

# **INTRODUCTORY MATTERS**

## **1. Introduction**

A crime is a socio-economic and political problem in any society. That is why actions thought to be against the interest of a community have been criminalized and punished since time immemorial. Be that as it may, care has to be taken in order to avoid or at least reduce the danger on human rights in the running of the criminal justice system. To what extent it is allowed to affect the rights of persons so as to maintain law and order is a controversial issue. This means-end and the related procedural and substantive justice debate underlying the study of criminal procedure.

To address systematically the salient aspects of the law of criminal procedure, the whole document is divided in to nine major chapters. The division is done mainly on the basis of the sequential orders of the whole process of the criminal justice.

The beginning chapter grapples with the background of the course. As can be observed from its content, it lays the foundation for the subsequent parts. It tries to highlight the concept, essence and development of criminal procedure, including history of Ethiopian criminal procedure. The legal source of the law both constitutional and statutory is also covered with particular emphasis on applying it to a federal system as our country follows that line. In addition, major orientations of criminal justice systems are included. These are the ‘Due Process’ and ‘Crime Control’ models. The adjudication process of the adversarial/ accusatorial, inquisitorial, and mixed systems is not also disregarded.

Chapter two directly indulges in to the main part of the course. It explores the early phases of the criminal justice system. Conditions leading to the functioning of the criminal justice system are treated. Besides, subsequent steps in the process, such as, summons, arrest, police investigation, confession, identification procedures, search and seizure, and remedies available for any kind of illegality committed on the process are discussed.

A person arrested has to be brought, as soon as possible, to the nearest court. Ascertaining the legality of the arrest, the court may allow bail or further investigation being in the hands of the police. In case the state authorities fail to bring the arrested person to court, one may use *habeas corpus* for that purpose. Thus, remand, bail, and *habeas corpus* are the subject matters of the third chapter.

Prosecution is one of the main activities done in the criminal justice process. It includes decision to prosecute or discontinue prosecution, ordering further investigation, preliminary hearing, etc. The fourth chapter grapples with these issues.

The fifth chapter is an extension of the fourth. It is restricted to the charge. It concerns how to frame a charge after the public prosecutor being convinced to do so, and its amendment.

The next chapter explores jurisdiction of courts, change of venue, and withdrawal of judges. It includes the three types of court jurisdiction, namely, judicial, material, and local jurisdiction.

Chapter seven is devoted to the trial. The trial can not be well conducted without the necessary preparations. Accordingly, it covers both the pre-trial procedures and the trial.

The gravity and complexity of crimes are not the same. For instance, murder rape, treason, robbery, corruption, etc are grave and complex. On the contrary, crimes, such as, insult, minor bodily harm, and violation of traffic regulations are less complex and grave. Besides, the perpetrators of crimes could be adults or minors. Juvenile delinquents require differential treatment due to the level of their psychological, social, mental and physical development. It is not prudent to handle every criminal case in a similar fashion. Accordingly, modern criminal justice system is in favor of differential treatment of criminal cases depending upon their complexity, gravity, and the nature of the perpetrators of a crime. Hence, chapter eight is about special criminal procedures like private prosecutions, default procedures, contraventions, court contempt, juvenile delinquency, and anti-corruption cases.

The final chapter examines procedures coming after judgment. The procedures that follow from the decision of a criminal case on a first instance basis that are discussed are review by the court of rendition, appeal, cassation, execution, pardon and amnesty.

## **2. Methodology**

We find it imperative to explicitly state the approach of preparation of the work. This could enable readers to easily grasp the content. The approach emanates from the purpose of the undertaking. It is primarily intended to develop an up to date course material for the subject. Accordingly, the basic task is compilation. But, inevitably, intervention to create coherence is needed. This is achieved through introduction, summary notes, and discussion questions. Besides, the course developers have been forced in some cases to forward their own reflections together with the available literature sources in cases literature on a certain topic is absent or found to be insufficient to be incorporated as it is. Therefore, even though the document is primarily a compilation, there is an input on the part of the course developers.

With regard to the compiled materials, they are taken in the form of extracts directly from different authoritative sources with no paraphrasing. Unnecessary parts of the text are left out so as to create linkage between different parts and make the document readable. The parts left are indicated using the commonly used three dots.

The design of the text and materials incorporates criminal procedure values, principles, rules, writings on various jurisdictions and decided court cases. Their mode of presentation follows this same logical pattern. This is purposefully done so that students have a holistic picture of the subject matters covered. Undoubtedly, the general approach of the document empowers students to make theoretical and practical analysis of criminal procedure issues.

As judicial decisions are usually long, it has been found proper to use writings discussing them. Some of the discussions questions also are designed so as to reflect real challenges in court even though a court case is not directly incorporated. But, when we find it important to include a case, attempt has been made to cut out most parts not essential to the understanding of the core

messages of the case. With regard to Ethiopian cases, we have tried to translate and brief the cases identifying the facts, issues, decision and reasoning of the court finally disposing the case. Foreign and Ethiopian court cases are presented in this way to save time and energy of students.

At this juncture, it is worth emphasizing the core guiding principles of the text and materials. The main objective is to help students in their effort towards understanding Ethiopian constitutional and statutory criminal procedure rules. As a result, the spring board is all the time the relevant provisions of the FDRE Constitution, the CC, and criminal procedure laws, basically, the CPC. This demands continuous reference to the appropriate laws. Internationally accepted criminal procedure values, principles, and rules as well as the laws and practices of other countries are explored to illuminate Ethiopian constitutional and statutory criminal law procedure. Thus, the course material does not have the purpose of disregarding the law. It is rather aims at exposing the law.

The other crucial point is grasping the function of the document. Although it has immense merit in providing easy reference material for the study of the course, it does not in any way gives answers to the contentious living issues surrounding the course. It is independent critical thinking that helps to address problems. In this regard, the course developers have attempted to coin discussion questions and problems. They are expected to provoke thought. Besides, the document is a mandatory material to be consulted, it is not an exclusive source. Students could make a further reference to any writing relevant to the topic. The wide reference materials indicated at the end of the document make the venture simpler.

Finally, the CPC is in the process of revision. However, this does not mean that totally a new law fundamentally different from the present or unrelated to basic values, principles and rules of criminal procedure will be issued. As it can be observed in due time, the CPC, though it has defects, contains core modern values, principles and rules of criminal procedure. These should be realized and applied.

The orientation adopted is not also restricted to the exposition of the CPC. It is to inculcate modern values, principles, and rules of criminal procedure. This enables to understand the gaps

and ambiguities found in the CPC so as to find solutions. Accordingly, students are supposed to view criminal procedure from a wider perspective.

## CHAPTER ONE

### GENERAL OVERVIEW

This chapter lays the foundation for the subsequent discussions on different subject matters of criminal procedure. The theoretical and legal bases of criminal procedure are analyzed. It also describes the trends of criminal procedure in the world and Ethiopia since time immemorial; models of criminal justice; major criminal justice systems of the world and their structure.

#### 1.1. Definition, Nature, Purpose, and Development of Criminal Procedure

##### Definition<sup>1</sup>

The rules governing the mechanisms, under which crimes are investigated, prosecuted, adjudicated, and punished. It includes the protection of accused persons' constitutional rights.

##### Substantive Due Process<sup>2</sup>

Substantive due process refers to the content or subject matter of a law. It protects people against unreasonable, arbitrary, or capricious laws or acts of government. An example is the void-for-vagueness doctrine. In accordance with this doctrine, the Supreme Court has struck down criminal statutes and local ordinances that, for example, made it unlawful to wander the streets late at night without lawful business, to “treat contemptuously the American flag,” and to willfully “obstruct public passages.” In all of these cases, the issue of substantive due process and the void-for-vagueness doctrine came into play because the statutes were neither definite nor certain as to the category of people they referred to or the precise conduct that was forbidden.

A landmark case involving substantive due process occurred in 1927 in the case of *Buck v. Bell*. Carrie Buck was an 18-year-old “feeble-minded” white woman who had been committed to the Virginia State Colony for Epileptics and the Feeble Minded. She was the daughter of a feeble-minded mother, and the mother of an illegitimate feeble-minded baby. At that time a

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<sup>1</sup> Bryyan A. Garner (ed.), *Black's Law Dictionary*, (Washington: West Publishing Co., 8<sup>th</sup> ed., 2004).

<sup>2</sup> James A. Inciardi, *Criminal Justice*, (Fort Worth: Harcourt, Inc., Alabama ed., 7<sup>th</sup> ed., 2002), pp. 134-138.

Virginia statute provided that in certain cases the health of the patient and the welfare of society may be promoted by the sterilization of mental defectives. The superintendent of the state colony where Carrie resided could recommend to its board of directors that the sterilization occur. The sterilization was ordered, and although Carrie may have been mentally deficient, she understood what was about to happen to her and filed an appeal.

The country circuit court as well as the Virginia Supreme Court of Appeals both affirmed the sterilization decree, stating that the sterilization law was a “blessing” for “feeble-minded persons” like Carrie Buck. Her lawyers then appealed to the U.S. Supreme Court on the grounds that the substance of the Virginia law represented a denial of due process, that the law was arbitrary, capricious, and unreasonable; and that it was a violation of the Fourteenth Amendment guarantee of equal protection. Chief Justice Oliver Wendell Holmes, Jr., upheld the Virginia statute, making the following comment:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. Three generations of imbeciles are enough.

Carrie Buck was ultimately sterilized, but the philosophy of *Buck v. Bell* has since been subjected to heavy criticism. Nevertheless, the case illustrates the concept of substantive due process and its inherent problems.

In *Skinner v. Oklahoma*, which was a test of the constitutionality of Oklahoma’s Habitual Criminal Sterilization Act in 1942, the Supreme Court ruled differently. Arthur Skinner was to be sterilized because he was a three-time habitual offender. (One of the felonies the prosecutor cited was the theft of three chickens.) The Court struck down the sterilization law because it denied both substantive due process and equal protection, since it applied only to felony offenses likely to be committed by poor people while not considering such felonies as embezzlement, political offenses, and other crimes likely to be committed by more affluent defendants. In

retrospect, the fact that Skinner was about to be sterilized party because he was a chicken thief points to the unfairness and cruelty inherent in the Oklahoma statute.

An interesting area of law that has raised questions of substantive due process involves the rape shield statutes that exist in most jurisdictions in the United States. Rape shield statutes are laws that protect alleged rape victims from questioning in Court (and depositions) about evidence of past sexual experiences that are not relevant to the case and that be prejudicial...

### **Procedural Due Process<sup>3</sup>**

Neither *Buck v. Bell* nor *Skinner v. Oklahoma* had any argument with procedures through which the decision to sterilize had been made. Rather, they were attacking the substance of the laws that demanded sterilization. By contrast, procedural due process is concerned with the notice, hearing, and other procedures that are required before the life, liberty, or property of a person may be taken by the government. In general, procedural due process requires the following:

1. Notice of the proceedings
2. A hearing
3. Opportunity to present a defense
4. An impartial tribunal
5. An atmosphere of fairness

*United States v. Valdovinos-Valdovinos* represents a good case example involving violation of procedural due process. In fact, the U.S. District Court for the Northern District of California considered the government's conduct so outrageous that the charges had to be dismissed.

In *Valdovinos-Valdovinos*, the Immigration and Naturalization Service (INS) was attempting to stem the flow of illegal immigrants from Mexico. Its major method of doing so was a "cold line," an undercover telephone operation in which agents posing as U.S. employers offered to reimburse immigrants for their smuggling expenses and give them jobs. The INS used the

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<sup>3</sup> *Id.*



operation to advise Mexican nationals still within Mexico that it was appropriate to violate U.S. law. The district court ruled that the procedure was a violation of due process; the operation amounted to “the generation by police of new crimes merely for the sake of pressing criminal charges.” As such, it constituted entrapment.

Since the 1960s, when questions concerning the procedural rights of criminal defendants came under closer and more frequent scrutiny by the Supreme Court, the due process clauses of the Fifth and Fourteenth Amendments have been clarified and extended. The Court’s decisions have had a significant impact on the processing of defendants and offenders through the criminal justice system—from arrest to trial and from sentencing through corrections...

#### **The Nature and Development of Criminal Law<sup>4</sup>**

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The list of crimes (in the sense of wrongdoing punished by the community) in early law was extremely short, and included as major offenses witchcraft and incest (Diamond, 1950). For offences such as homicide, wounding, rape, theft, etc, the only remedy in primitive law was self-help. As society developed, self-help was replaced by a system of enforced payment of compensation. The harmed victim, or his or her kin, was entitled to compensation from the wrongdoer. Such offences were thus not perceived as public wrongs affecting society as a whole. Only the victim or his or her kindred had sustained a loss and was entitled to have this loss made good.

The community at large did however have some interest in such forms of wrongdoing. Even in Anglo-Saxon times severe punishments were meted out against offenders who were unwilling or unable to compensate. By the end of the twelfth century it had been realized that such wrongdoing had implications beyond the simple harm sustained by the victim. First the wider community and then the king began to assume responsibility for criminal justice. Those who had broken the “king’s peace” were brought before the kings who were itinerant justices. The charges were laid on behalf of the community by a “grand jury”. Punishments were imposed that

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<sup>4</sup> C. M. V. Clarkson, *Understanding Criminal Law*, (London: Sweet & Maxwell, 2001), pp. 1-2.

did not involve compensation to the victim. In short, the criminal law began to assume one of its most distinctive features, namely, that it is concerned with public wrongs.

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### **The Civil Law<sup>5</sup>**

The civil law tradition is the most pervasive legal tradition in the world. It is found throughout Western Europe, in Latin America, and in parts of Africa and the Far East. Indeed, it was historically the basis of law in socialist countries, and socialist law, while classified separately, has many elements of the civil law remaining. As explained earlier, the civil law is sometimes called Romano-Germanic law because of its historical roots.

The Civil Law is code law. It is like the Ten Commandments of Moses that were published so that all people could know and follow them. Four major codifications of law, each building on the previous one, are involved in the history of the Civil Law. These are the Roman Law of the emperor Justinian, the Canon Law of the medieval Catholic Church, the Napoleonic Code of early nineteenth-century France, and the German Law of the people (*Bürgerliches Gesetzbuch*) that was compiled under Bismarck after the German Empire was established in 1870. In each case, the legal code derived from earlier laws, customs, and informal regulations...

Writing a set of laws is not as simple as it may sound. As in writing constitutions, the framers must be concise, must cover all contingencies, and must not depart radically from accepted custom. The laws must be at once general enough to allow for particular cases to be fit into the scope of legal rules and specific enough to provide adequate guidance for those whose job it is to administer the law. The various incarnations of the Civil Law met these requirements with varying degrees of success.

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<sup>5</sup> Erica Fairchild and Harry R. Dammer, *Comparative Criminal Justice Systems*, (Belmont: Wadsworth, 2<sup>nd</sup> ed., 2001), pp. 47-48.

## **The Common Law<sup>6</sup>**

The common law is more ancient, more complex, and more difficult to deal with than the French or German Civil codes. In Anglo-Saxon countries, its relative peculiarities have shaped not only the legal tradition but also a good part of the legal education, criminal procedure, and general approach to law and government...

## **The Modern History of Common Law<sup>7</sup>**

With the decline in the power of the monarchy and the ascendancy of parliament, the English court system stabilized; judicial independence was taken for granted and no longer considered a problem by the English rules. Even Oliver Cromwell and his puritan followers, who overthrew the Stuart kings and established a commonwealth in England between 1648 and 1660, feared the possible destabilizing effects of sweeping changes in the law. Cromwell thus made no major effort to supersede the common law (Prall, 1966). The English legal system remained a complex system of rules and precedents, interpreted with small shades of meaning and requiring a body of legal experts to deal with it. These legal experts had to serve long apprenticeships to become familiar with the vast number of cases and precedents that would govern their decisions.

## **The Development of Criminal Procedure<sup>8</sup>**

The fact that the common law is based on precedent does not mean that this law is not written down in one place. In the eighteenth century, William Blackstone set out to compile all the laws in effect in England up to that time. His monumental work Blackstone's Commentaries constituted a major step forward in English legal history. Since Blackstone's time, the common law has continued to be compiled and brought up to date in various collections.

For most of its existence, the common law addressed all matters likely to need settlement in court-not only private concerns such as contracts, property disputes, family questions, and torts

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<sup>6</sup> *Ibid.*, p.51.

<sup>7</sup> *Ibid.*, pp. 52.

<sup>8</sup> *Ibid.*, pp. 52-53.

against individuals but also criminal; offenses (Holmes, 1923). But more important than the actual delineation of criminal offenses was the development of common law criminal procedure. Most of the criminal procedure rules that are set forth in the Fourth, Fifth, Sixth, and Eighth Amendments to the U.S. constitution, as well as the rules about bringing the accused before a judge to question his incarceration (habeas corpus), were adapted from common law rules and from parliamentary decrees based on the common law. The concern in U.S. courts with criminal procedure, which often seems excessive to people in civil law countries, has its origin in the English common law criminal procedure.

### **Summary**

Crimes endanger the harmonious socio-economic and political relationship in any society. Maintaining law and order requires the perpetrators of offences to be detected and brought to justice. Otherwise, individuals could take the law into their own hands to revenge. But, the enforcement of the criminal law has to respect the human rights of suspected or accused persons.

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

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

Handling criminal cases is a sensitive matter as it is highly connected with human rights. For example, arrest and investigation limit the right to privacy, movement, bodily integrity, work, etc. The attitude of the public towards crime also leads to psychological embarrassment. Thus, it could lead to socio-economic and psychological problems. Moreover, unlike civil cases, criminal

proceedings could result in deprivation of life, and liberty. Upon conviction, death penalty and imprisonment could be imposed. There could also be confiscation and fine. This loss of property is accompanied by social stigma. The situation is different for civil liability. The latter has predominantly pecuniary effect. So, criminal procedure is very much related with human rights.

Human rights are birth rights of every person. A state has the responsibility to respect and protect them. Limitations are permitted only for the sake of protecting the rights of others and public life in accordance with the law.

Given the value attached to human rights, they have constitutional significance in any society. That is why it is common to find bill of rights in most modern constitutions. They do have the nature of limiting state power. There should not be loss of life, liberty, and property without due process of law. This principle is a manifestation of rule of law. Thus, rule of law imposes upon a state the duty to respect and protect human rights.

Due process of law has two major components. These are substantive and procedural. The former refers to the laws governing rights, duties, and liabilities. The legal provisions set a limit for their application. Their substance can also be subject to dispute. For instance, vague, ambiguous, discriminatory, or unreasonable criminal laws may be challenged on the grounds of their constitutionality. On the other hand, the latter pertains to the means of implementing them. It does not concern with the essence of the laws enforced. Rather the issue surrounds their mode of application. The substantive justice is more of an end. But, the procedural one is mainly a means to achieve that end. Nevertheless, procedural matters may be ends in themselves. Fair trial, the right to be heard, etc are rights to be upheld for their own sake besides their instrumentality in attaining a fair result. In addition, the formulation of substantive rules could affect procedural issues. For example, the penalty provided in the law is taken into account to decide bail or punishment. Thus, the distinction between substantive and procedural justice is elusive.

Criminal procedure and criminal law developed side by side. The primitive society relied on self-help. This was changed to compensating victims through public process. Then there was a shift

in the perception of crimes. They have been viewed as wrongs against the public instead of the person affected. This has made government to take the responsibility to have those in contravention of the criminal law to be judged through the efforts of government institutions. The protection of the rights of a suspect or accused has got attention through time. Thus, the development of criminal procedure rules is inseparable from the growth of substantive criminal law.

Therefore, criminal procedure rules govern the process of detecting, arrest, investigation, adjudication, punishment, and execution. It is connected with the enjoyment of human rights. Consequently, it is prohibited to restrict human rights without due process of law. For the promotion of rule of law, constitutional and other legal limitations have to be respected.

### **Discussion Questions**

1. Distinguish between criminal law and procedure.
2. What is the nexus between criminal procedure and constitutional law?
3. What is due process of law?
4. Compare and contrast criminal procedure and due process of law?
5. "Substantive due process refers to the content or subject matter of a law". Explain
6. "...procedural due process is concerned with the notice, hearing, and other procedures that are required before the life, liberty, or property of a person may be taken by the government". Discuss.
7. Explain the distinction between substantive and procedural due process of law in relation to the pertinent provisions of the FDRE Constitution, the CC, and CPC.
8. Is criminal procedure a means or an end?
9. Describe the role of criminal procedure in the promotion of rule of law.
10. What is the purpose of criminal procedure?
11. What is the significance of studying the history of criminal procedure?
12. Describe the development of criminal procedure and identify the major differences between primitive and modern criminal justice systems.

## 1.2. Sources of Criminal Procedure Rules

### The English System, the Sources of Law<sup>9</sup>

The major current source of English criminal procedure is Acts of parliament, of which some 150 bear upon the subject. Some of these have what might be called in a loose sense ‘constitutional status’, notably Magna Carta 1215, the Bill of Rights Act 1688, and more recently the Human Rights Act 1998, incorporating most of the European Convention on Human Rights. But this special status, in so far as it exists, means no more than that these statutes are well known and particularly revered. They are certainly not entrenched in the sense that some special procedure must be followed to amend or repeal them. Over the years the greater part of Magna Carta has been repealed, some of it quite unceremoniously, and in law there is nothing to prevent parliament repealing the Human Rights Act if it so desires. Indeed, so great was the desire to preserve the supremacy of parliament when the Human Rights Act was passed that Parliament stopped short of giving the court the power to declare invalid other Acts of Parliament if they were found to conflict with it.

Of the other less high-profile statutes, a few, such as the Justice of the Peace Act 1361, are very old, but most are comparatively modern. Some were to codify a particular area of the law, such as juries or police powers, but many are legislative rag-bags containing an assortment of odds and ends, and usually called ‘the criminal justice Act 1987’, or something equally uninformative. At present, the following important areas of criminal procedure are largely regulated by big and important Acts of Parliament: the structure of the courts, and the proceedings each is competent to handle (Criminal Appeal Act 1968, Supreme Court Act 1981, Magistrates’ Courts Act 1980); the appointment and tenure of judges and magistrates (Supreme Court Act 1981, Justices of the Peace Act 1997); the appointment, powers and duties of public prosecutors (Prosecution of Offences Act 1985, Criminal Justice Act 1987); jurors and juries (Juries Act 1974); and the structure of police forces (Police Act 1996, Police Act 1997). Also largely statutory are the powers of the police to investigate offences (Police and Criminal Evidence Act 1984, usually known as PACE), and the investigative powers of the Serious Fraud Office and of Customs and

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<sup>9</sup> Mireille Delmas-Marty and J.R. Spencer(ed.), *European Criminal Procedures*, (Cambridge and New York: Cambridge University Press, Reprinted in 2006), pp. 143-145.

Excise (Criminal Justice Act 1987, Customs and Excise Management Act 1979). The rules governing the pre-trial phase are a mixture of common law and statutory provisions; important Acts of parliament include the Magistrates' Courts Act 1980, the Bail Act 1976, the Criminal Procedure and Investigations Act 1996 and the Indictments Act 1915. The conduct of the trial, including the rules of criminal evidence, is composed of a similar mix; major statutes include the Criminal Evidence Act 1898) and the Youth Justice and Criminal Evidence Act 1999. The rules about sentencing, on the other hand, are almost entirely statutory and were recently consolidated in the Powers of Criminal Courts (Sentencing) Act 2000. The same is true about the rules of appeals; appeals from magistrates' courts are largely governed by the Magistrates' Courts Act 1980, and appeals from the crown court by the Criminal Appeal Act 1968 (as heavily amended by the Criminal Appeal Act 1995).

The source for many of the detailed rules of criminal procedure is delegated legislation, in particular the various sets of court rules: at present these are the Magistrates' Court Rules, the Crown Court Rules and the Criminal Appeal rules, all of which are made by Rules Committees. Other important rule-making powers are exercised by ministers notably the home secretary, who makes, inter alia, the rules about how long persons may be held in custody pending trial. This delegated legislation, which counts as a form of statute law, is supplemented by a range of other official documents that do not have the same high legal status although the courts and the personnel of the criminal justice system are inclined to obey them. These include various codes of practice (in particular those issued for the police under the Police and Criminal Evidence Act 1984), Home Office circulars issued to the police, guidelines issued to prosecutors by the attorney-general, practice directions issued by the senior judiciary to supplement the rules of court, and the official advice issued to judges on the conduct of cases by the Judicial Studies Board.

As a source of English criminal procedure, case law is doubly important. First, as in other countries, many of the major statutory provisions are surrounded by a body of case law that explains and interprets them. Secondly, whole areas of criminal procedure are regulated by case law and nothing else. Examples include the law on abuse of process, and large parts of the law of evidence.



In the absence of a code of criminal procedure the rules of English criminal procedure must sometimes be deduced from historical sources. These include the *History of the Pleas of the Crown* by Sir Matthew Hale (1609-76), *A treatise of the Pleas of the Crown* by William Hawkins (1673-746) and *Pleas of the Crown* by Sir Edward Hyde East (1764-1847). The standard work on the history of English criminal procedure is Sir James Fitzjames Stephen's history of the criminal law of England (1883). In addition to this there is the formidable five-volume history of English criminal law by Sir Leon Radzinowicz (1906-99). Since the 1970s our knowledge of the history of English criminal procedure since the sixteenth century has been extended by the researches of a number of legal historians, notably John Langbein and John Beattie.

## **The French System, Legal Sources<sup>10</sup>**

### **Constitutional Sources**

The 'constitutionalisation' of the law mainly dates back to the *loi constitutionnelle* of 29 October 1974, which allowed not only the president of the Republic, the prime minister or the presidents of the *Assemblée Nationale* and the *Senat* to invoke the *Conseil constitutionnel*, but also sixty deputies or senators.

The main body of constitutionality- '*le bloc de constitutionnalité*. The *conseil constitutionnel* bestowed constitutional value on a number of general principles not expressly included in the Constitution of 4 October 1958: first, those included in the Declaration *des droits de l'homme et du citoyen* of 26 August 1789 (DDHC) and in the introduction to the Constitution of 27 October 1946, then the 'fundamental principles recognized by the laws of the Republic' (principles *fondamentaux reconnus par les lois de la République* (PFLR), referred to as such without being listed more precisely in the introduction to the Constitution of 1946), and finally the 'objectives with constitutional value' (*objectifs de valeur constitutionnelle*), an idea elaborated by the *conseil constitutionnel* in order to ensure the effective implementation of a number of constitutional principles.

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<sup>10</sup> *Ibid.*, pp. 218-221.

The control of constitutionality. The control of constitutionality is a priori, before the law comes in to force. In the case of a judgment of non-conformity, the law voted on by parliament will not be promulgated. After promulgation, referral is impossible; however, the *conseil constitutionnel* has recognized its power to check the constitutionality of a law in force when subsequent legislation is being examined which ‘after its scope of application, complements it, or, even without changing its effect, modifies it in some way’ (see, in particular, judgment no. 99-416 of 23 July 1999). Neither criminal courts, nor administrative or civil courts, have the power to rule on the constitutionality of the laws that they enforce.

### **Legislative Sources<sup>11</sup>**

Only a statute may create rules of criminal procedure (article 34, Constitution). The *code penal* (hereafter CP) of 1810 had undergone no radical changes until its revision by the four laws of 22 July 1992, which came in to force on 1 March 1994. However, the new criminal code did not alter the tripartite classification of offences in to *crimes, delits and contraventions* (articles 111-1 and 111-2, CP), a classification which largely governs how the procedural regulations are organized.

Crimes are offences punished under the law by imprisonment with hard labour or imprisonment for life or for a fixed period of time. Delits are offences punished under the law by imprisonment or a fine of at least E 3,750 (25, 000 FF.). Contraventions are punished by a maximum fine of E 3, 000 (20,000 FF); there are five categories of contravention.

While criminal procedure has not undergone any profound reform since the promulgation of the CPP in 1958, the question of redrafting it has been raised, and in 1988 led to the formation of a committee to reflect on this, the Commission justice *penale et droits de l’homme*, whose two reports on criminal affairs (*La Mise etat des affaires penales*) were published in 1991, although the comprehensive reform proposed by this committee was rejected. But over recent years in France-as in England-criminal procedure has been the countinual subject of legislation making

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<sup>11</sup> *Id.*

partial changes (the laws of 30 December 1985, 9 September 1986, 6 July 1989, 16 December 1992, 4 January and 24 August 1993, 1 February 1994, 8 February 1995, 22 July 1996, 30 December 1996, 17 June 1998, 23 June 1999, 15 June 2000, 15 November 2001 and 4 March 2002.). Many of the changes have been controversial, and some again, as in England have been enacted, only to be repealed before they were brought in to force. (There has already been an adverse reaction to the major reforms of 2000. In particular, it has been asserted that the changes which increased the rights of the defendant during the police investigation have led to an increase in crime. In November 2001 and March 2002, two further laws were passed, intended to reverse in part some of the changes which the 2000 reform produced.)

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The provisions concerning organization of the courts appear in the *code de l'organisation judiciaire* instituted by *decrets* nos. 78-329 and 78-330 of 116 March 1978.

### **The German System, the Sources of Law (Rechtsquellen)<sup>12</sup>**

Germany is a Federal Republic consisting of sixteen *Länder*: these are territorial units endowed with wide powers and their own decision-making bodies. Such a structure leads to a superimposition of the various sources of law: at the top is the *Grundgesetz* (the German Constitution); then Federal law and regulations; and finally the constitutions, the laws and the regulations of the *Länder*.

### **Constitutional Sources<sup>13</sup>**

*Das Grundgesetz* (the German Constitution). The purpose of the *Grundgesetz* of 23 May 1949 (hereafter GG) was to re-establish a State where the rule of law prevailed (*Rechtsstaat*) after the twelve years of the Third Reich, and it draws upon the classical sources of liberal democracy. The fundamental guarantees which it sets out, adapted to the demands of the modern world, thus join the traditional human rights born out of the French Revolution. The impact of these rights in the field of criminal procedure appears particularly strong as they are binding on the legislator,

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<sup>12</sup> *Ibid.*, pp. 292-295.

<sup>13</sup> *Id.*

administration (public prosecutors) and judges ‘in the form of directly applicable law’ (article 1 Para. 3, GG).

Control of constitutionality. The *bundesverfassungsgericht* (Federal constitutional Court), set up under article 92 ff., GG, is situated in Karlsruhe. It is one of the central mechanisms of the legal order as it was designed, on the one hand, as a constitutional court and, on the other, as an instrument of political stability between the various organs of the State.

Its various powers in its capacity as a constitutional court can be deduced from article 93: the Court rules on the conflicting opinions and doubts concerning the compatibility of the systems of public law of the Federation and of the Lander, and on constitutional appeals (*Verfassungsbeschwerde*) made by anyone who believes a fundamental right of his to have been violated by the public authorities. The Court also has the task of final interpretation of the contents. The court also has the task of final interpretation of the contents of the *Grundgesetz*, resolving any litigation engendered by the application of the Constitution.

As the body that exercises control over the constitutional norms case by case, the Court judges the validity of objections on grounds of constitutionality raised before ordinary courts and strives to integrate the rules of international law in to domestic law (article 100, GG) such as the European Convention on Human Rights (*Europäische Menschenrechtskonvention* or EMRK).

### **The Legislative Sources<sup>14</sup>**

The *Strafprozeßordnung* (Code of Criminal Procedure). The *Strafprozeßordnung* (StPo), dating from 1 February 1877 (in force since 1 October 1879), comprises eight books dealing with:

- general dispositions (*allgemeine Vorschriften*) (book one, 1 to 150);
- procedure at first instance (*Verfahren im ersten Rechtszug*) (book two, 151 to 295);
- remedies (*Rechtsmittel*) (book three, 296 to 358);
- reopening of a case which has been finally disposed of (*Wiederaufnahme eines durch rechtskräftiges Urteil abgeschlossenen Verfahrens*) (book four, 359 to 373);

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<sup>14</sup> *Id.*

- the intervention of the victim in the procedure (*Beteiligung des Verletzten am Verfahren*) (book five, 374 to 406);
- special procedures (*Besondere Arten des Verfahrens*) (book six, 407 to 448);
- the implementation of sentences and payment of costs (*Strafvollstreckung und Kosten des Verfahrens*) (book seven, 449 to 473);
- federal prosecution register of criminal investigation (*Länderübergreifendes staatsanwaltliches Verfahrensregister*) (book eight, 474 to 477).

Numerous reforms made it necessary to publish two updating laws of 7 January 1975 and 7 April 1987 (*Neubekanntmachung*), which have themselves since been modified.

The *Gerichtsverfassungsgesetz* (law on judicial organization). The *Gerichtsverfassungsgesetz* (GVG) of 27 January 1877, republished by a law of 9 May 1975, also contains important provisions, which determine the competence of the public prosecutor and of the courts, lay down their internal organization, and set out other special principles relating to judicial activity.

The *Strafgesetzbuch* (Criminal Code). Thirdly, the 1871 *Strafgesetzbuch* (StGB) also contains rules for the criminal procedure. The form in which it was published in 1 January 1975 consists of two parts: one stating the general rules to be applied to all offences (*allgemeiner teil*), the other containing the particular definitions of the various crimes and *Vergehen* (*Besonderer teil*).

In addition, it contains procedural rules, such as the bipartite classification (*Zweiteilung*) of offences into *Verbrechen* (crimes) and *Vergehen* (misdemeanours), from which the partition of competences of the criminal courts ensues. The criterion for classification depends on the principal penalty to which the perpetrator is exposed.

- an offence constitutes a *Vergehen* if it is punishable by a minimum prison sentence of less than one year or a fine (12 II, StGB). Theft, for example, is a *Vergehen*, as it is punishable by a maximum sentence of five years' imprisonment with no minimum penalty being set by law (242, StGB);

- an offence constitutes a *Verbrechen* if it is punishable by a minimum prison sentence of at least one year (12 I, StGB).

As a result of this division, an attempted *Verbrechen* is always punishable, but in the case of an attempted *Vergehen* only when a text so provides. The participation of a lawyer as a defense counsel is obligatory where the offence is classed as a crime (140 I, No, 2, stop).

## **The Constitutionalization of Criminal Procedure<sup>15</sup>**

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### **(b) The Constitution and Criminal Procedure<sup>16</sup>**

To understand how constitutional limitations came to play such a significant role in the legal regulation of the criminal justice process, one must start with the Constitution itself. As originally proposed, the Constitution had only a few provisions relating to the administration of criminal law. But with the addition of the Bill of Rights, designed to ensure that the federal government did not encroach upon the rights of individuals, the criminal justice process took on a special significance in the Constitution.

Of the 27 separate guarantees noted in the first eight Amendments, 15 are aimed specifically at the criminal justice process. The Fourth Amendment guarantees the right of the people to be secure against unreasonable searches and seizures and prohibits the issuance of warrants unless certain conditions are met. The Fifth Amendment requires prosecution by grand jury indictment for all infamous crimes (excepting certain military prosecutions) and prohibits placing a person “twice in jeopardy” or compelling him to be a “witness against himself.” The Sixth Amendment lists several rights that apply “in all criminal prosecutions”- the rights to a speedy trial, to a public trial, to an impartial jury of the state and district in which the crime was committed, to notice of the “nature and cases of the accusation”, to conformation of opposing witnesses, to compulsory process for obtaining favorable witnesses, and to the assistance of counsel. The Eighth Amendment adds prohibitions against requiring excessive bail, imposing excessive fines,

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<sup>15</sup> Jerold H. Israel and Wayne R. LaFave, *Criminal Procedure: Constitutional Limitations in a Nut Shell*, St. Paul, Minn.: West Group, 6<sup>th</sup> ed., 2001), pp. 3-9.

<sup>16</sup> *Id.*

and inflicting cruel and unusual punishment in addition to these fifteen, the Fifth Amendment's due process clause clearly includes the criminal justice process in its general prohibition against the "deprivation of life, liberty or property" (which includes capital sentencing, incarceration, and fines) without "due process of law."

Taken together, the various Bill of Rights provisions offer an obvious potential for extensive constitutional regulation of the criminal justice process. Constitutional provisions, however, are not self-defining. Their ultimate impact depends, in large part, upon how they are interpreted by the judiciary in the course of adjudicating individual cases. Thus, it was not until the Supreme Court came to adopt certain critical interpretations of the constitution's criminal procedure guarantees that the potential for substantial constitutionalisation of the criminal justice process was realized.

### **(c) Constitutionnalisation and Judicial Interpretation<sup>17</sup>**

Two important doctrinal developments were prerequisites to establishing, through Supreme Court rulings, extensive constitutional regulation of the nation's criminal justice procedures. First, the relevant guarantees in the Bill of Rights had to be made applicable in large part to state proceedings. Although federal criminal jurisdiction has been expanding over the years, almost 99% of all criminal prosecutions still are brought in the state systems. For the Constitution to have a major impact upon criminal justice administration, its criminal procedure provisions had to be held applicable to state as well federal proceedings. That application eventually was achieved through the Supreme Court's reading of the Fourteenth Amendment's due process clause. It did not come about, however, until the Warren court adopted the "selective incorporation" doctrine in the 1960s, almost 100 years after the adoption of the Fourteenth Amendment...

The second major doctrinal prerequisite for the extensive constitutionalisation of criminal procedure was adoption of expansive interpretations of individual guarantees. Even though applied to the states, the Bill of Rights guarantees, if interpreted narrowly, would have only a

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<sup>17</sup> *Id.*

limited impact upon the criminal justice process. A narrow construction of each of the guarantees would produce a constitutional regulatory scheme that governs only a small portion of the total process and imposes these limitations fairly restricted in scope and unlikely to have a significant impact upon traditional state and federal criminal justice practices. Consider, for example, the Fifth Amendment clause stating that “no person shall be compelled in any criminal case to be a witness against himself.” Read narrowly, that provision might be said simply to prohibit the state from compelling the defendant to testify in his criminal trial as to any incriminating aspects of his involvement in the offence charged. Such an interpretation would establish constitutionally an important structural element of an accusatorial process, but its significance would be limited to the trial, and even then, it would only restate a prohibition firmly established in state law. On the other hand, an expansive interpretation of the self-incrimination privilege could render the privilege applicable to a wide range of practices occurring through-out the process, and impose limitations that extend far beyond those found in the law of most (and sometimes even all) states. The Supreme Court has, in fact, done exactly that. Reading the privilege to be “as broad as the mischief against which it seeks to guard,” *Counselman v. Hitchcock* (1892), the court has construed the self-incrimination clause to: guarantee to the accused an absolute right not to give any testimony at his trial...; bar procedural restrictions that require an early decision as to the exercise of that right not to testify...; prohibit comment by the prosecutor upon the defendant’s failure to testify...; prohibit the use of compulsory process in other proceedings besides the criminal trial (e.g., grand jury proceedings) to compel a witness to give testimony that could conceivably be used against that witness in a later criminal prosecution...; prohibit admission at trial of statements of the accused obtained by the state through the use of means deemed coercive, such as the threat of removal from public office, *Garrity v. N.J.* (1967); prohibit admission at trial of statements of the accused given in response to custodial interrogation by police unless the accused had been advised of certain rights (including the right to remain silent) and voluntarily waived those rights...; and prohibit the compulsory production of personal documents under some circumstances...

The Supreme Court’s rulings have not given the self-incrimination clause its broadest conceivable interpretation, one that would take the most expansive general policy suggested by the privilege and extend it without regard to limitations suggested by language, history, or



alternative (and narrower) understandings of the privilege's underlying policy. However, the key to characterizing rulings as expensive is not whether the accepted interpretation is as broad as it conceivably could be, but how the court approaches the interpretation of the guarantee. Expensive interpretations start from a presumption of liberal construction. They treat a constitutional guarantee as reflecting an important policy that must be safeguarded against circumvention and carried forward to meet changed conditions, especially growth in governmental authority. By that standard, the Court's interpretation of the self-incrimination privilege can be characterized as expensive. Moreover, that characterization also fits, in general, the court's interpretation of the other Bill of Rights guarantees applicable to the criminal justice process.

The adoption of expansive interpretations of the constitution's criminal procedure guarantees is not a new phenomenon. *Counselman*, supra, held in 1892 that the prohibition against compulsory self-incrimination was not limited to barring prosecution compulsion of defendant's testimony at trial extended to "any proceeding" in which a witness would otherwise be compelled to give testimony that might incriminate him in a subsequent criminal case. Indeed, it is debatable whether any Supreme Court ruling has adopted a broader view of the Fourth Amendment than did *Boyd v. U.S.* (1886)..., also decided before the turn of the century. Until the 1960s, however, Supreme Court opinions adopting strikingly expensive interpretations of criminal procedure guarantees were fairly infrequent. That was changed by the Warren Court. Its 1960s rulings marked the heyday of expansionist interpretation (although not every Warren Court ruling fell in that category). Over the 1970s, 1980s, 1990s, and the early 2000s, fewer and fewer dramatically expansionist rulings were issued. Shifts in the makeup of the Court produced rulings that, in some instances, partially withdrew from the Warren Court's earlier expansionist rulings, but most often, dealt with issues at the margin or edges of the earlier rulings, and refused to extend those rulings. Also, many of the expansionist rulings of the post-Warren Court era simply consisted of accepting and logically extending the core concepts of the Warren Court's expansionist rulings. However, over this period, the Court also branched out on occasion to produce new, expansive interpretations in areas barely touched upon by Warren Court rulings.

The above characterization obviously can be disputed, particularly as to the Rehnquist Court, which many commentators have described as decidedly non-expansionist in approach. That is not surprising since any characterization of a Supreme Court ruling as “expansive” or “narrow” rests, in considerable part, upon the eyes of the beholder. A decision that one observer characterizes as broadly expensive because it goes far beyond previous rulings will be seen by another as simply taking a minor step beyond a very restricted starting point because it falls short of rejecting the conceptual grounding of those earlier rulings and leaves the law with a less than totally sweeping view of the particular guarantee. A decision that some would characterize as a major retreat from expansive past rulings others would characterize as largely consistent with those rulings but simply refusing to extend them at the edges. Still, subjective though it may be, the general consensus is that, as compared to the overall character of judicial rulings prior to the 1960s, the Court’s rulings since then have tended to favor more expansive interpretations...

### **Describing the Fifty-Two Separate Criminal Justice Processes<sup>18</sup>**

#### **(a) State and Federal Authority<sup>19</sup>**

Under the American version of federalism, the federal (i.e., national) government and each of the fifty states has independent authority to enact criminal codes applicable within the territorial reach of its legislative powers. Each also has the authority to enforce those criminal laws through its own criminal justice process- that is, through its own criminal justice agencies and its own laws of criminal procedure. Thus, we have, in many respects, fifty-one different criminal justice processes in this country, one for each of the states and one for the federal government. A fifty-second jurisdiction is provided by congress’ decision to treat separately the district of Columbia, creating for it a separate criminal code and a separate criminal justice process that stands apart from the federal criminal law and process applied in the federal district courts spread throughout the states.

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<sup>18</sup> Wayne R. LaFave *et al*, *Criminal Procedure*, (St. Paul Minn. ; West, a Thompson business, 4<sup>th</sup> ed., 2004), pp. 3-5.

<sup>19</sup> *Id.*

**(b) Federal System That is “One Among Many”<sup>20</sup>**

In many fields in which both federal and state governments have the authority to regulate, the federal enforcement system has come to dominate. Federal law is the primary source of regulation and the vast majority of all enforcement actions are brought within the federal adjudicatory structure (administrative or judicial). A similar dominance is not found in the field of criminal law. Utilizing any of the traditional standards for measuring its portion of the nation’s criminal justice workload, the federal criminal justice system is no more than one among many. Indeed, the federal system is responsible each year for less than 2% of the total number of criminal prosecutions in the United States and less than 4% of all felony prosecutions.

**(c) The Limits of Mandated Uniformity<sup>21</sup>**

The presence of fifty-two separate criminal justice processes would be much less significant if those processes all were subject to a single law that mandated an exclusive, comprehensive regulation for all fifty-two jurisdictions. Contrary to the impression sometimes conveyed by constitutional scholars, the Constitution of the United States is not such a law. This is not to dispute the characterization of federal constitutional law, as interpreted by the Supreme Court, as “our most important source of criminal procedure law.” It is the only source of substantial legal regulation that is applicable to all fifty-two jurisdictions. It locks those fifty-two jurisdictions in to a basic procedural structure that guarantees a community in most of the overarching principles reflected in the fifty-two different processes. The federal constitution, for many aspects of the process, also is the source of specific standards (sometimes quite detailed) that implement those basic principles. Nonetheless ... the regulation imposed by the federal constitution is not sufficiently comprehensive nor exclusive to relegate the law of the individual jurisdiction to a relatively insignificant role in the regulation of its criminal justice process. For many aspects of the process, the law of the individual jurisdiction provides for more of the governing standards than does the federal constitution, and even where the federal constitution is dominant, the law of the individual jurisdiction often still plays a significant role.

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

Another possible source of mandated uniform standards of criminal procedure, applicable in all fifty-two jurisdictions, is congressional legislation. Exactly how far congress may go in adopting criminal procedure rules applicable to the state is uncertain, for congress has used its legislative authority sparingly, concentrating on police activities that have an obvious impact upon interstate commerce (e.g., wiretapping). As a result, standards mandated by federal legislation play a very limited role in shaping the criminal justice processes of the fifty states.

**(d) The Tendency to Individualize<sup>22</sup>**

In many fields where federal law does not mandate a uniform standard, and each state is free to adopt its own laws, there nonetheless is a fair degree of uniformity in the laws of the fifty- states, as all or almost all of the states have adopted a “model” or “uniform” law proposed by a group such as the National Conference of Commissioners on uniform state laws. For several reasons such uniformity has not been achieved in the field of criminal procedure.

Initially, criminal procedural is not a subject as to which there is a natural pressure to achieve uniformity. Unlike areas such as commercial law, the lack of uniformity here is not likely to be a deterrent to the free flow of goods, services, or persons between states or to restrain the full economic or social development of the individuals within the particular; there is little need to provide reciprocity of process between states. Secondly, individuality in each state’s criminal procedure law is encouraged by the diversity from state to state of the administrative environment in which the law is applied. Various elements contribute to that environment, including the demography of the population, the resources available to the process, and the structure of the institutions responsible for the administration of the process (particularly police, prosecutor, and judiciary), and as to each there is considerable variation from state to state. That variation is reflected, in turn, in the criminal justice processes of the states, for that process must be designed to accommodate in its application the state’s particular administrative environment.

Arguably, an even more significant obstacle to gaining substantial uniformity in the law of criminal procedure is the character of the decision that must be made in fashioning a law of criminal procedure. There are few areas, if any, of legislative choice in which the role of

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<sup>22</sup> *Id.*

symbolic politics is more pervasive than criminal justice reform, and that factor can readily lead lawmakers in different approaches in addressing the same basic issue (as well as produce frequent shifts in basic philosophy even in the same jurisdiction).

Still another important factor is the integrated nature of the overall criminal justice process. The process is composed of a series of interlocking parts, with each stage building upon what was done at earlier stages and those earlier stages shaped in part by anticipation of what will occur at later stages. The different components complement and compensate for each other in producing the character of the process as a whole. Thus, in considering whether to adopt a proposed reform that will change the governing standard at one stage of the process; a state lawmaker must consider the relationship of that standard to the operation of other aspects of the process. As a result, lawmakers in two different states, though sharing the same basic philosophy, may reach different conclusions on a proposed reform in light of difference in other of their state's process.

### **The Laws Regulating the Process<sup>23</sup>**

**(a) Varied Sources.** In each jurisdiction, the law governing the criminal justice process will come from several different sources. For cases in the federal system, those sources are (1) the United States Constitution; (2) federal statutes; (3) the Federal Rules of Criminal Procedure; (4) local district court rules; (5) rulings of federal courts based on their common law decisional authority or their supervisory authority over the administration of criminal justice in the federal courts (as contrasted to rulings interpreting the constitution, statutes, or court rules) and (6) the internal regulations of the Department of Justice and other agencies involved in the administration of the federal criminal justice process. At the state level, an even larger group of sources come into play. The legal standards applicable to the process in a state typically will come from nine different sources: (1) the United States Constitution; (2) federal statutes; (3) the state's constitution; (4) the state's statutes; (5) the state's general court rules; (6) local court rules; (7) rulings of the state's courts based on their common law authority or their supervisory authority; (8) the internal administrative standards of those state and local agencies involved in the administration of the process; and (9) local ordinances...

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<sup>23</sup> *Ibid.*, pp. 36-37.

## **Sources of Criminal Procedure Rules in Ethiopia**

Ethiopia has formally adopted a federal system since 1995. From the experiences of other federations, we can observe that the sources of criminal procedure rules in a federation have to be examined taking in to consideration the federal arrangement in place. In a federation, it is the supreme federal constitution that distributes law making, execution, judicial, and financial powers to different levels of government. In a federal system, the primary reference to determine the sources of criminal procedure rules is the federal constitution. As can be observed from the extracts pertaining to other countries, criminal procedure rules are not limited to the constitution. The other sources have to be also examined.

As regards Ethiopia, the FDRE Constitution, regional constitutions, and other relevant laws have to be analysed so as to have a comprehensive view of the sources of criminal procedure rules in the country. Currently, there are twelve distinct administrative systems. These are the federal government, nine regional states, Addis Ababa, and Dire Dawa. Accordingly, the sources of criminal procedure rules for each jurisdiction have to be carefully determined taking in to account the federal Constitution, regional constitutions, charters of the two federal territories, policies and laws issued at federal, regional, or the two cities level, etc. For instance, rules regulating the criminal jurisdiction of social courts may not be the same in the laws of all the twelve jurisdictions.

To sum up, identifying the sources of criminal procedure rules is not an easy task. The matter is more complicated in a federal set up where there are different jurisdictions having the mandate over the running of the criminal justice system. Ethiopia follows a federal system. The sources of criminal procedure rules found at the federal, regional, and the two cities level may not be the same.

### **Summary**

A source of law could refer to the legally competent authorities to enact it or the formal sources into which the provisions of the law are found. They are two sides of the same coin. The legal instruments can not be valid without enactment by the proper government organ. In this section, we have seen the sources of criminal procedure laws of other countries and Ethiopia.

The extracted writings deal with the sources of criminal procedure in Britannia, France, Germany, and the United States, respectively. The materials show that sources of criminal procedure rules are inseparable from the political and legal system of a country. Thus, the sources of criminal procedure laws have to be seen in the context of the political and legal set up of nations.

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

The other major sources of criminal procedure rules are a myriad of statutes enacted by parliament and delegated legislations. The role of court rulings based on common law power and interpretation of legislations can not also be undermined.

