, the time is delayed, such a delay may be tolerable.

Article 29 of the criminal procedure code has a concept not incorporated under the constitution. It employs the phrase: "so soon there after as local circumstances and communications permit", which is lacking in the constitution. It doesn't seem that this is an extension at the period of 48 hours by the time taken for journey to court. The term "communication" may actually be taken as representing the mode of transportation to be employed. But, the other word i.e "circumstances" designates very wide situations. This opens a loop way for the police to make extensions of the Forty - eight hours requirement on other additional grounds not incorporated under the constitution. The police may abuse the provision and fail to respect its duty on the such grounds as incoparable to the right of the accused to be brought before the court with in the time limit. If the phrase would have to be given force, at all, the reason of "local circumstances" must be related to something absolutely hindering the bringing of the person with in the fixed period of time. Otherwise, it is a potential ground for the illegality of an arrest (and detention)

Hypothetical Case

One day the police has been informed that group of individuals assembled in a certain house smoking a hashish. The police caught them red-handed at around the mid day and arrested two of them, x and y while the others have escaped. In the next morning a very serious disturbance which even required additional police force from other areas arose in the town. It took the police some three days to calm the disturbance down. On the fourth day of their arrest, x and y are brought to court. When the police officer is requested to explain the reason for delay, he forwarded the disturbance as a reason. Is it an acceptable reason? Is it a justifiable extension of the 48 hours time that is made? Why?

These are the procedures that came after arrest is effected on the individual. There is also an other procedure that the police would have to adhere to immediately after it has effected arrest. This is the duty to report to the ministry by virtue of Article 11 (3) of proclamation no 39/ 1993. This proclamation has, of course, been repealed by proclamation nº 74/1993. But Article 13 of the repealing proclamation cross - refers to Article 11 of proclamation number 39/ 1993.

3.6. Remedies to Illegal Arrest.

Dear student, we have previously seen that arrest being an exception to the principle of individual's liberty, certain procedural and substantive grounds have to exist for it to materialize. Hence, the arrest would be legal only if these grounds are satisfied. The non - fulfillment of any of such grounds would render the arrest illegal. There are two mechanisms devised by the law to avoid such an illegal arrest: preventive and remedial measures.

3.6.1. The preventive measures:

This is done through enacting preventive legislations such one legislation is Article 17 of the FDRE constitution. The Article, by the phrases such as " ------ no one shall be ------" and "------ no person may be -----" are intended to make prohibition on an illegal arrest. In addition to this, proclamation number 39/1977 and 39/ 1993 have incorporated provisions preventing the police from engaging in an illegal arrest.

3.6.2. Remedial Measures:

1. Criminal proceeding.
   An illegal arrest by itself turns out to be an offence for which there is a criminal liability. A private arrester may be prosecuted under the criminal code Article 585 A police officer may be made criminally liable under the revised penal code Articles 423, 424, 407, 796 - 798.
2. Civil proceedings: - The arresting individual may be made extra-contractually liable towards the person injured by the illegal arrest. This applies to an arrester who is an ordinary citizen (civil code Articles 2035, 2040 - 42). In the latter case, the state may be jointly liable with a right to recovery against the policeman. (civil code Article 2126 - 27)

3. Self help :- This refers to a person's right at common law to resist illegal arrest by force provided that he doesn't intentionally inflict death or great bodily harm. Although this rule protecting a person's prima facie right to freedom from unlawful restraint is easily justifiable where the arrester is another private citizen, it has come increasingly under attack where a police officer is involved. In a certain criminal case decided in 1964 (In crown V. Bada Asfaha), the court pronounced a dictum to the effect that deceased "should not have resisted" the arresting police officer despite the illegality of the arrest, but should have "instead brought the matter to court through legal proceeding".
4. Internal police discipline:- This is a remedy through formal complaint by the victim to the police authorities, who can then determine the facts and discipline employees found guilty of unlawful behavior. This may be effected against the arresting police officer in the form of departmental demotions, fines etc. such measures are specified in laws and other documents regulating the power and conduct of the police officers.
5. The Exclusionary rule

   In practice, people feel reluctant to take civil action or to resort to a legal self - help. They have also get the fear that a police won't investigate the criminal act of his fellow officer. The internal disciplinary measures are also not seriously taken. Due to this, the principle of the exclusionary rule remedy is introduced in some jurisdictions. This principle as related to illegal arrest forbids a court to consider in evidence any "fruits" of any search incident to the illegal arrest. Therefore, Although an accused may not gain immunity from trial and conviction merely because he was brought before the court illegally, he can often achieve the same result by invoking the "exclusionary rule". When crucial evidence is thus excluded from consideration at trial, it is in many cases impossible for the prosecution to process a defendant's guilt. This is believed to discourage the police from making an illegal arrest in the future. The exclusionary rule regarding illegally seized evidence will be considered latter in connection with our discussion of the law of search and seizure.
6. Writ of habeas Corpus.

   This is a remedy recognized in the countries of the Anglo - American legal system but is generally not found in civil law countries, although some of the latter have adopted comparable procedures. It is issued by a court or judge to direct one who holds another in his custody to produce the body of the person before the court for some specified purpose. It is used to correct violations of personal liberty by directing judicial inquiry in to the legality of a detention.

This is a civil remedy recognized under Articles 177 - 179 of the Ethiopian civil procedure code. This also is recognized under Article 19 (4) of the FDRE constitution. (you are advised to read these articles).

It is necessary to distinguish clearly between the writ of habeas corpus, and the order to release the person in custody. The writ of habeas corpus itself is simply an order requiring the person having custody of the detainee to bring the "body" to court, usually with the additional instruction to show cause (at that time) why release should not be ordered. The writ is thus represented by the "summons" referred to in Article 178 (1), civil procedure code. But granting of the writ by issuing this summons by no means is tantamount to ordering the release of the detainee that is a separate matter, covered by Article 179(2), civil procedure code. Thus, the court can grant the writ of habeas corpus and then, should it find the detenition law ful, refuse to grant the relief requested. Conversely, it is logically possible (and indeed the practice in some countries) for a

court to reject the application for the writ of habeas corpus (because it does not want the detainee produced in court), and yet grant the requested relief by ordering the detained person's discharge.

Dear student, does the civil procedure code's language support this interpretation? What is the correct procedure for the court to follow when it receives a habeas corpus application?

If you read the provisions of the civil procedure code and the constitution dealing with habeas corpus, there happens to be a discrepancy as to the scope and ruling, the constitution provides the grounds for the writ of habeas corpus to include the failure of the police to bring before court and provide reasons.

According to proclamation number 25 /1996, an application for habeas corpas has to be made to the federal first instance courts. The application may be made by the detainee himself or other individuals may make it for him.

What would be the ruling of the court after it has received an application for habeas corpus? If the detention is illegal, according to Article 179(2) of the civil procedure code, the court would order unconditional release. But, according to the constitution, Article 19(4) provides "--- where the interest of justice requires, the court may order the arrested person to remain in custody or, when requested, remand him for a time strictly required to carryout the necessary investigation ---" Hence, according to the constitution, the illegal definition may continue when the interest of justice requires.

In some countries like England and India, the application will be dismissed unless it establishes a prima facie case that the detenition is unlawful. The American law also gives the court discretion even where prima facie case is shown by the application. Instead of immediately issuing the writ, the court may require the respondent to show cause why the writ should not be granted. And the law goes on to provide that once the respondent's reply is received, the court may then either dismiss the application, order the applicant discharged, or hold a hearing. Lastly, it gives the court the added discretion to decide, if a hea
ring is ordered, whether or not to require the respondent to produce the body of the detainee. If the sole issues to be decided at the hearing are questions of law, then the detainee's presence will not be required; only if the facts are disputed will he have to be brought. How does the procedure under Ethiopian law compare?

> ***Hypothetical Case***
>
> *Supposing as a federal first instance court judge you receive a habeas corpus application alleging that D, remanded to prison to await trial on a theft charge, is unlawfully detained because as a seventh cousin of a member of parliament he is legally immune from arrest? Or alleging that X, convicted of murder under Article 540, should be released because after his appeals failed he paid "blood money" to the deceased's family? Will you issue a writ? Have you any discretion in the matter?*

To make you better acquinted with the practice of court entertainment of applications for a writ of habeas corpus, below are stated two decisions of the high court decided in 1958.

In the first case,
The petitioner has not appeared, allegedly because he is imprisoned. Woizero Qeleme Worq Abebe, his wife, has appeared before the court. Major Gizaw Belayneh has appeared as representative of the public security department.

Major Gizaw stated that his knowledge of the case of Ato Asefa Dula was limited to what was contained in the records; that, on the basis of the records, Ato Asefa Dula has been ordered to remain in Asela; that he is allowed to appear in court under the custody of policemen and argue if there are cases involving his interests; that he is kept under supervision; that in his opinion, he cannot leave Asela. He asked that General Yilma should be asked to explain (matters) to the court since he knows more about the case. Since Ato Asefa Dula submitted a written statement made under oath dated Tahsas 19, 1958, and a petition dated Tahsas 15, 1958, alleging that he had been imprisoned for no cause by order of Brigadier General Yilma Shibeshi, an order was given for Brigadier General Yilma to appear in court, and the case was adjourned for Ter 9, 1958.

Pursuant to the request of the public security department for another adjournment on the ground that Brigadier General Yilma had departed on duty on Ter 9. 1958, the case was adjourned for Yekatit 28, 1958. But Ato Assefa Dula argued, in his petition dated Ter 10, 1958, that the lengthy adjournment which was requested would pervert and prejudice his petition for justice, and that the length of the adjournment should be shortened. The court considered his petition valid, and accepted the amendment of his wife, woizero Qeleme Worq Abebe. That Brigadier General Yilma was not the only respondent and that the public security department could answer as well. Therefore, the court, sitting on Ter 17, 1958 gave an adjournment for today after ordering that the amended petition and the previous one submitted on Tahsas 15, 1958, together with a summons should be sent to the public security department and that the person who knows about the case must appear with the statement of defence.

Major Gizaw Belayneh has appeared today to represent the public security Department, and has repeated that he knows nothing other than what is contained in the records. He has indicated that the person who issued the order could give a better explanation.

The court made the remark that any person may petition to the court on the ground that he has been arrested or imprisoned unduly. And the procedure has been laid down under Articles 177 179 of the civil procedure code. Ato Asefa Dula has submitted a petition on the basis of this civil procedure. The respondent, the Minister of the public security department or Brigadier General Yilma, has been unable or unwilling to explain that Ato Asefa Dula was duly arrested and prevented from leaving Asela. Since everyone has a fundamental constitutional right not to be deprived of his liberty without due process of law, the authorities may not encroach upon this right without due process at law. We have not been shown that Ato Aseffa Dula has been deprived of his liberty in accordance with the law. Therefore, since the court has realized that Ato Asefa Dula has been illegally detained it ruled that he must be released today, Ter 21, 1958, by virtue of Art. 179(2)of the civil procedure code.

Any person or authority who hinders the execution of this decision shall be punished for contempt of court.

Let this decision together with an order be sent to the office of the Arussi Taklay Guezat, to the chief police officer of the Arussi Taklay Guezat, to the Ministry of Interior, to the public security department, to the ministry of justice and to the Advocate General.

The right of Ato Asefa Dula to claim compensation for the damage caused him by his illegal imprisonment is reserved.
Yekatit 1, 1958

Since Ato Asefa Dula has sent two petitions dated Ter 25, 1958, stating that the decision of the High Court ordering his release has not been carried out:
Order

The order of the court given on Ter 21, 1958, ordering the release of Ato Asefa Dula, has not been executed.

If the decision of the court is not executed, it is impossible to know the value of courts and the law.

Therefore, let a summons be sent to his Excellency Dejazmatch Sahlu Tsegaye, the Governor General of Arussi, who has allegedly declined to execute the decision of the court, so that he may appear before the court together with Ato Asefa Dula.

Let an order be sent to the Ministry of Interior of the Imperial Ethiopian Government to execute this order. The case is adjourned for Yekatit 5, 1958.

Yekatit 2, 1958

Since Ato Asefa Dula has come to me and stated that he has been released, the order given above need not be transmitted. The file is closed.

(Signed by Judge Belatchew)

Yekatit 5, 1958

In the second case, the order is being issued because on Tekemt 20, 1958 the chief of police of Eritrea, Brigadier General Zeramariam, arrested Belatta Umar Kadi on political grounds, and an application for habeas corpus accompanied by an affidavit was submitted to this court under Articles 177 79 of the civil procedure code, stating that the arrest was both unconstitutional and against the penal law, there fore praying the court to release him. The court, having satisfied itself of the accuracy of the procedure, summoned the chief of police of Eritrea under Article 178 to appear with the detainee on Yekatit 25, 1958 and to show cause why he should not be set free.

On the appointed day the Chief of police stated in court that the arrest was made because of a written order from His Majesty's Enderassiye in Eritrea and that the detainee was immediately handed over to the commander of the 35th Army Unit. A summons was then issued to the Army Commander telling him to appear with the detainee on Yekatit 28, 1958. The assistant commander of the detanee had been under his custody. Up on order he had been handed over to Lt. Col Tekie Asgedom. Chief Criminal Investigator (of the police) who affirmed by signature having received the detainee under his custody.

The court having ascertained the return of the detainee to the police, issued a summons for the last time requiring the chief of police and the chief criminal investigator to appear with the detainee in court on Yekatit 30, 1958. The chief of police and the chief criminal invetigator appeared before the court on the appointed day, and affirmed that because his brother had petitioned his majesty for a pardon, on Yekatit 28, 1958 the detainee was sent to Addis Ababa accompanied by an officer, to be handed over to H.E. Dej. Kifle Ergetu, as ordered in writing by H.E. the Enderassiye; therefore since the detainee was not in their custody they stated that they could not bring him to court, and they brought a copy of the order.

The letter written to the court on Yekatit 29, 1958 by H.E. the Enderassiye confirmed that he had received an order requiring the detainee to appear before his Majesty□s Chilot and that since the chief of police acted according to orders from the crown, he was not responsible.

We now understand why the detainee was not brought to court. Nevertheless, even though the chief of police arrested him on superior orders, when the court requires the presence of the detainee superior orders are no excuse. It should be understood that the rule of law requires the police to show that the detainee has been arrested on legal grounds, not to create various excuses.

The application that we received requested the court to examine the reasons why the person was arrested and if the arrest was illegal to set the detainee free, as provided for in the civil procedure code. Every body should understand that since our constitution has clearly said that the law should be administered equally for every body, it is the court□s fundamental role to uphold (that principle).

Even now, since the chief of police did not present the detainee in court, the detainee has not been given the opportunity to submit his legal arguments, but has been shifted from place to place without the court□s order being satisfied. Therefore, we think that it is an infringement on human rights and freedom to say that the detainee must remain as he is until the reason for his detention has been stated. Since the detainor has been given more than two opportunities to present the detainee in court and to give reasons for the arrest but has not done so, this leads the court to doubt the legality of the arrest; the detainor has not presented the detainee in court and given reasons why the detainee should not be set free, pursuant to Art. 179(2) of the civil procedure code. We there fore order that Belatta Umar Kadi be set free.

A copy of this order shall be forwarded to the chief of police in Eritrea. Given in the presence of the chief prosecutor of Ertrea and counsel for the detainee.

Dear student, was the high court's final order in Umar kadi a proper one? Supposing the government wished to appeal it; - could it? Should it be able to? Can the court's refusal to order discharge of the detaince under article 179 (2), civil procedure code be appealed? What is the effect of such an appeal?

Questions

1. X, shepherd, comes to you accusing Y, a wandering minstrel of having stolen sheep. He asks you to issue the warrant at once because he has just seen the accused collecting wood for a fire and inviting his friends to "a big lunch". Would you approve?
2. An investigating police officer (p) appears in your court and explains (orally) that he has just received an anonymous telephone accusation against X, a respectable advocate. The telephone caller said that he had overheard a tejbet conversation the previous night in which one of the talkers has whispered to the other, "we can pick up the counter feit money at ten tomorrow; x has already printed most of it on his basement counterfeiting machine". The caller advised p just before hanging up the telephone that it looked like a clear violation of 369 of the criminal law, but that he had better hurry up and arrest X before the latter left the country permanently, as he was planning to do with in the next few weeks. P ran directly from the telephone in to your court. Would you approve warrant of arrest?
3. Ato X, a law student, was walking along Yekatit 12 Avenue when policeman P stopped him saying, "you are under arrest - up with your hands." As X raised his arms a small package tell from inside his coat pocket to the ground. P picked it up, opened it, looked inside, and saw that it contained hair of a dead person. Ato X admits to have been (in his own words) "carrying off" from his uncle's funeral some of the deceased□s hair for the purpose of scattering it on the top of Entoto; an old magician had told him this would bring him luck on his forth coming examinations. X, who was convicted of an offence under Article 493 penal code. Now asks you as his attorney if he can successfully sue P for damages arising out of an illegal arrest. P candidly admits he arrested X " on an impulsive and erroneous hunch" that X was a notorious jewel thief and for no other reason, but he justifies the legality of the arrest under Article 50, criminal procedure code.

What is your advice?

CHAPTER IV
Post Arrest Investigation

In the previous chapters, we have been dealing with the manner of setting justice in motion and different modes of securing the attendance of the suspects appearance before the police. In this chapter, we will consider some of the problems which are connected with the gathering of evidence by the police in criminal cases. This investigative activity may take place prior to, contemporaneous with, or subsequent to the initial stages of information, summons and arrest; it is governed by Articles 22 - 39 of the code. This chapter deals primarily with the legitimacy of attempts, by interrogation, to use the accused himself as a source of evidence.

Many of the problems arising in these areas are presented to courts as questions of evidence: will this or that item of evidence of guilt be admissible at trial against the accused, or will the court decline to consider to because of the manner of its acquisition by the police. An important issue to be resolved is whether, in Ethiopia, exclusionary rules of evidence should be adopted to enforce the right of criminal defendants who are maltreated by the police during investigation, or whether other remedies would be preferable. An issue would also arise as to whether fruits of interrogation would after all be accepted by courts for the purpose of conviction. We would be exhaustively dealing with the procedural aspects involved at this stage.

4.1. Interrogation

The police officer, after recording the accusation or complaint lodged, shall begin his investigation by gathering information from the person who reported as to all relevant facts in addition to these persons or where the police can not know of the offence by themselves, they may examine witnesses. This forms part or beginning of the investigation process. The preliminary investigation by the police or the persons reporting an offence or other witnesses may result in a reasonable belief that a certain person (a suspect) has committed it. This may result in turn in the suspect's being called or brought to the police. Once the attendance of the suspect is secured, he will be interrogated by the investigating police officer.

Interrogation is the process of questioning by which the police obtains evidence from the suspect. Usually, the aim at the questioning is to obtain an admission of the offense that will lead eventually to a plea of guilty and avoid the need for a contested trial. Hence, you may say that it is an examination of the suspect by the police with a view to eliciting relevant information pertaining to the offence with which the person is suspected.

Article 27

1. *Any person summoned under Article 25 or arrested under Article 26, 50 or 51 shall, after his identity and address have been established, be asked to answer the accusation or complaint made against him.*

As indicated under this article, the individual has to be summoned or arrested in accordance with the procedures laid down under the relevant provisions of the criminal procedure code. As the suspect from whom evidence is to be gathered is the focal point, the examination requires his presence. The presence of the suspect should be secured by the legal means we discussed.

In the process of interrogation, there are two tasks to be performed: one, establishment of the identity of the suspect. For this purpose, the investigating police officer would pose questions that have the purpose of ensuring whether he is the real suspect and identifying his real address for further proceedings (like incase he is released and wanted again. The establishment of identity at this stage is more than just a registration of the important preliminary information about the arrested person. It is the real and determinant stage where the police can identify whether the person before him is the actural suspect though this may also be done before summoning or arresting him. If the information received from the person conforms to that which has been taken by the police in the accusation/ complaint lodged against him, the police proceeds to interrogate the arrestee further ask him to answer the accusation or complaint made against him. This, there fore, is a preliminary selection process.

The second is questioning him to answer to the accusation or complaint made against him. This should not be understood as to mean interrogation with such purpose is limited to those against whom suspicion arises from accusation or complaint. It applies also where the police came to know or suspect the commission of an offence directely in case of flagrancy. Here, the police would ask the suspect questions so that he would frankly admit to the accusations or complaints. Therefore, if the suspect willingly admitted the commission of the crime, he is a good citizen helping the criminal justice system and the law would encourage to keep up to this honesty. However, if the suspect denies the accusation other methods of investigation should be adopted. Infact, this method may involve the police to a more difficult and tiresome task.

Dear student, what kind of confession is a confession given freely?

There are certain procedural requirements that need to be fulfilled in the process of interrogation. These are restrictions on the scope and method of interrogation in order to ensure that suspects are not coerced in to confessions by unacceptable means. The fulfillment of these requirements would prove that the confession is given freely.

One such requirement is that provided under Article 19 (2) of the FDRE constitution and Article 27 (2) of the criminal procedure code.

Article 19 - right of persons arrested.

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

Article 27

2 *. He shall not be compelled to answer and shall be informed that he has the right not to answer and that any statement he may make may be used in evidence. As you can read from the above mentioned provisions, one condition to be fulfilled in the course of interrogation is the requirement that the police give warning to the suspect that he has the right to remain silent and any statement he may make may be used as evidence against him in court. Here you have to distinguish two aspects of the warning; the first is that the suspect has the right to remain silent. This right is a widely recognized right under international human rights instruments. The second aspect of the warning is to inform the suspect, in a language he understands, that any statement he is going to make may be used as an evidence against him in court.*

The right to be silent does not seem to apply for interrogation to establish the identity and address of the suspect. The right exists to prohibit self-incrimination and answers to questions relating to name and address are not expected to have such an effect. The suspect can remain silent as to the substance of the accusation or complaint. With the added information that any statement he may make may be used in evidence, it may help in reaching at a free confession, if that is the way the suspect intends to answer the accusation or complaint.

As regards this warning, the common law has put certain other restrictions.

The Miranda warnings in the united states, for example, provides that any suspect who is being interrogated in custody must be offered the services of a lawyer, at the expense of the state if he

can not afford to pay, and failure to advise the suspect of this right result in the rejection of a confession. The English law also follows the rule that a person suspected or accused of a criminal offense is not at any stage in the process of investigation or trial obliged to answer any question or to give evidence. The principal effect of the judge's rule is to impose an obligation on the investigating police officer to administer to the suspect a caution to the effect that he was not obliged to answer any question and that any thing he did say might be given in evidence at his trial. The caution was required to be given at the beginning of any period of interrogation and immediately before the suspect began to make a full statement or confession.

The other restriction is on the use of force or other improper means to elicit the consent of the suspect to give admission. On this point, Article 19 (5) of the FDRE constitution and Article 31 of the Ethiopian criminal procedure provide as the following;

Article 19 of the FDRE constitution

> *(5) persons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible.*

Article 31 of the code - No inducement to be offered

1. *No police officer or person in authority shall offer or use or make or cause to be offered, made or used any inducement, threat, promise or any other improper method to any person examined by the police.*
2. *No police officer or other person shall prevent or discourage by whatever means any person from making or from requiring to be recorded in the course of the police investigation any statement relating to such investigation which may be disposed to make of his own free will.*

The right to the prohibition against forced confession arises from the constitutional right to the privilege against self-incrimination. This rule, known both to Anglo - American and continental procedure, holds that no person may be compelled to give evidence against himself in a criminal proceeding. Although historically the privilege not to be a witness against oneself arose quite separately from the rule excluding involuntary confession from evidence, to day the privilege serves to buttress the confessions rule: in order to ensure that coercive measures are not used to wring a confession from the accused, he is permitted to remain silent altogether. Hence, according, to the principle, and evidence obtained through torture, physical or psychological inducement should be inadmissible. One may incriminate himself voluntarily, but he must not be compelled to do so. The evidence obtained by involuntary confessions should be disregarded because;

1. They are unreliable indices of truth:
   This is because men have been known to admit crimes of which they are innocent, simply to escape the pain of torture, to obtain an irresistible benefit or to evade various social condemnations.
2. It would be immoral for the state to enlist the accused in the search for evidence; that, instead, the state ought to get the source from independent sources, without asking him to help the case against himself. Society condemns these "third-degree" methods, which violates the accused's privilege against self-incrimination.
3. Inflicting harm on one merely suspected, not convicted of crime, nullify his constitutional right to the presumption of innocence. The presumption of innocence is recognized under article 20 (3) of the constitution. It reads; 'During proceedings accused persons have the

right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves".

This right to the presumption of innocence requires the treatment of suspects on such a status until and up to when the court made decision of conviction of the suspect. There fore, the suspect should not suffer from any harm until the court has a warded penalty in the form of imprisonment or fine.

More than the need to decide cases based on trustworthy evidence, the prohibition also serves the purpose of discouraging the police from using illegal questioning methods by excluding the evidence.

Hence, the above stated condition would all have to be fulfilled for the interrogation to be conducted in a legal manner. They are tests of freedom or voluntaries. As provided under Article 19 (1) of the federal police proclamation, it is provided that the police must perform his activities in accordance with the criminal procedure code and the appropriate laws by honoring the human and democratic rights ensured by the constitution. Hence, it is important to know that the police must always respect the pre conditions about interrogation.

Even an involuntary admission, which is subsequently proved to be true, is not held admissible for the following reasons:

1. it would be recognizing or appreciating the inhuman or cruel treatment of the police. Article 18 (1) of the constitution declares that every one has the right to protection against cruel, inhuman or degrading treatment or punishment. If such acts are committed with the purpose to get an evidence, the evidence is obtained through unconstitutional methods and hence, it shall have no effect in accordance with article 9 (1).
2. it would be encouraging the police to use the same illegal methods in the future.
3. The privilege against self - incrimination is an absolute right in such a way that as long as the suspect do not volunteered to the admissions, the admissions would not be accepted. Hence, using drugs or cross - examination for the purpose of securing admission should not be allowed because, it would be immoral for the state to oblige the suspect to incriminate himself through devises that would interfere with his free consent. In cross - examination, the police is confusing the suspect to say what he doesn't want to say this is against the right to remain silent.

Generally, the idea behind the privilege against self-incrimination is that it is up to the society to prove the commission of the crime. If he intelligently, voluntarily makes admissions, he is assisting the criminal justice. But if he keeps silent, since the allegation comes from the police, he should not be required to provide the bullet with which he is going to be killed. It would be immoral for the state to seek the assistance of the suspect in collectioning evidence that would incriminate him. It is for this reason that Articles 19 (2) and 20 (3) of the FDRE constitution and the criminal procedure code Article 31 and 142 (3) prohibit the soliciting of incriminatory statements from the accused.

Under Article 31 of the criminal procedure, the prohibition on the use of inducement, threat, promise or any other improper method to any person examined by the police extends not only to the police, but to "persons in authority".

Dear student, who is the "person in authority?" why should confessions produced by threats, etc. Proceeding from persons in authority be excluded from evidence more readily than those produced in similar circumstances from persons not in authority? Should a confession made under violent threats from, e.g, a self - righteous fellow, prisoner, be admitted in to evidence as 'Voluntary"?

If the threat, promise or inducement must, for purposes of exclusion, relate to the charge, then the "person in authority" must be one who has (apparent) authority to interfere in the charge. These could be the public prosecutor or the victim of the crime, as the case may be. But if, on the other hand, the promise, threat or inducement need not relate to the charge, then the "person in authority" seems to be any one who has the power to perform the particular threat, promise or inducement he has made.

The aforementioned legislations are sufficient to assure that no accused person will be interrogated without his wish. They prevent confessing.

4.1.1. Confession given freely

Confession is no where defined under Ethiopian legal instruments. There should be a clear distinction between the following three terms; confession, statement and admissions. Confession is a voluntary statement made by a person charged with a crime in which he acknowledges that he is guilty of committing that crime. Where as a confession is a complete acknowledgement of guilt in criminal proceedings, an admission is a statement of fact in either a civil or a criminal case. A confession admits the entire criminal charge, where as an admission covers only particular facts in the charge. Statements, however are those utterances of the suspect with no evidentiary value of all.

Confession, of course, may be made in court in the course of legal proceedings, or it may be made out of court to any person, either an official in police interrogation or a non-official. Be it a confession in court or police interrogation, it is given during the investigation stage. As long as it is voluntarily given, confession has an evidentiary value in convicting the suspect. (Articles 27 and 35 of the conde)..

One case submitted to the Federal Supreme Court, the issue of "what a confession is" was raised and settled. The accused had made a statement at the police station admitting the killing and alleging that the homicide was committed during a fight between the deceased and himself, both of whom were then intoxicated. He further stated that he did not remember whether he or the deceased has begun the fight. The court said that the appellant did not clearly acknowledge himself guilty of the offence by disclosing all the elements of the crime by excluding any possibility of inference to the contrary. The court goes on to state that the accused appellant made a statement to the police to the effect that he has killed the person during struggle and he did not remember who began the struggle because both were intoxicated. These statements of the appellant, said the court, cast doubt as to whether the statement was a confession because the appellant by giving such statement may be alleging a defence of intoxication or self - defence. Because of this reason the statement was not taken as a confession.

Furthermore the court adopted a narrow definition of confession. But it tried to draw a line between confession and affermative defences. Such defences are characterized by admission of

the facts alleged by the adverse party and raising a new fact which can serve as a defence. Such as intoxication, insanity and self- defence. For a confession to be counted as an acceptable confession, it should relate to every element of the alleged crime. We have said that confession may be given to court or the police officer in interrogation . Let us deal with each of them one by one.

4.1.2. Confession on the course of interrogation:

We have said that in the course of interrogation, there are certain procedural requirements that the police would have to adhere to. These are tests of voluntaries: of the person through summons or law full arrest, prior warning, prohibition on the use of force, inducement or any other improper means and authentication of the statements by the suspect who made them.

Dear student, now is the issue; what would be the fate of fruits of interrogation made without the fulfillment of any of the tests of vouluntariness?

Lets we deal with each of the tests one by one. As regards confession which is the result of unlawful summon or arrest, there is a split of authority concerning its voluntariness. In the united states, the federal rule that confessions are inadmissible if obtained while the defendant was unlawfully detained has not gone quit so far, though the law is still in a state of considerable flux. In Ethiopia, examination of decided cases reveals that our courts have taken different stands. Some say that the illegality of the summons and arrest can not affect the confession made there after as far as the suspect making it is not coerced. They say that a causal relationship can not be established between the illegality in securing attendance and the confession. Other court decisions, however indicate that if the arrest has been illegal, or if it turns out to be illegal for unreasonable delays more than the 48 hours limit, the confession there after turns out to be involuntary. Courts reasoned that regarding those confessions involuntary would encourage the police to adhere to the 48 hours period of limitation.

Dear student, what about confessions acquired by the police with out the warning given?

The warning is an important requirement under Ethiopian law (Article 27 (2) of the code and 19 (2) of the FDRE constitution).

The requirement of warning has its purpose in that it will avoid the psychological distress that the suspect may face due to the coercive environment of the police station. Normally, the individual would experience fear when he enter in to the police station and he might psychologically feel that he is under obligation to give answers to whatever questions the police might pose to him. To proceed in to investigation without prior warnings would allow such coercion to persist on the moment of interrogation. Hence, the warning is needed to make the environment more comfortable avoiding the frustrating environment. It is due to this that the requirement is made mandatory. There fore, where the warning is not made, it can not be said that the statement of the suspect is free and voluntary on the famous decision of the U.S. supreme court in the Mirand V. Arizona case, the chief justice Earl warren has written in the five to four majority decision that the prosecution may not use, statements made by a person under questioning in police custody unless certain minimum procedural safeguards were followed. These requirements include informing arrested persons prior to questioning that they have the right to remain silent, that anything they say may be used against them as evidence, and that they have the right to counsel of an attorney.

In Ethiopia too, once it is established that the element of coercion do exist in such cases too, then Article 19 (5) would be applicable and hence it shall not be admissible. As can be seen from court decisions on the issue, Ethiopian courts seem to adopt the same stand on the issue. In a certain case decided by the high court in the imperial era, the court said that 'evidence of a confession taken without first informing the accused of his rights is valueless." In an other case too, the court has taken the same stance. In order to get how Ethiopian courts deal with the situation, it is better to state the full story and the reasoning of the court in this latter case.

The accused was charged with having committed arson in violation of Article 488(2) of the penal code, in that on Ter 12, 1958 he burned down a thatched hut belonging to the private complainant, thereby killing one Chara Hora and destroying different articles of furniture □□..

Accused has pleaded not guilty. The public prosecutor has produced a two □ page statement of three witnesses who heard accused at the Woreda police station confess to having burned private complainant□s hut. The essentials of their statement were as follows: The three witnesses were present while accused was giving his confession. He was hand □ cuffed at the time and told the police that with intent to burn private complainant□s hut he took fire in dried cow□s dung, put it near the wall at the eastern side (of the hut) and went back to his own house and slept. According to the witnesses the police gave no warning to the accused before taking down his confession. Second and third witnesses further stated that they had signed on the confession record. A look at this record shows accused□s declaration that on Ter 18, 1958 he gave his confession at the Addis Alem Woreda Police Station, that he understood that that confession might be produced against him before any authority and that he gave his confession of his own free will. His reason for deciding to burn Ato Fita Wordofa□s house was that a certain Woz. Gete Nigatu on Ter 10, 1958 persuaded his wife to leave him and stay at private complainant□s house. Accused had been to this house many times asking the people there to reconcile him with his wife. But they kept on refusing and at last on Ter 12th they insulted him. That was why he took the fire and put it on the windy side (of the hut) and seeing the hut burn he ran back to his own house.

The public prosecutor□s evidence is weak because the prosecution witnesses statements and the police record are different. The witnesses had stated that they had signed on the confession record, but the document produced as the confession contains only one thumb mark. Further, the prosecution witnesses had said that the investigating police officers had given no warning to the accused. But the record states that such a warning had been given.

The witnesses themselves have given contradicting statements on certain points. We there fore do not consider their statements credible. Besides, they saw accused hand □ cuffed while giving his testimony. We there fore do not believe the written declaration that accused gave the confession of his own free will.

As a general rule a person can only be arrested if there is sufficient evidence against him or when he is suspected for good cause. After arrest he gives his statement only of his own free will. It is prohibited by law to extract a confession by force from an arrested person. It is only a confession that is given voluntarily that can be produced as evidence against the accused. If the accused is not willing to confess evidence should be looked for somewhere else.

We have no reason for saying that accused was not forced to confess. Being hand□cuffed is sufficient force (to render the confession involuntary).

Article 27 of the criminal procedure code provides that an accused should be asked to confess and if he is not willing he cannot be forced. Besides, the investigating police officer should inform him that all that he might confess will be produced as evidence against him. That this procedure has not been complied with is confirmed by the witnesses.

An investigation carried out without the proper procedure is illegal and cannot be used to convict the accused.
We therefore hereby unanimously set the accused free because his confession was given under an impoper procedure and the evidence brought against him is contradictory.
The other issue relates to confession alleged to have been made by the suspect who is not named and signed. We have seen that Article 27 (3) requires the words that the suspect gives to the police be recorded. The record should be on the exact statements of the suspect. To ensure that these statements are given by the suspect himself, the record must be read to him and signed by him. This of course doesn't exist under Article 27 and is derived from Article 35 that deals with confessions given to the police, there is no reason why this doesn□t apply to police confession.

As to the status of the confession when this requirement is not fulfilled, it seems that it should be taken as involuntary. This is because the absence of such authentication by the accused may imply that the records are fabrications by the police. In one case, the Federal High court stated the following in rejecting a confession given to the police because it was not signed by the accused. "you can not know whether that confession was made by the accused. The absence of signature may even show that the accused might have refused to sign and hence, the confession might have been involuntary". Hence, a confession not acknowledged by the signature of the suspect must be taken as involuntary.

The last issue relates to confession obtained through the use of inducement, threat, promise or any other improper method. What would be the fate of such confessions?

Article 31 of the criminal procedure code and Article 19 (5) of the FDRE constitution are clear on this. "Coercion" under Article 19(5) of the constitution has two aspects; physical and psychological. Physical coercion is simply forcing the suspect to give confessions through beating or torturing him.

Dear student, what is psychological coercion?

This refers to the use of all activities mentioned under Article 31 of the criminal procedure code: threat, promise, inducement or any other improper means. Dear student, you would have to be reminded that Article 31 is open minded in listing the activities prohibited by the law. Hence, as long as the activities do interfere with the free will of the suspect being interrogated, that would fall under the "improper means" category.

Hence, proceeds of interrogation obtained through coercion, either psychological or physical and with the absence of the warning are involuntary and thus, of "no effect"; meaning in admissible before the court. But, if they are found to be voluntary, it is no question that they would be

admissible. But, the problem is on how to prove the involuntariness of the confessions given at the police station.

Dear student, who has the burden of proving the vol untariness or involuntariness of the confession before court: the public prosecutor or the accused?

Basically, when the document of interrogation is submitted to the court, we expect it to be made in accordance with Article 27 and 31 of the criminal procedure code, Satisfying the requirements stated there. The public prosecutor, before introducing them to courts, would be presumed to have ensured that they are obtained satisfying the requirements of the law. Since the law prohibits improper means of interrogation, there is also the presumption that the public prosecutor will not submit confession involuntarily obtained. Beyond this, however, it may sometimes be difficult to require the public prosecutor to prove. More over, there is a maxim of evidence law which says that he who alleges shall prove his allegation.

Moreover, we presume that the police will comply with the requirements of the constitution. Therefore, on all or any one of the grounds the burden of proving the involuntariness seems to lie on the accused. But, considering the secret nature of police interrogation, how would it be practically possible to find evidence of the polices misbehavior? Remember, the interrogation is undertaken with in the four walls where only the suspect and the police officer are present. Hence, it is very much difficult for the suspect to obtain any evidence that would prove the involntariness of the confession.

For this reason, many countries have provided that the burden of proving that a confession was voluntary lay with the prosecutor. The English police and criminal Evidence Act of 1984, for example, provides that a confession by an accused person may be admitted in evidence provided that the court is satisfied that the confession was not obtained by "oppression" of the person who made it or as a result of any thing said or done that was likely to render the confession unreliable. Oppression is defined to include torture, inhuman or degrading treatment, and the use or threat of violence, but it also includes other matters as well (such as excessively prolonged periods of questioning). In America, the "oppression", it is believed, will be avoided by making a suspect's right to counsel while in custody always realistic, in that a denial of this right automatically makes a confession involuntary and unacceptable as evidence whether or not it is credible. In India, on the other hand, in order for a confession to be admissible against an accused person at trial, it must be made before a magistrate. This procedure, it is believed, will make a confession reliable as given voluntarily.

Dear student, what is the situation of the Ethiopian law on this point?

There are various arguments and infact, Ethiopian court experiences as regards this. Some people argue that the voluntariness or involuntariness of the statements given to the police doesn't matter. What is important is that the confessions given to the police are recorded by the court under Article 35. Hence, what is important are confessions given to court not to the police. What are confessions given to courts?

4.2. Confessions given to courts

Article 35 of the Ethiopian criminal procedure code provides the possibility of recording the confessions of the suspect given to court.

Article 35 power of court to record statements and confessions.

1. *Any court may record any statement or confession made to it at any time before the opening of a preliminary inquiry or trial.*
2. *No court shall record any such statement or confession unless, up on questioning the person making it, it ascertains that such person voluntarily makes such statement or confession. A note to this effect shall be made on the record.*
3. *Such statement or confession shall be recorded in writing and in full by the court and shall there after be read out to the person making the statement or confession, who shall sign and date it. The statement shall then be signed by the president of the court.*
4. *A copy of the record shall then be sent to the court before which the case is to be inquired in to or tried, and to the public prosecutor. According to Article 35 (1), any court may record any statement or confession made to it at any time before the opening of a preliminary inquiry or trial. As far as preliminary inquiry (Article 80 ff) or trial is not opened, any court, whether it has jurisdictions over the matter or not, has the power to record confession. However, if such a proceedings is opened the confession would be recorded by the court of preliminary inquiry or trial. This is because, first, as the case is already brought before a court (Preliminary inquiry is conducted or charge is instituted) such court can properly handle the case and need not be passed over to another court for it would also waste time.*

It is important to note that this provision is talking about confessions" as distinguished from "statements" under Article 27. Some people argue that whatever statement made at the police station is not confession. As we have distinguished it previously, statements are words with no evidentiary value while confessions are necessarily self-criminalizing. Hence, whatever statement given to the police are not confessions. Those statements need to be confirmed under Article 35 by the court as to their voluntariness. The failure of Article 27 to mention 'confession" and the reference to "statements" under Article 97 of the criminal procedure code is a deliberate technique due to the former's incriminating purpose. The failure of these articles to mention confession should be taken as demonstrating an interest that only non - confessional statements are covered by them. In this regard, the record of confessions under Article 35 is taken as test of voluntariness or trustworthiness of a confession.

For the public prosecutor to present the words of the suspect as an evidence before a court as a "confession" it must be that recorded by the court in accordance with Article 35.

Other people, however, argue the other way. Article 27 (2) and of the constitution provide that the police officer has an obligation to warn the suspect that " any statement he may make may be used in evidence". This is an indication that the legislature has opted for the introduction of the fruits of interrogation given at the police station for incriminating the suspect at the trial stage.

Considering the effect of such a stand on the police power and the time to be taken for interrogation, to ignore the proceeds of interrogation requiring their certification by the court would render Article 27 purposeless.

The proponents of the first argument, however, do not agree with this. According to this line of argument, though the phrase under Article 27 (2) and 19(2)of the constitution indicate that the statements of the suspect may be used in court, the significance attach to these statements in the criminal procedure code is that provided under Article 145. Hence, the public prosecutor may

invoke these statements in court to impeach the words of witnesses testifying before the court. Article 145 of the criminal procedure code provides:

1. "--- the court may, on the request of the accused or the prosecuter, refer to statement made by a witness to a police officer in the course of police investigation."
2. It may then, if it thinks it expedient in the interests of justice, direct the accused to be furnished with a copy there of and such statement may be used to impeach the credit of such witness."

Other than this, Article 27 is of great significance to police investigation in that, the police officer may make use of the words of the suspect for the better collection of evidences which may indicate the commission of the crime by the suspect or some other individual. With the problem of proof of voluntariness of words given to the police (as mentioned above) and the similar stand taken by some jurisdictions having contribution to the Ethiopian legal system, it would be a problem to accept statements given to the police lacking certification by the court under Article 35.

Dear student, which argument seems to be more convincing?

Ethiopian courts do have various experience as regards the issue. In 1967 for example the Ethiopian high court has reversed the decision of the Awraja court to convict the suspect based on his statements given at the police station on the ground that such statement cannot be a conclusive evidence to justify conviction. Due to its educative purpose, I have reinstated the decision of the court as follows:

"We have examined a copy of the Awraja Court record. The charge against the accused was that together with an accomplice, Gebre, he stole, killed and ate the meat of an ox belonging to Ato Aboye in violation of Articles 630 and 36 of the Penal Code.

The accused entered a plea of not guilty and the public prosecutor presented three witnesses who had heard the accused confessing to committing the act. When he entered his plea of not guilty the accused said that his confession was obtained by police coercion, and since it was not his voluntary confession it is not valid. He brought three witnesses to show that he was beaten.

The witnesses for the prosecution testified that they were at the police station when the police interrogated the accused, and they heard the accused confess stealing an ox, and he gave the name of its owner, and (confessed to) killing it and eating its meat. But they didn□t testify that he voluntarily confessed.

One of the defense witnesses testified that when they were imprisoned they were whipped to tell the truth and (all three) testified that they didn□t see the accused being beaten. Then the court, giving an elaborate opinion, sentenced him to two years□ imprisonment.

We have been able to see from the (Awraja Court□s) opinion that the court invalidated the evidence of the defence witnesses by saying that the witnesses were imprisoned for committing theft, but it didn□t point out any article to support this. This disappoints us.

To make an accused person a criminal merely on his confession at the police station is not in accordance with the law. The confession given at the police station can be used as supporting evidence but it cannot be conclusive evidence by itself. If this were the case there would have been no need for Article 35 of the criminal procedure code. A confession given at the police station may be used to give a clue as can be seen from Article 145 of the criminal procedure code, (but) it cannot be used (as evidence) to give punishment.

Since the accused has been convicted only on the confession that he gave at the police station and no other evidence has been brought against him, we are of the opinion that the sentence is lawful. We reverse his conviction "

Article 35 requires the court recording the confession to make sure that the person is making the statement or confession voluntarily. In ascertaining voluntariness, the court may be required to do more than the things the police are required to do under Article 27 (2) and some other activities including the following:

a. the judge must tell the person that he has the right to remain silent in a language he understands as enshrined in the constitution;
b. the suspect must be told that if he elects to make any statement, it is to be recorded and is going to be used as an evidence during trial and it can not be challenged later art;
c. the judge has to see alternative practical solution to certain practical problems.

If the person appearing before the court wants to make statements or confession, it is unlikely that he will make such confession voluntarily where;

(a) he has been questioned in the presence of the police officer in the court room, or
(b) he is returned to the police station which could make him further subject to the power of the investigating police officer. Thus, the judge must make sure that there is no police officer in the court room. He must also tell the person that he will either be released on bail or remanded to prision rather than the police station.

4.2.1. The need for collaborative evidence

Now, the accused has made his confession voluntarily and this has been confirmed by the court in accordance with Article 35. But, no other evidence has been found to correborate the commission of the crime as is confessed by the accused. The issue arises as to whether the confession by it self proves the commission of an offence or should it be supported by evidence.

In other jurisdictions, although confession is competent evidence of guilt, it is not necessarily sufficient evidence of guilt. It must usually be corroborated by other competent evidence. And most importantly, the circumstances under which the confession was given may negate its value by making it inadmissible as evidence. Hence, in many countries, there is a rule of evidence that an accused may not be convicted on the basis of his confession alone - that some "independent". Corroborative evidence is needed. This is so even when the accused has expressely confirmed that his confession is voluntary. This is because history has shown that individuals might prefer to be convicted of crimes for different reasons to absolute themselves of military duty, to prevent some sort of social condemnation due to alleged behaviors (e.g. people regarded as impotent are found to have admitted of commission or the crime of rape) e.t.c.

Whether there is such a requirement under Ethiopian law is not clear. As the case demonstrated below shows, there are times Ethiopian courts require corroboration and disregard confession.

In a certain case decided by the former Ethiopian high court the need for corroboration was capitalized as the following case indicates; The allegation was that the accused, a house maid of the private complainant, stole a dress worth $20 from the complainant and disappeared. The accused was found strolling at the market place, where up on she was taken to the police station; the prosecutor alleged that she admitted the charge there. When the case was brought to court, the accused admitted that a dress and a pullover were given to her by her mistress, the complainant, for her service, but denied the charge. The accused further alleged that she was beaten up at the police station to (make her) admit the charge, and due to this beating the accused confessed. The accused stated that if her mistress (the private complainant), under oath, testifies that the accused stole the dress, she (the accused) will be willing to suffer any punishment which might be imposed up on her, with out any complaint.

The prosecutor then asked the court to be allowed to introduce witnesses to prove that the accused admitted the charge. According to the prosecution, these witnesses were present at the police station and heard the statement made by the accused, admitting the charge of her own free will.

Order
Whereas the accused denied the charge but stated that the dress in question was given to her by the private complainant;

Whereas the prosecutor alleged that the accused admitted the charge, and has witnesses to the statement made by the accused to the police at the police station;

Whereas the accused alleged that she was forced by the police to admit the charge, and stated that if the complainant, under oath, testifies that the accused stole the dress, she will be willing to suffer any punishment that might be imposed upon her by this court;
Whereas this court ordered the complainant to appear before the court to give her testimony, but (she has) failed to appear for the third time;

Whereas it is difficult to believe the story of the police and ignore the story of the accused, because there was not enough evidence produced either at the police station or before this court to prove that the accused stole the dress in question, and (whereas) the prosecutor s witnesses only heard the accused admit the charge at the police station, and these witnesses could only testify to (that confession) but not to the offence charged;

And whereas the accused has been imprisoned for thirty two days for the alleged crime, because of the private complainant s failure to appear in court and give her testimony under oath

We have, from to day, discharged the accused; this order should be sent to the prison administration so that she will be set free.

Order given on Tekemt 21, 1956 at 12:30 a.m. by the third division of the high court, criminal section.

Dear student, do this decision show that there is such a requirement under the Ethiopian law?

What purpose does the requirement of corroboration serve?

Activities.

1. S and Y were arrested on suspicion of having committed a robbery. Under questioning at the police station, X denied any connection with the crime. The police then falsely told X that Y had signed a confession swearing X had planned the robbery and convicted Y to come along. X then confessed, but blamed Y as the instigator. He later learned that Y never confessed was S's confession lawfully obtained should it be admissible in evidence?
2. D was arrested at 10:00 a.m. on the 4th of Ter. He arrived at the police station forty minutes later. For one hour he was put through the "formalities". Photographing; Finger printing, registering his identity etc. After a half hour of solitude, he was brought in to a room and questioned by a rotating force of police men (two at a time), for six hours. He was then given some food, another half hour of rest, and questioned again for four and a half hours. He was then allowed to eat again, then sleep for seven hours. By this time, it was 8:30 a.m, the 5th of Ter roughly the same routine of questioning, rest, food, questioning and sleep occurred. Finally, at 9:00 a.m. on the 6th of Ter, he confessed to the charge under investigation. He was then taken before a court, arriving there at 9:45 a.m. and the judge released him on bond. Is his confession admissible? Would it make any difference to your answer if D had asked to telephone his wife (so that she could obtain a lawyer for him) when he arrived at the police station but had been denied permission?
3. Some facts as 4, above, except that D refused to make any statement to the police. When he was brought before the court, the judge agreed to remand D to the Addis Ababa prison. There, the following morning, the police again questioned him for four hours, obtaining his onfession.
4. On the 12th of Takemt, 1997 a bar girl was found brutally murdered on the outskirts of Addis Ababa. The police discovered by investigation that four men were present in the bar which she kept on the afternoon preceding the murder. The police thought it possible that one of them was the murderer, but had no evidence against any particular one of them. They decided to summon them all as witnesses under Article 30, Crim. Pro. C. Ato X was first called, and told the police that he had left the bar early in the afternoon with two of his friends, leaving Ato D alone with the deceased. Ato D was questioned next, and after an hour s interrogation he confessed. He later repeated his confession to a court, which recorded it. At trial he retracted the confession, claiming he had never been informed either by the police or by the recording judge of his privilege against self incrimination; he had been under the impression that he was legally obliged to answer police questions. Should he have been cautioned? When? By whom? Should his confession be admitted in to evidence?
5. D was arrested on a homicide accusation, and subjected to brutal treatment by the police for three weeks until he confessed. His confession consisted of the following: I shot Wt/ L, and I threw the pistol under Ras Mekonnen Bridge. The police later recovered the pistol

from under the bridge. Assuming D's confes a police officer testify that the pistol was found as a result of information from D?

6. D was arrested on suspicion of homicide at 10:00 a.m. on the 18th of Hamle, 1997 At 3:00 P.M. on the 24th of Hamle he was brought before a woreda court judge to have his confession recorded. The judge asked him if he was confessing voluntarily, and he said he was. The judge then asked the police officers guarding D to leave the court room, and he recorded D's confession. The police officers then took D back to the police station so that he could assist them further in the investigation. At trial D objects to the receipt in evidence of his confession, which he now claims was made in fear of police torture. He claims when he was brought before the court he was so bruised from beating he could hardly stand, and that the judge never questioned him to make sure he had not been beaten, nor told him he had a right to silence. Should the trial court admit the confession? Should/ may the prosecution call the judge who recorded the confession as a witness to testify that, at the time, D had seemed in perfect physical condition?

4.3. The Law of Search and Seizure

We have previously said that the first step in criminal proceedings is the investigation stage. Through the different acts of investigation, the police gathers evidences that would point to the commission of the crime by the alleged suspect. With a view to accomplishing this, the police makes investigatory acts before and after arrest is made on the suspect. After a lawfull arrest is made the police would, through interrogation, require the suspect to willingly cooperate in the collection of evidences likely to prove the commission of the crime. But, if this is of no, or little help, the investigating police officer would have to resort to other means of collection of evidences, i.e. search and seizure. The law of search and seizure provides the ways the police officer would proceed in to this mode of investigation. Accordingly, this topic would be dealing with issues on how search and seizure is dealt with under Ethiopian law.

The purpose of the law as regards search and seizure is to regulate the ways (means) how the police officer collects evidence.

Dear student, what constitutes search and seizure.
In previous times, the property approach was the traditional method used in deciding what constitutes a search. Accordingly, what the law gives protection was the search of a person, house, papers or effects and there would be seizure if the property is tangible. Lateron, however, there came to be recognized the "privacy approach" which considered that a search as a governmental intrusion in to area or interest where a person has reasonable expectation of privacy. Hence courrently, search and seizure is a restriction on the right to privacy and the right to property as arrest is to liberty.

The rights to privacy and to property exist under Articles 26 and 40 of the FDRE constitution respectively.
Article 26 Right to privacy

1. *Every one has the right to privacy. This right shall include the right not to be subjected to searches of his home person, or property, or the seizure of any property under his personal possession.*

2. *Every one has the right to the inviolability of his notes and correspondence including postal letters, and communications made by means of telephone, telecommunications and electronic devices.*
3. *public officials shall respect and protect these rights. No restrictions may be placed on the enjoyment of such rights except in compelling circumstances and in accordance with specific laws whose purpose shall be the safeguarding of national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others.*

In addition to the constitutional protection the right to privacy is recognized under different legal instruments. To mention, Article 11 and 13 of the civil code providing for a prohibition of searches and inviolability of domicile Article 17 of the international covenant on civil and political rights and Article 13 of the universal declaration on human rights have the purpose of protection of freedom.

As is indicated under Article 26 of the FDRE constitution, the evidence which the police gathers and seizes may be physical or non - physical and might be searched for in various locations homes, business premises, moving conveyances or on the person of individuals. The criminal procedure code seems to limit searches to the body of the person and premises. The reading of the constitutional provision however. Indicates that searches may be conducted in movable properties like vehicles when the need arises.

The constitutional provision enshrines the principle that search and seizure may not be made to the person or his properties Article 26 (3) puts forth the exceptional situations where privacy may be affected by searches. If there exists a compelling circumstance which justifies the restriction of such a right, it may be restricted only in accordance with a specific law dealing with such restriction having certain objectives among which prevention of crimes and safeguarding of peace and security are the two considering the effect of crimes. You may take them as "compelling circumstances" and Articles 32 - 34 are the specific law by which search and seizure may be conducted. These articles of the code concerning investigation of crimes have the purpose coming under either prevention of crime or keeping peace and security, or even the other purposes pointed out in Article 26 (3) of the constitution.

Search as a restriction to the right to privacy, there fore, has to be conducted only under certain circumstances. The constitutional rule is protection of the right to privacy. Article 26 gives protection to the body, home and property of a person against arbitrary search. Like the arrest power, the power of search and seizure is designed in law to be exercised "normally" under prior court warrant, search with out warrant is in theory restricted to the "exceptional" circumstance, and must always be justified by reference to specific authorization in the code. We shall see this under the following sections.

4.3.1. Search with warrant

We have said that search and seizure is one means of collecting evidence by restricting the right to privacy of a person. As indicated under Article 26 (3) of the constitution, the restriction will be imposed only when a specific law exists. The constitutional provision states that the existence of the law being one condition for the restriction of the right, there must be compelling circumstance to allow and the purpose should be either the safeguarding of national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others. Here, there would arise different issues.

First, when does the compelling circumstance exist? At the time of issuance of the law by the legislature or at the time of restriction?

It seems that the compelling circumstance should be decided at the time of making the restriction. This specifically refers to the instance described under Article 32(2).

Can the court refuse to grant a warrant by saying that the law which empowers to grant warrant doesn't serve any of the purposes under Article 26(3) and hence, is in violation of the individual's right to privacy? This takes us to the question as to whether courts have the power to interprete the constitution.

Dear student, what is interpretation? You have dealt with the power of courts to interpret the constitution in your constitutional law course in connection with judicial review. In light of this discussion and the constitutional provisions of Article 62, 83 & 84, it seems that the house of Federation has the power to interprete the constitution. However, it also seems that the courts are totally devoid of the power to entertain constitutional matters at all. The previously listed articles seem to grant to power to the council of the constitutional inquiry and the house of federation when there is a dispute, You can glean from the reading of the provisions that the existence of disputes is a pre requisite for these organs to assume jurisdiction. From this, you can conclude that courts can interprete the constitution when the parties have agreed. This is so because the reading of Articles 9[2], 13(1) and Article 37 cum 79 implies that the courts have been entrusted with such a power.

In addition to this, some people argue that courts have a power to interprete the constitution even when dispute a rises between the parties on constitutional matters. The argument arises from the fact that Articles 37 (1) and 79 (1) have given courts the power to decide on justiciable matters giving them an absolute Judicial power. In line with this, Article 3(1) of the Federal courts establishment proclamation 25/96 has stated that federal courts have jurisdiction over disputes involving the federal constitution. Hence, justiciable matters involving the constitution are to be decided by the courts.

Dear student, what are justiciable matters?

Proclamation 250/2000 seems to suggest that political cases are non justiciable matters. Hence, it seems that justiciable matters are non political disputes involving the constitution. Therefore, the argument goes on to conclude that courts have a power to interprete and decide cases arising from the constitution as long as they are non-political matters (e.g. establishment of a separate identity of nation, nationality and peoples, right to secession, etc- --

These people further argue that if the courts are denied of the power to interprete that constitution, how are they expected to shed out their responsibility under Articles 9(2) and 13(1) of the constitution? The normal task of courts in the division the three governmental organs is interpretation and if courts are expected to enforce the constitution, it is only through their normal business. i.e. interpretation.

Dear student, what is your response to this line of argument? Do you agree or not?

When we come to discuss about search with warrant, we will found Article 32(2) providing that No premises may be searched unless the police officer or member of the police is in possession of a search warrant in a form prescribed in the third schedule to this code ------- This shows that as a rule, search is made on court authorization through issuance of warrant. It also shows that search and seizure can only be conducted by the police unlike arrest where private individuals are allowed to make arrest.
Why are individuals prohibited to search premises and other places?

The court issues search warrant if the requirements under Article 33 are fulfilled.

Article 33 – issue of search warrant

(1) A search warrant may be issued by any court. No search warrant shall be issued unless the court is satisfied that the purposes of justice or of any inquiry, trial or other proceedings under this code will be served by the issue of such warrant.

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

(3) On seizing any property such investigation police officer or member of the police shall make a list of the property seized and where possible shall have the list cheked and signed by an independent person. Any property seized which is required for the trial shall be preserved in a safe place until handed over to the court as an exhibit. Any property not so required may be returned to the person from whom it was taken and a receipt shall be taken.

(4) In effecting a search the investigating police officer or member of the police may use such force as is necessary and may where access to premises is denied use reasonable force to effect entry.

(5) Unless otherwise expressly ordered by the court, searches shall be carried out only between the hours of 6 A.M. and 6 P.M.

Unlike the law of arrest, this Article doesn't tell us who is to apply for search warrant and what should be the form of application for search warrant.

But, since we said that searches are conducted only by police officers, it is the police officer who has to apply. As in the case of warrant of arrest, search warrant may be issued by any court whether it has jurisdiction over the crime or not.

As regards the form of application for search warrant, you have seen that in case of warrant of arrest even application by telephone is possible in case of urgency though it should be confirmed in writing. Some say that the same applies for search warrant for identical reason. Urgency may require searching immediately provided that search without warrant is not authorized, oral application and latter confirmation proper. Nevertheless, as the practice is, it is good to make a written application.

What are the requirements to be fulfilled for the issuance of warrant?

Article 33 states the requirements in a general manner. The first requirement is that "the purpose of justice" is served. When do we say this is so? This, as you can see, is vague. It requires interpretation. Secondly, of the purpose if any inquiry, trial or other proceedings is served, warrant is issued.

Under Article 54, we said that the requirement of reasonable suspicion is a kind of concrete evidence to show that this person was involved in a crime. Should we have a different standard in the case of search warrant? Why don't we use the same standard?

Accordingly, the police should not go to court and ask for a warrant for the mere fact that they are informed. They should go further and get other information. The court should see whether there is a reasonable ground, as required by justice or by any inquiry or trial, to intervence in to the suspects right to privacy. In making the application the police should come with some kind of evidence that shows search is necessary. The court must be satisfied that there is a reasonable suspicion that the said property will be found at the premise to be searched. If the material which is sought to be searched as an evidence in respect of the offence doesn't have any connection with the crime under investigation or is not likely to be found at the said place, the purpose of justice can not be served and so warrant should not be issued.

Thus, the court must ask the police conducting the investigation and requesting for the search warrant the reasons making him believe that:

1. there is an item of evidence important or relevant for the proof of offence under investigation; and
2. such evidence is probably found at the said place.

Hence, the mere allegation that there is something in an individual's premise doesn't necessitate warrant. If so, giving the power to the court will be meaningless. If the police fails to concretely show evidence, one can say that issuing a search warrant doesn't serve justice.

Of course, conclusive evidence is not required as still there is investigation, but at least sufficient evidence is necessary for the issuance of search warrant.

Article 33(2) provides that there should not be a general search even if the police believes that there is an object. Hence, based on the scope, there are two types of search:

1. General search: when the warrant fails to specify the place where search is to be conducted and the article which may be seized.
2. Specific search: The item to be searched and the place of the search are clearly indicated.

Article 33(2) is providing that no general search is allowed in Ethiopia. The police cannot search and seize any thing he gets. Though the sub "article provides that the property to be searched for and seized be specified, I will say not only the things to be searched, but also the place to be searched must be specified. If for example the search warrant only specifies electronic materials, the police must seize only electronic materials even if he gets other materials.

If a police officer seizes an item not specified in the search warrant, it is not in accordance with Article 33(2) which means that it is not made in accordance with a specific law which in effect is a violation of Article 26 (3) of the FDPE constitution.

Dear student, sometimes, it may appear reasonable to seize a property not specified under the warrant. For example, a police officer who has got a search warrant to seize a contraband property hidden in a box, while searching it, may come up with a certain drug on the box. In such instances, what is the police officer supposed to do?

In foreign jurisdictions, there is a concept called the plain view exception. Plain view is not considered to be a search. If something can be observed from an area open to the public, there has been no search. To be a search, there must be a violation of the reasonable expectation of privacy. Once contraband located in a private area is observed from a public area, the police may need a warrant to seize the property. Under the plain view doctrine, if the police are lawfully in a position from which they view an object if its incriminating character is immediately apparent and if the officers have a lawful right of access to the object, it may then be seized without a warrant. Accordingly, a police officer can seize an object that is not specified in the search warrant incidentally to the law full search if: -

1. The item is clearly visible to the police officer from the position he has been executing a law full search.
2. The object is clearly unlawfull; i.e, the incriminating character of the object is apparent.

The rationale of the plain view doctrine is that if contraband is left in open view and is observed by the police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no "search" is made with in the meaning of the law.

Dear student, how is search executed?
After a search warrant is issued by the court, or the elements of the law excluding the need for warrant are fulfilled how would the police officer make the search? Sub Articles (3) – (5) deal with the issues of time and the procedures that need to be fulfilled in making a search.

We have discussed that a warrant of search must specify the space of search must specify the space of the days with in which the search is to be made. Besides, Article 33(5) provides that searches shall be carried out only between the hours of 6 A.M. and 6 P.M. unless the court expressly ordered otherwise. This means that search must be conducted with in the day, in the normal course of things. If the person whose premise is to be searched for instance, is not available at such place to be searched during such hours for justifiable reason, the search may be effected at a different hour as fixed by the court in the warrant. Thus, though exceptionally, a warrant of search may specify the time at which it may be conducted.

Some people argue that the time restriction under Article 33(5) doesn't apply to searches with out warrant. The ground of such argument is the sub article's phrase providing " ordered by the court." Considering the fact that there is no need to go to court in case of search without warrant, they tend to argue that the provision doesn't apply in case of searches with out warrant. Hence, in respect of flagrant offences as it may be committed any time of the day, it is said that in hot pursuit cases, search may be conducted any time. This is so because the rational of making some offenses flagrant will have no purpose we impose a time restriction. In the case of Article 32 (2[6]) again, since the search without warrant is basically justified by the possibility of removal of the article if it is delayed, search at any time seems possible.