In France, the sources of criminal procedure rules are mainly the constitution, legislations and decisions of the constitutional court. As United Kingdom and France are unitary state, the criminal procedure rules tend to be uniform. The situation is quite different in Germany and the United States. These countries have adopted a federal arrangement. In a federation, there are two or more sovereign orders of government sharing legislative and executive power with the federal government. Each tier of government has to exercise the powers delimited in a federal constitution. Accordingly, in a federation, one has to identify the role of the different orders of government over the functioning of the criminal justice system. Thus, the political system has an implication over the nature and application of criminal procedure.

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

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

Unlike the criminal law, the FDRE Constitution is silent about the layer of government having the mandate to enact criminal procedure rules. It might be argued that the level of government responsible for the enforcement of the criminal law should have also the mandate to proclaim criminal procedure rules.

Like other federations, criminal procedure rules are found in regional constitutions. Some regions have also enacted criminal procedure rules. For example, Tigray Regional State has



issued a proclamation empowering social courts to entertain petty offences.<sup>24</sup> Addis Ababa City Administration has also enacted a similar proclamation.<sup>25</sup>

At the federal level, the sources of criminal procedure rules are the FDRE constitution, federal legislations, sentencing guideline to be enacted by the Federal Supreme Court, Federal Supreme Court cassation division decisions, criminal justice and prosecution policies to be enacted, etc. At state level, besides the federal sources mentioned, the sources include regional constitutions, policies and legislations.

To sum up, the sources of criminal procedure principles and rules have to be seen the overall political, constitutional, and legal system of a country. In every nation, the constitution is the first legal document to be referred to. In many countries, there has been a trend of constitutionalisation of criminal procedure rules. Legislations also play a crucial role. The statutory sources of criminal procedure rules come next to constitutional criminal procedure rules. There may also be case laws. These are dependent upon the legal tradition of a state. In a federal set up, there is a proliferation of criminal procedure rules due to the presence of two or more orders of government. There may also be regional constitutions governing the criminal justice system. The situation found in Ethiopia has to be viewed from these perspectives.

### **Discussion Questions**

1. What is the value of analyzing the sources of criminal procedure principles and rules?
2. Compare and contrast the sources of criminal procedure rules in England, France, Germany, and the United States.
3. Distinguish between constitutional and statutory sources of criminal procedure rules.
4. What is the implication of constitutionalisation of criminal procedure rules?
5. How does the political, constitutional, and legal system of a country affect the sources of criminal procedure rules?
6. Discuss the constitutional and statutory sources of criminal procedure in the Ethiopian federal set up focusing on the available twelve jurisdictions.

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<sup>24</sup> See A Proclamation Enacted to Establish Social Courts in Tigray Region, Proclamation No. 14/1995(as amended).

<sup>25</sup> See Definition of the Organization and Procedures of the Addis Ababa City Government Qebele Social Courts Proclamation No. 12/2003.

7. What is the role of the federal government and the regions in the enforcement of the criminal law?
8. In Ethiopia, do regions have the constitutional mandate to enact criminal procedure rules?
9. Are the criminal procedure rules enacted by the Tigray Regional State and Addis Ababa City Administration constitutional?
10. What is the impact of the inclusion of criminal procedure rules in the FDRE Constitution and regional constitutions upon the federal and regional courts to interpret and apply them?

### **1.3. Models of Criminal Justice Systems: the ‘Due Process’ and the ‘Crime Control’ Models**

#### **Models of Criminal Justice<sup>26</sup>**

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

#### **The Due Process Model<sup>27</sup>**

In the 1960s, **Warren Court**-the Supreme Court under the leadership of Chief Justice Earl Warren- announced a large number of decisions that were in accord with the **due process model**

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<sup>26</sup> James A. Inciardi, *Supra* note 2, p. 13.

<sup>27</sup> *Id.*

of the criminal justice system. This model stresses the possibility of error in the stages leading to trial. It therefore emphasizes the need to protect procedural rights even if this prevents the legal system from operating with maximum efficiency. Although no model can possibly describe reality in a completely satisfactory manner, the Warren Court's decisions in the area of criminal law applied a relatively strict version of the due process model to the justice process. As mentioned earlier, one provision after another of the Bill of Rights was incorporated in to the due process clause of the Fourteenth Amendment, thereby obliging the states to grant criminal defendants many of the constitutional safeguards that were already routinely accorded to those accused of federal crimes.

### **The Crime Control Model<sup>28</sup>**

Whereas the Warren Court clearly was attuned to the due process model of criminal justice, the **Burger Court** –the Supreme Court under the leadership of Chief Justice Warren Burger–appeared to support an alternative model of the legal process–the **crime control model**. This model emphasizes efficiency and is based on the view that the most important function of the criminal process is repression of criminal conduct. Proponents of this model put a premium on speed and finally, and can not understand why obviously guilty defendants should go free simply because of errors by police or court personnel.

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### **Models of Criminal Justice Systems<sup>29</sup>**

In order to judge the effectiveness of a criminal justice system (or anything else for that matter), you need first to know what that system sets out to do. The academic Herbert Packer {1968} has identified two quite different potential aims for criminal justice systems: the “due process” model; and “crime control” model. The former gives priority to fairness of procedure and to protecting the innocent from wrongful conviction, accepting that a high level of protection for suspects makes it more difficult to convict the guilty, and that some guilty people will therefore go free. The latter places most importance on convicting the guilty, taking the risk that occasionally some innocent people will be convicted. Obviously, criminal justice systems tend not to fall completely within one model or the other: most seek to strike a balance between the

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<sup>28</sup> *Ibid.*, p.14.

<sup>29</sup> Catherine Elliot and Frances Quinn, *English Legal System*, (England: Pearson Education Limited, 6<sup>th</sup> ed., 2005), p. 338.

two. This is not always easy: imagine for a moment that you are put in charge of our criminal justice system, and you have to decide the balance at which it should aim. How many innocent people do you believe it is acceptable to convict? Bear in mind that if you answer “none”, the chances are that protections against this may have to be so strong that very few guilty people will be convicted either. Would it be acceptable for 10 percent of innocent people to be convicted if that means 50 percent of the guilty were also convicted? If that 10 percent seems totally unacceptable, does it become more reasonable if it means that 90 percent of the guilty are convicted? It is not an easy choice to make.

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

### **Summary**

A criminal justice system has dual purposes. These are protection of the public against criminal harm and suspects or accused against unfair treatment along the process. It is not easy to reconcile these two competing and, at times, conflicting values. A state is expected to strike a balance between the two. But, it is unthinkable to achieve absolute balance. The balance could tilt towards one over the other. Consequently, depending upon the approach of the state towards the two interests, two models of criminal justice system have been developed. These are the due process model and crime control model.

The due process model is distinguished for its emphasis on the avoidance of convicting innocent. It tolerates the escape of criminals for the sake of not harming innocents. This may affect the public interest as offenders are sent free. On the contrary, the policy of the crime control model,

as its name implies, is the prevention of crime. It gives lesser emphasis to the protection of the rights of a suspect or accused. There is a possibility to convict innocent persons since the major target is repressing crime.

Determining the orientation of a jurisdiction is not an easy task. Comprehensive understanding requires the examination of a constitution, statutes, case laws, and law enforcement activities. The approach can not be static amidst the dynamism of socio-economic and political reality. Thus, the policy of the criminal justice system has to be seen in light of the overall arrangement and operation of the justice system.

### **Discussion Questions**

1. Explain the due process and crime control models.
2. “Obviously, criminal justice systems tend not to fall completely within one model or the other: most seek to strike a balance between the two.” Discuss.
3. What is the importance of understanding models of criminal justice systems for the interpretation and application of the criminal law?
4. How can one determine the policy of a criminal justice system?
5. Which model of criminal justice is followed in Ethiopia?

### **1.4. Systems of Criminal Procedure: the Adversarial/Accusatorial, the Inquisitorial, and the Mixed Systems**

#### **Adjudicatory Processes<sup>30</sup>**

The process of adjudication is typically either *adversarial* (also called accusatorial) or *inquisitorial* in nature... Both systems have the finding of truth as a fundamental aim, and each is guided by the principle that the guilty should be punished and the innocent left alone... The differences between the two are in their assumptions about the best way to find the truth.

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<sup>30</sup> Philip L. Reichel, *Comparative Criminal Justice Systems: A Topical Approach*, (Upper Saddle River: Pearson Education Inc., 4<sup>th</sup> ed., 2005), pp. 166-167.

The adversarial system is often considered the successor to the private vengeance. As societies evolve, the power to initiate action first lies with the wronged person (the accuser). That power eventually extends to relatives of the “victim,” then to all members of the person’s group, and finally to the government responsible for the well-being of the person. In time, then, the accuser moves from being the individual to being the state (as in *State of Texas v. Jones*). The setting for the accusation is before an impartial official serving as referee (judge). Because the disputing parties (the state and the accused) behave in a manner similar to a contest, they are considered adversaries.

The inquisitorial process also shows societal evolution but along a different path. Here, the wronged person is eliminated as a private accuser and replaced with a public official. Unlike the adversarial process, the inquisitorial process does not keep the public official in the role of accuser. Instead of accusation, there is now, investigation. Because the parties are not engaged in a contest, a referee is not necessary. Instead, the impartial official (judge) serves as an inquisitor actively seeking to determine what transpired.

In general terms, the common legal tradition uses the adversarial process, whereas the civil legal tradition follows one of inquisition. Because of its civil roots, the socialist tradition also exemplifies the inquisitorial process. The Islamic legal tradition offers a unique combination relying on the private accusation in an inquisitorial-type setting.

### **The Adversarial System<sup>31</sup>**

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

The analogy to a game is not inappropriate when analogy to a game is not inappropriate when describing an adversary system. Not only is the accused not obligated to cooperate with the

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<sup>31</sup> Erica Fairchild and Harry R. Dammer, *Supra* note 5, pp. 140-142.

government in a case, but the government may fail to disclose crucial elements of its case against the accused. This does not mean that the government has the right to ignore or suppress evidence that would help the other side in the case-only the accused has that right. But it does mean that the prosecutor, who represents the government, is expected to devote his or her efforts to providing guilt rather than potential innocence once an individual has been indicted and is moving toward trial.

Another way to understand the adversarial system is to compare it to its philosophical opposite-the nonadversarial or inquisitorial system. Advocates of the adversarial systems of justice believe that the competition between the two parties is the best process for obtaining truth. Advocates of the nonadversarial system, which we will discuss later, believe that judicial control of the investigative process is the best way to uncover the truth. These fundamental beliefs create the differences in the role of witnesses, attorneys, and judges found in the common and civil law systems...

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

There is concern that correct criminal procedure has become so extreme that predatory criminals who learn to manipulate the rules of the system are likely to win the game despite their obvious guilt. Such criticism often does not take in to consideration mitigating factors that counteract excessive manipulation of criminal procedure. In the first place, a vast majority of cases that occur in common law countries are settled through guilty pleas rather than through court trials. Students of criminal justice in the United States are well aware of the importance of plea bargaining and sentence bargaining in the settlement of criminal cases. In these cases, the accused agrees to plead guilty in return for various concessions, such as a lesser charge or a

reduced sentence. On an aggregate basis, it is estimated that over 90 percent of criminal cases are settled through plea bargains in the United States.

In common law jurisprudence, a prosecutor has the obligation not to accept a guilty plea if there is no evidence to support it. However, once a guilty plea is accepted and made before a judge, no further trial is held.

America's overt, and by now legitimized, plea bargaining seems unique in modern legal systems. Nevertheless, we find that most cases in other common law countries are also settled through guilty pleas, despite the claims of legal system personnel that no plea bargaining exists. For example, in a study of the lower criminal courts in Sheffield, England, it was found that over 80 percent of cases were settled through guilty pleas...

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

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



## **The Inquisitorial System<sup>32</sup>**

U.S. Supreme Court Justice Warren Burger once remarked that “if he were innocent, he would prefer to be tried by a civil law court, but...if he were guilty, he would prefer to be tried by a common law court” (Burger, 1968). This remark is in some ways an indictment of the Common Law procedure in its suggestion that it is less likely than the civil law procedure to arrive at the truth of a case. We can weigh the validity of this statement as we examine some of the details of civil law procedure.

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

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

In modern civil law systems, the inquisitorial system refers not to any legacy of the inquisition but to the extensive pretrial investigation and interrogations that are designed to ensure that no innocent person is brought to trial. Even to this extent, inquisitorial is a misleading term that does not truly describe the rather hybrid procedure that developed in civil law systems, often in emulation of common law procedural rights, during the nineteenth and twentieth centuries.

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<sup>32</sup> *Ibid.*, p.146.

Miryam Damaska (1986, p. 3) describes the inquisitorial process as an “official inquiry” and compares it to the “contest” or “dispute” that characterizes the adversary process.

Many countries of the world can be classified as having inquisitorial systems, including our model countries of France, Germany, China, and even, in some respects, Japan. But there are important disparities in criminal procedure among them. France and Germany have long civil law traditions but differ from each other with respect to some aspects of criminal procedure, such as the use of a prosecutor in Germany and an examining magistrate in France. Italy another civil law country, changed much of its pretrial process in 1988, and its system now resembles Common Law procedures in many ways. The Italians call this “process Perry Mason.”

Despite individual variations, certain aspects of criminal procedure in the civil law countries give this procedure a distinctive character. Among these are the relative ease with which procedural rules are adopted and changed and the relative length and importance of the pretrial process in determining the out come of a case.

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

### **The Mixed Court<sup>33</sup>**

The **mixed court** is another variation of criminal procedure that is used primarily in civil law countries but that is also found in Socialist and Common Law legal systems. It is a method of adjudication in which one or more lay judges help the professional judge come to a decision. Lay

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<sup>33</sup> *Ibid.*, p. 151.

judges are typical citizens, not professional legal personnel. They are usually elected (on the local level) or chosen by the government agency responsible for monitoring the courts. The lay judges either work as volunteers a certain number of days each year or serve a term prescribed by law. Their numbers vary depending on the seriousness of the case, the court level, and the laws of the country; they range from at least two to six. In effect, the lay judges replace the jury system, providing the balance between the state acting against the accused and the peers of the accused in considering the interests of justice and the community at large. It is possible in many systems for the lay judges to overrule the professional judge. However, in practice, lay judges often defer to the professional judge's knowledge and rarely muster a majority that overrides the professional judge's vote. Their main function seems to be a restraining one, to keep the judge from acting in an arbitrary or unreasonable manner.

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

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

### **The Convergence of Systems<sup>34</sup>**

Each country develops its own code of criminal procedure, at least partially as a result of its own history, and we would have to scrutinize them all to identify all the difference among them. The classification in to adversarial and inquisitorial systems, however, seems to be increasingly a matter of style and history rather than major differences in procedure. Civil law countries have adopted many of the rules of procedure that protect the accused from arbitrary action by the state. Common law countries have modified the excesses of the adversarial system by allowing for pretrial investigations, by allowing judges to participate in trial if they choose to do so, and by making various arrangements for avoiding trial through the use of plea bargains.

Convergence can also be seen in Islamic and Socialist legal systems. In Saudi Arabia, Islamic law reflects the inquisitorial system through strong cooperation between the judge and the investigator. In addition, the defense attorney is less adversarial than in common law trials. At the same time, Islamic law includes provisions for the right to confront accusers and to remain silent and for the presumption of innocence... And with the changes in the role of judges and in the standard of proof, the Chinese may actually have moved from a strict inquisitorial to a semi-adversarial model...

The end result seems to be a certain homogenization of criminal procedure among the legal traditions. This process was predicted by legal scholar John Merryman, who over thirty years ago wrote of the blending of the inquisitorial and adversarial systems:

*In a sense, it can be said that the evaluation of criminal procedure in the last two centuries in the civil law world has been away from the extremes and abuses of the inquisitorial system, and that the evolution in the common law world during the same period has been away from the abuses and excesses of the accusatorial system.*

The two systems, in other words, are converging from different directions toward roughly equivalent mixed systems of criminal procedure...

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<sup>34</sup> *Ibid.*, p. 161.

### **Contrasting Adversarial and Inquisitorial Processes<sup>35</sup>**

Barton Ingraham developed an intriguing and helpful model of criminal procedure that allows us to compare and contrast procedures in a variety of nations. The application of his model to procedural criminal law resulted in the identification of four areas in which inquisitorial and adversarial procedures differ:

1. The inquisitorial systems emphasize the screening phase of the criminal process with the idea that a careful investigation will determine factual guilt. The adversarial systems emphasize the trial phase, where the idea that complex rules of evidence to produce substantive results will ensure the defendant a fair trial.
2. The adversarial systems are much more likely to restrict the involvement of the judiciary in both the investigatory and adjudicatory process. The direct involvement of the judge in inquisitorial systems contrasts with his or her more indirect involvement in adversarial systems.
3. Because the inquisitorial system assumes that all involved persons are seeking the truth, the defendant is expected (though not required<sup>35</sup>) to be cooperative. That cooperation includes supplying information to investigators and answering questions at trial. The adversarial systems, on the other hand, neither expect nor require the defendant to assist investigators. The burden of proof is no the prosecutor, who assumes that the defendant will maintain silence.
4. The role of the judge in adversarial proceedings is primarily one of referee. The attorneys develop and present their respective cases, and then a jury decides between the two versions of the facts. The court in an inquisitorial system is another investigator with the added power of being able to decide the case. The judges ask most of the questions and develop the facts while the attorneys exist more to argue the interpretation that the court should give those facts...

Ingraham believes that the main objectives of the inquisitorial system are a search for truth and the achievement of procedural justice. Are these objectives different from those of the

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<sup>35</sup> Philip L. Reichel, *Supra* note 30, pp. 171-174.

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

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

### **A Mixed System<sup>36</sup>**

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

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<sup>36</sup> *Ibid.*, pp.174-75.

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

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

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

## **Summary**

Every state wants to apprehend and adjudicate those who violated the criminal law. However, the procedures and processes utilized may not be the same. There are two major criminal procedure systems, i.e., adversarial (accusatorial) and inquisitorial. Their difference lies in the selection of the appropriate procedures and processes for effectively detecting and prosecuting criminals. They are two paths to filter out the guilty from the innocents. The adoption of these systems is influenced by legal tradition. Generally, common law systems follow the accusatorial system and civil law countries adopt the inquisitorial approach.

In the adversarial system, a judge plays the role of a referee in the contest between the prosecution and defense. This is thought to be the ideal system to arrive at a fact. On the contrary, in the inquisitorial system, the judge is supposed to inquire in to the case to arrive at the truth. In the former, the court is passive, whereas in the latter, the judge plays a key role in examining the parties and evidence. Hence, the adversarial approach focuses on the existence of fair process which is considered to have an inbuilt method of finding facts. In the inquisitorial system, the criminal justice system is inclined towards finding the truth.

However, in the actual world, there is no clear cut demarcation between the two systems. It is common to find an element of both in the functioning a criminal justice system. There are also variations in their implementation within jurisdictions following the same system. Some countries have adopted a mixed system combining the features of both. Besides, it is mistaken to conclude that one is apt to favor suspects or accused and the other society. Each system has mechanisms to strike a balance between the interest of individuals and the public. The efficiency and effectiveness of a system has to be seen on a case by case basis.

Ascertaining the system opted by a country is not simple. The laws and practices of the justice sectors have to be explored. For instance, to determine the system of our country, we have to see the laws regulating the justice system and their application.



To sum up, the adversarial and inquisitorial systems are the procedures and processes utilized for adjudicating criminal cases. The former is characterized by limited judicial intervention and the latter is identified for its active involvement of the judiciary.

### **Discussion Questions**

1. What is the distinction between models of criminal justice (due process and crime control models), common law and civil law traditions, and adversarial and inquisitorial systems?
2. Describe the adversarial, inquisitorial, and mixed systems of criminal procedure.
3. Which system of criminal procedure is efficient and effective to detect and adjudicate those who violated the criminal law? Why do you think so?
4. Advocates of the adversarial systems of justice believe that the competition between the two parties is the best process for obtaining truth. Advocates of the nonadversarial system...believe that judicial control of the investigative process is the best way to uncover the truth. Explain.
5. “The classification in to adversarial and inquisitorial systems, however, seems to be increasingly a matter of style and history rather than major differences in procedure”. Discuss.
6. Is the Ethiopian criminal procedure adversarial, inquisitorial, or mixed system? Why?

### **1.5. Structure and Fundamental Principles of Modern Criminal Procedure**

#### **Relevant Laws**

Art 1, 2, 3, 5, 7, 8, 9, 10, 11, 12, UDHR

Art 2, 4, 6, 9, 10, 11, 14, 15, 17, ICCPR

Art 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 28, 37, FDRE Constitution

Art, 2, 4, CC

Office of the Central Attorney General of the Transitional Government of Ethiopia  
Establishment Proclamation No. 39/1993

Definition of Powers and Duties of the Central and Regional Organs of the Transitional  
Government of Ethiopia Proclamation No. 41/1993

Definition of Powers and Duties of the Central and Regional Organs of the Transitional Government of Ethiopia (Amendment) Proclamation No. 73/1993 Attorneys Proclamation No. 74/1993

The Federal Courts Proclamation No. 25/1996 (as amended)

The Re-Establishment and Modernization of Customs Authority Proclamation No. 60/97 (as amended)

The Federal Police Commission Proclamation No. 313/2003

The Federal Prisons Commission Establishment Proclamation No. 365/2003

Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation No. 433/2005

Definition of Powers and Duties of the Executive Organs of the FDRE Proclamation No. 471/2005

Ethiopian Revenues and Customs Authority Establishment Proclamation No. 587/2008

### **The Status of the Public Prosecutor<sup>37</sup>**

The crown prosecution service in England and Wales is comparatively new and its status is comparatively lowly. It has no power to direct the police during the investigation, and for the first fifteen years of its existence-until 2000-crown prosecutors did not even have the right to appear in the crown court to present the case against defendants accused of serious offences. Crown prosecutors are, in law, civil servants, and enjoy no particular immunity or security of tenure.

In continental Europe (as in Scotland) the public prosecutor is a long-established office, the status of which is considerably higher. The public prosecutor has, in principle at least, the right to give the police directions when offences are being investigated and it is he, not they, who decide if someone shall be prosecuted. Public prosecutors routinely appear before the courts to prosecute, and for them to engage a barrister for this task would be unthinkable. In three of the countries in this study- France, Belgium and Italy- public prosecutors enjoy what is called in French le statut de magistrat, which means that for a number of legal purposes they are equated with judges. In France, Italy and Belgium it is customary to refer to both judges and prosecutors

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<sup>37</sup> Mireille Delmas-Marty and J.R. Spencer (ed.), *Supra* note 9, pp.30-31.

to gather as a single group: la magistrature in France and Belgium, in Italy-public prosecutors enjoy what is called in French le statut de magistrat, which means that for a number of legal purposes they are equated with judges. In France, Italy and Belgium it is customary to refer to both judges and prosecutors together as a single group: la magistrature in France and Belgium, in Italy la magistratura . in all three countries both groups are initially recruited and trained together- in France, at a special 'judges-school', the Ecolenationale de la magistrature...

To many English lawyers this looks alarming, because of the risk that there will be too much professional solidarity between judges and prosecutors. These fears are sometimes expressed by critics on the continent as well. However, on the credit side, giving prosecutors le statut do magistrat is thought to help ensure the recruitment of suitable people and to maintain high professional standards and a degree of detachment and impartiality in carrying out the task of prosecuting. the high status of prosecutors in Italy is certainly part of what made it possible to abolish the Italian equivalent of the juge d'instruction and to transfer to the public prosecutor a large part of the corresponding responsibilities and it is also something that makes it politically possible for various people seriously to advocate the same type of reform in France.

### **The Status and Organization of the Police<sup>38</sup>**

In the four continental countries in this study, police forces are differently organized than they are in England, and in several ways their status is different. In England and Wales there are at present forty-three different police forces, all organized and administrated locally. In continental Europe, by contrast, the trend is to organize police forces on a national basis. That said, however, a balance of power is usually maintained in various ways. In France there are two national forces that operate in parallel-the police nationale under the direction of the home office, and the gendarmerie that exists under the wing of the Ministry of Defense and these two main organizations are supplemented by a number of local police forces in the bigger towns. A broadly similar arrangement exists in Italy; in Germany, by contrast, police forces are organized by the different Lander. As regards the status of the police, one difference is that when investigating crimes they operate (at least in theory) under the direction of the public prosecutor. A second difference is that, unlike in England where broadly speaking all police officers have

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<sup>38</sup>*Ibid.*, pp.31-32.

similar powers, the various coercive powers that exist to enable continental policeman to investigate crimes are usually the monopoly of a restricted group within the police who are known in French as la police judiciaire. (this term was difficult to translate in to English, and in what follows la police judiciaire has usually been quietly turned in to ‘the police’.)

### **The Status, Recruitment and Training of Judges<sup>39</sup>**

In England and Wales, as in the rest of the common law world, professional judges are recruited from the ranks of successful legal practitioners (and predominantly from the bar). The consequence is a professional judiciary that is predominantly male and universally middle-aged. In the other countries in this study, as in Europe generally, there is a career judiciary. Those who wish to become judges apply to do so at the end of their law studies at university, and, like those who in England wish to join the civil service, make a formal application, which leads to their sitting an examination, on the basis of which they are selected or rejected. A period of training follows, which in France even takes place at a special residential college, the Ecole nationale de la magistrature. The continental judge then starts in a lowly post, from which he or she hopes to move upwards by a series of regular promotions. One consequence of this is that the continental judiciary is, on average, very much younger than the judiciary in England and Wales. In Germany, for example, you will meet the jurist ‘who enters the judicial profession while still in his twenties and whose first working day might require putting in to prison a defendant who is old enough to be his grandfather.

The different method of recruitment leads to other subtle differences, too. One of these is the different relationship that exists between Bench and Bar. On the whole, English barristers and English judges get on well together, and barristers usually treat the professional Bench with respect-which is not always the case in continental Europe. This sometimes leads continental observes (or at least those whose source of information is Bar) to form a very favorable view about the standing and quality of the English judiciary. But here there is another paradox. The English method of recruiting judges from the ranks of successful middle-aged practitioners is, of course, extremely expensive, and it is probably true that this costly system is only tolerated in England and Wales because (in sharp contrast to the situation in continental Europe) over 90 per

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<sup>39</sup> *Ibid.*, pp. 32-33.

cent of all criminal cases are tried by lay magistrates, who give their services free and who have formal legal training.

### **Legal Status of the Victim<sup>40</sup>**

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

In the other systems in this study, the defendant has (at least in theory) considerably greater rights. In France and in Belgium the victim can make himself a *partie civile*, and as such either institute proceedings or make himself a party to them if the public prosecutor has started them already. In Italy and Germany the victim has second of these rights, but not the first...

Although the position of the victim is theoretically stronger on the continent than in England, it is debatable question how much (if at all) the victim is really better off. Compensation orders are a case in point. In England the victim has no right to ask the court for one, and unlike in continental Europe the sums so awarded are usually small because they are always geared to the defendant's ability to pay. On the other hand, where a French or Belgian court awards a *partie civile* damages against the defendant, it is the *partie civile* who then has the thankless task of trying to make the convicted defendant pay; whereas in England, compensation orders are enforced automatically by the same court machinery as is used to make the defendant pay his fines.

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<sup>40</sup> *Ibid.*, pp. 36-37.

### **The Fundamental Principles of Procedure (England)<sup>41</sup>**

English law has traditionally been rather short on public pronouncements about the fundamental principles of criminal procedure, whether in statutes, case law or books. However, from two of the ancient Acts of parliament that are regarded as having ‘constitutional status’ certain basic principles are usually derived. The first of these is Magna Carta 1215, clause 29, which is as follows:

No freeman shall to be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we pass upon him nor condemn him, unless by the lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

From an early date, this provision has been taken-rightly-as establishing the principle of legality: the notion that citizens are only to be punished to the extent and in the ways that the law allows, and in accordance with due process of law.

This clause also had an important influence on the development of habeas corpus, the procedure under which any person physically detained is entitled to have the legality of his detention examined by a judge. Historically, the main importance of habeas corpus was that it became the vehicle for challenging the arbitrary imprisonment of the king’s potential opponents. Within criminal procedure, it also served an important function at one time as the mechanism by which defendants in ordinary cases could challenge the refusal by the justices of the peace to grant them bail, and excessive periods of pre-trial detention although such challenges are now made by using different legal machinery, and in modern books on English criminal procedure habeas corpus hardly gets a mention.

From clause 29 of Magna Carta it is also possible to derive the principle that cases must be tried within a reasonable time-although the only defendant who has tried to invoke it in this sense in modern times was unsuccessful.

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<sup>41</sup> *Ibid.*, pp. 145-147.

It is widely believed that clause 29 contains a guarantee of trial by jury. Although a string of legal writers have said this, it cannot possibly have been the original intention of the provision, because when Magna Carta was drafted in 1215 trial by jury in criminal cases had not yet come into existence. Furthermore, even if the phrase ‘judgment of his peers’ does refer to jury trial, it gives no absolute guarantee, because what the clause requires is ‘judgment of his peer or the law of the land’. And, of course, clause 29 has not prevented parliament in the past from enacting statutes that limit jury trial.

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

Until the Human Rights Act 1998, for other ‘fundamental principles’ of criminal procedure it was necessary to look at case law: among the basic principles that could be found spelt out there were the presumption of innocence, the principle that trials must take in public, the principle that in contested trials the evidence of key witness must be given orally, the principle that the defendant has the right to challenge the prosecution witnesses by means of cross-examination, and the principle that English criminal procedure is ‘accusatorial’ in the sense that the calling and examination of witnesses at trial is a matter for prosecution and defence, and not the judge.

But now that the Human Rights Act has incorporated the European Convention into UK law, the search for fundamental principles normally takes place within the framework of the Convention. Recent as it is, the impact of this Act on English criminal procedure is already evident. Thus in one recent case, it led the House of Lords to put a narrow construction on a provision of an Act of parliament, which, if interpreted literally, would have reversed the burden of proof in drugs cases. In another case it affirmed the defendant’s right to a ‘fair trial’ under Article 6 of the Convention by restrictively construing a recent Act which, in the interests of victims, sought to limit the questions that defendants could ask complaints during cross-examination in sex cases.

## **Fundamental Principles of Procedure (France)<sup>42</sup>**

The fundamental principles of procedure are mainly principles that presently have constitutional value. Given their heterogeneity which reflects the values in the constitutional source one should distinguish between non-specific principles which may be invoked in the field of criminal law and specific principles that are peculiar to criminal law or to criminal procedure.

The non-specific principles are more numerous: equality in the eyes of the law (... article 2 Constitution); judicial guarantee of individual liberty (article 66, Constitution); security of persons and property... the dignity of the person (preamble to the constitution of 1946); protection of legal rights and of the separation of powers..., the consequence being the right to appeal before the courts of law.

In criminal law, there is also the non-retroactivity of laws...; the principle that punishments should only be imposed where new laws softening the harshness of a rule, and proportionality); the individual nature of penalties...; in criminal procedure, the presumption of innocence...; the right of defence, and its corollary, the adversarial principle...

In 1989 the Commission justice penal et droits de l'homme proposed that a list of basic principles should be placed at the head of a new code of criminal procedure. Although not accepted at the time, the reform of criminal procedure in 2000 added a preliminary article to the beginning of the code de procedure penale, setting out guiding principles:

I - Criminal procedure should be fair and adversarial [contradictoire] and preserve a balance between the rights of the parties. It should guarantee a separation between those authorities responsible for prosecuting and those responsible for judging. Persons who find themselves in a similar situation and prosecuted for the same offences should be judged according to the same rules.

II- The judicial authority ensures that victims are informed and that their rights are respected throughout any criminal process.

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<sup>42</sup> *Ibid.*, pp. 220-222.



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

### **The Fundamental Principles of Procedure (Germany)<sup>43</sup>**

The constitutional norms are imposed on the three branches of government, which are bound by the principle of legality (Gesetzlichkeitsprinzip: article 20, para3, GG).

The Grundgesetz specifies in its First Title, concerning fundamental rights (die Grundrechte), various principles relating to the respect and protection of human rights. They are all derived from the principle of the inviolability of human dignity (article 1, GG) and are directed towards respect for the liberty (article 2, GG) and equality of persons (article 3, GG). These civil liberties, in the sense of the French Declaration des droits de l'homme et du citoyen of 1789, are designed to protect the individual from the State and are therefore binding on all the organs of the State endowed with any portion of sovereignty. The articles following this set out various general rights, but few govern criminal procedure. Attention can nevertheless be drawn to the principles of inviolability of privacy of correspondence (article 10, GG), the inviolability of the home (article 3, GG, regulating searches) or even the restriction of the examination of nationals (article 16, Para. 2 GG).

Furthermore, the Grundgesetz contains certain rules in Title IX concerning judicial organization, which are fundamental rights of a legal character (Justizgrundrechte or grundrechtsgleiche Rechte), such as the principle of the legitimate judge (Grundsatz des gesetzlichen Richters

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<sup>43</sup> *Ibid.*, pp. 295-296.

(article 1101, GG)), the right to a hearing by a judge (article 03, Para. 1, GG; Recht auf rechtliches Gehor), legality (non-retroactivity of offences and principle of clarity and definiteness of a law constituting an offence (article 103, Para. 2, GG: Ruckwirkungsverbot and Bestimmtheitsgebot))... and the necessity of the intervention of a judge for all measures that restrict individual liberty (article 104, GG). In addition there is the prohibition of the death penalty (article 102, GG).

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

### **Summary**

The materials in this section deal with the institutional set up of the criminal justice sectors and fundamental principles of criminal procedure. The main actors in the criminal justice system discussed are the police, prosecution, and courts. The organization of the organs of government is affected by the legal tradition of a country. The role of victims also varies from jurisdiction to jurisdiction.

It is worth considering the approach of different countries towards fundamental principles of criminal procedure. The countries selected, i.e. Britannia, France, and Germany, follow different legal system. But, all of them share the basic principles of criminal procedure. The fundamental criminal procedure principles encountered in a modern criminal justice system include presumption of innocence, freedom from self-incrimination, fair trial, speedy trial, public trial, the right to defence counsel, equality, legality, rule of law, due process of law, etc. These are universal values to be incorporated in any modern criminal justice system. They are also part of the UDHR and ICCPR.

In Ethiopia, the justice sectors are organized at the federal and regional level. The main actors in the criminal justice system are separately organized. But, the police and the prosecution act together on judicial matters of handling criminal cases. They are differentiated for administrative affairs of the institutions like budget, training, salary, discipline, etc. There are also specialized institutions like ethics and anti-corruption and revenues and customs involved in the criminal justice. These institutions are unique as they are accorded both police and prosecution powers.

Our country also shares the fundamental principles of criminal procedure. The FDRE Constitution and other laws have directly or indirectly incorporated these basic principles of modern criminal justice system.

In short, the major institutions that are involved in the criminal justice system include the police, prosecution, and courts. Their organization varies from jurisdiction to jurisdiction. The role of victims can not also be undermined. Irrespective of variation in the legal systems of states, all share fundamental values of criminal procedure. Our country is not also exception to that.

### **Discussion Questions**

1. Compare and contrast the organization of the criminal justice sector in other countries and Ethiopia taking into consideration the institutional changes made after 1991.
2. Identify and discuss the fundamental criminal procedure principles found in the FDRE Constitution and other laws of Ethiopia.

## **1.6. History of Ethiopian Criminal Procedure**

### **Criminal Investigation and Models of Litigation<sup>44</sup>**

General remarks

The body of law that was indigenous to Ethiopia and that marked a significant development in the last decades of this century was the regime of law known in modern legal science as civil and criminal procedure laws. It had been transmitted from generation to generation by oral tradition.

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<sup>44</sup> Abera Jembere, *Legal History of Ethiopia 1434-1974: Some Aspects of Substantive and Procedural Laws*, (Leiden the Netherland: African Studies Center, 1999) , pp. 243-285.

Before the Italian occupation in 1936, it was the procedural law that was comparatively well developed and that had attained a high degree of excellence. It was also the same law that was more popular among the people than the substantive law, a fact that tends to show how much the people of Ethiopia give due respect and importance to the proper administration of justice. Judges and all other persons engaged in the administration of justice were respected and honoured. They were expected to live up to the then standard of justice and aspire to the attainment of this lofty goal.

This procedural law included the law of evidence, which incorporated techniques of investigation and highly sophisticated interrogation and cross-examination procedures, methods of interpretation of law and framing of issues, including principal and side issues (*obiter dictum*). All these fell under the administration of justice process of Ethiopia.

#### Criminal investigation devices

In criminal cases, court proceedings were often preceded by the investigation of the commission of the alleged crime.

There were three types of devices of crime investigation or detection under the old procedural law of Ethiopia. These were known as *leba shay*, *afarsata*, and the investigations undertaken by the “market guards” (*arada zabagna*) and secret guards (*mist’ir zabagna*).

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

Leba Shay was a method employed to identify a thief by using a young boy who had not attained the age of puberty. He was made to drink a beverage made of a certain herb. One end of a strip of a cloth would be tied around the waist of the boy and the chief of leba shay would follow the intoxicated boy wherever he went by holding the other end. Since it was believed that water would neutralize the effect that the herb would have on the boy, great care was taken to keep him away from it. In the house where he collapsed, he would again be made to drink the beverage so that he could identify the particular individual from among the inhabitants of the house. The boy would push aside any one he meets entering the house of the suspected culprit. Any person on

whom he laid his hand would be taken as a suspect and brought before a court of law. At some stage of its development, supplying information to the boy was made a part of the practice. This brought more harm than the service it rendered, for it could easily be manipulated to serve individual interests.

During the reign Empress Zewditu (r. 1916-1930) an investigation for a thief who had stolen a garment from the palace was conducted by leba shay. The chief of leba shay hinted to the intoxicated boy to indicate someone as the person who had stolen the garment. The person thus picked was a well-known personality among the imperial courtiers but he was not on good terms with the chief of leba shay. This incident triggered a lot of controversy among the imperial courtiers, particularly when it was later discovered that the garment had been found after it was offered for sale at the market and that it had been stolen by a maid of the palace. Blaten Geta Matheme-Sellassie recounted that this particular incident revealed the disadvantages of the institution, as a result of which Empress Zewditu abolished leba shay as a technique of criminal investigation.

Indeed leba shay is not by any standard a modern method of criminal investigation. Nonetheless, in the absence of such modern institutions as a police force and crime investigation, the institution of leba shay must, at the time, have served as a psychological deterrent in the minds of potentially dangerous people.

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

The afarsata was a device by which all male members of a community would assemble to identify an offender.

Whenever a person or a group of persons reported to the local chief or other official that cattle had been stolen, that they had been robbed or that one of their relatives had been murdered, the local chief ( *chiqa shum* ) or the village shum (*dug*) would call on all male members of the community in that locality to assemble in a fixed place on a given date. In the assembly, the elders would call upon each person to tell whom he suspected. Every person would declare the identity of the person he suspected or what had been told to him by the “singing

bird”. The person who would testify as to the identity of the criminal under oath was kept secret and referred to as “bird”. The person thus identified as the offender would be prosecuted and convicted before a court without having the chance to confront the witnesses for the prosecution.

In what is now the Gonder region, the person who said that he saw the commission of the crime was known as a “bird” (wof), while the one who testified as having heard it from another person was referred to as a “stone” (dingay). A prosecution would take place against the person who was identified as the offender by the testimony of the “bird” or the “stone”. It was an established practice not to allow anybody to go home until the identity of the criminal was established. As a result, a great deal of harm was done to innocent people. The following comment given by an elderly person on this institution leads to the same conclusion.

In a certain place, there were three well-known thieves who brought about untold harm to the people of the community. Their names were Lemma, Bitwe and Jenber. They lived in the community pretending to be law-abiding citizens. The people tolerated them quite a long time for fear of vengeance. However, in one of the public meetings, a certain witty man declared that in our community, the thief is flourishing (lemma), he better stop it (bitew yettew), if he does not, are we supposed to be kept on jammed in such a meeting every day (jenber bessereqe gutter).

Thus the witty man revealed the names of the thieves by the use of ambiguous phrases.

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

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

In times when modern techniques of criminal investigation were not sufficiently developed or totally absent, techniques such as the afarsata must have had their own reason d’être. After the adoption of modern techniques of investigation and other rules of criminal justice, the decision to maintain such an institution was unwarranted, particularly when it is seen in the light of its negative effects. It was not deemed wise to maintain such an institution because it was not only a psychologically and socio-economically damaging practice, but also an ineffective method of screening criminals from amongst innocent persons. In fact, it allowed a great deal of leeway for abuse and even corruption. Even where it was correctly applied, the very nature of the procedure went against the principle of due process of law. Since the leba shay assembly, by its nature, passed in to decline and since it was, at least by implication, repealed, there was no justification for its continuity after the promulgation of the 1955 Revised Constitution.

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

...

The market guard (arada Zebagna) was very close to what we now refer to as the metropolitan police force. The main responsibilities of the market guard were:

- 1) to maintain peace and order in the city of Addis Ababa,
- 2) to guard at night the shops in the market places (arada), and
- 3) to detain any person who acted contrary to the law and the accepted ways of behavior, and cause such person to appear before the competent municipal court.

The market guard also had the power to arrest persons found committing, or suspected of committing, a crime. After the necessary investigation, the market guard could bring such

persons before the market court. An appeal from the decisions of the market court was taken to the lord mayor of the city.

Where a person instituted a civil action for battery, the market court required a prior payment of the court fee. This was controversial. One person remarked: “what justice where the one injured is required to pay beforehand.”

...

The secret guard (mist'ir zabagna) was a unit of the market guard that was charged with the responsibility of crime prevention.

The secret guard was charged with the crime prevention by moving around public squares, and in hotels and bars where alcohol was served. The inscription “Secret Guard” was engraved on the front of their identity (and “secrecy”), this was done to have a deterring effect on would-be criminals aware of their presence.

The secret guard remained a device of crime prevention and control during the period before 1936. It maintained peace and order, gave due warnings, reprimanded offenders who committed petty offences, and brought before a court of law those persons who were accused of committing serious crimes. In short, the institution can be said to have served as useful technique for the enforcement of enacted laws and customary laws.

#### Public prosecutor and legal Counselor

Not much is known regarding the establishment and development of the institution of public prosecutor in Ethiopia for the earlier period. One may find scattered facts that indicate the existence of a public prosecutor before the eighteenth century, the most vivid account of which was given by James Bruce, the eighteenth-century Scottish traveler who lived in Ethiopia for some years and wrote a book on his quest for the source of the Nile...

... the chief administration of prisons were customarily required to act on behalf of the government as a public prosecutor.



This practice was operative until finally a law establishing the office of public prosecutor was issued in 1943. According to this law, a public prosecutor should possess a sound knowledge of law or should have judicial experience. No person was to be appointed a public prosecutor other than those who had been an advocate, government official, or police officer who has above the rank of assistant inspector of police. According to this law, all prosecutions other than private complaints were to be conducted by a public prosecutor who could plead in any court where a criminal case was instituted.

Before 1943, the initiation of criminal proceedings was to a very large extent left to the aggrieved party or to his representative. It must have been the outcome of this procedure that the framing or handling of issues of fact or law required no special skill. Any person who attended court sessions and was gifted in oratory was considered as person skilled in the art of advocacy. Without the need to fulfil any formality, such a person could practice law both in civil or criminal proceedings. Legal counselors were free to enter in to contractual arrangements with individual litigants to be paid a fixed sum of money or to be given a plot of land in return for the services they rendered. In cases in forma pauperis, any person attending court litigation had the right to offer his legal service, known as voluntarily without payment (*belich'egnannet*), but such offer had to secure the consent of the accused party.

Legal skill was, in those days, acquired through frequent attendance at law courts and practice. As a result, except for complicated cases, every person who satisfied the minimum requirement could argue his case without the need of legal aid. The existence of such *laissez-faire* practice in the legal profession has accentuated the degree of refinement attained in the modes of litigation known as “be interrogated” (*tat'ayyeqser'at*), which is demonstrated below.

#### Features of court proceedings

Litigation, at its initial stage, was a voluntary and spontaneous form of arbitration. A party to a dispute was entitled by law to call upon any passer-by to decide his case. If the parties to the alleged dispute were satisfied by the rulings of the road-side courts, the matter would be considered settled. However, if a decision could not be obtained which was satisfactory to both

parties, they would go to the regular court. Sometimes the person who acted as the road-side judge would take them to the lowest official judge.

Assessors (techewoch) stood next to the judge in order of importance. Some of them were selected by the contending parties, and some by the court from among those people attending court session.

The third typical feature of the judicial process was the production of guarantee (wass). The most frequent forms of guarantees were: (a) yesene-ser'al wass (a guarantee produced by both parties at the time of initiation of a case to ensure respect and fulfillment of all procedural requirements of the court and also to ensure the appearance of the party in question on the day fixed for the hearing); (b) yedagnennet wass (a guarantee produced by both parties at the initial stage of a proceeding for securing the payment of the court fee by the party who lost the case); (c) yewurered wass (a guarantee entered in to at the time of court proceeding to secure the payment of a wager or bet payable by the loser on and at the time of settlement of the issue under consideration; and (d) yebesselle wass, a guarantee to secure the payment of the value claimed in a civil suit, produced at the time of pronouncement of judgement).

The fourth and last element in a legal process involved in this system was the institution known then as nagarafaj (advocate or lawyer) that pertained to a person who usually had a fair knowledge of the law and who had agreed to represent a person before a court.

...

In principle, a witness was not required to tender an oath before his testimony. He would, however, be warned to testify to the truth and only the truth. Failing this, the party against whom the witness testified had the right to request the court to require the witness to tender an oath. This was done during Holy Mass particularly, when the Holy Communion was offered. The witness would close the door of a church or hold the Holy Bible and say:

May he perforate me like his cross,

May he erase me like his picture,

May he chop me down in to pieces like his flesh,

May he spill me like his blood, and  
May he choke me up as his alter is closed,  
If I am not telling the truth.

In case of perjury a penalty, short of death sentence, would be imposed on him in secular courts. In ecclesiastical courts on the other hand, a clergy who is proved swearing falsely was expelled or deposed, according the provisions of the Fetha Negest.

If a witness had already testified out of court, the other party could impeach the credibility of his testimony or might claim that it could not be admissible at all. Consanguineous relationships and other relationships such as godfather, adopted child, godchild and the like were grounds that could be invoked to bar a person from testifying or to discredit his testimony. The party who called the witness would, before asking him to testify, warn him as follows:

One may go to hell after death;  
One may be reduced to bones, laying sick in bed;  
One may also be a permanent inmate of a hospital;  
All the same, one is obliged to tell the truth.

In a similar manner, the defendant would advise the witness to tell the truth and ask him to testify that he did not know what was alleged by the plaintiff.

After the witnesses had given their testimony, the party that felt the most of the witnesses had testified in his favour would pray for judgement to be entered in the following manner: “threshing ground would go to the one who prepared it, judgement should be made in favour of one who had proved right”.

There were instances where each party to the suit would claim that the testimony given stood in his favour. In such a situation, contentions were settled by mere allocations of the testimony to this or that party by persons selected as new observers (irtibe emagne). Later on, however, a rule was made that required the witness who gave the testimony that had become the object of

contention to be recalled to state whom his testimony favoured. His answer would automatically settle the matter.

...

### Appeal

Judicial and administrative functions were entrusted to governors and local chiefs such as grant land-holders (bale-gult), the head of a monastery or church, or the shum (chief) of court of first instance (yesir dagna) on matters of extra- contractual liabilities and matters connected with contract such as those arising out of betrothal or marriage relationships. An appeal against the decision of these courts was lodged to the district court (akaldagna). In regions administered by the officials of the palace (gann-geb), provincial governors (shaleqas) or persons appointed by them as representatives (messlenes) or as local officials (duges) used to have jurisdiction at the district level as a district court.

Appeals from the district court were taken to the governor's (shaleqa-wambar) at the province level. From this it used to go to the provincial governor himself for review. Appeals from the provincial governor's judgement were lodged with the chief justice and his judges. Cases of injury to the human body, arson and homicide were adjudicated by the chief justice and the senior judges (ras wambars) and not by local governors.

The court of the chief justice was therefore the supreme judicial body for all civil and criminal matters save crimes punishable by death. Sentences other than capital punishment passed by the chief justices were executable without the need for confirmation by the emperor. In some exceptional situation, however, the decisions of the chief justice were appealable to the Crown Court. In case where a person had lost a case in the court of the chief justice, and where such a person secured leave to take his case to the Crown Court, a note used to be issued enabling such a person to appear before that court.

Sentences of capital punishment were passed by the emperor only after the assessors gave their opinion in the crown court on every point of the case and the relevant provisions of the Fetha Negest which were read and interpreted by scholars.

An appeal could be based on any substantive or procedural issues, including interlocutory matters. Every complaint lodged against the judgements or interlocutory decisions of a court was examined not only by judges sitting in higher courts, but also by korqwaris (king of assessors) attending the court session.

Appeals made on interlocutory orders were not very frequent. However, whenever one of the parties felt such interlocutory decisions would be prejudicial to the principal issue, he was justified in making an interlocutory appeal. For example, if on a question of title, a ruling was given regarding the mode of proving such a subsidiary issue as the existence of a pre-emptive right in the customary law of a specific ethnic group, which would adversely affect the interest of the complainant unless immediately addressed, then this might be considered as a justifiable ground for lodging an interlocutory appeal.

Another matter that was taken to a higher court, particularly that of the Chief Justice, was the question of interpretation of the law. A dispute over who had the right to prove an allegation, and questions of interpretation of law were submitted to the Chief Justice, who was assisted by the senior judges. For instruction or guidance as to how a set of facts or questions of law was to be interpreted, it was to this court that judges of lower rank had to make reference.

In those days (before the Second World War), everyone had a chance to take his case on appeal as far as the emperor, when s/he was not satisfied with decision of lower courts. Regarding the procedure applicable in the Crown Court, for the earlier period, the Ser'ate Mengist, which is believed to have been an old legal text, provided the following order for assessors to speak:

The first ones to give their options are Shaleqas. Then follow Seyoum Musse. Then the Bejirond of Anbessa Bet and Bejirond of the palace followed suit. Next to them come Lique-Mequas, Balambaras, Fitawrari, Gerazmach, Blaten Geta of first rank, Tsehafi Te'ezaz, Ras Masserea and Basha. The next that would be allowed to speak are Dejzmach of Damot, of gojjam Amhara, Begameder, Semien and after them follows the Nebure-ed of tigray, than comes Akabe Ser'at, Blaten Geta and finally Ras.

Regarding the nature of proceedings of the chilot in the recent past, Blaten Geta Mahteme-Sellassie gave the following account:

Criminal cases brought from various lower courts were read in the presence of the accused. Everyone listens to the case as one would do in Holy Mass. Where a case is sufficiently dealt with, the accused will be asked as to whether he admits or not. If he admitted all that had been said and if the case was instituted by a private complainant, the aggrieved party would plead that the verdict be given.

If the accused requested that his case be further investigated, then everybody attending the court would be allowed to ascertain the truth by way of examination and cross-examination. All persons skilled and experienced in this matter will make use of every bit of their wits and intelligence.

After conviction, the private complainant or official of the government demands that the accused be sentenced to death or to this and that type of punishment, while the accused pleads that his case does not carry such sentence or simply prays for mercy.

After this, the process of the sentencing starts.

Every person attending the court, starting from those who are standing and the shambles, would give his opinion when requested by the usher (agafari). Everybody does according to the practice of his locality. When doing so, one had to turn his face towards the emperor and stand close to the usher (agafari)....

After those who have stood gave their opinion, those who sat do the same starting from the lowest to the highest rank. Then follow the judges (wambars) in their order of rank. The Betwededs and Dejazmaches would give their opinion coming just before the judges of the first division.

Then, the chief justice (afe-negus) gives his opinion. Everybody had to remain standing in the entire process, except for the emperor. Raising his head, the Emperor listens to them all attentively. The scholars having cited the appropriate provision from the Fetha Negast would read and translate and interpret it for the public and would decide whether the accused deserves capital punishment, imprisonment or any other punishment or no penalty at all. If the emperor finds

any problem as to the interpretation of the cited provision, he may adjourn the case for the morrow. If the interpretation suggested is favoured, judgement would immediately be given and when the death sentence is pronounced, one hears the cheering of the family of the victim and the cry of the family of the condemned.

...

Finally, the right to take cases to the crown court was, likewise, provided in the law. Hence, one may realize that a party to a suit had, in those days, as many as five stages of appeal.

The emperors of Ethiopia were reviewing cases in the Crown Court (Zufan Chilot) while seated. However, Emperor Haile Sellassie I, due to a vow he made to God while he was in exile in Britain during the Italian occupation from 1936 to 1941, reviewed cases in the Crown Court (in the period 1941-1974) standing up for hours.

#### Execution of judgments

...

Judgements in minor criminal cases were executed then and there as the decision was made by lower courts. Serious criminal offences such as homicide, injury to the human body and arson, however, after being decided by the competent courts, would be sent to administrative bodies that had the responsibility and power to execute them. Blaten Geta Mahteme-Sellassie gave account of the execution of decisions rendered by the Crown Court as follows:

After the judgement had been rendered, an instruction is issued to the office of the ligaba [Lord Chamberlain] to execute the sentence. The ligaba would, on his part, according to the judgement, order the convicted person to face a firing squad, to be for life or for a given period. Immediately after a sentence of flogging is pronounced, the person's hands and legs would be tied with a rope. Then, he would be pegged in the middle of a field where he would receive utmost forty lashes. The sentence of flogging was executed by an authorised person.

Capital punishment, when confirmed by the emperor, was executed around the area where the present Addis Ababa Qirqos Church is located. Later, it was executed in a building in the neighbourhood of the present ammunition factory.

A convict against whom the death sentence had been passed and confirmed used to be given three days leave to take the traditional medicine against tapeworms (kosso, i.e. the plant *Hagenia abyssinica*). It was within this time that he was required to leave his will and to make a confession, if he wanted to do so. If he was to be killed by a firing squad, one of the relatives of the aggrieved party would be given a rifle to shoot and kill him. If the capital punishment was to be executed by hanging, it was usually done within the prison grounds by an authorized person. It is said that the act of hanging a convicted person used to take place in Addis Ababa on the branches of an oak tree that was found where the present statue of the Emperor Menilik II is located. If the rope broke loose when the convicted person was being hanged, he would be set free. Many years ago a person was sentenced to face a firing squad, accordingly, he was shot at. However, he was only wounded and slowly recovered. The issue was raised as to whether he should be shot again. To cut the Gordian knot, a committee consisting of Ethiopians and foreigners was set up to decide the issue. The Ethiopian members of the committee drew an analogy between the customary usage that forbids the hanging of a convicted person for the second time in cases where he had been saved because the rope broke before he died. The foreigners, on the other hand, held that irrespective of time and other considerations, a judgment once passed should be executed. It was finally decided by the emperor that the opinion that conformed to the traditional practice should prevail.

Places where sentences of imprisonment were executed were prisons known as government prisons (*weheni bet*), provincial prisons (*isir bet*) and gaols (*zebetteya*). Government prisons were established in Addis Abeba and other places and were administrated by a warden (*weheni azazj*). Government prisons were the central government's prisons, whereas provincial prisons were under the control of provincial governors. Gaols (*zebetteyas*) were set up in Addis Abeba and Harar, they had the same function as modern police stations.



Thieves found in the market place in Addis Ababa were detained in the gaol. Many popular couplets (losing all flavour in translation) expressed the common feelings about the goal, e.g., “the market is nice, for eating meat and drinking mead (tej) but what makes one afraid is that one might have to spend a night in gaol.

In the period under discussion, persons accused of committing serious crimes were often kept in prison for undefined periods. Such persons used to petition the court to determine their status. The court had the right to release such prisoners when it deemed it appropriate. Detainees who had no relatives to bring them food were permitted, under guard, to go to the house of their relatives, friends and acquaintances in search for food and drink. Persons who could not pay the agreed amount of blood money (guma) would try to raise the required amount of money by going from village to village accompanied by a guard. To symbolise their distress, they used to tie their hands with iron chains.

Depending on the gravity of the crime committed, a prisoner could be sentenced to three different types of imprisonment. The first one was known as imprisonment by chaining leg and hand (igir teworch). This kind of the penalty was imposed on dangerous criminals such as habitual murderers and bandits. The second imprisonment by shackle (igir beret) was a measure taken against murder, mutilator of human body and persons who committed arson. The third kind of penalty that was taken against common criminals was chaining by the leg (igire mook).

### **Historical Introduction to the Criminal Procedure Code, 1961<sup>45</sup>**

Prior to the 1960 CPC there was no systematic body of legislation in the field. Only a few proclamations enacted early during the post Liberation era were in existence. These showed a strong Anglo-Indian influence, as might be expected from the British influence in the country at that time.

In the early 1950's the Ethiopian government decided to adopt new codes in all major areas of the law, and for that purpose to call in foreign experts to do the drafting in close consultation

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<sup>45</sup> Stanley Z. Fisher, *Ethiopian Criminal Procedure: A Source Book*, (Addis Ababa: Haile Sellassie I University, 1969), pp. ix-xii.

with local Ethiopian and expatriate colleagues. The task of drafting the criminal procedure code fell initially to the eminent scholar of comparative penal law and procedure, Professor Jean Graven of Geneva. He was then also engaged in drafting the Ethiopian Penal Code of 1957. From the documents now available to the present writer, it appears that formal discussions of the CPC began on August 13, 1955-the date of the first process verbal-in a “commission of codification of procedure” presided over by the Minister of Justice. Notes of all commission discussions were taken by M. Philippe Graven, son of Professor Jean Graven and at that time an advisor to the Ministry of Justice. Virtually all of the codification materials were originally drafted in the French language, and French and Amharic were probably the languages of discussion at the commission sessions.

The commission’s first discussions took place until October, 1955; there was then a break until they resumed in July, 1956; they then carried on more or less continuously through February, 1957, when there was another hiatus. They resumed in August, 1958 and occurred through October of that year. Another period of commission inactivity on the project followed; this ended in October, 1960, when final discussions were held. These terminated in commission approval of the draft code, apparently in November, 1960. After submission of the code, parliament amended the draft in some respects; it was promulgated in 1961.

In its deliberations, the commission considered several drafts of a procedure code. Beginning with an initial draft of 241 articles (dated March 1, 1956), Professor Graven had presented to the commission an avant-project of 840 basic articles, and another 174 articles dealing with post-judgment proceedings by December 29, 1956. The next version of the code’s text was apparently the *texte definitive*, drafted by Professor Graven in two instalments, dated December 6, 1958 and July 23, 1959. This version consists of only 159 articles, and resembles the present code in content much more than did the first draft. The *texte definitive* also contains annotations by Professor Graven commenting on the changes he had made in the previous drafts. The last text version available to us is a very slightly modified English translation of the *texte definitive*; it is dated November 9, 1959, and consists of 158 unannotated articles.

The history of the CPC is in a way the story of a gradual discarding of Professor Graven's initial drafting work, although it is clear that his draft did ultimately influence the code's final structure, and in some respects its contents. A major alteration of the draft occurred when, apparently in 1957, the commission decided that the code should not contain the draft's many general provisions dealing with judicial organization, jurisdiction, evidence, etc., but that those provisions, which constituted the first 443 articles, should be shifted to a separate code, the "code judiciaire," which would govern these matters for both civil and criminal matters. During 1957 and 1958, Professor Graven drafted two versions of a code judiciaire, adapting the borrowed 443 articles as its core, but adding others to a grand total of 757 provisions. The commission sat to discuss this code between August 2, 1957 and August 12, 1958, but eventually decided to drop it entirely. Seeing as the Civil Procedure Code appeared in 1965, and an evidence is reportedly now in the drafting stages, it seems doubtful that the code judiciaire will ever be revived.

The second factor which led to the partial abandonment of Professor Graven's draft was the decision, reached apparently in late 1958, to abandon the initial project of an evenly "mixed" continental-common law procedure for an overall design more substantially adversary and thus less continental. A perusal of the commission debates reveals that even from the start there was some difference in views between those commission members who were trained in common law procedure, and those who were trained in continental procedure. This difference was of course to be expected. It may well have contributed to the creativeness with which the drafters approached the task, as they it, of constructing a truly Ethiopian procedure, which would not simply copy either continental or common law procedure, and those who were trained in continental procedure. This difference was of course to be expected. It may well have contributed to the creativeness with which the drafters approached the task, as they saw it, of constructing a truly Ethiopian procedure, which would not simply copy either continental or common law rules. Be that as it may, in October, 1958, the commission agreed to give Professor Graven's avant-project to sir Charles Matcew for examination and proposed amendment. Sir Charles was a distinguished English jurist who had had wide experience in East Africa, Ethiopia (during the post-Liberation period), and Malaya prior to his renewed tenure in Ethiopia as Advisor to the Ministry of Justice. Sir Charles was asked to review Professor Graven's draft with a view to simplifying it, and to making it less "inquisitorial" and more "adversary" than it was. A likely reason for both the

referral to an English lawyer and the instructions given was that the Ethiopian courts had British-influenced, adversary procedures since 1941 at least; substantial alternation in procedure might have caused confusion to Ethiopia's judges and advocates. It is most likely that professor Graven's *texte definitive*, which so differed from the *avant-project*, was strongly, influenced by sir Charles' proposals. Indeed, the November, 1959 English "version" of the *texte definitive* may have been drafted by sir Charles. Professor Graven had stopped attending the CPC commission discussion in August, 1956, and Sir Charles Mathew first began attending those meeting in early February, 1957, playing an important role until the deliberations ended in November, 1960. It appears that Professor Graven submitted his *texte definitif* to the commission from abroad, and that the whole movement towards a more adversary procedure and away from some of the continental institutions of his draft occurred after his departure from the scene.

Knowledge of this background to the code makes it easier to understand the code's structure and sources. The unique organization is essentially based on Prof. Graven's *avant-project*. Many code provisions, particularly those with continental sources, are also derived from his *avant-project*, but they have usually been lifted out of their original context and shortened almost beyond recognition. The Code's sporadic relationship to Malayan, and therefore, ultimately, Indian law, derives from the influence of Sir Charles Mathew's drafts. The overall flavor of the law is adversary, but the adversary system often contains fragments of "inquisitorial" procedure retained from the *avant-project*.

In my opinion, the criminal procedure Code is not very satisfactory. Indeed, it is hardly a "code" at all, if by that term we mean a consistent, integrated body of law whose coverage of the subject is reasonably comprehensive. The law especially suffers from being overly brief [only 224 articles as compared with the Civil Procedure Code's 482 articles], and therefore from being too sparse, with too many crucial gaps. Filling the gaps by the interpretation is made extremely difficult because it is hard to extrapolate legislative intent from a body of law which so lacks cohesiveness. And, of course since no one foreign country's legislation was substantially taken as a model, one cannot often resort to foreign commentaries or jurisprudence for aid, as one can for substantial portions of every other Ethiopian code.

Hopefully, the code will before too long receive a fresh appraisal, with a view towards comprehensive revision. Because the code is still somewhat new and is not yet followed everywhere in the country, there is still a period of “grace” in which to work...

### **Summary**

In Ethiopia, the procedural laws had been developed before the substantive laws. Before the enactment of the CPC, the criminal procedure was guided by traditional rules. There were mechanisms to detect and judge criminals. The methods include *leba shay* and *afersata*. But, these techniques were exposed to abuse. Their value for that stage of development can not be underestimated.

Modern criminal justice has appeared with the enactment of the CPC. The code has been mainly influenced by common law legal system. But, it has also civil law inclination. It is a precise code. As a result it is open to interpretation. It is up to legal scholars and practitioners to interpret it in light of acceptable criminal procedure principles and rules. The lacunas can be observed with the detail discussion of the different subject matters covered in the code. Nevertheless, the code remains a significant input for the development of modern criminal procedure principles and rules in the country.

To sum up, the major trend of criminal procedure in Ethiopia is not quite different from the rest of the world. Modern criminal procedure principles and rules have been brought with the first codified law on the area. The size of the code definitely affects its coverage of requisite criminal procedure principles and rules. The gap has to be filled by lawyers through interpretation.

### **Discussion Questions**

1. Explain the history of Ethiopian criminal procedure in light of the developments in other parts of the world.
2. What are the pros and cons of the traditional Ethiopian criminal justice system?
3. Which legal system influenced the drafting of the CPC?

## **CHAPTER TWO**

### **SETTING JUSTICE IN MOTION: IN TAKE PROCEDURES AND INVESTIGATIVE ACTIVITIES**

The operation of criminal procedure begins with the reception of information about the commission of a crime. The information could reach the police through different channels. These are complaint, accusation and the occurrence of flagrant offences. They serve as condition precedents to set criminal justice in motion. Once the criminal justice is triggered, it is often followed by investigation to substantiate the case with evidence to prove guilt. Arresting the suspect could also be made whenever the law requires or circumstances justify.

The investigation may be made before the arrest of a suspect or after the arrest. The police are supposed to hear witnesses and gather other real evidences like exhibit, finger print, blood test, etc. The gathering of evidence sometimes requires search and seizure. The information source could be either from the suspect or out of the suspect. The process of undertaking the criminal investigation raises the constitutional issues of the right to life, liberty, privacy, against self-incrimination, etc. Their violation also brings to the fore front the problem of remedial measures. The task of this part of the document is exposing the legal principles and rules facilitating the initiation and investigation of crimes as well as protecting the interests of the suspected persons.

#### **2.1. Complaint, Accusation, and Flagrant Offences**

##### **Relevant Laws**

Art 11-21, 50, 150-153,165-166, CPC

Art 101-102, 211-213, 254, 255, 443, 447, 448, CC

Art 2027-2065, Civil Code

##### **The Role of the Victim<sup>46</sup>**

In a predominantly accusatorial system, victims have the option of bringing private prosecutions, but compensation for damage caused to the victim has traditionally been (still largely remains) a

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<sup>46</sup> Mireille Delmas-Marty and J.R. Spencer (ed), *Supra* note 9, pp. 451-453.

matter for the civil courts. However, in England and Wales pecuniary compensation can now be ordered by the judge at the close of criminal proceedings where the victim plays (at most) the part of a mere witness, which is all he does except in cases where he actually brought the prosecution himself. In systems originally inquisitorial by nature, the monopoly over prosecution acquired by the public prosecutor has led to the victim obtaining the status of party to the proceedings. By a fusion of private and public prosecution, the victim has been granted the possibility of asserting his civil interests before the criminal courts, rather than through the civil courts. However, special mention must be made of the situation in Germany where the rather unfavorable status of the victim is coupled with the survival, in a small way, of private prosecution. Similarly, in Germany, civil proceedings can also sometimes be attached to public prosecution, and without even being linked to the request for compensation; although this can happen, compensation claims are almost always brought before the civil courts.

#### Private prosecution

In England and Wales, the right to exercise private prosecution (on which the system of prosecution originally depended) is in practice little used today, but it is still a possible way of starting criminal proceedings and is open to every citizen. In Germany, the private complaint (privatklage)- a relic of the accusatorial system as it existed in ancient German law, and so as an exception to the principle of State monopoly over prosecutions... belongs exclusively to the victim and applies only to minor offences involving interests that are essentially private.

#### In England and Wales

In England and Wales, any citizen has the right to prosecute, though in practice a private prosecution is usually brought by the victim. The right to bring a private prosecution was retained unchanged in the reform establishing the Crown Prosecution Service, despite the fact that the Philips Commission had proposed important changes. The commission thought it was desirable to retain private prosecutions as a counterbalance to prosecution by other authorities, but it was concerned about the prohibitive effect of their cost, which usually falls on the private prosecutor's own pocket. It therefore thought that private prosecutors should be given help from public funds. But the Commission also thought it was necessary to prevent improper or vexatious use of the right to prosecute. With this in mind it recommended that the would be prosecutor

should have to make a preliminary request to the CPS to prosecute, and in the case of a refusal, obtain permission to prosecute privately from the magistrates' court. The government, however, thought that the right to prosecute privately should be left alone - that is, limited by financial constraints but largely free of legal ones. Hence, the Prosecution of Offences Act 1985, which created the CPS, kept the law on private prosecutions as it was before.

Three types of restrictions seek to limit the potentially harmful consequences of private prosecution. First, prosecution for a certain number of offences is subject to the prior consent of the attorney general or the DPP. The attorney general's consent is required for all cases calling into question public policy, national security or foreign relations, and that of the DPP is required for a number of disparate offences which have in common the likelihood of a particularly tricky and sensitive assessment of the interests at stake. Secondly, the DPP has the power to take any proceedings over, and having done so, to drop them [section 6[2] of the POA 1985]. He has the right to discontinue the case up to the start of the trial before the magistrates' court, or up to committal for trial in the crown court [section 23[3] of the POA 1985]. Reasons must be given for 'discontinuing', but it can not be challenged unless it is obvious that it was done dishonestly and unreasonably. If he does not end the case by discontinuing, it still remains open to him to abort the proceedings by offering no evidence at the trial. According to the court of Appeal, the decision of the prosecuting authority is not subject to approval by the judge. The judge may not take the case over and call the witnesses himself because he thinks justice and equity require it. Finally, the attorney general can at any stage of the procedure issue a nolle prosequi, the effect of which will be to end the proceedings. No reasons need be given and there no appeal against his decision. Moreover, a ruling of the Divisional Court in 1994 upheld a decision of the magistrates' court refusing to allow a private prosecution to issue a summons, saying that to start a prosecution where the CPS had already dealt with the case in accordance with the criteria in the code of crown prosecutors might amount to an abuse of process.

In consequence of all this, private prosecution, though theoretically important, has a limited practical impact in the initiating of proceedings in England and Wales.

In Germany



In Germany, in certain cases the victim, through the *Privatklage*, has the initiative in starting a prosecution and the right to prosecute. In such a case he has much the same rights as the public prosecutor... though not his powers of coercion, particularly with respect to the investigation. However, prosecution by *privatklage* is only allowed in respect of a few minor offences, restrictively enumerated... and only when these put a private interest at stake. The *privatklage* is little used, particularly due to the financial cost involved. The thing that is most interesting about this type of procedure is the obligation to engage in a 'conciliation procedure' before the formal complaint is made. Thus, more than half of private complaints end in an amicable agreement.

In addition, a general limit is also imposed on the *privatklage*: where public order is at stake the public prosecutor can either start his own prosecution or take over the one instituted by the *privatklage*... If this happens the victim can assert his interests by joining himself as a party to the public prosecution, using the *Nebenklage* procedure that is described below.

#### Joining private actions to public prosecutions

In France and Belgium, a civil claim can take place either through the initiation of proceedings, or through intervention once the public prosecutor has started a public prosecution. In the German and Italian systems, on the other hand, the legality principle has prevailed. There the public prosecutor is under an obligation to act once he receives a complaint. These systems allow civil claims to be joined to existing public prosecutions, but do not allow prosecutions to be started by private citizens. Prosecutions may be [and if the legal conditions are fulfilled must be] initiated solely on the impetus of the public prosecutor.

#### **The Complaint (*strafantrag*)-Germany<sup>47</sup>**

Any minor offence or offence affecting the privacy of the individual requires a prior complaint... for example, insults, criminal damage and so on. The victim [or his beneficiaries] has three months after discovering the offence to notify the public prosecutor that he wants the offences to be prosecuted. Such a report, unlike an ordinary report, does not merely inform the public prosecutor, but sets the criminal law in motion. If the public prosecutor tries to drop the charges,

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<sup>47</sup> Mireille Delmas-Marty and J.R. Spencer (ed), *Supra* note 9, pp.318-319.

the victim can compel him to prosecute by using the procedure to enforce prosecution [klageerzwingungsverfahren].

### **Prosecuting Criminal Offences Punishable only upon Complaint<sup>48</sup>**

Article 1 of the PC states that “the purpose of criminal law is to ensure order, peace and the security of the state and its inhabitants for the public good.” The code achieves this purpose by laying down prohibitions from acting or act whenever it is in the general interest that one should act or refrain from acting. Whosoever commits a criminal offence by disregarding these prohibitions or obligations is answerable, therefore, to the community. Hence the principle that criminal offences are prosecuted and punished, on behalf of the public, by the state acting as the agent of the citizens. There are offences, however, which do not jeopardize the order, peace and security of the state and its inhabitants but are contrary solely to the rights of a given individual. There are offences of a purely private or personal character, the effect of which does not extend beyond the individual there by injured. In such cases, the state, though it is generally responsible for instituting criminal proceedings whether or not the victim of the offence agrees thereto, will not carry out this duty unless the victim indicates affirmatively that he wants the offender to be prosecuted.

The prior consent of the injured party is required, firstly, because public interests are not at risk as the offence does not endanger the society at large, and secondly, because the institution of proceedings, against the will of the injured party, might often be more harmful to him than the commission of the offence, for it might draw the attention of society to certain facts, such as his spouse’s unfaithfulness or his child’s dishonesty, which are precisely what he does not want known publicly. In these situations, the institution of criminal proceedings is conditional upon a complaint first being made by the individual concerned. Where he makes a request to this effect, the state then acts, not on behalf of the public, but as the custodian of his rights for the purpose of prosecution and punishment insofar as this is possible. This raises two questions: which are these offences so punishable on complaint and what are the effects of such a complaint being made.

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<sup>48</sup> \_\_\_\_\_, ‘Prosecuting Criminal Offences Punishable only upon Private Complaint’, 2 No. 1 J. Eth. Law.

The PC does not specifically set out a complete list of offences punishable only on complaint and Article 217 confines itself to making reference to the special part of the code or any other law defining “offences of a predominantly nature which cannot be prosecuted except upon a formal accusation or request, or a complaint in the strict sense of the term, of the aggrieved party or those claiming under him.”

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

Whenever an offence is committed in violation of any of the above mentioned provisions, no action may be taken except at the initiative of the person qualified under the law of making the necessary complaint. If the offence is a flagrant one, the offender may not, it seems, be arrested without a warrant unless a complaint is first made. Article 21 of the CPC states (1) that, in cases of flagrant or quasi-flagrant offences, proceedings may be instituted without an accusation or

complaint (in the general sense of information) being made, unless the offence is punishable on complaint (in the technical sense of the term) and (2) that the offender may in such cases be arrested without a warrant in accordance with Articles 49 ff. It may be argued that sub-article (2) dealing with arrest is as general as it could be and that had it been intended to prohibit an arrest without a warrant from being made when the flagrant or quasi-flagrant offence is punishable on complaint, this prohibition would have been expressly laid down in sub-article (2) or, like the prohibition from instituting proceedings, in sub-article (1) of the said Article 21. There are however, a number of reasons which militate towards a different construction of this Article. Firstly, it is debatable as to whether the words “in such cases” appearing in sub-article (2) are meant to refer to all cases of flagrant and quasi-flagrant offences or only to those where proceedings may be instituted without an accusation or complaint being made, i.e., all cases where the offence is not punishable on complaint (*stricto sensu*). Secondly, when a flagrant offence is committed, justice is set in motion by the mere fact of the arrest; to allow an arrest without a warrant when the offence is punishable on complaint would be inconsistent with the principle that it is for the injured party to set justice in motion. Thirdly, one of the purposes of an arrest without a warrant in flagrant cases is to prevent public order from being disturbed or further disturbed; yet, he who is about to commit or is committing an offence punishable on complaint does not disturb public order. Finally, to permit an arrest without a warrant when the flagrant or quasi-flagrant offence is punishable on complaint would as often as not result in defeating one of the main purposes of the complaint, that is, to avoid scandal when the injured party does not want certain things known. This is probably the strongest argument against taking the said Article 21 to mean that such an arrest is permitted. It is undesirable, to say the least, that any one whether a member of the police or a private person (see Article 50 of the CPC) should be entitled, for instance, to grab by the neck and bring to the nearest police station, *coram populo*, 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 spouse. For obvious reasons of convenience, the complaint should then be made orally to the police, and not in writing as required by Article 14 of the CPC, so that the arrest, if to be made by the police, may be made forthwith. This oral complaint should thereafter be confirmed in writing.

It must be clear that the sole purpose and effect of the complaint is to enable the public prosecutor to institute proceedings. It may not be held that offences punishable on complaint are offences which may be prosecuted only by the injured party. The second paragraph of Article 217 of the PC states that “this form of ... complaint upon which... the bringing of the public action depends....” The bringing of the public action obviously means the institution of proceedings by the public prosecutor. It is quite true, as will be seen later, that a private prosecution may be instituted with regard to offences punishable on complaint, but this is permissible only after the public prosecutor has found himself unable to carry out his duty to institute proceedings as he is bound by Articles 216 of the PC and 40 of the CPC to do whenever any breach of the law occurs. As noted above, the public prosecutor will act as custodian of the injured party’s rights insofar as is possible; only when this is not possible may the injured party substitute himself for the prosecutor.

Regarding the manner in which offences punishable on complaint are to be prosecuted, the PC and CPC must be read together. Thus, the person or persons against whom an offence punishable on complaint has been committed may set justice in motion by making a complaint in accordance with Article 220 of the PC and 13 ff. of the CPC unless the offender is a juvenile, in which case the provisions of Article 172 of the CPC will apply. The question as to who is qualified to file a complaint is resolved by Articles 218 and 219 of the PC. It must be noted, however, that the general rules contained in the latter Articles are sometimes departed from in the special part of the PC. In cases of adultery for instance, the right of complaint does not pass to the next of kin (Article 619), contrary to what is provided for by Article 218.

The complaint must be made within three months of the injured party’s knowledge of the offence (as a complaint may, according to Article 15 of the CPC be, made against an unknown offender) or that of the offender (Article 220 of the PC), unless the law itself makes it clear that this period of three months begins to run from a different date, as is the case under Articles 599 and 614 (2) of the PC. After a complaint has been made, a police investigation will be held as provided for by Article 22 ff. of the CPC. After considering the findings of the police, the public prosecutor, ordering further investigations in questionable cases, will either close the police investigation file

with an unappealable decision (Article 39 of the CPC) or institute proceedings unless there are reasons why proceeding may not or cannot be instituted (Article 42 of the same code).

When the public prosecutor institutes proceedings with respect to an offence punishable on complaint, the ordinary provisions regarding the charge and the trial will apply (Articles 94 ff. of the CPC) or, where appropriate, those regarding petty offences. (Article 67-170 of the same code).

However, as the public prosecutor prosecutes only because the injured party has expressly requested him to do so, it follows that, where the complainant declares that he no longer wants the offender to be prosecuted, i.e., where he withdraws his complaint as he entitled to do under Article 221 of the PC, the public prosecutor is compelled to withdraw the charge. The accused may not, as a rule, object to such withdrawal and demand that the case should be carried forward.

Where, for reasons which are to be given in writing to the injured party (Article 43 of the CPC) in the manner prescribed by form V in Third Schedule to the said code, the public prosecutor refuses to institute proceedings with respect to an offence punishable on complaint, proceedings may nonetheless be instituted, depending on the reasons upon which this refusal is based. If the public prosecutor refuses to prosecute for any of the reasons set out in Article 42 (1) (b)-(d) of the CPC, his refusal is final (as it is, also, when the offence is not punishable on complaint). But if the prosecutor refuses to institute proceedings because he is of the opinion that there is not sufficient evidence to justify a conviction, that is, he considers in accordance with Article 42 (1) (a) of the CPC that he is unable to prove that the offender is guilty of the offence to which the complaint relates, a remedy is available to the injured party. What then is the nature of this remedy and what are its effects?

The remedy consists of providing the injured party with a certificate specifying the offence to which the refusal relates, stating that public proceedings will not be instituted with regard to such offence, and authorizing the injured party to conduct a private prosecution with respect thereto (Article 44 (1) of the CPC) at his peril and at his own expense (Articles 46 and 221 of the same code). A copy of the certificate, for which there is unfortunately no form in the Third Schedule to

the CPC, will be sent to the court having jurisdiction, enabling it to ascertain, in accordance with Article 150 (2) of the CPC, that the offence charged by the private prosecutor actually is the offence in respect of which he has been authorized, under the certificate, to institute private proceedings.

The question may be asked whether the certificate is to be automatically issued upon the public prosecutor's refusal to prosecute, in which case it ought to be attached to the copy of the decision sent to the injured party in accordance with Article 43 (2) of the CPC, or whether it is issued only at the request of the injured party, in which case this request ought presumably to be made within the same period of time as an appeal under Article 44 (2) of the said code. Although the law makes no specific provision on this point, the first solution should prevail. Since the public prosecutor may, in no case, object to the institution of private proceedings after he has declined to prosecute on the ground of lack of evidence, it is of little importance whether the certificates is issued automatically or on application. This being so, the more convenient practice of giving the certificate immediately, regardless of whether the injured party intends to make use of it, ought to be followed.

Another question is whether, as of the time that he has been issued a certificate, the private complainant may exercise all the rights which the public prosecutor would have in public proceedings. Although a provision like Article 153 (1) of the CPC would induce one to answer in the affirmative, it seems more responsible to consider that certain powers. And particularly the power to select the court have local jurisdiction, are retained by the public prosecutor even though he does not prosecute. If a reasonable doubt arises as to the place where the offence punishable on complaint was committed (see Article 102 of the CPC), it should not be held that the power to direct the place of trial, which is normally exercised by the public prosecutor in accordance with Article 107 of the said code, passes to the private prosecutor, for this might cause confusion. It should rather be held that, in such a case, the public prosecutor must, prior to issuing the certificate, decide as to the court in which the complainant will file his charge, and such court ought, therefore, to be mentioned in the certificate. This interpretation is confirmed by Article 44 (1) of the said code which, as has been seen, compels the public prosecutor to send a copy of the certificate to the court having jurisdiction, which term does not mean only material

jurisdiction but includes personal and local jurisdiction, also. Should several courts have local jurisdiction, the public prosecutor would clearly be unable to comply with this duty if it were not for he and he alone to decide in which of these courts the private prosecution would have to be conducted.

The effect of a certificate having been issued is that the injured party or his representative, as defined in Article 47 of the CPC, may institute proceedings in the court mentioned in the certificate. He will frame a charge, and the case will then proceed in accordance with the provisions of Article 150-153 of the CPC. It will be noted that even in these cases the injured party may apply to be allowed to claim compensation while at the same time conducting the prosecution (Article 154 (3) of the CPC). Unless the accused is a juvenile (Article 155 (1)(a) of the same code).

The above explanations are without prejudice to the provisions of Article 48 of the CPC. According to which a private prosecution may be stayed at any stage thereof at the request of the public prosecutor, if it appears in the course of such prosecution that the accused committed a more serious offence than that for which the certificate had been issued under Article 44 (1) of the said code. An example would be if the certificate were issued with regard to an offence under Article 664 of the PC (unlawful use of the property of another) and it were disclosed during the trial that the accused actually had the intention of obtaining an unlawful enrichment and should, therefore, have been charged with an offence of theft in violation of Article 630 of the PC. In this respect, it must be clear that a stay of proceedings should not be ordered whenever new evidence is produced and the public prosecutor declares that had he known such evidence before, he would not have refused to prosecute on the ground of insufficiency of evidence but would himself have instituted public proceedings. It seems that a stay of proceedings should be ordered only when it appears that the offence actually committed is such that the public prosecutor could, in no case, have issued a certificate under Article 44(1) of the CPC because that offence is not punishable on complaint. Although the said Article 48 does not expressly so provide, one should consider that after a certificate has been issued, the public prosecutor may not interfere in private proceedings unless the case clearly is not one in which only private interests are involved.



## Conclusion

These are the general rules to be followed when an offence is committed that cannot be tried except upon the request of the person whose rights or interests have been affected by the offence. Similar rules will seldom be found in other countries for, although many foreign laws provide for offences punishable on complaint, few of them authorize the institution of private proceedings, as this is deemed contrary to the principle that prosecution and punishment are not an individual but a collective concern and that a person who commits a criminal offence is answerable to the community, regardless of the fact that only one member thereof has been injured.

The system laid down in the CPC is much more restrictive, and rightfully so, than the one which existed previously, according to Section 9 of the Public Prosecutors Proclamation No. 29 of 1942, impliedly repealed by the CPC, when a criminal case was not conducted by the public prosecutor, the court was bound to permit the injured party to conduct the prosecution either personally or by an advocate, irrespective of the nature or seriousness of the offence or of the reasons why the public prosecutor did not prosecute. This provision, which so emphatically stressed the importance of the part traditionally played by the injured party in criminal proceedings, resulted in disregarding the fundamental differences that exist between civil and criminal liability and procedure, as did also the now abolished practice of avoiding certain criminal prosecutions by paying blood money. It is only proper that this difference should be clearly made today in the provisions of the respective penal and criminal procedure codes relating to offences punishable on complaint.

## Summary

The criminal justices process has a beginning and end. The condition precedents for setting the criminal justice in motion are complaint, accusation and flagrant offences. These intake mechanisms are related to the nature of crimes. In many jurisdictions, it is common to find classification of crimes in to felonies, misdemeanors, and contraventions. Some jurisdictions also distinguish between consensual and non-consensual offences.

In Ethiopia, offenses are grouped into crimes and contraventions as well as complaint and accusation. Both distinctions are made based on the gravity of offences. But, the latter is particularly identifiable in relation to the intake system to trigger criminal justice.

Under the Ethiopian criminal justice system, in principle, every crime concerns the public and is the responsibility of law enforcement organs to investigate and prosecute whenever they received information indicating the commission of offenses. However, exceptionally, some crimes are investigated or prosecuted only when the injured person requests criminal proceeding to start. In addition, providing information concerning the commission of a crime is a right. But, in exceptional cases provided in the law, it is a duty to inform the commission of such kind of offenses to the authorities.

Complaint refers to the information presented to law enforcement organs by the injured persons or their legal representatives to set criminal justice in motion. Unless this condition precedent is satisfied, a criminal proceeding cannot ensue. As a result, withdrawal of the complaint is also reserved to the victims or their legal representatives.

The criminal justice is also set in motion whenever there is a flagrant offense. Normally, an offence is said to be flagrant when the perpetrator is red handed while committing the crime. It is easy to apprehend the offender in such cases. Under the new CC, detailed provisions pertaining to complaint have been left. They are made part of the draft Criminal Procedure Code.

To prevent unfounded accusation or complaint against innocent persons, the law has criminalized the act of false denunciation to the authorities about the commission of a crime. It might also result in civil or administrative sanctions in appropriate cases.

Thus, the beginning of the criminal justice process demands complaint, accusation, and flagrant offense. The law has also mechanisms to prevent false accusation and complaint against innocent persons.

## **Discussion Questions**

1. What are the justifications for identifying crimes to be brought only upon complaint?
2. Describe the role of the victim in complaint and accusation.
3. Explain the relevance of alternative dispute resolution mechanisms to give an end to criminal cases.

## **2.2. Summons and Arrest**

### **Relevant Laws**

Art 3, 5, 8, 9, 11, and 12, UDHR

Art 9 and 14, ICCPR

Art 16-21, 26, 32, FDRE Constitution

Art 19-21, 49-59, CPC

Art 420, 423, 425-426, CC

Art 2027-2065, Civil Code

### **Warrant or Summons Issued on the Complaint<sup>49</sup>**

Once the magistrate has determined from the complaint and accompanying affidavits that there is probable cause to believe that an offense has been committed and that an offense has been committed and that the defendant committed it, the magistrate issues either a summons or an arrest warrant for the defendant's appearance in court. If the defendant is already before the court, no summons or warrant is necessary.

Once the summons or warrant is issued, the law enforcement officer must serve the summons or execute the warrant by arresting the defendant and bringing the defendant before a judicial officer as commanded in the warrant...

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<sup>49</sup> John N. Ferdico, *Criminal Procedure for the Criminal Justice Professional*, (Belmont, CA: Wadsworth Group, 8<sup>th</sup> ed., 2002), p. 40.

## Arrest<sup>50</sup>

Where there is good ground for supposing as, for instance, from the gravity of the charge that a summons would not suffice to secure the attendance of an accused person, he should be arrested, in order to bring him before a magistrate. On accusations of indictable offences, a warrant is sometimes obtained only in about ten percent of the arrests for such crimes in order to authorize the arrest. But the cases in which arrest is legally permissible, without any such special authorization, are numerous... In the case of certain crimes, search warrants may be issued. Apart too from specific crimes there is a general right to search arrested persons, and on arrest any property may be taken which is found in the possession of the arrested person and which would form material evidence on the prosecution of any criminal charge against any person. Articles or documents taken must be returned on the conclusion of the charge to which they were material.

### (a) By warrant

Special authorization for arrest always takes in modern times the form of a written warrant. This may be issued in cases of political crime by a secretary of state or any other privy Councillor, or, in any criminal case whatever, by a judge of the queen's Bench Division or (as usually happens) by a justice of the peace. If issued by an ordinary justice of the peace, it formerly could only be executed within the district to which his commission extended, though it could be executed in any other district as soon as it had been 'backed' by any justice commissioned there. But now by virtue of sect. 102 of the Magistrates' Courts Act, 1952, any warrant of arrest, commitment, distress, or search can be executed anywhere in England and Wales by any person to whom it is addressed or any constable acting within his police area.

The execution of a warrant. Whenever, in such a manner, a warrant is executed outside the district of the justice who issued it, the accused is usually taken back to be examined in that district. But it is permissible, in the case of indictable offences, for him to be instead brought before some justice of the place of his arrest (Criminal Justice Act, 1925, s.115). A warrant authorizes the person executing it to arrest the person therein described. When executing the

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<sup>50</sup> J W Cecil Turner, *Kenny's Outlines of Criminal law*, (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 19<sup>th</sup> ed., 2004), pp. 576-580.

warrant, he need not now have it with him, but it must, if demanded, be shown to the person arrested as soon as is practicable. Since the charge is not a civil but a criminal one, he is allowed to break open even the outer doors of a house, if he cannot otherwise seize the person who is to be arrested (e.g., if those in the house will not give him up). If the charge be one of treason, violent felony, or dangerous wounding, he may, moreover, use any degree of force that may be necessary to effect the arrest, or prevent the escape, of the accused; even to the infliction of wounds or death upon him. If, on the other hand, the accused, knowing the authority or intent of the arrester, should kill the arrester, he may be guilty of murder, even if innocent of the charge. But if a constable attempts to arrest offenders illegally (e.g., on a void warrant) they may be guilty only of manslaughter if, in resisting such as arrest, they kill the constable

(b) Without warrant: (1) By a private person

At common law. Even when no warrant has been issued, the common law often permits an arrest to be effected, a permission accorded not only to a constable but even to private persons.

Firstly, at common law a private person, without any warrant, may arrest any person who, in his presence, commits a treason or felony or dangerous wounding. The law does not merely permit, but requires, the citizen to do his best to arrest such a criminal. And as he is thus acting not only by a right but under an imperative duty, he may break outer doors in pursuit of the criminal. And for a treason or a violent felony he may use whatever force is necessary for capturing the offender, as, for instance, shooting at him, if he cannot otherwise be prevented from escaping, so that if the felon's death results, the case will be one of justifiable homicide. Besides this power to arrest, with a view to permanent detention, a person who has actually committed a view to permanent detention, a person who has actually committed a grave crime, every private citizen has also the right to prevent such crimes, by seizing any man who is about to commit a treason or felony or even a breach of the peace, and detaining him temporarily, until the danger is over. Strangely enough what constitutes a 'breach of the peace' has not been authoritatively laid down. But, as it seems to mean a 'breach of the Queen's peace', it should include every crime. It has been held in Scotland that a person who peered into lighted windows after nightfall had properly been found guilty of a breach of the peace.

Secondly, at common law a private person may arrest without warrant any person whom he reasonably suspects of having committed a treason or felony or dangerous wounding, provided that this very crime has been actually committed by someone (whether by the arrested person or not). But in this case, as also in all the statutory ones about to be mentioned, law, though permitting a private person to make an arrest (and so making it a felonious homicide for a guilty man to kill him by resisting it), does not command him to do so, and hence confers no general right to effect it by breaking in to a house or by using blows or other violence.

Statutory powers of arrest. In addition to these two common law powers, modern statutes permit any private person to arrest anyone whom he 'finds' signaling to a smuggling vessel; or committing any offence under the Vagrancy Act, the Larceny Act, 1916, or the Coinage Offences Act, 1936, c.16; or committing by night any indictable offence whatever; or, if the arrest be authorized by the owner of the property concerned, anyone whom he finds committing any offence against the Malicious Damage Act, 1861, the Night Poaching Act, 1828, the Town Police Clauses Act, 1847, or the Metropolitan Police Act, 1839.

(ii) By a police constable

A police constable, even when acting without a warrant, has powers still more extensive than those of a private person. Moreover, as his official position renders it in all these cases a duty for him to make the arrest, it will, in any of them, be a duty, even for an innocent person, to submit to him and not resist arrest. He is entitled to call for the assistance of any able-bodied bystander if necessary, *R. v. Brown* (1841), and it is an offence at common law for a person so called upon to refuse to assist when reasonably able to do so. It is doubtful whether in the case of all crimes for which arrest without warrant is permissible a police officer may enter premises in search of material evidence. In *Thomas v. Sawkins* (1935), it was held that a police officer may enter private premises to prevent a breach of the peace, and per Lord Hewart, C. J., to prevent the commission of any offence that he believes to be imminent or likely to be committed.

## **Fresh Pursuit<sup>51</sup>**

Under the common law and most statutes, law enforcement officer may make a lawful arrest without a warrant beyond the border of their jurisdiction in cases of fresh pursuit. Fresh pursuit means an officer's immediate pursuit of a criminal suspect in to another jurisdiction after the officer has attempted to arrest the suspect in the officer's jurisdiction. The common law allowed a warrantless arrest in fresh pursuit only in felony cases, but to day most states allow warrantless arrests for both felonies and misdemeanors. For a warrantless arrest in fresh pursuit to be legal, all of the following conditions must be met:

- The officer must have authority to arrest for the crime in the first place.
- The pursuit must be of a fleeing criminal attempting to avoid immediate capture.
- The pursuit must begin promptly and be maintained continuously.

The main requirement is that the pursuit be fresh. The pursuit must flow out of the act of attempting to make an arrest and must be a part of the continuous process of the apprehension. The pursuit need not be instantaneous, but it must be made without unreasonable delay or interruption. There should be no side trips or diversions, even for other police business. However, the continuity of pursuit is not legally broken by unavoidable interruptions connected with the act of apprehension, such as eating, sleeping, summoning assistance, or obtaining further information.

Fresh pursuit may lead a law enforcement officer outside the boundaries of his or her state. Ordinarily, an officer has no authority beyond that of a private citizen to make arrests in another state. However, many states have adopted the uniform act on fresh pursuit or similar legislation, which permits law enforcement officers from other states, entering in fresh pursuit, to make an arrest. The uniform fresh pursuit Law of Iowa is typical:

Any member of a duly organized state, country, or municipal law enforcing unit of another state of the United States who enters this state in fresh pursuit, and continuous within this state in such fresh pursuit, of a person in order to arrest the person on the

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<sup>51</sup> John N. Ferdico, *Supra* note 49, pp129-130.

ground that the person is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized state, country, or municipal law enforcing unit of this state, to arrest and hold in custody a person on the ground that the person is believed to have committed a felony in this state. Iowa Code Ann. 806.1.

Because some states extend the privilege to make an arrest in fresh pursuit to out of state officers only on a reciprocal basis, a law enforcement officer must be familiar with not only the statutes in his or her own state but also the fresh pursuit statutes of all neighboring states.

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

#### **“On-scene” Arrests<sup>52</sup>**

A substantial percentage of arrests for a wide variety of crimes are of the “on-scene” variety. These are arrests made during the course of the crime or immediately thereafter either at the place where the crime occurred or in its immediate vicinity. Ordinarily on-scene arrests will be based on the officer's own observation (leading to the alternative description of such arrests as “on view”), although they will sometimes be based on the directive of a witness who has just viewed the crime. For some offenses, on-scene arrests typically are the product of proactive prearrest investigative activities designed to place the police in a position where they will be able to view the crime as it is committed. That usually is the case, for example, with so called

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<sup>52</sup> Wayne R. LaFave *et al*, *Supra* note 18, p. 8.



“victimless” crimes (i.e., crimes which do not involve an interaction with another person, such as possession of a weapon, and crimes which ordinarily involve willing participants, such as vice crimes or narcotics-transfer offenses). For many other offenses, most on scene arrests occur, with basically no patrol responds to an event that calls the crime to his attention (e.g., a victim’s call for assistance, a burglar alarm, or an observation). Thus, one study concluded that 42% of all arrests for nonviolent property crimes (basically theft and burglary) were such on-scene arrests, made within 5 minutes of the commission of the offense.

### **Articles: Some Aspects of Ethiopian Arrest Law: the Eclectic Approach to Codification<sup>53</sup>**

The law of arrest: importance

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

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<sup>53</sup> \_\_\_\_\_, *Articles: Some Aspects of Ethiopian Arrest Law: the Eclectic Approach to Codification*, 3 No. 2 J. Eth. Law.

Thus, for example, Anglo-American system of criminal procedure ordinarily provide two post-arrest, pre-trial “screens” for the arrested accused in serious cases. First, an arrested person will immediately be brought before a court, which after a “preliminary hearing” may order his discharge if upon the evidence the court finds that there is no sufficient ground to believe him guilty of any crime. If at this stage the accused is not “de-selected” out of the criminal process he will either remain in custody or be released on bail until the public prosecutor decides whether or not to institute proceedings against him by framing a charge. This is the second opportunity, now at prosecutor’s discretion, to secure the discharge of an innocent accused before trial. Since the latter screen is administrative rather than judicial, and since in any case it comes in to operation relatively late in the criminal process (a considerable delay may occur between the time of arrest and that of the prosecutor’s decision to frame a charge) the first screen is, from the point of view of an innocent accused, of much greater value.

In the continental systems, too, post arrest-judicial screens play a vital part in serious criminal cases. In France, for example, there is not only a preliminary judicial hearing, to determine whether or not the accused should be committed for trial and on what charge, but a second screening by the “Chambre d’accusation” of the court of Appeals, which must ratify the examining magistrate’s decision to commit.

But, turning to Ethiopian law, we find that it is doubtful whether any post arrest judicial screen exists short of the trial itself. The code is not very clear whether the court before which an accused is brought immediately after his arrest has the power to pass on the grounds for the arrest and to order the discharge of the accused should it find them inadequate; and it is fairly clear that the preliminary inquiry court lacks that power. Thus, whether legal case exists or not, once in custody the innocent accused in Ethiopia possibly has no opportunity to win a discharge at any time prior to the trial itself, should the public prosecutor decide to institute proceedings. In such a case, during the months or possibly years which elapse between arrest and trial an innocent accused ordinarily might have no access to any judicial forum before which he might demonstrate his innocence, or the prosecution be compelled to justify his selection of innocence.

Noting the possible lack in Ethiopian criminal procedure of any post-arrest judicial screen short of the trial itself, the student is led to focus his attention on the initial selection process: how does one become liable to arrest and detention? How do we ensure that only probable offenders are caught up in the process? What safeguards does the law provide to minimize the risk that through inadvertence or excess of zeal on the part of informant, police or judges, the “wrong man” will be taken in to custody, with possibly no opportunity to prove his innocence to a court until the trial hearing some uncomfortable months hence? We will discuss these questions under the following heads: arrest by court warrant, use of the summons, and arrest without warrant.

#### Arrest by court warrant

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

The meaning of these criteria and the method of proving their satisfaction in any particular case are not explained. Nor has the author knowledge of any foreign sources on point, for the language of Article 54 is apparently sui generic in the Code. In the absence of further legislative guidance, then, it is for the courts to decide how best to administer these requirements in keeping with the spirit of the Code and Constitution.

#### The criterion of absolute necessity

How can the court decide whether or not the attendance of a person before it is “absolutely necessary”? We must note at the outset that these words imply a very rigorous test, and in combination with the preceding word “only” clearly suggest that the court is to exercise a screening function; it is not supposed “automatically” to issue warrants to arrest whomever the police suspect of an offence. It is a fair inference that, as a minimum standard, the court must be

satisfied that there is sufficient evidence to believe that the suspected person has probably committed the offence. By requiring the applicant to produce some credible evidence to support that belief, the code has established an impartial judicial check on the weighty power of arrest.

After the court is satisfied that the suspect is a proper target for criminal prosecution, then it becomes necessary for the court to obtain physical jurisdiction and control over him. Once the suspect is before it, the court can take steps to ensure the continued availability of his person to the judicial process: this is accomplished either by keeping him in custody or by granting him conditional liberty on bail. Therefore, in a sense it is “absolutely necessary” that every probable offender against whom criminal proceedings are contemplated appear before the court. But where an investigating police officer applies for a warrant to arrest a person as to whom there is shown no substantial evidence of criminal activity it follows that no prosecution is justified and, therefore, that the presence of that individual before the court is not [absolutely] necessary.

Concededly, this interpretation requires that a somewhat special meaning be given to the phrase, “absolutely necessary.” It is, however, supported by the limitation placed on the power of the police to summon a suspect to appear, that there be “reason to believe” that he has committed an offence. Unless “absolutely necessary” is interpreted in the manner suggested here, we would have the anomalous situation that a suspect could not be requested to appear unless there were substantial evidence indicating his guilt, but he could be brought to the police station by force on the basis of the slightest evidence, or on the basis of no evidence at all.