But still, there are scholars arguing that the time requirement must apply in all cases including search without warrant. They say that the sub article is a continuation of sub articles (3) and (4)

that stipulate the methods of conducting search in all cases. As such, it is difficult to specify this sub article as applying only to searches with a warrant. As regards Article 32(2)(b), they say that the removal of the article may be protected by the police doing the necessary security protection around the premise till down comes. As regards the use of force in effecting the search, sub article (4) of article 33 provides that the police may use force as is necessary and may where access to premises is denied use reasonable force to effect entry. As search involves the invasion of their privacy, people do not like searches by authorities. Whether it be a search with or with out warrant, there is a possibility that the police face resistance from the person whose premise is to be searched. In such a case, the police are empowered by virtue of Article 33(4) of the code to use reasonable force to effect entry and /or search and seize items. The amount of force necessary /reasonable to effect search depends on the degree of resistance by the owner/occupant of the premises.

After the search is conducted in the manner specified by the said Articles, the court shall entertain the proceeds of the search in accordance with sub article (3) of Article 33. Hence, if the police officer finds any thing as stated in the warrant or which he considers relevant in flagrant cases and effects seizure, where it is possible, he shall have the list of items seized and checked and signed by an independent person. It seems that the police should have had an independent person with him in conducting search. But this is not a must. Any property seized as the circumstances require may be employed. Articles material as evidence to the offence should be passed over to the court as exhibits.

4.3.2. Search without warrant

1. **Bodily search**
   This is one kind of search which a police officer may undertake with no warrant needed. It is recognized under Article 32 (1) of the criminal procedure code which reads as;

   > *No arrested person shall be searched except where it is reasonably suspected that he has about his person any articles which may be material as evidence in respect of the offence with which he is accused or is suspected to have committed. A search shall be made by a person of the same sex as the arrested person.*

The provision indicates that search of persons is made on persons arrested. The beginning of the article by the phrase "No arrested person may be searched indicates that search may be conducted only exceptionally, such an exception is when the stated conditions exist. These are:-

1. The person is arrested
2. He should be reasonably suspected that he has articles about his person
3. Such an article may be material evidence in respect of the offence he is suspected of.

It is only when these conditions have cumulatively existed that a bodily search may be made. The requirement that the person be arrested seems to relate to the concept of search incident to lawful arrest recognized under foreign jurisdictions. In these jurisdictions, it is reasonable for the police to make a full - body search of an individual incident to a lawful arrest. If the arrest is legal, probable cause is not needed to search the arrested individual. The officer may search any area with in the immediate control of the accused at the time of the arrest. For example, if the police arrest an individual in his home, the police may search that portion of the home with in the immediate control of the accused, that is, the room in which the arrest occurs. The rational for the

search of the near by area is to keep the accused from obtaining a weapon or destroying evidence. It does not matter that the search of the area occurs after the accused is under control and can not possibly reach those areas nearby. The fact that the accused was handcuffed and his or her reach was impaired was held not to limit the permissible area of search.

Dear student, is the search under Article 32(1) of the Ethiopian criminal procedure code the same with searches incident to lawfull arrest incorporated under foreign jurisdictions?

Search under the Ethiopian criminal procedure code is different from the concept of search incident to lawfull arrest discussed above. In both cases, there is a requirement that there be a lawfull arrest. Hence, the illegality of the arrest would make the search illegal. In the Ethiopian case, however, there are certain other requirements. There is a "reasonable suspicion", which, some how seems to be the same standard as "reason to believe" in the case of summons and it may be understood as such. The second condition requires that the article whose existence is reasonably suspected to be material as evidence in respect of the offence for which the search is conducted. However, the search may possibly reveal an article the holding of which is or implies a crime but having no relation with the offence with which the person is suspected. It is said that Article 32 (1) does not allow the seizing of other things than those connected with the offence. Therefore, if the offence is a kind of offence whose means of proof doesn't require physical evidence (eg. Crime of defamation or perjury) searching his body is not necessary and in fact, not allowed by the law. However, some people argue that the police should be allowed to make bodily searches and seize things that are found to be dangerous.

Dear student, what is your opinion as regards this issue?

A problem arises in connection with the requirement that the evidence be material. Since search is conducted to discover something which could not be seen otherwise, it is practically difficult for the police to identify the article which is reasonably suspected to be possessed by the person to be material as evidence for the offence. The search should not be avoided by this stringent requirement as far as it is compelling. Hence, the search is lawfull as far as it is conducted on an arrested person based on a reasonable suspicion of having articles material as evidence for the offence which is the basis of arrest. But, after the search is conducted for an evidence for which the individual is suspected, if the proceed is an evidence related to an other offence for which the suspect has not been suspected, its legality may be challenged when he is charged for this later crime. We will be dealing with this later on when we discuss effects of illegal search.

Another issue arises as to whether there is a need for court warrant to make a bodily search. Article 32 (1) do not have a stand on this. As warrant is raised by the code in connection with search of premises, as long as the stated requirements are fulfilled, there doesn't seem to be a need that a warrant be requested from the court.

Bodily search is expected to be made by the person of the same sex as the arrested person. As the number of female police members is very limited, it is unlikely that this requirement would be satisfied in most parts of Ethiopia. What, then, would be the effect of the search made by an opposite sex? Would this regard the search illegal? This would be our point of discussion later on.

The situation under Article 32(1) is the only situation that allows the police officer to make bodily searches, i.e. to collect evidences to an offence for which the person is arrested. But, there are

other kind of searches made on the gates of governmental or non - governmental organizations. There are also other "stop and frisk" searches made suddenly by the police under the guise of "immediate actions to keep peace and security". Do such kinds of searches fall under the Ethiopian legal framework?

As regards the first kind of search, it is called an administrative search and is not envisaged under the criminal procedure code. Here, individuals are willingly compromising their right to privacy due to their need to enter these institutions. As such, there is no violation of the right to privacy of individuals.

The "stop and Frisk" is a standard police practice to stop suspicious persons in public places for the purposes of questioning them or conductiong an investigation. In the U.S. legal system, an officer may make searches only if he has the additional reasonable suspicion that it is necessary for safety reason, In Ethiopia, it is usually made on every body in the street on grounds of national security. It is questionable as to whether the Ethiopian legal system accommodates such acts of the police. As far as the writer is concerned, he found no provision of the law giving this power to the police.

Dear student, how do you consider the legality of "stop and Frisk" searches?

An other issue relates to taking out the evidence from the body of the suspect. Assume, that the suspect swallows the evidence. Should the police take him to the Doctor or should search be limited to search of external part only?

This raises the physical examination concept contemplated by Article 34 of the criminal procedure code. So long as search is an endeavor to obtain evidence, it should not be restricted to search of things which the person may possess about his person. For example, if the nature of the offence admits evidence of blood test that may also be made when the police considers it necessary. This examination is to be made notwithstanding the right to refuse to submit oneself to medical examination under Article 20 the civil code. Such physical or medical examination is to be made by a registered and licensed medical practitioner who is required to record the results of his examination. Such examination may be made also on the victim of the offence up on his or (where he is incapable)his representatives consent.

2. Search of Premises.

Search of premises is most of the times made on a warrant. We will see to this in the next chapter in detail. Before that, however, we will see the circumstances where by search of premises may be made with out awarrant. Article 32 (2) provides for two conditions where search with out warrant may be made.

Article 32 (2)

> *No premises may be searched unless the police officer or member of the police is in possession of a search warrant in the form prescribed in the Third Schedule to this code except where:*
>
> *a. the offender is followed in hot pursuit and enters premises or disposes of articles the subject mater of an offence in premises.*
>
> *b. Information is given to an investigating police officer or member of the police that there is reasonable cause for suspecting that Articles*

which may be material as evidence in respect of which an accusation or complaint has been made under Article 14 of this code and the offence is punishable with more than three years imprisonment, are concealed or lodged in any place and he has good grounds for believing that by reasons of the delay in obtaining a search warrant such articles are likely to be removed.

The first situation stated under 32 (2) may be termed as search incident to hot pursuit. The circumstance is such as where a flagrant offence as defined under Article 19 and 20 is committed. This refers to a situation where a member of the police pursues a person whom he has seen committing an offence. The search here may be to find and seize the offender who hides himself in the premise or articles which were the meanse or result of the commission of crime but disposed of in the premise by the offender.
An issue arises in connection with Article 32 (2) (a) as to whether a private person can make search without warrant. As you remember from our previous discussion, we have seen that Article 50 allows any private person, besides the police, to effect an arrest with out warrant. Article 32 (2) (a) permits search without warrant in flagrant offences in the same way as arrest with out warrant. However, the code doesn't entitle any person other than a police officer or member of the police to conduct searches.

Some people argue that Unless you interpret the provisions of Article 50 to enable the arresting private person to conduct search of the type under consideration the whole purpose of the provision will be defeated. According to this argument, prohibiting the private person from searching at least for the offender is giving him a chance to fled. Nevertheless, as seen previously, search incident to arrest doesn't seem possible as the law provides independent procedural rules for search and arrest.

There fore it is difficult to take Article 50 allowing search too. Most importantly, Article 26 (3) of the constitution tells that search may be conducted only exceptionally in accordance with specific laws which are Articles 32 - 34. These specific laws do not entitle private persons to conduct searches in whatever circumstance. Therefore, whatever evil may result from the prohibition, private persons are not entitled to make a search and if they do, it will be illegal.

The other circumstance permitting the making of search of premises without a warrant is that stated under Article 32 (2) b). There are certain requirements set by the subarticle so that the search may be made legally. These are:-

1. The investigation should have been commenced based on accusation or complaint under Article 14 of the code.
2. Information (perhaps from a source other than the one for accusation or complaint) which makes the police suspect that articles which may be material as evidence to the offence are concealed or lodged in any place to be searched;
3. the offence is punishable with more than three years imprisonment.
4. possibility of removing the articles;
5. the police must have reasonable belief that the search will result in a material evidence.

As you can see it, the search without warrant is allowed based on the information to the police that there is a reasonable ground for suspecting that an article which may be material evidence is

lodged in any place. What makes the search urgent and so without warrant is the fact that delay in obtaining a search warrant will give a chance to remove that article.

The purpose of search without warrant in such cases is to preserve an item of evidence from destruction. Due to this, a fast decision would be necessary. However, it is practically very difficult to see the fulfillment of all the requirements with in a short period of time. In practice, the police most of the time conduct search without warrant in whatever case. They try to justify this by the possibility of removal of the article during the delay to secure a warrant.

4.4 Remedies for Illegal Search and Seizure

We have previously discussed the causes making search and seizure illegal. In relation to searches with warrant, searching a place not specified in the warrant, or seizing a property not specified there in would regard the search and seizure illegal. In relation to search of persons as well, searching a non arrested person without a ground which is reasonable and/or seizure of an article not material as evidence to the offence at hand are sources of illegality. In circumstances where warrant is issued for a purpose of justice, inquiry or trial cannot be served as another cause for unlawfulness. Irregularities in conducting the search like use of force, at time of carrying out the search and treatment of articles seized may also be grounds leading to remedies for an illegal search and seizure.

What are the remedies for illegal search and seizure?

The Ethiopian law on search and seizure strongly prohibits unlawful search and beyond that, it goes to provide for some remedies. Most of them are similar to remedies for illegal arrest. Before going to see the remedies, lets we look at the strictness of the prohibitions of unlawful search.

The constitution attaches very strict conditions even for conducting search. It says that search may be conducted only in compelling circumstances and according to specific laws. Search in cases other than the exceptional situations are strongly forbidden. In this respect, the criminal procedure code goes further in ordering for example, that no police officer may seize any property other than the specified in the search warrant under Article 33 (2). The same is implied in the usage of phrases like No arrested persons shall be searched --- and No premise may be searched --- in Article 32 of the code. But, however, strong the prohibition of unlawful search may be, it does not directly give rise to the exclusionary rule.

When we came to the remedies, one remedy is criminal prosecution of the police officer who made the illegal search and seizure under Article 422 of the criminal law.
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There is also civil remedy under the extra contractual law. (Article 422 penal code cum. Article 2035 civil code). Hence, the police officer who has caused damage through the illegal search may be held liable to compensate it. What about the exclusionary rule remedy? As you remember, this is one of the remedies in case of illegal arrest. Is this also true in case of illegal search and seizure?

In relation to search and seizure, our law doesn t go further than strongly prohibiting unlawfull search. However, strong the prohibition of unlawfull search may be, it does not directly give rise

to the exclusionary rule. The rule that evidence which is the result of unlawfull search and seizure shall be rejected is nowhere provided in our law.

In the absence of a clear legal provision providing for the exclusionary rule, the gap created in the law is one which depends on the position of judges in court judicial activism.

Some people argue that in confession, it is very serious as you force the person to make confession. This is serious and exclusionary rule applies easily. But in search you simply go to the premise of a suspect and take property i.e. it is not quite serious. So, exclusionary rule should not apply.

Others, however, bring the arguments provided for illegal arrest and would argue that the rule applies to evidence which is the result of unlawful search and seizure. Generally they argue that evidence should be rejected where the procedural requirements for and/or in conducting search are not respected.

Summary Question.

1. D was arrested pursuant to a lawful arrest warrant on a charge of dealing in hashish (Article 525, Pen. C.). The arresting officer did not suspect D of having on his person any evidence of the offence but, aware of D's reputation for carrying a pistol, searched him for weapons. The search disclosed not weapons but forty grams of gold, later discovered to be stolen property. Was the search of D's person legal?
2. D was arrested lawfully in his home on a charge of armed robbery of a church. In order to effect the arrest the police officer knocked on the door and was admitted by D. After the officer placed him under arrest he commenced searching the house. In the top drawer of a table standing near the entrance door, he found and seized a revolver belonging to D. (A revolver had been used in the robbery). Under the mattress of D's bed, in another room, the officer found and seized two silver crosses, similar in appearance to those which had been reported taken in the robbery. The officer took both the revolver and the crosses with him. Were they legally seized? Suppose D had been packing a suitcase when the officer entered.. Would search of the suitcase for evidence have been legal? What if he had seen the revolver lying on top of the table, instead of discovering it inside the drawer?
3. Police Officer P was patrolling the streets one dark night out by the old Addis Ababa airport. He was particularly alert to the possibility of prowlers because a number of wealthy homes in that area had been burgled during the past two weeks. At 8:00 P.M. he spied two men walking on the side of the road, towards the city outskirts. Each was carrying an apparently heavy suitcase. Seeing that they were poorly dressed he ordered them to halt. When he approached them and shined his torch at their faces, they appeared frightened. Thinking he might have two thieves in hand, he asked: "where are you going, carrying those cases?" "We are on a journey to our village twelve kilometers from here: I came to the city this morning to meet my brother who came from Harrar, and now we are going home where he will live with us. These cases contain his belongings". "But why are you traveling so late at night?" asked P. "Because my wife and child are all alone, and there are so many thieves about, I fear to leave them for more than one day", answered the spokesman. P was fairly convinced by these replies but, wishing to be safe, told the men "you had better let me take a look inside those cases". The men opened the cases and P found them packed with expensive objects

including a transistor radio, silk dresses, a gold cigarette lighter and case, two German cameras, and four bill-folds containing hundreds of dollars in cash and travelers checks. P placed the men under arrest for suspected theft and they were subsequently tried and convicted of having stolen the above items from houses in the neighborhood. Were the suit cases lawfully searched? Does the code never permit the search without warrant of a person who is not under arrest? What reasons favour or oppose the grant of such power to the police? Suppose, in the above case, the two men had refused to allow P to search their luggage _ would such refusal have constituted a criminal offence? Would it have justified their arrest? Would it make any difference to your answers whether the men were not thieves but honest travelers? Whether P had suspected them of sabotage instead of theft? Of possessing goods for sale without having paid the required municipal tax?

4. An officer X had information leading him to believe that D was involved in a currency smuggling ring. For nine days X followed D about town until, seeing him drive through a red traffic light, he stopped D s car, issued a traffic court summons, and made a thorough search of D and the car. Hidden under the driver s seat he found smuggled swiss francs worth $100,000. Were they lawfully seized?

CHAPTER V
First Court Appearance

Generally, we have seen that when an offence is said to be committed, the suspected person will be summoned or arrested by the police. The purpose of bringing the suspect differs from system to systems. It may be to get permission from the court to institute a charge in legal systems where the court has the power to determine whether a charge should be framed. In such systems, the public prosecutor has to get committal to frame a charge.

In other legal systems, it is to get additional time for investigation. In our legal system, Article 19(3) of the FDRE constitution and 29(1) of the criminal procedure code have provided that the suspect has to be brought before court with in 48 hours. Then as to the options available to the court before which the suspect is brought, Article 29(2) cross refers to Article 59 of the criminal procedure code. In this chapter, we will be dealing with the procedural laws regarding the order to be given in such cases of first appearance.

In such a time, the court s decision on whether the arrestee should be released or remain in custody is of crucial importance. It involves so many sensitive constitutional rights. Involved here in are the right to speedy trial, the presumption of innocence, the prohibition of punishment before conviction and the prohibition against deprivation of liberty with out due process of law. In studying the law governing the possible orders on first appearance and in looking at the practice, due regard must be given to these rights of the arrestee and principles of criminal law.

As has been manifested in our discussion of the provisions of the criminal procedure law, this is also the area where the problems of the existing criminal procedure code are highly manifested. Hence, in an effort to look for solutions to some problems, we may resort to discussion of concepts under foreign legal systems the draft code prepared by the justice and legal system research institute. We would also cite court practices in some controversial areas.

5.1. Remand of the case of the suspect.

We have previously discussed the court s role in recording the accused s statement under Article 35. We will now focus on its functions under Articles 59 ff. in the decision to remand the accused in custody or to release him on bail.

Article 59 *Detention*

1. *The court before which the arrested person is brought (Article 29) shall decide whether such person shall be kept in custody or be released on bail.*

2. *Where the police investigation is not completed the investigating police officer may apply for a remand for a sufficient time to enable the investigation to be completed.*
3. *A remand may be granted in writing. No remand shall be granted for more than fourteen days on each occasion.*

Under this Article, the court has two alternatives after the suspect is brought before it. The first is to remand the suspect in custody or release him on bail. When we see the option of the court with regard to remand in custod; the court? would allow this only if investigation is not completed and the police officer applied for this. The procedure of remand is controversial because the period is not limited Article 59 (3) reads no remand shall be granted for more than fourteen days on each occasion. But for how many times would the maximum 14 days remand be granted?

It is related to the right to speedy trial thus in some jurisdictions, the law provides the maximum days to be granted for a remand. In a similar manner, the draft code has provided that the time for which the accused may be kept in custody (on remand) can not in any way be more than 180 days. (Article 66 93) (b)) otherwise, the police may simply use this as a means of harassment. So, the courts should play a decisive role in checking the police. The court must ask what are the developments on each period of remand.

Article 19(4) of the FDRE constitution gives guidelines as to how many 14 days the court should remand. --- where the interest of justice requires, the court may order the arrested person to remain in custody or, when requested, remand him for a time strictly required to carry out the necessary investigation --- As per this Article, if the court believes that a certain fixed day is sufficient and gives remand but when the police applies for a remand saying that I have not completed the investigation,without good cause the court should order the investigation to be stopped. It is by doing this that the court can enforce the right to speedy trial. Even if the court believes that the investigation takes 2 months, it cannot give more than 14 days at each occuassion . This helps the court to supervise how effectively is the police using the periods for investigation. 14 days is the maximum limit and it may be 6 or 7 days if the court believes it is sufficient to carry out the investigation.

5.1.1. Grounds of Remand

When we come to the grounds of remand, generally, you may have the following grounds of remand:-

1. Where it is necessary to enable the investigation to be completed.
2. Where the offence for which the person is suspected is non bailable or when bail is denied.
3. Where bail is granted but the arrested person refuses or is unable to find and produce sureties.

We have exhaustively dealt with the first ground. The other two grounds may have to do with grounds for denial of bail under Article 67. Courts should not allow remand for interrogation as it would amount to prolonged interrogation which may result in involuntary confession. However, the release of the person on bail may hamper investigation. For instance, if the arrested person is suspected of a crime of theft, robbery or forgery, the police might need additional days to gather such items that are stolen, robbed or forged so as to use them as evidence and /or return them to their owners at last. Should the person be released howe ver, it is likely that he would conceal or

destroy such items (Article 67 (c)). In case where the existence of such facts are shown to the court remand may be granted.

The court has to take some conditions in to consideration in making its decision to grant or disallow remand. Such conditions include

1. the conditions under which arrest is effected, i.e. whether there was reason to believe that the person has probably committed the offence;
2. the progress of the investigation and diligence of the police by taking steps in collecting evidence such as interrogation, seizure of articles in flagrant offence and examination of relevant witnesses;
3. whether the applicant□s release affects the investigation, the complexity of the case, and the nature of evidence to be gathered; and
4. the physical condition of the arrested person. Granting remand without considering such points may tant amount to punishing a person who is presumed to be innocent.

An important issue may be raised in connection to this. In the first hearing, we have said that the court may order remand. Should the court give the suspect an opportunity to be heard before granting the remand?

As an aspect of due process of law and in fact, to hold a fair proceeding, the arrested person should be given the opportunity to be heard in case of remand, which affects him directly, that is why Article 66(3) (b) of the draft code has granted the arrested person the right to be heard before deciding on the issue of remand. Sometimes, the practice shows that police officers request remand in order to conceal the torture they committed against the suspect. Thus, the police should be required to come with the arrested at any stage of the investigation , Whenever remand may be requested.

We have seen hat under article 59, the court has two alternatives, i.e. release on bail or remand in custody. The later is ordered when investigation is not completed. In such instances, there are countries who have adopted the mechanism of investigative remand. Accordingly, the case would be remanded to the police while the suspect is released. Would this be possible under Ethiopian law?

The law says that remand may be requested and granted where the police investigation is not completed. We have seen the reason why remand is ordered till investigation is completed. If the case is such that bail may be granted and there is no problem with releasing the person on bail, one may say, there is no reason why investigation cannot be conducted on the released person. In some simple crimes where release of the person on bail may bring about no problem, the investigation may be conducted by requiring the person to appear (in police station) whenever necessary. Therefore, although the law talks of remand while a person is in custody and where police investigation is not completed, it is possible that investigation may be carried out by releasing the person on bail as far as this does not hamper the proceeding.

One last issue relates to whether the decision of the court on remand is appellable. There is no indication under the criminal procedure code as to whether the decision of the court on remand is appellable. But, remand and bail may be considered as two sides of coin as the decision is given almost at the same stage. And so, one may say, if appeal can be lodged against denying bail, there is no reason why the person can not lodge appeal against decision on granting remand.

However, as remand is granted for few days (a maximum of fourteen days), it seems infeasible to lodge an appeal and get decision in such short period. Again, the decision of appeal may take a longer period than that of remand and appeal may be of no importance.

5.1.2 Rights of persons remanded in custody

The right to presumption of innocence is a fundamental right pertaining to the protection of person□s from any restriction of their right before conviction. As remand has nothing to do with guilt or responsibility, the protection would also extend to persons remanded in custody accordingly, the FDRE constitution provides under Article 21 that all persons in custody have the right to treatment respecting their human dignity. It also says that such persons shall have the opportunity to communicate with, and to be visited by, their spouses or partners, close relatives, friends, religious councilors, medical doctors and their legal council. In our country□s situation, it would be too much to request so much rights, there are instances where visiting is completely prohibited or seldom permitted. With specific reference to the right to legal counsel, Article 61 of the criminal procedure code provides:

> □Any person detained on arrest or on remand shall be permitted forthwith to call and interview his advocate and shall, if he so requests, be provided with the meanse to write.□

In contrast to other legal systems, the admissibility of the proceed of interrogation is not made conditional on the presence of defense counsel. But, the suspect is allowed to discuss with his advocate and write the results of such discussion or other things. It seems that the detained person should have an advocate at his own cost. In relation to accused persons(charge being filed against them), they may be provided with legal representation at state expense, if they do not have sufficient meanse to pay of it and if miscarriage of justice would result. (Article 20(5) of FDRE constitution). In the practice of some courts in our country, legal counsel is assigned at state expense for persons accused of crimes punishable by more than five years. The constitutional provision should be extended to apply to all persons under custody because the accused person may possibly be in custody (bail might have been denied). However, considering our real circumstances(economy and number of lawyers) it seems practically impossible to provide every person in custody with legal representation. But still, the right should exist.

Article 60 of the criminal procedure code provides that: -

> □ any arrested person shall be detained on the conditions prescribed by the law relating to prisons□

In Ethiopia, there is no detailed law relating to prisons clearly stipulaesting the procedures related to the respect of the rights of persons in custody. Even if this is so, the person in custody must enjoy the right to treatments respecting their human dignity and to communication provided under Article 21 of the FDRE constitution.

Article 62 of the procedure code also stipulates that any person on remand who may be released on bail shall be given the opportunity to find sureties. This applies to a person who is remanded for further investigation in situations where the offence with which he is suspected of is bailable. It may also apply where the grounds under which bail is denied under Article 67 cease to exist. Since the person has to comply with the condition of bail, when granted, of which production of a guarantor is most important, he must have the opportunity to search for one. This is not to elongate the duration of his detention in case he could find a guarantor when bail is granted.

If remand is given and the investigation comes to an end, the next question is determining whether this person is to be released on bail.

5.2. The right to be released on bail

The general right to be released on bail is a fundamental right of arrested persons in a criminal proceeding. That is why the jurisprudence holds that all arrested persons should be released on bail. The otherwise alternative (i.e. denial) is an exception to this principle. In a similar manner, Article 19(6) of the FDRE constitution provides the following:-

> *persons arrested have the right to be released on bail. In exceptional circumstances prescribed by the law; the court may deny bail or demand adequate guarantee for the conditional release of the arrested person.*

You can glean from this that the situation in Ethiopia as regards bail is in line with the jurisprudential position.

Why should a person be released on bail?

You can raise many justifications. One of such justifications is the presumption of innocence. In former times, however, this was not the reason. It was introduced in England by police officers as a result of the death of many arrestees and because of the delay of trial. The public treasure that would be expended to sustain the life of persons in custody.

However, the existing justifications for bail are:

1. The presumption of innocence. Arresting or keeping in custody up until the decision of the court to convict or acquit the person would be tantamount to arresting an innocent.
2. The fact that liberty is the principle and arrest the exception would also justify bail.
3. The principle that no one should suffer punishment before conviction, and importantly,
4. The right to well prepared defense are the justifications behind bail. If a suspect is detained, he will not have the opportunity to prepare his defense while the public prosecutor collects evidence freely on behalf of the state.

Due to this, when you look at from the side of the suspect, it seems fair that all suspects be released. But, on the other side of the state, there is the interest of the society that requires all suspects to be tried. These two interests are harmonized by introducing the bail system as up on posting money as a security for the reappearance of the suspect. In this sense, bail serves both the interest of the suspect and that of the society.

The adoption of the bail system was followed by criticism in this time on two counts:

I. it was said that the system is discriminatory because it is only those that have money that can be released.
II. It was also said that it is unfair in the administration of justice because the released person will and also have committed additional crimes or do away with evidences.

Following these objections, modifications were introduced in to the system. Thus, one can produce personal guarantees and it is only when the court is sure that the suspect is not likely to commit

additional crimes. In addition to this the court has to take in to consideration the financial capacity of the accused while fixing the bail bond.

In some of the common law countries, bailability is determined on the discretion of courts while in some others; the law fixes certain kinds of capital crimes not to be bailable.

As regards the amount of bond, it is up to the court to determine. But the restriction is that fixing excessive amount of bond would not be allowed as it amounts to denial of bail.

As to the availability of the right during appeal, some argue that the right to bail should be given pending the case in the appellate court provided that he has been granted bail while the case was pending in the court of rendition. This is so because the right to be presumed innocent exists until the final disposition of the case by the appellate court.

Others, however, argue that the right should not be allowed at the appellate stage once the court has entered a verdict conducting the suspect. The presumption of innocence has been defeated and should not wait until the last preceding. Moreover, the chance of the suspect to abscond the system is higher after conviction. Hence, it should not be allowed at the appellate level.

Dear student, which line of argument do you favor? Why?

As seen previously, the Ethiopian law has made it the principle that accused persons be released on bail. But exceptionally, it may not be given. In fact, the issue of bail is raised here if the accused has not been released on bail at the police station. We have seen the issue of bail at the police stage in our discussion of Article 28.

The issue of bail may be raised either by the court or through the application of the accused. The court would have to raise the issue of bail on its own motion because: 1. Release on bail is one of the alternatives presented to the court as per Article 59(1) of the procedure code. 2nd, the court has the constitutional duty to enforce the human rights provisions of the constitution under Article 13(1) of the FDRE constitution. Also, Article 65(1) of the criminal procedure code gives a height light that the court may consider the issues of bail up on its own motion by granting the discretion to endorse bail as an alternative when it issues an arrest warrant. From what is said before, it seems that the court has obligation to consider the possibility of releasing the arrested person on bail. For this to hold, however, the court must be able to see the conditions warranting bail clearly. If the court does not consider it on its own motion, the arrested may apply for it as per Article 64. Article 64 provides:

1. A person under arrest may at any time apply for bail.
2. The application shall be made in writing and signed by the applicant. It shall contain a summary of the reasons for making the application and the nature of the bail bond the applicant is prepared to enter into.
3. An application for bail may be granted to any court.

As the article provides, the application to bail would be made by the arrested person in writing. Having the realities in the police station in our country, however, this doesn't seem to be practicable. In consideration of this, the Draft code makes some modifications that the application can be made orally or in writing by the person under arrest, his representative or family. (Art. 83).

What are the reasons that the law requires to be stated on the application for bail?

If brought to court, it should be enough that the arrestee requests his release on bond. If he is not given the chance, however, the reasons to be stated may be the state of facts under which the person is put in custody. The applicant is also required to describe the nature of bail bond that he is prepared to enter in to. The application should state the person and the amount which he is prepared to submit as a security for appearance. This will serve as a ground for the court's decision under Article 69(1) of the code.

As regards the court to which the application is to be made, Article 64 (3) provides that it may be made to any court. Hence, he may apply to the court to which he is brought within forty – eight hours or any other court.

Another issue relates to as to when the court would decide on the application for bail.

Article 66 requires the court to decide on it without delay and in fact, with in forty – eight hours. In an effort to make the hearing fair, it also requires the court to call up on the prosecutor or the investigating police officer in his absence, for comments and recommendations. The possible comments and recommendations of the public prosecutor or the police officer will help the court in deciding whether the crime with which the applicant is suspected is bailable or not and whether there is a circumstance warranting denial of bail.

It, however, is very rare that Ethiopian courts would decide on bail with in forty – eight hours. If you order the public prosecutor to comment on the application, it alleges that the investigation file has not reached it and it can't give a response without it. Even if he has received the file, there are many times the prosecutor seeks for an additional time on the ground that he is studying the case and that he can't respond at this time. The process takes more than the time specified in Article 66 because you cannot request the police to comment in the presence of the public prosecutor.

5.2.1. Factors to be considered in deciding on bail

Article 19(6) of FDRE Constitution provides that in exceptional circumstances prescribed by law the court may deny bail or demand adequate guarantee for the conditional release of the arrested person. We have previously seen that the organ that has jurisdiction over bail may be either the legislature or the court. In countries where the legislature has jurisdiction, the law would list the different crimes and stipulate that they are unbailable.

Dear student, whose jurisdiction is it to decide on bail in Ethiopia?

The constitutional provision (Article 19 (6)) provides that "the court may deny bail or demand adequate guarantee ---." Hence, it is the power of the court to deny bail. But the court would make its decision based on "the circumstances prescribed by law". The law of criminal procedure prescribes such circumstances under Articles 63 and 67. Hence, the approach under Ethiopian law is to grant the power to the court.

This issue has become to be controversial after the issuance of the Federal Anti – Corruption Proclamation. The proclamation provides that a person suspected of the crime of corruption would be denied of his bail right. Hence, the right to bail is denied by the law or the legislature.

Attorneys of the persons accused of the crime of corruption argue that it is not the jurisdiction of the legislature to allow or deny bail. Article 19 (6) does not allow the legislature to entertain the issue of bail rather than fixing the circumstances based on which, the court may grant or deny bail. Hence, they argue that the law providing for the denial of bail for a specific crime is unconstitutional.

What is your position as regards this?
When we came to the circumstances that the court should consider, Article 63 states:

1. Whosoever has been arrested may be released on bail where the offence with which he is charged does not carry the death penalty or rigorous imprisonment for fifteen years or more and where there is no possibility of the person in respect of whom the offence was committed dying.
2. No person shall be released on bail unless he has entered in to a bail bond, with or without sureties, which, in the opinion of the court, is sufficient to secure his attendance at the court when so required to appear.

This article is open to different interpretation as to the requirement the limitations provide. When is the arrested person denied bail?

1. The offence he is charged with doesn□t carry death penalty or rigorous imprisonment for fifteen years or more.
2. There is no possibility of the person in respect of whom the offence was committed dying.

According to the first interpretation the two situations are connected by □and□ and hence, you will release him if both condition are cumulatively fulfilled. The missing of one of the elements results in custody.

There is also other interpretation. Accordingly, the person would be denied of bail if the offence with which the suspect is charged is punishable with death penalty or rigorous imprisonment of 15 years or more and there is the possibility of the victim dying. Hence, a person charged with homicide by negligence under Article 543 is released on bail because it doesn□t fulfill the requirement of imprisonment for a minimum of 15 years although the person in respect of whom the offence is committed dies.

The Draft code, after correcting the provision as to applicable to any person under arrest, seems to introduce the above grounds with some additions as alternative requirements for denial of bail. Where the person in respect of whom the offence is committed dies or there is that possibility, and if the offence is punishable with a minimum of five years imprisonment, bail is denied. (Article 82 of the draft code). Here, the law seems to have taken the stand that persons suspected of serious crimes punishable with more than fifteen years imprisonment should remain in custody although there is the possibility that they are innocents. Release on bail may be ordered where the court believes in the possibility of appearance. But with offences punishable with 15 years imprisonment or more, the law has presumed that the offender may prefer to abscond. A person committing an offence punishable with death or life imprisonment would prefer absconding rather than dying or suffering life imprisonment at the end. Therefore, the interpretation should be in a way that the individual would be released on bail in the majority of cases. That would make denial the proper exception to release on bail.

The article provides ---- with which he is charged ---- what if he is in the hands of the police, or even if the file is presented before the public prosecutor, he has not prepared charge? How do you construe charge here? Should it be formal charge? The public prosecutor may stay months to prepare charges for different reasons. So, to require a formal charge be prepared in this context would amount to denying bail. Hence, it should be construed literally to mean simple suspicion.

Who is going to determine the offence with which the person is suspected of? The police or the public prosecutor may say the person is suspected of the crime under Article 538. Should the judge simply accept or look at the evidences and examine as to whether it would fall under the provision?

Unlike other jurisdictions there is no clear provision allowing such determination by the courts. However, even if there is no such a stipulation, it is not the police or the public prosecutor, but the court which has the power to determine which offence require release on bail. The court must inquire, is there a possibility of charging this person under Article 538 under the circumstances? The police or the public prosecutor do not know the technicalities. Considering that the person has a right to be presumed innocent and the bail is the principle, the court should examine whether the legal requirements are really fulfilled in relation to the offence with which the person is actually suspected rather than just looking at the title of the charge. This goes in line with our assertion that the constitution has granted the court the power to grant or deny bail.

Once the court has examined the case in consideration of the circumstances under Article 63 (1), then the court would began to consider other factors under Article 67. Even if the grounds for denial of bail under Article 63 (1) are not fulfilled, it may be denied by the court in consideration of the factors under Article 67.

***Article 67**, Bail not allowed*
An application for bail shall not be allowed where:

- *(a) The applicant is of such nature that it is unlikely that he will comply with the conditions laid down in the bail bond.*
- *(b) The applicant, if set at liberty, is likely to commit other offences;*
- *(c) The applicant is likely to interfere with witnesses or hamper with the evidence.*

These standards are very vague. How is the public prosecutor going to prove the existence of these situations? We should not simply accept the opinions of the public prosecutor. As it relates to fundamental rights of the accused, the public prosecutor must have prima facie evidence for the existence of the conditions. Simply accepting the opinions of the public prosecutor will be against the purpose of release on bail. Sub (b), for example require the proof that the applicant is likely to commit other offences. How would the public prosecutor prove this? Some people say that this is through the public prosecutors producing the previous convictions of the accused until after he has been convicted.

In all of the sub articles, the law just requires proof of likely hood. But, the grounds seem to be difficult to prove in advance. It seems difficult to rely on what has happened in the past, perhaps unrelated with the crime at hand, in determining whether bail should be granted or not. It is good to depend on the circumstances in which the offence is committed and the applicant is arrested. If, for example, the person was caught in situations where he was attempting to kill a material witness, the likelihood that he may commit another crime or conceal evidence exist.

5.2.2. Amount of the Bail Bond

The crime might be bailable under Article Article 63 and may not be objectionable under Article 67. This, however, doesn't mean that the person under arrest will automatically be released. When bail is allowed, Article 68 provides that the court shall fix the conditions on which bail is granted. These conditions include the amount to be secured and the duration of the bail bond. Unless the bail bond is entered in to by the suspect, the court may not release him (Article 63 (2)) Article 63 (2) provides that the bail bond may be with or without sureties. This implies that release of the suspect through personal surety is an accessory to a release on bail bond. This would open the criticism for the discriminatory character of the system as implemented under Ethiopian law because Article 63 (2) doesn't seem to suggest that the suspect may be released through sureties only. The draft code provides for the possibility of release on the court's own guarantee where the suspect is unable to secure and the offence is punishable with below one year imprisonment fine.(Article 87(2)).

How Would the amount of bail bond be fixed?

The amount of bail bond depends on the purpose of the bail. As we have said it has two purposes:

1. Not to punish the suspect before he is convicted.
2. It helps the society by not letting individual suspects go without being tried.

Taking these two interests into consideration, a moderate amount of bail should be fixed. It is with in the discretionary power of the court to fix the bond. Hence, the amount necessary to secure the defendant's presence at trial varies according to the circumstances of each case. Generally, however, the following factors are considered by U.S. judges, in setting bail amounts:

1. Seriousness of the offense charged
2. Weight of the evidence against the defendant.
3. Dependant's ties with the community, family, and employment.
4. Defendant's prior criminal record.
5. Any history of failure to appear.

Under Ethiopian law, court has to take the situations stated under Article 69 in to consideration.

Article 69 – Amount to be secured.

1. *The choice of the guarantors and the amount to be guaranteed shall be in the discretion of the court.*
2. *The court shall decide such matter having regard to:*
   - *(a) the seriousness of the charge; and*
   - *(b) the likelihood of the accused's appearance; and*
   - *(c) the danger to public order which his release may occasion; and*
   - *(d) the resources of the accused and his guarantors.*
3. *Any decision granting or refusing the application shall be in writing and shall give reasons.*

The seriousness of the charge is determined based on the penalty attaching to the offence with which the person is suspected. The amount to be fixed to increase with the increase in the seriousness (penalty of the offence). More years of imprisonment, more amount of money. If appearance is unlikely, higher amount should be fixed. Again, if a danger to public order is involved, the amount to be secured should increase. Where the accused as well as the guarantor are so rich to have a very good resource, higher amount should be secured. But still, there is a problem with some of the requirements. For example, where the accused is unlikely to reappear or his release would occasion public order (b and c) , there seems to be a ground to disallow bail

under Article 67. Any way, we may make them as grounds increasing the amount to be guaranteed unless they are so strong as to serve as grounds for denial of bail.

Generally, the right to be released before trial is conditioned up on the accused's giving adequate gurantee to the court that he or she will return to stand trial. AS far as the principle is release on bail, the court should be reasonable in fixing the amount. As the purpose of bail is to secure the regular attendance of the suspect arrestee, such determination has to be made having this objective in mind. Thus, it should not be so simple as a tempting absconding. The amount should not also be so has as to amount to denial. The amount to be secured should not discriminate between poor and rich. That is why the court is required to take the financial position of the accused as well as guarantor in to consideration. The court should be serious not only in giving bail but also in fixing the amount of bail.

One last issue relates to the duration of the bail bond; as regards this, Article 71 provides:

1. The bail bond shall be in the form prescribed in the third schedule to this code.
2. The bail bond shall remain in force for such period as shall be fixed by the court but may be extended from time to time by the court.
3. Where the charge against the person released on bail is withdrawn the court shall discharge the bail bond.

The duration of the bail bond is fixed by the court and starts to count as of the time the accused person is released from custody up on his compliance of all the formalities. (Art. 72 of the code).

5.2.3. Effect of Bail Bond

The effect of bail bond is to give the suspect the right to be released from custody. This is stated under Article 72:

> *"When the bail bond has been entered in to and all formalities complied with, the accused shall be released from custody".*

The other effect of the bail bond is the coming in to picture of the guarantor's obligation under Article 70.

Article 70 – obligations of guarantors:

1. Unless otherwise expressly provided in the bail bond the guarantor shall be responsible for securing the appearance of the person released on bail at any time and place to which during the course of the proceedings the hearing may from time to time be adjourned.
2. Nothing herein contained shall affect the provisions of Article 77 and 78.
3. Where the guarantor of a bail bond dies, his guarantee shall lapse. Any recognizance which has been deposited shall be returned to the guarantor's personal representative. The person released on bail may be required to produce new sureties.

The obligation of the guarantor is to secure the appearance of the person released on bail at any time and place to which during the course of the proceedings the hearing may from time to time be adjourned. The failure of the accused to appear in the time specified by the court would result in forfeiture of the amount secured as per Article 76(2) cum Article 79.

As regards the accused, an arrest warrant will be issued if he fails to comply with the conditions he has undertaken to comply with. All the rights and duties of the guarantor and other issues in connection to bail bond are dealt with under Articles 70 – 79. You are required to read these provision.

5.2.4. Appeal on the court's decision on bail

Dear students, our last topic in connection to our discussion on bail would be the issue of appeal. The decision of the court on denying bail is appeallable. In this regard, Article 75 provides:-

1. Where bail has been refused by a court, the accused may apply in writing within twenty days against such refusal to the court having appellate jurisdiction under Article 182(1) to grant bail. The application shall set forth concisely the reasons why bail should be granted.
2. The court of appeal after considering the application shall dismiss the application or grant bail on such conditions as it shall fix. No appeal shall lie against a decision given by the court of appeal under this Article.

This article speaks about the right of the accused to appeal against denial of his right to appeal. Nothing is mentioned as to whether the public prosecutor lodge an appeal against the decision of the court releasing the suspect on bail. As we will look at it later on, appeal is a right available to both parties in a criminal proceeding; the accused and prosecutor. But, when it corns to the decision of the court on bail, the right is mentioned on behalf of the accused only.

Dear student, is this the flaw of the law as has been in some parts of the procedure or an intentional act by the legislature in line with the principle that bail is the principle and hence has to be granted to many people except in those exceptional circumstances?

Another issue relates to on which decision of the court to lodge an appeal. We have said that fixing an excessive bond may sometimes amount to denial of the right. So, can the accused appeal against such an excessive amount of bail?

We have said that the granting of bail is at the exclusive jurisdiction of courts. The courts, in exercising this discretion, however, have to take the guiding circumstances listed by the law in to a ccount. So, in denying bail, if the court neglects to consider these, that would be a proper ground for appeal. Once bail has been granted, however, fixing the amount is the exclusive jurisdiction of courts which they will decide considering various aspects of the case. The wordings of Article 69(1) also support this interpretation. Certain circumstances are listed under (2) of Article 69 so that they will serve as guidelines for the court in fixing the amount.

Do you agree to this? Why not?

Summary questions

As presiding judge in the Bahir Dar Woreda Court you have received the following application for bail:

"I was arrested two days ago on an accusation of grave willful injury. I am innocent, and I want to go home and find witnesses who will prove my innocence. Let me sign a bail bond in the amount of five dollars because I am a poor man. Unfortunately I cannot provide any sureties because I am

very unpopular in my village and with my relatives. And I have no wealthy or prominent acquaintance.

You have asked the public prosecutor for his recommendations and he has sent you a paper saying:

"The applicant is, unfortunately, of such a nature that it is unlikely that he will comply with any bail bond – he will probably not show up at trial. Furthermore, he is likely to commit other offences and to interfere with the witnesses if he is set at liberty. Lastly, I am pretty sure he is guilty. About eight months ago he raped a daughter of the man he has assaulted, but no one ever reported it to the police".

What decision will you make? Consider the following questions:

a. Who has the burden of proof under Article 67 – the applicant or the prosecution? Under Article 75? Is the burden properly allocated?
b. Will you hold a hearing on the bail question so that you can question the accused and the prosecution representative? Should the injured party's representative have the right to be heard on the question?
c. Has the accused a right to see the prosecutor's recommendations so that he may reply to them? To call witnesses in support of his application?
d. What kind of "reasons" must an applicant allege under Article 64? Is it not enough for him to say "I want to be let out on bail because I do not like being in jail?" will he usually have the aid of an advocate in drawing up his application?
e. Assuming you decided to allow release of the accused on bail, in what amount would it be? Would you agree to dispense with the need for sureties? Why or why not? What relevance, in general, have the criteria of Article 69 to the policies underlying bail? Should a rich man be required to enter into a very high bond even though the charge is minor? Should a poor man be allowed to enter into a very low bond although the charge is serious?

CHAPTER VI

The Powers and Duties of the Public Prosecutor

Introduction

In making decisions to institute proceedings, there are different approaches in the world which we will consider later on. In Ethiopia, the public prosecutor is entrusted to this task. In this chapter, we are introduced to the considerable powers of the public prosecutor in his decision, based up on the police investigation an alleged offender one device available to him in making that decision is the preliminary inquiry, and we shall examine the workings of that institution in some detail. Other aspects of the public prosecutor□s role; framing the charge, conducting the trial and in proceedings after conviction will be considered in subsequent chapters.

6.1. Decision to institute proceedings

There are two approaches in making the decision to institute a proceeding. In some countries like France, courts are empowered to decide whether the case has to be instituted. In some others like England, U.S.A and Germany, the prosecutor has full discretion to decide whether to institute a proceedings or not. In some petty offences, however, the police would have the discretion to proceed or not to proceed.

In Germany, the rule is that the public prosecutor must take proceedings for all crimes that come to his notice for which there is sufficient evidence, unless they fall with in an exception for petty offences, in respect of which he is given the discretion to decide not to institute.

In Ethiopia, the powers and responsibilities are defined not only in the criminal procedure code, but also in other laws. Proclamation number 39/93 which, later was replaced by proclamation no 74/1993 deal with the powers and duties of the prosecutor office. The former one gives the public prosecutor broad powers. Its power was not limited only to prosecuting, it also has the duty to ensure the laws of the country and human rights are respected. The office was independently organized accountable only to the parliament and the president. This was to ensure its neutrality as has been the case in other legal systems.

Proclamation 74/1993 drastically reduced its power. Hence, the public prosecutor is left with the traditional activities i.e. representing the state in criminal matters and taking civil actions affecting the government.

More over, it is made accountable to the ministry of justice. So, one may say that the minister of justice is a chief prosecutor because the office is not independently organized.

Dear student, what do you think is the justification for such reduction of power? What implications would it have in the quest for the respect of law and enforcement of justice in the country?

These proclamations are supplemented with the criminal procedure code so long as this is not in consistent with proc. 74/93. We will see those provisions that are repealed due to their inconsistency with the proclamation.

Up on the receipt of the investigation file, the public prosecutor has about five options under the criminal procedure code.

1. Prosecute the suspect preparing a charge
2. Order preliminary inquiry
3. Order further investigation
4. Order closure of the file on the grounds listed by the law (article 39) or
5. Refuse the institution of the charge on the circumstances
   Under Article 42

When would the public prosecutor order the closure of the file?

This would happen in the situations stated under Article 39.

1. The public prosecutor shall close the police investigation file where the accused:
   a. has died; or
   b. is under nine years of age; or
   c. cannot be prosecuted under any special law or under
      Public international law (diplomatic immunity).
2. The provisions of Article 43 – 45 shall not apply where the case file is closed under this Article.
3. On closing the case file, the public prosecutor shall send a copy of his decision to the advocate general, the private complainant, if any, and the investigating police officer.

Sub (b) goes in line with the position of the Ethiopian law that persons under the age of nine years cannot be held responsible for their acts. Sub (c) is talking about immunity from criminal action.

When it says "special law", it refers to members of the Ethiopian parliament who are immune from prosecution unless the house permits so. The other group of individuals benefiting from immunity are members of the diplomatic community who have immunity.

The decision of the public prosecutor to close the file under this article is not challenged in any ways.

If any of these grounds do not exist and the evidences collected warrant prosecution, the public prosecutor is obliged to institute proceeding.

Article 40/ duty to institute a proceeding

1. *Subject to the provisions of Article 42, the public prosecutor shall institute proceedings in accordance with the provisions of this chapter whenever he is of opinion that there are sufficient grounds for prosecuting the accused.*
2. *The public prosecutor shall not institute proceedings against a young person unless instructed so to do by the court under Article 172.*

However, if the prosecutor is in doubt as to whether the sufficiency of evidences collected warrants prosecution or not, Article 41 obliges him to refer the matter for instructions to the advocate general.

If the prosecuter believes that the evidences are not sufficient to warrant prosecution, however, the prosecutor has discretion to refuse the institution of the proceeding. There are grounds recognized by the law up on which the prosecutor may refuse to institute a proceeding. In dealing with this power, we must see two important policy considerations. The first is that the public prosecutor has to prosecute the accused for the public interest that is why the institution is established. The public prosecutor must take actions against those potential offenders. On the other hand, the public prosecutor should not take every weak cases and incur expenses, spend time on his part or the court. He has to see to it that he has viable evidence. If he doesn't find a viable evidence, he should refrain from taking the case.

Article 42 cases where proceedings shall not be instituted.

1. No proceedings shall be instituted where:
    a. The public prosecutor is of opinion that there is not sufficient evidence to justify a conviction; or
    b. There is no possibility of finding the accused and the case is one which may not be tried in his absence; or
    c. The prosecution is barred by limitation or the offence is made the subject of a pardon or amnesty; or
    d. The public prosecutor is instructed not to institute proceedings in the public interest by the minister by order under his hand.
2. On no other grounds may the public prosecutor refuse to institute proceedings.
3. The public prosecutor shall institute proceeding in cases affecting the government when so instructed by the minister.

The power of the public prosecutor under Article 42 (1) (a) is a very huge power as every public prosecutor have such a power. He may have a subjective element and as such, it is subject to abuse. After ordering further investigation, if the evidences collected are not sufficient to establish the guilt of the accused beyond shadow of doubt, he can refuse.

The other case where the public prosecutor may refuse is if there is no possibility of finding the accused. There are some situations stated under Article 161(2) where proceedings cannot be taken in the absence of the accused.

Article 161 conditions for trying accused person in his absence.

(2) No accused person may be tried in his absence under the provisions of this Section unless he is charged with:

a. *an offence punishable with rigorous imprisonment for not less than twelve years; or*
b. *An offence under article 354 – 365 of penal code punishable with rigorous imprisonment or fine exceeding five thousand dollars.*

In such instances, the prosecutor must refuse to institute an action because the court will also refuse.

If the offence is barred by limitation, it bars entertaining the case at all. In civil cases, period of limitation is to be raised by the defendant and if he doesn't raise it, he is presumed to have waived it. In criminal cases, however, it cannot be waived by the party.

If the offence is already made part of pardon or amnesty again, the prosecutor would refuse prosecution. Pardon applies only to penalties or sentences. A penalty could be avoided by pardon. It is not clear why pardon is stated under Article 42. It is difficult at this stage to talk about pardon as it comes after sentencing. Amnesty is given to offenders who have not yet been prosecuted. When you give amnesty, you are saying that I am not going to prosecute. But pardon applies only to sentences while amnesty to prosecutions. The other grounds of refusal under 42(1)(d) and (3) are clearly repealed by proclamation number 39/1993 and are not reinstated by proc. No 74/93.

If the public prosecutor refuses to take an action on grounds of Article 42, Article 43 says the public prosecutor must make it in writing.

What is the effect of the refusal by the public prosecutor to institute a proceeding? As to the effect, the law makes distinction between offences punishable on complaint and those on accusation.

In offenses punishable up on complaint, they affect the victim more than the public and so, if the public prosecutor refuses to institutes, a proceeding, Article 44(1) requires him to authorize the victim to proceed privately. These persons allowed to undertake private prosecution are listed under Article 47.

According to Article 46, such a private prosecutor shall conduct the private prosecution at his peril and at his own expense. Hence, he shall incur the costs of private prosecution and in case his allegations are found to be false, he may face prosecution for defamation and also may be required to cover the costs the accused person has incurred in the proceeding.

In offences punishable on accusation, the nature of the crimes indicate that it is the public prosecutor who has to decide. For this reason, not only is the victim prevented from undertaking private prosecution; he is also not allowed to lodge appeal the court challenging the decision of the prosecutor. This is so because it is unnecessary for the court to interfere in such decisions of the prosecutor. This is why Articles 44(2) and 45 are repealed by proclamation 39/1993.

What alternative does the victim have now?
He cannot take an action in court. He has now only administrative remedy. i.e. to lodge appeal to the prosecutor in the next level of hierarchy.

6.2. Preliminary Inquiry

Under modern conditions, it is absolutely necessary that every system for the administration of criminal justice be provided with an efficient process for screening the type and number of cases which should receive a trial. This is so for two reasons;

First, an individual is definitely affected by being forced to stand trial for a crime. The social and economic pressures brought to bear up on the defendant in a criminal trial are real and substantial. All systems must, therefore, strive earnestly to assure that the glaring light of public opinion will be focused only up on those persons against whom sufficient evidence exists to warrant a public trial of the charges. It is always easier to charge a person with the commission of a crime than to prove the charge under the strict requirements of the law, and the state must assume the responsibility of weeding out, at the earliest possible time, those charges which are incapable of proof.

Secondly, there is the very practical problem of assuring promptness in the administration of criminal justice. With the increase of crime in all parts of the world, it is necessary to relieve the trial of courts of the impossible burden of trying all charges of the commission of crime. In order to permit timely action to be taken in those cases which require the full attention of the criminal courts, a selective process must be made available in the early stages of prosecution.

In England, no criminal case of a serious nature may be tried in a superior court unless a preliminary examination is first conducted by a magistrate, known as an examining justice. The sole purpose of the preliminary examination is to assure that no serious criminal charge will proceed to trial unless the examining justice is satisfied that there is sufficient evidence to establish a prima facie case against the accused. This is accompanied by requiring the prosecution to present in open court the evidence previously developed by the police against the accused. In the course of examination, witnesses will be produced, and all of the available documentary and physical evidence will be presented by the prosecution. Out of a sense of fairness to the accused, the prosecution will present all of the evidence in its possession, not merely that amount which might justify a committal. The accused may or may not present evidence, as he chooses, and normally his strategy will depend on the nature of the case presented by the prosecution. After hearing all of the evidence, the examining justice may either discharge the accused or commit him for trial before the appropriate court.

The English preliminary examination seems to be designed primarily as a protection for the accused against unjust and obviously insufficient accusations. It also serves as a device by which the accused is informed of the entire case against him, while providing him with the privilege of reserving any matters of defense for the trial. As a discovery device, the preliminary examination provides many benefits for the accused which are not available in other countries.

It seems certain that the public nature of the preliminary examination, with its full disclosure of the case for the prosecution, does contribute substantially to the reduction of the number of cases actually tried in the superior courts. When the accused is confronted with incriminating evidence

of a substantial nature, discretion will normally indicate the desirability of pleading guilty in the superior court.

The French concept of preliminary examination is radically different from that existing in England. As pointed out above the English inquiry constitue an evaluation of the evidence gathered by the police and presented by the prosecution. In France, however, instruction preparatoire is designed as an independent judicial investigation which will develop evidence indicating either the guilt or innocence of the accused. We have here a transfer of the primary investigating function to the judiciary, and we also find the judiciary entering a criminal case at a much earlier stage of the proceedings. The preparatory examination is required before an accused may be required to stand trial for the most serious offences, crimes, and is discretionary with the prosecutor in the case of the less serious type of offenses.

Since the object of an examination is to produce evidence, the proceedings are designed to elicit all of the facts concerning the alleged offense and the connection of the accused with the offense. This, in theory at least, requires the judge to develop any information which may be favorable to the accused, as well as those facts which may indicate his guilt, and he must proceed to determine the truth in a strictly impartial manner. That this may not always be the case is indicated by professor Vouin, as follows; "But one is not unaware that the examining magistrate shows a certain tendency to behave as an agent of the prosecution and, further more, that the preparatory examination is not exclusively his function, but also, and in a very large measure, the activity of the police".

The preparatory examination will be conducted in two stages. No prosecution may be commenced in the trial court until the magistrate has first found "sufficient indications of guilt" or "sufficient grounds to warrant committal" for trial. However, the judge has no power to commit an accused for a crime. If it is believed that the evidence developed at the preparatory examination discloses that the accused has committed a crime, the dossier
must be forwarded to the procureur general, the prosecutor attached to the court of Appeal. The procureur general will examine the dossier and then present the case to the chamber of committals of the court of Appeal, for the second stage of the preparatory examination. The chamber considers all such cases solely on the basis of the dossier and the report of the procureur general, and determines whether the case is to be tried and, if so, the appropriate court for the trial.

Generally, in all systems of the world, preliminary inquiry has the following advantages;

1. Screening: This is to avoid pre – trial detention when the offense did not allow of release on bail but the charges were insufficient. This is the major purpose of the system of preliminary inquiry.
2. Pre – trial discovery of evidence so that the accused will be in a better position to prepare his defense well.
3. Perpetuation of the oral testimony that the public prosecutor brings. To hear witnesses on the spot while the facts were still fresh in their memory.

In the Ethiopian legal system, the concept of preliminary inquiry is recognized under Articles 80 – 93 of the code. As you may read it from Article 80(1), the opening of a preliminary inquiry is made mandatory for the offences of homicide in the first degree and aggravated robbery while in all other cases triable by the high court, the public prosecutor has the discretion to order preliminary

inquiry or not. This shows that preliminary inquiry is designed to record the evidence of the public prosecutor. As is in other legal systems, it is not a right available to the accused.

The public prosecutor presents his witnesses they testify and that testimony will be recorded by the court. After the record, it will go to the trial of course, the accused is not required to present witnesses. Despite the weakness of the evidence gathered, the court has no power to release the suspect . It can only order the committal of the suspect for trial on the high court.

Dear student, in such circumstances, to whose advantage is preliminary inquiry under the Ethiopian law?

It will perpetuate the oral testimonies of the witnesses which may be presented at the trial. (Read Art. 144 of the criminal procedure code). The witness may die, or disappear. To avoid the risk or to preserve the testimony of the witnesses, the public prosecutor may wish to conduct preliminary inquiry.

Another important thing available to the public prosecutor is that after the witnesses are heard the public prosecutor may decide either to continue or drop out the case. In this sense, he is using the preliminary inquiry as a test. Therefore, it seems that the system is designed to the benefit of the public prosecutor.
Because courts are devoid of their screening power which their counter parts in other legal systems play, they can't release the suspect even if they are convinced that the evidences collected are trivial.

Even if it is not designed for the interest of the accused, however, the system might incidentally accrue some advantage to the accused.

The preliminary inquiey provisions does satisfy his right to pre trial discovery of evidences under Article 20 (4) of the FDRE constitution, therefore, he knows how it is going to be testified against him at the trial, and hence, he prepares his defense well in accordance with that.

The preliminary inquiry in Ethiopia was devoid of its screening power during the parliamentary discussion. The drafter designed it to be like other jurisdictions. But it was transformed step by step during the discussions, into a preparatory inquiry as it presently looks like.

When the criminal procedure code was promulgated, the federal supreme court has no first instance jurisdiction and that is why Article 80 is silent as to whether preliminary inquiry should be ordered in cases triable by the supreme court. But now, our supreme court has first instance jurisdiction. Should there any preliminary inquiry be made in such cases? By which court, the high court or first instance court?

Dear student, you are required to read the procedures of preliminary inquiry under Articles 80 93 of the criminal procedure code.

Activities

1. The police investigation report under consideration by the public prosecutor shows the following. C complained to the police that he was beaten and robbed one evening. Although it was quite dark at the scene of the crime, C stated that he recognized D as the assailant. A and B, two neighbors who saw the robber running away, also believe it was D. D has two witnesses who swear he was with them on the evening of the crime, and who support D's statement that A, B and C are enemies of his who are trying to "frame" him. After reading the statements in the file, the public prosecutor believes that A, B and C are mistaken or lying in their identification. Should he refuse to institute proceedings on the ground that the evidence is "insufficient"? By what standard should he measure "sufficiency" under Article 42? Should defensive matter be "weighed" against incriminating evidence?
2. D has been the employee of W for over twelve years. Learning that W's wife, to whom W was very mean and for whom D had a great affection, needed fifty dollars to pay for a trip home to her dying mother, and that W had refused her the money, D took a gold watch of W's from his coat pocket, sold it, and gave w's wife all the proceeds ($46). Enraged at discovering the offence, W accused D to the police and as a result an investigation was begun, evidence collected, and a police report made under Article 37.

Meanwhile, a few weeks after the incident, D had a long talk with W and explained the reasons that made him commit the crime. W, who had always liked D and who valued him highly as an employee, realized that he himself was partly at fault in the matter and accepted D's apology and offer of full restitution of the value of the watch. Three months later when the public prosecutor received the police report, he spoke with W who informed him he now had no wish to see his good friend and loyal employee go to prison, and that he wished to withdraw the charge. The prosecutor insisted that D must pay the penalty for his crime against society, but W was very unhappy about the situation. Since W is the key witness against D, the prosecutor, who feels there is ample evidence against D, is afraid W may testify unconvincingly in court and lose the case against the offender. In view of the reconciliation between the parties, and the accuser's unwillingness to press the matter, may the public prosecutor refuse to press charges? Should he be able to?

6.3. Preparing the Charge

Now, the public prosecutor may say that the evidences are sufficient, and then the next step is taking action before the court within 15 days of the receipt of the police investigation file.

How is the public prosecutor going to take action?
The issues are formally put before the court in the form of pleadings. The moving party, whether he is a public or private prosecutor, files a formal accusation with the appropriate court. That accusation, the pleading to be tried by the court, is known in Ethiopia as the charge; in Anglo American law it is sometimes called an indictment or information. The accused s response to the charge is known as his plea.

In this topic, we will examine the law governing the framing and filing of charges, the relationship between act and offence, joinder of offences and defendants for trial and the sentencing of one offender for concurrent offences. Finally, we will consider the plea of guilty.

6.3.1. The Charge in General

No clear definition do exist in the term charge under the criminal procedure code. However, from the readings of the provisions of the same code, one can see that the charge is the document originating criminal proceedings. As opposed to a pleading in civil cases, the charge does not include application for the recording of a suspect s statements under article 35 and the holding of preliminary inquiry under Article 83. Those provisions do not make any reference to the term charge you may, therefore, say that a charge originates a proceeding with a view to judgment of guilt or otherwise. A charge is a formal document containing an allegation that a person named there in has committed a crime by describing the necessary facts and evidence implying that such person deserves punishment as provided for under the relevant article that has been violated.

There are various objectives at the charge. The first objective is to avail the accused of his conviction or acquittal for protection against a further prosecution for the same cause. Article 108(1) of the code provides that no person may be tried for an offence other than a petty offence with out a formal charge. The second objective is to furnish the accused with such a description of the charge against him as will enable him to make his defense. The institution of charges in a written form is a constitutional right of the accused (FDRE constitution. Article 19 (1), 17(2) and 20(2)). That the accused shall be given a copy of every charge free of cost is also provided for under Article 109(4) of the criminal procedure code.

Moreover, the fact of instituting a charge in writing enables the accused to understand the charge against him and to make a rational decision whether to plea guilty or not and to defend himself if he wishes to. The charge furnishes the accused with such a description of the charge against him as will enable him to make his defense. The third objective of the charge is to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had while it is of some importance that the court be enlightened as to the nature of the case, surely this reason requires no more of an accusation than is required by the basic function of notifying the accused.