It remains to consider by what means the applicant might demonstrate the reasonableness of suspecting a particular person to the court. Although on this point too the Code is silent it seems that the application for a warrant could be supported by the submission of various sorts of proofs. Some of these might be: (a) a copy of the accusation or complaint (as recorded under Article 14) ; (b) the presence in court of the party who signed the accusation or complaint, and his availability for questioning by the judge; (c) copies of any other statements obtained from witness during the police investigation (Arts. 24, 30(3)); (d) written statements of the results of any other investigatory activities conducted by police such as searches (Arts. 32, 33) and physical examinations (Art. 34).

“Cannot otherwise be obtained” - The second requirement of Art 54

We have mentioned a second criterion which must be satisfied before the court may issue an arrest warrant: that the presence of the accused before the court cannot be obtained in any other way. The apparent basis of this reluctance to authorize arrest when there is some alternative way to get the accused before the court is that arrest, involving as it does the possible use before, 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 find the accused and bring him to court under supervision; (b) possible embarrassment to an innocent accused in being publicly arrested and escorted by the police; and (c) the possibility of resistance to arrest with attendant injuries to the accused and others. For these reasons the Code prefers that the accused's presence in court be obtained by “polite” means, reserving the use of arrest for those cases where it is the only practicable alternative. The preferred method is for the police to summon the accused “voluntarily” to appear at the police station, a method which has none of the cited disadvantages of arrest.

As a general rule, then, the court may not issue a warrant of arrest unless the accused has already been summoned without success. For, until a summons has been tried it is possible that the accused's attendance in court can “otherwise be obtained” and therefore resort to arrest is forbidden by Art 54. Of course if the accused has already been summoned and has deliberately failed to appear the investigating police officer has the duty to arrest him by applying for an arrest warrant if necessary, and the court should issue it, assuming that “ absolute necessity” has been shown.

There are, however, cases imaginable in which the court would be justified in issuing an arrest warrant even though the summons method had not been tried. If, for example, the applicant could by reliable evidence convince the court that summoning the accused would be completely futile because the latter had already planned or begun to flee the empire, or because receipt of a summons would likely induce him to flee, the court would be justified in ordering arrest because the accused's attendance could not “otherwise be obtained.” But unless such exceptional circumstances are shown, the police should always first proceed by summons.

According to Lord Devlin, “[t] the distinction between the process begun by arrest and that begun by summons is that the latter leaves the accused completely at liberty until he is convicted.” In England, perhaps, but not in Ethiopia. For, although, as we have said, the summons method is free from many of the coercive aspects of arrest, under Ethiopian law it leads just as surely to immediate custody, with perhaps no possibility of discharge before trial. Even assuming the summoned accused’s readiness and ability to convince the police of his absolute innocence of the offence with respect to which he was summoned, the Code does not permit the police to discharge him. Rather, they have the option to release him conditionally on bond or bring him before a court. In this respect, and in all others, response to a summons entails the identical consequences for the accused as does subjection to arrest: the court before which the police take him has no explicit authority to discharge him even if convinced of innocence, and the preliminary inquiry court clearly has none. In other words, summons differs arrest under Ethiopian law only in that it draws one into custody “voluntarily” rather than by force; it is, once the accused arrives at the police station and is detained there involuntarily, transformed in to arrest.

This conclusion, that summons under the code holds practically identical consequences for the accused as does arrest, provokes the question whether the code adequately controls and limits the power to issue summons. We find that in contrast to the practice of other procedural systems, both Anglo- American and continental, where a summons, like an arrest is issued by the courts, in Ethiopia the power is given to the police themselves. The only limitation imposed by Article 25 is that the investigating police officer should have “reason to believe,” that the accused has committed an offence. While that standard is not precise it can at least be said that Article 25 prohibits the summoning of an accused where the evidence is of very questionable reliability- such as anonymous or ambiguous information, hearsay unsustained by factual investigation, etc.

Of course the existence of a criterion and its proper application are two different things, and it may be asked whether it is wise to delegate this power to the police rather than to the courts. The decision whether or not there is sufficient “reason to believe” to justify the issuance of a summons calls for a weighing of the evidence of criminal guilt against the presumption of innocence and the right to freedom. In the hands of the police this delicate discretion, which

entails the same serious consequences for an accused as does the decision to issue a warrant, is likely to be exercised less dispassionately than if left with the judiciary. For, those whose difficult job it is to apprehend criminals are understandably prone to resolve doubts in favour of the government, not the individual.

It is submitted, therefore, that both for the sake of internal consistency and in order to safeguard the rights of citizens the code should be amended so as to transfer the summons power from the police to the courts. If that were done, judges would issue either warrants of arrest or summonses upon application, after reviewing evidence of the accused's criminal conduct and in accordance with the feasibility of obtaining custody of him without the use of force. They, not the police, would decide before issuing a summons whether or not there or not there were "reason to believe" the accused guilty of an offence, just as they now decide before issuing warrants whether or not his presence before the court "is absolutely necessary." The decision as to which form of process to use in a particular case would never arise until after a judicial determination had been made that the accused was probably guilty of a criminal offence.

Assuming, though, that the above recommendation is rejected, and it is decided to leave the summons power in police hands, there might be another acceptable way to alleviate the present law's harshness. That is, to amend the Code to allow the police to discharge summoned suspects whose innocence becomes apparent to them.

There are two foreseeable objections to granting the police this power. It might be argued, first, that by allowing police discharge the process would thereby become obscured from judicial review and supervision. The police would be free upon the flimsiest suspicion to summon suspects "arbitrarily" for questioning, and then discharge them when the interrogation proves fruitless. This fear of police abuse underlies the common requirement that persons arrested without warrant must, despite their apparent innocence or the illegality of their arrest, be taken before a court to have the facts judicially established. Where the arrest has been illegal, a judicial finding to that effect might lay the basis for a successful civil or penal action against the offender. But these arguments are not so strong when applied to the wrongful summons which,

up until the time it ripens into arrest (involuntary custody), is far less an invasion of the citizen's rights.

It might also be argued that the Code omits to authorize police discharge of a summoned accused for a very sound reason: that the rank and file police officer is not sufficiently educated and trained in law to exercise this discretion competently; that we cannot "trust" him to decide which accused to discharge and which to hold or bound for further investigation. The obvious reply is to point out that if the police are not sufficiently competent to decide that a summoned accused is innocent and ought therefore to be discharged, then that a summoned accused is innocent and ought therefore to be discharged, then they are equally incompetent in the first place to issue a summons on the ground that there is "reason to believe" the accused guilty of a crime, and the power to issue summonses ought to be vested in the judiciary instead of the police. This solution has been proposed above. But, it is submitted, unless and until the Code is so amended the police ought at least to have the power to undo the consequences of their own erroneous actions.

In summary, it has been suggested that since from the accused's point of view the same serious consequences which follow from the execution of an arrest warrant against him also follow response to a summons, both forms of process ought to be issued by the same authority- the courts - on similar criteria. Failing this reform, the police at least ought to be given the authority to discharge apparently innocent accused whom they have summoned.

If the latter change were made, the police would have three options at their disposal for dealing with a summoned accused, one of which would have to be acted for dealing with a summoned accused within forty-eight hours of his voluntary appearance at the police station: discharge, conditional release on bond, and presentation before the nearest court.

#### Arrest without warrant

Having thus far considered arrest under court warrant and the use of police summonses let us turn to the third and last method by which physical custody over suspected offenders is obtained - arrest without warrant. The governing rules are found in both the Constitution and the Code.

...



The Code: flagrant offences

Code Art 19-21 and 50 define flagrant offences and declare that any person may arrest a flagrant offender. A comparison of these provisions with Article 53, 67 and 73 of the French Criminal Procedure Code demonstrates unquestionably the continental source of this portion of Ethiopian arrest law. We may approach the comparison by first noting the differences between the two sets of rules.

The French law adopts a bi-partite division of flagrant offences into “flagrant” and “assimilated” ones. To these the Ethiopian code adds a third category, “quasi-flagrant” offences. One should note, however, that these labels are of no functional consequence, since the Code treats all three categories in exactly the same way.

(i) Definition

Regarding the definition of “flagrant offence” (including sub-categories) the Ethiopian codifiers both added to and omitted from the continental model. To the standard definition of “flagrant offence” as one which “is being committed or has just been committed” Art 19 (1) has added flagrant attempts. This probably is not a substantial change in the old formula because an attempt to commit an offence is in itself a penal offence, and therefore needs no separate mention. Another “addition” to the traditional concept is found in Article 19 (2), which includes situation where a “hue and cry” has been raised. This, again, is not a substantial addition, since it merely duplicates the first part of the same sentence “when... the offender who has escaped is chased by witnesses or by members of the public.” As for the Ethiopian Code’s seeming omission of important circumstance covered by the French law, where the suspect is “found in possession of objects, or presents traces or indications, leading to the belief that he has participated in the felony or misdemeanor,” this was no doubt motivated by the consideration that the English-Commonwealth formulas of Article 51 (1) (f)-(g) adequately provide for them.

The “assimilated cases” of Art 20 are in form different but in essence quite similar to the “assimilated cases” of Article 53, second paragraph, of the French Code. Although the Ethiopian provision covers a bit more ground than the French, it serves the same object of allowing immediate action where attention is called to the offence at a time soon after its occurrence.

Having in Art 19 and 20 established the definition of “flagrant offence” the code goes on in Articles 21 and 50 to state the procedural consequences thereof: in the case of ordinary flagrant offences proceedings may be instituted without an accusation being lodged; and, both ordinary and compliant offences, if flagrant, subject the offender to arrest without warrant by any police officer or private citizen if the offence carries a possible maximum punishment of three months simple imprisonment or a more severe penalty... We have seen that in French law, arrest without warrant is allowed for flagrant felonies (crimes) and certain misdemeanors (delits) but not in flagrant petty offences (contraventions). Granted the conditional derivation of the Ethiopian provisions it is probable that “serious” was meant to denote offences corresponding to the continental categories of crimes and delits. In fact, by excluding all offences with a maximum punishment of less than three months simple imprisonment Article 50 does very closely approximate the French rule, for contraventions are punishable by imprisonment for not more than two months and a fine of not more than 2,000 new francs...

(ii) Application: immediacy and publicity

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

Appropriate guides might be sought not only in foreign law but by reference to the purposes of the provisions in question. Why does the law permit these exceptions to the general rule that no

one may suffer arrest without prior court scrutiny and approval of the grounds therefor? The obvious advantages of arrest without warrant over arrest by warrant is that the former allows prompt action by avoiding that delay involved in traveling to the court and applying for a warrant. According to continental writers, flagrant offences require or permit the omission of such time-consuming formalities on three grounds: prevention, detection and certainty. Prevention applies where immediate arrest is the only way to prevent the offender from carrying off the fruits of his crime. Detection refers to the need for arrest in order to stop the offender from escaping, and to preserve evidence. Certainty refers to the fact where an offender is found “red-handed” there is no possibility that he is innocent, so there is no need for such judicial safeguards as a warrant.

It should be noted that although these arguments are offered in support of allowing wide arrest powers in flagrant cases, the first two may be equally applicable to non-flagrant offences. A police officer who, for example, some months or years after an offence spots the suspected offender in a railroad station, risks his escape if he delays for the time necessary to procure an arrest warrant. Similarly, an officer who three weeks after an offence learns that the suspected offender is about to check out of his hotel room, risks his escape with fruits of his crime if he forbears from rushing in to the room and arresting the suspect without a warrant. Nevertheless, although it might be advantageous from some points of view to execute an arrest without warrant in such exceptional (but non flagrant) cases, one must keep in mind the extraordinary nature of this procedure and the danger that in the progressive extension of its scope to cover more and more “exceptional cases,” ... That, and the fact that the “certainty” rationale grows weaker with each passing moment after the completion of the criminal act, argues for a very strict construction of Article 19 and 20. Therefore, it would be best if the proximity in time required by Art 19 and 20 were interpreted narrowly, that is, a matter of only a few hours at most after the commission of the offence.

The second element of flagrancy, that the commission of the offence or its aftermath be in some sense “public,” is apparent in such requirements as that the offender be “found” committing or attempting to commit the offence, that he be “chased by witness or by members of the public, that a “hue and cry has been raised, that the police have been “called to the place where the

offence has been committed, or that a “cry for help has been raised” from the place of the offence. (Emphases added.) The policy allowing free arrests in such cases can be justified, not only by the added certainty which “publicity” lends, but also, often, 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 disturbance in the form of lynching or other violence committed by the offender or his pursuers. Thus it is easy to understand why the concurrence of a “public” offence, together, frequently, with an opportunity to terminate a resulting disturbance while it is in the course of happening, should qualify as an exception to the rule requiring prior court approval of all arrests.

Granted that “public” commission or consequences are essential to flagrancy let us consider the application of Art 19 and 20 to a particular case. Suppose there is a disturbance during an authorized public meeting, and a police officer comes upon X and Y pushing and shouting at each other in the assembly. Three of four of the bystanders tell the officer that X is a trouble-making intruder, so the officer arrests him for having been “found committing” an offence under Article 484 of the PC, for which arrest without warrant is authorized by Art 19 and 50. Later it turns out that Y was the real intruder- X was really the meeting’s chairman, who had been trying to eject Y when the policeman arrived and, owing to the false accusations of unsympathetic bystanders, arrested the wrong man. Was the arrest lawful?

It seems clear that in order to protect the police officer, who acted very reasonably under the circumstances, we would have to say that it is immaterial that the arrested person was not truly “found committing” an offence. Rather, he was “apparently” committing an offence, and the proper interpretation of every requirement under Art 19 and 20 must be so viewed not “found... attempting to commit the offence” but “found apparently attempting to commit the offence,” not “has just committed the offence” but “has apparently just committed the offence” and so on. So long as the test of Art 19 or Art 20 reasonably appears to be satisfied in any particular case the power of arrest without warrant granted by Art 50 must be seen in law as applicable, even if it should later develop that the test was not actually satisfied.

Similarly, the converse must be true of arrests without warrant which do not reasonably appear legal at the time of execution but which are justified, post facto, by the results. In those cases the arrest must be seen as illegal, and the officer held liable for his misconduct. Thus, for example, should a police officer in the circumstances described above arrest peaceful on looker, simply for the unsatisfactory reason that the officer dislikes his appearance, the arrest cannot be justified under Art 50 even should it later develop that the arrestee was the ringleader of the intruders, and in fact guilty of an offence under PC Art 484. For, in order to protect innocent citizens, one cannot allow arrests which, from the point of view of the arresting party at the time of the arrest, were legally unjustifiable, even though subsequent developments justify prosecution and conviction of the arrestee. The proper test of the legality of any arrest under Art 50 must be the apparent, not actual, existence of a flagrant offence.

The Code: Art 51

We have so far considered one group of Code provisions which permit arrest without warrant—Art 19-21 and 50 and have demonstrated their origin in continental legal systems... We may now turn to the second “cluster” of provisions allowing arrest without warrant, those contained in Article 51.

Although space does not permit detailed consideration here of each rule contained in Article 51, a few general comments, illustrated by reference to particular rules, might be helpful.

We might note first that in contrast to the “flagrancy” provisions considered above, the various elements of Art 51 are derived from English-Commonwealth, not continental law. The immediate source of Art 51 is apparently section 23 of the Malayan Criminal Procedure Code, which in turn is closely based upon section 54 of the India Criminal Procedure Code...

## **Real Time Dispatch<sup>54</sup>**

...

In France, toward the end of 1994, real time dispatch technique has been developed and progressively extended to the all French Police, Prosecution Offices and Courts with the view of reducing the length of criminal proceedings while securing the quality of decision-making.

...

Adopting “next day justice” as called in the United Kingdom by 2006 will bring about a huge improvement...

## **Effect of Illegal Arrest<sup>55</sup>**

Jurisdiction to try a person for a crime is not affected by an illegal arrest.

[T]he power of a court to try a person for crime is not impaired by the fact that he had been brought within the court’s jurisdiction by reason of a “forcible abduction.” ...[D]ue process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will. *Frisbie v. Collins*, 342 U.s. 519, 522, 72 s. Ct. 509, 51-2, 96 Ld. 541, 545-46(1952).

The doctrine that the manner in which a defendant is brought to trial does not affect the power of the court to try him or her is known as the Ker-Frisble doctrine. Its principle was previously enunciated in the 1886 U.S. Supreme Court case of *Ker v. Illinois* in which the court declared that “forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such a court.” 119 U.S. 436, 444, 7 S.ct. 225, 229, 30 L.Ed. 421, 424.

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<sup>54</sup> *Training Material Prepared for Handling Flagrant Offenses*, 2007 (Unpublished), Federal First Instance Court.

<sup>55</sup> John N. Ferdico, *Supra* note 49, pp. 147-149.

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

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

The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, ... and, particularly, the purpose and flagrancy of the official misconduct are all relevant....And the burden of showing admissibility rest, of course, on the prosecution. *Brown v. Illinois*, 422 U.s. 590, 603-04, 95 S.Ct. 2254, 2261-62, 45 L.Ed.2d 416, 427 (1975).

The prosecution has a difficult burden in curing the effect of an illegal arrest on a subsequent confession. In *Taylor v. Alabama*, 457 U.s. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982), police made an investigatory arrest without probable cause, based on an uncorroborated informant's tip, and transported the defendant against his will to the station for interrogation in the hope that something would turn up. The defendant was in police custody the entire time, and the police repeatedly questioned him, took his fingerprints, and subjected him to a lineup without counsel present. The court held that there was no meaningful intervening event to break the causal

connection between the arrest and the confession, even though (1) six hours elapsed between the arrest and the confession and (2) the confession may have been voluntary for purposes of the Fifth Amendment in the sense that Miranda warnings were given and understood, the defendant was permitted a short visit with his girlfriend, and the police did not physically abuse the defendant.

Many factors must be considered to determine whether a confession is obtained by exploration of an illegal arrest; thus, it is difficult to predict how a particular court will rule. For example, despite only a two-hour lapse between an illegal arrest and a confession, in *People v. Vance*, 185 Cal. Rptr. 594 (Cal. 1982), the court held the defendant's confession admissible because of the following circumstances.

- Proper Miranda warnings were given,
- the defendant was confronted with information that tied him to the crimes,
- the defendant was allowed to speak privately with his common law wife, and
- there was no purposeful or flagrant police activity.

Because circumstances in the police's control often determine the admissibility of a confession following an illegal arrest, officers should do everything possible to ensure that a confession is a product of the suspect's free will.

If the evidence is not the product of the illegal arrest, however, the exclusionary rule does not apply. The indirect fruit of an illegal arrest should be suppressed only when they bear a sufficiently close relationship to the underlying illegality. In *New York v. Harris*, 495 U.S. 14, 110 S. Ct. 1640, 109 L.Ed.2d 13 (1990), police officers, who had probable cause to believe that the defendant committed murder, entered his home without first obtaining an arrest warrant in violation of *Payton v. New York*... The officers read him his Miranda rights and obtained an admission of guilt. After the defendant was arrested, taken to the police station, and given his Miranda warnings, he signed a written inculpatory statement. The first statement was inadmissible because it was obtained in the defendant's home by exploitation of the *Payton* violation. The statement taken at the police station, however, was admissible. That statement was



not the product of being in unlawful custody; neither was it the fruit of having been arrested in the home rather than someplace else. The police had a justification to question the defendant prior to his arrest. Therefore, his subsequent statement was not an exploitation of the illegal entry in to his home. Moreover, suppressing a station house statement obtained after a Payton violation would have minimal deterrent value, since it is doubtful that the desire to secure a statement from a suspect whom the police have probable cause to arrest would motivate them to violate Payton. The court therefore held that “where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State’s use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of Payton.” 495 U.S. at 21, 110 S.Ct. 1644-45, 109 L.Ed.2d at 22.

Finally, a law enforcement officer may be subject to civil liability for false arrest or false imprisonment if an arrest is illegal or is made with excessive or unreasonable force.

### **Summary**

The setting in motion of the criminal justice may result in the summons or the arrest of the suspect. However, this does not mean that whenever the police receive information about the commission of a crime, they should summon or arrest the suspect. The responsibility for the protection of innocent persons begins from the police. Before proceeding to summons or arrest, the police have to make sure that there is a prima facie case against the suspect. This is a judicial or at least quasi-judicial activity. Under the CPC, too, the police must have reasonable grounds to resort to summons or as the case may be to arrest.

Once the police are convinced that the process should continue, then the police have to contemplate the mode of bringing the suspect to the police station. The two commonly used mechanisms are summons and arrest. The effect of the two is the same. But, the means utilized in both cases is completely different. Summons is a peaceful system of taking a person into custody. On the contrary, arrest involves force. It brings psychological embarrassment on the part of the detainee. It may result in bodily injury or even death, in particular, if the suspect refuses to surrender. The extent of force utilized depends upon the gravity of the offense. For example, it does not seem rational to injure or kill a person for escaping from prosecution for

minor offenses. It is difficult to state a clear rule to be applied all the time. Nevertheless, it is appropriate to set the upper limits.

Arrest might be with a warrant or without a warrant. In principle, it should be done with court order. But, in exceptional justifiable circumstances, it is legal to resort to arrest without a warrant. The clearest case is flagrant offense. It is not wise to wait for arrest warrant while a person is publicly committing a crime justifying arrest. It defeats the purpose of the criminal law. The danger for human rights, too, is less in such kinds of situations. Thus, arrest without warrant should be applied for certain justifiable cases. Private persons are also entitled to make arrest without warrant in such circumstances.

Violating the rules pertaining to summons and arrest might result in criminal, civil, and administrative sanctions. For instance, a police officer who acted illegally while effecting the summons and arrest may face criminal charge and civil suit. Disciplinary measure might also be taken against him. The administrative penalty may go up to dismissal.

The mere act of illegality in the arrest of a person can not be a ground to drop the criminal case on the suspect. The case has to continue. But, the illegality might affect the admissibility of evidence acquired in the process. The inadmissibility might crucially affect the case. It might lead to the closing of the file or acquittal.

In case of flagrant offenses, the criminal proceeding is made faster and trial could start forthwith. In such cases, it is often unnecessary to find other evidence than that acquired on the scene of the crime. It is not prudent to delay the case. The possibility of pleading guilty is expected to be higher when the case is tried speedily. It is easy to get witnesses.

The procedure is called “next day justice” in Britannia and “real time dispatch” in France. It is not a special procedure as such. It is rather a technique. The police and the prosecution office have to exchange information from the moment of reporting of a crime. The two should act as one. The court has to be also ready to hear the case whenever the prosecution files a charge. There has to be a coordinated effort on the part of the stake holders. One should not hinder the

efficient and effective performance of the other. The legal procedure followed is ordinary. The crucial factor is the attitudinal change towards implementation of the criminal procedure. It is a kind of differentiated case management technique adopted to tackle flagrant offences taking into consideration their particular nature.

In Ethiopia, the procedure had been limited to the Christian religious ceremony at *Qulibi Gabriel* by establishing temporary police, prosecution and court to speedily handle flagrant offenses. Now, beginning from the eve of Ethiopian Millennium in Addis Ababa, different specialized benches entertaining flagrant offenses have been set up. The regions have also started applying the system. Practice has proved that pleading guilty is the norm. The prosecution and defence witnesses are made ready on the moment of pleading guilty or not guilty. The accused will be forced to plead guilty as the possibility to hear the case and decide is nearer. Even pleading guilty is one of the major mitigating factors under Art 82/1/e of the CC.

Now, it is even possible to have a criminal case decided on the very date of the crime committed using the real time dispatch technique. Within hours, the victim could hear the final determination of the criminal case in a court of law. Here, it should be underlined that the constitutional and legal guarantees for the suspect or accused remain in tact. For instance, the accused can ask adjournment to prepare and bring defense. Indeed, Art 94/2/b does not require a justification for not bringing evidence on the first day of appearance in court. Art 94/2/a clarifies the interpretation adopted. The prosecutor (public or private) or the accused should have good cause not to attend a court session. For the case of evidence on the first appearance, the mere failure of the party supposed to present evidence is enough to get adjournment. The court should give adjournment for at least one reasonable time. It may order the police to help the accused in bringing defence in case bail is denied or unable to obtain.

Therefore, the police have to take the necessary precaution before deciding to have the body of a person and the means used has to also be carefully evaluated. As much as possible the use of summons should be given precedence over arrest. In case of flagrant offence, institutions involved in the criminal justice system have to act in a coordinated manner to ensure speedy trial.

## Discussion Questions

1. Compare and contrast the pre-arrest and post-arrest screening mechanisms found under the CPC and other jurisdictions.
2. Explain the phrase “reason to believe” under Art 25, CPC and “absolutely necessary” and “cannot otherwise be obtained” under Art 54 of the CPC.
3. “...summons differs arrest under Ethiopian law only in that it draws one into custody “voluntarily” rather than by force; it is, once the accused arrives at the police station and is detained there involuntarily, transformed in to arrest.” Discuss.
4. “The exclusionary rule, as it relates to arrest, states that any evidence obtained by exploitation of an unlawful arrest will be inadmissible in court in a prosecution against the person arrested.” Discuss.
5. “If the charge be one of treason, violent felony, or dangerous wounding, he may, moreover, use any degree of force that may be necessary to effect the arrest, or prevent the escape, of the accused; even to the infliction of wounds or death upon him.” Elaborate. Does Ethiopian law give recognition to this rule?
6. To what extent, can private persons use force to arrest a person committing a grave offense?
7. Describe the remedies available for a person subjected to illegal arrest.
8. Can one require acquittal on the ground of illegal arrest? Why or why not?

## 2.3. Police Investigation

### Relevant Laws

Art 3, 5, 8, 9, 11, and 12, UDHR

Art 9 and 14, ICCPR

Art 16-21, 26, 32 FDRE Constitution

Art 12, 22-31, CPC

Art 420, 424, CC

Art 2027-2065, Civil Code

### Pre Arrest Investigation<sup>56</sup>

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<sup>56</sup> Wayne R. LaFave, *Supra* note 18, pp. 7-8.

Various distinctions are used in grouping pre arrest investigatory procedures. Lawyer tends to group procedures according to the governing legal standards. In this overview, however, we follow the lead of criminal justice analysts, stressing two dividing lines; (1) the agency involved (distinguishing primarily between the investigative activities of the police and the prosecutor) and (2) the focus of the procedure (distinguishing primarily between activities aimed at solving past reported crimes and activities aimed at unknown but anticipated crimes). Those distinctions create three basic groups of prearrest investigative procedures: (1) police procedures that are aimed at solving specific past crimes known to the police (commonly described as “reactive” procedures), (2) police procedures that are aimed at unknown but anticipated ongoing and future criminal activity (commonly described as “proactive” procedures), and (3) prosecutorial and other non-police investigations conducted primarily through the use of subpoena authority...

Reactive investigations. General purpose police agencies (e.g., local police departments), who employ over 85% of all police officers in the country, traditionally have devoted the vast majority of their investigative efforts to reactive investigations. This is an “incident driven” or “complaint-responsive” style of policing, including the neighborhood patrol and the 911 emergency telephone link. The police received a citizen report of a crime (typically from the victim or an eyewitness), or they discover physical evidence indicating that a crime has been committed, and they then proceed to initiate an investigation responsive to that “known crime.” This involves (1) determining whether there actually was a crime committed, (2) if so, determining who committed the crime, (3) collecting evidence of that person’s guilt, and (4) locating the offender so that he can be taken in to custody. A wide variety of investigative activities may be utilized to achieve these objectives. Those activities include: (1) the interviewing of victims; (2) the interviewing of witnesses at the crime scene; (3) canvassing the neighborhood for (and interviewing) other wise witnesses; (4) the interviewing of suspects, which may require a physical stopping of the suspect on the street and a frisking of the suspect (i.e., pat-down of the outer clothing) for possible weapons; (5) the examination of the crime scene and the collection of physical evidence found there; (6) checking departmental records and computer files; (7) seeking information from informants; (8) searching for physical evidence of the crime (e.g., stolen property or weapons) in places accessible to the suspect (e.g., his home or automobile) and seizing any evidence found there; (9) surveillance of a suspect (including

electronic surveillance) amid at obtaining leads to evidence or accomplices; and (10) using undercover operatives to gain information from the suspect.

### **Post Arrest Investigation<sup>57</sup>**

The initial post-arrest investigation by the police consists of the search of the person (and possibly the interior of the automobile)...The extent of any further post arrest investigation will vary with the fact situation. In some cases, such as where the arrestee was caught “red-handed,” there will be little left to be done. In others, police will utilize many of the same kinds of investigative procedures as are used before arrest (e.g., interviewing witnesses, searching the suspect’s home, and viewing the scene of the crime). Post arrest investigation does offer one important investigative source, however, that ordinarily is not available prior to the arrest the person of the arrestee. Thus, the police may seek to obtain an eyewitness identification of the arrestee by placing him in a lineup, having the witness view him individually (a “show –up”), or taking his picture and showing it to the witness (usually with the photographic line up”). They may also require the arrestee to provide handwriting or hair samples that can be compared with evidence the police have found at the scene of the crime. The arrest similarly facilitates questioning the arrestee at length about either the crime for which he was arrested or other crimes through to be related (although warnings must be given prior to the custodial interrogation).

Releasing the arrestee at this point and then rearresting him when and if that evidence is obtained), decide against prosecution if the arrestee will participate in a diversion program, or simply decide against prosecution without condition. A prosecutorial decision not to proceed commonly is described as a “rejection,” “declination” or “no-paper” decision. That decision most often is based on anticipated difficulties of proof (e.g., the evidence is insufficient, the victim is reluctant to testify, or key evidence was obtained illegally and therefore will not be admissible). However, the prosecutor may decide against proceeding, even though the evidence clearly is sufficient, because other alternatives (e.g., diversion, probation revocation, or prosecution in another jurisdiction) are preferable, or special circumstances render prosecution not “in the interest of justice.” As might be expected from the differences among prosecutors’ offices in the

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<sup>57</sup> *Ibid.*, pp. 12-14.

proportion of arrests reviewed pre-filing, and the subjective nature of many of the grounds for declining prosecution, studies reveal considerable variation from one community to another in the impact of pre-filing prosecutorial screening. Thus, a study of 13 urban prosecutorial districts found that the percentage of felony arrests that did not result in charges ranged from a low of 0% (in a jurisdiction which apparently did no pre-filing screening) to a high of 38%.

Assuming the prosecutor decides to charge, pre-filing screening presents another important prosecutorial decision-setting the level of the charge. Although an arrest was made on a felony charge, the prosecutor may decide to go forward on a lesser charge. As might be expected, substantial variations are found among prosecutorial districts on the rate of reductions, particularly the reductions to a misdemeanor charge. In one district, all felony arrests that result in charges may be filed as felony charges while in another district as many as 50% may be reduced prior to filing to misdemeanor charges. Prosecutors most often reduce the recommended charge because they believe that the evidence only supports a lower charge, but reductions also may be based on the prosecutor's determination that the penalty for the higher charge is too severe for the nature of the crime or that the additional process costs involved in proceeding on a felony (rather than a misdemeanor) are not justified. In some offices, certain felony offenses are viewed as so clearly over graded legislatively as to necessitate almost automatic reductions on arrests for that offense (e.g., where shoplifting is a felony and all first offender cases are reduced to petty larceny charges).

## **Summary**

Investigation is required to substantiate the information pertaining to the commission of crime. The police have to undertake interrogation of the suspect as well as witnesses; gather real evidence, such as exhibit, fingerprint, etc. In the process, the police have to refrain from illegal activities leading to the rebuttal of the evidence in court. It has to avoid the use of the "third degree" to elicit information from the suspect and witnesses. Otherwise, the fate of evidence collected violating the rights of persons might be rejection. In addition, the police could face administrative, civil, and criminal sanctions.

While taking information as well as examination of witnesses, the police have to act in such a way that it is possible to protect the rights of innocent persons. To the extent possible, the informant or the witness has to explain the facts taking any kind of responsibility that might follow. To achieve this purpose, the police have to register the facts known to the informant or the witness acquired through the five senses. Unless the witness is expert, it is wrong to take the mere opinion of a witness. For example, the informant or the witness should not be allowed to say that I know the commission of a crime and who did it. One has to state the facts as they are acquired through the five senses. Arriving at a conclusion based on the facts obtained is the business of the competent authorities.

Thus, the police have to handle criminal investigation with due care not to by pass legal restrictions in place to protect the rights of innocent persons and suspects. Attention has to be given for both the means and the end of the criminal justice system.

### **Discussion Questions**

1. Are the police required to undertake investigation whenever there is information about the commission of a crime from whatever source?
2. What is the “third degree” method of investigation? What are the legal mechanisms designed to prevent it from being used?
3. Who is the “person in authority” stipulated under Art 31 of the CPC?
4. What is the significance of identifying opinion, fact, and conclusion during the investigation stage?

### **2.4. Confession**

#### **Relevant Laws**

Art 3, 5, 8, 11, and 12, UDHR

Art 7, 9, 14, ICCPR

Art 18-19, FDRE Constitution

Art 27, 34 and 35, CPC

Art 424, CC



**The Right to Remain Silent (Common Law)<sup>58</sup>**

Since passage of the Criminal Justice and Public Order Act in 1994, the status of the right to silence in England has been altered. Previously, the accused could not be required to incriminate him-or herself, and silence could not be taken to infer guilt. But since passage of the act, it is possible for guilt to be inferred by silence, and so there is pressure on the accused to waive the right to silence when being questioned by police...

Yet, the right to remain silent is at the heart of common law criminal procedure. The Fifth Amendment to the U.S. Constitution puts it this way: "No person...shall be compelled in any criminal case to be witness against himself..." Thus the states must prove its case without the help of the accused if the accused chooses not to give that help. At its most basic level, the right to remain silent is designed to protect individuals against forced confessions obtained through torture, threats, or other undue pressures. It also means, however, that the accused can remain silent throughout the pretrial or trial phase of his or her criminal proceedings. In other words, the state must prove that an individual is guilty with out the help of that individual.

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

Some dissenters chose to deal with this dilemma by refusing to take the oath and refusing to testify, claiming that the authorities had no right to require individuals to testify against

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<sup>58</sup> Erica Fairchild and Harry R. Dammer, *Supra* note 5, p. 141.

themselves. Unfortunately, many of them suffered severe punishments as a result of their refusal to take the oath. One of the most famous of these dissenters, the Puritan John Liburne, defied both King Charles I and Oliver Cromwell and became a popular hero although he was tortured and spent a large part of his life in person or in exile. Gradually, over many years and through the courage of many brave dissenters who incurred the wrath of the authorities by their intransigence, the custom of refusing to testify at all became common and was finally legitimized by Parliament in the latter seventeenth century. This hard-won right was especially precious to the American colonists, since so many of them were the progeny of religious dissenters, such as Quakers and Puritans, who had made a new home in the American wilderness...

### **The Right to Remain Silent (Civil Law)<sup>59</sup>**

In addition to requiring the presence of an attorney, French law requires that the accused be informed of his or her right to remain silent during the pretrial proceedings. This right, so integral to the adversarial system, represents another modification of the inquisitorial procedure. However, it does not have the stature that the similar right has in common law countries, and the presumption on the part of all parties is that the accused will cooperate in the investigation by answering questions and raising points that might help in the defense.

Despite the presence of an attorney, the pretrial investigation of the accused by a magistrate can be an intimidating process for one who is inexperienced in criminal cases. As Cappelletti and Cohen put it (1979, p. 385):

*The French process of inquiry appears to be principally concerned with the attempt to obtain an admission of the truth of the charge from a person reasonably believed to be guilty; confession is self-evidently, surely, the most proper result of a properly conducted instruction which does not end in a discharge.*

At the same time, except in minor cases, the accused has to be proven guilty through the entire process of developing a dossier and going through a trial. If the accused chooses to make a statement at trial, he or she is not under oath, as in common law procedure, and is not subject to

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<sup>59</sup> *Ibid.*, pp. 148-149.

cross-examination. Any confession in the pretrial or trial process is treated as part of the evidence included in the dossier. This is a major difference from many common law countries, especially in the United States, where plea bargaining is the norm.

### **Police Interrogation<sup>60</sup>**

... false confessions do not only occur where the suspects are physically threatened. A study by psychologist G.H Gudjonsson (The psychology of interrogations, confessions and testimony, 1992) found that there were four situations in which people were likely to confess to crimes they did not commit. First, a minority may make confessions quite voluntarily, out of a disturbed desire for publicity, to relieve general feelings of guilt or because they can not distinguish between reality and fantasy. Secondly, they may want to protect someone else, perhaps a friend or relative, from interrogation and prosecution. Thirdly, they may be unable to see further than a desire to put the questioning to an end and get away from the police station, which can, after all, be a frightening place for those who are not accustomed to it. A psychologist giving evidence to the 1993 Royal Commission commented that: "some children are brought up in such a way that confession always seems to produce forgiveness, in which case a false confession may be one way of bringing an unpleasant situation (the interrogation) to an end." Among this group there may also be a feeling that, once they get out of the police station, they will be able to make everyone see sense, and realize their innocence: unfortunately this does not always happen.

Finally, the pressure of questioning, and the fact that the police seem convinced of their case, may temporarily persuade the suspect that they must have done the act in question. Obviously the young and the mentally ill are likely to be particularly vulnerable to this last situation, but Gudjonsson's research found that its effects were not confined to those who might be considered abnormally suggestible. Their subjects included people of reasonable intelligence who scored highly in tests on suggestibility, showing that they were particularly prepared to go along with what someone in authority was saying. Under hostile interrogation in the psychologically intimidating environment of police station, even non-vulnerable people are likely to make admissions which are not true, failing to realize that once a statement has been made, it will be extremely difficult to retract.

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<sup>60</sup> Catherine Elliott and Frances Quinn, *Supra* note 29, pp. 308-309.

## **The Privilege against Self-Incrimination<sup>61</sup>**

### **(a) The *Schmerber* Case**

In *Schmerber v. Cal.* (1966), the court upheld the taking of a blood sample by a physician at police direction from a defendant over his objection after his arrest for drunken driving. Among the grounds upon which the defendant challenged the admission of this sample in evidence against him was that it violated his Fifth Amendment privilege not to “be compelled in any criminal case to be a witness against himself.” The court, in a 5-4 decision, rejected this contention and held that “the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature.” As the court later put it, the privilege only protects one from being compelled to express the “contents of his mind.” *Doe v. U.S.* (1988).

In defining the scope of the privilege, the *Schmerber* majority noted that many identification procedures were not protected by the Fifth Amendment.

*Holt v.* (1910), holding that a defendant could be compelled to model a blouse, was cited as the “leading case,” and it was observed that “both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.”

### **(b) Application to pretrial identification**

It is thus not surprising that the court has subsequently relied upon *Schmerber* in holding that several identification practices do not conflict with the privilege: requiring the defendant to appear in a lineup and to speak for identification, *U.S., v. Wade* (1967); or to provide handwriting exemplars, *Gilbert v. Cal.* (1967). In both cases the court split 5-4 on this issue. The majority relied upon the *Schmerber* distinction between an accused’s “communications” in whatever form, vocal or physical, and “compulsion which makes a suspect or accused the source of ‘real or physical evidence.’” The dissenters argued that *Schmerber* was wrongly decided, in that the privilege is designed to bar the government from forcing a person to supply proof of his

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<sup>61</sup> Jerold H. Israel, *Supra* note 15, pp. 241-244.

own crime, and that even assuming the correctness of *Schmerber* the instant cases were distinguishable because each defendant was required “actively to cooperate to accuse himself by a volitional act.” other courts have followed the majority view and have thus held the privilege inapplicable to such other identification procedures as fingerprinting or examination by ultraviolet light.

(c) Consequences of failure to cooperate

Although not protected by the Fifth Amendment, some identification procedures (such as speaking or writing for identification) require the active participation of the suspect. But, what if the suspect will not cooperate? One possibility, feared the dissenters in *Wade*, is that “an accused may be jailed- indefinitely until he is willing to” cooperate. Indeed, some courts have utilized civil contempt and criminal contempt as a means to coerce or punish the suspect who failed to comply with a court order to participate in some identification proceeding. Another possibility is that the prosecution may be permitted to comment at trial on the lack of cooperation. Cf. *So. Dak. V. Neville* (1983), holding refusal to give a blood sample is admissible at a criminal trial, as the refusal “is not an act coerced by the officer.” But comment on the defendant’s refusal to speak for identification is improper if it was the direct result of a prior police warning of the right to remain silent, of then the silence is insolubly ambiguous.

(d) Change in appearance

If a suspect drastically alters his appearance between the time of the crime and of identification procedures, this is admissible at trial as an indication of consciousness of guilt. Also, the identification procedure may be conducted in such a way as to simulate the defendant’s prior appearance (e.g., by having him wear a false beard), but interference with the suspect’s due process right to determine his personal appearance (e.g., by having him shave off a beard) requires a showing of substantial justification.

**Guidelines for Lineup Identifications<sup>62</sup>**

In general, the decision to conduct a lineup is made at the discretion of the police or prosecution. Although the police, the prosecution, or the court may grant a suspect’s request for a lineup,

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<sup>62</sup> John N. Ferdico, *Supra* note 49, pp. 530-535.

there is no requirement that a request be gained. *United States v. Harvey*, 756 F.2d 636 (8<sup>th</sup> Cir. 1985). The following are guidelines for the law enforcement officer in conducting a lineup identification procedure.

#### Before the lineup

- No lineup identification procedure should be conducted by a law enforcement officer without the officer discussing with the prosecuting attorney the legal advisability of the lineup.
- A lineup should be conducted as soon after the arrest of a suspect as is practicable. Promptly conducted lineups enable the release of innocent arrestees, guarantee the freshness of witnesses' memories, and ensure that crucial identification evidence is obtained before the suspect is released on bail or for other reason. When possible, lineup arrangements (such as contacting witnesses and locating innocent participants) should be completed before the arrest of the suspect.
- A person in custody may be compelled to participate in a lineup without Fourth or Fifth Amendment rights being violated. Most courts hold that once a person is in custody, his or her liberty is not future infringed by that person's being presented in a lineup for witnesses to view. *People v. Hodge*, 526 p.2d 309(Colo 1974). Furthermore, "compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have." *United States v. Wade*, 388 U.S. 218, 222, 87 S.Ct. 1926, 1930, 18 L.Ed2d 1149, 1154-55 (1976).

Compelling persons who are not in custody to appear in a lineup involves a much greater intrusion on liberty and is usually done only by order of a court or grand jury, or by authority of statute in some states. Some courts have upheld the ordering of a person not in custody to appear in a lineup in serious cases in which the public interest in law enforcement outweighed the privacy interests of the person. *Wise v. Murphy*, 275 A. 2d 205 (D.C. App.1971). Other courts have held that a person not in

custody cannot be ordered to participate in a lineup unless there is probable cause to arrest. *Alphonso C.V. Morgenthau*, 50 A.D.2d 97, 376 N.Y.S.2d 126 (N.Y.1975).

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- Before viewing the lineup, each witness should be required to give to the officer in charge of the lineup a written description of the perpetrator of the crime. A copy should be made available to the suspect's counsel.

#### During the lineup

- Insofar as possible, all persons in the lineup should be of the same general weight, height, age, and race; have the same general physical characteristics; and should be dressed similarly. A suspect, and other participants in the lineup, may be required to wear particular kinds of clothing at the lineup. *United States v. King*, 433 F.937 (9<sup>th</sup> Cir.1970). In addition, a suspect may be required to shave, trim his or her hair, or even grow a beard before participating in a lineup. *United States v. O'Neal* 349 F. supp. 572 (N.D.Ohio 1972). If a suspect fails to cooperate with identification procedures or attempts to change his or her appearance, the officer conducting the lineup should keep a careful record of this behavior.
- The suspect should be allowed to choose his or her initial position in the lineup and to change that position after each viewing. This promotes fairness and eliminates any claim that the positioning of the suspect in the lineup was unduly suggestive.
- Nonsuspects participating in the lineup should be instructed not to act in a way that singles out the suspect.
- If any body movement or gesture is necessary, it should be made one time only by each person in the lineup and repeated only at the express request of the observing witness or victim. Again, the officer conducting the lineup should keep a careful record of any person's failure to cooperate.
- Lineup participants may be compelled to speak for purposes of voice identification. As stated by the U.S. Supreme Court in the *Wade* case, "compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt." 388 U.S. at

222-23, 87 S. Ct. at 1930, 18 L.Ed.2d at 1155. Each person in the lineup should be asked to speak the same words.

- A color photograph or videotape (or both) of the lineup should be made, and copies should be provided to the suspect's counsel as soon as possible after the lineup.
- If more than one witness is called to view a lineup, the persons who have already viewed the lineup should not be allowed to converse with the persons who have not yet viewed the lineup. It is good practice to keep witnesses who have viewed the lineup in a room separate from witnesses who have not yet viewed the lineup. Furthermore, only one witness at a time should be present in the room where the lineup is being conducted.
- The officer conducting the lineup should not engage in unnecessary conversation with witnesses, most important, the officer should not indicate by word, gesture, or otherwise his or her opinion as to the identity or guilt of the suspect. This means, especially, that the officer should not tell the witness that he or she has chosen the person suspected of the crime or has made the "correct" decision.
- The officer conducting the lineup should not allow unnecessary persons in the lineup rooms. A suggested group of people to include is the witness, the officer conducting the lineup, the prosecuting attorney, the suspect's attorney, and an investigator.
- Upon entering the room in which the lineup is being conducted, each witness should be handed a form for use in the identification. The form should be signed by the witness and the law enforcement officer conducting the lineup...
- A copy of the witness identification form should be given to the suspect's attorney at the time each witness completes his or her viewing of the lineup.
- Use of a one-way mirror in a lineup, so that the suspect is unable to know that occurs on the other side of the mirror, has been held to be a prima facie violation of constitutional due process. This means that a lineup identification in which a one-way mirror is so used will be illegal, unless the officer conducting the lineup can show that particularly compelling or exigent circumstances made the use of the mirror necessary. *State v. Northup*, 303 A.2d 1.5 (Me. 1973). When the suspect's counsel is present, however, one-way mirror may be permitted because counsel can observe the conduct of the lineup and preserve the suspect's rights. A one-way mirror may also be used to protect witnesses who fear retaliation. *Commonwealth v. Lopes*, 287 N.E.2d 118 (Mass. 1972).



#### After the lineup

- The officer conducting the lineup should take complete notes of everything that takes place at the lineup and should prepare an official report of all the proceedings, to be filed in the law enforcement agency's permanent records. The report should include the time, location, identity of persons present, statements made, and photographs or videotapes of the lineup. A copy should be sent to the prosecuting attorney and made available to the suspect's attorney. The lineup identification form... for each witness viewing the lineup should be included as part of the officer's report.
- A defendant has no right to have his or her counsel present at a post lineup police interview with an identifying witness. *Hallmark v. Cartwright*, 742 F.2d 584(10<sup>th</sup> Cir. 1984).
- Any officer who observed a lineup must disclose to the court that reviews the lineup any evidence that might affect the accuracy of the identification, whether the evidence was observed before, during, or after the lineup. Failure to do so may be violation of the suspect's due process rights.
- Multiple lineups involving the same suspect and witness are inherently suggestive and strongly discouraged. In *Foster v. California*, 394 U.S. 440, 89 S.Ct.127,22 L.Ed.2d 402 (1969 ), the eyewitness was unable to make a positive identification at the first lineup in which Foster was placed with men considerably shorter than he. Even after the eyewitness met one-on-one with Foster, the identification was tentative with the eyewitness still indicating he was not sure Foster was the one. At a second lineup, the eyewitness was finally convinced Foster committed the crime and positively identified him. Foster was the only person who was used in both lineups. The U.S. Supreme court reversed the conviction:

The suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact "the man." In effect, the police repeatedly said to the witness, "This is the man." ... This procedure so undermined the reliability of the eyewitness identification as to violate due process. 394 U.S. at 443, 89 S.Ct.at 1129, 22 L.Ed at 407.

### **Fruit of Poisonous Tree Doctrine<sup>63</sup>**

The exclusionary rule is not limited to evidence that is the direct product of illegal police behavior, such as a coerced confession or the items seized as a result of an illegal search. The rule also requires exclusion of evidence that is obtained indirectly when one's constitutional rights are violated. This type of evidence is sometimes called derivative evidence or secondary evidence. In *Silverthorne Lumber Co. v United States*, 251 U.S. 385, 392, 40S.ct. 182, 183, 64 L.Ed. 319, 321 (1920), the U.S. Supreme Court invalidated a subpoena that had been issued on the basis of information obtained through an illegal search.

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from independent source they may be like any others, but the knowledge gained by the government's own wrong can not be used by it in the way proposed.

Thus, the prosecution may not use in court evidence obtained directly or indirectly from an unconstitutional search. The prohibition against using this derivative or secondary evidence is often called the rule against admission of "fruit of the poisonous tree." The tree being the illegal search and the fruit being the evidence obtained as an indirect result of that search. The fruit, or the evidence indirectly obtained, is sometimes referred to as tainted evidence. Although the rule against the admission of fruit of the poisonous tree was originally developed in applying the exclusionary rule to unconstitutional searches, it has been applied equally to evidence obtained as the indirect result of other constitutional violations. Thus, evidence may be inadmissible if it is acquired indirectly as a result of an illegal stop, an illegal arrest, an illegal identification procedure, or an involuntary confession.

The fruit of the poisonous tree doctrine applies only when a person's constitutional rights have been violated. Neither the exclusionary rule nor the fruit of the poisonous tree doctrine applies when a violation of rights is not of constitutional dimensions. Nevertheless, the fruit of the poisonous tree doctrine may apply in different ways depending on the type and severity of the

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<sup>63</sup> John N. Ferdico, *Supra* note 49, p. 81.

underlying violation of constitutional rights. As the U.S. Supreme Court stated with respect to the fruit of the poisonous tree doctrine, “unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.” *Dickerson v. United States*, 530 U.S.428, 120 S.Ct. 2326, 2335, 147 L.Ed.2d 405, 418 (2000)...

### **Current Issues: Involuntary Confessions and Art 35, CPC<sup>64</sup>**

Coercive interrogation: ineffective and unlawful

Improper methods of police interrogation are known to every country in the world. And everywhere, it is agreed that an accused’s confession of guilt which has been procured through physical violence, psychological intimidation, or improper inducements or promises cannot be considered in evidence against him at trial. The primary reason why involuntary confessions are excluded from evidence is that they are unreliable indices of truth: men have been known to admit crimes of which they are innocent, simply to escape the pain of torture or to obtain an irresistible benefit.