6.3.2. Form and Content of Charges

After the public prosecutor has decided to institute a charge against the suspect, the latter is expected to frame a charge. The charge is expected to meet certain formal and substantive requirements in relation to which article 111 of the criminal procedure code provides:

Article 111 contents and form

1. *Every charge shall be dated and signed and shall contain:*
    a. *the name of the accused; and*
    b. *the offence with which the accused is charged and its legal and material ingredients; and*
    c. *the time and place of the offence and, where appropriate, the person against whom or the property in respect of which the offence was committed; and*
    d. *the law and article of the law against which the offence is said to have been committed.*
2. *The charge shall be in the form set out in the second schedule to this code or shall conform there to as nearly as may be*

The content of the charge pertains to the particulars of the offence. The right to be informed of the charge (in writing) with sufficient particularity is one of the rights of the accused as enshrined in the FDRE constitution. The more specific the charge is the easier for the accused to defend himself. Thus, the charge shall contain all the legal, material and moral elements of the offence with sufficient particularity so that the accused can understand the charge against him and himself. For this reason, Article 12 also provides the following:

> *"Each charge shall describe the offence and its circumstances so as to enable the accused to know exactly what charge he has to answer. Such description shall follow as closely as may be the words of the law creating the offence".*

Article 112 requires that each charge has to describe the offence and its circumstances so as to enable the accused what charges he has to answer. In describing the circumstances and manner of commission of the offence, irrelevant facts which are not elements of the offences; should be avoided. To this effect, the description of the offence shall follow as closely as may the words of the law creating the offence.

Generally, we can say that a charge has three parts; namely, the introduction part, the statement of offense part and the particulars of the offense part.

The introduction part sets that date, the court before which the case is brought and the prosecutor. The statement of the offence is normally written as a title. It describes the name of the offence and the article creating the offence also stating that it has been violated by the accused. Example; "Homicide in the first degree contrary to Article 522 penal code".

Particulars of the offence is the significant part of the charge and it basically describes all the elements of the offence and the circumstances of its commission. Most of the things are included here; the day, time, against who or property the offence is committed the means used in the offence, e.g. gun, knife, ---. This is the last part which gives you the whole picture of the offence. The failure to state such elements as the time and place specifically affects such rights as a right to the defense of alibi and preliminary objection based on period of limitation.

Assuming, however, that an accusation must set forth all the essential elements of the crime charged. There is the problem of what are the essential elements. In particular, is the lack of a defense which the substantive criminal law may allow for the particular crime charged an element of the crime which must be alleged in the first instance and proved at the trial in the second instance or is such a defense a sort of "affirmative defense" which the defendant must raise, just as a civil defendant must raise; defenses like contributory negligence, duress and fraud? Thus with a murder charge, must the accusation allege not only that A murdered B but also that A was sane and did not act in self defense against B?

The various jurisdictions have adopted two rules to solve such questions:

1. The rule of location: if the exception appears in the enacting clause of the statute, the absence of such an exception must be pleaded in the accusation, while if it appears in a subsequent clause or section or statute, the absence need not be pleaded;
2. The "necessary descriptive" rule: if the exception is so incorporated in the language of the statute defining the crime that the elements of the offense can not be accurately described if the exception is omitted, the accusation must negative the exception; otherwise it need not the two rules tend to come together; thus, if an exception is found in the enacting clause, it tends to be considered a necessary description of the offense, though "necessarily descriptive" is a vague expression. Applying these rules, all jurisdictions would agree defendant is same and that he did not kill in self – defense.

Courts usually take the requirement of specification seriously, especially, as regards the time and place of the crime's commission. In this regard it is worth to mention the decision of the former high court of Ethiopia decided short after the promulgation of the criminal procedure code.

As the case indicates, the Counsel for the accused has expressed his objection to the charge that the public prosecutor has filed for the third time. The ground for the objection is that it does not specify the time and place of commission of the offence.

The suit was originally instituted in the Awraja court of Addis Ababa, and was transferred to this court under Article 106 of the criminal procedure code. Since counsel for the accused objected on the ground that the charge filed in the Awraja court was improper, and since the public prosecutor stated that he would amend it, it was ordered that the charge should be amended. Still, counsel for the accused objected on the ground that the amended charge was incomplete. Since the public prosecutor stated that he had been short of time, he was ordered to amend it again and he has submitted the present charge, dated Nehasse 8, 1957. Still the time and the specific place have not been mentioned. If the public prosecutor had ordered further investigation on the basis of Article 38 (c) of the criminal procedure code when he received the report of the investigation, this contention would not have arisen.

Article 111(1)(C) of the criminal procedure code states that the time and place of the crime's commission must be specified. The charge which has been filed, having stated that it was committed at an unknown time and date, alleges that it was when the accused was going back and forth daily from Sene 15, 1957, up to Hamle 4, 1957. As for the place, it states that it was in the neighborhood of princess Zenebe – Worq Hospital. And "neighborhood" means an area with no limit. It must state clearly whether the accused uttered the words while walking on the highway, or while standing in the street, or in the community, or in a particular place. As for the date, it states that he uttered offensive words for nineteen full days, without interruption, from

Sene 15th up to Hamle 4th. If this is so it must specify the dates and times. Even if the time is unknown, the approximate day or night must be expressed. Without denying the defence advocate's contentions and what we have already stated, the public prosecutor has asked for leave to amend the charge once again. We realize that this is because no further investigation was ordered. Since the evidence which must be submitted by the public prosecutor must be based on the charge, the charge must be complete. Though the court twice ordered amendment of the charge, a proper charge has not been submitted, for lack of investigation. It seems that the charge is based on a hit or miss theory. Instead of proceeding thus, it is better to hear the case when the charge has been conformed to the procedural requirements, after further investigation has been made. Having ordered the file to be closed, the court remanded the case. The order has been given by majority. The minority opinion stated that,

I, the presiding judge, have dissented because not specifying the time in the charge is not a major error. The charge alleges that the accused committed the crime when he was walking back and forth daily in the neighborhood of princess Zenebe Worq Hospital, from Sene 15, 1957 to Hamle 4, 1957. Since the time was alleged to be during the election to the House of Deputies, the judge said that it would be better to give a proper decision after ordering the accused to answer the charge and argue on it.

6.3.3. Alternative and Concurrent Charges

Sometimes, the public prosecutor may be in doubt on what article he is going to prepare the charge. This happens because the public prosecutor may not be able to accurately forcast what weight may the judges attach to the evidences collected to prove the offence. He may not be sure to charge the person under Article 538 or 539 because of the weight of evidence. In such instances, Article 113(1) says he can prepare alternative charges.

Article 113 *where it is doubtful what offence has been committed.*

1. *If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed the offence which appears the more probable to have been committed and he may be charged in the alternative with having committed all other offences which the facts which can be proved might constitute.*
2. *Where the evidence shows that the accused committed an offence with which he might have been charged in the alternative and the offence is with in the jurisdiction of the court, he may be convicted of such offence notwith- standing that he was not charged with it, where such offence is of lesser gravity than the offence charged.*
3. *Nothing in this Article shall prevent the court from applying the provisions of Article 6 and 9 penal code.*

Alternative charges are charges prepared by the public prosecutor in such a way that he charges the person first under Article 538 having all the above formalities and then, say "alternatively" and prepare a charge under Article 539. The alternation is between the possible offences one of which may be proved on trial. The one which appears more probable to have been committed, is to be stated first as a substantive charge and the other offence, which may be constituted by the facts of the case when proved, is to be stated next as an alternative charge.

The public prosecutor is not in doubt as to the occurrence or non occurrence of the fact, or the commission of an offence by the suspect. The prosecution basically relies on the facts to show the guilt of the person accused. The doubt is therefore one of application of the provisions of the substantive law to the existing facts i.e. whether the entire required facts for the application of a particular provision are in existence or not.

The doubt giving rise to alternative charges should not be one which can be rectified by ordering further investigation. Further investigation is primarily important where there is a doubt as to the commission of the offence or the offender. Here, it should be the case that investigation is primarily important where there is a doubt as to the commission of the offence or the offender. Here, it should be the case that investigation is over but it fails to reveal what specific offence is committed. If the doubt as to the type of the offence can be avoided through further investigation, you should proceed accordingly than framing alternative charges.

This must be distinguished from concurrent offences. Concurrence is the commission of more than one offence and the person is charged for all of them. In alternative charges, however, the court will finally find the accused guilty of only one offence, To charge the person alternatively, you must consider that there is something common between the two articles. You can not charge a person alternatively by theft and defamation.

Article 113(2) states the situations where the public prosecutor fails to prepare alternative charges while it ought to have. Say, for example, the public prosecutor charged the suspect on the crime of aggravated theft under Article 669 while the evidences collected show that the individual has committed a crime under Article 665 (theft). In such cases, the court may convict him under Article 665 provided that the following are fulfilled: -

1. The crime is such that the accused might have been charged in the alternative. This is to mean that the evidences required to prove the offence with which the prosecutor charged the suspect and that the court found him to have committed have some commonalities.
2. The offence with which the accused might have been charged is with in the jurisdiction of the court.
3. The offence is of lesser gravity than the offence charged.

In the cumulative existence of these elements, the court would convict the accused on this crime even if he is not charged with it.

An issue arises that this would go against the person s right to well prepared defense. The court is convicting the accused person for an offence he could have been charged in the alternative (and in fact, he has not been charged).

Are you going to say that a person who has defended under Article 669 (Aggravated theft) has also defended under Article 665 (theft)?

6.3.4. Charging Aggravated Offences

In case of aggravated offences, there is a special procedure. Such a special procedure is stated under Article 114.

Article 114 Aggravated offences how charged and procedure

(1) where an accused person may be charged with an- aggravated offence by reason of previous convictions, he shall be charged with the un- aggravated offence and the charged shall be filed in the court having jurisdiction to try the aggravated offence.

(2) Where the accused is convicted of the unaggravated offence the public prosecutor may, after conviction and before sentence, prove the previous convictions of the accused which, had they been proved at the trial, would `have resulted in his conviction of the aggravated offence. The court may sentence him as though he had been convicted accordingly.

There are two forms of aggravation. The first is aggravation on the grounds provided for under the general part of the penal code as general and special aggravating circumstances. (Articles 81 and 82 penal code) the general aggravating circumstance include among others the previous conviction of the accused while the special aggravating circumstance is basically a matter of concurrence of offences. The second form of aggravation is where there is aggravated form of a certain offence in the special part, this may be exemplified by aggravated theft (See. Article 630 and Article 635 penal code) and aggravated robbery (see Articles 636 and 637 penal code). The difference between the two is that in that in the first a normal offence is aggravated by additional grounds provided in the general part while in the second the elements of the specific article creating the offence aggravate the crime. The point now is that aggravating circumstances are to be taken in to account by the public prosecutor during the framing of the charge.

If the aggravation is based on previous conviction of the accused person, the public prosecutor shall not consider it during the framing of the charge. He rather describes the offence in line with the unaggravated crime. To the same effect, Article 1238 (1) of the same code prohibits the disclosure to the court (Perhaps though the charge) of the fact that the accused was previously convicted (the verdict of guilt). Thus, previous conviction as a ground of aggravation under Article 81 penal code must not be stated in the charge. The reason seems to be one of avoiding prejudice in the heart and mind of the judge against the accused to treat the latter as quality of the offence (Presumption of guilt) which affects the constitutional right to be presumed innocent. Such statement and proof there of may also make the judge prone to be satisfied with little evidence.

What about in cases where aggravation is based on the elements of the provision in the special part?

Where a crime is aggravated by virtue of the article creating the offences, the grounds of aggravation will make part of the crime itself. The special part article may make an offence aggravated on the ground of previous conviction. For instance, a person committing an act of robbery habitually is punishable of an aggravated robbery under Article 637 penal code rather than robbery under Article 636 penal code. As I have discussed that the description of the offence should follow the words of the law creating the offence, the charge should state the ground of aggravation contained in the article even if it is a previous conviction. The prosecutor frames the charge, inescapably, as aggravated by the law. This is covered by the clause Unless otherwise

expressly provided by law under Article 138 (1) of the criminal procedure code. Since the previous conviction as a requirement constituting the offence is put forth by the special part provisions, it should be stated in the charge.

The idea under Article 114(2) is that where previous conviction is a ground of aggravation, it should not be stated in the charge and the conviction based on such a charge will be of the un aggravated offence as aggravation will be proved offer conviction of the same offence as charged. Here, there is sentencing for an offence not as stated in the charge (because of aggravation) rather than conviction of a crime not charged.

6.3.5. Charging Concurrent Offences

In this topic, you will discuss about what concurrent offences are and how you can frame a charge in concurrent offences.

Basically, concurrence may be material or notional. Material concurrence exists when the offender successively committed several offences as where an offender kills one person and injures another. Notional concurrence exists when the act simultaneously contravenes several criminal provisions as where a person has sexual intercourse by the use of violence (rape) with his child (incest).

As regards the preparation of the charge in such cases, Article 116 of the criminal procedure code provides as follows:-

Article 116. *More than one charge*

1. *A charge may contain several different counts relating to the same accused and each offence so charged shall be described separately.*
2. *All charges may be tried together but where the accused is likely to be embarrassed in his defense, the court shall order the charges to be tried separately.*

A person or persons might commit different or successive offences against the same or different protected right at the same or different place and time with the same or different act/ omission and the same or different moral (mental) element for the same or different reason. If the act or combination of acts, or successive or repeated acts (Read Article 60 penal code) are done against the same protected right following from a singles criminal intention/ negligence and achieving the same purpose, the person shall be charged and convicted only for a single offence. The same holds when the final act of commission of an offence presupposes previous successive acts for the purpose of achieving that objectives. In such cases, none of the successive acts constitute a fresh offence as all of them are merged by the unity of intention and purpose, unless they are committed under renewed criminal intention or negligence (Article 61 penal code.) in all the above circumstances, the charge will have a normal or ordinary form and content as in situations where a single crime is simply committed by an individual.

If, however, the previous criminal act accompanied by the required mental element is not related to the subsequent one, that constitutes a different offence. This happens where the subsequent act gives the offender a good opportunity by facilitating the commission of the subsequent

offence (Article 62 penal code) or making his escape possible or enable him to conceal certain evidence against him. In such cases, the person will be charged for the different offences.

As has been considered, where the person violates more than one provision of the law or when the person commits more than one offence, he shall be charged for each of them as constituting separate counts either in the same or different charge sheets depending on convenience of the accused as ordered by the court. Such act of framing charges as having different counts in the same charge sheet is said to be jointer of charges.

Such charges have the same caption as the parties are the same. As there are more than one count each count has a separate statement of the offence and particulars of the offence each of which again need to be supported by either the same or different evidence. This is because, each count constitutes a distinct charge containing all the required elements of the offence with which the accused is charged. (Article 116 (1) criminal procedure code). This particular provision, however, does not say anything as to whether such offences stated in different counts should be related or unrelated. It seems it does not matter in so far as the accused is going to be charged and tried for each of the accused is going to be charged and tried for each of the offences. Thus, all such charges may be tried together. If it is likely to embarrass the accused in this defense, however, the court shall order the charges be tried separately. (Article 116 (2)).

Article 116 governs the preparation of a charge in case of concurrent offences. Accordingly, the charge stating the concurrent crimes under different counts as the case may be. If, for instance, the accused compelled his child to submit to sexual intercourse by the use of violence, the charge would be prepared in two counts. The charge would be prepared under two statements of the offence, namely, Rape contrary to Article 620 penal code and incest contrary to Article 654 penal code. However, there will be the same caption. As to the particulars of the offence each will be described by following as closely as may be the words of the law creating the offence and the other elements will be the same as the offences are committed by the same act. Almost the same procedure would be followed where a person has contravened different provisions of the penal code by successive acts (material concurrence).

How are concurrent offences punished?
Where offences are joined in the same suit, there will be conviction for each and every offence stated in the suit. If for example, a person is charged with the offences of rape and incest as joined and evidence showed that he committed both, he will be convicted of each crime as stated in the charge. As to the penalty, according to the crimes committed and the punishment attaching there to, the accused may be subjected to the aggregate of all the penalties or the penalty attaching to either of the offences. (Read Articles 183 188 penal code) In relation to concurrence, as opposed to alternative charges, there is no such thing as conviction or punishment for an offence not charged.

CHAPTER VII
Jurisdiction and Venue

Once the charge has been formed, determination of the court in which it is to be instituted comes next. The charge should be instituted in a court having jurisdiction. Jurisdiction is the power of a court to hear and decide a case or to subject persons to its powers. It has three elements, namely, judicial jurisdiction, subject matter jurisdiction and local jurisdiction. This chapter has 4 sections. The first section will deal about judicial jurisdiction. In section 2, the writer I will discuss subject matter jurisdiction. Section 3 will teach about local jurisdiction. The final section is concerned with change of venue and withdrawal of judges.

Judicial jurisdiction is an issue as to whether Ethiopian courts have power to decide a certain case. If you determine that Ethiopian courts have jurisdiction over the matter the next question is one of identifying the level of court having jurisdiction over the matter. This is an issue of subject matter jurisdiction. Considering the present federal arrangement, subject matter jurisdiction involves determination of whether a case is within the jurisdiction of federal or state courts and the level of court which can decide the case within the federal or state court structure. If it is decided, for example, that the case is within the subject matter jurisdiction of state high court, a question of which specific state high court constitutes an issue of local jurisdiction. Local jurisdiction refers to the area of Ethiopia in which the case is to be tried. All the procedural rules adopted for the determination of the three elements of jurisdiction will be discussed in this chapter.

A determination based on the above three elements of jurisdiction will take us to a specific court in which a charge may be instituted. However, a party (the accused or the prosecutor) may have a doubt as to the possibility of the achievement of justice, by that particular court. In such a case, the party may request for a change of venue i.e transfer of the case for trial by another court. If the problem is, however, related to the judge himself, then either the judge withdraws himself or one of the parties may apply for the removal of the judge. These procedures will also be dealt with in this chapter.

After successful completion of the study of this chapter, you are expected to be able to:

- Determine whether Ethiopian courts can entertain and decide a specific case submitted to them;
- Distinguish between cases falling within the jurisdiction of federal and state courts;
- Identify the level of court within the federal or regional court structure, to which a case may be taken;
- Decide the specific court in which a change may be instituted, and
- Resolve related legal issues.

7.1. Judicial Jurisdiction

Basically, judicial jurisdiction has got much to do with the persons subject to the law of a specific country. Thus, all persons subject to the penal code of Ethiopia are subject to the jurisdiction of the Ethiopian courts, and they may be tried here for violation of the penal code depends on

1. the place where the offence was omitted,
2. the nationality of the accused and
3. the kind of offence that has been committed.

In certain circumstances, an accused is said to be subject to Ethiopia's principal jurisdiction; in other circumstances he is said to be subject to Ethiopia's subsidiary jurisdiction. The conditions for the exercise of judicial jurisdiction differ depending on whether the accused is subject to Ethiopia's principal or subsidiary jurisdiction. Most significantly, where a person is subject to Ethiopia's principal jurisdiction, discharge or acquittal in a foreign country does not prevent a prosecution for the same offence in Ethiopia. It does so if he is only subject to Ethiopia's subsidiary jurisdiction.

7.1.1. Principal jurisdiction

Principal jurisdiction exists as to an accused who is

1. charged with the commission of an offence in Ethiopia,
2. charged with the commission of certain offences against Ethiopia in a foreign country,
3. charged with the commission of an offence in foreign country where he possesses immunity from prosecution by virtue of his status as an Ethiopian official,
4. charged with the commission of certain offences in a foreign country while a member of the Ethiopian Armed Forces. First you will consider where an accused is subject to Ethiopia's principals jurisdiction; then you will consider the conditions for the exercises of principal jurisdiction.

7.1.1.1. Persons subject to Ethiopia's principal jurisdiction

Article 11(1) of the penal code provides that the code is applicable to any person who commits any offence specified in the code on Ethiopian territory. Territory consists of land sea ard air. For example, assume that a national of Kenya, while visiting Ethiopia, allegedly rapes another Kenyan in violation of Article 620. Since the alleged offence was committed on the territory of Ethiopia, the accused is subject to the code and may be tried in the Ethiopian courts for a violation of Article 620.

Certain persons such as diplomatic officials are immune from criminal prosecution in the country to which they are accredited, under principles of public international law. Such immunity is recognized under Article 11(2) and a person enjoying this immunity is not subject to the penal code. Thus, the person is not subject to the jurisdiction of Ethiopian courts even if the offence is committed on the territory of Ethiopia. Assume, for example, that the ambassador of America negligently drives his automobile in Addis Ababa, killing an Ethiopian. Such conduct would constitute homicide by negligence under Article 543. Since under principles of public international law, ambassadors not subject to the penal law of the country to which they are accredited. The ambassador may not be tried in the Ethiopian courts for a violation of Articles 543.

What if a person who has committed an offence in Ethiopia have successfully escaped and taken refuge in a foreign country?

In such case, the Ethiopian authorities are directed under Article 11(3) to request his extradition so that he may be tried under Ethiopian law. Extradition is the process by which a person who has committed an offence in one country and has taken refuge in another is returned to the country where the offence was committed in order that he may stand trial there. Unfortunately, Ethiopia does not have extradition treaties with very many countries, and most countries will not permit anyone to be extradited unless there is a treaty with the country requesting extradition. (see

penal code article 21). In light of the absence of extradition treaties, Article 11(3) is not likely to be very effective.

Where extradition cannot be obtained, Article 12(1) directs the Ethiopian authorities to request that the offender be tried in the country of refuge. If that request is honored by the country in which the offender has taken refuge, and he is tried and acquitted there, he cannot be tried again for the same offence in Ethiopia if he is subsequently apprehended here. This is also true if his sentence has been remitted there or if enforcement of the sentence is barred by limitation (penal code Article 12(2)). For instance, assume that a foreign national suspected of committing homicide in Ethiopia flees to his home country, where he is apprehended. Suppose again that he is not extradited, but upon the request of the Ethiopian Authorities he is tried for the homicide allegedly committed in Ethiopia. He is acquitted and returns to Ethiopia. Since he was acquitted of the homicide charge, he cannot be again tried for that offence in Ethiopia. As shall be seen, the same conclusion can not be reached if the trial resulting in the acquittal is not based on the request of the Ethiopian authorities.

Where the offender has been convicted following a request under Article 12 and has served out his sentence, he cannot again be punished in Ethiopia. But if he has been convicted and has not undergone any of the punishment or has undergone only part of it, the remainder shall be enforced in Ethiopia. This applies to an offender apprehended in Ethiopia provided that enforcement of the punishment is not barred by Ethiopian law of limitation (Penal code Article 12(3)).

What are offences committed in a foreign country against Ethiopia?

Article 13 of the penal code covers offences committed in a foreign country that have their effect in Ethiopia. Not all such offences subject the offender to the principal jurisdiction of the Ethiopian courts. Only the offences prohibited by Articles 238 – 260 (Offences against the state or against national or international interests) and those prohibited by Articles 355 – 374 (offences against Ethiopian currency and official seals) subject the offender to Ethiopia's principal jurisdiction. But when such offences have been committed, the offender is subject to Ethiopia's principal jurisdiction whether he is an Ethiopian or a foreigner.

What if offences by Ethiopian Officials enjoying immunity or by members of the Ethiopian Armed forces are committed in a foreign country?

Ethiopian officials are subject to Ethiopian's principal jurisdiction while abroad. In the same way, members of the Armed Forces are subject to Ethiopia's principal jurisdiction with respect to certain offences committed while abroad. With respect to certain offences to be considered, however, such persons are only subject to Ethiopia's subsidiary jurisdiction. Except for the offences specified in Article 13, other Ethiopians acting abroad are only subject to Ethiopia's subsidiary jurisdiction as provided in Article 18.

Under Article 14, diplomatic, consular and other government officials who commit an offence in a foreign country for which they cannot be prosecuted there because they possess immunity under principles of international law, are subject to Ethiopia's principal jurisdiction. They may be prosecuted here if the offence is punishable under the Ethiopian code (other than those offences specified in Article 13, which may in all cases be presented here) and is also punishable under the

law of the country where it was committed. In other words, the offence must be punishable under both Ethiopian law and the law of the place of commission. If the offence is punishable only upon complaint under either law, proceedings may not be instituted in Ethiopia unless such a complaint has been lodged.

7.1.1.2. Limitations up on the Exercise of Principal Jurisdiction

When a person is subjected to Ethiopia's principal jurisdiction, this means that Ethiopia is the country most affected by the alleged commission of the offence. Consequently, the limitations imposed up on the exercise of subsidiary jurisdiction (where by definition Ethiopia is not the country most affected by the commissions of the offence), are not imposed up on the exercise of principal jurisdiction. Most significantly, a person subject to Ethiopia's principal jurisdiction, if found in Ethiopia or extradited here may be tried for the offence here, whether or not he was tried in a foreign country for the same offence. Also, if he was tried, whether or not he was discharged or acquitted, may be tried again for the offence in Ethiopia.

In this connection, it should be noted that where the person has been tried abroad at the request of the Ethiopian authorities pursuant to Art. 12, he is no longer subject to Ethiopia's principle jurisdiction. Moreover, Art. 14, which has already been discussed, imposes certain limitations up on the exercise of jurisdiction over government officials enjoying diplomatic immunity.

7.1.2. Subsidiary Jurisdiction

Subsidiary jurisdiction exists as to an accused who is

1. Charged with offences committed in a foreign country against international law and certain offences against public health or morals,
2. Charged with certain offences committed in a foreign country against Ethiopian national and
3. Charged with certain serious offences committed in a certain foreign country against any person. It also exists with respect to Ethiopians and members of the Armed forces charged with certain offences in foreign countries against the ordinary law of that country, but who escape to Ethiopia. (see prior discussion of Art. 15).

The limitations up on the exercise of subsidiary jurisdiction are significantly different from those imposed upon the exercises of principal jurisdiction. Now you will consider the circumstances in which a person is subject to Ethiopia's subsidiary jurisdiction. Then you will study the limitation up on the exercise of subsidiary jurisdiction.

7.1.2.1. Persons subject to Ethiopia's subsidiary Jurisdiction

Under Art. 17 penal code all persons who commit the offences specified here in are subject to Ethiopia's subsidiary jurisdiction except Ethiopians enjoying immunity who commit these offences in a foreign country and members of the Armed forces who commit violations of arts. 269 – 322. Such persons are subject to Ethiopia's principal jurisdiction under Art. 14 and Art. 15(2) respectively. Also persons who are subject to Ethiopia's principal jurisdiction under the provisions of Art. 13 of course, are not subject to Ethiopia's subsidiary jurisdiction.

Any person who, in a foreign country, has committed an offence against international or an international offence specified in Ethiopian legislation or in an international treaty to which Ethiopia has adhered is subject to Ethiopia's subsidiary jurisdiction. Offences against international law are those prohibited by Articles 269 – 280. The other offences referred to here would be found in the legislation in the Negarit Gazeta and the treaties to which Ethiopia is a party that incorporate penal provisions.

In addition, persons who, in a foreign country, have committed certain offences against public health or morals as specified in Article 17(1) are subject to Ethiopia's subsidiary jurisdiction. These offences are the violation of Art. 525 (narcotics), Art. 599, Arts. 635 – 636 (traffic in woman, children and young persons), and Arts 640 – 641 (obscene or indecent publication or performances). Suppose, for example, that a person in state A (foreign state) procures a young woman to engage in prostitution. Since this is a violation of Art. 635, that person is subject to Ethiopian's subsidiary jurisdiction and may be tried here for a violation of Art. 635 penal code.

> May other offences committed in a foreign country subject a person to Ethiopia's subsidiary jurisdiction?

By virtue of Art. 18 of penal code, the answer to the above question is in the positive. In order for a person to be subject to Ethiopia's subsidiary jurisdiction under this articles two conditions must be satisfied. First, the act for which he is charged must be prohibited by the law of the state where it was committed and by justify extradiction. In order to determine whether the act is of sufficient gravity to justify extradiction, the court must look to any extradictable under the provisions of any of the treaties or the legislations, it is of sufficient gravity to justify extradiction within the meaning of Art 18 (1) (b). Thus, the accused will be subjected to Ethiopian's subsidiary jurisdiction.

There are two types of situations covered by Art 18. The first is where the crime is committed in a foreign country either by a foreigner against an Ethiopian or by an Ethiopian. It is this situation, which you shall consider first. In order to subject the accused to Ethiopia's subsidiary jurisdiction, it is only necessary that the conditions referred to previously be satisfied. As long as the offence is of sufficient gravity to justify extradiction, it subjects the offender to Ethiopia's subsidiary jurisdiction (if prohibited by the law of the place of commission and Ethiopian law) irrespective of the punishment that is authorized.

The second type of situation covered in Art. 18 is the commission of a very serious offence in a foreign country by a foreigner. The commission of such an act by a foreigner against any one in a foreign country subjects him to Ethiopia's jurisdiction if:

1. the act is prohibited both by the law of the state of commission and by Ethiopian law;
2. it is extradictable under Ethiopian law; and
3. it is punishable under Ethiopian law by death or rigorous imprisonment for not less than ten years.

The second situation then differs from the first in two respects:

1. it is not necessary that the offence have been committed against an Ethiopian; and
2. it is necessary that the offence is sufficiently serious so that it is punishable under Ethiopian law by death or rigorous imprisonment for more than ten years.

When a member of the Ethiopian Armed forces commits in a foreign country an offence against the ordinary law of that country, he is not subject to Ethiopia's principal jurisdiction. But he is subject to Ethiopia's subsidiary jurisdiction, and if he apprehended here, he may be tried under Ethiopian law. It is important to remember that he is only subject to Ethiopia's subsidiary jurisdiction, since the limitations on the exercise of subsidiary jurisdiction differ from those imposed upon the exercises of principal jurisdiction.

Under Art. 19(3), it is provided that the punishment imposed under the penal code when the court is exercising subsidiary jurisdiction, shall not exceed the heaviest penalty prescribed by the law of the country where the offence is committed, so long as that country is recognized by Ethiopia. Suppose for example, that in state A, which is recognized by Ethiopia, a state A national commits aggravated homicide against an Ethiopian, which offence is prohibited by law of state A as well as by Art, 539 of the penal code. State A has abolished capital punishment, and the maximum punishment authorized for homicide by state A's law is life imprisonment. Therefore, although Art. 539authorized the imposition of the death penalty in cases of aggravated homicide, the Ethiopian court can only impose a sentence of life imprisonment.

Article 20 deals with the effect of foreign trial and sentence. Where a person is subject to Ethiopia's principal jurisdiction, if he is tried and acquitted in foreign country for the offence, there is no bar to his trial for the same offence in Ethiopia. But where a person is only subject to Ethiopia's subsidiary jurisdiction, Art. 20 (1) provides that the person can not be tried in Ethiopia for the offence if he was discharged or acquitted for the same act in a foreign country.

Where the offender was tried and sentenced in a foreign country, but did not undergo any or all of his punishment, it is provided under Art, 20 (2) that the remaining part, if not barred by limitation, may be enforced in Ethiopia. This is the same kind of provision as is contained in Art. 12(3) where the Ethiopian authority's have requested the trail of an offender subject to Ethiopia's principal jurisdiction, and then he has been tried in the foreign country in which he has taken refuge.

Finally, Art. 19 puts forth provisions relating to the exercise of subsidiary jurisdiction. Art. 19(1) sets forth certain presumptions with respect to the conditions necessary for the exercise of subsidiary jurisdiction. Where the filing of a complaint by the victim is a condition for prosecution and trial either under the law of the place of commission or under Ethiopian law, it is presumed that such complaint was lodged. It is also presumed that the offender is in the Empire and has not been extradicted to that if he was extradicted, it was by reason of the offence committed. Lastly, it is presumed that the offence was not legally pardoned and that prosecution is not barred under either the law of the place of commission or under Ethiopian law. These presumptions can be rebutted (proof other wise is possible)

Art. 19 (2) provides that prosecutions where the accused is subject to Ethiopia's subsidiary jurisdiction shall be instituted by the prosecutor after consultation with the minister of justice.

7.2. Subject Matter Jurisdiction

Once you determine that Ethiopian courts have jurisdiction over the matter, the next question is which level of court has jurisdiction over the matter. This is often called material jurisdiction and

also jurisdiction over offences, but to avoid some confusions you will call it as subject matter jurisdiction.

Given the federal arrangement, there are levels of courts at both federal and state plane. You have Federal supreme, High and first instance courts in the federal structure; and state supreme, high and first instance courts in the regional structure. This topic will show how judicial power over offences is apportioned between federal and regional courts, and among the federal courts on the one hand and the state courts on the other, on those matters. There is also what is known as delegation of power. As we do not have federal courts all over the country, the federal first instance and federal high courts jurisdiction are delegated to state high and state supreme courts, respectively. This will also be covered by this topic.

Dear student, It is good to have the federal courts proclamation No. 25/1996 for the study of this topic.

The general issue under this topic being one of identifying the level of court to which a case may be taken, decision of whether a case is federal or state subject matter comes first. As a prerequisite to the knowledge of the legal regime governing this issue, it is better to first discuss about the structure of courts in Ethiopia.

Currently Ethiopia has a federal structure in the organization of the government. The structure of courts follows the same pattern. We have federal and state courts. At the federal level, the FDRE constitution by Art. 78(2) established the federal supreme court and gave the power to establish (nation wide or in some parts of the country only) federal high and first instance counts to the house of peoples representatives. Such courts are established in Addis Ababa and Dire Dawa. Art. 78(3) of the constitution empowered states to establish state supreme, high and first instance courts. Therefore, though it is not complete at Federal level, supreme, high and first instance courts are established at both federal and state levels. Till the establishment of federal high and first instance courts nation wide, their power is delegated to state supreme and high courts respectively.(Art 78(2) and Art. 80(2) and (4) of the FDRE constitution.)

In distribution power between the federal and state government, the FDRE constitution followed the exclusion approach. It listed down of the federal government exhaustively and gave the remaining powers (over matters not listed down) to the regional governments. The same approach should be expected in the distribution of jurisdiction over offences between the federal and state courts. There are establishment proclamations of the federal and the different state courts. The federal courts establishment proclamation no. 25/96 defines the common and independent jurisdiction of the federal courts. It means that state courts lack jurisdiction over those cases and can exercise jurisdiction only by way of delegation.

7.2.1. Federal Subject Matters

First, let we deal with cases falling within the jurisdiction of federal courts. This is governed by the federal courts proclamation No. 25/1996. In stating the common jurisdiction of federal courts (both civil and criminal) in a general manner Art. 3 of the proclamation provides as follows:

Article 3 principle:
Federal courts shall have jurisdiction over:

1. *Cases arising under the constitution, federal laws and international treaties;*
2. *Parties specified in federal laws; and*
3. *Places specified in the constitution or in federal laws.*

Article 3 in general lays down the common jurisdiction of federal courts with refraction places, parties and laws. To begin with the places, as can be gathered form the constitution as well as proclamation No 25/96 itself, the reference is to Addis Ababa and Dire Dawa. Actually, criminal cases arising in this places are, by virtue of the provisions of the proclamation put under the jurisdiction of Federal courts. When we go to the parties, they prominently include officials of the Federal Government and employees of the federal government as defined under Art. 2(1) and Art 2(2) of proclamation No 25/96, respectively. Officials of Federal government are defined as members of house of peoples representatives and of the house of the federation, officials of the federal government above ministerial rank, ministers, judges of the Federal supreme court and other officials of the federal government of equivalent rank. Whereas employees of the federal government are defined as including employees engaged in the activities of the federal government excluding those pointed out as officials of the federal government. Though there is a problem of interpreting the phrase officials of equivalent rank in Art 2(1) of proclamation no. 25/96, any body in service of the federal government will fall under officials or employees of the federal government. Therefore, the parties refered to by Art. 3(2) are the ones pointed out above and others who may be governed by a federal law (like diplomats and representatives of international organizations). When such persons commit offences, they will be tried by federal courts.

When it comes to the referenced laws, Art. 3(1) says that cases arising under the constitution, federal laws and international treates are under the jurisdiction of federal courts. The constitution being a law laying down principles rather than detailed laws, it is difficult to think of a case arising under it. In the sense of creating offences, the constitution has got no so much roles. It may be that a dispute in a case thought have involved issues based on constitutional provisions for which detailed laws have not been enacted. In such a case arising under the constitution, there will be the jurisdiction of federal courts. Again, if a case involved an issue based on an international treaty which is signed or adopted by Ethiopia, it falls within the jurisdiction of federal courts. Now, the very important issue relates to what federal laws are.

As you have seen, the cases falling within the jurisdiction of federal courts, as stated under Art. 3, have in one way or another got to do with federal laws. Hence, defining laws is important. Art 2(3) of proclamation No 25/1996, defines laws of the federal government as including all pervious laws in force which are not in consistent with the constitution and relating to matters that fall within the competence of the federal government as specified in the constitution. Laws the making of which fall within the competence of the federal government are listed out under Art. 55 of the FDRE constitution sub article (5) of the article gives the power to enact a penal code to the house of peoples representatives. It provides also that states may enact penal laws on matters that are not specifically covered by federal penal legislation. The house of peoples representatives has enacted the criminal code of the federal democratic republic of Ethiopia on May 9, 2005. By virtue of Art. 3(1) of Procl. No. 25/96, cases arising under the penal code fall within the jurisdiction of federal courts.

Hence, cases arising under the penal code are given to the exclusive jurisdiction of federal courts. It means again that state courts cannot entertain and decide criminal cases except by way of

delegation. Within the picture of delegation, only state high and supreme court are delegated to exercise the jurisdiction of Federal first instance and high courts, respectively. The federal supreme court□s jurisdiction has not been delegated and the state first instance court cannot see federal matters (including criminal cases) by way of delegation. In practice however, state first instance courts are exercising criminal jurisdiction all over the country. Even the case being heard and decided by state high courts are not those falling within the jurisdiction of first instance courts at the federal level. As far as criminal cases are concerned, state courts are not operating by way of delegation. They rather hear criminal cases as though they themselves have jurisdiction over such matters.

Some judges of state courts tend to say that the jurisdiction of state courts cannot be governed by the federal courts proclamation. They say that proclamation No. 25/96 cannot have the effect of excluding state courts from exercising jurisdiction over and above defining the jurisdiction of federal courts. It is therefore, said that courts can keep on exercising their jurisdiction over criminal matters in the same way as before proc. No.25/96 i.e federal as well as state courts can exercise criminal jurisdiction as having the power (both) by themselves.

In addition to the jurisdiction provided in general terms under Art. 3, proclamation No. 25/96 has, under Art. 4 listed down criminal cases over which federal courts have jurisdiction. It reads:

Art. 4 Criminal Jurisdictions
Federal courts shall have jurisdiction over the following criminal cases:

1. Offences against the constitutional orders or against the internal security of the state;
2. offences against foreign states;
3. offences against the law of national;
4. Offences against the fiscal and economic interests of the federal government;
5. offences regarding counterfeit of currency;
6. offences regarding forgery of instruments of the federal government;
7. offences regarding the security and freedom of communication services operating within more than one region at the international level;
8. Offences against the safety of aviation;
9. Offences regarding foreign nationals;
10. offences regarding illicit trafficking of dangerous drug;
11. offences failing under the jurisdiction of courts of different regions under the jurisdiction of both the federal and regional courts as well as concurrent offences; and
12. offences committed by officials and employees of the federal government in connection with their official responsibilities or duties.

A close scrutiny of the cases listed out under Art. 4 proc. No 25/96 reveals that there are offences which have been crated (covered) by the penal code. Such and other offences not covered by the penal code are put within the jurisdiction of federal courts because:

1. The interest of the federal government is involved or is at stake, or
2. They have international or national characteristic. Some of them are cases involving more than one region and others involve an international element (like a foreign national).

The specific jurisdictions of the three levels of federal courts are provided for under Art. 8, 12 and 15 of proclamation No, 25/96.

As per Art. 8 of the proclamation, the federal supreme courts shall have exclusive first instance jurisdiction over the following criminal cases:

1. Offences for which officials of the federal government are held liable in connection with their official responsibility.
2. Without prejudice to international diplomatic law and custom, offences for which foreign ambassadors, consuls as well as representative of international organizationsl and foreign states are held liable.

The case falling under sub art (1), which is partly covered by Art. 4(12) of the proclamation, can best be exemplified by the criminal cases which involved the former prime minister i.e. Tamrat Lyene as a principal offender. This case involved a charge stating that Ato Tamrat Lyene in cooperation with other individuals has changed public money to his own account by making use of his authority. The other persons (merchants) who were charged with Ato Tamrat had raised objection relating to the jurisdiction of the supreme court saying that they are not officials of the federal government. But their objection was overruled and the case was tried and decided by the federal supreme court.

The case falling under sub article (2) is not perfectly covered by Art. 4 . you may take it as an addition to the cases over which the federal courts have criminal jurisdiction.

According to Art. 12 of the proclamation, the Federal high court shall have first instance jurisdiction over the following criminal cases:

1. criminal cases specified under sub articles (1), (2), (3), (8), and (10) of article 4 here of;
2. other criminal cases arising in Addis Ababa and Dire Dawa and falling under the jurisdiction of the high court pursuant to other laws in force.

Sub article (1) refers to cases listed out, as included under Art. 4, above. You have seen the general characteristic of those cases before. Art, 12(2) provides that all criminal cases arising in Addis Ababa and Dire Dawa and put under the jurisdiction of High court (it is not a reference to federal or state high courts) by other laws in force fall within the jurisdiction of federal high court. The other laws in force defining the jurisdiction of high courts prominently include the criminal procedure code, first schedule. Those cases specified as falling within the jurisdiction of the high court (in the former count structure) under the first schedule heard and decided by the federal high court as far as they arise in Addis Ababa and Dire Dawa. The criminal cases referred to by sub article (1) may be taken as additions to the former jurisdiction of the High court.

According to Art. 15 of proclamation No. 25/96, the federal first instance court shall have jurisdiction over the following criminal cases:

1. criminal cases specified under sub article (4), (5), (6), and (9) of article 4 here of;
2. Without prejudice to judicial power vested in other organs by law, other criminal cases arising in Addis Ababa and Dire Dawa as well as other criminal cases under the jurisdictions of Awraja and wereda courts pursuant to other laws in force.

The same explanation as you have made for Art. 12 above applies here. Out of the cases listed out under Art. 4, part of them, as you have seen, fall within the jurisdiction of the federal supreme and high courts. Out of the remaining part the ones cross referred by sub article (1) of Article 15 are cases over which the federal first instance court exercises jurisdiction.

Article 15(2) states with the phrase: "with out prejudice to judicial power vested in other organs by law ". It is a reference primarily to criminal cases arising in Addis Ababa which are put under the jurisdiction of organs like the Addis Ababa city court (Petty offences) by proclamation No. 87/97. Those cases specified under the first schedule of the criminal procedure code as falling within the jurisdiction of wereda and Aweraja courts (in the former structure of courts) will be taken of the federal first instance court when they arise in Addis Ababa and Dire Dawa.

7.2.2. Criminal Jurisdiction of State courts

Proclamation No, 25/96 provides that cases arising under the federal laws fall with in the jurisdiction of federal courts. By virtue of this proclamation and the FDRE constitution, you have seen that the penal code is a federal law and cases arising there under are within the jurisdiction of federal courts. This takes you to the tenet that state courts cannot exercise jurisdiction over criminal matters except by way of delegation. By the constitution state supreme and high courts are delegated to exercise the jurisdiction of the federal high court and federal first instance court respectively.

However, in their establishment proclamation, cases falling within the jurisdiction of wereda and Awraja courts persuant to the criminal procedure code are given to state first instance court while those offences triable by high court are put under the jurisdiction of state high court. In this case, state courts are exercising criminal jurisdiction not based on delegation of the power of federal courts.

Some people argue that enacting penal code is not the exclusive jurisdiction of the federal legislature. Article 55(5) when listing the powers at the house of peoples representatives, provides "it shall enact a penal code. The states may, however, enact penal laws on matters that are not specifically covered by federal penal legislation".

The federal government, when enacting the penal law should base itself from the division of power between the federal and state governments under Articles 51 and 52. Accordingly, the house of peoples representatives shall enact penal code arising from powers listed under Article 51 while those listed under Article 52 are not expected to be "specifically covered by federal penal legislation". Hence, states may enact penal legislation in such areas and state courts may properly assume inherent power over such legislations.

But, the criminal law enacted by the federal government in May 2005 has tried to stretch it self over every behavior and hence, nothing is left to state legislations.

If we go in line with this argument, states cannot have inherent jurisdiction over criminal cases. This makes the exercise of criminal jurisdiction by state courts illegal. All told, it is submitted that a solution be given to the problem.

7.3. Local Jurisdiction

The issue of local jurisdiction comes in to picture once we establish the existence of judicial and subject matter jurisdiction. Assuming that Ethiopian courts can see a case and that the case is one falling within the jurisdiction of the federal high court. For example, local jurisdiction involves

the question of which specific federal high courts can entertain the case? The one in Addis Ababa? or the one in Dire Dawa? It refers to the area of Ethiopia in which the case is to be tried.

This relatively narrow topic will elaborate and exemplify the provisions of the criminal procedure code pertaining to local jurisdiction you will consider criminal procedure code Articles 6, 99 – 107. Art. 6 provides that the courts shall exercises local jurisdiction in accordance with the provisions of Articles 99 – 107.

For a better study of this topic, it is good to relate local jurisdiction with delegation you have learnt that till federal counts are established all over the country, the power of federal high and first instance courts is delegated to state supreme and high courts, respectively. This means that state courts have criminal jurisdiction (subject matter jurisdiction) by delegation (considering penal legislations as federal laws). The question of which specific court in the region (the court of which area) is to be delegated (can exercises jurisdiction by delegation) is one related to the issue of local jurisdiction. Dear Student, it is good to note from the outset that when I make reference to criminal jurisdiction by state courts, it is with the assumption that state courts can see penal cases as they are doing in practice (although this is not the case as was seen).

7.3.1. Place of Trial

Article 99 – ordinary place of trial

Every offence shall be tried by the court within the local limits of whose jurisdiction it was committed.

Basically, Art. 99 puts forth a general principle of local jurisdiction. The place referred to by Art, 99 may be termed as the principal place of local jurisdiction.

What does the phrase ‘‘local limits of whose jurisdiction’’ mean?
At regional level the local jurisdiction of the courts goes hand with the organization of the administration. High courts are established at zonal level, while first instance courts are sit at each wereda. This means that state high courts have local jurisdiction over the area of the zone in which they sit and state first instance courts have local jurisdiction over their respective wereda. As to the federal courts there are federal high and first instance courts in Addis Ababa and Dire Dawa having local jurisdiction over the respective places. In this connection, it is good to know that there is only one federal first instance court in Addis Ababa having regular divisions at the different parts of the city. Thus, the ‘local limits of whose jurisdiction’ should be interpreted to mean within the local limits of the zone or Wereda or administration in which the first instance or high court is sitting. Thus, an offence committed in western Hererge should be brought before the high court sitting in that Zone rather than before the high court sitting in Eastern Harerge Zone.

Where all the operative events involving the offence occurred within the jurisdiction of the courts in which it is to be tried there is no problem arises when some of the operative facts occurred within the local limits of the jurisdiction of more than one court. This situation is covered by Article 100 – 103.

Article 100, accused triable in place where act is done or where consequences ensued.

Where a person is accused of the commission of any offence by reason of any thing which has been done and of any consequence which has ensued such offence may be tried by a court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued.

Under Article 100, it may happen that the act which caused the harm may occur in one jurisdiction and the harm resulting from the act may occur in another. In such a case, the offence may be tried before either the court within the limits of whose jurisdiction the act took place or the court within the limits of whose jurisdiction the consequences resulting from the act took place. For example, assume that in Dire Dawa, the accused prepared a shipment of poisoned fruit and sent it to the victim who resided in Addis Ababa, intending that the victim should be poisoned. Suppose again that the victim died as a result of eating the poisoned fruit. The accused may be tried for a violation of Art. 538 , penal code, either before the federal high court sitting in Dire Dawa or in Addis Ababa.

Art. 101 place of trial where an act is an offence by reason of relation to other offence.

Where an act is an offence by reason of its relation to another offence a charge of the first mentioned offence may be tried by a court with in the local limits of whose jurisdiction either act was done.

Certain acts become offences by reason of their relation to other offences. For example, Art. 455 penal code, prohibits soliciting another to give false testimony. This act is punishable, because it can induce the commission of the offence of perjury. Assume that in western Hararge, the accused persuades another person to give false testimony in a trial that is taking place in Eastern Hararge, and the person does give false testimony. Violations of Art. 455 are triable before the high court. Since the act of the accused took place in Western Hararge, and the act constituting the related offence took place in Eastern Hararge, the a accused can be tried for a violation of Art. 455 before either the high court siting in western Hararge or the high court sitting in E/Hararge zone.

Art. 102 □ Trial where place of offence is uncertain

a) *Where it is uncertain in which of several local areas an offence was committed: or*
b) *Where an offence is committed partly in one local area and partly in another; or*
c) *Where an offence continues to be committed in more than one local area; or*
d) *Where an offence consists of several acts done in different local areas, it may be tried by a court having jurisdiction over any of such local areas.*

Art. 102 defines the place of local jurisdiction where an offence is committed in more than one area (or there is no certainty as to the area where it is committed) or it involves acts done in different areas. You can better understand the situations to which Art. 102 applies from the following examples.

The accused is charged with the abduction of a minor, violation of Art. 589 penal code. Such offences are triable before the first instance court (in the practice of regional courts). The child cannot remember exactly where she was at the time of the abduction neither could the investigation identify the place for sure. But it is clear that the child was either in Nazereth or Deber Zait. The accused may be tried in the first instance court of either place.

Under Art. 102 (b), lets we assume that near the boarder between Addis Ababa city administration and Oromiya region (some kilometers from the town of Dukem on the road to Addis) the accused strikes his victim three times with a club and then drags him across the boarder in to an area falling within Addis Ababa, where he strikes him a fourth time. The victim dies after the fourth below. The accused may be tried for homicide before either the federal high court sitting in Addis Ababa or the court having jurisdiction in Oromiya region around the town of Dukem (in practice the high court sitting in Nazareth). This is because, the offence is partly committed in Oromiya region and partly in Addis Ababa.

Example for Art. 102 (c)- the accused contrary to law arrests a person in Dire Dawa and takes him to a police station in Addis Ababa. The illegal restraint constitutes a violation of Art. 585 penal code which is a offence to be tried by federal first instance court since the illegal restraint continued when the victim was taken to the police station in Addis Ababa, the accused may be tried before either the federal first instance court or Dire Dawa or Addis Ababa.

Example for Art. 102 (d)- The accused living in Dire Dawa, sends a letter from there to a person living in Addis Ababa, stating that he is entitled to certain property possessed by the other person. The accused comes to Addis Ababa and obtains the property from the conduct constitutes a violation of Art. 679 penal code. The offence consisted of the writing of the fraudulent letter and the receipt of the property as a result of the fraudulent misrepresentation. Since the writing of the letter occurred in Dire dawa and the receipt of the property occurred in Addis Ababa the accused is triable before either the federal high court sitting in Dire Dawa or Addis Ababa.

Art. 103 – offence committed on a journey.

> *An offence committed whilst the offender is in the course of performing a journey or voyage may be tried by a court through or into the local limits of whose jurisdiction the offender or the person against whom or the thing in respect of which the offence was committed passed in the course of the journey or voyage.*

Art. 103 does not make reference to the specific place where the offence was committed. It rather refers to the places through which the offender, victim or object refers to the places is not necessary that the offence was committed in the jurisdiction of the court so long as the offender, the victim or the thing passed through the jurisdiction. For example, assume that the accused and the victim were passengers on a bus that was going from Addis Ababa to Harar. This bus to pass through, among other towns, the towns of Debre Zeit, Nazereth, Awash. The accused boarded the bus in Debre Zeit Wereda, assaulted the victim and left the bus in the town of Nazereth through the town of Awash during the course of the journey. The accused may be tried for violation of Art. 560 penal code in Debre zeit or nazereth or Awash first instance court of the areas through which the accused and/ or the victim passed.

Art. 104 – Place of trial offence committed outside Ethiopia on an Ethiopian ship or aircraft.

> *An offence committed outside Ethiopia on an Ethiopian ship or aircraft shall be deemed to have been committed in Ethiopia.*

Art. 104 does not specify in what area the case is triable. However, Art. 107 provides that in the cases under Articles 100 – 104, the public prosecutor shall decide the court in which the charge shall be filed and on the filing of the charge, the court in which the charge is filed shall have jurisdiction. In other words, where the case is triable in more than one court, the decision as to where the case is to be tried is with the public prosecutor. Suppose, for example, that an offence triable before the federal firsts instance court is committed on an Ethiopian Airlines plane while the plane is flying over the sudan. Assuming the accused is subject to first instance courts (of Dire Dawa or Addis Ababa) or state high courts (by delegation) in Ethiopia in the discretion of the public prosecutor.

7.4. Change of Venue and Withdrawal of Judges

Based on the rules governing jurisdiction, the specific court in which the case is to be tried will be determined and the suit will be instituted in such court. Even where the court to which suit is submitted has jurisdiction, however, there are circumstances where an accused or the prosecut or may feel that justice may be hampered. Such circumstances may be reasons related either with the court, in which the case is instituted, as an institution or the judge of the court as an individual person.

When a party has a doubt as to the possibility of the achievement of justice by the particular court, he may request for a change of venue i.e transfer of the case to another court. If the problem is, however, related to the judge himself, then either the judge with- draws himself or one of the parties may apply for the removal of the judge. See the rules governing procedures separately. Consideration will be made of Art. 106 of the criminal procedure code and Arts. 8(3), 27 – 30 of federal courts proclamation No. 25/96.

7.4.1. Change of Venue

"Venue" literally means place or area at which some thing is to be done or conducted in judicial proceedings, venue is the particular court before which a charge is instituted and trial conducted; change of venue then means change of the place where or the court in which the case is to be tried. It simply means transfer of the case from one court to another for trial. The procedure of change of venue is governed basically by Art. 106 of the criminal procedure code which is reproduced bellow.

Art. 106 – Change of venue.

Whenever it is made to appear to the high court by application before a trail has started either by the public prosecutor or by the accused:

a. *that a fair and impartial trial cannot be held in any criminal court subordinate there to; or*
b. *that some question of law of unusual difficulty is likely to arise; or*
c. *that an order under this article will tend to the general convenience of the parties or witnesses; or*
d. *that such an order is expedient for the ends of justice or is required by any provision of this code, it may make an order against which no appeal shall lie to the effect that:*

i. *any offence be fried by any court not empowered under the provision of Art. 99 – 104 of this chapter but in other respects competent to try such offence;*
ii. *an accused person be committed for trial to itself;*

Art. 106 refers to an application for change of venue being made to the high court. Though the detailed procedural rules of Art. 106 are not changed by the establishment proclamations of federal as well as regional courts, there are provisions defining the court to which a case may be submitted in such proclamation. At the federal level, it is provided by Art. 8(3) of proclamation No. 25/96 that the federal supreme court has jurisdiction over application for change of venue from one federal high court to another or to itself, in accordance with the law. The law refered to is Art. 106. Although Art. 106 seems to limit the jurisdiction over an application for change of venue of to the high court it is possible that such an application may be submitted to the supreme court and you should read the provisions as applying to the supreme court mutates mutandis. This is where change of venue is requested from one federal high court to another or to the federal supreme court again, though procl. No. 25/96 provides for the jurisdiction over an application for change of venue to the federal high court, in situation where the case is pending in the federal first instance court, in civil cases; there is no express provision as to whether there is such criminal jurisdiction. However, it is provided under art. 12(2) of the same proclamation, that the federal high court has jurisdiction over cases falling under the jurisdiction of the high court pursuant to other laws in force. As Art. 106 of the criminal procedure code is one of such laws, you can say the federal high court has jurisdiction over the application for change of venue from one federal first instance court to another, federal first instance court.

At regional level too, Art. 106 should be understood as applying to change of venue from one state first instance court to another (if at all state first instance courts have criminal jurisdiction). Where the case is pending in state high court, however, Art. 106 should be interpreted as allowing application for change of venue to the state supreme court. The state supreme court should be understood as having jurisdiction over application for change of venue where the a state high court hears a case by way of delegation. In case a state supreme court is exercising criminal jurisdiction by way of delegation, an application for change of venue, to a supreme court of another region or to it self, may be submitted to the federal supreme court. It is expected that the new criminal procedure code will come up with such detailed provisions governing jurisdiction over an application for change of venue. The draft code has got such provisions.

According to art. 106, application for change of venue may be made by the accused or the prosecutor before a trail has started. This means that, if there is the need, change of venue should be applied for before the hearing of evidence.

The law seems to have presumed that problems which may give rise to such an application will surface themselves before trial has started. However, it seems that some of the grounds like unusually difficult issue and partiality of trial may be identified after trial has began. All the same, the law seems to have blocked application for or order of change of venue after trial began.

The grounds on which an application for change of venue may be granted are listed out under art. 106(a) and (b). All the grounds, in one way or another, have something to do with the requirements of justice. Let us have a brief overview of each of the grounds.

What do we mean by □a fair and impartial trial cannot be held in any criminal court subordinate there to□?

Change of venue may be applied for stating that the court cannot dispose the case freely or in a just manner. The ground may be fear of bias based on the influenciality of the accused in the area where the case in instituted. Where there are factors affecting the independence of the judiciary or a judge in court, application for transfer of the case to another court may be made and granted. There are also other factors not related to the court or judge which may hamper fair and impartial trial. Assume, for example, that the accused is charged with the theft of a widow□s property
exploiting her loneliness. The theft has caused great resentment in the area. The accused contends that he was somewhere else at the time of the alleged offence, but that witnesses who could testify to this fact will not testify on behalf of the accused because threats have been made against them if they so testify. If the high court believes this, it can order the case to be tried before another first instance court than where the case it instituted or can hear it itself. Where the court is satisfied that the ground under Art. 106 (a) is fulfilled, it may order transfer of the case to a court of the same level. The phrase □□in any subordinate court there to □□ should not mislead you to conclude that transfer to a court of the same level is an impossibility. If the court believes that a fair or impartial trial can be held in a criminal court of the same level, transfer to such court may be ordered. If, however, no criminal court of the same level can be believed to conduct fair or impartial trial of the case, the high or supreme court shall order transfer to itself.

What do you understand by □some question of law of unusual difficulty is likely to arise?□

This ground is taken to have been fulfilled if a case instituted in first instance court would be likely to involve interpretation of complicated code provisions that have not been interpreted before. One may think this to go against the presumed competence of the judges of lower courts. Actually, difference of degree of competence is implicit in the hierarchy of courts and assignment of judges of different levels. By the rules of subject matter jurisdiction relatively more serious offences are made to fall within the jurisdiction of courts higher in the hierarchy. In spite of this, you cannot avoid the possibility of cases involving relatively difficult issues presenting themselves before lower courts. For instance, the interpretation of, □Unjustifiable environment □□ within the meaning of 675 penal code may constitute of question of law of unusual difficulty, and upon application, the high court may decide to hear the case itself. Though such an offence is triable by first insurance court, its elements may be difficult to interpret as such cases seldom arise. When the ground under Art. 106 (b) is established to the satisfaction of the higher court, the order of transfer should evidently be to itself.

When can you say that an order of change of venue □will tend to the general convince of the parties or witnesses?□

Art. 106 (c) incorporates the well □ known doctrine of forum non □ convenience (inconvenient forum). This doctrine simply means that even though a court has jurisdiction, it should not hear the case where the place where the offence is instituted is inconvenient for the parties or witnesses, or it is to their prejudice. The problem of inconvenience may possibly be crated because some laws of local jurisdiction put forth alternative places of trial. The decision of the specific place of trial is within the discretion of the prosecutor. If, however, he has decided to

institute the case in a court whose location creates inconvenience to the parties and production of evidence, transfer to another court may be ordered upon application.

The above can best be demonstrated by the following example. Goods loaded on a lorry that passed through the towns of Debre Zeit, Nazareth and Awash were allegedly stolen by the accused while the truck was stopped in Debre Zeit. The public prosecutor has elected to file the charges in the first instance court of Awash (as in practice a change for an offence of theft is instituted in state first instance courts). The accused and all the witnesses reside in the town of Debre Zeit. Up on application, the high court may decide to transfer the case to the first instance court sitting in Debre Zeit on the ground that this is necessary for the convenience of the witnesses and the accused.

Finally, Art. 106 (d) gives the court the discretion to order transfer in any other proper case of where another provision of the code would indicate that trial in a particular court is required. It governs an order of change of venue dictated by expedience for the ends of justice. This requirement seems to have something to do with the other three grounds (a c).

If it believed that one of the grounds under Art. 106 is sufficiently established, the high or supreme court will give a non appealable order by transferring the case to another court of the same level or to itself. The court of the same level before which an offence may be tried, through transfer, is not expected to be empowered under the provisions of Arts. 99 104 of the code. This means that the court to which the case may be transferred may not have local jurisdiction to try the offence. But such court must be competent to try the offence in other respects. i.e it must have subject matter jurisdiction over the offence. Where the case is transferred to the higher court (to which an application for change of venue is submitted), however, subject matter jurisdiction is affected as an offence falling within the jurisdiction of a lower court is to be tried by a court higher in the hierarchy.

A related question here is as to whether an application for venue may be made for the transfer of a criminal case from one of the regular divisions of federal first instance court in Addis Ababa to another regular division. It is good to know that there is only one federal first instance court sitting in Addis Ababa. The several regular chilots found in the city are divions of the single federal first instance court. However, the relevant legal provisions (governing change of venue) are applicable to transfer of a case from one court to another rather than one regular division to another regular division for change of venue from the same court. If at all application for change of venue from one regular division to another (like from Arada regular division to Lideta regular division) is granted, it will be one of administrative character rather than one falling under the provisions governing the procedure (like Art. 106). Incidentally, it is important to note that an offence which is committed in Addis Ababa may legally be tried in any of the regular divisions of the federal first instance court in the city. The distribution of cases to the divisions on wereda basis is a practice justified by administrative feasibility rather than the law (Art. 106).

7.4.2. Withdrawal of Judges

Withdrawal of judges is a fact related to a particular judge that when certain facts exist, the judge either withdraws from the bench himself or either party may apply for his removal. The grounds for the withdrawal or for the removal of judges are provided for under Art. 27(1) of federal courts proclamation No. 25/96. Thus, a judge withdraws or will be removed from bench if:

a. he is related to one of the parties or the advocate there of by consanguinity or by affinity:
b. the disputes relates to a case in which one of the parties is a person for whom he acted as tutor, legal representative or advocate;
c. he has previously acted in some capacity in connection with the case or the subject matter of the dispute;
d. he has a case pending in court with one of the parties or the advocate there of ;
e. there are sufficient reasons, other than specified under sub article (1) (a) to (d) here of, to conclude that injustice may be done.

If any of the grounds stated above exists, the judge should withdraw as soon as he is aware that he should not sit, and be replaced by another judge (Art. 27(2)). If he fails to do so, however, or where a party (the prosecutor or the accused) is of the opinion that the judge should not sit for one of the rasons specified above, he shall submit a written application to the court requesting that the judge be removed (Art. 28(1)).

The application shall be made before the trial opens or soon after the party became aware of the reasons for making such an application (Art. 28(2)). Where the judge is sitting alone, he shall either withdraw or refer the matter for decision to another division of the same court or where there is no another division, to a court is which appeal lies from the decision of his court (Art. 28(3)). If the judge is sitting with other judges, however, the remaining judges without the judge against whom the application is made shall hear the application (for removal) and give a decision on the matter (28(4)). Such decisions on the removal (withdrawal) of a judge are not appealable and the judge shall forthwith comply with the decision (Art. 28(5) and (6)).

In situations where the application for removal is granted, the cost of application will form part of the costs in the case. Where the application is dismissed, however, the cost shall be borne by the applicant irrespective of the outcome of the case (Art. 29)). Where a party makes the application without good cause, the court may impose a fine not exceeding 500 Birr in addition to dismissing the case (Art. 30)).

Finally, the provisions governing withdrawal of judges, which are discovered above are from a proclamation applying to federal courts. There are almost similar provisions in state courts establishment proclamations. Therefore, you may take the procedure as applying to judges of state courts too.

7.5. Amendment to and withdrawal of charges

We have said that the charge should be prepared in accordance with the legal requirements, so as to enable the defendant to present his defense. It happens sometimes, however, that a charge contains errors or omissions that may be related to the statement of the offence or the particulars of the offence. However, the mere fact of existence of such error or omission in stating the offence or its particulars doesn't invalidate the charge. Art. 118 of the criminal procedure code states the effect of error in a charge as follows:

Art. 118 Effect of errors.

> *No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be*

regarded as material and no charge containing such errors or omissions shall be regarded as invalid unless they relate to essential points or the accused was in fact misled by such error or omission or justice is likely to be thereby defeated.