The exclusionary practice also expresses society’s condemnation of police “third degree” methods, which not only violate the accused’s privilege against self-incrimination, but, by inflicting harm on one merely suspected, not convicted, of crime, nullify his constitutional right to the presumption of innocence. Thus the practice serves purposes other than the mere need to decide cases upon trustworthy evidence: by removing the ultimate incentive it serves to discourage the police from using illegal questioning methods.

In light of these considerations it is understandable that Ethiopian law frowns severely upon the use of coercion against persons being investigated under suspicion of crime. The CPC states quite clearly that “no police officer or person in authority shall offer or use or make or cause to be offered, made or used any inducement, threat, promise or any other improper method to any person examined by the police.” Violation of this command subjects the police officer to both civil and penal sanctions. And, of course, the courts do not allow into evidence confessions which have been obtained by force.

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<sup>64</sup> \_\_\_\_\_, *Involuntary Confessions and Art 35, CPC*, 3 No. 1 J. Eth. Law.

But, it must be asked, are the exclusion of coerced confessions and the threat of sanctions having their intended effect? To judge from what one sees and hears, no. In many cases in the High Court, convictions are based wholly or in part upon confessions given by the accused to the police while in their custody. And, in many cases, the accused repudiates his confession at trial, claiming it was the result of coercion, while the police in truth insist it was not. Even granting that many or even most of these claims of beatings and torture are untrue (it is hard to believe that all are), the vital question is: how is the trial court to distinguish between the free confession and the forced one? It seems that cases are rare in which the accused is able to convince the court to exclude the confession, and no wonder: When the police interrogate a suspect there are no witnesses, no friends, no family present. Therefore it inevitably boils down to the word of the accused against that of the police, and how many of us will believe the accused?

Foreign “solutions” to the third degree

This problem of distinguishing voluntary from involuntary confessions is not unique to the Empire. It has been faced in many other countries, and “solutions” worked out. In England, for example, the rule excluding involuntary confessions was not, by itself, felt sufficient to deter the police from coercive methods. Therefore, in the well-known “Judges’ Rules,” it is laid down that the police must inform a suspect of his privilege against self-incrimination as soon as the police officer decides in his mind to charge him, and, once the suspect is in custody, he may not be questioned at all. Extraction of a confession in violation of the Rules confers upon the trial court a discretion to exclude it from evidence. Thus the English system tries to avoid the possibility of improper police interrogation, by forbidding all interrogation of the accused while he is in custody-the time when the “third degree” generally takes place.

The Americans have resorted to other means of deterring the police from using improper methods. In addition to the rule excluding involuntary confessions from evidence, the federal courts automatically exclude any confession, “voluntary” or “involuntary,” which is obtained while the police are unlawfully holding the accused-e.g., during a period of “unnecessary delay” between his arrest and his appearance in court. And for the state courts, a federally-imposed rule is now evolving which probably will exclude any confession made by an accused while in police

custody if his right to counsel was denied at that time. Like the English approach, both of these rules attempt to discourage coercive police methods by denying the police the right to interrogate suspects secretly and at length, for under those conditions the “third degree” flourishes.

Lastly, let us mention the Indian approach. Under the Indian Criminal Procedure Code the police are permitted to question a suspect at length, and need not caution him to remain silent. But generally, no confession the accused makes to the police or while in police custody is admissible against him at trial; to be admissible it must be made before a magistrate, who will ensure that the accused is making it voluntarily and with knowledge of his right to remain silent before recording it. The theory of this rule is, apparently, that the only confessions which are certain to be voluntary are those made to a court, and that confessions made to the police are bound to be tainted with the suspicion of coercion. To discourage police coercion, then the Indians do not recognize as evidence the results of police interrogations.

The Ethiopian approach; Art 35

... What is the purpose of this article? In view of its strong similarity to section 164 of the Indian Code, it is unquestionable that the drafters of Ethiopian’s Code were to some extent looking towards the Indian system. And in Indian law, as we have seen, the reason why the magistrate is given power to record confessions is that only confessions so recorded are admissible in evidence at trial. It was the intention of drafters of our CPC, I submit, to require all confessions which the police wish to have proved at trial, recorded and certified “voluntary” under Article 35. Confessions not so recorded should be inadmissible against the accused, as they are in India.

Miranda v. Arizona<sup>65</sup>

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The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only

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<sup>65</sup> <http://www.tourolaw.edu/Patch/Miranda/> Retrived on 30 October 2008

through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege...

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In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one...

"Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

...

To summarize... He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

...

We turn now to... consider the application to these cases of the constitutional principles discussed above...

No. 759. *Miranda v. Arizona*.

On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to "Interrogation Room No. 2" of the detective bureau. There he was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present. Two hours later, the officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and "with full knowledge of my legal rights, understanding any statement I make may be used against me."

At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years' imprisonment on each count, the sentences to run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession and affirmed the conviction. 98 Ariz. 18, 401 P. 2d 721. In reaching its decision, the court emphasized heavily the fact that Miranda did not specifically request counsel.

We reverse. From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had "full knowledge" of his "legal rights" does not approach the knowing and intelligent waiver required to relinquish constitutional rights...

Therefore, in accordance with the foregoing, the judgments of the Supreme Court of Arizona in No. 759... reversed...

## **Abebe Esubalew vs Public Prosecutor<sup>66</sup>**

**Facts-** The appellant was accused of killing his wife violating Art 522/1/a of the PC and discarding her corpse transgressing Art 487/2 of the PC. He pleaded not guilty and the evidence of the prosecution was heard. There were two prosecution witnesses. One of the witnesses testified that he saw the appellant and the deceased going to a forest one day. The other witness, chairman of the rural kebele, expressed that the appellant told him that his wife had absconded stealing 50 birr denying guilt for her disappearance and then searching the forest a human bone was found.

There were also two documentary evidences. The first was the confession of the appellant administered in accordance with Art 35 of the CPC in the wereda court. The second was expert evidence proving that the bone found is that of a human being.

Then the accused was told to defend. His defense was based on alibi and proving the use of force before the confession in the wereda court. He had four witnesses. Two of them proved the alibi. The remaining testified the torture committed on the appellant at the police station to make him confess in the wereda court.

The High Court found him guilty under Art 523 and 487/2 of the PC and sentenced him to 15 years rigorous imprisonment. He appealed to the Supreme Court.

**Issue-** Whether the accused is guilty of the two offenses?

**Decision-** The Central Supreme Court reversed the judgment and sent the appellant free.

**Reasoning of the Supreme Court-** The Court argued that evidences other than the confession were not sufficient to warrant conviction. As regards the confession, the appellant had proved the use of force to obtain it. He had told to one of the prosecution witness before the confession that

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<sup>66</sup> Abebe Esubalew vs Public Prosecutor ( Criminal Appeal File No. 173/78) in Selected Judgments Vol. 1, Federal Supreme Court Research and Publication Department, 1996, pp.328-335.



he had no responsibility for what happened. The Court determined unconvincing the content of the confession alleging that he killed his wife as a result of her communication to the appellant the fact of secret love affair and giving birth to one child in that relationship. The Court said that it is unthinkable to expect a woman exposing such kind of affair to her husband. It took it for granted that the appellant was coerced to speak.

The Court asserted that it would have accepted the confession, had the appellant shown the corpse of the deceased and instruments utilized for the crime. What matters is the fruit of the third degree. The bone was found by another person. As a result, the confession could not be admissible.

The Court also touched the problem of rejecting a confession administered by wereda court. It underlined the possibility of coercion following return from the wereda court to the police station. Hence, the justification for rejecting confession given to the wereda court.

### **Summary**

One of the most controversial procedures during investigation is interrogation of the suspect. The person interrogated has the privilege against self-incrimination. However, the scope of this right is not a settled issue. It is debatable whether confession includes line up, blood test, finger printing, photographing, etc. Some jurisdictions restrict it only to information communicated verbally or by sign. It does not include real or physical evidences like blood test, etc.

In Ethiopia, the issue of confession is much more debatable. This is due to the recognition by the CPC of confession made to the police and the court without clarifying the effects of the one given to the police. The FDRE Constitution clearly outlaws any evidence acquired through coercion. This categorical approach of the Constitution raises a\the question of its scope. The scope of this protection is not clear. But, it is possible to limit it to confession or admission acquired through the medium of communication. It does not seem applicable to real evidences like blood test, photographing, etc.

Here, it should be underlined that confession, as it implies the full acceptance of the crime alleged, often ends with conviction. But, if there is only part confession, it is merely an admission of some elements of the offense. Admission is not enough to lead to conviction though it may be helpful for the prosecution during trial.

To conclude, the right against self-incrimination is a grand constitutional right to be protected during the carrying out of criminal investigation. It would not be admissible in court unless it is obtained without any coercion from a person in authority.

### **Discussion Questions**

1. The privilege against self-incrimination... “the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature.” Discuss.
2. “It was the intention of drafters of our CPC, I submit, to require all confessions which the police wish to have proved at trial, recorded and certified “voluntary” under Article 35.” Do you agree? Why or why not?
3. What should be done in the event of refusal by a suspect to submit to line up, blood test, fingerprinting, photographing, etc? Should one be forcefully submitted to such procedures? How do you justify it in light of Art 19/5 of the FDRE Constitution? Should the case be referred to the Council of Constitutional Inquiry and the House of Federation?
4. Is the right to counsel guaranteed under the FDRE Constitution during investigation?
5. Does the ruling in *Miranda v. Arizona* apply to the Ethiopian criminal justice system? Why or why not?
6. Who should prove that a confession or admission is obtained without coercion?
7. Can one challenge a confession given pursuant to Art 35 of the CPC to another court during trial?
8. When does a confession becomes conclusive?
9. Do you agree with the reasonings and ruling of the Supreme Court in *Abebe Esubalew vs Public Prosecutor*? Why or why not?

## 2.5. Search and Seizure

### Relevant Laws

Art 3, 5, 8, 11, and 12, UDHR

Art 17, ICCPR

Art 26, FDRE Constitution

Art 32-33, CPC

Art 58, The Re-Establishment and Modernization of Customs Authority Proclamation No. 60/97  
(as amended)

Art 422, CC

Art 2027-2065, Civil Code

### Search and Seizure<sup>67</sup>

**Search and seizure** is a legal procedure used in many civil law and common law legal systems whereby police or other authorities and their agents, who suspect that a crime has been committed, do a search of a person's property and confiscate any relevant evidence to the crime. Most countries have provisions in their constitutions that provide the public with the right to be free from "unreasonable" search and seizure. This right is generally based on the premise that everyone is entitled to a reasonable right to privacy. In practice, this constitutional right is regularly respected only in democracies.

Though interpretation may vary, this right usually requires law enforcement to obtain a search warrant before engaging in any form of search and seizure.

### Canada

In Canada, Section Eight of the Canadian Charter of Rights and Freedoms protects all individuals from unreasonable search and seizure. For a search to be "reasonable" it must be authorized by law, the law itself must be reasonable, and the manner in which the search was

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<sup>67</sup> [http://en.wikipedia.org/wiki/Search\\_and\\_seizure](http://en.wikipedia.org/wiki/Search_and_seizure) Retrieved on 17 December 2008.

carried out must be reasonable (*R. v. S.A.B.*, 2003 SCC 60). This means that the officer must be acting within the power of a valid statute, and it must be performed on the basis of there being "reasonable and probable grounds" that a crime has been committed.

## **United States**

The Fourth Amendment to the United States Constitution ensures citizens' right to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ...". The amendment goes on to set forth the conditions under which a warrant may be issued: "no warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The text of the amendment is brief, and most of the law determining what constitutes an unlawful search and seizure is found in court rulings. The general rule under the U.S. Constitution is that a valid warrant is required for a valid search. There are, however, several exceptions to this rule.

For instance, the owner of the property in question may consent to the search. The consent must be voluntary, but there is no clear test to determine voluntariness; rather, a court will consider the "totality of the circumstances" in assessing whether consent was voluntary. Police officers are *not* required to advise a suspect that he may refuse. There are also some circumstances in which a third party who has equal control, i.e. common authority, over the property may consent to a search.

When an individual does not possess a "reasonable expectation of privacy" that society is willing to acknowledge in a particular piece of property, any interference by the government with regard to that property is not considered a search for Fourth Amendment purposes, and a warrant is never required. For example, courts have found that a person does not possess a reasonable expectation of privacy in information transferred to a third party, such as writing on the outside of an envelope sent through the mail or left for pick-up in an area where others might view it. While that does not mean that the person has no reasonable expectation of privacy in the contents of that envelope, the Court has held that one does not possess a reasonable expectation of privacy that society is willing to acknowledge in the contents of garbage left outside the curtilage of a home.

There is also a lowered expectation of privacy inside of motor vehicles. This "automobile exception" has been summarized by St. Mary's University law scholar Professor Gerald Reamey in "Reamey's Rule" as "never, ever, ever put anything in your vehicle that you do not want the police to see", although the Supreme Court's analysis is somewhat more nuanced. Nevertheless, a 'bright line' has been drawn at the doorstep of person's homes, however, so that whenever the government intrudes inside, their action is considered a search for Fourth Amendment purpose and must always be accompanied by a search warrant (absent exigent circumstances).

Courts have also established an "exigent circumstances" exception to the warrant requirement. "Exigent circumstances" simply means that the officers must act quickly. Typically, this is because police have a reasonable belief that evidence is in imminent danger of being removed or destroyed. Exigent circumstances may also exist where there is a continuing danger, or where officers have a reasonable belief that people in need of assistance are present.

Certain limited searches are also allowed during an investigatory stop or incident to an arrest. These searches are called refined searches.

While the interpretations of the U.S. Supreme Court are binding on all federal courts interpreting the U.S. Constitution, there is some variance in the specifics from state to state, for two reasons. First, if an issue has not been decided by the U.S. Supreme Court, then a lower court makes a ruling of "first impression" on the issue, and sometimes two different lower courts will reach different interpretations. Second, virtually all state constitutions also contain provisions regarding search and seizure. Those provisions cannot reduce the protections offered by the U.S. Constitution, but they can provide additional protections such that a search deemed "reasonable" under the U.S. Constitution might nonetheless be unreasonable under the law of a particular state.

The primary remedy in illegal search cases is known as the "exclusionary rule". This means that any evidence obtained through an illegal search is excluded and cannot be used against the defendant at his or her trial. There are some narrow exceptions to this rule. For instance, if police

officers acted in good faith--perhaps pursuant to a warrant that turned out to be invalid, but that the officers had believed valid at the time of the search--evidence may be admitted.

Further, under the "fruit of the poisonous tree" doctrine, additional evidence discovered as a result of illegally obtained evidence is also inadmissible.

Forfeiture laws are covered under Title 18, part I, chapter 46 of the United States Code.

### **Stop-and-Frisk and Other Brief Detention**

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Police have long followed the practice of stopping suspicious persons on the street or other public places for purposes of questioning them or conducting some other form of investigation, and, incident to many stoppings, of searching the person for dangerous weapons. Because this investigative technique, commonly referred to as stop-and-frisk, is ordinarily employed when there are not grounds to arrest, it was often questioned whether the practice could be squared with the Fourth Amendment. The Supreme Court provided some answers in *Terry v. Ohio* (1968).

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The result in *Terry* rests upon three fundamental conclusions the Court reached concerning Fourth Amendment theory. First of all, the Court concluded that restraining a person on the street is a "seizure" and that exploring the outer surfaces of his clothing is a "search," and thus rejected "the notions that the Fourth amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'fullblown search.'" Secondly, after noting that the police conduct here was without a warrant and thus subject to the reasonableness rather than the probable cause part of the Fourth Amendment, the Court utilized the balancing test of the *Camara* case... to conclude that a frisk could be undertaken upon facts which would not support an arrest and full search... Finally, in response to the defendant's observation that some stops and frisks are employed for harassment and other improper purposes, the Court noted that the exclusionary rule is ineffective when the police have no interest in prosecution and that consequently a flat prohibition of all stops and frisks would not deter those undertaking for improper objectives.

### **Administrative Searches<sup>68</sup>**

Prior to *Katz v. United States*, the criminal justice was not concerned with inspections by administrative agencies other than law enforcement agencies. For example, in *Frank v. Maryland*, the U.S. Supreme Court held that “inspections” by health department officials were not searches within the meaning of the Fourth Amendment because the amendment was primarily concerned with searches for evidence of criminal activity, and only peripherally concerned with the right of privacy. The *Frank* case was overturned in *Camara v. Municipal Court*, when the U. S. Supreme Court stated that it was anomalous to say that the individual and his private property are fully protected... only when the individual is suspected of criminal behaviour.

*Camara* and *Katz* together defined a search as any government action that intrudes upon a legitimate expectation of privacy. The underlying motivation for the search, whether it be criminal investigation or benign purposes of public health and safety, is no longer relevant in defining the scope of Fourth Amendment protections. Thus in *New Jersey v. T.L.O.*, the Fourth Amendment was applied to a public school official’s search for cigarettes that violated the school’s no smoking policy. When the vice-principal found marijuana in a student’s purse, the subsequent criminal prosecution demonstrated that administrative inspections are relevant to the criminal justice system when evidence of criminal activity is discovered in the course of an inspection conducted by a civil agency.

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### **Search of the person after arrest<sup>69</sup>**

Section 32 of PACE provides that the police may search arrested person at a place other than a police station if there are reasonable grounds for believing they are in possession of evidence, or anything that might assist escape or present a danger.

The police have the power to search arrested persons on arrival at the police station, and to seize anything which they reasonably believe the suspect might use to injure anyone, or use to make

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<sup>68</sup> Ronald J. Bacigal, *Criminal Law and Procedure: An Introduction*, (Albany: Delmar, 1996), pp. 219-220.

<sup>69</sup> Catherine Elliot and Frances Quinn, *Supra* note 29, p. 317.

an escape, or that is evidence of an offence or has been obtained as the result of an offence (s. 54).

### **Execution of Search Warrant<sup>70</sup>**

If a search warrant... is proper at the time it is issued, the search itself may become unconstitutional because of the manner in which it is carried out. When assessing the constitutionality of a search the courts have considered (1) the time at which the search is conducted, (2) the manner of entering the defendant's premises, and (3) the scope of the search conducted by the police officers.

The time factor. All jurisdictions have statutes or court rules that limit the time in which a search warrant may be executed. For example, federal search warrants must be executed within ten days of their issuance. Although the U.S. Supreme Court has not ruled on the issue, most courts recognize that a search warrant executed beyond the statutory period is an illegal search. Some jurisdictions also have statutory provisions regulating whether a search warrant may be executed during the day time or night time. The Supreme Court, however, has never addressed this issue.

The manner of entering the defendant's premises. In most situations, police officers must seek admittance by announcing their presence, identifying themselves as police officers, and stating their purpose. This procedure is commonly referred to as the **knock and notice** requirement. Some states specifically provide for the issuance of no knock warrants in certain cases, most commonly, drug offenses.

In the absence of a "no knock" warrant, a number exceptions allow the officers to dispense with the notice requirement and force entry into the defendant's premises. These exceptions apply when (1) announcing their presence would allow suspects to escape, or (3) giving notice would be likely to result in the destruction of the evidence sought to be seized. Failure to comply with the knock and notice requirement, or to establish a recognized exception, renders the search unconstitutional.

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<sup>70</sup> Ronald J. Bacigal, *Supra* note 68, pp. 206.



The scope of the search. Because “nothing is left to the discretion of the officer executing the warrant,” police may only search the premises described in the warrant and may only search for the items listed in the warrant. The scope of the search is thus controlled by the nature and size of the items enumerated in the warrant. For example, a search for a small quantity of drugs may extend to the opening of small containers, but a search for a stolen automobile tire must be limited to those areas large enough to contain the item.

### **Effect of Illegal Search and Seizure<sup>71</sup>**

The most important effect of an illegal search or seizure is the exclusion of the evidence obtained from use in court against the person whose rights were violated... When crucial evidence is suppressed, the prosecution’s case may be lost, and the person charged with the crime may go free.

Another possible effect of an illegal search and seizure is the civil or criminal liability of the officer conducting the search and seizure. As with an illegal arrest, the consequences for the officer depend on the circumstances of each case, including the officer’s good faith, the degree of care used, the seriousness of the violation, and the extent of injury or intrusion suffered by the defendant.

### **Summary**

Like the case of arrest, search and seizure have to be undertaken only by the order of the court. The mere existence of a court order is not enough to guarantee the legality of search and seizure. It has to be also executed properly. But, it is possible to effect search and seizure in certain justified circumstances with out search warrant.

In other jurisdictions, there is a developed statutory and case law regime to regulate the behavior of law enforcement organs. In our country, the rules governing search and seizure are scanty. Unlike the case of forced confession, the FDRE Constitution does not contain rules making inadmissible illegal search and seizure. The Constitution devotes one third of its part to the protection of human rights. Given the value attached to the cause of human rights, it seems

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<sup>71</sup> John N. Ferdico, *Supra* note 49, pp. 213-214.

justified to seriously scrutinize and reject illegally obtained evidence. Otherwise, the protection of human rights becomes exposed to risk.

Therefore, the procedure of search and seizure has to be carried out with due care being accorded to the respect for human rights. The mechanism to enforce the rules pertaining to search and seizure is exclusionary rule. Fruit of the poisonous tree should be applicable. This might discourage the police from resorting to illegal means to secure legal end. The end should not justify the means. The police should also be liable administratively, civilly as well as criminally.

### **Discussion Questions**

1. Compare and contrast search and seizure without warrant in Ethiopia and other jurisdictions.
2. Discuss the effects of illegal search and seizure in Ethiopia and other countries?
3. What is the fate of evidence gathered illegally in Ethiopia given the silence of the FDRE Constitution on the point?
4. Is body search a natural consequence of arrest in the Ethiopian law and practice? Why or why not?
5. What is the distinction between administrative and criminal search?
6. What is the legal place of stop and frisk as well as search undertaken by the Ethiopian Revenues and Customs Authority in the Ethiopian law?
7. Read Art 58/f of the proclamation related to customs. By a contrario reading of the provision, the Ethiopian Revenues and Customs Authority tend to interpret it as allowing search and seizure without court warrant except for persons engaged in import and export trade. Do you agree? Why or why not?

## **CHAPTER THREE**

### **POST ARREST PROCEDURES**

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

#### **3.1. Remand**

##### **Relevant Laws**

Art 3, 5, 8, 9, 11, and 12, UDHR

Art 9 and 14, ICCPR

Art 19-21, FDRE Constitution

Art 29, 59-62, CPC

##### **Initial Appearance<sup>72</sup>**

Due process requirements mandate that within a reasonable (not extreme or arbitrary) time after arrest, the accused person must be brought before a magistrate and given formal notice of the charge. Such notice occurs at the initial appearance. At this time the accused is also notified of his or her legal rights, and bail is determined for those who did not receive temporary release during the booking phase. Release on recognizance (ROR), a substitute for bail, can also occur, typically at the recommendation of the magistrate, when there seems to be little risk that the accused will fail to appear for trial. The accused is released on his or her own personal recognizance, or obligation...

For some kinds of minor offenses, such as being drunk and disorderly, or in cases in which a simple citation has been issued, summary trials and sentencing are conducted at this initial appearance, with no further court processing. In other situations, the magistrate presiding at the

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<sup>72</sup> James A. Inciardi, *Supra* note 2, p. 143.

initial appearance may determine that the available evidence is not sufficient to warrant further criminal processing and consequently may dismiss the case.

### **The Judicial Decision to Release<sup>73</sup>**

An arrested person must promptly be taken before a magistrate, who is a judge at the lowest level of the judicial hierarchy and who makes a determination that probable cause exists. The magistrate will use a standard of probable cause that is a bit tougher than that of the police officers. For one thing, the magistrate has more time to view the evidence, to reflect, and then to decide than the police officer had at the scene of the crime. The magistrate must also repeat the Miranda warning and then whether to release the defendant on bail or on percentage bail (the defendant deposits with the court only a certain percentage of the bail that has been set): to release on recognizance or ROR (no bail is required on condition that the defendant appears for trial and remains law-abiding in the meantime); to release the defendant in to some one's custody; or to detain the defendant in jail pending further proceedings.

In making the decision to release, judges or magistrates are strongly influenced by prosecutors' views as to whether a given defendant is a safe risk for release. In most, release criteria have been whether the defendant can be relied on to be present for the next court appearance. In practice, judges tend to rely on such factors as the gravity of the charge and the probability that the defendant may commit a crime or harass victims if released. The district of Colombia and a few other jurisdictions permit "preventive detention" when there is a high probability that the defendant may commit a crime if released. Following passage of the Anti-Terrorism Act of 2001, the number of detainees held in federal correctional facilities increased significantly. Despite the difficulty of predicting human behavior, the Supreme Court has ruled that it is constitutional to deny bail to a person who is considered dangerous.

### **Pretrial Investigation, Arrest, and Detention (China)<sup>74</sup>**

Once a crime is committed or alleged, it is reported to the public service agency (police), the procurator, or the court. After a brief preliminary investigation, if it is determined that the matter

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<sup>73</sup> Freda Adler *et al*, *Criminal Justice*, (New York: MacGraw Hill, 4<sup>th</sup> ed., 2006), pp. 18-19.

<sup>74</sup> Erica Fairchild and Harry R. Dammer, *Supra* note 5, pp. 152-153.

warrants further state involvement, the case is filed, and an investigation conducted by the police (public service agency) or the procurator...

Arrested persons should not be held during the investigation stage for longer than one month. However, according to the revised CPL (Articles 126-127), this time can be extended if circumstances justify. These circumstances include major criminal gang cases, complex cases involving multiple offenses and offenders, complex cases in remote areas, and cases in which the penalty for the crime would be more than ten years imprisonment.

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### **Summary**

To protect the rights of suspected persons, it is a constitutional requirement to bring the detained individual within a reasonable time to the nearest court. The court has to ascertain the legality of the arrest. It cannot enter into the business of weighing evidence like a trial. This is an early stage. The police usually have to gather further evidence. The court should limit itself to checking a prima-facie case against the suspect. It is difficult to formulate a clear rule for every matter. It should be seen on a case by case basis. The court must allow the detention of the person unless there are legal grounds to deny bail or it is necessary till the completion of the investigation. This demands responsible handling of each and every case. Limiting the time to finalize the investigation has the advantage of protecting the rights of the suspect. But, it might create difficulty in cases of exceptional complexity. It seems prudent to leave room for such kinds of unique situations.

To sum up, bringing a suspect to court immediately after arrest guarantees the rights of individuals from not being curved by the state. The court has to ascertain the legality of the arrest. However, it should not unnecessarily hamper the legal efforts of the police to prevent and investigate crime. The court should appraise each and every case striking a balance between the interests of individuals and that of the community.

### **Discussion Questions**

1. What are the procedures to be followed in handling remand cases?

2. Can one appeal on an order of remand?
3. Is it legal to entertain bail question by the remand bench after ordering the arrestee to remain in custody?
4. What should a court handling a remand case do upon ascertaining that the suspect was detained by mistake? Is it legal to release the suspect unconditionally even without personal recognizance?
5. What are the pros and cons of limiting the period of remand?

### **3.2. Release on Bail**

#### **Relevant Laws**

Art 3, 8, 11, UDHR

Art 9, ICCPR

Art 17, 19-21, FDRE Constitution

Art 28, 59-79, CPC

Vagrancy Control Proclamation No. 384/2004

Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005

#### **Bail<sup>75</sup>**

Persons accused, convicted or under arrest for an offence may be granted bail, which means they are released under a duty to attend court or the police station at a given time. The right to bail has been reduced in recent years amid concern that individuals on bail reoffend and fail to turn up at court for their trial. Twelve percent of those bailed to appear at court fail to do so (criminal justice statistics 2000) and nearly 25 percent of defendants commit at least one offence while on bail (Brown {1998} offending while on bail, Home Office, Report No.72}. The criteria for granting or refusing bail are contained in the Bail Act 1976. There is a general presumption in favour of bail for unconvicted defendants, but there are some important exceptions. Bail need not be granted where there are substantial grounds for believing that, unless kept in custody, the accused would fail to surrender to bail, or would commit an offence, interfere with witnesses or

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<sup>75</sup> Catherine Elliott and Frances Quinn, *Supra* note 29, pp. 328-329.

otherwise obstruct the course of justice. In assessing these risks, the court may take account of the nature and seriousness of the offence and the probable sentence, along with the character, antecedents, associations and community ties of the defendant. Following the Criminal Justice and Court Services Act 2000, a court considering the question of bail must take into account any drug misuse by the defendant. The Criminal Justice Act 2003 has created a presumption against bail for a person charged with an imprisonable offence, who tests positive for a specified class A drug and refuses treatment, unless there are exceptional circumstances. This provision may breach Art. 5 of the European Conventions on Human Rights which guarantees the right to freedom of the person.

The courts need not grant bail when the accused should be kept in custody for their own protection, where the accused is already serving a prison sentence or where there has been insufficient time to obtain information as to the criteria for bail. If the court does choose to grant bail in such cases, its reasons for doing so must be included in the bail record. The presumption in favour of bail is reversed where someone is charged with a further indictable offence which appears to have been committed while on bail.

The Criminal Justice and Public Order Act 1994, following concern at offences being committed by accused while on bail, provided that a person charged or convicted of murder, manslaughter, rape, attempted murder or attempted rape could never be granted bail if they had a previous conviction for such an offence. This complete ban breached the European Convention on Human Rights. The law has now been reformed by the Crime and Disorder Act 1998, under which such a person may only be granted bail where there are exceptional circumstances which justify doing so. Thus Sion Jenkins, who was convicted of the murder of his foster daughter Billy- Jo, was on bail throughout most of the proceedings.

When bail is refused for any of the stated reasons, other than insufficient information, the accused will usually be allowed only one further bail application; the court does not have to hear further applications unless there has been a change in circumstances. Where the remand in custody is on the basis of insufficient information, this is not technically a refusal of bail. So, the accused may still make two applications.

Bail can be granted subject to conditions, such as that the accused obtain legal advice before their text court appearance or that the accused or a third party give a security (which is a payment into court that will be forfeited if the accused fails to attend a court hearing). When a defendant fails to attend court any money held by the court is immediately forfeited and it is up to the person who paid that money to show it should not be forfeited. A defendant refused bail, or who objects to the conditions under which it is offered must be told the reasons for the decision, and informed of their right to appeal. The prosecution also has increasing rights to appeal against a decision to grant bail.

The Criminal Justice Act 2003 has given the police the power to grant bail at the place of arrest. This is called “street bail”. It means that the police do not have to take suspects to the police station and undertake lengthy paperwork. A form is completed on the street and later entered in police records. The power is unlikely to be used much until compulsory ID cards have been introduced.

In 1992 the average proportion of unconvicted and unsentenced prisoners was 22 percent of the average prison population. Many of these remand prisoners, who have not been convicted of any offence, are kept in prison for between six months and a year before being tried, despite the fact that 60 percent of them go on to be acquitted or given a non- custodial sentence.

### **Methods of Pre Trial Release<sup>76</sup>**

Financial Bond Both financial bonds and alternative release options are used today

Fully secured bail- The defendant posts the full amount of bail with the court.

Privately secured bail- A bondsman signs a promissory note to the court for the bail amount and charges the defendant a fee for the service (usually percent of the bail amount). If the defendant fails to appear, the bondsman must pay the court the full amount. Frequently, the bondsman requires the defendant to post collateral in addition to the fee.

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<sup>76</sup> George E. Rush and Judy Hails, *The dictionary of Criminal Justice with Summaries of Supreme Court Cases Affecting Criminal Justice*, (New York: Dushkin/McGraw-Hill, 6<sup>th</sup> ed., 2003), p. 27.



Deposit bail- The court allow the defendant to deposit a percentage (usually 10 percent) of the full bail with the court. The full amount of the bail is required if the defendant fails to appear. The percentage bail is returned after disposition of the case, but the court often retains 1 percent for administrative costs.

Unsecured bail- The defendant pays no money to the court but is liable for the full amount of bail should he or she fail to appear.

### ***Alternative Release Options***

Release on recognizance (ROR)- The court releases the defendant on the promise that he or she will appear in court as required.

Conditional release- The court releases the defendant subject to his or her following specific conditions set by the court, such as attendance at drug treatment therapy or staying away from the complaining witness.

Third party custody- The defendant is released into the custody of an individual or agency that promises to assure his or her appearance in court. No monetary transactions are involved in this type of release.

Citation release- Arrestees are released pending their first court appearance on a written order issued by law enforcement personnel.

***Source: Bureau of Justice Statistics.***

### **Bail<sup>77</sup>**

Traditionally, **bail** is some form of property deposited or pledged to a court in order to persuade it to release a suspect from jail, on the understanding that the suspect will return for trial or forfeit the bail (and be guilty of the crime of failure to appear). In most cases bail money will be returned at the end of the trial, if all court appearances are made, no matter whether the person is found guilty or not guilty of the crime accused. In some countries granting bail is common. Even in such countries, however, bail may not be offered by some courts under some circumstances; for instance, if the accused is considered likely not to appear for trial regardless of bail. Countries without bail imprison the suspect before the trial only if deemed necessary.

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<sup>77</sup> <http://en.wikipedia.org/wiki/Bail> Visited on 25 November 2008.

Legislatures may also set out certain crimes to be unbailable, such as capital crimes. Under the current law of England and Wales, *bail* simply refers to the release of the accused before trial.

### Forms of bail

The form of bail varies from jurisdiction. But the common forms of bail include:

- **Recognizance** — a promise made by the accused to the court that he/she will attend all required judicial proceedings and will not engage in illegal activity or other prohibited conduct as set by the court. Typically a monetary amount is set by the court, but is not paid by the defendant unless the court orders it forfeited; this is denominated an *unsecured appearance bond* or *release on one's own recognizance*.
- **Surety** — when a third party agrees to be responsible for the debt or obligation of the defendant. In many jurisdictions this service is provided commercially by a bail bondsman, where the agent will receive 10% of the bail amount up front and will keep that amount regardless of whether the defendant appears in court. The court in many jurisdictions, especially jurisdictions that prohibit bail bondsmen, may demand a certain amount of the total bail (typically 10%) be given to the court, which, unlike with bail bondsmen, is returned if the defendant does not violate the conditions of bail. This also known as *surety on the bond*.
- **Conditions of release** - many varied non-monetary conditions and restrictions on liberty can be imposed by a court to ensure that a person released into the community will appear in court and not commit any more crimes. Common examples include: mandatory calls to the police, surrendering passports, home detention, electronic monitoring, drug testing, alcohol counseling and surrendering firearms.
- **Protective order**-also called an **Order of protection**- one very common feature of any conditional release, whether on bail, bond or condition, is a court order requiring the defendant to refrain from criminal activity against the alleged crime victim, or stay away from and have no contact with the alleged crime victim. The former is a *limited* order, the latter a *full* order. Violation of the order can subject the defendant to automatic forfeiture of bail and further fine or imprisonment.
- **Cash** — typically "*cash-only*," where the only form of bail that the Court will accept is cash.

- **Combinations** - courts often allow defendants to post cash bail or bond, and then impose further conditions, as mentioned above, in order to protect the community or ensure attendance.

Bail may be forfeited, and the defendant remanded to jail, for failure to appear when required.

### ***Bail law in England and Wales***

#### ***History***

In mediæval England, the sheriffs originally possessed sovereign authority to release or hold suspected criminals. Some sheriffs would exploit the bail for their own gain. The Statute of Westminster (1275) limited the discretion of sheriffs with respect to the bail. Although sheriffs still had the authority to fix the amount of bail required, the statute stipulates which crimes are bailable and which ones are not.

In the early 17th century, King Charles. I ordered noblemen to issue him loans. Those who refused were imprisoned. Five of the prisoners filed a habeas corpus petition arguing that they should not be held indefinitely without trial or bail. In the Petition of Right (1628) the Parliament argued that the king had flouted Magna Carta by imprisoning people without just cause.

The Habeas Corpus Act 1679 states, "A Magistrate shall discharge prisoners from their Imprisonment taking their Recognizance, with one or more Surety or Sureties, in any Sum according to the Magistrate's discretion, unless it shall appear that the Party is committed for such Matter or offenses for which by law the Prisoner is not bailable."

The English Bill of Rights (1689) states that "excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects. Excessive bail ought not to be required." This was a precursor of the Eighth Amendment to the US Constitution.

### **Forms of Bail**

In the UK there are three types of bail namely:

1. **Police Bail** where a suspect is released without being charged but must return to the police station at a given time.
2. **Police to Court** where having been charged a suspect is given bail but must attend his first court hearing at the time and Court given

3. **Court bail** where having already been in court a suspect is granted bail pending further investigation or while the case continues

### **Police Bail Before Charge**

Under the Police and Criminal Evidence Act 1984, the police have power to release a person, who has not been charged, on bail. This is deemed to be a release on bail in accordance with sections 3, 3A, 5 and 5A of the Bail Act 1976.

### **Police Bail After Charge**

After a person has been charged, he must ordinarily be released, on bail or without bail. Unless the accused has a previous conviction (or equivalents in cases of insanity) for certain specified homicide or sexual offences, the accused must be released either on bail or without bail. This must be done in either of the following cases.

(a) If the person arrested is not an arrested juvenile—

- (i) his name or address cannot be ascertained or the custody officer has reasonable grounds for doubting whether a name or address furnished by him as his name or address is his real name or address;
- (ii) the custody officer has reasonable grounds for believing that the person arrested will fail to appear in court to answer to bail;
- (iii) in the case of a person arrested for an imprisonable offence, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from committing an offence;
- (iii) in the case of a person who has attained the age of 18, the custody officer has reasonable grounds for believing that the detention of the person is necessary to enable a sample to be taken from him under section 63B below]
- (iiv) in the case of a person arrested for an offence which is not an imprisonable offence, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from causing physical injury to any other person or from causing loss of or damage to property;

- (v) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from interfering with the administration of justice or with the investigation of offences or of a particular offence; or
  - (vi) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary for his own protection;
- (b) If he is an arrested juvenile—
- (i) any of the requirements of paragraph (a) above is satisfied; or
  - (ii) the custody officer has reasonable grounds for believing that he ought to be detained in his own interests.

If he is granted bail it will be bail to appear at a Magistrates' Court at the next available sitting.

## **Bail by a court**

### **Right to bail**

Under current law, a defendant has an absolute right to bail if the custody time limits have expired and otherwise ordinarily a right to bail unless there is sufficient reason not to grant it.

The main reasons for refusing bail are that the defendant is accused of an imprisonable offence and there are **substantial grounds for believing that** the defendant:

1. will abscond;
2. will commit further offences whilst on bail; or
3. will interfere with witnesses.

The court should take into account:

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

The court may also refuse bail:

- for the defendant's own protection;
- where the defendant is already serving a custodial sentence for another offence;
- where the court is satisfied that it has not been practicable to obtain sufficient information;

- where the defendant has already absconded in the present proceedings;
- where the defendant has been convicted but the court is awaiting a pre-sentence report, other report or inquiry and it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody;
- where the defendant is charged with a non-imprisonable offence, has already been released on bail for the offence with which he is now accused, and has been arrested for absconding or breaching bail.

Where the accused has previous convictions for certain homicide or sexual offences, the burden of proof is on the defendant to rebut a presumption against bail.

The Criminal Justice Act 2003 amended the Bail Act 1976 restricting the right to bail for adults who tested positive for a Class A drug and refused to be assessed or refused to participate in recommended treatment

### **Conditions**

Conditions may be applied to the grant of bail, such as living at a particular address or having someone act as surety, if the court considers that this is necessary:

- to prevent the defendant absconding;
- to prevent the defendant committing further offences whilst on bail;
- to prevent the defendant interfering with witnesses; or
- for the defendant's own protection (or if he is a child or young person, for his own welfare or in his own interests).

### **Failure to Comply with Bail**

Failing to attend court on time as required is an offence, for which the maximum sentence in a Magistrates' court is three years and twelve months' imprisonment in the Crown Court. (Sentences are usually much shorter than the maximum, but are often custody.) In addition to imposing punishment for this offence, courts will often revoke bail as they may not trust the defendant again. The amended Consolidated Criminal Practice Direction states (at paragraph 1.13.5) that "the sentence for the breach of bail should usually be custodial and consecutive to any other custodial sentence".

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

### **Bail Law in the United States**

In pre-independence America, bail law was based on English law. Some of the colonies simply guaranteed their subjects the protections of British law. In 1776, after the Declaration of Independence, those which had not already done so enacted their own versions of bail law.

Section 9 of Virginia's 1776 Constitution states "excessive bail ought not to be required..." In 1785, the following was added,

"Those shall be let to bail who are apprehended for any crime not punishable in life or limb...But if a crime be punishable by life or limb, or if it be manslaughter and there be good cause to believe the party guilty thereof, he shall not be admitted to bail."

Section 29 of the Pennsylvania Constitution of 1776 states that "Excessive bail shall not be exacted forailable offences: And all fines shall be moderate."

The Eighth Amendment in the US Federal Bill of Rights is derived from the Virginia Constitution, "Excessive bail shall not be required...", in regard to which Samuel Livermore commented, "The clause seems to have no meaning to it, I do not think it necessary. What is meant by the term excessive bail...?" The Supreme Court has never decided whether the constitutional prohibition on excessive bail applies to the States through the Fourteenth Amendment.

The Sixth Amendment, to the Constitution, like the English Habeas Corpus Act of 1678, requires that a suspect must "be informed of the nature and cause of the accusation" and thus enabling a suspect to demand bail if accused of aailable offense.

### **The Judiciary Act of 1789**

In 1789, the same year that the United States Bill of Rights was introduced, Congress passed the Judiciary Act of 1789. This specified which types of crimes were bailable and set bounds on a judge's discretion in setting bail. The Act states that all non-capital crimes are bailable and that in capital cases the decision to detain a suspect, prior to trial, was to be left to the judge.

The Judiciary Act states, "Upon all arrests in criminal cases, bail shall be admitted, except where punishment may be by death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein."

### **The Bail Reform Act of 1966**

In 1966, Congress enacted the Bail Reform Act of 1966 which states that a non-capital defendant is to be released, pending trial, on his personal recognizance or on personal bond, unless the judicial officer determines that such incentives will not adequately assure his appearance at trial. In that case, the judge must select an alternative from a list of conditions, such as restrictions on travel. Individuals charged with a capital crime, or who have been convicted and are awaiting sentencing or appeal, are to be released unless the judicial officer has reason to believe that no conditions will reasonably assure that the person will not flee or pose a danger. In non-capital cases, the Act does not permit a judge to consider a suspect's danger to the community, only in capital cases or after conviction is the judge authorized to do so.

The 1966 Act was particularly criticized within the District of Columbia, where all crimes formerly fell under Federal bail law. In a number of instances, persons accused of violent crimes committed additional crimes when released on their personal recognizance. These individuals were often released yet again.

The Judicial Council committee recommended that, even in non-capital cases, a person's dangerousness should be considered in determining conditions for release. The District of Columbia Court Reform and Criminal Procedure Act of 1970 allowed judges to consider dangerousness and risk of flight when setting bail in noncapital cases.



## **Current U.S. Bail Law**

In 1984 Congress replaced the Bail Reform Act of 1966 with new bail law, codified at United States Code, Title 18, Sections 3141-3150. The main innovation of the new law is that it allows pre-trial detention of individuals based upon their danger to the community; under prior law and traditional bail statutes in the U.S., pre-trial detention was to be based solely upon the risk of flight.

18 USC 3142(f) provides that only persons who fit into certain categories are subject to detention without bail: persons charged with a crime of violence, an offense for which the maximum sentence is life imprisonment or death, certain drug offenses for which the maximum offense is greater than 10 years, repeat felony offenders, or if the defendant poses a serious risk of flight, obstruction of justice, or witness tampering. There is a special hearing held to determine whether the defendant fits within these categories; anyone not within them must be admitted to bail.

## **State bail laws**

Bail laws vary somewhat from state to state, as is typical of U.S. jurisprudence. Generally, a person charged with a non-capital crime is presumptively entitled to be granted bail. Recently, some states have enacted statutes modelled on federal law which permit pretrial detention of persons charged with serious violent offenses, if it can be demonstrated that the defendant is a flight risk or a danger to the community.

Some states have very strict guidelines for judges to follow, with a published **bail schedule**. Some states go so far as to require certain forfeitures, bail, and fines for certain crimes.

## **Summary**

In principle, every one arrested suspected of a crime has the right to be released upon conditions set. Denial of bail should be an exception. The accepted grounds for denying release are possibility of absconding, tampering with evidence, commission of other offences, gravity of an offence, etc. In case a court determines to release the suspect, it has to take into account several factors, such as, the nature of the offence, social ties of the suspect, and capacity to bring guarantee. The court could also impose further conditions on the released person. Their purpose

is to limit the danger of absconding, for the protection of the suspects themselves, and danger to the public. This could be prohibition of emigration, going to certain places, not contacting victims, electronic monitoring, etc. These non-monetary restrictions are particularly helpful to protect victims of rape from potential harassment from the suspect.

The release of a suspect could take several forms. These include bond, surety, personal recognizance, and cash. Generally, they can be classified into monetary and non-monetary. To ensure transparency, accountability and predictability, many jurisdictions adopt guidelines to handle bail issues.

Release on bail is a conditional undertaking. The suspect or accused has to comply with the terms of the release. One should attend each and every proceeding of a court. Besides, the non-monetary conditions have to be respected. Otherwise, it could result in different financial and non-financial consequences. There may be forfeiture of the amount of money set as a bail. The released person may also be detained as the case may be. Besides, in some jurisdictions, failure to comply with bail obligation may entail criminal liability.

The FDRE Constitution guarantees the right to bail. But, it can be denied on certain circumstances. Whether the Constitution allows automatic denial of bail by law is not clear. Its formulation seems to restrict disallowance of bail on a case by case basis by court. In this regard, the laws pertaining to vagrancy and corruption are contestable. The CPC has also provisions regulating bail matters.

Therefore, bail is a constitutional right. It could be limited by law on justifiable grounds. It takes different forms. Failure to comply with bail obligation could entail civil and criminal liability.

### **Discussion Questions**

1. Why bail is made a constitutional right?
2. Which forms of bail are recognized under the CPC?
3. Is it possible to lessen the amount of bail once fixed?
4. Can a public prosecutor appeal on the granting or amount of bail? Why or why not?

5. Are the requirements under Art 63 of the CPC alternative or cumulative?
6. As the law and practice shows, it is possible to entertain a bail case during remand and at the beginning of trial. Can a trial court enforce the bail granted during remand in case the suspect fails to appear without due cause?
7. What are the requirements to be released on bail by the police?
8. How should a bail allowed by police be enforced?
9. The legal provision cited in the charge affects the granting or denial of bail. For instance, for corruption case falling under Art 407 and 408 of the CC, using sub-Article 1 and 2 has great repercussion on the determination of bail as it is a matter of allowing or denying bail pursuant to the special law governing corruption cases. There is no bail for a corruption case entailing more than ten years imprisonment (Art 4/1, Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/05). See also *infra* Section 8.5. What if the public prosecutor deliberately cited sub-article 2 of the CC while the proper provision is sub-article 1 of Art 407-408? Should the court see the substance of the case for determining bail or the form of the matter as it appears in the charge? Should the court see the minimum or the maximum punishment for bail purpose?
10. Pursuant to Art 63/2 CPC, is the suspect or accused always expected to sign a bail bond whether additionally a surety is required or not? If this is the case, should the amount of bail for the suspect or accused and the surety be the same or different?
11. Can a criminal bench grant an injunction order on the released person from leaving the country as an additional condition to bail? Is it possible to challenge it based on the constitutional right to freedom of movement?

### **3.3. Habeas Corpus**

#### **Relevant Laws**

Art 3, 8, 9, 11, and 12, UDHR

Art 9, ICCPR

Art 19 and 21, FDRE Constitution

Art 15/2/I, 177-179, Civil Procedure Code

Federal Courts Proclamation No. 25/96 (as amended)

## **Habeas Corpus<sup>78</sup>**

A prisoner can challenge the legality of detention by petitioning for a writ of habeas corpus. Such a writ orders the person holding the prisoner to produce him or her in court and justify depriving the person of his or her liberty. It is available where the court sending the petitioner to prison was powerless to do so or where such detention violated the prisoner's constitutional rights.

The writ of habeas corpus is available, either by statute or constitutional provision, in every state, but it is generally considered an extraordinary remedy, to be used only when other adequate procedure exists to protect the petitioner's rights. It is not a second chance to litigate the case or a substitute for normal appeal procedures...

## **Habeas Corpus (Ethiopia)<sup>79</sup>**

Habeas Corpus (literally, in Latin, "you have the body") is the procedure by which a person illegally detained may obtain release from such detention. It is a civil remedy, although in most cases the person seeking release from custody will have been detained on a charge of committing a criminal offence. A discussion of the grounds for granting the application of habeas corpus, that is, of what constitutes an illegal detention, is beyond the scope of this book. We will merely be concerned with the procedure for filling the application. However, it may be observed that in England and United States, this procedure has proved very valuable in protecting individuals from arbitrary restraint by government officials. There was some doubt as to whether the procedure was available in Ethiopia, and the Civil Procedure Code makes it clear that it is.

An application for habeas corpus comes within the exclusive jurisdiction of the High Court. It may be made by any person who has been restrained otherwise than in pursuance of an order duly made under the Civil Procedure Code or Criminal procedure Code. It does not matter that the order was made under legal authority; if, in fact, the nature of the restraint or the means by which it was imposed is in violation of the law, the application is proper. The application must be accompanied by an affidavit of the applicant stating the name of the person under whose

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<sup>78</sup> *The Guide to American Law, Everyone's Legal Encyclopedia*, (St. Paul, Minnesota: West Publishing Company, Vol. 3, 1983), p. 396.

<sup>79</sup> Robert Allen Sedler, *Ethiopia Civil Procedure*, (Addis Ababa: Haile Sellasie I University, 1968), pp. 373-375.

custody he is, the nature and place of the restraint and the names of any persons who can testify to the facts alleged in the application. If the person restrained is unable to make the application himself, e.g., if he is restrained in a remote area or is prevented by his custodian from making the application, the application may be made by any person on his behalf; in such cases, the application must state the name of the person restrained and that he is unable to make the application and/or affidavit himself.

On receiving the application, the High Court immediately issues a summons directing the person having custody over the restrained person to appear before the court together with the person restrained on day to be fixed in the summons and to show cause why the restrained person should not be released. The court will also issue a summons for the appearance of any person who may be able to testify to the facts alleged in the application. On the day of the hearing, the court investigates the truth of the allegations and may make such orders with regard to evidence as it thinks fit. The sole question before the court is whether the restraint is unlawful. If it concludes that the restraint is unlawful, it must order the immediate release of the person in custody, and the custodian must immediately release him notwithstanding any orders or instructions to the contrary. Suppose that the applicant was arrested and detained in the prison on a charge of homicide and the prison director was instructed by the Minister of the Interior not to release him under any circumstances. If the court finds that the detention is unlawful, the director must release him despite the instructions of the Minister, and if he fails to do so, he will be held in contempt. On the other hand, it may be that court is in doubt as to the truth of the facts alleged in the application and wishes to adjourn the case until a later date, when more evidence can be presented. It may then order the release of the person restrained upon his executing a bond, with or without sureties, that he will appear in court on any future day on which his appearance may be required and will comply with such other orders that the court ordering the release may think fit to make in the circumstances. It would seem that the court is not required to order his release on bound, but if it fails to do so, it should make a decision on the application as soon as practicable thereafter.