Though the title refers to errors, the provisions of the article address error and omission in a charge. Error is about stating something in a situation where the prosecutor should have correctly stated some other thing. Whereas omission is failure to state something which should have been stated. However, to have the effect contemplated by Art. 118, the error or omission should relate to statement or particulars of the offence and must be material. The article makes a distinction between material and non material errors or omissions. Material errors may be defined as those which may be defined the very purpose why the charge is instituted. When there are such errors or omissions the charge shall be regarded as invalid. To have such an effect, the error or omission must be essential, misleading and against justice.

In so far as a charge is supposed to contain matters of fact and law, such has to be correctly stated in the charge. Essential points are those which are important to constitute the offence. The essentiality seems to be determined by having regard to the law that creates the offense or the facts which constitute the offence under the said provision. The omissions of those facts or laws (elements of the crime as created by the specific law) in the statement of the offence or particulars of the offence is one of the grounds for invalidation of the charge. Essential errors or omissions, in general, are those making the charge defective with regard to formal and substantial requirements which it is expected to fulfill.

You have learnt that the basic function of the charge is one of informing the defendant so that he can defend himself. When there is error or omission which is material, it is unlikely that the charge will serve such a function. A charge is required to follow a certain form and contain certain elements so that the accused will be informed of the charge (accusation) which he has to answer. If there is an error or omission basically affecting the required form of substance of the charge, the accused may be misled and may give an incorrect answer. It is easy to see the effect of such possible situations. If the misstatement or omission in stating the offence or particulars of the offences actually misleads the accused, such charge is invalid.

This ground of invalidity of the charge may be related to the above two. If the charge has an error relating to essential points (like where the accused is to be sentenced for a crime other than the one he committed or where a proceeding on a really committed offence is to be discontinued) a just decision may not be given through a trial based on it. Again, justice cannot be served in a situation where the defendant is misled as when he failed to present a valid defense because of an error or omission which has mistaken him. You may also look for other types of errors or omissions which may defeat justice perhaps misleading the court is one of the possibilities you may have in mind. If there are errors or omissions which are likely to defeat justice, whatever their nature, the charge is invalid.

What does shall be regarded invalid mean under art. 118?

The wording of the provisions of Art. 118 should not give as a wrong impression. The a contrary interpretation of part of the provisions gives you the message that when the condition are fulfilled, the effect is invalidation of the charge. This does not, however, mean that the prosecutor cannot bring another charge as corrected. Nor does it mean that the accused shall be acquitted.

Rather the charge is to be amended as to avoid the material error or omission. This is supported by Art. 119(3) of the code which provides that the procedure of amendment applies in case of errors or omissions within the meaning of Art. 118.

7.5.1. Amendment of the Charge

The procedure of amendment is governed by Arts. 110 – 121 of the criminal procedure code of which Art. 119 provides:
Art. 119 – Alteration or addition to charge

1. where the accused is brought to trial on a charge containing essential errors or omissions or such errors or omissions that the accused has been or is likely to be misled, the court may at any time before Judgement of its own motion order the charge to be altered or added to or a new charge to be framed, as the case may be.
2. Every such alteration, addition or new charge shall be read and explained to the accused.
3. the provisions of this article shall also apply in the case of errors or omissions within the meaning of Art. 118.

The provisions of the above article define the grounds and procedure of allowing amendment. The alteration or addition to the charge or the farming of a new charge under Art. 119(1) should be understood as to mean amendment.

Although Art. 119(3) seems to try to distinguish between errors and omissions which are grounds for invalidity of charge and those which are grounds of amendment, there is no actual destination. Art. 199(1) says that a charge may be amended where it contain errors or omissions which are essential or more likely to mislead the accused. With the exception of errors or omissions likely to defeat justice, these are the same grounds as those of invalidity of the charge under Art. 118. As to the ground of errors or omissions likely to defeat justice, you have seen that it is mainly consisted of the other two (essentiality and misleading the defendant) therefore, you can say that the grounds of amendment are the same as those of invalidity of the charge. That is way you have in the previous sub – section learnt that invalidity of the charge may be put right through amendment.

The grounds for amendment of the charge are the presence in the charge of errors or omissions which are essential or are likely to mislead the accused. You have, in the previous sub – section, seen what these grounds do mean. The first relates to errors in stating the facts in the case or elements of the offence which are necessary to establish the crime and its commission. While the second (misleading the accused) relates a basic function of the charge which is giving the opportunity to present a valid defense. In practice, however, prosecutors request amendment on other grounds.
Art. 119(1) does not say that the stated types of errors or omissions are the only grounds of amendment. Amendment under that article is provided as a remedy for errors or omissions in the charge which are material. Making use of this line of argument, prosecutors, in practice, request amendment, for example, when the trial shows them that the accused will not be convicted of the crime (Article of the penal code) which they have stated in the charge. Where there is error or omission which is essential or is likely to mislead the accused, amendment should be allowed even in such cases. It is submitted that amendment should be allowed even on other grounds unless otherwise it is meant to delay justice or embarrass the accused.

May amendment changing the offence to one of a greater gravity than the offence charged be allowed?
This is a question of amendment to change the statement and description of the offence in the charge. Actually, amendment relates to these parts of the charge. Provided that there is a fundamental error in stating them, amendment would be allowed even if its effect is changing the crime under which the accused is charged. However, it is questionable that it would be permitted where the prosecutor wants to change the offence in to one of grater gravity. For instance, assuming that the accused was originally charged for homicide under Art. 523 penal code, the prosecutor may, up on believing that the trial proves first degree homicide under Art. 522 penal code, request amendment to change the crime as such.

There are two positions in relation to whether amendment should be allowed in such a situation. The first is based on the fact that there is no clear prohibition against such amendment. The second is based on Art. 113(2) and that the accused should be benefited where there is unclarity of the law. According to Art. 113(2), even where there was a possibility of charging the accused for the more serious offence in the alternative, it is said, he may not be convicted of such an offence. Through amendment too the accused is going to be convicted of an offence for which he was not charged. The offence under which the accused is to be convicted should at any rate be of a lesser gravity than charged. Again, when there is a gap in the law, in principle, you should opt an interpretation which supports the accused. Therefore, where amendment is requested to change the offence with which the accused is changed, it should not be allowed unless the charge is to an offence of lesser gravity than charged.

In relation to time, Art. 119(1) provides that amendment may be ordered at any time before judgement. The time runs from the institution of a charge to a judgement in the case. It is possible that errors, omissions or other grounds necessitating amendment may be revealed during or after trial. Actually, it is at the time that they are mostly discerned. That is why Art. 119(1) employs the phrase where the accused is brought to trial on a charge containing there may arise an issue as to whether amendment may be ordered any time before a final judgement (on appeal) in the case.

What if the prosecutor requested amendment of the original charge when the case is pending in the appellate court?
Considering grounds like likelihood of misleading the accused and that a charge containing errors which are grounds of amendment is invalid, you may say that the term, judgement in Art. 119 (1) refers to the judgment of a court looking the case in the firs instance. This is because, the importance of avoiding misleading the accused is strong during the first instance proceeding and a valid judgement cannot be reached by a proceeding on an invalid charge.

Amendment may be ordered on the courts own motion or on application. Where the errors or omissions having the required characteristics are so evident that the court can identify them, it may order the prosecutor to submit an amended charge. This happens, for example, where the statement of the offence reads: First Degre Homicide contrary to Art. 538 penal code. The request for amendment may also come mainly from the prosecutor when he feels that the purpose for which he instituted the proceeding cannot be attained because of error you cannot avoid the possibility of a valid request for amendment coming from the accused. Where amendment is an application, the court should permit it by seriously considering the grounds on which it is requested. This is because the procedure may delay justice.

So far you have seen grounds and procedures in ordering amendment of a charge. The amendment may take three forms. The charge may be altered or added to or a new charge may be framed, as the case may be. The error or omission in the charge may be put right by correcting misstatements (like by replacing a wrongly state article) or adding what is omitted in the charge (like in a case where the article under which the charge is framed is not stated). Where the original charge cannot be corrected (errors or omissions cannot be remedied) by the alteration or addition, the court may order the framing of a new charge. This latter situation holds where the error or omission tainted the whole statement and description of the offence in the charge. Once the charge is amended in any of the above ways, the amended charge shall be read and explained to the accused. (Art. 119(2))

After reading and explaining the amended charge to the accused, the court shall ask the accused to state whether he is ready to be tried on the altered, added or new charge. (Art. 120(1)). This is a question relating to the stage of proceeding at which amendment is ordered. If, for example, the charge is amended after the accused has given plea of guilty or not quality (confessing or denying the commission of the offence originally stated), the court asks him whether he is ready to continue with the proceeding (trial) from where it is stopped. The accused shall be asked whether he wants to give another statement of confession or denial. If he opts to be tried on the previous plea, he will tell the court that he is ready. The same holds where the accused shows willingness to be tried on previously (before amendment) heard witnesses.

Should the accused answer that he is not ready for the trial, the court shall ask him his reasons and evaluate their justifiability. If the court finds the reasons justifiable, it will grant an adjournment or permit the accused to submit his defense against the amended charge. If, however, conducting the trial immediately is not likely to prejudice the accused in his defense, the court may proceed with the trial as if the altered or added to or the newly framed charge had been the original charge (Art. 120(2) and (3)). This holds true in situations where there is no basic difference between the original and amended charges as to affect the accused adversely if the trial proceeds on the amended change.

The issue of convenience in proceeding with trial (no amended charge) is not limited to the accused. As can be inferred from the provisions of Art. 120 (3), if it prejudices the prosecutor in the conduct of prosecution, immediate trial may not be held. Such may, for instance, be the case where there is a change in the evidence (witnesses other than those heard before amendment) which the prosecutor wants to introduce.

Where amendment of charge is made after the beginning of the trial, i.e .. after all or part of the evidence (witnesses) are examined, the prosecutor and the accused may need to reexamine those witnesses. They shall be allowed to recall and examine any witness who may have been examined, in respect of those facts relating to the alteration, addition or newly framed charge. The parties may also call any further evidence (not called before) which may be material for proof of the amended charge or facts there in (Art, 121).

7.5.2. Withdrawal of charges

After filing the charge to the proper court having jurisdiction, sometimes, the public prosecutor may want to withdraw his charge.

What are the procedures for with drawal of charges?

Art. 122 – withdrawal of charges

1. *with the permission of the court, the public prosecutor may before judgement at any stage of the proceedings withdraw any charge other than a charge under Art. 522 (homicide in the first degree) or Art. 637 (aggravated robbery).*
2. *Where the public prosecutor informs the court that the withdrawal of a charge is on the instructions of the government, the court shall, if it is satisfied that the public prosecutor has been so ordered, grant permission to the public prosecutor to withdraw the charge.*
3. *Where no new charge is framed under the provisions at Art. 119 the accused shall be discharged.*
4. *The court shall give reasons for allowing or refusing withdrawal of a charge.*
5. *The withdrawal of a charge under the provisions of this Article is no bar to subsequent proceedings.*

The article provides that except the two offences of homicide in the first degree and aggravated robbery, the public prosecutor can withdraw any charge before judgement, of course, with the permission of the court.
Dear Student, why is the public prosecutor prohibited from withdrawing in these two offences?

If the charge is withdrawn, the public prosecutor is not barred to bring subsequent prosecution. The public prosecutor can prepare charge on the same ground in subsequent time.

Most of the provisions of Article 122 ((1), (2) and (4)) are clearly repealed by proclamation number 39/ 1993. The only remaining articles are sub – articles 3 and 5. Hence the only existing message in this article is that if the public prosecutor withdraws a charge and no new charge is instituted, the accused shall be discharged and even if the public prosecutor withdraws a charge, it will not be a bar to subsequent prosecution.

But, this proclamation is in turn repealed by proclamation number 74/1993. This proclamation doesn't make any reference to these provisions and hence, there is a lacunae (gap).

What is the effect of this repeal?
As we have seen it in our previous discussion of the powers of the public prosecutor, the public prosecutor has huge power under proclamation number 39/1993. The trend of proclamation number 74/1993 is to curtail this power. If this is the case, how can we say that the public prosecutor may withdraw charges without the permission of the court only because the proclamation has removed such a requirement?
On the other hand, it is difficult to say that withdrawal of charges is not a possibility in Ethiopia as there are some reminant provisions.

Some people argue that the public prosecutor is denied to withdraw a charge. But, as the fact of withdrawal is recognized by the case (as there are remaining provisions), the discretion is in the hands of the court, the court has to check. It should not simply see the public prosecutor when the latter withdraws any time he wants.

Some other still argue that the provisions of the criminal procedure code dealing with withdrawal do still exist. They base their argument on the interpretation that a law repealing another, when repealed, reviews the other. Hence, even if proclamation number 39/1993 repealed provisions of Article 122 of the code, the fact of proclamation number 74/1993 repealing proclamation number 39/1993 would review provisions of Article 122.

Dear student, which of the arguments seem to be convincing. Discuss this issue thoroughly with your friends and your tutor.

CHAPTER VIII
The Trial

Introduction

In earlier chapters we have examined the preliminary stages of criminal procedure, and the various institutions which take part in them. We have seen how the criminal offence is brought to the attention of the police, how physical jurisdiction over the suspected offender is obtained and regulated, how evidence is gathered, and what are the preliminary roles of the police, public prosecutor, court and accused in probably a large proportion of criminal cases the process is deflected at some point prior to trial, so that the state is never called upon to prove its charge. We are here concerned with the cases that do reach the trial stage.

Essentially, a criminal trial is a procedure by which the truth or falsity of the carge is determined. In early common and civil law systems the issue of guilt was not determined by □rational□ means; trial was commonly by ordeal or by oath but these days we attempt to determine the issue of guilt rationally □ by considering facutual evidence of the crime presented by the prosecution in light of any evidence the accused may wish to offer. If the prosecution proves the accused□s guilt of the crime charged by empirical evidence demonstrated at the trial, conviction results. Otherwise, he is acquitted.

In Ethiopian law there are a few basic principles, some of constitutional dimension, which determine the main features of a fair trial. Ordinarily the accused has the right to be tried by an impartial tribunal, publicly and speedily, according to law. He has the right to compulsory process to obtain witnesses in his favour, and to confront the witnesses against him. The prosecution has the burden of proving him guilty of the offence charged, and he has the privilege of remaining silent throughout the trial. In the materials. Which follow we shall consider some of these aspects of fair trial procedure as illustrated by Ethiopian and foreign laws.

8.1 Aspects of Fair Trial □ General

The idea of fairness during trial has something to do with equality of arms of the parties. In criminal proceedings, things are considered as a Biblical fight between that little David and the mighty Goliath. The accused almost always does not have knowledge of the law and he is inexperienced. It may be his first time to appear before a court of law for that matter. He may not know what his rights and duties are, at what stage they are to be raised and exercised, what kinds of evidence are relevant to his case etc. If the offence with which he is charged is not bailable or if he is denied bail, as may occur in many cases, he is not able to gather evidence in his defense. This may be worsened by lack of resources to have a counsel.

The public prosecutor, on the other hand, is a professional trained and skilled in law, and is the prosecution arm of the government. He has all the government power and resources to conduct the investigation and the prosecution. The police is under the prosecutor who even takes instructions as to investigations which are to be complied with. He uses the public fund to prosecute. Depending on the economic strength of a country, this power and resource is very great when seen in light of that poor accused. Fair trial is thus an effort to reduce this unbridgeable gap of power and resources between the two parties and in some way leveling the ground so that there could be a fair hearing.

Fair trial is mainly ensured by granting certain rights to the accused such as the right to remain silent, due process of law, the rights to counsel, pretrial access to evidence, open court trial and presumption of innocence. It may also be brought about by imposing certain burdens and obligations on the public prosecutor such as the constitutional obligation to respect and have respected the rights and privileges of the accused and the obligation to prove the charge beyond reasonable doubt. The following discussion rests on discussion of some aspects of fair trial.

8.1.1 The right to counsel

The right to counsel has been discussed in Module one in relation to condition for police investigation. Thus, you are advised to refer back to or recollect the notes there.

As has been pointed out early, in criminal proceedings, the accused may not have any knowledge of law. In order to level the play field, the accused need to have a counsel since the earliest possible time, it is said, even during police interrogation, in our law, right to counsel exists as a right of an accused person.

> *Art. 20(5) of the FDRE constitution provides:*
>
> *accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense.*

The provision puts forth the right of a person charged to be represented by legal counsel of their own choice. If the accused affords, he/she can have a counsel, you may say, at any stage of criminal proceedings, even at the police investigation stage. However, this is not practicable in this country as the police fell reluctant to allow the visit of an arrestee even by his relatives (which is a constitutional right) let alone by a legal counsel. The legal representation contemplated by

Art. 20(5) is to be given only during trial as the decision is to be made by the court and the right exists for an accused.

If, however, the accused is not able to afford the payment for a legal counsel, he/she has the right to be provided with legal representation at state expense. But, two facts should be proved here:

1) that accused has not suffient means to hire a lawyer and,
2) that miscarriage of justice would happen should he be tried without a lawyer.

The first requirement is one to be proved by the accused showing to the satisfaction of the court that he/she does not have money to pay for a lawyer. In the practice of some courts, this is done by administering oath (requiring the accused to vow in the name of God that he doesn't have sufficient means). The second factor is mostly determined by the court's own appreciation of the case. When the offence involved is relatively serious (in some courts, punishable with five years or more imprisonment), it is said that miscarriage of justice would happen.

If the accused knows his right to defence counsel, it doesn't matter. Where he does not know that he has such right, however, who can inform him that he has the right to get a counsel at a state expense, at what stage it may be requested and under what circumstances, are questions that are not addressed by express provisions in our law. Here, you may possibly say that the judge should inform the accused of the right immediately after reading the charge to him (before the accused says anything in answer to the charge) and this actually is the practice in many court. The judge should act proactively for the attainment of fairness and justice and for the ascertainment of truth. In this respect, the public prosecutor should also act ethically (perhaps by informing the right) as his role is bringing about the manifestation of truth and respect for the law.

8.1.2. The Right to speedy Trial in Open Court

This right is constituted of the right to public trial and speedy trial. The requirement is that the accused should be tried publicly within the shortest possible time. This right is guaranteed by Art. 20(1) of the FDRE constitution which provides as follows:

> "Accused persons have the right to a public trial by an ordinary court of law within a reasonable time after having been charged. The court may hear cases in a closed session only with a view to protecting the right to privacy of the parties concerned, public morals and national security".

Basically, public trial means that trial has to be conducted in open court before an ordinary court of law. The court should be ordinary in the sense that it should be a competent court which is independent and impartial. The public trial is important in establishing public confidence in the law as well as courts. For one thing, the public has a right to know what is going in the courtroom. For another, particular in criminal cases, the public has an interest to see the offender punished and the innocent released unpunished. The publicity of the trial has also some psychological pressure on the mind of the judge (s) to be fair and impartial. In certain circumstances, however, the requirement of public trial may be dispensed with.

A situation where an offence may be tried in a closed session (as opposed to public trial) is also known as trial in Camera. Such trial may be conducted only with a view to protecting the right to privacy of parties concerned, public morals and national security. More or less the same provision is put forth by Art. 26 of proclamation Number 25/96. Art. 176 of the criminal procedure code also

provides that proceedings concerning young offenders shall be conducted in camera. For instance, a person is accused of the offence of adultery, (Art. 618 penal code) public trial may affect the privacy of the person or his/her spouse who is a complainant in the case. Equally, if the offence is one of distribution of indecent or obscene publications (Art. 609 penal code) trial in open court may affect public morals. If again a person is accused of treason (Art. 261 penal code) as a result of which a certain part(province) of a country has fallen in the hands of an enemy, disclosure of these facts in a public trial may affect national security.

Speedy trial is trial within a reasonable time after having been charged. The time to be taken by a trial, which comes to an end by a judgement of acquittal or conviction, should be reasonable depending on the circumstances of the case. This may be attained only if, among other things, long and frequent adjournment are avoided. As the grounds of adjournment under Art. 94 of the code are not seriously complied with, perhaps because of the number of cases, the courts take more than reasonable time for disposition of case.

The accused once charged with an offence is no more at liberity both legally and psychologically. He has the legal right to be freed from such restrictions over his liberty as soon as possible. Considering also that there is no chance of pretrial release in our country, trial within the shortest time possible is very important.

8.1.3. Right of Access to Evidence

It is also an aspect of fair trial that the accused have an access to the evidence to be submitted against him. The right of access to evidence is provided for under Art. 20(4) of the FDRE constitution which reads:

> *"Accused persons have the right to full access to any evidence presented against them, to examine witnesses testifying against them, to adduce or to have evidence produced in their own defense, and to obtain the attendance of and examination of witness on their behalf before the court".*

The accused needs to have access to evidence submitted against him so that he will be able to test and challenge its reliability. After having seen the evidence, the accused can measure his potential to prepare his defense. He should be enabled to challenge the variety of witnesses and the reliability of the evidence. This assists the court in the manifestation of truth and disposition of the case. Again, where the accused or his counsel is given access to evidence that is going to be produced against him at the trial, it creates some sense of fairness in the mind of the accused even if judgment is entered against him. These all can be achieved only when the accused or his counsel is given access to examine and test the reliability of such evidence in a reasonable time before trial.

Art. 20(4) of the constitution provides the right of access to evidence to an "accused" against whom evidence is "presented". The suspect is said to be an "accused" person only after the institution of a charge against him. Again, the sub " article provides the right in relation to evidence introduced against the accused. This raises a question as to whether the right cannot be exercised before the person is accused or the evidence is introduced against him. This is a question relating to pre–trial access to evidence which is provided in many systems. In our law too, there seems to be no prohibition against such right.

As of the day on which the charge is instituted, the public prosecutor has the obligation to deposit the evidence in the office of the registrar. Who makes and keeps the same in a safe place (Art. 91 and Art. 97). It seems that the suspect can consult the evidence from the registrar office. If a preliminary inquiry was held, a copy of the whole content of the record shall be given to the accused (Art. 91(3) and Art. (2). These are provisions imply that the accused may have access to evidence before a charge is instituted against him.

In order to enable the accused challenge (test) the veracity of evidence against him, if it is an exhibit he or his counsel can examine it. Where convenient, the accused can take a copy of the evidence at his expense. If it is oral evidence, the accused shall be informed of the names of witnesses in the charge. This is particularly strengthened by Art. 143(3) of the code which reads:

> *"The prosecutor may in a case submitted for trial to the high court call any witness who has not given evidence at the preliminary inquiry where he informs the accused in writing of the name of the witness he proposes to call and of the nature of the testimony he will give".*

Despite these and other provisions, in practice, evidence is not deposited in the Registrars Office and the accused is normally given the charge to which nothing is attached only during the hearing. He has no knowledge as to what kind of evidence is to be produced against him and he knows the evidence only when it is produced against him during the hearing.

8.1.4. Presumption of Innocence

It is basic requirement of fair trial that the accused has a right to be presumed innocent. This is a right guaranteed by Art. 20(3) of the FDRE constitution which reads.

> *"During proceedings accused persons have the right to be presumed innocent until proved guilty according to the law".*

Trial of an offence (and even investigation and prosecution of a crime) is an endeavour to ascertain whether an offence has been committed and whether it has been committed by the accused. The accused is said to have committed an offence only after this is proved beyond reasonable doubt. Until that moment he should be considered and treated as innocent by the court as well as the prosecutor (and even the public). This is what is known as presumption of innocence. But this does not mean that the accussed shall be considered in the same way as every individual in the society. This is because at least, he is a suspect and that is why requirements like bail are attached to his freedom. The presumption of innocence rather relates to guilt. The accused shall not be considered guilty till he proved to be so.
Once the charge is instituted, the court must give an appointment (a particular day) to start the case on this day, the court shall summon the public prosecutor and the accused to appear and start the proceeding. If the accused is in custody, the court shall take the necessary arrangement to secure his attendance. The court, therefore, sends a letter to the prison administration or the police to produce the accused on the fixed day.

Where, however, an accused, who has been duly summoned, has failed to appear as required, the court may issue a bench warrant and such person shall be brought before the court by the police (Art. 125 of the code). If the accused fails to appear in a situation where there is proof of the fact that the summons has been served on him, the court shall order that the accused be produced

arrested by the police. In the practice of many courts, an order for the production of the accused as arrested is passed even without trying to secure his attendance through summons. In situations where the accused is to be produced through arrest, the law does not provide as to when the arrest may be effected. But some courts fix the time stating in the warrant that arrest be effected 48 or 72 hours before the fixed day. They are circumstances where the police arrests the accused a week before the fixed day.

On the day and at the hour fixed for the hearing, the court shall sit (be in session); the case shall be called (the parties attention will be called to the case) and the accused shall be produced(At. 126). As different from the procedure in civil cases the accused shall always appear personally to be informed of the charge and to defend himself. When he is assisted by an advocate, whether personally hired or court appointed, the advocate shall appear with him. The accused shall be adequately guarded and shall not be chained unless there are good reasons to believe that he is dangerous or may become violent or may try to escape (Art. 127). If the accused is not able to speak the language of the forum, qualified interpreter must be appointed for him. Persons who have involvement in the case, the prosecutor or a relative of the accused, cannot be selected as an interpreter.

The next step (after the accused is produced) is verifying or establishing the identity of the accused. Thus his name, address, occupation, age and other information relating to his identity as may be relevant, shall be established (Art. 128). As was seen, establishment of identity is a very important step at different stages of criminal proceedings. It helps in determining whether the person produced is the real accused. If the elements of identity which are recorded by asking the accused do not fit to what has been alleged by the public prosecutor, has been investigated by the police, it is questionable that the case may be proceeded with. The accused must be the person whom the prosecutor as well as the police suspected or believed to have committed the offence charged. If the identity of the person before the court is different and this is proved, it may not be necessary to consider the merit of the case at all.

The next step after the establishment of the identity of the individual is to read or explain the charge to the accused. The judge would then ask if he has any objection to the charge. This is the same in civil cases where objection can be raised.

8.2. Objections to the Charge

The objection that will be raised at this stage are objections not going to the merits of the case. These objections are not related to the question of whether or not the accused is guilty or has committed the alleged offence. Article 130 of the criminal procedure code lists out the different grounds of objection as follows:

Art. 130 - Objections to the charge

1) *If the accused has anything to say as to the form or contents of the charge, the provisions of Art. 119 et.seq. Shall apply.*
2) *The provisions of Art. 131 shall apply where the accused states:*
    a) *that the case is pending before another court; or*
    b) *that he has previously been acquitted or convicted on the same charge; or*
    c) *that the charge against him has been barred by limitation or the offence with which has been charged has been made the subject of pardon or amnesty; or*
    d) *that he will be embarrassed in his defence if he is not granted a separate trial, where he is tried with others; or*
    e) *that no permission to prosecute as required by law has been obtained; or*

f) *that the decision in the criminal case against him cannot be given until other proceedings have been completed; or*
g) *that he is not responsible for his acts.*

Question may be raised as to whether there are preliminary objections other than those listed above. The answer is in the positive. The listing under Art. 130 is indictive rather than exhaustive. The accused may for instance, raise preliminary objection relating to jurisdiction of the court in which the charge is instituted. This may concern the judicial, material or local jurisdiction of the court.

Where the objection relates to the form or contents of the charge, the court may at any time before judgement order the charge to be altered or added to or a new charge to be framed, as the case may be. Such objections have to do with essential errors or ommissions misleading or is likely to mislead the accused. Where the court believes in the existence of such errors, it will order the amendment of the charge.

In relation to an objection raised under art. 130(2), the court shall take it down and shall ask the prosecutor whether he has any statement to make in relation to such objection (Art. 131(1)). The court shall hear both the parties in relation to the objection and as a ruling sustaining (accepting) or overruling (rejection) it. Where the objection can be disposed of by reference to the law or the facts on which the obligation is based are not disputed by the prosecutor, the court shall decide on it immediately (Art. 131(1)). Suppose, for example, that the objection is based on period of limitation and the date of commission of the crime stated in the charge is not contested. The court can decide on the objection forthwith by having regard to such facts as contained in the charge and raised by the accused, and the relevant legal provisions dealing with period of limitation. It may also be the case that the public prosecutor admits the objection as appropriate and is not subject of dispute. Even where the objection of the accused where it is possible for the materials already produced and the law, the court shall decide on it forthwith.

Where a decision cannot be made forthwith owing to lack of evidence, however, the court shall order that the necessary evidence be submitted without delay. (Art. 131(3)) this means that the court will adjourn the case so that evidence based on which ruling will be passed is produced. If the objection is made based on the fact that the case is pending in another court, for instance, the accused may be ordered to produce the appropriate evidence (may be the summons and copy of the charge in the other court) to show the alleged fact. The court shall then make its decision so soon after the necessary evidence is produced. (Art. 131(4)).

The question arises as to whether there is such thing as waiver of an objection. i.e. if the accused failed to raise an objection where asked, can he raise the same at a latter time? An answer to this question may be found from Art. 130(3), which provided:

> *"where no objection is raised under this Article (Art. 130(1) and (2)) immediately after the accused has been required by the court to state his objections, the accused shall be barred from raising any such objection of any latter stage in the trial, unless the objection be such as to prevent a valid judgment being given".*

This means that an objection is deemed to be waived if it is not raised at the right time (when requested by the court) unless it is shown that the objection is one preventing a valid judgment from being given. An objection is said to be such as to prevent a valid judgment from being given, where it goes against the rightness of the judgment to be given overlooking it. If, for instance, the accused has been convicted of and sentenced for the offence before, the objection has to be accepted at any stage of the proceeding as rejection (or the objection) would have the consequence of subjection the person to double jeopardy which is unconstitutional, (Art. 23 of the FDRE constitution). One important point in connection to this is that Article 130 (2) (c) seem to prohibit the lodging of a charge on the same charge This creates confusion because, it is only charging on the same offence that would constitute the act of double jeopardy and hence, prohibited. The same holds with objections based on a cases pending in another court. Art. 23 of the constitution provides:

> *No person shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the criminal law and procedure.*

Again, according to Art. 119(1) of the code, objection based on the form and content of the charge may be raised at any time before judgment. An objection based on the subject matter jurisdiction of a court may also be raised at any time before judgment because a court lacking such power cannot give a valid judgment.

Once objection are asked for and are settled (if raised), the plea of the accused should be asked. This is question of whether the accused admit or denies the charge. Art. 132(1) provided: After the charge has been read out and explained to the accused, the presiding judge shall ask the accused whether he pleads guilty or not guilty. Reading this sub article with Art. 129, it is after objections, if any are raised, the plea of the accused (whether he is guilty or not guilty) will be asked. Where there is more than one charge, the presiding judge shall read out and explain each charge one by one and shall record the plea of the accused in respect of each charge separately. (Art. 132 (2)) such plea of the possible in the words of the accused (Art. 132(3). The judge may not include or substitute any word of his own to what is stated by the accused, neither may he condense (use a short hand) in recording the plea.

Art. 133*. Plea of not guilty*

1) *where the accused say nothing in answer to the charge or denies the charge, a plea of not guilty shall be entered.*
2) *Where the accused admits the charge with reservations, the court shall enter a plea of not guilty.*

According to this article, plea of not guilty shall be recorded in the three circumstances. First, where he simply denies the commission of the offence explained, second where he says nothing in answer to the charge or exercises his right to be silent. Third, where the accused admits the charge with reservations.

The situation where the accused denies the charge is easy to understand. The accused simply says that he did not commit the offence or he has got nothing to do with the stated crime. Then

the court will record plea of not guilty. The same is true with the silence of the accused. Silence in criminal proceedings do not in any way amount to admission. The accused has got a right to be silent and if he exercises this right when asked for his plea, it shall be considered as if he has denied the charge. If the accused wants to admit, he must admit purely. Where he admit with reservations, like admitting some parts of the charge and denying or remaining silent as to the other parts, plea of not guilty shall be entered. In all the three cases, however, the judge should record the statements of the accused before entering a plea of guilty or not guilty.

According to Art. 134(1), where the accused admits without reservation every ingredient in the offence charged, the court shall enter a plea of guilty. The accused is said to have admitted without reservations where he admits each element of the offence by stating it in its terms (theft or robbery or murder)

The accused may not know what constitutes an offence. In explaining the charge to the accused, the court must explain the elements of the offence and the circumstance of its commission. When the accused admits committing the offence, the court must make sure that the admission of the accused is based on knowledge. Thus, the court is expected to ask the existence of every elements of the offence. It is only after all these have been done that a plea of guilty shall be entered.

If a plea of guilty is recorded, the court on its own discretion either convicts the accused forthwith or demands the prosecution to corroborate the plea with evidence. That the court may immediately convict the accused is provided by Article 134 (1) . Article 134(2) provides "where a plea of guilty has been entered, the court may require the prosecution to call such evidence for the prosecution as it considers necessary and may permit the accused to call evidence". This shows that evidence may be heard even where a plea of quilty is entered.

Where the court is convinced that the crime has actually been committed and it has been committed by the accused for the latter has made confining statements, it may convict forthwith. This holds where the accused makes statement showing that it was him and nobody else who has committed the crime. If the accused says only "yes" and gives no further explanation, there is big gap to be bridged between the plea of guilty and conviction. Thus, even though the accused pleads guilty, the court has to demand corroboration (supportive evidence). The prosecutor may also request the introduction of evidence to show the criminal disposition or demeanor of the accused so that punishment would be aggravated. In practice, courts require corroboration of the accuser's plea of guilty when the charge involves a serious crime.

A question may be raised as to whether the plea of the accused may be amended. An answer to this question seems to have been given by Article 135 of the code which reads:

Art. 135 *amendment of plea*

1) *where a plea of guilty has been entered and it appears to the court in the course of proceedings that a plea of not guilty should have been entered, the court may charge the plea to one of not guilty.*
2) *The conviction, if any, shall then be set aside.*

Though this article allows amendment of plea, it seems to be of a restrictive application. It governs a situation where a plea of guilty is entered and the case is proceeded with or convicted. Judgment in a criminal case being constituted of conviction and sentence, the plea may be amended after conviction forthwith but before sentence. In case where corroboration is required, the plea of guilty may be changed to one of not guilty any time along the proceeding, even before conviction.

Through the amendment contemplated by Art. 135, it is the plea of guilty that is to be chaged to one of not guilty. The law does not say anything about whether plea of not guilty can be amended to one of guilty. In practice, some persons (accuseds) when they come to know that there is a simple punishment attached to the offence or become sick of the prolonged trial of the offence, tend to change their plea of not guilty to one of guilty. As to the position of our courts there is not uniformity. Some say that the change of the plea to one of guilty should be accepted and the case should be proceeded with accordingly. This is because the accused may admit when things become clearer or he comes to know that he has no defence. Others say that the case should be proceeded with (though accused changes his plea of not guilty) and whether to convict the accused or not should be based on evidence and not on the newly made plea as the law do not expressly permit such amendment.

8.3 The Production of Testimonies

If the court registered a plea of not guilty, (i.e. when he totally denies the charge, kept silent, accepted some and not the other), the next step is to require the public prosecutor to prove his case. This is by producing evidences and calling witnesses. He intact, is required to make remark as to the kind of charge, as to what kind of evidences or experts to be called by him and ensure that the witnesses are sworn before the court.

With specific reference to witnesses, as has been said, they are to be produced through summons. In practice, however, the names of witnesses will be stated on the charge and the court orders the police to produce the named witnesses. By virtue of Article 125, it is only where a witness fails to appear being duly served with summons that the court orders the police to bring him before the court. This is a gap between the law and the practice. There are even situations where the police are punished for not bringing witnesses without the summons method being tried. Any ways such a practice must be corrected.

The evidence that may be produced by the prosecutor (and/or the accused) in support of his allegation may be oral or real. Oral evidence is the testimony of witnesses. While real evidence includes documentary evidence, exhibits and other physical evidence. As the documentary evidence (like certificate of death) are annexed to the charge (not to the copy that is to be given to the accused, in the existing practice) the court has the chance to examine it any time. Exhibits (materials involved in the commission of the offence) shall be produced for the examination of both the court and the accused during the trial when it is appropriate. Exhibits as evidence shall be supported by witnesses who explain about them. The major type of evidence in criminal cases is oral evidence and the law provides for a relatively detailed rules on examination of witnesses.

8.3.1 Examination of Witnesses

Irrespective of the nature of his evidence, the public prosecutor, in opening his case, shall state the charges he propose to prove and the nature of evidence he tenders in respect of each fact.

The public prosecutor shall do this in an impartial and objective manner (Art. 136). The prosecutor shall open the case by framing and having recorded the issues to be proved by the evidence, and explaining about such evidence in short. Any proposition likely to create bias with the court or witnesses should be avoided. Then the prosecutor shall call his witnesses who shall tender an oath or make an affirmation before giving testimony. The witnesses shall be examined in chief by the public prosecutor, cross examined by the accused or his advocate and may be re-examined by the public prosecutor. These examinations apply to the witness called by the accused as well.

8.3.2. Examination in Chief

Examination in chief is investigation of witnesses to be conducted by the proponent (the party calling them). By the examination in chief the prosecutor shall solicit from the witness facts supporting his side of the case i.e testimony enabling the prosecutor to prove the charge. It is a technique of examination at this stage that the prosecutor should put to the witness only questions the answers to which prove the allegations in the charge. The prosecutor should not, for example, ask questions the answer to which proves self defence by the accused. The law provides for the nature of questions to be asked in the examination in chief.

Article 137 of the code provides the forms of questions to be put in examination in chief.

1. *questions put in examination in chief shall only relate to facts which are relevant to the issues to be decided and such facts only of which the witness has direct or indirect knowledge.*
2. *No leading question shall be put to a witness without the permission of the accused or his advocate or the public prosecutor, as the case may be.*

Two rules of examination in chief may be gathered from Art. 137 (1), namely, that the questions shall relate to facts which are relevant and to the knowledge of the witness. Relevant facts having to do with what is stated in the charge or which are important to prove the allegations of the prosecutor (proponent). Thus, where the proponent puts a question relating to a fact which is not important may raise the objection of relevancy. The other rule is that the question should relate to facts of which the witness has direct or indirect knowledge. Direct knowledge is a knowledge acquired by a witness through personal observation. Depending on the nature of the fact, the witness should observe the fact in any of or any combination of the five sense organs. To say that a witness has direct knowledge, he must personally have seen, heard, smelt, touched/felt or tested the fact if it is perceivable in such ways. About such facts the witness can give reliable testimony.

The law provides also that questions may relate to facts of which the witness has indirect knowledge. A witness is said to have indirect knowledge where he has heard about the fact from another person who has observed the fact and does not personally observe it. In other jurisdictions, such questions and their answer are objectionable as hearsay. In our law, questions relating to facts which are based on hearsay may possibly be out during the examination-in-chief. However, it is questionable that testimony based on hearsay (indirect knowledge) can have a force of proof as strong as that based on direct knowledge.

Leading questions are prohibited during examination-in-chief. These are questions suggesting their own answers. Through leading questions it is said that the proponent puts an answer (a fact)

in the mouth of the witness. The prohibition is because what the court wants to hear is the testimony of the witness and not that of the proponent. The questions must he so neutral as to enable the witness to testify what he himself knows explaining the facts in his own way. There are, however, exceptional circumstances where the leading question may be put to the witness during the examination-in-chief. These are exceptions provided by the law, practice and rules developed in the legal science. These are where:

1) the accused or his advocate gives his permission. This may be through failure to object where leading questions are put; or
2) the question is related only to introductory matter such as the name, occupation and address of the witness and not the substance of the testimony; or
3) the witness is a minor (a minor does loose capacity to testify) who does not have good command of language for the purpose of assisting him. But this should not extend to telling what the minor is to testify; or
4) the witness does not know as to where to start to refresh his memory. This still should be limited to reviving the witness s knowledge.
5) The witness turns out to be hostile.

8.3.3 Cross Examination

Once the prosecutor (proponent) is over with the examination-in-chief, the accused or his advocate may conduct cross-examination. Cross-examination is the investigation of witness by a party (or his counsel) against whom testimony is given during the examination-in-chief. It has the purpose of destroying, falsifying or shading doubt on what has been established during the examination-in-chief.

As regards the form of questions put to the witness article 137 (3) during cross-examination of the code provides:

> *questions put in cross-examination shall tend to show to the court what is erroneous, doubtful or untrue in the answer given in examination-in-chief. Leading questions may be put to a witness in cross-examination.*

This sub-article tells you the mechanisms of destroying the testimony of a witness. During cross-examination, the questions to be raised are those whose answer is likely to show the erroneousness, suspiciousness or falsity of the testimony of a witness given during examination-in-chief.

Thus, the questions should as far as possible related by facts testified by witness during the examination-in-chief. If questions relating to new facts which have never been testified are to be asked, the purpose of cross-examination (falsifying testimony given during examination-in-chief) would be lost. For different reasons considered by the law, leading questions are allowed during cross-examination. This is perhaps because the party (accused or counsel) may not lead the witness to tell facts falsifying his own testimony has already been given, leading question cannot amount to feeding facts for the witness to testify. However, as the witness is discharging his civil obligation in assisting the administration of justice, every question must be put to him with all due respect to him and he should not be harassed by both parties and the court.

Crosse-examination is just a right. Whether a party put questions for cross-examination or not might have a strategic significance in the over all outcome of the case. Therefore, it is at the

option of a party whether to conduct cross-examination or not. But it is good to note that failure to cross-examine a fact testified does not amount to admission of that fact. According to Art. 140, failure to cross-examine on a particular point does not constitute an admission of the truth of the point by the opposite party.

8.3.4. Re-Examination

After the cross-examination is over, if there is any the re-examination follow. Re-examination is interrogation of witness by the proponent (who has conducted the examination-in-chief) in an effort to strengthen the original testimony of the witness.

Article 139 of the code provides:

> *"the public prosecutor; the accused or his advocate may on re-examination only ask questions for the purpose of clarifying matters which have been raised in cross-examination".*

This shows that the purpose of re-examination is to re-establish what has been demolished (falsified or made erroneous) during the cross-examination or to clarify what has been confused, (made doubtful) during the cross-examination. In view of this purpose, therefore, the facts that are to be raised during the re-examination should be limited to those which were raised during the cross-examination. If there is no cross-examination at all, again, there cannot be a reexamination as nothing would be destroyed from what has been established by the examination-in-chief. Leading questions may be put during re-examination.

8.4. The Role of the Judge in Examination of Witnesses

According to Art. 136 (4), the court may at any time put to a witness any question which appears necessary for the just decision of the case. This implies that there is examination of witness by the court. The court puts questions to the witness after the parties are over with their examination. In their examination, the parties may fail to ask or solicit a fact which is important for the determination of the case. Such facts may relate to the elements of the offence with which the accused is charged or the question of whether he has committed the offence. In search of such facts, the court may examine the witness.

There is a procedure for recording the testimony of witnesses be them of the prosecution or of the defense. The record shall start with the name, address, occupation and age of the witness and there shall be an indication whether he has been sworn or affirmed (Art. 147 (1)). The testimony of each witness shall be written down by the presiding judge if he is unable to write for whatever reason, it may be recorded by another judge or clerk under his personal direction and superintendence (Art. 147 (2)). The record shall be divided in to examination-in-chief, cross examination and re-examination with a note as to where each examination begun and end (Art. 147(3)). In the normal course of things it is difficult to write every thing during the hearing. Therefore, the judge writes only the answers of the witness (as it is easy to suppose what the question were) in the form of narration. However, the presiding judge may take down or cause to be taken down under his direction any particular question and answer which he finds to be important (Art. 147 (4)).

During examination, one of the parties may object the form of question put to the witness or the admissibility of his testimony.

Art. 146 of the code provides:

> *Where the prosecutor or the accused objects to the admission of any evidence or the putting of a question to a witness, the court shall decide forthwith on the admissibility of such evidence.*

The grounds of objection relate to prohibition attaching to examination of witnesses at any stage. A party may, for instance object the question put to the witness during examination-in-chief as irrelevant or leading. When such objections are raised, the court immediately passes ruling on them. If the court accepts the objection, it will sustain the objection and renders the testimony inadmissible or rejects the question. If, however, the objection is groundless, the courtover rules the objection and records the testimony.

8.5. The Production of Additional Evidence

Ordinarily, the prosecution as well as the defense will produce witness whose list is originally given to the registrar. However, there are also situations where additional witnesses and their testimony may be introduced. The prosecution and /or the defence (accused) may later in the proceeding find out that the testimony of some other witness is relevant. In such cases, they may call any witness whose name does not appear on the list of witnesses. Such witness shall be summoned where the court is satisfied that he is a material witness and the application for summons is not being made for the purpose of delaying the case (Art. 143(2)). The prosecutor may also call a witness who has not given evidence at the preliminary inquiry. But he has to inform the accused in writing of the name of the witness he propose to call and of the nature of the testimony he will give. Art. 143(3)).

Also, the court may at any time before judgement call additional witnesses, on its own motion where their testimony is necessary in the interest of justice (Art. 143 (1)). The court may along the proceeding come to know persons who can be witness in the case but not called by the parties. When the court deems these witnesses important for the determination of the case, it will call them. It does not seem to be clear as to who conducts the examination-in-chief. But as they are court witnesses, it shall be conducted by the court and the party against whom they are testifying may conduct the cross-examination.

It is not always the case that witnesses are available during the trial. When the witness is dead or insane, cannot be found, is so ill as not to be able to attend the trial or is absent from the empire, his deposition (testimony) taken at a preliminary inquiry may be read and put in evidence before the high court (Art. 144 (1)). If the witness cannot testify in court due to the reasons pointed out, his testimony recorded during the preliminary inquiry may be admitted in evidence. Where such witness is an expert, his testimony may be read and put in evidence before the high court although he is not called as a witness (Art. 144(2)). The deposition of an expert witness may be admitted in evidence whether he is available or not.

However, caution has to be taken when such depositions (testimony recorded during preliminary inquiry) are taken as evidence. For one thing, preliminary inquiry is some how an unfair proceeding as it is mean only for the recording of the evidence of the public prosecutor and not of the accused. For another, the accused may not exercise his right to cross examine the witness. Thus, admition of such testimony in evidence may ultimately of taint the out come of the case.

Therefore, the court must first make sure that the evidence produced do not affect the rights of the accused and question their admissibility before admitting such evidence.

As part of the investigator activity, the police might have examined witnesses. Upon the request of the accused or the prosecutor, the court may refer to statement made by a witness to a police officer in the course of police investigation (Art. 145(1)). The accused may also be furnished with a copy of the record of the testimony if it is thought expedient such testimony may be admitted in evidence. It is questionable that such testimony of a witness should be taken as evidence to prove facts by itself as it was not subject to cross-examination. According to Art. 145(2), such statement may be used to impeach the credit of such witness. This means that testimony recorded during police investigation may only be used to prove the credibility of the testimony of witness given in court. If there is a misstatement or a contradiction between the statement the witness made to the court and the statement he made before the police, the testimony looses credibility and may not be admitted in evidence.

In the existing practice, there are situations where testimony recording by police is used as evidence (at least as a corroborative evidence). Specially, where the witness cannot be produced before the court, the public prosecutor requests to introduce the testimony. The request is for the record to be used as evidence and such a request is almost always granted.

As has been pointed out earlier, the evidence that may be produced before the court for proof of the commission of an offence by the accused is not only the testimony of witnesses. It may be documentary evidence such as the admission/ confession of the accused person either before the investigation police officer by virtue of Art. 27(2) or before a court of law by virtue of Art. 35, or any other document, which may be material for the proof of the offence or defense. Exhibits may also be produced. These include material which has been used as means for the commission of the crime such as knife or gun; a thing which is the fruit of an offence such as a stolen or robbed property; a document produced illegally; a thing against which the crime has been committed such as a document which has been forged; and item from which its parts are looted. These pieces of evidence shall be numbered and marked by the registrar of the court and kept in a safe place until the date of trial. Exhibits shall not be with drawn without an order of the court (Art. 97). In the existing practice, however, exhibits are put under the complete control of the police.

8.6 "No Case" Motion

You have learnt that it is the public prosecutor who will introduce his evidence first. Based on the strength of such evidence the court will decide whether a case has been made against the accused. There is a case for prosecution where the evidence introduced by the prosecutor is weighty i.e. where the charge is proved to the required degree. Otherwise, there is no case for prosecution. First I will discuss the situation where there is no case for prosecution. This is provided for by Article 141 of the criminal procedure code which reads:

Article 141 – Acquittal of accused when no case for prosecution.

> *When the case for the prosecution is concluded, the court, if it finds that no case against the accused has been made out which, if unrebutted, would warrant, his conviction, shall record an order of acquittal.*

After examining the evidence and measuring its weight, the court will decide whether a case is made out against the accused i.e whether the charge is proved against the accused. The result of such inquiry may be that the case (the offence and its commission by the accused) is not proved to the required degree. There is a degree to which extent the case should be proved for the purpose of making the accused guilty. If the proof submitted is not such as warranting conviction, the court shall order the acquittal of the accused or his release if in custody.

Obviously, the decision to convict the accused must be based on a certain degree of proof. Now, the question is one of standard of such proof. In the continental Europe, in order for the court to convict the accused, the judge needs to have the "internal conviction". In Anglo – America system, on the other hand, the court be convinced to the degree of "beyond reasonable doubt" that the accused is guilty. Though there is no clear law in this respect in our country our courts in practice apply the "beyond reasonable doubt" degree of proof. This may be because of the Anglo – American influence in our court (we used to have judges of such origin) and the criminal procedure law. Therefore, an order of conviction (making guilty) should depend on a satisfactory proof of commission of the offence charged against the accused.

It is important to note, however, that evaluation of evidence in view of the guilt of the accused under Art. 141 is not to convict the accused once and for all. The standard is whether the proof would have led to conviction, if not rebutted (defended). If the prosecution has proved the charge in such a way that the court believe in the commission of the offence by the accused, as you shall see, the accused will be given a chance to defend. If, however, the prosecution failed to prove to the required degree as to warrant conviction, if not rebutted), the accused shall be acquitted under Article 141 without requiring the accused to present his defense.

If it is proved to the satisfaction of the court that the alleged offence has been committed by the accused, the court shall call up on the accused to produce his evidence to defend himself. In this respect Article 142 (1) provides:

> "*Where the court finds that a case against the accused has been made out and the witnesses for the injured party, if any, have been heard it shall call on the accused to enter upon his defense and shall inform him that he may make a statement in answer to the charge and may call witness in his defense*".

If the court believes based on the evidence submitted that the offence has been committed by the accused, the latter will be given a chance to defend. The accused will then make a statement and introduce evidence, if he has any to show that he should not be held guality. The statement to be made by the accused in answer to the charge relates to the defense he is going to present. He may say that he has not committed the offence or plead self defense. The accused states what his evidence is going to prove for him.

The courts in making an order for the accused to defend must consider the weight of evidence seriously. There must be a belived based on evidence of the prosecution, that the accused would be convicted if he fails to rubute (defend) the case made against him. In practice, however, our courts are loose in evaluating evidence and measuring degree of proof at the stage of inquiring whether a case has been made against the accused or not. The adverse effect of lack of seriousness in this regard is manifested in cases where the accused fails to present defense evidence. In such cases; unless other wise the court had a belief that the accused has committed

the alledged offence, at the time of ordering the accused to defend the case, it becomes difficult to convict him on the evidence available. In conclusion, you may say that the court should not take into account the possibility of defense by the accused at the time of deciding whether a case has been made out against him or not.

When called upon to defend, the accused or his advocate opens the case for the defense by explaining the defense stating the evidence he proposes to put forward (Article 142 (2)). As in the prosecution proceeding, he shall call his witnesses and experts who shall be sworn or affirmed before they give their testimony. The witnesses may be called in any order the accused or his counsel desires. If the accused wishes to make any statement, he shall speak first (Art. 142 (3)). As the accused is not considered as the witnesses, he shall not be sworn or make an affirmation and shall not be subject to Cross examination. For the purpose of clarifying matters, however, the court may put questions to him.

The manners and modalities of proof in the defense proceeding are like that of the prosecution proceeding. There are the same rules relating to the order of examination of witnesses, form of questions and admissibility of evidence. Once a witness has been called for instance, the examination in chief, having the same purpose and scope as in the prosecution case, shall be conducted by the accused or his advocate; the cross examination, if any, by the prosecutor and the re examination, if there is any again, by the accused or his counsel.

8.7 The Judgment

If judgment is taken as the disposition of a case, you may distinguish between two types of judgments. The first is where a case is disposed without evidence for defense and the second is where defense evidence is heard. If a case is not made out (charge not proved) against the accused, the case will be decided by acquitting the accused under Article 141. Where, however, the accused presents evidence in defense, judgment will be given by evaluating evidence on both sides.

After the evidence for the defense has been concluded, the prosecutor may, at his option, address the court on questions of law and fact. The accused or his advocate shall then address the court on question of law and fact. He shall always have the last word. This is a kind of oral litigation between parties to a criminal proceeding before judgment concerning guilt of the accused is given. When there are more than one accused, the presiding judge shall decide in which order the accused or their advocates shall address the court (Article 148).

Judgment in criminal cases is constituted of two important stages. First, the court will decide whether the accused is guilty or not guilty. Second, is the accused if found guilty, the court will proceed to fix the penalty to be imposed on the accused. The former is conviction and the latter is sentence.

After the evidence for the defense and the final address, if any, have been concluded the court shall give judgment. The judgment shall be written as containing a summary of the evidence, reasons for accepting or rejecting the same and the provisions of the law on which it is based. In case of conviction, the article of the law under which the conviction is made shall be pointed out. The judgment shall also be dated and signed by the judge delivering it (Article 149 (1)).

By producing evidence in his defense, the accused may successfully defend the case made out against him. He may introduce credible evidence which could falsify the evidence of the prosecution or he may pursued the court to believe that he is not liable (like proving self defense). In such cases, you may say that the accused is found not guilty. Where the accused is found not guilty, the judgment shall contain an order of acquittal and, where appropriate, an order that accused be released from custody (Article 149 (2)). It is as if a case where not made out against the accused. He will be set free.

Unlike the public prosecutor, the accused is not required to prove his case beyond reasonable doubt or to demolish all the facts that were proved and established by the public prosecutor. It is a rule of reason that he is required to prove his case only to the degree of creating reasonable doubt in the evidence of prosecution or in the holding that he has committed the offence. If the accused or his counsel creates such reasonable doubt over the proof of the public prosecutor or develops doubts in the mind of the judges to able to create such reasonable doubt that the court convicts the accused with the crime proved by the prosecution.

An accused is found guilty where he fails to produce evidence being called upon to defend or where the evidence introduced in defense could not create a reasonable doubt. When the accused is found guilty, the court shall convict him of the crime established. Then the court shall ask the prosecutor whether he has anything to say as regards sentence by way of aggravation or mitigation (Article 149 (3)). The prosecutor will be required to establish grounds for aggravating or mitigating (Article 79 84 Penal Code) the penalty (Punishment) to be decided on the accused. As has been seen, if the offence is aggravated by reason of previous conviction, the public prosecutor shall not include such facts in the charge (Article 114 (1)). Neither shall such facts be entered in the record of the preliminary inquiry (Article 138(2)). It is at this stage of the proceeding that the public prosecutor reveals such facts to the court in the determination of sentence. In practice, the public prosecutor informs the court only when there are grounds for aggravation and not when there are grounds for mitigation.

Whether the aggravation or mitigation is based on previous conviction, character of the accused or any other facts provided for in the substantive law, the public prosecutor must prove such allegations. He may call witnesses. The accused shall be entitled to reply and may call witnesses against the grounds proved. Where the accused does not admit the alleged grounds for aggravation, the prosecutor shall be required to prove the same. (Article 149(4)).

After statements regarding sentence have been made and proved or disproved, the court shall pass sentence and shall record the articles of the law under which the sentence has been passed (Article 149 (5)). This means that the court determines the punishment which the accused has to serve after examining evidence on aggravating or mitigating circumstance, if any. After delivery of judgment, which is constituted of conviction and sentence, the prosecutor and the accused shall be informed of their right of appeal. (Article 149 (7)).

Article 149 (6) provides that nothing shall affect the provisions of Article 195 and 196 of penal code. This means that an accused may not always be either freely acquitted or sentenced. There is a law by which punishment of an accused found guilty may be suspended. Where the offender has no previous conviction and does not appear dangerous and where his offence is punishable with fine, compulsory labour or simple imprisonment for less than three years , the court, after having convicted the offender, may suspend sentence and place the offender on probation (Article

195 Penal Code). When the court considers that the offender, whether previously sentenced or not, shall receive a warning it shall enter a conviction and pass sentence but may order that the enforcement of the sentence be suspended for a specified period of probation (Article 196 Penal Code). Incidentally, Article 196 seems to be applicable for any offence (Whatever the seriousness).

CHAPTER IX
Special Procedures

9.1 Appeal

Appeal is the last stage of the criminal proceedings. For a party dissatisfied in whole or part with the decisions reached by the trial court, appellate procedures are foremost among the possible post□judgment remedies. Of course, there are also further proceedings which may occur after the sentencing and appellate review stages have passed among which are: proceedings to obtain further review of the decision taken below in order to have the verdict of disposition a ltered in some way, proceedings to settle questions about the execution of the sentence and proceedings, taken after the sentence has been executed, to achieve □reinstatement□ of the offender. Now, we shall consider the Ethiopian law of criminal appeal under three topics right of appeal, procedure on appeal and powers of the appellate court.

9.1.1 The right to appeal

Appeal is a right available to all persons aggrieved by the decision of the court of original decision. It is recognized under Article 20(6) of the FDRE constitution which provides:-

□*All persons have the right of appeal to the competent court against an order or a judgment of the court which first heard the case*□.

As you can glean from the constitutional provision, the right seems to be complete with no exception. When you look at the criminal procedure code however, there are limitation imposed in connection to the grounds of appeal that would impose a restriction on the scope of application of the right of appeal. We will look at them when we discuss the procedures on appeal. An accused normally has the right to appeal his or her conviction and sentence to the court of appeals. The function of appellate court is to provide a legal review of rulings made by the trial court. If the

appellate court finds no substantial error, the conviction is affirmed (up held); if the court finds error and concludes that the error may have prevented the accused from obtaining a fair trial, the court may reverse (set aside) the conviction and return the case to the original trial court for proceeding not in consistent with the appellate court's decision. Therefore, for the individuals to be able to exercise their right, it is necessary that there is a higher level of court next to the court of rendition to which, an appeal may be lodged. Therefore, if the court which first heard the case is the federal first instance court, appeal would be lodged to the federal high court. In order to enable individuals exercise this right of appeal. Appellate courts are not given an original jurisdiction.

If you read proclamation number 25/1996, however, an original jurisdiction is given to the federal Supreme Court in offences committed by senior officials of the federal court. (read Article 3--- of the proclamation). Some people argue that this provision restricts the individual's right to appeal as there is no any other court to which they may lodge an appeal. Of course, they can take it to the cassation court. But, this is not alright like appeal, as it is not lodged to another "competent court" from the court which first heard the case.

The constitution says that all persons accused have the right of appeal. What about the public prosecutor? Can we say that the constitution is denying the public prosecutor the right to appeal? In the U.S. legal system, the prosecution may not appeal an acquittal. It may appeal only on the rulings listed below:

1. An order dismissing the case before the defendant has been placed in jeopardy.
2. A judgment for the defendant up on the sustaining of a demurrer (objection to pleadings),
3. An order granting a new trial,
4. An order arresting judgement, and
5. Any order made after judgement affecting the substantial rights of the people.

The U.S. legal system prohibits an appeal on acquittal while allowing appeal against conviction because it is difficult to say that they are on equal status. Policy considerations may force the law to discriminate between the public prosecutor and the accused.

In our legal system, however though the constitution states in the way stated above, Article 185 (2) provides that the prosecutor may appeal from a judgment of a criminal court discharging acquitting an accused person or on the grounds of inadequacy of sentences.

9.1.2. Procedures on appeal

Not all decisions are appealable. There are decisions called interlocutory matters that do not finally dispose of the case or on which ground appeal is not allowed. These are those listed under Article 184 of the criminal procedure code which reads:

"No interlocutory appeal shall lie from a decision of the court:

a. granting or refusing an adjournment under Article 94; or
b. regarding an objection under Article 131; or
c. regarding the admissibility or non-admissibility of evidence under Article 146, but any such decision may form the subject of a ground of appeal where an appeal is lodged against conviction, discharge or acquittal".

The Article is forcing the accused to wait until the final decision of the court. There are also other interlocutory matters not listed by Article 184. These include, for example, an objection on the ground that "no case" motion should have been given, objection on the decision for amendment

of charges, e.t.c. what about such interlocutory matters other than those provided under Article 184? Does this mean that appeal is the possibility in all other cases?

The writer believes that under Article 184, the law is simply listing the most obvious matters. If the order cannot dispose an issue, it is wrong to discriminate among interlocutory matters. Hence, it seems that all decisions on interlocutory matters including those not listed under Article 184, are not appealable.
To which court would an appeal be lodged?
Unlike civil cases where you file your appeal to the appellate court, in criminal cases, the memorandum of appeal is lodged in the court which gave the judgment appealed against. This is provided under Article 187. It is the court which transfers the memorandum of appeal and necessary documents to the appellate court. This may be so due to the sensitive nature of criminal cases.

Article 187 also provides that notice of appeal should be made within 15 days of the delivery of the judgment appealed against and the memorandum of appeal should be filed within 30 days of such a date. If you fail to lodge within the given day, an application should be made for leave to appeal out of time (Article 191 of the procedure code). If it is established that the delay is not occasioned by the default of the applicant, he will be allowed. In making such decision, the court should not strict on the grounds as in civil cases unless you see extra carelessness. Because, if you reject, he may be sentenced for life or death.

If the application is granted, the normal proceeding will continue. The court will fix a specific period and on that date, the appellate court considers the grounds and decide mutatis mutandis (with appropriate changes).

What are the powers of the appellate court?

Article 195 of the procedure code lists the powers of the court of appeal. Accordingly, if it is conviction or acquittal, it may cancel and convict or remand the file with instruction to the lower/ trial court (please read the whole provisions of the Article.

9.2. Stay of execution

Once an appeal is accepted, stay of execution is the possibility. Under what circumstances can the appellant apply for stay of execution in criminal cases?

As Article 188(5) provides, an application for stay of execution may be made to the court of appeal before the hearing of the appeal. The Article further lists the sentences that need to be stayed.

9.3. Special Provisions for Young Offenders

In many countries there has developed over the past fifty to seventy five years, an institution known as the juvenile court. Although local variations are numerous, basically the juvenile court can be described as a special court designed to apply the penal law, or a special modification of the penal law, to children and young persons. The juvenile court grew up as a reaction against the former practice of dealing with juveniles in the same courts, under the same procedural and substantive law, as adults charged with crime. Some of the innovations claimed for juvenile courts have been: specialization of judges, informality of the court room and of other aspects of the

proceedings, rigid segregation of juveniles from adult subjects of the criminal process at all pre trial and post trial stages, protection of juvenile offenders from publicity, emphasis on discovering the causes of anti social behavior in the juvenile, and on rehabilitating him through affecting his environoment rather than on fixing his blame and punishment. In some countries the non punitive philosophy of the juvenile court has led to the discarding of such criminal court nomenclature as charge, offence, plea, conviction, and sentence in favour of more neutral terms. These, it is thought, help protect the juvenile from any connotations of crime and punishment. In other countries, notably the Scandinavian ones, administrative boards deal with juvenile delinquency, in a setting completely removed from that of courts and the criminal law.

But, it can be said generally of all countries, whether juvenile courts or child welfare boards perform these functions, that there had been some tension between the non punitive, rehabilitative aims of the system, and sometimes harsh realities of the dispositions applied to juvenile subjects. And in view of the fact that despite noble aims and non punitive philosophy, juvenile courts and boards frequently dispense procedural protections for the juvenile who is subject to such treatment. In this regard the, Ethiopian criminal procedure code present a somewhat unclear picture. A chapter of ten articles devoted to procedure in cases concerns young persons apparently purports to provide a comprehensive and self contained guide, covering criminal procedure from the first stages to the last. Complaint and accusation, arrest, investigation, charge and plea, trial, judgment, sentence and appeal all are apparently meant to be governed by these few provisions. Inevitably, such brief coverage has left many matters unsettled, and it is often problematic whether and how much of the rest of the code should be used to fill the gaps criminal procedure code articles 171 180 deal with these issues of the special provisions concerning young persons. (Please read these provisions)

In addition to the special procedures dealing with young offenders, there are also stated other special procedures concerning procedures in cases of default, in case of petty offences, setting aside judgments given in default and execution of sentences.

Due to the limitation of time, however, we are not going to deal with the issues in this material. Hence, you are advised to read the procedure code provisions dealing with such issues. We shall now complete our discussion on the law of criminal procedure code.