This brief discussion of the procedure to be followed upon an application for habeas corpus should not be taken as minimizing the importance of this remedy. It is available to test the

legality of any detention, either pursuant to a charge of the commission of a criminal offence or for any other person. It operates to protect the liberty of all persons from legal governmental and private action. The inclusion of this remedy in the Civil Procedure Code makes it clear that this remedy is to be available in Ethiopia, and it may prove to be a most important one.

### **Summary**

Habeas corpus is a remedy in case government authorities detain a person and fail to bring the arrestee to the nearest court. It is a civil proceeding. The person is claiming civil right though detained for matters related to crime. Consequently, the Civil Procedure Code has provisions governing it. Thus, habeas corpus is one of the remedies available in exceptional circumstances of denial of the rights of persons.

### **Discussion Questions**

1. What are the procedures followed for deciding habeas corpus case in a civil court?
2. Do regions have jurisdiction to handle habeas corpus case related to their region or are they to handle it only by delegation from the federal courts?
3. What is the rationale for making habeas corpus a civil case even if a person is detained unlawfully in relation to crime?

## **CHAPTER FOUR**

### **PROSECUTION AND PRELIMINARY INQUIRY**

One of the key activities undertaken in the criminal procedure is prosecution. This chapter explores issues surrounding the decision to prosecute or not to prosecute and continue or discontinue the criminal justice process. It also deals with the related procedure of the preliminary inquiry. Besides, the role of justice sector institutions is examined. Prosecution is not the exclusive business of the public prosecutor. Other organs of the state are also involved in one way or another. Thus, prosecution and preliminary hearing are treated in relation to the actors in the criminal justice system.

#### **4.1. Prosecution**

##### **Relevant Laws**

Art 37-48, 122, CPC (Note that the Office of the Central Attorney General of the Transitional Government of Ethiopia Establishment Proclamation No. 39/1993 has repealed Art 42/1/d, 42/3, 44/2, 45, and 122/1,2,4 of the CPC)

Office of the Central Attorney General of the Transitional Government of Ethiopia Establishment Proclamation No. 39/1993

Art 23, Definition of Powers and Duties of the Central and Regional Organs of the Transitional Government of Ethiopia Proclamation No. 73/1993

Definition of Powers and Duties of the Central and Regional Organs of the Transitional Government of Ethiopia (amendment) Proclamation No. 73/1993

Attorneys Proclamation No. 74/1993

Art 23/3, Definitions of Powers and Duties of the Executive Organs of the FDRE Proclamation No. 471/2005

Art 16/2/b/2, Ethiopian Revenues and Customs Authority Establishment Proclamation No. 587/2008

##### **Investigation and the Initial Decision to Prosecute<sup>80</sup>**

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<sup>80</sup> Mireille Delmas-Marty and J.R. Spencer (ed), *Supra* note 9, pp. 165-166.

## The powers of the police

In England and Wales, as previously mentioned, the police have a double function: they not only investigate the alleged offence, but also take the first steps in instituting a prosecution. The same thing is true a fortiori of those other public agencies, such as the Inland Revenue and Customs and Excise, which investigate particular types of offence because these not only institute prosecutions, but remain in charge of the case as it proceeds through the courts.

At present it is a characteristic feature of criminal investigations in England that the police are left to get on with it. Unlike in France (or even Scotland) they do not have to report their actions to the public prosecutor, much less get his permission to take any particular course of action. However, in gathering information in a serious case the police will often need to make use of the various coercive powers that the law gives them, and for most of these they will need to obtain the authorization of some kind of judicial body typically a warrant from a magistrate. Thus to search property they will often need to obtain a search warrant. Similarly, they may need a 'warrant for further detention' if they wish to go to the limits that the law allows in questioning a suspect who has been arrested. Under part IV of PACE 1984 they may hold a suspect for questioning for up to thirty-six hours on their own initiative, but to hold him longer they must obtain permission from a magistrate, who may authorize detention for up to a total of ninety-six hours. However, in so far as a judge or magistrate does intervene in an investigation, the intervention is purely reactive. He or she merely decides whether or not the police (or other agency) shall be allowed to take the step for which they ask permission. There is no question of the judge or magistrate taking over the responsibility for the investigation, like the judge d'instruction in France.

## **The Continuation or Discontinuance of the Prosecution<sup>81</sup>**

Once the police have instituted proceeding, it is the duty of the CPS to take them over. When the CPS receives the file it then makes a decision as to whether to continue the proceedings, or to drop them. In reaching this decision it applies the principles set out in the code of practice for crown prosecutors...The normal method used by the CPS to discontinue a prosecution is to issue a 'notice of discontinuance' under section 23 of the Prosecution of Offences Act [POA] 1985.

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<sup>81</sup> *Ibid.*, pp. 170-171.



This enables the CPS to drop a case simply by informing the court that they are doing so. For a summary offence, or an either-way offence that is to be handled in the magistrates' court, this can be done at any time before the magistrates' court has begun to hear evidence at the trial: for a case that is destined for the crown court, discontinuance is possible up to the point where the case has been sent for trial. Where a case is discontinued under section 23, the defendant has the right, if he so wishes, to insist on the case proceeding-as he occasionally will, if he is certain that they will result in his acquittal and the public cleaning of his name. In practice, the CPS usually has little information beyond what appears in the police file with which to decide whether to continue with the case or to drop it. From this it might reasonably be expected that the CPS rarely decides to drop a case. However, this not in fact the case; some 12 percent of cases are 'discontinued'.

The power to discontinue a prosecution under section 23 of the prosecution of offences Act is only one of several ways in which it is possible for a prosecution to be dropped. Other methods include the prosecutor inviting the court to allow him not to proceed with the case, and offering no evidence-thereby forcing the court to acquit. 113

### **Procedural Decisions<sup>82</sup>**

#### Unilateral dispositions

Several different actors in the process have a unilateral power to bring the proceeding to an end. First, the police can drop the case in the early stages. They may decide to caution the offender instead of prosecuting him or, more simply, they may decide to take no further action.

Secondly, once the file has reached the hands of the CPS, the CPS may decide to drop the proceedings by issuing a 'notice of discontinuance' under section 23 of the prosecution of offences Act 1985... In addition to this, at common law the prosecution may also drop the case ahead of trial by obtaining the leave of the court to withdraw the charge. Finally, at common law the prosecution may also halt the proceeding by simply refusing to call evidence usually at the outset of the trial, but occasionally even after it has begun. At one time it was thought that where the prosecutor elects to call no evidence, he must obtain the leave of the court, as, for example,

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<sup>82</sup> *Ibid.*, pp. 209-211.

when he asks the court to allow him to withdraw the charge ahead of trial; but the modern case law makes it plain that the prosecutor has the right to do this even where the court objects. This development in the case law is paradoxical, since it took place at the same time as the courts were asserting that, in principle, the decision to prosecute [or refrain from prosecuting] is one that is open to the courts to control by means of judicial review.

Lastly, the court itself has various powers that enable it to terminate the proceedings. One of these is the common law power to terminate the proceedings for what is called ‘abuse of processes’. This is an important case law development that has taken place since the mid 1960s. As things now stand, the power to intervene for abuse of process covers two broad types of case. The first is where something has happened that means that the defendant can no longer be given a fair trial for example, because of excessive delay. English criminal procedure, unlike that in many other countries, does not have formal prescription periods for serious offences, a gap that is in practice partly filled by abuse of process. The second is where the court considers that, because of what has happened, it is unfair that the defendant should stand trial at all: for example, where the English police, to avoid the trouble of extradition, made a collusive arrangement with their colleagues in Africa to have an individual arrested and illegally put on a plane for London. The law on abuse of process is now highly developed and fills many pages in the practitioners’ books.

The court’s other power is to terminate the proceeding where, at the end of the prosecution case, the court accepts a defence submission of ‘no case to answer’...

...

### **Agreement between the victim and the accused**

In practice, an agreement between the victim and the accused can result in the prosecution being dropped. This only occurs, however, where the police and the crown prosecution service are prepared to discontinue the prosecution: in law, the victim has no right to prevent them from continuing with the prosecution even if he or she wishes to put an end to it.

### **Initiating Prosecution<sup>83</sup>**

French criminal procedure, like English criminal procedure, works on the basis of discretionary prosecution. The public prosecutor has the task of initiating the prosecution (article 31, CPP), and he must evaluate not only the legal basis of the case, but also the appropriateness of prosecution.

Exceptionally, a preliminary complaint may be required (for example, that brought by the administration in tax cases, or by the victim regarding defamation). The victim also has the power to initiate a prosecution when he either makes a complaint and constitutes himself *partie civile*, or by issuing a summons (*citation directe*). The judge concerned (*juge d'instruction* or trial judge) must then give a ruling, whatever the demands of the public prosecutor may be.

### **Termination of the Procedure<sup>84</sup>**

The decision to drop the charges on legal grounds... is pronounced by the public prosecutor if the proceedings for the offence alleged are legally unfounded [ absence of the constituent elements] or procedurally barred [ time- barred, death of the accused, unknown perpetrator, and so on]. Dropping a case does not finally dispose of it unless and until the prescription period elapses... Secondly, it provides for the adjustment of the sentence and develops sentencing with suspended sentences and conditional release. In order to combat short sentences, the legislator has provided a system of three levels: for sentences of less than six months, suspension is automatic if there are guarantees of reform [demonstrated by, for example, personality, attitude towards the acts committed or present situation]; for sentences of six months to one year, suspension of the sentence is obligatory, except when the protection of public order requires the sentence to be immediate; beyond one year and up to two years, suspension is at the discretion of the court, which must take in to account the circumstances of the offence and the personality of the offender...

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<sup>83</sup>*Ibid.*, pp. 232-233.

<sup>84</sup>*Ibid.*, pp. 341-344.

### **The Function<sup>85</sup>**

The public prosecutor has discretion to prosecute, or is under a legal duty to prosecute, depending on whether the public interest in prosecuting and the general will as expressed by the rules of criminal law are considered to be the same thing or two different things. Even where the legality principle applies, however, it is sometimes relaxed to give the public prosecutor some sort of limited discretion to prosecute.

### **The Discretion to Prosecute<sup>86</sup>**

A key feature of the English system is the discretion to prosecute. It is not, and has never been, the case in England that the authorities are obliged to prosecute for all the offences that come to their attention. One of the reasons for the creation of the CPS was to make sure that the discretion to prosecute was exercised in a consistent way from one part of the country to another. With this in mind, the legislation that set up the new service requires... to issue a code in which the principles of the exercise of this discretion are laid out. The code indicates that the decision to prosecute must be made in two stages. The prosecutor must first be satisfied that there is enough evidence to provide 'a realistic prospect of conviction'; if not, he must not proceed with the case. Secondly, even where there is a realistic prospect of conviction, he must be satisfied that it is in the public interest to bring a prosecution in this case. With this in mind, the code lists a series of factors that should weigh in favour of a prosecution, and a number of other factors that should weigh against. The courts have subsequently held that, in extreme cases, a decision made in disregard of the principles contained in the code can be the subject of judicial review.

A consequence of the division of functions between the police and the CPS is that the discretion to prosecute is exerted in two stages: once by the police when they decide whether or not to institute proceedings. And again by the CPS when they consider whether or not to continue with the case. When the police make the initial decision, they have the possible alternative of letting the suspect off with a formal caution.

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<sup>85</sup> *Ibid.*, pp.441.

<sup>86</sup> *Ibid.*, pp. 161-162.

The criteria for the police to apply when deciding whether to caution rather than to prosecute are set out in official guidelines issued by the home office. In these guidelines a number of the same factors are mentioned which also appear in the code for crown prosecutors.

### **Discretion to Prosecute (England and Wales, France and Belgium)<sup>87</sup>**

The English, French and Belgian systems all recognize the principle of discretionary prosecution. They also have a further characteristic in common, which is that the public prosecutor is attached to the executive power. This power is in turn the channel of parliamentary responsibility which is often said to be necessary to give democratic legitimacy to the policy decisions involved in prosecutions. How this principle operates varies from one country to another, and follows differences in the way that criminal justice policy has evolved.

#### **England and Wales**

In England and Wales the final decision on when to prosecute takes place when the CPS reviews the initiative taken by the police, and is framed by the guidelines issued...

... The guidelines are intended to provide coherence and transparency to the penal policy adopted by the prosecution service. They consist of criteria designed to limit the discretion inherent in the two stages which they identify in the decision to prosecute namely a review of the evidence in the case, and then a review of the public interest. In practice, however, prosecutors also rely on more precise directives set out in the practitioner manuals, the contents of which are confidential.

On the first limb of the decision, the CPS code requires the prosecutor objectively to assess whether there is 'a realistic prospect of conviction' by asking himself whether the court, on a strict application of the law, would probably convict the accused rather than acquit him. This not only implies an estimation of the admissibility and reliability of the prosecution evidence, but also, implicitly, consideration of the defenses the accused might raise. In fact, the decision is usually based on the file as passed on to the CPS by the police and without additional examination of the witnesses or of the accused. The CPS's only power is to ask the police for

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<sup>87</sup> *Ibid.*, pp. 441-446.

further investigation, refusal of which would entail dropping the case for lack of evidence. Thus in taking the decision, the CPS is rather dependant on the police. If this prospective analysis of the available evidence is positive, the CPS will proceed to the second test, which is the one that involves discretion to prosecute in the proper sense.

At the second stage the prosecutor must ask himself whether it is in the public interest to prosecute the offence that has apparently been committed. Here the code advises the prosecutor to weigh up the potentially applicable criteria for and against prosecuting which are listed in it. These criteria largely fall within the proportionality principle, the basic idea being that the more serious the offence in question, the less weight will arguments against prosecution carries in comparison to those in favour of it. At this stage of the determination of penal policy, it seems that prosecutors most commonly leave the decision whether to prosecute to the police, on the basis of the closer relationship between the police and the local community, and probably also because of the ties of close co-operation linking the prosecutors and the police together. Moreover, the police, when taking the initial decision to prosecute, have at their disposal the power to caution the offender, provided there is sufficient evidence and that the person involved recognizes the offender and admits to it. Cautioning takes place under guidelines issued by the Home Office., the contents of which are broadly similar to those of the CPS code. Thus as the CPS's decision making power is a more or less residual one, the question of the discretion to prosecute arises predominantly in terms of the relationship between the CPS and the police.

Decision making by the CPS goes beyond the question of deciding whether or not to proceed with the case, because the CPS- like other public prosecutors also, makes important decisions about the offence with which the defendant will be charged. In England and Wales, this matter is complicated by the fact that the defendant can opt to plead guilty, and as a guilty plea saves time for the prosecutor and the courts, This means that there are often negotiations about plea and charge how far the decision to prosecute is reviewable in the courts.

At one time, the magistrates at committal proceedings routinely examined cases destined for trial on indictment, with a view to throwing out the ones that appeared to be evidentially weak. However, as a result of various to the procedure for committal, they no longer do this.

Various forms of challenge against a decision to prosecute are possible, as the courts are showing an increased willingness to them in the discretionary power of the prosecuting authority, whether the decision in question is one to prosecute or to drop the case. First, the decision to prosecute (or not prosecute) is susceptible to judicial review. Under normal principles of judicial review, this means that any decision made corruptly can be challenged, as can that is grossly unreasonable. It also seems that a blanket policy of never prosecuting for a particular type of offence would be capable of challenge. In recent years, the courts have gone further. They have said that it is possible to use judicial review to attack a decision that is in conflict with the principles set out in the CPS code, and in a case in 1995 the Divisional Court actually set aside a CPS decision for this reason. In an important decision in 2000, the Divisional Court quashed a decision not to prosecute because it had been given without reasons; although the Court said that the DPP was under no general duty to give reasons, should be given for not prosecuting where, following the death of a prisoner in custody, a coroner's jury had brought in a verdict of 'unlawful killing'. In addition to judicial review, the theory of abuse of process has led the Court to use its power to stay the proceedings where there has been a manipulation or improper use of criminal proceedings. It has also been applied where there had been a delay in starting the proceedings, where this was such as to render them unfair-although the cases make it clear that a stay would be exceptional where the delay involved no fault on the part of the prosecution. This same power has also been exercised on the basis of the *non bis in idem* principle. But abuse of process is not limited to these situations. The Divisional Court has also held it to be an abuse of process to prosecute a witness who had helped the police and consequently had a reasonable expectation of not being prosecuted for a closely related offence, even though he had received no express guarantee to this effect.

In principle, judicial review of the discretion to prosecute means that official guidelines need to be laid down in a transparent manner. The duty to do this is complementary to the prosecutors' general responsibility within the service and to parliament to ensure a fair and coherent application of the law. There are, however, obvious difficulties in ensuring a coherent policy in so far the CPS tends to follow the decisions made by the police, and police forces are independent and decentralized.

Though the details are different, in continental Europe the ‘discretion to prosecute’ is also subjected to certain forms of regulation designed to eliminate unjustified discrimination.

### **France and Belgium<sup>88</sup>**

The French prosecutor assesses what ‘action to take’ on offences of which he has knowledge (article 40, CPP). The same is true in Belgium, where the discretion to prosecute (which always existed in practice) now formally appears in the code d’instruction criminelle as part of the recent revisions.

In France and Belgium, decisions about enforcing the law and the choices relating to the decision to prosecute were traditionally considered as belonging to the executive, which had the power to control the public prosecutor. As part of this thinking also came the idea that the public prosecutor’s decisions on such matters were beyond the reach of judicial control. But the trend to limit the dependence of public prosecutors has had the consequence of accentuating the judicial nature of their functions. This has produced various moves designed to make decisions about prosecuting more transparent, and also moves to subject the prosecutor’s decision (as in England ) to various types of external control.

As seen above, the new arrangement in Belgium is that guidelines on matters of prosecution policy are formulated by the College des procurers and published on the Ministry of Justice website. In France things have not yet reached this degree of transparency. However, the reasons on which the decisions of public prosecutors are commonly based are widely known and publicly discussed, and are set out in legal textbook. In addition, the French Ministry of justice frequently issues official circulars, with advice to prosecutors on how to deal with particular types of crime.

In France, although not so far in Belgium, there have been moves to put limits on the public prosecutor’s power to drop a case. In 1998, article 40 of the CPP, which is the source of the French prosecutor’s power to drop proceedings, was amended to require reasons to be given if he declined to take proceedings for certain sexual and violent offences. About the same time, there was an unsuccessful attempt to change the law to require prosecutors to give reasons for

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<sup>88</sup> *Id.*



dropping prosecutions in all cases, and also formalize the right of disgruntled citizens to ask the local procurer general to review the decision of one of his procureurs de la Republique who had decided not to prosecute.

In neither France nor Belgium have there been ‘abuse of process’, so as to enable a person who found himself prosecuted in breach of publicly stated guidelines to bring the proceedings to a halt. In 1994 the Belgian Court de cassation was invited to suppress a prosecution on the ground that, although instituted within the legal time-limit, it had not been brought within ‘a reasonable time’ as required by Article 6 of the European Convention-but it refused to do so.

As in England, so in France and Belgium the public prosecutor has to make important decisions about the nature of the charge as well as the initial decision whether to proceed with the case at all. Unlike in England, the position is not complicated by the possibility of guilty pleas, but the prosecutor may still wish to save time and trouble by the informal procedure known as correctionnalisation...

### **The Legality Principle (Italy)<sup>89</sup>**

The unsteady establishment of the parliamentary regime in Italy favored the assertion of the principle of legality of prosecution, which was helpful to the public prosecutor, then under the hierarchical supervision of the executive. The legality principle originally reflected the liberal wish to supplement political responsibility, which was almost non-existent at the time, with some other means of limiting governmental influence in public prosecution. The legality principle first appeared in the 1930 Rocco Code and survived the fascist period, although by the end of it judicial control over prosecutors’ decisions to drop cases had been abolished. The 1948 Constitution set out the legality principle among those destined to establish the rule of law. It was also conceptually linked to the institutional detachment of the public prosecutor from the executive power.

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<sup>89</sup> *Ibid.*, pp. 446-447.

Article 112 of the Constitution states that ‘the public prosecutor is under the obligation to prosecute.’ This signifies that he does not have discretion to refuse to put before the judge any allegations of which he is informed, if they fit definition of an offence.

### **Combining the Principle of Legality with Discretion to Prosecute (Germany)<sup>90</sup>**

Although the German system traditionally rests on the legality principle, its impact has been weakened by successive reforms introducing elements of the discretionary principle to the point where the two concepts could be said to coexist.

### **Upholding the principle of legality of prosecution**

The federal Code of 1887 set out the principle of legality of prosecution (although before unification, several German states had followed the discretionary approach). The legality principle is not expressly stated in the German Constitution but is seen as deriving from the principle of equality of citizens before the law and the rule of law itself. It is stated in the code of criminal procedure, the *strafprozeßordnung* that ‘the public prosecutor must prosecute all offences capable of being prosecuted, save those treated otherwise by the law, as soon as the facts are sufficiently established’... The principle is qualified by the rule that the public prosecutor can close a case without obtaining anybody’s permission because the facts alleged disclose no known criminal offence or because of procedural difficulties in prosecuting... although if he does so he must give the alleged victim reasons for his decision.

The legality principle in Germany operates in the context of a public prosecutor who depends on the executive power. This limits its effectiveness, in particular because the public prosecutor is in practice heavily dependent on the police. Furthermore, the gradual move towards limiting the legality principle in favour of ‘discretion to prosecute’ increases the possibilities of interference with prosecution by the political power. This makes it all more important for the rules about dropping prosecutions to be clearly and publicly stated.

Assessment of the discretion to prosecute

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<sup>90</sup>*Ibid.*, pp. 449-450.

The first exception to the legality principle, to minor offences only, was introduced in 1924, as part of a wider package of reforms. But it was the 1975 reform of criminal procedure that made substantial inroads on the legality principle, and it did so in two ways. First for less serious offences it became possible, with the judge's agreement, to drop a case by means of pure and simple discretion, on the basis of little blameworthiness and no public interest in prosecuting. The Court's approval is not required where the offence is a minor one and its consequences slight... Secondly, a conditional dropping of the case...possible where the accused agrees to it. The accused must then pay the victim damages, or pay a sum of money to a public body or to the State, or do community service or pay someone a pension. Here the judge's agreement is always necessary. Finally, the public prosecutor can end the proceedings with the judge's consent if it appears that no punishment would be imposed if the offence were to be tried... Guidelines on using discretion in closing a case have been laid down in circulars at the level of the Lander. This reduces disparities in the use of this flexibility in prosecution.

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### **Decision to Charge<sup>91</sup>**

#### **(a) Limitations upon the charging decision**

The American prosecutor traditionally has had broad discretion in determining whether to initiate formal charges and in selecting among possible charges. The Supreme Court has frequently recognized the freedom of individual jurisdictions to grant immense charging discretion to the prosecutor. See e.g., *U.S. v. Batchelder* (1979) (holding constitutional a statutory scheme that allowed a prosecutor to choose between two offenses, carrying substantially different punishments, but prohibiting the same conduct). Nonetheless, the Court has also noted that the prosecutor's charging discretion must be exercised consistent with the equal protection guarantee and the due process prohibition against "vindictiveness."

**Equal protection:** As noted in *Oyler v. Boles* (1962), the prosecutor's "conscious exercise of selectivity in law enforcement" may not be "deliberately based" upon grounds that would violate equal protection, "such as race, religion, or other arbitrary classification." The court has also noted, however, that because "the decision to prosecute is particularly ill-suited to judicial review," and because "examining the basis of a prosecution delays the criminal proceeding,

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<sup>91</sup> Jerold H. Israel and Wayne R. LaFave, *Supra* note 15, pp. 405-410.

threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy," the standard for establishing such an equal protection claim is a "demanding one." U.S. v. Armstrong (1996); Wayte v. U.S. (1985). The defendant must overcome "the presumption that a prosecutor has not violated equal protection" by presenting "clean evidence to the contrary." Armstrong. That "clear evidence" must establish that the prosecutor's selective enforcement policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." Wayte. To gain discovery from the government, the defendant must first produce "some evidence tending to show the existence" of both of these elements. Armstrong.(1996)

Armstrong illustrates that establishing a discriminatory impact requires more than showing that the persons prosecuted under the particular statute all fell within a category that would constitute an arbitrary classification. The defense there failed to make even a case for discovery because it did not also show that there were similarly situated offenders, outside of the class allegedly discriminated against, who were known to the prosecuting officials but nonetheless were not prosecuted. Wayte illustrates that a discriminatory motivation does not necessarily follow from a discriminatory impact.

The defendants there claimed that the government's policy of enforcing the offense of failing to register for the draft only against those who self-reported their violation (or were reported by others) was actually aimed at the suspect class of those vocal opponents of the draft who had failed to register. The court noted that even if the defendant's could show a discriminatory impact upon that class (which was highly problematic), that would hardly establish that the government purpose was to prosecute "vocal objectors," as opposed to simply being aware that such a disparate impact would follow from a policy seeking to serve other ends (e.g., administrative convenience of prosecuting self-reporters).

**Vindictive prosecution:** A due process prohibition against prosecutorial vindictiveness in charge selection was first recognized in Blackledge v. Perry (1974), a case in which defendant was originally convicted of a misdemeanor assault, exercised his right under local law to a trial

de novo, and then was charged before the de novo court with a felony assault based on the same conduct. Striking down the prosecutor's raising of the charge to a felony, the court noted that defendant was "entitled to pursue his statutory right to a trial de novo without apprehension that the state will retaliate by substituting a more serious charge for the original one." In *Blackledge*, the prosecution initially had gone to trial on the misdemeanor charge, and the court was willing to assume that the subsequent raising of the charge was vindictive. *U.S. v. Goodwin* (1982) held, however, that a presumption of vindictiveness would not be applied in a pretrial setting because at that stage changes in the charge were so much more likely to be based on non-vindictive grounds. Thus, for the defendant to establish vindictiveness under the facts of *Goodwin* (where defendant, originally charged with a petty offense, sought a jury trial, resulting in the transfer of the case to another court, where a new prosecutor obtained a felony indictment), he would have to show that the raising of the charge against him stemmed from an "actual retaliatory motive" rather than some other factor (e.g., differences in the perspectives of the two prosecutors).

**(b) Grand jury or preliminary hearing review of the charge**

Under the Fifth Amendment, a federal prosecutor cannot proceed on a decision to charge for a felony offense ("an infamous crime") unless a grand jury affirms that charging decision by indicting the defendant for that offense or the defendant waives his right to be proceeded against only by indictment. *Hurtado v. Cal.*(1884) held that this Fifth Amendment did not reflect a "fundamental principle of liberty" and therefore was not imposed upon the states by the Fourteenth Amendment. The state in the *Hurtado* case had substituted a preliminary, but *Lem Woon v. Ore.* (1913) held that due process was not violated where a state eliminated all independent screening procedures, allowing the prosecution of file felony charges directly in the trial court upon a prosecutorial oath that the charge was fairly grounded. Although *Hurtado* and *Lem Woon* were decided during the early stages of the application of the Fourteenth Amendment to state criminal justice systems, the court has continued to cite those decisions with approval. See *Gerstein v. Pugh* (1975).

Although states are not constitutionally required to provide for independent screening of the prosecution's decision to charge by grand jury or preliminary hearing, once such a procedure is imposed under local law, it cannot be conducted in a manner that denies equal protection. Thus,

the Supreme Court has long held that an indictment is subject to constitutional challenge if the grand jury selection procedure operated to discriminate on racial grounds. See *Ex. Parte Va.* (1879). Indeed, since racial discrimination “strikes at the fundamental values of our society as a whole,” such a challenge is cognizable on appeal or post conviction review even through a fairly selected petit jury subsequently convicted defendant on the charges presented in the grand jury indictment. *Rose v. Mitchell* (1979). See also *Vasquez v. Hillery* (1979). See also *Vasquez v. Hillery* { 1986 } {even though the petit jury’s conviction establishes sufficient evidence to indict, a grand jury of a different racial composition may have been willing to exercise its power to “charge a lesser offence than evidence might support”}. So too, dismissal of the indictment is required even though the racial discrimination was limited to a single member of the grand jury (which does not require a unanimous vote to indict) *Campbell v. Louisiana* (1998) (racial discrimination in the selection of the foreperson, who was taken from outside the randomly selected panel).

The court has also suggested that due process may impose certain other fairness restrictions on the grand jury selection process. See *Hobby v. U. S.* (1984) (racial and gender discrimination in the selection of the grand jury foreperson violated “representational due process values,” which require that “no large and identifiable segment of the community [be] excluded from jury service,” but did not require dismissal where foreperson’s duties were ministerial and the discrimination did not alter the overall composition of the grand jury); Cf. *Beck v. Wash.* (1962) {raising, but not deciding, the question of whether a state grand jury indictment is subject to a due process challenge on the ground of juror bias).

### **Post Filing Prosecutorial Screening<sup>92</sup>**

Post filing prosecutorial review of the charging decision is inherent in the many post-filing procedures (e.g., the preliminary hearing) that require the prosecutor to review the facts of the case. If the prosecutor should determine that the charge is not justified, a dismissal will be obtained through a *nolle prosequi* motion (noting the prosecutor’s desire to relinquish prosecution), which ordinarily will be granted in a perfunctory fashion by the court. Similarly, if the prosecutor considers the charge to be too high, a motion can be entered to reduce the charges.

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<sup>92</sup> Wayne R. LaFave *et al*, *Supra* note 18, pp. 14-15.

In deciding whether to make such motions, the prosecutor will look to basically the same grounds that might justify a pre-filing rejection or reduction of the charge. Even where a charge was carefully screened and approved prior to filing, post-filing review can readily lead to a contrary conclusion as circumstances change (e.g., evidence becomes unavailable ) or the prosecutor learns more about the facts of the case. Of course, where the charge was not previously screened or was screened only on a skimpy arrest report, post filing review is even more likely to lead to a decision to drop or reduce the charges.

What is the end product of the combined pre-filing screening by police and prosecutor and post-filing screening by the prosecutor? The best source on that question is a series of studies on the attrition of felony arrests. One leading study, using a dozen urban prosecutorial districts, found that those districts screened out of the criminal justice system from 31% to 46% of all felony arrests, with a jurisdictional mean of 39%. A later study, drawing information from 11 states, (including diversions) fell in the range of 31-36% for those states as a group.

### **Summary**

The criminal procedure has different filtering mechanisms to avoid or at least minimize the risk of endangering innocent persons. These systems are pre-filing screening and post filing screening. Before submitting an a charge, in some jurisdictions, the police have the discretion to drop a case under investigation. Even prior to such a decision, in a modern criminal justice system, the police should have a reasonable ground to trigger criminal investigation.

After the police, it is up to the public prosecutor to scrutinize the police investigation file to determine the presence of sufficient evidence to prove guilt. The prosecution office should not rush to frame charge. The available evidence has to be evaluated. If there are points not clarified, a further investigation has to be ordered.

In some jurisdictions, the public prosecution has to evaluate the interest of the public in proceeding with the case even though there is sufficient evidence to guarantee realistic prospect of conviction. Thus, there is a possibility to pass two hurdles in certain jurisdictions.

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

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

The discretion of the prosecution has an impact over its role in the determination of continuing or discontinuing a criminal case. Once a charge is filed, the situation is different. The court has to know at least the interruption. In some jurisdictions, the approval of the court is sought. Others differentiate cases to be subjected to limitation. As regards the role of the victim, many jurisdictions allow the victim to have a say in terminating less grave offences like misdemeanors.

In Ethiopia, the decision to prosecute or not has now been left to the public prosecution office. Anyone aggrieved has to follow the hierarchical channel till the general attorney, now head of the Ministry of Justice and justice bureau heads at the federal and regional levels, respectively. It appears that there is no judicial review. The possibility for court intervention in the process is debatable. The CPC contains provisions regulating the manner of deciding whether to charge or not.

As the law stands, there is no law clearly empowering the public prosecutor to drop charges. Art 122 of the CPC has been repealed by Proclamation No. 39/93. Art 23/3 of Proclamation No. 471/2005 allows withdrawal based on a law. It implies that there is another law defining the



conditions necessary to terminate the prosecution. There is up to now no law allowing that. But, this law permits automatic interruption of a criminal investigation for due cause. Once a charge is filed, it does not seem legal to drop charges. Art 16/2/b/2 of Proclamation No. 587/2008 also contains similar provisions regarding interruption of criminal investigation and charges pertaining to revenues and customs related offences.

The case of upon complaint cases is different. It is the absolute right of the victim to decide the fate of the case until a judgment is entered.

To sum up, the public prosecutor has the key role in the determination of case to be brought to court or discontinued. But, the police and courts have also some role. In our country, the legal regime regulating prosecution and interruption is found in the constitution, CPC and many statutes. There is controversy over the power to discontinue charges filed in court.

### **Discussion Questions**

1. “The prosecutor must first be satisfied that there is enough evidence to provide ‘a realistic prospect of conviction’; if not, he must not proceed with the case. Secondly, even where there is a realistic prospect of conviction, he must be satisfied that it is in the public interest to bring a prosecution in this case.” Does this work in Ethiopia? Why or why not?
2. What is the principle of legality and discretion in prosecution? Do they have a place in Ethiopia?
3. Is there a possibility in Ethiopia for a court to intervene in the business of prosecution? Why or why not? Can there be review by way of cassation on the final decision of a prosecution authority in case there is a clear unreasonableness in its decision?
4. Is there a legal ground for withdrawing a criminal charge in Ethiopia at the federal and regional level?
5. Can the heir of a deceased person demand a court interruption of a criminal case brought upon complaint the deceased?
6. Can a police close a criminal case brought upon complaint?
7. What is the effect of withdrawal of a charge? Can a public prosecutor file the indictment later?

## 4.2. The Preliminary Inquiry

### Relevant Law

Article 80-93, CPC

### Preliminary Hearing <sup>93</sup>

Following the first appearance, the next scheduled step in a felony case ordinarily is the preliminary hearing (sometimes called a preliminary “examination”). All but a few of our fifty-two jurisdictions grant the felony defendant a right to a preliminary hearing, to be held within a specified period (typically, within a week or two if the defendant does not gain pretrial release and within a few weeks if released). This hardly means, however, that the preliminary hearing will be held in almost all or even most cases. Initially, the critical stage for post prosecutorial screening of charges... is in the period prior to the scheduled preliminary hearing and a prosecution can readily dismiss 15-30% of the felony cases before the scheduled hearing (the higher percentage coming in those jurisdictions in which there is little or no pre-filing screening). Where the charges are not dismissed, two additional decisions—one by the prosecutor and one by the defense—can sharply reduce the number of preliminary hearings.

First, in almost all jurisdictions, if the prosecutor obtains a grand jury indictment prior to the scheduled preliminary hearing, the preliminary hearing will not be held, as the grand jury’s finding of probable cause has rendered irrelevant any contrary finding that the magistrate might make at the preliminary hearing. Prosecutorial bypassing of the preliminary hearing by immediately obtaining a grand jury indictment occurs with great frequency in many prosecutorial districts, particularly those that regularly prosecute by grand jury indictment... Second, even where the preliminary hearing is made available to the defendant, there nonetheless may not be a preliminary hearing because the defendant prefers to waive the hearing and move directly to the trial court. That is often the strategy employed where the defendant intends to plead guilty.

Where the preliminary hearing is held, it will provide, like grand jury review, a screening of the decision to charge by a neutral body. In the preliminary hearing, that neutral body is the

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<sup>93</sup> *Ibid.*, pp. 18-19.

magistrate, who must determine whether, on the evidence presented, there is probable cause to believe that defendant committed the crime charged. Ordinarily, the magistrate will exist as part of the *ex parte* screening of the complaint... The preliminary hearing, however, provides screening in an adversary proceeding in which both sides are represented by counsel. Jurisdictions vary in the evidentiary rules applicable to the preliminary hearing, but most require that the parties rely primarily on live witnesses rather than affidavits. Typically, the prosecution will present its key witnesses and the defense will limit its response to the cross-examination of those witnesses. The defendant has the right to present his own evidence at the hearing, but traditional defense strategy advises against subjecting defense witnesses to prosecution cross-examination in any pretrial proceeding.

If the magistrate concludes that the evidence presented establishes probable cause, she will “bind the case over” to the next stage in the proceedings. In an indictment jurisdiction... the case is bound over to the grand jury, and in a jurisdiction that permits the direct filing of an information... the case is bound over directly to the general trial court, if the magistrate finds that the probable cause supports only a misdemeanor charge, she will reject the felony charge and allow the prosecutor to substitute the lower charge, which will then be set for trial in the magistrate court. If the magistrate finds that the prosecution’s evidence does not support any charge, she will order that the defendant be released. The rate of dismissals at the preliminary hearing quite naturally varies with the degree of previous screening exercised by the prosecutor. In a jurisdiction with fairly extensive screening, the percentage of dismissals is likely to fall in the range of 5-10% of the cases heard. However, other jurisdictions (usually those in which hearings are more sparingly utilized) report a much higher dismissal rate. In either type of jurisdiction, the preliminary hearing dismissal is likely to account for the disposition of less than 5% of all felony complaints.

### **Grand Jury Review<sup>94</sup>**

Although almost all American jurisdictions still have provisions authorizing grand jury screening of felony charges, such screening is mandatory only in those jurisdictions requiring felony prosecutions to be instituted by an indictment, a charging instrument issued by the grand jury. In

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<sup>94</sup> *Id.*

a majority of the states, the prosecution is now allowed to proceed either by grand jury indictment or by information at its option. Because prosecutors in these states most often choose to prosecute by information, the states providing this option commonly are referred to as “information” states. Eighteen states, the federal system, and the District of Columbia currently require grand jury indictments for all felony prosecutions. These jurisdictions commonly are described as “indictment” jurisdictions. Four additional states are “limited indictment” jurisdictions requiring prosecution by indictment only for their most severity punished offenses (capital life imprisonment, or both). Apart possibly from capital offenses, the defendant may waive the right to be proceeded against by indictment, thereby allowing the prosecution to proceed by information. Waiver rates vary from one jurisdiction to another but waivers are likely to be made by at least 10% of all felony defendants.

The grand jury is composed of a group of private citizens who are selected to review cases presented over a term that may range from one to eighteen months. Traditionally the grand jury consisted of 32 persons with the favorable vote of a majority needed to indict. Today, many states use a somewhat smaller grand jury (e.g., 12) and some require more than a simple majority to indict. As in the case of the magistrate at the preliminary hearing, the primary function of the grand jury is to determine whether there is sufficient evidence to justify a trial on the charge sought by the prosecution. The grand jury, however, participates in a screening process quite different from the preliminary hearing. It meets in a closed session and hears only the evidence or to be present during grand jury proceedings. If there was a prior preliminary hearing, the grand jury is in no way bound by the ruling on probable cause at the hearing. The grand jury may indict even though the magistrate dismissed the charge at the preliminary hearing and may refuse to indict even though the magistrate bound over to the grand jury.

If a majority of the grand jurors conclude that the prosecution’s evidence is sufficient, the grand jury will issue the indictment requested by the prosecutor. The indictment will set forth a brief description of the offense charged, and the grand jury’s approval of that charge will be indicated by its designation of indictment as a “true bill.” If the grand jury majority refuses to approve a proposed indictment, the charges against the defendant will be dismissed. Jurisdictions vary in

the percentage of cases in which grand jurors do not indict, although typically that percentage is quite low (e.g., 2-5%).

### **Function of the Preliminary Hearing<sup>95</sup>**

**(a) Screening.** The preliminary hearing, also known as the “preliminary examination” or the “probable cause” or “bind over” hearing, is a judicial proceeding, hearing, is a judicial proceeding, commonly conducted by a magistrate and available only in felony prosecutions. At that proceeding, the prosecution in an open and adversary hearing must establish that there is sufficient evidence supporting its charge to “bind the case over” to the next stage in the process (either review by the grand jury or the filing of information in the trial court). In determining whether the prosecution has made such a showing, the magistrate provides an independent screening of the prosecution’s decision to charge. Indeed, most court view this screening objective as the sole legally cognizable purpose of the preliminary hearing. The importance of this screening in the overall functioning of the criminal justice process has frequently been noted by appellate courts. Preliminary hearing screening is said to serve to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based.

The actual effectiveness of the preliminary hearing screening in achieving these ends is a matter of some dispute. Commentators and courts have offered arguments and statistics on both sides. Fruitful evaluation of their conclusions is made especially difficult, the difficulty of it, however, is with substantial variations in the hearing’s structure and operation from one jurisdiction to another (and sometimes, in its operation from one court to another in the same jurisdiction). Studies of the preliminary hearing in different jurisdictions have produced, for example, quite disparate statistics on preliminary hearing dispositions. The percentage of dismissals to the total number of hearings ranged from 2% to more than 30%. Equally significant differences were

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<sup>95</sup> Wayne R. LaFave and Wayne H. Israel, *Criminal Procedure*, (St. Paul, Minn. : West Publishing Co., 2<sup>nd</sup> ed., 1992), pp. 655-661.

found for the percentage of cases in which the magistrate's bind over was restricted to a lesser offense than that originally charged.

A variety of differences among jurisdictions have been cited as having a possible bearing on the disparate rates of dismissals and reductions. Those differences relate not only to the legal standards governing the preliminary hearing, but also to the institutional structure and local traditions that influence the participants in the hearing. Among the differences mentioned are the following: (1) whether prosecutorial screening before the case reaches the preliminary hearing stage is extensive (as in jurisdictions where 30-50% of the cases presented by the police do not result in the filing of charges) or is superficial or not even utilized for all but exceptional cases; (2) whether prosecutors are assigned horizontally to cases (with different prosecutors responsible for initial screening, preliminary hearing presentation, and trial) or vertically (with the same prosecutor responsible for the case from initial presentation to final disposition); (3) Whether the prosecutor may bypass the preliminary hearing by taking the case directly to the grand jury... whether the prosecutor regularly uses the bypass alternative (so that preliminary hearings are used in only a small group of cases) or regularly utilizes the preliminary hearing; (4) whether the use of the bypass procedure is tied to the strength of the particular case or to unrelated, administrative concerns; (5) whether the magistrates conducting the hearings are lay persons or lawyer/judges; (6) whether the magistrates operate under heavy or light caseloads; (7) whether the caseload at the trial level necessarily precludes trial of the cases which could justifiably be bound over (thereby encouraging the magistrate to reduce charges in cases more appropriately disposed of at the misdemeanor level); (8) whether cases are settled by plea bargaining prior to the preliminary hearing stages or plea bargaining and cases are settled largely after the case is bound over to the trial level; (9) whether a defense counsel regularly insist upon a preliminary hearing even in open and shut cases (largely to obtain discovery) or usually waive the hearing in such cases; (10) whether the evidentiary standard governing the magistrates decision to cause standard applied on the issuance of an arrest warrant or a standard comparable to that imposed by a trial judge in determining whether there is sufficient evidence to send a case to the jury...; (11) whether the prosecutor must meet the bind over standard through evidence that would be admissible at trial or may rely instead on hearsay and other evidence generally inadmissible at trial...; (12) whether the prosecution, even though not required to do so in order to satisfy the

bind over standard, follows the practice of presenting all of its key witnesses, or instead seeks to limit defense discovery and reduce the burden on its witnesses by introducing just enough evidence to meet the bind over standard; (13) whether the magistrate has the same leeway as a trial court fact finder in judging credibility or can only reject inherently incredible testimony...(14) whether the scope of permissible defense presentations is comparable to that at trial or restricted through limitations on such matters as the presentation of affirmative defenses or the range of whether the practical impact of a magistrate's order of dismissal is to end the case unless new evidence is uncovered, or the prosecutor frequently reinitiates prosecution with out additional evidence by either taking the case to the grand jury or refilling when another judge is sitting as preliminary hearing magistrate...

Assuming that substantially different dismissal and reduction rates for two jurisdictions are explained in large part by one or more of the differences noted above, depending upon the nature of the influential factor, the lesson suggested will be quite different. As for some differences, such as differences in the extent of pre-hearing prosecutorial screening, their impact might suggest that the disparate rates do not reflect significant differences in the effectiveness of preliminary hearing screening, but rather differences in the type of cases that reach the preliminary hearing. As for others, such as caseload or institutional factors that promote efforts to sharply reduce the number of cases that reach the felony trial courts, their impact might suggest that rate differentials are attributable to one jurisdiction adopting a screening determination that goes substantially beyond assessment of the technical sufficiency of the evidence. Here, magistrates, with the prosecutor's acquiescence, may be looking as well to other factors that reflect upon the "prosecutorial worth" of the offense (e.g., the likelihood of jury sympathy that could produce an acquittal, the comparative seriousness of the crime, and the need for criminal sanctions), even though legally the only issue for the court is evidentiary sufficiency. Finally, as to those that relate to the character of the evaluation of evidentiary strength (such as the requirement of admissible evidence), a correlation between more rigorous standards and higher rates here would suggest that the disparate rates do reflect significant differences in the effectiveness of the preliminary hearing in serving its basic screening function.

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

In many jurisdictions, these factors combine to provide preliminary hearing discovery that is of quite limited use. The importance of such limited discovery to the defendant will depend in part on the alternatives available for obtaining the same or even broader discovery and the comparative costs of those alternatives. Where the identity of prosecution witnesses and the content of their prior statements to the police are automatically available under state discovery rules, along with all material physical evidence, the discovery available through the preliminary hearing tends to be costly and of little significance. On the other hand, where discovery rules give the defense discovery of only limited aspects of the prosecution's case, and the defense counsel can otherwise learn of likely prosecution testimony only by finding and interviewing (if they are willing) prospective prosecution witnesses, the preliminary hearing may be so important a discovery tool as to easily justify going through a hearing notwithstanding the certainty of a bind over. Moreover, even where state law provides extensive discovery, if that discovery is not available until after the critical time for plea settlements has passed, the preliminary hearing may still serve as the primary discovery vehicle for the substantial percentage of cases resolved by guilty pleas.



For all but a few jurisdictions, the defense discovery available through the hearing treated as an incidental byproduct rather than a basic function of the hearing. Indeed, if the defense's use of cross-examination subpoena authority seems aimed basically discovery, rather than at challenging the sufficiency of the prosecution's evidence, the magistrate may prohibit such use. So too, where a magistrate's error is found to have had no bearing on defendant's right to finding on evidentiary sufficiency, a defense showing that the error cost it the opportunity for discovery will not justify relief. Both legislatures and courts have been unreceptive to the suggestion that discovery should be recognized as a basic function of the preliminary hearing and its procedures shaped accordingly. The preliminary hearing, it is noted, imposes significant burdens on witnesses and is a costly use of the time of prosecutor defense counsel, and magistrate. It makes to sense that can be fulfilled more expeditiously and with more appropriate timing through traditional discovery procedures.

**(c) Future impeachment.** Extensive cross-examination of prosecution witnesses the preliminary hearing may be of value of the defense even though there is little likelihood of successfully challenging the prosecution's showing of evidentiary sufficiency and little to be gained by way of discovery. That is because, as the Supreme Court has noted "the skilled interrogation of witnesses (at the preliminary examination) by an experienced lawyer can fashion a vital impeachment to for use in cross-examination of the state witnesses at the trial." In many instance witnesses are more likely to make damaging admissions or contradictory statements at the preliminary hearing because they are less thoroughly briefed for that proceeding than they are for trial. Also, with respect to some witnesses, the more they say before trial, the more likely that there will be some inconsistency between their trial testimony and their serious statements. Arguably, the jury may view such inconsistencies as more damaging to the witness' credibility when the testimony, as opposed to prior statements given to the police, since the preliminary hearing testimony was given under oath in a judicial setting. Moreover, in some jurisdictions, the use of the inconsistent statement is not limited to impeachment; it may be used as substantive evidence.

Cross examination designed to lay the function for future impeachment carries with it certain danger for the defense. If the cross-examination focuses too much on potential weaknesses in the

witness' testimony, it may educate the witness as to these weaknesses. The witness may rehabilitate himself for the trial and state that at the hearing he was confused, but that everything is now clear in his mind. If the witness is one who otherwise might "soften" his view of the facts as time passes and his emotional involvement lessens, extensive cross-examination at the preliminary hearing may only harden his position and make him less able to retreat to a more friendly position.

**(d) The Perpetuation of testimony.** Preliminary hearing testimony traditionally has been admitted at trial as substantive evidence, under the "prior testimony" exception to the hearsay rule, where the witness is not available to testify at trial. Thus, the hearing perpetuates the testimony of witness, ensuring that it may be used even if the witness should die, disappear, or otherwise become unavailable to testify. While the Supreme Court has stated that a major advantage of the hearing for the defense is its availability to "preserve testimony favorable to the accused of a witness who does not appear at the trial," the hearing is not commonly used by the defense for this purpose. For reasons discussed... the defense rarely will have its own witnesses testify at the preliminary hearing. Accordingly, the perpetuation of testimony is of practical significance primarily as it relates to prosecution witnesses, and the possibility of perpetuation tends to be viewed by the defense as a negative feature of the hearing.

The admission of the preliminary hearing testimony of a prosecution witness who is unavailable at trial (and therefore is not subject to trial cross-examination) must be reconciled with the defendant's Sixth Amendment right of confrontation. *California v. Green* established the basic guidelines for admitting such testimony consistent with defendant's Sixth Amendment right. The court there upheld the constitutionality of admitting preliminary hearing testimony over a defense objection that it should not be admissible where the prosecution witness was "unavailable" solely because of a claimed loss of memory. The defendant in *Green* had been charged with furnishing marijuana to a minor, Porter. When Porter was called to testify, he was evasive and uncooperative on the stand, claiming a lapse of memory. The prosecution then introduced two prior statements of Porter, including his preliminary hearing testimony, "to prove the truth of the matter asserted in the statements." The state court held that admission of these

statements as substantive evidence violated defendant's right to confrontation, but the Supreme Court reversed.

The court in *Green* initially held that if Porter was subject to cross-examination as to the statements at the trial, then the confrontation clause was not violated by admission of the statements as substantive evidence. The court added, however, that there was a question as to whether Porter was subject to effective cross-examination at trial in light of his lapse of memory. It accordingly went on to consider the admissibility of the preliminary hearing testimony on the assumption that Porter was an "unavailable" witness at trial: [P]orter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. In the present case respondent's counsel does not appear to have been significantly limited in any way in the scope or nature of his cross-examination of the witness Porter at the preliminary hearing. If Porter had died or was otherwise unavailable, the Confrontation Clause would not have been violated by admitting his testimony given at the preliminary hearing—the right of cross-examination then afforded provides substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the state. As in the case where the witness is physically unproducible, the State here has made every effort to introduce its evidence through the live testimony of the witness; it produced Porter at trial, swore him as a witness, and tendered him for cross-examination. Whether Porter claimed a loss of memory, claimed his privilege against compulsory self-incrimination or simply refused to answer, nothing in the Confrontation Clause prohibited the state from also relying on his testimony to prove its case against *Green*.

As various lower courts have noted, *Green* requires "an opportunity to effectively cross-examine and merely providing an opportunity to cross-examine at the preliminary hearing is not per se adequate opportunity". Ordinarily, however, unless the defense counsel was limited by "unusual circumstances," the opportunity for cross-examination provided in the typical preliminary

hearing will be deemed sufficient. In his *Green* dissent, Justice Brennan cited a series of factors that might inhibit cross-examination at the typical preliminary hearing. Since the issue presented there is one of probable cause, counsel may view cross-examination to be of little value. Counsel may also be concerned that cross-examination will give the prosecutor discovery, that the magistrate will not look kindly on extending the length of the hearing, and that the short time available for preparation makes cross examination too risky at this point. The court majority did not find persuasive Justice Brennan's reliance on these potential restraints, noting that Justice Brennan nonetheless acknowledged that the preliminary hearing testimony could be used where the witness was unavailable for reasons [e.g., death] that prevented his appearance.

In *Ohio v. Roberts*, however, the Court raised the possibility that *Green* would be limited to cases in which the opportunity to cross-examine had been extensively utilized. The Court there held that *Green* permitted admission of the preliminary hearing testimony of an unavailable prosecution witness who had been called by the defense at the preliminary hearing, but had been examined, in effect as a hostile witness. The Court noted that counsel, in his "direct examination," and her veracity, and had not been limited in any way" in this line of questioning. The end result was, as in *Green*, a "substantial compliance with the purposes behind the conformation requirement." The Court added that, in light of the facts before it, there was no need to determine where *Green* applied where a defense counsel had not actually cross-examined the witness or had engaged in only "de minimus questioning." It acknowledges that passages in *Green* "suggest that the opportunity to cross-examine at the preliminary hearing—even absent actual cross-examination—satisfies the Conformation Clause." Yet, the court there also recognized that "defense counsel in fact had cross-examined Porter." As defense counsel here had acted similarly, it would leave for another day the question of whether "the mere opportunity to cross-examine render(s) the prior testimony admissible."

**(e) Other functions.** In a particular jurisdiction the preliminary hearing may be utilized to serve other incidental functions, such as to gain release. This is particularly true where bail is set at the initial appearance largely on the bases of a schedule tied to the defense charged, and the preliminary hearing provides the magistrate with his first extensive examination of the facts of the individual case.

The preliminary hearing also may serve as an integral part of the plea bargaining process, particularly where negotiations have been undertaken prior to the hearing. The hearing may then operate as a valuable “educational process” for the defendant who is not persuaded by his counsel’s option that the prosecution has such a strong case that a negotiated plea is in the defendant’s best interest. In other jurisdictions, the preliminary hearing may serve as an occasion for the initiation of the plea bargaining... The hearing in some jurisdictions offers the initial point at which the constitutional validity of police acquisition of evidence may be challenged, and under some circumstances, it may offer sufficient advantages over the pretrial motion to suppress that defense counsel will insist upon a preliminary examination for this purpose alone. The preliminary hearing also may be utilized to establish mitigating circumstances that can then be presented at sentencing through the preliminary hearing transcript.

### **Summary**

One of the essential events in the criminal justice process is the preliminary hearing. It is the procedure for hearing evidence before charge or trial. It has various functions such as filtering, discovery, basis for future impeachment, and preservation of testimonial evidence. The United States has a unique system of grand jury hearing for felony cases. This jury is different from the jury that is going to see the merit of the case during trial. The preliminary hearing is often used by the prosecution. Defendants are reluctant to use it. It might be fear of the exposition of their defence to the opposing side. But, the chance should be granted for both sides.

The CPC also recognizes this procedure. Its main purpose is preservation of evidence. Other purposes can also be inferred from the provisions of the law. But, it is not a screening mechanism used by the courts found in other jurisdictions. The criminal bench entertaining a preliminary hearing cannot have a say in deciding whether there is sufficient evidence against the suspect. In fact, the primary responsibility of the court is notifying the purpose of the preliminary hearing to the suspect at the earliest possible opportunity before starting taking evidence. So, the preliminary hearing is undertaken for various purposes. In our country, its functions are limited.

### **Discussion Questions**

1. What are the functions of the preliminary hearing other than the maintenance of evidence under the CPC?
2. What are the procedures followed to conduct a preliminary hearing under the CPC?
3. Can a public prosecutor order preliminary hearing after a charge is already filed to the high court on a case of first degree murder or aggravated robbery?
4. Should the remand under Art 93 be renewed every 14 days to avoid the danger of being left in prison indefinitely?

## CHAPTER FIVE

### THE CHARGE

After the public prosecutor decided that there is sufficient evidence to warrant conviction, the next step is preparation of a charge/indictment. The charge has to fulfill technical and legal requirements to facilitate the trial process. Hence, this chapter is engaged with formality and substance of the charge. It also deals with the related problems of joinder of offences and accused, amendment of charges.

#### **5.1. Framing the Charge: Form and Content**

##### **Relevant Laws**

Art 108-122 and Second Schedule of the CPC

Art 20 of FDRE Constitution

##### **The Charge<sup>96</sup>**

...

The provisions relating to “charges” are intended to provide that the “charge” shall give the accused full notice of the offence charged against him.

The purpose of a charge is to tell an accused person as precisely and concisely as possible of the matter with which he is charged and must convey to him with sufficient clearness and certainty what the prosecution intends to prove against him and of which he will have to clear himself ... It has been repeatedly held that the framing of a proper charge is vital to a criminal trial and that this is a matter on which the Judge should bestow the most careful attention...

##### **Indictment Consists of Three Parts<sup>97</sup>**

Sir Mathew Hale, under Charles II, described an indictment as ‘a plain, brief, certain narrative of an offence committed’. The growth of technicalities soon destroyed both the brevity and the

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<sup>96</sup> Y V Chandrachud *et al*, *Ratanala & Dhirajilal's The Code of Criminal Procedure*, (New Delhi: Wadhwa & Company Nagpur, 17<sup>th</sup> ed., Reprint 2006), pp. 441-442.

<sup>97</sup> J W Cecil Turner, *Supra* note 50, pp. 593-594.

plainness. But the sweeping alterations introduced by the Indictments Act, 1995, did much to reduce this portion of criminal procedure to a simple and rational system, making it easier for the accused to defend himself, and harder for him to escape by mere technical objections. An indictment now consists of three parts: (a) the commencement, (b) the statement of offence, and (c) the particulars of offence...

(a) The commencement

This states the place of the court's jurisdiction, usually a particular county or borough.

...

(b) The statement of offence

The statement of offence, with which every count must begin, merely names the crime charged, e.g. 'murder', 'manslaughter', 'cruelty to a child, contrary to sect. I of the Children and Young Persons Act, 1933'. Under the Act of 195 it must use ordinary language, avoiding technical terms as far as possible, and need not set out all the essential elements of the offence. If the offence be a statutory one, the statute and the particular section must be specified in the statement (schedule I, rule 4(3)).

(c) The particulars of offence

The particulars of offence follow, in order to inform the accused as to the circumstances-e.g. time, place, conduct, subject matter-of the crime which has thus been alleged against him, in fact, such particulars as may be necessary for giving reasonable information as to the nature of the charge. Here again, ordinary language is to be employed, and the use of technical terms is not to be necessary (schedule I, rule 4(4)). The particulars may, too, be very brief, e.g. 'A.B. on the first day of July 1951, in the county of Cambridge, murdered Y.Z.' But they must be sufficient to indicate to the accused 'with reasonable clearness' (schedule I, rule 9) the occasion and the circumstances of his crime. This is necessary for that he may be able to know what defence to offer and, moreover, he may be able to know whether he be prosecuted a second time for this same misdeed, to protect himself by showing...that the identical charge has already been dealt with.



### **General Counts<sup>98</sup>**

Hence if a count be not detailed enough, but too 'general', the judge may quash it; for 'generality of accusation is difficulty of defence'. A count, for instance, would be too general if it merely alleged the act of 'inciting A to commit an indictable offence', or of 'attempting to induce A to contravene the law of the land', without specifying what the particular offence or contravention was. Formerly it was also required that no count should run in the alternative ( as by alleging that the prisoner murdered A or wounded him), the result being to purchase precision at the cost of prolixity; for a further count was added in order to allege the second of the alternatives.

**Alternative counts permitted by statute:** But by the act of 915(schedule I, rule 5(1)) in the case of any statutory offence which is defined by alternatives- as, for instance, conduct performed with any one of different capacities, or consisting of doing or omitting any one of different acts- a count may now allege the different alternatives which the defining statute sets out. A good instance is afforded in the Act of 1915 itself: 'ill-treated or neglected the said child, or caused or procured the said child to be ill-treated or neglected, in a manner likely to cause the said child unnecessary suffering or injury to its health' (form).

**Duplicity:** A count may, however, still be bad for duplicity. Thus a conviction was quashed where a prisoner was charged that he 'by night unlawfully took or destroyed game or rabbits on land at C or was on the said land by night with a gun, net or other instrument for the purpose of unlawfully taking or destroying game'. The count was held bad as charging the appellant in one count with two different offences. The section under which the prisoner was charged did not deal with one act in alternative ways but with two different offences.

### **What a Count Should State<sup>99</sup>**

To be good, a count should state in the particulars of offence (i) the party indicted; (ii) the party injured, and (iii) the facts and the intent that are necessary ingredients of the offence. Under the old law no 'variance' was allowed; i.e. the facts given in evidence had to fit exactly the

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<sup>98</sup> *Ibid.*, pp.594-595.

<sup>99</sup> *Ibid.*, pp. 595-596.

allegations stated in the indictment. But the Act of 1915 (schedule I, rules 7,9) relaxes the precision formerly required in stating them.

**Description of the parties; elements of the offence:**

(i) the party indicted should be described. But it need only be in such a manner as is reasonably sufficient to identify him', without necessarily stating his occupation or abode or even his correct name. and if his name is unknown, and he refuses to disclose it, he may be indicted as 'a person unknown'.

(ii) The party injured be described, but only with the like reasonable sufficiency. And, if this be impossible, he too may be described as 'a person unknown', as in the case of the murder of some stranger found dead. And in an indictment for obtaining by false pretences it is not necessary to state the person to whom the false pretences were made.

(iii) The acts, circumstances, and state of mind constituting the offence should be set out. Here, again, certainty was formerly required. And in some offences the due degree of legal certainty could only be obtained by employing particular technical expressions, e.g. in indictment for any felony, 'feloniously', for burglary, 'feloniously and burglariously'. But, now, by the act of 1915 (schedule I, rule 9), it will usually 'be sufficient to describe any place, time, thing, matter, act, or omission whatsoever (to which it is necessary to refer in any indictment) in ordinary language, in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to'...

**Plurality of Counts<sup>100</sup>**

In early days no indictment could contain more than one count. This simplicity of statement made inevitable a miscarriage of justice if the facts proved at the trial happened to deviate even slightly from those alleged in the indictment. To avoid this danger, a plurality of counts was soon allowed, describing the same crime in many forms, as if there had been so many distinct occurrences. Later practice came to permit even entirely different crimes to be charged in the same indictment, of course in different counts. But all of them had to be of the same grade, i.e. all had to be treasons or all felonies or all misdemeanors.

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<sup>100</sup> *Ibid.*, pp. 596-598.

**Statutory restriction of plurality:** The Act of 1915 (s.4, schedule I, rule 3) forbids the joinder of several charges in the same indictment, except when all the charges either ‘are founded on the same facts’, or else ‘form, or area part of, a series of offences of the same or a similar character’. Section 5/3 of the Act confers on the judge a discretion to order a separate trial on any count or counts, a discretion with which the Court of Appeal will not interfere unless justice has not been done. The mere fact that evidence was admissible on one count and inadmissible on another is not, by itself, a ground for separate trials. On the other hand, wherever a joinder becomes permissible, the old prohibition against joining felonies and misdemeanors together is removed. That prohibition was due to the fact that the procedure at a trial for a felony is slightly different from that at trials for misdemeanor...Where the indictment does contain more than one count, each count should be put separately to the accused and his plea should be taken separately to each count.

#### **Averments Divisible at Common Law<sup>101</sup>**

On the basic rule, the evidence must of course establish, and the conviction also be for, the actual offence stated in the count which it concerns. But even by common law, ‘averments are divisible’; so that if the words in which a count states an offence involve the statement of some minor offence, the petty jury can reject part of the averment and convict of the minor offence alone, though it was not stated separately. Thus a statement of murder would stand as a statement of manslaughter if the words ‘of malice aforethought’ were struck out. Similarly every statement of aggravated larceny includes one of simple larceny.

#### **Conviction of a Crime Different from that Charged<sup>102</sup>**

And the legislature has gone still further, in two ways. For in some cases it has enabled juries to convict of the crime which has in fact been proved, although it is not the crime charged in the indictment. Thus on an indictment for any crime the jury may convict of an attempt to commit it; and on one for robbery, of an assault with the intent to rob; on one for embezzlement, of either stealing as a servant or simple stealing...

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<sup>101</sup> *Id.*

<sup>102</sup> *Ibid.*, 598-599.

Again the legislature has in other cases permitted juries to convict of the crime alleged in an indictment, even though a different (but a graver one) has been disclosed by the evidence. Thus on a trial of any person for misdemeanor, if it appears that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor.

### **Duplicity and Multiplicity**<sup>103</sup>

A **duplicitous indictment** or information is one that unites two or more separate and distinct offenses in the same count. By obscuring the exact charge, duplicitous indictments or informations may violate the defendant's constitutional right to notice of charges and may violate the defendant's constitutional right to notice of charges and may impair the defendant's ability to plead double jeopardy in a subsequent prosecution. A **multiplicitous** indictment or information is one that charges the commission of a single offense in several counts. The evil of a multiplicitous indictment is that it may lead to multiple sentences for the same offense, or it may have some psychological effect on a jury by suggesting that the defendant has committed more than one crime. If a duplicitous or multiplicitous indictment or information is prejudicial to the defendant and the prejudice is not corrected, the indictment may be dismissed.

### **Joinder of Offenses**<sup>104</sup>

A defendant's action in the course of a single criminal episode may result in several violations of the law. Where local law gives the prosecutor the option of prosecuting each of those violations in a separate trial, two aspects of the Fifth Amendment's prohibition against double jeopardy may impose restraints upon the prosecutor's exercise of such discretion. While neither directly mandates that different charges be joined in the same prosecution, each may prohibit the prosecutor from presenting in a second trial those charges that are not joined in the initial prosecution.

Initially, successive prosecutions may be barred by the Fifth Amendment's basic prohibition against repeated jeopardy for the "same offence." Even though there has been a violation of two

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<sup>103</sup> John N. Ferdico, *Supra* note 49, p. 45.

<sup>104</sup> Jerold H. Israel and Wayne R. LaFave, *Supra* note 15, pp. 410-415.

distinct state criminal provisions, those provisions may nevertheless be considered part of the “same offense” for double jeopardy purposes. “[To] determine whether there are two offenses or only one,” the court applies the “same elements” test of *Blockburger v. U. S.* (1932): “whether each [criminal] provision requires proof of an additional fact which the other does not.” Obvious illustrations of separate provisions that are part of the same offense under this test are the higher and lower degrees of the same crime (e.g., first degree and second degree homicide). However, the two provisions need not be part of a formal degree classification scheme in order to constitute the “same offense” under the *Blockburger* test. Thus *Brown v. Ohio* (1977) found that the crimes of theft of a vehicle and joyriding in that vehicle were part of the same offense since, as defined by state law, theft was simply joyriding with an additional element (an intent to permanently deprive the owner of the property). On the other hand, two crimes can be part of the same statutory grouping, building upon the same core offence, and not be the “same offense” under the *Blockburger* standard. Thus, in *U.S. v. Dixon* (1993), Justice Souter (in a dissent arguing for a conception of “same offense” broader than *Blockburger*) offered the illustration of the crimes of robbery in a dwelling and robbery with a firearm. While both have the common element of robbery, each has a different additional element, and therefore, under *Blockburger*, separate prosecutions could be brought for a single robbery involving both additional elements (although if a prosecution initially was brought for the core crime of robbery, subsequent prosecutions for the firearm and dwelling offenses should be barred because the simple robbery would be the “same offense” as to each).

When a statutory offence includes alternative elements, determining whether two crimes constitute the same offense requires an inquiry beyond the language of the statutory provisions. Thus, in *Harris v. Okla.* (1977), defendant was initially prosecuted under a felony murder statute that made all felonies predicate offenses for felony murder. Since that prosecution was premised on the murder having occurred in the perpetration of a robbery with a firearm, the court held that a second prosecution for the underlying offence of robbery with a firearm was barred. Although commissions of that particular felony was not essential to a felony murder, the court looked to the theory of the earlier prosecution as establishing the relevant statutory elements for that case, and applied *Blockburger* to those elements. In *Grady v. Corbin* (1990), the court went beyond *Harris* and *Blockburger* to hold that a defendant who had been prosecuted for driving while

intoxicated and crossing the median could not subsequently be prosecuted for negligent homicide if the element of negligence was to be proven by the “ same conduct” as charged in the earlier prosecution. However, U.S v. Dixon (1993) overruled the “same conduct” standard of Grady, and held that double jeopardy protection did not go beyond the Harris application of Blockburger. Illustrating the limits of this standard, the Dixon court noted that Harris would have been decided differently if the felony murder statute there had a specified predicate offense simply of robbery and the second prosecution had been for robbery with a firearm. Then, each of the two prosecutions would have required proof of a different element (the killing in the felony murder prosecution and the firearm in the armed robbery prosecution).

If the two crimes are the “same offense” under the Blackburger test, they can not be prosecuted separately. The second prosecution, whether for the more serious or the least serious of the two, will be barred by double jeopardy. However, there are exceptions. If defendant is charged and convicted on one of two crimes constituting the same offense, and then appeals that conviction and gains a new trial, the prosecution is viewed as starting over (consistent with the Ball principle... and the second crime may be substituted or added in the prosecution on retrial. Mont.v. Hall (1987). So too, the “same offense” double jeopardy objection will be lost if the defendant is responsible for splitting two charges into separate trials. Jeffers v. U.S. (1977) (defence successfully opposed government motion to consolidate). Similarly, the government will not be held responsible for failing to bring the two charges together when the elements of the second offense charged did not exist or could not have been known at the time first charge was resolved (a situation that would be presented in a felony murder situation if the charge on the predicate offense was resolved before the victim died). Daz v. U.S. (1912). See also Garrett v.U.S. (1985) (separate continuing enterprise charge not barred because that offense was still ongoing when defendant plead guilty to included narcotics transaction}.

A second double jeopardy doctrine -the collateral estoppel doctrine- primarily affects joinder of violations arising from the same criminal episode that are separate offences under Blockburger. Recognized as an aspect of double jeopardy in Ashe v. Swenson (1970), the collateral estoppel doctrine bars prosecution for a second offense where the defendant was previously acquitted on a factually related offence and that acquittal was based on a factual element that is also an essential

element of the second offense. Thus, in *Ashe*, a defendant charged with robbing the initial victim in a single, multi victim robbery, and acquitted by the jury on the ground that he had not been prevented at the robbery, could not subsequently be prosecuted on a charge of robbing the other victims. Under the collateral estoppel doctrine, the earlier acquittal only bars use of the same critical facts as an element of another offense; it does not preclude use of the same evidence for another purpose requiring a lesser standard of proof, such as a civil forfeiture or showing similar past behavior in a prosecution for an unconnected offence. *Dwling v. U.S.* (1990). Also, it applies only to the ultimate fact on which the jury acquitted and not as to some subsidiary issue. *Id.* Of course, as an aspect of double jeopardy, collateral estoppel serves only to protect the defendant; the prosecution cannot use a guilty verdict to relieve it of the burden of establishment beyond a reasonable doubt the same ultimate fact in a prosecution for another offense involving that fact. *Simpson v. Fla.* (1971).

### **Joinder of Parties<sup>105</sup>**

Where several persons have participated in a single offense or a series of related offenses, state law ordinarily grants the prosecutor discretion to prosecute them jointly or separately. In at least one situation, where the prosecutor desires to use a confession of one of the participants, the prosecutor's exercise of discretion to try the defendants jointly is subject to a significant constitutional restraint. *Bruton v. U.S.* (1968) held that where the confession of one codefendant contains references to a second codefendant, and the confessor refuses to take the stand, the use of that confession in a joint trial violates the second codefendant's Sixth Amendment right of confrontation; it is not sufficient simply to inform the jury that the confession constitutes admissible evidence only against the confessor. While *Bruton* does not bar joinder of accomplices, it imposes a significant price for joinder-not using one accomplice's confessions if it contains prejudicial references to the other accomplice. This restriction applies even though the prosecution uses interlocking confessions of each of the non-testifying codefendants. *Cruz v. N.Y.* (11987). Where, however, the non-testifying codefendant's statement is attributable to the other codefendants under the hearsay exception for coconspirators' statements made during the course of and in furtherance of the conspiracy, the *Bruton* restriction does not apply since use of

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<sup>105</sup> *Ibid.*, pp. 415-417.

the confession against all the codefendants is consistent with the confrontation clause. *Dutton v. Evans* (1970).

*Richardson v. Marsh* (1987) limits *Bruton* to cases in which the non-testifying codefendant's confession refers directly to the other codefendant. Where the confession has only an evidentiary linkage to the other codefendant (i.e., in light of other evidence in the case, as linking the other codefendant to the crime, but it does not refer to the codefendant or his actions), sufficient protection is provided by judicial charge to the jury that the confession is evidence only against the confessing codefendant. In *Gray v. Maryland*, (1998), however, the court refused to extend the distinction drawn in *Richardson* as to "inferential incrimination" to a confession that referred to the defendant but then had been redacted to substitute "a blank space, the word deleted, or a similar symbol" for that name. The redaction could not eliminate the confession's potential for direct incrimination since the jury "will often realize that the [redacted] confession refers specifically to the defendant" and the "obvious deletion may well call the juror's attention specifically to the removed name," thus "encouraging the jury to speculate about the reference." *Richardson* reflected an accommodation of administrative concerns (e.g., the difficulty of determining pretrial whether an evidentiary linkage would exist, and the value of joinder in avoiding inconsistent verdicts), and that accommodation would not be carried over to a setting posing far greater potential for improper use of the confession to incriminate other codefendants.

### **Timing of the Prosecution<sup>106</sup>**

State discretion as to the timing of a trial is limited by the Sixth Amendment requirement that "the accused shall enjoy the right to a speedy trial." Denial of this right automatically requires dismissal of the delayed prosecution with prejudice; the impact of the denial is too diffuse to permit trial courts to seek to tailor the remedy (e.g., by reducing defendant's sentence) to the hardship that may have been caused in the particular case, *Strunk v. U.S.* (1973). Flexibility has been the governing philosophy, however, in determining whether delay constitutes a denial of the right. Thus, the leading speedy trial decision, *Barker v. Wingo* (1972), rejected what it described as "inflexible approaches" (e.g., imposing a specific time limitation) in favor of "a balancing test, in which the conduct of both the prosecution and the defendant are weighed."

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<sup>106</sup> *Ibid.*, pp. 47-421.



Barker listed four factors to be weighed in determining whether there had been a denial of the speedy trial right: (1) length of the delay; (2) the government's justification for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice caused by the delay, such as lengthened pretrial incarceration, lengthened anxiety, and possible impairment of the presentation of a defense. In discussing those factors, the court indicated that though a defense demand for a speedy trial is not essential, the absence of a demand will work strongly against the defendant who had counsel. The speedy trial right, it noted, was unlike most other constitutional rights in that the "deprivation of the right may work to the accused's advantage," and it could not be assumed that defendant wanted a speedy trial, delay being a "not uncommon defense tactic." The absence of a defense demand played a large role in sustaining much of a five year delay in Barker, where defendant had been at large on bail through most of that period and pursued the strategy of awaiting the outcome of the ongoing prosecution of his accomplice.

Where the court has had before it a lengthy delay following a defense demand for a prompt trial, its primary focus has been on evaluating the cause for the delay. While each ruling has been tied to the facts of the particular case, the decisions clearly indicate that the state must offer some affirmative justification, not merely the absence of a deliberate attempt to gain advantage by postponing the trial. Thus, *Smith v. Hooey* (1969) and *Dickey v. Fla* (1970) found speedy trial violations where the state failed to make any effort to respond to the demand of a defendant, then serving a federal sentence, for a prompt trial on pending state charges. The state's failure to even request that federal officials make the defendant available for trial could not be justified by its lack of authority to compel such cooperation. Neither could its failure be justified on the ground that the cost of transporting the prisoner would have had to be borne by the state.

The lack of an affirmative justification also was critical in the unusual case of *Doggett v. U.S.* (1992), where there was no demand, but defendant was not in a position to make a demand because he did not know charges were pending against him. The government there indicated while he was out of the country, but then was negligent in failing to note his return, so that nearly six years elapsed between his return and his arrest. The court noted that two of the Barker prejudice elements obviously were not present the accused was not subjected to pretrial incarceration and he had no anxiety and concern as to charges of which he was unaware and the

only evidence of the third element was the length of the delay in itself, there being no affirmative proof of particularized prejudice. Accordingly, if the government had pursued the accused with reasonable diligence, his speedy trial claim would have failed. However, “when, the government’s negligence causes delay six times as long as that generally sufficient to trigger judicial review [i.e., six years], and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant’s acquiescence, nor persuasively rebutted, the defendant is entitled to relief.”

Of course, the speedy trial guarantee, like other Sixth Amendment rights, applies only to the “accused.” Thus, as suggested in *MacDonald*, discussed *infra*, if the government had dismissed the indictment in *Doggett* after failing to locate the defendant, that would have tolled the running of the Sixth Amendment time period without regard to whether a court later concluded that the government had exercised due diligence in looking for him.

While *Kloper v. N.C.* (1967) held unconstitutional a state practice that, in effect, suspended a prosecution with automatic leave to reinstate. *U.S. v. MacDonald* (1982) viewed an outright dismissal as quite different. Once the charges are dismissed, the individual is no longer a subject of public accusation and has no restraints on his liberty, leaving him in a situation analogous to that in *U.S. v. Lovasco*, discussed *infra*. See also *U.S.v. Loud Hawk* (1986) (*MacDonald* controlling as to period of pending government appeal from a lower court’s dismissal of an indictment, the defendant no longer being subject to restraint, although government’s desire to reinstitute the prosecution if successful on appeal was a “matter of public record”). Under delay between the dismissal and the reinstatement of charges remains subject to constitutional control, but only under the due process clause. *MacDonald*.

The speedy trial guarantee protects the defendant only against undue delay between the initiation of prosecution and trial, *U.S. v. Marion* (1971), and prosecution is initiated for this purpose with either the filing of formal charges or the arrest and holding of the defendant for the purpose of filing charges, *Dillingham v. U.S.* (1975). However, undue delay between the completion of the crime and the institution of prosecution can constitute a violation of due process. *U.S. v. Lovasco* (1977). To establish such a due process violation, defense must show initially that the

prosecution had sufficient evidence to institute prosecution at an earlier point, and that the delay resulted in actual trial prejudice (e.g., the loss of favorable witnesses). In addition, the court must find that the reasons for the delay were so unjustified as to “deviate from ‘fundamental conceptions of justice.’” Lovasco cited as legitimate justifications such administrative needs as “awaiting the results of additional investigation” to possibly identify other offenders and bringing charges together so as to avoid “multiple trials involving a single set of facts.” A clearly impermissible grounding for delay would be the prosecution’s gain through the hoped for loss of defense evidence over the period of the delay. Marion.

### **Indian Criminal Procedure<sup>107</sup>**

**Enhanced punishment of previous convict [sub-section (7)].-** This sub-section says how previous conviction is to be set out. Where it is intended to prove a previous conviction for the purpose of enhancing the punishment, it should be entered in the charge and the accused should be called on to plead thereto; his mere admission that he had been in jail once is insufficient to show that he pleaded guilty to a previous conviction. Where the previous convictions are denied, the prosecution is bound to prove that there were such convictions and that the accused was the person charged.

**‘Without specifying particular items or exact dates’:** When the accused is charged with criminal breach of trust or dishonest misappropriation of money, the particular items or exact dates on which the offence was committed need not be stated. It is not necessary to specify the separate sums which have been embezzled. It is sufficient that some of the money mentioned in the charges has been misappropriated, even though it may be uncertain what is the exact amount so misappropriated...

**‘Time.....shall not exceed one year’.** - Any number of acts of breach of trust committed within one year amounts only to one offence. But where a series of acts extend over more than a year the joinder of charges is illegal...

### **Summary**

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<sup>107</sup> Y V Chandrachud, *Supra* note 96, pp. 444-445.

A charge or indictment is written information to an accused. It is used to communicate to the accused the legal provision alleged to be violated and the particulars of the offence in order that one gets the opportunity to challenge the truth or otherwise of the charge. Thus, framing a charge is a requirement of due process of law. After the preparation of the charge, the suspect becomes an accused.

The extracted materials elaborate the laws of England, United States and Indian, respectively. We can observe that the charge has to be prepared so as to fulfill its intended purpose. It should be precise. But, it should not be general. It must explain with reasonable clarity the alleged offence with its particulars. The satisfaction of these criterias has to be seen on a case by case basis.

The indictment could contain several counts against a single accused in the case of concurrent crimes. But, one count should be restricted to the case of violation of an independent offence. In other words, it should avoid duplication. It is also possible to charge several persons at a time in case there is a link between them with the alleged crime. A court could order separate trial whenever justice requires it.

Besides, there could be alternative charges. It is also possible to convict a person for an offence not mentioned in the indictment. However, there has to be a nexus between the law found in the charge and the one to be used as a substitute. The accused should get the chance to defend.

The FDRE Constitution has guaranteed for the accused persons to be informed of criminal charges in writing. The CPC, too, has provisions dealing with the charge. But it lacks the necessary detail and some clarity. Unlike the Civil Procedure Code, the CPC does not authorize the registrar and court to enforce the formal and legal requirement of a charge. It seems prudent to assume the power. But, the registrar should be limited to checking technicality. For instance, the registrar can order correction or reject a charge not mentioning a criminal law violated. It does not have the mandate to evaluate the appropriateness of a law cited. In case no criminal law is stated, it becomes a technical matter.

The prosecution has to frame and file a criminal charge within 15 days. The absence of a clear sanction has the effect of disregarding it. The FDRE Constitution also contains a vague “reasonable time” test. Its justiciability is subject to controversy. Art 114 of the CPC is intended to prevent prejudice of judges as there may be a tendency to be biased by past record. It was targeted to apply provisions like Art 635/3/a of the repealed PC. In the new CC, the requirement of past record for aggravating theft has been left from Art 669/3 of the CC.

Like many other jurisdictions, the CPC separately treats the charge and evidence brought to substantiate or refute it. Art 124 of the CPC imposes a duty on both parties to make sure that evidence is ready for trial. Other jurisdictions adopt a pre-trial conference system to facilitate the exchange of evidence between the parties. Pre-trial discovery is a reciprocal duty. The CPC does not also have the procedure before full scale trial, i.e., arraignment. It is used to ascertain pleading of guilty or not and make the necessary preparation for the trial. Had the CPC had the arraignment stage, it could have been used for sharing of evidence between the parties. There should not be surprise during the trial. Every one has to be ready knowing the charge and the kind and identities of evidence to be confronted. Art 94/2/e requires adjournment in case any evidence unexpected by either party is produced. Taking by surprise is not allowed.

Forced by the absence of a clear provision regulating pre-trial discovery in the CPC, the practice of stating and attaching evidence to a charge has developed. The need for exchange of information between the parties is out of question. Earlier there was a practice of preparing a charge without indicating or attaching evidence to the accused. But, the court is given a differently prepared charge containing the list of prosecution evidence. This was done fearing the possible move of the accused to tamper with evidence. This violates the constitutional guarantee to properly confront witnesses and other evidence. Now, the situation is completely changed. The charge and evidence submitted to court and given to the accused are similar.

As regards the manner of indicating the evidence, there is variation between the different prosecuting agencies. The prosecutors of the Ministry of Justice indicate the kind of evidence and only list them under the titles of testimonial, documentary, and exhibit. The Ethiopian Revenues and Customs Authority prosecutors follow a distinct approach. They go beyond and

explain what each and every type of evidence is going to prove. This really facilitates the trial process. It becomes easy to determine the relevance or admissibility of the evidence. The prosecutors can also support in achieving speedy trial as it is simple to identify the crucial evidence to win the case. For instance, they may not require adjournment in case one witness fails to appear if there are other witnesses testifying on a similar point.

Therefore, a charge/indictment serves to communicate the law violated and particulars of an offence for an accused. It enables the accused to properly defend. The Ethiopian constitutional and legal provisions relating to charge resemble the laws of other countries. But, they do lack clarity and detail. The gap found in the CPC has affected the matters to be included in the charge. The mode of production and exchange of criminal evidence is not well addressed. In practice, evidence is made part of the charge. There is also variation as regards the levels of details of the evidence included in the charge.

### **Discussion Questions**

1. Can a court registrar reject or order correction of a criminal charge failing to satisfy the formal requirements of the law in the absence of a clear provision in the CPC?
2. Can a judge reject or order correction of a criminal charge on the grounds of technical and legal requirements of the CPC without a mandate given in the code?
3. Ato Adefers demolished the fence found on the boundary shared with Ato Selamu found in Arada Sub-city Kebele 07/08 on 5 January 2008 at 4:00 PM in the afternoon. Is the appropriate legal provision to charge Ato Adefers Art 686, 689, or 851 of CC? Why? Can he be charged under more than one count? Why or why not? Frame a charge based on the pertinent provisions and Second Schedule of the CPC.
4. Ato Gulbetu slapped the face of W/o Lemlam on 6 December 08 in Arada sub-city Kebele 04/05 at 9:00 AM in the morning and she felt the pain for three hours. Is the proper legal provision to charge Ato Gulbetu Art 556, 560 or 840 of the CC? Can he be charged on more than one charge? Prepare a charge based on the pertinent provisions and Second Schedule of the CPC.
5. Does the CC contain provisions directly allowing alternative charge? If so, cite examples.

6. Describe the rule prohibiting duplicity or multiplicity of charges. Does the CPC contain a similar provision?
7. Can an accused demand the court to reject a criminal charge filed after the 15 days limit set to the public prosecutor to frame and file it? How should the “reasonable time” test found under Art 20/1 of the FDRE Constitution be interpreted? Should the court refer the matter to the Constitutional inquiry and the House of Federation?
8. A person was charged for theft. But the prosecution witnesses testified only the commission of assault on the victim. Can the court convict the accused for the assault under Art 113 of the CPC? Why or why not?
9. Ato Kifu committed sexual intercourse with a 16 year girl and she becomes pregnant. Should he be charged either on Art 626 and its aggravating Art 628 or only under Art 628? Why or why not? What if he used force?
10. Ato Kalabay repeatedly committed sexual intercourse with his 8 year student living in an orphanage and caused serious physical and mental damage on her. The fact was discovered after a year when she was caught by sexually transmitted disease. But the victim could not remember the exact dates of the crime. The prosecution framed and brought a charge under Art 627/1 of the CC citing as the time of crime the year 2007. Ato Kalabay objected that to properly defend the prosecution should state the exact date of crime. What should be the ruling of the court? Assuming that he was convicted, can the prosecution ask the court to aggravate the penalty under Art 627/4-5? What if the defendant objected that he was only charged under Art 627? Was the prosecution expected to mention Art 627/1, 4, and 5? Does Art 114 of the CPC have relevance?
11. Art 4/10 of the Vagrarancy Control Proclamation No. 384/96 reads: ‘...is a theft-recidivist who is found preparing himself to commit another theft or loitering at a place where theft is committed or alarms the public in vicinity...’ How should the past record be proved?
12. Can a public prosecutor frame a charge on petty offence in Addis Ababa falling under the jurisdiction of the city and kebele courts with other counts to the Federal High Court or First Instance Court? Can the city and kebele courts organized separately from the federal courts be taken to be ‘subordinate’ to hear the petty offences? Confer Art 109-110 Of the CPC.

## 5.2. Amendment

### Relevant Law

Art 118-119, CPC

### Amendment of Indictment<sup>108</sup>

By section 5 of the Act of 1915:

Where before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case unless having regard to the merits of the required amendments cannot be made without injustice; and may make such order as to the payment of any costs incurred owing to the necessity for the amendment as the court thinks fit.

### Public Prosecutor vs Habtamu Berhanu et al<sup>109</sup>

**Facts-** The three respondents were charged for killing Ato Gutata Lemu in violation of Art 32/1/a and 523 of the PC. The first and third respondents were released based on no case motion. And the second was also sent free after he presented his defense. The court determined the case based on the right to self-defence in accordance with Art 74 of the PC. Before the judgment, the public prosecutor requested to rectify mistakes detected in the charge and the court allowed to do so. But, the amended charge merely contained a more severe provision of Art 522/1/a of the PC. The lawyer of the second respondent objected the move of the prosecution. The prosecutor also replied. The court ruled in favor of the respondent and rejected the amended charge as it was prejudicial to the respondent. The prosecutor appealed on the judgment relying on the refusal of the amendment as one ground.

**Issue-** Whether the respondents were guilty of the alleged crime?

**Decision-** The judgment of the High Court was altered and the second respondent was found guilty.

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<sup>108</sup> J W Cecil Turner, *Supra* note 50, p. 598.

<sup>109</sup> Public Prosecutor vs Habtamu Berhanu et al (Criminal Appeal File No. 426/81) in Selected Judgments Vol. 1, Federal Supreme Court Research and Publication Department, 1996, pp.374-381.



**Reasoning of the Supreme Court-** The court ascertained that the acquittal of the first and third respondents was proper. However, the second respondent acted after being attacked. It went beyond self-defence. It was revenge. He was found guilty. However, the objection of the prosecution on the ruling of the court relating to amendment of the charge was not accepted. The court reiterated that amendment of a charge cannot be made to the disadvantage of the accused. Amending the charge to cite a more severe penal provision is prejudicial to the interest of the accused. It is not allowed to amend the charge from less grave criminal provision to a more severe one. He was found guilty of violating Art 524/b taking the action of the victim as provocative and sentenced him to two years imprisonment.

### **Summary**

Prosecutors are human beings. It is possible to make error during the preparation of a charge. As a result many jurisdictions allow amendment of indictment. But, it should be made before judgment is given. The order could be given upon the initiation of the court, prosecution, or accused.

The CPC is not clear with regard to the ground for amendment. It seems to benefit the accused. It is possible that a public prosecutor may cite an improper provision. But the amendment is prejudicial to the accused. The charge is clear on every standard but the problem is only with the severity of the provision of the criminal law cited. Thus, amendment of a charge is possible at any time before judgment. But, the purpose for which the amendment allowed is not clear under the CPC. It seems to prohibit amending the charge to cite a more severe penal provision.

### **Discussion Questions**

1. Can a public prosecutor request the amendment of a charge for the exclusive reason of using another criminal law provision stipulating a more severe penalty?
2. Is it possible to correct minor mistakes of the charge, such as name, and type errors without the need to frame a new charge?
3. Do you agree with the reasoning and ruling of the Court in Public Prosecutor vs Habtamu Berhanu et al? Why or why not?

## **CHAPTER SIX**

### **THE FEDERAL SYSTEM AND JURISDICTION OF COURTS**

#### **6.1. An Overview of the Court System in the Ethiopian Federal Set-up**

The 1995 Constitution of the FDRE provides for a federal state structure with nine member states making up the federation. It has thus brought in to being two layers of administration i.e. the federal government on the one hand and self-governing regional states on the other hand. The regional units are formally designated as national regional states.

The three braches (organs) of the government i.e. legislative, executive and judiciary are established at both levels of the government having their own powers and responsibilities constitutionally defined. The Constitution allocates power between the federal government and regional governments. Powers not specifically allocated for either or both of them (concurrent) or what is called residual power are left by the Constitution to the regional states.

Judicial organ is one among the fundamental organs of the republic. Hence, the Constitution enshrines a broad range of principles of constitutional importance regarding on the organization and function of the judiciary. One of these principles is the establishment of the independence of the judiciary. By so doing, it puts on a firmer pedestal both on institutional and personal autonomy.

FDRE Constitution also incorporates specific provisions that are recognized in different human rights conventions and other organs of the state. It also provides the specific reasons for retirement of judges.

Special or ad hoc courts that take away judicial powers and do not follow legally prescribed procedures may not be established. Further, no judge may be relived of duty unless it is established by the federal judicial council that he has either violated disciplinary rules, or is adjudged to be incompetent to carry out his responsibilities or is unable to work as a judge because of a falling health subject of the approval by the House of People Representatives.

As mentioned earlier, FDRE Constitution established judicial organ both at federal and state levels. So, we have federal courts on the one hand and regional courts on the other hand.

Federal judicial authority is vested in federal courts tiered along three layers based on their competence as provided for by law. By virtue of this arrangement, we have the Federal Supreme Court, which is the highest federal judicial organ, the Federal High Court and Federal First Instance Court.

State judicial power on the other hand is vested in state courts. The structure of state courts comprises state supreme court, state high court and woreda courts. In principle these courts exercise jurisdiction within the concerned state jurisdictions only. Besides these matters which in principle fall under the jurisdiction of Federal High Court and First Instance Court at the state level is to be exercised by state supreme and state high courts respectively, because of the delegation given under the Constitution.

## **6.2. Criminal Jurisdiction of Courts.**

We have seen that two sets of courts are established under the federal form of government each having three layers of courts and that they are empowered to exercise judicial power over offences. Issues on how this power of adjudication over offences is apportioned as between federal and regional courts, and even among the federal courts on the one hand and the state courts on those matters is jurisdiction over offences.

The appointment of jurisdiction over offences between the federal and state courts is dependant up on some factors. In principle federal courts have jurisdiction over offences based on three major grounds:

- a. law,
- b. Parties to the case, and
- c. Places of commission

Thus, whether a particular case is within the jurisdiction of federal courts or not is to be determined by first, ascertaining that it arises under the federal constitution, the federal laws and international treaties or that parties are those specified in the federal laws to be subject to the jurisdiction of the federal courts or the case occurs in places specified in the Constitution or in other federal laws.

On the other hand, the law lists down specific cases which fall within the exclusive jurisdiction of federal courts. In doing so it would be obvious that cases not specifically allocated to federal courts are left to regional courts.

Apart from these apportionment of jurisdiction among the federal and state courts, there is a delegation of power because of the fact that we do not have yet established federal courts all over the country. Hence, matters which in principle fall within the jurisdiction of Federal First Instance and Federal High Courts may come within the jurisdiction of state high court and state supreme courts respectively, if they are committed in regions or there is any other ground justifying delegation. It is designed for the purpose of convenience, both for the parties and the court as well.

So far issues as to how jurisdiction over offences is apportioned as between federal and regional courts have been examined. The point, however, does not stop there for the issue as to which particular court of a federal court or regional courts i.e. supreme court, high court or first instance/ woreda court has the pertinent jurisdiction over the case has to be addressed. It is only by then that one can say question of determination of jurisdiction is exhausted.

The above issue, hence, refers to local jurisdiction, which is about the specific place of the court in which the case is going to be entertained (tried).

All what we have been looking presupposes the fact that Ethiopian courts have judicial jurisdiction to adjudicate the case. The meaning of judicial jurisdiction is left to the subsequent discussion.

Jurisdiction has three elements:

Judicial

Material, and

Local

A court is said to have jurisdiction over a particular offence only when it has the judicial, material and local jurisdiction of adjudication.

### **6.2.1. Judicial Jurisdiction**

In short, judicial jurisdiction is all about whether Ethiopian courts have power to see and then adjudicate a case or not. Hence, it is related to issue of whether a person is subject to the criminal law of Ethiopia or subject to the jurisdiction of Ethiopian courts and therefore they may be tried by Ethiopian courts for violation of the Ethiopian criminal laws.

Though normally the issue of jurisdiction is a subject matter of criminal procedure law, both the previous and the current criminal code of Ethiopia has provisions dealing with the issue of jurisdiction.

Art 11-20 of the CC are devoted to issues of judicial jurisdiction of Ethiopian courts over offences. Thus, whether or not a person is subject to the CC of Ethiopia depends on:

- (1) the place where the offence was committed;
- (2) the nationality of the accused, and;
- (3) the kind of the offence that has been committed.

In certain circumstances, an accused is said to be subject to Ethiopia's principal jurisdiction; in other circumstances, although he is not subject to Ethiopia's principal jurisdiction, he is subject to Ethiopia's subsidiary jurisdiction. Most significantly, whether a person is subject to Ethiopia's principal jurisdiction, discharge or acquittal in a foreign country does not prevent a prosecution for the same offences in Ethiopia. However, if he is subject only to Ethiopian subsidiary jurisdiction, no fresh prosecution if discharged or acquitted before.

## **I. Principal jurisdiction**

According to Art 11-16 of the CC principal jurisdiction, which is one form of judicial jurisdiction exists in cases where the accused 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 a 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.

Herein below we shall first consider the conditions when an accused is subject to Ethiopia's principal jurisdiction; and then we will consider the conditions for the exercise of principal jurisdiction as being incorporated under the current criminal code.

### **Persons Subject to Ethiopia's Principal Jurisdiction.**

Under this section we have two kinds of jurisdictions, territorial and extra territorial.

#### **Territorial jurisdiction**

Art 11 and 12 of the CC are about territorial jurisdiction. According to this principle, which has almost gained universal acceptance, the Ethiopian courts shall have principal jurisdiction over offences specified in the CC committed by any person on Ethiopian territory. Territory consists of land, sea and air.

#### Examples

Mr. Wayne, English national, living here in Ethiopia killed Ato Habtamu thereby violated Art 539 of the CC. Art 11 of the code, therefore, makes him subject to the jurisdiction of Ethiopian courts because the alleged offence, aggravated homicide, had been committed within the Ethiopian territory. Hence, he may be tried here in Ethiopia for violation of the article mentioned above.

While a Sudan air craft flight is passing over Ethiopia, a Sudanese national abroad the flight allegedly assaults a fellow passenger, who is a Kenyan national. Since Ethiopian air space is part of the Ethiopian territory, which subjects the accused to the criminal code, and he may be tried in the Ethiopian courts for violation of Art 560 of the CC.

Art 11(2) of the CC is an exception to the above principle, i.e. Art 11(1) of the CC. Consequently, certain persons such as diplomatic officials are immune from criminal prosecutions in the country to which they are accredited under principles of public international law. Any person who enjoys such immunity, therefore, is not subject to the CC, and thus, not subject to the jurisdiction of the Ethiopian courts.

For instance, Kenyan ambassador to Ethiopia recklessly driving his automobile in Addis Ababa killed an Ethiopian. His conduct is a violation of Art 543 of the CC- homicide by negligence. Under principles of public international law, ambassadors are not subject to criminal law of the country to which they are accredited. Thus, the ambassador may not be tried under Ethiopian courts for violation of Ethiopian law. This, however, does not mean that he will never be asked for his wrong rather there is a principle by which such individual would be tried. We will be looking in to it.

The principal jurisdiction of Ethiopian courts to try offences committed in Ethiopian territory presupposes the offenders presence within the Ethiopian territory, the request of his extradition to Ethiopia or the possibility of trial in absentia as per the provisions of (Art 160-161) of the CPC.

### **Extra-Territorial Jurisdiction**

Any Ethiopian or a foreigner having no immunity is obviously subject to an Ethiopian jurisdiction for violation of Ethiopian criminal laws provided that he is in Ethiopia. However, people may after having committed an offence in Ethiopia may have successfully escaped and taken refuge in a foreign country. In such a case, the Ethiopian authorities are directed under Art

11(3) of the CC to request his extradition so that he may be tried in Ethiopia under Ethiopian law.

What is extradition?

With which countries did Ethiopia conclude extradition treaties (if any)?

Art 21(2) of the CC which reads as:

No Ethiopian national having that status at the time of the commission of the crime or at the time of the request for his extradition may be handed over to a foreign court. However, he shall be tried by Ethiopian courts under Ethiopian law.

No agreement with any country for the purpose of extradition concluded therefore it becomes a plain fact that extradition under Art 11(3) is ineffective by virtue of Art 21(2).

Where extradition cannot be obtained, Art 12(1) directs the Ethiopian authorities to request that the suspect 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, Art 12(2) of the CC. Had no request been made or the request had not been honored, Art 12(2) is not applicable and that he could be retried in Ethiopia though he had been tried and acquitted for the same offence abroad according to Art 16 of the code.

Where the offender has been convicted following a request of the Ethiopian authority and has served out his sentence, he cannot again be punished in Ethiopia for the same act (omission). But if he has been convicted and has not undergone any of the punishment or has undergone only part of, and if he is apprehended in Ethiopia, the remainder (the unserved sentence) shall be enforced in Ethiopia provided that enforcement of the punishment is not barred by Ethiopia's law of limitation.



## **Art 13 of the CC**

### **Crimes committed against Ethiopia outside its territory.**

Under this provision, crimes committed in a foreign country which have their effects in Ethiopia are dealt. However, not all such offences are covered. Accordingly, only offences prohibited by Art 238-260 and Art 355-374, i.e. crimes against the state (crimes against the constitutional order and the internal security of the state), and crimes against currencies, government bonds or security documents, official seals, stamps or instruments, respectively, are subject matters of the Ethiopian principal jurisdiction. The offender of such offences is subject to Ethiopian principal jurisdiction.

## **Article 14 and 15**

### **Crimes committed in a foreign country by an Ethiopian enjoying immunity and by a member of the Ethiopian defense force.**

It is normal that Ethiopian officials and members of defense force goes to another country temporarily. This, however, does not exonerate them from becoming liable for their acts/omissions happened in their stay. Art 14 and 15 is designed to make Ethiopian officials and members of the Ethiopian defense force subject to the Ethiopian principal jurisdiction for certain offences they committed while abroad.

Members of the Ethiopian diplomatic or consular service, an Ethiopian official or agent who cannot be prosecuted at the place of commission of the crime by virtue of international principles of immunity are subject to the Ethiopian's jurisdiction for offences other than those provided under Art 13 of the CC provided that the offence is punishable both under the Ethiopian criminal law and the law of the place of commission. If the offence is punishable only upon complaint under either law, no proceedings may be instituted until such complaint is lodged.

Ethiopian defense force may for some time stationed abroad as in the case of Somalia and Rwanda and a member (members) of the defense force may commit offences which are against international law or crimes specifically mentioned as military offences under Art 269-322 of the

code under such circumstances Art 15 makes the offender(s) subject to the Ethiopian principal jurisdiction and be tried by Ethiopian military courts. In other cases, the offender shall remain subject to the ordinary laws and territorial jurisdiction of the country where he committed the crime if he is arrested there. If he has taken refuge in Ethiopia, he shall be tried in accordance with the principles of extradition provided under Art 21(2) of the code.

Under the aforementioned circumstances, we have been looking in to the kinds of offences that fall under the Ethiopian principal jurisdiction. A person is subject to the Ethiopian principal jurisdiction. This is because of the belief that Ethiopia is the country most affected by the alleged commission of the offence. Any person subject to Ethiopia's principal jurisdiction, if found in Ethiopia or extradited to Ethiopia, may be tried in Ethiopia for the offence, whether or not he was not tried in a foreign country for the same offence and if he was tried, whether or not he was discharged or acquitted. If, however, he has been convicted of the offence abroad, any part of the punishment he already served shall be deducted from the new sentence.

It should also be noted that where the person had been tried abroad on the request of the Ethiopian authorities pursuant to Art 12 of the code, he is no longer subject to Ethiopia's principal jurisdiction.

## **II. Subsidiary Jurisdiction.**

With regard to offences that do not directly and chiefly concern Ethiopia, our courts have subsidiary jurisdiction which is derivative-not original. Under these circumstances, Ethiopian courts substitute foreign courts in trying offenders who must have been (but have not been) tried in a foreign country.

Subsidiary jurisdiction exists as to an accused who is charged with:

- Offences committed by members of the armed forces against the ordinary laws of a foreign country, Art 15(1).

- Offences committed in a foreign country “against international law or international offences specified in Ethiopian legislation, or/ and international treaty or a convention to which Ethiopia has adhered”, Art 17(1) (a).
- Offences committed in a foreign country “against public health and morals specified in Art 525, 599, 635, 636, 640 or 641 of the code, 17(1)(b).
- Offences committed abroad against an Ethiopian national or offences committed by Ethiopians while abroad, if the offence is punishable under both laws and is grave enough to justify extradition, Art 18(1) and
- Other offences punishable by rigorous imprisonment of not less than ten years) committed abroad by non- extradited foreigners, Art 18(2).

An Ethiopian accused is subject to Ethiopia’s subsidiary jurisdiction pursuant to the Art if except that he is enjoying immunity and that he is a member of the Ethiopian defense force. Besides, those who are subject to Ethiopia’s principal jurisdiction under Art 13 of the code are not subject to Ethiopia’s subsidiary jurisdiction.

For Art 18 to be applicable, i.e. in order for a person to be subject to Ethiopia’s subsidiary jurisdiction, 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 Ethiopian law. Secondly, the act must be of a sufficient gravity under Ethiopian law to justify extradition.

***How can a country determine whether an act is of sufficient gravity to justify extradition or not?***

There are two types situations covered under Art 18. The first one is where the crime is committed in a foreign country either by a foreigner against an Ethiopian or by an Ethiopian. In order to make a suspect subject to Ethiopia’s subsidiary jurisdiction, it is only necessary that the conditions referred previously be satisfied. As long as the offences are of sufficient gravity to justify extradition, it subjects the offender to Ethiopia’s subsidiary jurisdiction (if prohibited by law of the place of commission and Ethiopian law) irrespective of the punishment authorized. The questions to be asked in such a situation are:

1. Was the offence committed in a foreign country against an Ethiopian or by an Ethiopian?
2. Is the offence prohibited by the law of the country where it was committed and by Ethiopian law?
3. Is the offence extraditable under any of Ethiopia's extradition treaties or legislation? If the answer to each of the three questions is in the affirmative, the accused is subject to Ethiopia's subsidiary jurisdiction and may be tried here for the commission of the offence.

The second type of situation covered under 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 anyone 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 extraditable 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 thus 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.

### ***Which offences are punishable for more than 10 years?***

Mr. Roberto who is a French national committed aggravated robbery against a British national in France. Roberto's act is a crime under his country's law punishable by death penalty or rigorous imprisonment for life. Once after the commission of the offence, Roberto flees to Ethiopia, where he is apprehended. Ethiopia had extradition treaty with Sudan pursuant to this treaty; aggravated robbery is an extraditable offence. Consequently, Roberto is subject to Ethiopia's subsidiary jurisdiction because:

- i. The act is prohibited both by law of the place of commission i.e. France and by Ethiopian law.

- ii. It is extraditable under Ethiopian law and,
- iii. It is punishable under Ethiopian law by death or rigorous imprisonment for life, which is obviously for more than 10 years.

Art 19(3), 19(4) and 20 put some conditions which in fact are limitations upon the exercise of subsidiary jurisdiction. Sub-article 3 of Art 19, which does not exist under the PC, stipulates that no prosecution shall be instituted before consulting the Ministry of Justice, the supreme prosecution organ at the federal level, to this effect.

Another restriction provided under Art 19(4) has to do with the principle of legality. Hence, an offender tried in Ethiopia pursuant to its subsidiary jurisdiction shall not be punished more severely than he could expect to be at the time when and the place where he committed the offence. Thus, in case of disparity between the punishment prescribed under the criminal code of Ethiopia and the law of the country of commission, the punishment to be imposed by the Ethiopian courts must be the one which is more favorable to the accused.

It has been seen that in cases of principal jurisdiction a person's discharge, acquittal or conviction abroad is no bar to proceedings being instituted anew in Ethiopia, provided that where the suspect is convicted and new sentence is passed, the term of the sentence already served abroad will be deducted from such new sentence.

The effect of foreign sentence in the case of offences to which Ethiopia has only subsidiary jurisdiction is different. Ethiopian courts may only exercise their subsidiary jurisdiction only insofar as no action has been taken against the offender in a foreign country in general. Offences as defined under Art 15(1), 17 and 18 are not triable in Ethiopia if the offender was previously prosecuted abroad, whatever the result of the proceedings (acquittal, discharge, conviction and also, presumably, *nolle prosequi*).

If the offender was tried and sentenced in a foreign country but did not undergo his punishment, or served only part of it in the said country, Art 20(2) of the code states that the punishment, to the remaining part thereof, may be enforced in Ethiopia unless otherwise it is barred by

limitation under either of the Ethiopian law or the law of the country of commission. Thus, Art 12(3) is applicable to such cases *mutatis mutandis*.

It should be noted that there are other conditions to be fulfilled for Ethiopia to exercise subsidiary jurisdiction over certain offenders. These conditions are found scattered under different provisions dealing with such type of jurisdiction for instance Art 19(1) (2).

### **6.2.2. Material Jurisdiction.**

So far, we have been discussing on the issue of judicial jurisdiction with the view of determining cases upon which Ethiopian courts have power of prosecution i.e. whether Ethiopian courts in general have power (competence) to see and then adjudicate the case or not. Determination of such issue though crucial is not conclusive. The question of which particular court in Ethiopia has jurisdiction to hear specific case should be answered subsequently. The issue of material jurisdiction and local jurisdiction, hence, comes in to being.

Material jurisdiction is concerned with the level of courts, and the type of court that should hear the case. Thus, the issue of material jurisdiction should be seen the light of structure of courts.

Before the early 1990's the judicial system in Ethiopia was of a monolithic structure reflecting the unitary system of government; we had one Supreme Court, high courts and awraja courts parallel to the regional administrative and awraja administrative units.

The 1994 FDRE Constitution takes Ethiopia in to a federal form of government. Hence, the organization of courts had been changed accordingly. Art 78 of the FDRE Constitution created a two tiered court system, i.e. federal and state courts. At federal level, we have the Federal Supreme Court, the Federal High Court and the Federal First Instance Court. At state level, too, we have the state supreme court, the state high court and the state woreda court. There are no specialized courts currently in Ethiopia except administrative courts like the tax appeal commission.

In countries like ours where a federal /state court system is found, the next point once after the determination of the issue of judicial jurisdiction is whether the case at hand is under federal or state jurisdiction or state courts. We have to ascertain where it falls specifically.

The apportionment of jurisdiction is first determined on the basis of subject matter which in turn is to be determined based on law, parties and places. Our Constitution nowhere defines federal matters and state matters, hence, this is left to the determination of the legislator. If the legislature decides that such certain matters be under federal jurisdiction, then such matter would be regarded as federal matters. But there are matters which as a rule must be categorized as federal matters or state matters. Under such rule a case is a federal matter if it arises on federal law and a case is a state case if it arises on state law. We may, therefore, conclude that all cases that arise or all claims that are based on federal law may be called federal matters and the rest may be categorized as state matters.

All laws made by the House of Peoples' Representatives under its enumerated power of legislation and laws made by the council of ministers are referred to as Federal laws; and all laws made by the state legislative bodies under their residual power of legislation are state laws.

Article 80(1) (2) of FDRE Constitution;

- The federal Supreme Court shall have the highest and final judicial power over federal matters.
- The state supreme courts shall have the highest and final judicial power over state matters.

Federal Courts Proclamation No. 25/96 and 322/2003 sets out the rules for allocation of common and specific jurisdictions to federal courts on the basis of three grounds; laws, parties and places.

## **Laws**

Article III section 2 of the United States Constitution states that 'federal courts can have jurisdiction over cases that arise under the U.S. Constitution, the laws of the United States, and

the treaties made under the authority of the United States. These issues therefore are the sole prerogative of the federal courts.

Article 3(1) of the Federal Courts Proclamation No. 25/96 which seems to be direct copy of the above provides that:

In principle federal courts shall have jurisdiction over;

1. Cases arising under the Constitution, federal laws and international treaties.

In the United States, the following types of cases are considered to be within the jurisdiction of federal courts

- suits between states
- cases involving ambassadors and other high ranking public figures
- federal crimes
- bankruptcy
- patent, copyright and trade mark cases
- cases arising from acts of congress
- admiralty
- anti trust
- securities and banking regulations
- Other cases specified by federal statute etc

Proclamation No. 25/96 in the same way enumerates specific offences that are within the common jurisdiction of federal courts. Consequently, the following offences are within the material jurisdiction of federal courts.

- \* Offences against the national state (offences against the constitutional order, or the internal security of the state)
- \* Offences against foreign state
- \* Offences against the law of nations
- \* Offences against the fiscal and economic interests of the federal government
- \* Offences regarding counterfeit currency



- \* Offences regarding forgery of instruments of the federal government
- \* Offences regarding the security and freedom of communication service operating within more than one region at the international level
- \* Offences against the safety of aviation
- \* Offences regarding foreign nationals
- \* Offences regarding illicit trafficking of dangerous drugs
- \* Offences falling under the jurisdiction of courts of both different regional courts as well as concurrent offences
- \* Offences committed by officials and employees of the federal government in connection with their official responsibilities or duties
- \* Offences involving conflicts or hostilities between various nations, nationalities, religious or political groups
- \* Offences committed against property of the federal government and which entail more than five years of rigorous imprisonment

In addition to these common jurisdictions, the proclamation also enumerates specific jurisdictions of federal courts. Thus, they have first instance and appellate jurisdiction over cases as follows:

## **I. Federal Supreme Court Article 8**

### **1. First Instance Jurisdiction**

According to Art 8 of the Federal Courts Proclamation, the Federal Supreme Court is given an exclusive first instance jurisdiction over:

- ❖ Offences for which officials of the federal government are held liable in connection with their official responsibility;
- ❖ Without prejudice to international law and custom, offences for which foreign ambassadors, consuls and representatives of international organizations and foreign states are held liable; and
- ❖ Application for change of venue from one federal high court to another or to itself as provided by law.

## **2. Appellate Jurisdiction**

Art 9 of the proclamation provides that the Federal Supreme Courts shall have appellate jurisdiction over decisions of Federal High Courts rendered in their first instance and appellate jurisdiction on variation of the decisions of the Federal First Instance Court.

*Is second appeal possible?*

### **3. Power of Cassation (Art 10(1-3))**

The Federal Supreme Court exercises power of cassation over final decisions it has rendered in its appellate jurisdiction, in its first instance jurisdiction and final decisions of regional supreme courts rendered in their first instance jurisdiction or in their appellate jurisdiction where such decisions contain fundamental error of law. The federal Supreme Court's decision under its cassation power is final and binding. *Stare decisis* this makes Ethiopian legal system shifted towards the common law legal system where judge made law/ case law is prevalent.

## **II. The Federal High Court (Article 12)**

### **First instance criminal jurisdiction**

Article 12 of the proclamation provides that the Federal High Court shall have first instance jurisdiction over:

- ❖ Offences against the national state i.e. offences against the constitutional order, or the internal security of the state.
- ❖ Offences against foreign states.
- ❖ Offences against the law of nations.
- ❖ Offences against the safety of aviation.
- ❖ Offences regarding illicit trafficking in dangerous drugs. 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.

### **Appellate Jurisdiction.**

The federal high court exercises criminal appellate jurisdiction over all decisions rendered by Federal First Instance Court, the national electoral board, tax appeals commission, labor boards, etc.

### **III. The Federal First Instance Court.**

The Federal First Instance Court shall have jurisdiction over

- ❖ Offences against the fiscal and economic interest of the federal government.
- ❖ Offences regarding counterfeiting of currency.
- ❖ Offences regarding the security and freedom of communication services operating within more than one region or at the international level.
- ❖ Offences in which foreign national who enjoy privileges and immunities and reside in Ethiopian are victims or defendants subject to the jurisdiction of First Instance Court in operating laws and without prejudice to international agreements entered in to by Ethiopia.

They also have jurisdiction over criminal cases that arise in Addis Ababa and Dire Dawa as well as over cases that are under the jurisdiction of awraja and woreda courts pursuant to the laws in force. The laws in force referred under the provisions of the proclamation are obviously the First Schedule of the CPC and other subsequent laws. The federal arrangement and the current progress to enact new criminal procedure code presumably, when materialized, would become “the law in force”.

#### **IV. Municipality Courts**

Offences of less serious nature like contraventions of traffic regulations fall within the competence of municipality courts in the City of Addis Ababa. A prosecution unit in charge of petty offences subject to the jurisdiction of these courts is already well in place. Similar courts are operating in other parts of the country as well.

#### **V. Jurisdiction of State Courts.**

In the foregoing discussion, we have seen that Proclamation No. 25/96 sets the rules that apportioned jurisdiction between federal courts and state courts. It enumerates the cases where the federal courts would assume jurisdiction. The areas that are not specifically mentioned to fall under federal court jurisdiction are therefore presumed to be under jurisdiction of state courts. Thus, it may be argued that there is no need of enumerating the jurisdiction of state courts. The way FDRE Constitution did the residual jurisdiction is left to regional courts.

#### **VI. Concept of Delegation (delegated jurisdiction)**

Art 78(2) of FDRE Constitution provides that “the jurisdiction of federal high court and of the first instance courts is delegated to state courts”. Art 80 of the same also provides that “state high courts in addition to state jurisdiction shall exercise the jurisdiction of the federal first instance court. State supreme courts then shall exercise the jurisdiction of the federal high court because of the delegated authority.

We have seen the principle under Art 3(1) of the Federal Courts Proclamation and the specific jurisdictions over offences that are provided under Art 8, 12 and 15 of the same. However, there seems a contradiction to exist in the manner the principle and the specific jurisdiction is provided.

## **Read**

The Court System and Questions of Jurisdiction under the Federal Constitution and Proclamation No. 25/96, Article by Abebe Mulatu.

The “principle” under Art 3(1) provides that federal courts shall have jurisdiction over all cases that may “arise under the Constitution, federal laws and international treaties”. Art 4-8 of the Proclamation on the other hand enumerates a very small number of federal laws that fall within federal courts jurisdiction, the wisdom of providing a blanket provision as a principle that encompasses all federal laws and then reducing the types of federal laws that fall within the jurisdiction of federal courts is not understandable. Anyway, the proclamation has provided that federal courts shall have jurisdiction over a few numbers of federal laws in both civil and criminal areas. The rest of federal laws which are not enumerated under Proclamation No. 25/96 are then understood to be within the jurisdiction of the state courts.

The proclamation, therefore, has vested the state courts with the executive jurisdiction not only on matters that arise under state laws but also on cases that may arise under federal laws and that are not mentioned in Proclamation No. 25/96. In the previous section, we were trying to find out federal matters that are under the Constitution. And we proposed that the federal matters are all cases arising from federal laws. Proclamation No. 25/96 has, however, provided us with a different meaning of federal matters. Under the proclamation, a federal matter is not a case that may arise from any federal law; these types of laws must be enumerated under Art 4, 5 and 8 of Proclamation No. 25/96. The proclamation has, therefore, narrowed down the meaning or definition of a federal matter. Under this approach, a cause of action that may solely be based on federal law can fall within the exclusive jurisdiction of the state courts. So the state courts will entertain the case like any state case on the basis of the states’ law of material jurisdiction and the final decision of the state courts on such matter is not appealable to the federal court system.

Simeneh Kiros in his module to Alpha University College, 2006 forwarded the same argument. It reads:

“The practice is, however, different that the exclusive jurisdiction of the federal courts is those offences enumerated under Art 4 of the Courts Proclamation and other offences than those listed above, by a contrario interpretation, are the jurisdiction of states’ courts. Thus, what has been provided for in the First Schedule of the CPC is apportioned among the state first instance and state high courts. The question is, is it actually the jurisdiction of state courts to entertain criminal matters in the present legislation? Is it in consonance with the principle of federalism as enshrined in the Constitution? What is the need then for delegation of jurisdiction of federal courts to state courts? Even if it is provided in the existing legislation, does the House of People’s Representative have the power to revoke the inherent power of the federal courts and to make the jurisdiction of state courts without any constitutional authority? Otherwise stated, does the House of Peoples’ Representatives have the power to dismantle the constitutional order once after judicial federalism is established in the Constitution? These are questions that need to be properly addressed. ... the fact that the law lists certain powers in an in exhaustive manner after the general index for jurisdiction does not mean restricting the latter. It does not seem to be illustrative either. It is just a result of poor draftsmanship. It must, however, be seen in light of the principles of federalism.... The House of Peoples’ Representatives is given the power to legislate on matters that are reserved for the federal government. The states have also their own legislatures to enact laws on matters reserved to them. The respective courts i.e. states laws by state courts and federal laws by federal courts..... As there is no power delegated to state first instance court they do not have criminal jurisdiction at all, legally speaking. They are, however, adjudicating criminal cases that were assigned to awraja and woreda courts by the First Schedule of the CPC. How is the delegation to be explained? If he regional courts are exercising jurisdiction over matters as provided for in the First Schedule of the CPC is state high courts and state first instant courts parallel with federal high court and federal first instance courts respectively, how the shift in level of courts during delegation can be raised? i.e. the delegation of the jurisdiction of the federal high and first instance courts to the state supreme and high courts respectively.”

So far a number of issues that deserve attention and need be addressed are raised and the writers of this paper are of the opinion that students would refer and dig materials to answer these and other related questions.

Art 55(5) of FDRE Constitution provides that the power of enacting penal code is given to the House of Peoples’ Representatives. Though the same provision states that states may, enact penal legislation, only some laws are enacted at least to the knowledge of these writers. Laws enacted by the House Peoples Representatives are federal laws thereby becomes the subject matters of the federal government whose interpretation and application is left to federal courts save the concept of delegation. Would it mean that state courts do not have inherent criminal jurisdiction?

The power of enacting criminal procedure code is not specifically given to the federal government. Would it be states to enact the same because of the fact that the residual power is left to states?

### **6.2.3. Local Jurisdiction**

Based on the above criteria and standards, one could determine whether Ethiopian courts have jurisdiction, the case is within the material jurisdiction of federal or state courts, and also which level of courts i.e., supreme, high or first instance/woreda court as the case may be yet the last but most important question of which particular court has the jurisdiction to see and adjudicate the case at hand is not answered. It is only by then that the pertinent public prosecutor or the private prosecutor only exceptionally can frame (prepare) charge against a suspect to a particular named court.

To North Gondar High Court

Gondar

Or

To the Federal first Instance Court Arada Branch

Addis Ababa

Robert Allan Sedler, in his article under Journal of Ethiopia Law Vol. 2 No.2, pp.491- 486 has the following on local jurisdiction pursuant to Art 6, 99-107 of the CPC.

Local jurisdiction refers to the area of Ethiopia in which the case is to be tried. If jurisdiction over the offence is in the Awraja court, the question is in which Awraja court the particular case is to be tried. Art 6 provides that the court shall exercise local jurisdiction in accordance with the provisions of Art 99-107. The general principle, embodied in the Art 99 is that every offence shall be tried by the court within the local limits of whose jurisdiction the offence is committed. In this connection where an offence is triable before the high court, which now sits in some of the provincial – now zonal, capitals, the “local limits of whose jurisdiction “ should be interpreted to mean within the local limits of the province- now zone, in which the High Court is

sitting. Thus, an offence committed in Gojam province – East Gojam zone –should be brought before the High Court sitting in Gojam province i.e. Debremarkos the capital of Eastern Gojjam now- rather than before the High Court sitting in Shoa province, like sitting in Debre Brihan capital of North Shoa zone because of the federal arrangement.

Where all the operative events involving the offence occurred within the jurisdiction of the court in which it is to be tried, there is no problem. The problem arises when the operative facts occurred within the local limits of the jurisdiction of more than one court. This situation is covered by Art 100-103.

Under Art 100, it is provided that where that act which caused harm occurred in one jurisdiction and the harm resulting from the act occurred in another, 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 consequence resulting from the act took place.

Certain acts become offences by reason of their relation to other offences. For example, Art 449 of PC (Art 455 under the CC), prohibits soliciting another to give false testimony. This act is punishable, because it can induce the commission of the offence of perjury. Art 101 provides that where an act is an offence by reason of its relation to another offence, a charge of the first mentioned offence may be tried by a court within the local limits of whose jurisdiction either act was done.

Art 102 deals with the situation where, in the broad sense, the place of offence is uncertain. Where it is factually uncertain in which of several local areas an offence was committed, Art 102 (a) provides that it may be tried before the court in any of the local areas.

The same is true where the offence is committed partly in one local area and partly in another, Art 102(b), where an offence continues to be committed in more than one local area, Article 102(c) and where an offence consists of different acts done in different local means Art 102(d).



Where an offence is committed while the offender is in the course of performing a journey or voyage, Art 103 provides that the offender may be tried by any court through or into the limits of whose jurisdiction either the offender, the victim or the thing against which the offence was committed passed during the course of the journey. It 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.

Art 104 provides that when an offence is committed outside Ethiopia on an Ethiopian ship or aircraft, it is deemed to have been committed in Ethiopia. This Art doesn't specify in what area the case is triable. However, Art 107 provides that in the case under Art 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 filled 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 rests with the public prosecutor.

Example:

If an offence triable before the high court is committed on an Ethiopian aircraft plane while it is flying over Sudan, assuming the accused is subject to the criminal code, the case can be tried in any high court in Ethiopia in the discretion of the public prosecutor.

Robert Sedler's discussion above presuppose a monolithic structure reflecting the unitary structure of government we had previously. Where we had administrative units like "awraja" which is abolished because of the current federal structure of government? Nonetheless, the discussion holds true even now *mutatis mutandis*.

#### **6.2.4. Change of Venue and Withdrawal of Judges.**

The issue of determination of the pertinent jurisdiction is of vital importance in that judicial jurisdiction determines to know whether Ethiopian courts in general have power to see the case, material jurisdiction, which is a reflection of court, the court system in Ethiopia. It is , therefore,

about among different levels of courts to which court shall the case be submitted and most importantly local jurisdiction determines to which particular court can the public prosecutor or the private person can take his charge is to be ascertained.

The system of apportionment of cases to different courts is established with the view of having cases be properly adjudicated by the trial court. Nonetheless, sometimes proper adjudication of cases by the court having jurisdiction might not be possible for reasons attributable to that court as an institution or a judge(s) as an individual in which case change of court (venue) or withdrawal of that particular judge could be sought.

#### **6.2.4.1. Change of Venue**

Assuming that a public prosecutor/ private person prepared his charge as against an accused pursuant to Art 111 and 112 of the CPC and then submitted the same to the court which according to the law has judicial, material and local jurisdiction to see and decide the case. Once after this, the next step normally is what we call going to the trial stage because it is presumed that such court is competent enough to properly adjudicate the case. This, however, may not always hold true. One of the parties to the case, i.e. the public prosecutor or the accused, may come up with reasons to show that the said court can not properly and impartially adjudicate the case thereby protest that court from entertaining the case. In cognizance of this, we have different laws as to how such protections are addressed.

Change of venue, therefore become a process by which a case is to be transferred from one court that have jurisdiction to another court having the same jurisdiction for good cause.

Note that change of venue is possible only for valid reason and that only if the conditions provided by law are complied with, hence, it should be exercised in relation to cases triable before a court in so far as there is a court empowered to entertain the question (application for change of venue).

Art 106 of the CPC states that application for change of venue shall only be made to high court. By implication the code permits application for change of venue only in respect of cases which are within the jurisdiction of woreda courts only. Normally application in such a case should be made to a higher court because the court from which the applicant sought change is already trying the case for it has jurisdiction. Hence, it is better for a higher court to go through the reasons of the applicant and grant him or not. Besides, it is obvious that application for change of venue from Supreme Court cannot be made to a high court as a river never flows up a hill. Above all the law is clear in a way it says "... to high court. Consequently, the literary meaning of the article seems that it does not permit application for change of venue in respect of cases triable before high court and Supreme Court.

*Do you think this is fair?*

*What possible rational could the legislature have?*

Accordingly (Art 106), the accused or public prosecutor can make an application to the high court, before the commencement of trial and the court has to accept the application and permit change of venue if it ascertained that :

- ✦ A fair and impartial trial cannot be held in the subordinate court, as against which the application has been made
- ✦ A question of law of unusual difficulty is to arise
- ✦ Where such an order is necessary for the general convenience of the parties or witnesses
- ✦ Such an order is expedient for the ends of justice or is required by any provisions of the CPC.

The high court, which following the application, realized that one/more of the above mentioned consequences is to happen would decide that the case be transferred to another subordinate court, which have both judicial and material jurisdiction or try it by itself.

According to the existing laws of Ethiopia, application for change of venue is admissible only if brought before the commencement of trial of the case. The fact that there is not outlet for late

applicants should be reconsidered so that applicants who knew the cause of the application at the stage of the trial or sometime latter or applicants who for good cause cannot lodge their application before the stage of trial could be permitted to submit their application for change of venue. Nonetheless, the writers agree that the right of making application should be subject to period of limitation. Depending on the nature of the cause an applicant should be permitted to make out of time application if brought before witnesses are heard by the trial court. In fact Art 124 of the CPC anticipates that the witnesses of both parties be heard at the first date fixed for hearing in which case the phrase “before trial started” and before evidences are examined becomes the same but in times when witnesses of either parties could not be heard at the first date for hearing late applicants would be allowed to submit their application for good cause.

Even though the CPC narrowed that application for change of venue within the ambit of high courts only, Proclamation No. 25/96 widens its scope in a way that such application be made to Federal Supreme Court and Federal High Court.

Art 8(3) of the Courts Proclamation No. 25/96 provides that the Federal Supreme Court has first instance jurisdiction over application for change of venue from one Federal High Court to another Federal High Court or to itself (Federal Supreme Court), in accordance with the law.

First instance civil jurisdiction of the Federal High Court is provided under Art 11 of Proclamation No. 25/96. Sub-article 2(d) of the same grants the same power to the Federal High Court, the power of entertaining application for change of venue from one Federal First Instance Court to another or to itself, in accordance with the law. Note such provision of the proclamation dealing with criminal jurisdiction of federal high court. These writers dare to say that similar provision is omitted only by oversight not to deny Federal High Court such right. Art 12(2) reads as ... Federal High Court has jurisdiction over cases falling under the jurisdiction of the high court pursuant to other laws in force.

The CPC is still in force and this code makes application for change of venue fall within the jurisdiction of high court. Thus, it is possible to conclude that Art 12(2) makes cross reference to provisions of the CPC thereby granting Federal High Court the power of entertaining application

for change of venue. In the same token, then phrase “in accordance with law “under Art 8(3) refers to the CPC, among other laws.

Details of when application for change of venue is possible and that admissible by the courts is not provided under Proclamation No. 25/96 yet one can infer that the provisions of the proclamation are making cross reference in a way that Art 106 of the CPC holds true.

Whenever application for change of venue has been made, Art 106 of the CPC has to be closely examined. It would be only then after that a court can permit the same. The decision of the court is then final i.e. not appealable.

The concept of change of venue is an exception to local jurisdiction in general and material jurisdiction in cases where the court decides the case be committed for itself i.e. transferred to itself from the subordinate court.

***Explain change of venue in the light of delegation of power.***

***In your opinion, when does a court order that an accused committed for trial to itself i.e. the case be transferred to itself from the subordinate court?***

***Comment on the grounds for a court to grant change of venue provided under Art 106(a-d) of the CPC.***

Example: Mr. A, president of North Gondar High Court negligently killed Ato Habtamu. Investigation conducted by police and the public prosecutor charged Mr. A citing Art 543(1) of the CC. Mr. A now wants the case to be transferred to another court and makes application for change of venue. On account of the fact that he is the president of such court and that impartial trial could not be held.

***To which court can such application (if possible) be made?***

***Assuming that it is possible to make application, explain the reason to grant him change.***

#### **6.2.4.2. Withdrawal of a Judge**

Withdrawal of a judge is also another procedure to secure justice. It is related to a particular judge who would have seen the case. Art 27-30 of Proclamation No. 25/96 deals with the issue of withdrawal of judges. Thus, sub- article 1 of Art 27 lists the grounds of withdrawal of judges. It reads as:

No judge of a federal court shall sit in any case where:

- A. He is related to one of the parties or the advocate thereof by consanguinity or by affinity.
- B. The dispute relates to a case in which one of the parties is a person for whom he acted as tutor, legal representative or advocate.
- C. He has previously acted in some capacity in connection with the case or the subject matter of the dispute.
- D. He has a case pending in court with one of the parties or the advocate thereof.
- E. There are sufficient reasons, other than those specified under sub-article (1), (a) to (d) hereof, to conclude that injustice may be done.

Whenever one or more of the above conditions exists, a judge, who was to see the case should withdraw himself or be removed from entertaining the case.

The grounds listed above seem to envisage only civil cases conditions when withdrawal of judge is possible in civil case for instance under a and d we have seen that a judge being related to one of the parties i.e. the accused and the public prosecutor and that the judge has case with one of the parties. The public prosecutor, in criminal cases, becomes a party not because his personal interests have been affected but representing the state at large so any thing a particular judge has with a particular public prosecutor cannot be a ground of change of venue in criminal cases. That is merely personal. In case of private prosecution, however, the provision holds true as it is the victim in criminal case, in principle, is not a party to the litigation.

A judge who knew the existence of one or more of the situations provided under sub-article of Art 27(1) is supposed to withdraw himself from the case soon upon his own motion and be replaced by another.

Though the law anticipates voluntary withdrawal this may not be always true. Art 28 addresses this application for removal of a judge. Thus, where a party is of the opinion that a judge should not sit to see a case for one of the reasons specified under Art 27 of the proclamation, he shall submit a written application to the court requesting that the judge be removed.

Such application shall be in writing and be made before the opening of the trial or soon after the applicant becomes aware of the ground for making such an application.

Sub-article 3 and 4 of Art 28 addresses the issue of how the application be considered. Hence, where the judge against whom the application is made is sitting alone, he shall, after considering the application, either withdraw or refer the matter for decision to another division of the same court or where there is no other division to the court in which appeal lies from the decision of his court. However, if the judge is sitting with other judges, he shall withdraw and the remaining judges shall hear the application and give a decision there on.

For withdrawal of a judge to be granted the conditions under Art 27 should be complied with. The applicant, therefore, should have good cause. If not the application would be dismissed. In addition to the dismissal of the application, Art 30 provides that application for withdrawal of a judge without good cause might even resulted in a penalty of fine not exceeding 500 birr (five hundred birr).

The CPC has no provision dealing with withdrawal of judge. This, however, should be considered in the new criminal procedure code to be enacted in the near future.

## **CHAPTER SEVEN**

### **THE TRIAL**

#### **7.1. Fair Trial Rights and Trial Proceedings**

Trial in general and criminal trial proceeding in particular should be fair. To this effect, parties to the proceeding have certain rights which we call fair trial rights. Almost in all legal systems an accused enjoys rights, often granted by law or customarily. Such rights could be exercised before, on or even after the criminal proceeding. In the subsequent sections, we will highlight some of the fair trial rights, which the writers deem to be the most important.

Simeneh Kiros, Law of Criminal Procedure, has the following:

The idea of fairness during a trial has something to do with equality of arms of the parties. In criminal proceedings, things are considered as a biblical fight between the 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 does not know what are his rights and duties at what stage are they to be raised and exercised, what kind of evidences are relevant to his case, etc. If the offence with which he is charged is not bailable or if he is denied bail, which occurs in the majority of cases, he is not able to gather evidence in his defense.

The public prosecutor, on the other hand is a professional trained and skilled in law, and in the prosecuting arm of the government. He has all the government power and resources to conduct the investigation and the prosecution. The police are under the prosecutor who even takes instructions as to investigations which are to be complied with. He is using the public fund to prosecute. Depending on the economic strength of the country, this power and resource is boundless 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. These mechanisms are mainly by “granting” certain rights to the accused such as the right to remain silent, due process of law the right to pre-trial



access to evidence, open court trial and presumption of innocence and 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, the obligation to prove the charge and to prove it beyond reasonable doubt degree.

The trial stage is critical stage at which the guilt or innocence of the defendant is established. Despite the remarkable diversity, the practice between and within the various legal systems of the world as to the composition of the tribunal and the laws of evidence to be brought before the court, the essence of the right of the accused at this stage is related to the adequate time and facilities given to him to defend himself and that these facilities must be at least equal to those enjoyed by the prosecuting or any other party at trial.

Often the following are mentioned as rights of the accused:

- \* Right to speedy trial
- \*Right to public trial
- \*Right to counsel or legal assistance
- \*Right to obtain a copy of the charge
- \*Right to be presumed innocent
- \*Prohibition of self incrimination

The Six Amendment of the American Constitution in this respect reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The rights of the accused must be seen in the lights of the pre- trial or trial stage. To put it in other words, such rights extend to the period between when a person is accused of a crime and be convicted or acquitted.

The rights of the accused are generally based on the maxim of “innocent until proven guilty” and embodied in due process often found within a constitution.

### **7.1.1. The Right to Defense Counsel**

It has been discussed that often accused are layman who lack the relevant knowledge of law to bring and defend causes of actions brought against them. Consequently, they are urged to seek lawyers/advocates/ to defend causes on their behalf. To this end most legal systems allow accused persons to have the service of lawyers of their choice or appointed by the state so that they will be able to protect their liberty at stake.

Lawyers then are duty bound to cooperate in the realization of such rights by effectively and diligently discharge their responsibilities.

The development of a constitutional right to have a defense counsel, and by extension, of a constitutional right to effective counsel, is of a relatively recent origin. In the United States of America, prior to 1938, the Six Amendment, right to counsel was viewed as affording only the right to retain counsel.

In *Johnson V. Zerbs* / U.S 1938 /, the United States Supreme Court found the Six Amendment to grant the right to appointed counsel in all federal criminal cases. The right to counsel has been greatly expanded, beginning with the land mark case of *Gideon V Wainwright*, where the right was founded to be required for all state felony proceedings. Nine years after this case, i.e. in 1972, the right to counsel was mandated for trial for any offences; whether classified as petty, misdemeanor, or felony for which the penalty involved loss of liberty.

The development of case law finding the right to counsel to include the right to effective counsel began with *Powell V Alabama*, U.S 1932 case.

In *Mc. Mann V Richardson* U.S 1970 case the court stated that:

“it has long been recognized that the right to counsel is the right to the effective assistance of counsel. If the right to counsel guaranteed by the Constitution is to serve its purpose defendant cannot be left to the mercies of incompetent counsel.”

The historic Constitution of Ethiopia—the 1931- recognized the right to assistance of counsel as a right of any accused. It is clearly provided that “in all criminal prosecution, the accused duly submitting to the court, shall have the right ... to have assistance of counsel for his defense, when the accused is unable to obtain the same by his own effort or through his own funds, shall be assigned and provided with a court appointed defense counsel.

Accordingly, it had been stated that an accused shall have his own defense at his expense or court appointed irrespective of the nature of the offence with which he is charged.

The 1955 Revised Constitution did not make any revision of such right. It simply reaffirmed this right to any accused. The 1987 Derg Constitution as well dealt with the accused’s right to defense counsel with slight modifications to the preceding two constitutions. According to this Constitution, the right to defense counsel is recognized as a right to any accused. However, unlike the previous constitutions, under this Constitution, a state appoints defense counsel to defendants to those who can not appoint the same by themselves only if the offence with which they are charged is *serious offence* /emphasis added /

Article 20/5/ of FDRE Constitution in realizing this right reads:

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 right to have defense counsel, therefore, is a constitutional right extended to accused persons. This right, however, is subject to certain conditions.

In principle Art 20(5) of FDRE Constitution is extended to every accused in that it grants the right to be represented by legal counsel of their choice at their own expenses. However, a state should provide defense legal counsel only to those who are not able to pay for it, even though, only if miscarriage of justice is believed to have resulted had defence counsel not been provided. In all others cases, no legal counsel be provided to the accused at the expense of the state.

Practically, however, such right is not being exercised by all accused persons. Obviously those who can afford to appoint a legal counsel at their own expense can do so without any restriction. The only condition precedent in such case is that the person to be appointed should have a valid advocate license from the pertinent authority.

The problem is in connection with the above notes. Thus, though it is a constitutional right for an accused to be provided with legal counsel (representative) at the state expense provided that miscarriage of justice is to occur unless a legal counsel is provided to him, it is often only in some limited cases that such right is exercised.

The writers of this paper believe that because the parties in criminal prosecution i.e. the public prosecutor who is trained in law on the one hand and the accused often a layman who have no legal knowledge and who to defend himself are not balanced, litigation between them can not be fair. Hence, any litigation would result in miscarriage of justice.

In the localities where one of this writer resides accused persons who are not able to appoint defense counsel can be provided with defence counsel by the state only if they are charged with aggravated homicide and aggravated robbery and recently to female accused. Even then it is hardly possible that they are defending them properly. Therefore, this right seems only theoretical.

Nonetheless, the writers agree that some sort of standardization should be set for it is impossible for the state to provide legal counsel for accused persons charged with all kinds of offences.

The roles of a legal counsel even before trial is of paramount importance, but the existing laws of Ethiopia seem to give recognition to such right only during or post trial, Art 20/5, Art 21(2) of the FDRE Constitution. Thus, subsequent laws especially the draft Criminal Procedure Code which hopefully is to be enacted in the near future should address this issue in a way that it extends the right to have legal counsel even before the stage of trial.

### **7.1.2. The Right to Obtain Copy of the Charge**

It has been discussed that upon the receipt of the report of police investigation, the public prosecutor may prosecute the accused on a charge drawn up by him pursuant to Articles 108-122 of the CPC among others.

Charge could be defined as a formal document containing an allegation that a person named therein 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.

Charge describes the necessary facts and evidences implying the person deserve punishment. Mere charge, however, will not necessarily result in punishment. The accused (defendant) has a constitutional right to examine witnesses testifying against him to adduce or to have evidence produced in his own defense and to obtain the attendance of and examination of witnesses on his behalf before the trial court. Hence, the right of the accused to obtain a copy of the charge is of high importance in the exercise of all these rights and in his decision whether to plea guilty or not and to properly defend him by not pleading guilty.

*Note:* a charge is not exclusively prepared by a public prosecutor it could also be framed by private prosecutor.

Under Art 20(2) of FDRE Constitution, the fact that an accused person has the right to be informed with sufficient particulars of the charge brought against him and to be given the charge in writing has been stated.

Hence, the institution of a charge in written form and obtaining the same is a constitutional right of any acc used.

The CPC under Art 109/4/ stated that a copy of every charge shall be given to the accused free of cost which at the same time indicates that a charge be in writing.

*What purpose would it serve to the accused?*

*Discuss when private prosecution is possible?*

### **7. 1 .3. The Right to Public Trial**

The word “trial” in English suggests a contest between competing champions. In adversarial procedure, the degree to which the question of guilt or innocence is left to the playing skills of two adversary players (if the defendant has the same on his part).

The search for the truth and the achievement of substantive (and not merely procedural) justice are the main objectives of inquisitorial procedural systems. In these systems the search for the truth begins with the investigation and receives its final testing at the trial where the evidence is reviewed by judges or juries so that mistakes or oversights can be corrected and only the guilty be convicted.

In the adversarial procedure on the other hand, the search for the truth, if there is one, begins officially at the trial phase because all previous investigation by the police has no standing and given no consideration until it is presented to the court through witnesses and other evidences. There, each side, the prosecutor and the defense, presents their own private version of the truth and the adjudicators, i.e. judges in particular have to decide between them.

Criminal procedures relating to adjudication of proceedings vary greatly from nation to nation. They differ as to the rules of evidence; the composition and function of adjudicators; the duties of attorneys, witnesses, judicial assistances, and others who participate in the trial; and *the degree to which the public is involved in the proceedings, either as spectators or as participants.*

Legal proceedings to determine guilt are fundamentally different from administrative methods of determining facts, which can be carried out secretly, but with accuracy and impartiality, by police or other investigators. Legal proceedings, however, must give the way—to give that appearance is by allowing the community either to witness the process through which their decision is made or to participate in some way. This leads to proceeding legitimacy, avoids suspicion and rumor of official prejudice and arbitrariness, and gives the public a feeling of security. In the second place, public trial performs an important function in the administration of fact finding. It dramatize moral issues and inform the public of the sad consequences which attend violation of law through their public ceremonies, adjudication proceedings condemn, educate, and deter. The administrative determination of guilt carried on behind closed doors can perform none of these necessary functions.

In cognizance of the above merits our Constitution under article 20 /1/ provides:

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.

Thus, the FDRE Constitution makes trial to be “public”, i.e. in an open court before ordinary court in principle. Ordinary court should be understood to mean a court having both judicial, material and local jurisdiction to adjudicate the case based on the grounds discussed under the preceding chapter. No special tribunal be assigned for a particular case.

Article 20/1/, however, is not limited to the accused’s right to public trial. It also guaranteed that trial be undertaken speedily – speedy trial. Speedy trial is to mean trial which avoids unnecessary and unreasonable delay, i.e. decision rendered within the possible reasonable period of time.

Proclamation No. 25/96, which is subordinate to the Constitution, also provides that cases be heard in open court.

Yet, both the Constitution under Art 20 and the Courts Proclamation under Art 26 put exceptions to this right. The Constitution provides that a court could hear cases in a closed session only with a view of protecting the rights to privacy of the concerned parties, public morals and national security. Sub Art 2 of article 26 of Proclamation No. 25/96 lists two grounds for a court to hear cases in a closed session –“in camera” these are:

- i. Public and state safety, and
- ii. Public morality and decency.

Under Art 176 of the CPC:

Where the young person is brought before the court all the proceedings shall be held in chambers. Nobody shall be present at any hearing except witnesses, experts , parents or guardian or representatives of welfare organizations. The public prosecutor shall be present at any hearing in the high court.

Hence, the criminal procedure code states that prosecution in cases of young offenders be semi closed

In all cases, therefore, the accused has the right to open court – public trial as a rule and that trial be in closed session i.e. in camera, is possible only under some exceptional situations provided by law.



*Discus when trial in camera is possible.*

*Can the public prosecutor attend trial held at wereda or Federal First Instance Court dealing with juvenile delinquency?*

#### **7.1.4. The Presumption of Innocence.**

The presumption of innocence – being innocent until proven guilty – is a legal right that the accused in a criminal trial in many modern nations. The burden of proof is thus, on the prosecution, which has to collect and present enough compelling evidence to convince the judges, who are restrained and ordered by law to consider only actual evidence and testimony that is legally admissible, and in most cases lawfully obtained, that the accused is beyond reasonable doubt guilty. In case of remaining doubt, the accused is to be acquitted. This presumption is seen to stem from the Latin legal principle that *ei incumbit probatio qui dicit, non qui negat* (the burden of proof rests on who asserts, not on who denies).

The presumption of innocence is in fact a legal instrument created by law to favor the accused based on the legal inference that most people are not criminal. It is literally considered as favorable evidence for the accused that automatically attaches at the trial. It requires that the trier of fact, be it a juror, begin with the presumption that the state is unable to support its assertion.

The fact that investigation is being conducted or the public prosecutor framed a charge, submit the same to the court and trial being undergone does not mean that the person against whom these proceedings are being carried on is guilty. All such proceedings are endeavors to ascertain whether that person committed a crime or not. This is to be decided only by the trial court. Up until that decision, therefore, nobody can be certain that the accused person is guilty.

Article 20/3/ of FDRE Constitution, in this connection states that during proceedings any accused person has the right *to be presumed innocent until proven guilty according to law*.

Courts are, therefore, the only competent organs to declare that a person is guilty. Though it has been said that everybody is presumed to be innocent, it does not mean that, that particular person is in fact innocent. He could be in reality guilty but the law says “he shall be presumed innocent

until proven guilty – until his guilt is declared by the court in accordance with law, which everyone should respect.

#### **7.1.5. Privilege against Self Incrimination.**

The protection against self incrimination is an important one for any procedural system which attempts to reach a just result and its importance is recognized in all inquisitorial as well as in accusatorial systems. The core of this protection in almost all systems is the desire to prevent investigation or adjudication procedures from coercing unreliable confession from the mouths of accused persons. It is not the desire to prevent investigators from asking accused or suspected persons questions relating to the crime, not the desire to keep the person from answering them (although defendants are usually given the option of doing so), not the desire to keep people from drawing adverse inferences from an accused persons' refusal to answer question. If there are procedure rules which seek to accomplish these ancillary objectives, they are intended to make it more certain that the core objective will be realized.

In all the systems of the civilized world, a defendant has the right of silence in this narrow sense at least throughout the entirety of the criminal proceedings he or she has the right to refuse to answer question and may not be exposed to criminal sanctions for exercising this right much less to torture by order of the authorities.

The use in evidence of statements obtained from the defendant in breach of his right to silence is an important aspect of the problem of improperly obtained evidence. The question most frequently discussed in this connection is whether a suspect's statement may be used in evidence where he made it without first being warned that he has a right not to talk. The question potentially raises the issue of evidence illegally obtained. In different systems the solution depends on whether there was a legal duty to warn the suspect of his right to silence in the case in question, the terms of this duty if it exists, and the attitude of the court to breach of this obligation and as might be expected, the courts where the inquisitional tradition is strongest are the least sympathetic to the defendant in this respect.

The Fifth Amendment to the United States Constitution provides that “no person...shall be compelled in any criminal case to be a witness against himself.”

Art 19(5), FDRE Constitution in the some token provides that:

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 19/5 thus, guaranteed right not to be compelled to make confessions or admissions to arrested persons and the same right is extended to accused persons too.

Art 20(3) of the FDRE Constitution provides:

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

Consequently, one may say that privilege against self-incrimination is a constitutional right given to arrested as well as accused persons. The Constitution does not stop in guaranteeing this right. It also makes that any evidence obtained in violation of this right inadmissible, which could be considered as signal not to compel persons with the view of obtaining evidences for it would be useless.

## **7.2. Preliminary Objections and Their Consequences.**

A prosecutor (public or private) frames his charge and submit the same to the registrar of the court having jurisdiction to adjudicate the case. It is only when the public prosecutor files a charge in a court having jurisdiction that the charge be accepted by the registrar.

Where the charge has been filed to the court having jurisdiction, the court shall forthwith fix the date of trial and cause the accused and the prosecutor to be summoned to appear on the date and

at the time fixed. It is at this juncture that the accused be served with summons along with the charge. This takes us to the stage of trial.

The accused is supposed to personally appear before the trial court on the date fixed. If he appears, the court shall first verify the accused's identity –his name, address, occupation and other information the court deems necessary relating to his identity be asked and recorded. This is to ascertain that the person in the dock (stood before the court) is really he whose name is mentioned in the charge. Thus, it would refrain from going deep in to the merit of the case if it came to know that he who is before it is another person.

Assuming that what the person is responding fits with that mentioned in the charge, the presiding judge shall read out the charge to such person (the accused) and ask if he has any objection to the charge. The objection may be based on the form or content of the charge or any other substantive matter. If the objection is based on the form and content of the charge, the provisions of the CPC on amendments of charges (alteration of and addition to charges) and their effects shall apply. Consequently, the court shall order (if the objection is valid) the charge to be amended within a reasonable period of time it fixes.

Under Art 130 of the CPC, the grounds of objections to a charge are listed. Thus,

- ✓ That the case is pending before another court; or
- ✓ That he has previously been acquitted or convicted on the same charge; or
- ✓ That the charge against him has been barred by limitation or offence with which he has been charged made the subject of pardon or amnesty; or
- ✓ That he will be embarrassed in his defense if he is not granted a separate trial, where he is tried with others; or
- ✓ That no permission to prosecute as required by law has been obtained; or
- ✓ That the decision in the criminal case against him can not be given until other proceedings have been completed: or
- ✓ That he is not responsible for his acts.

The accused may raise one or more of the objections provided above. One may ask whether the list is exhaustive or enumerative.

***Would it be possible for the accused to raise the issue of jurisdiction as a preliminary objection?***

The right of the accused to raise such objections is not unlimited. Where no objection is raised after it has been required by court to state objections (if any) the accused is barred from raising any such objections at any latter stage in the trial. Yet if the objection is of a nature that could prevent valid judgment being given the accused could be allowed to raise such objections even out of time.

***Among the objections listed above, which do you think is better allowed to be raised even out of time?***

***Do you think is there any ground of objection that does not prevent valid judgment from being given?***

Where objections are raised, the court shall take down the same and ask the prosecutor whether he has any statement to make in relation to such objection. Then the court shall decide forthwith on such objection where the objection can be disposed of by reference to the law or the facts. This is where the other party, prosecutor admits the objection(s) as appropriate and valid. However where the prosecutor does not admit or where the court can not decide on the objection forthwith, the court shall order the production of necessary evidences without delay and shall forthwith decide on the objection upon the receipt of such relevant evidences

**For example:**

Ato Meseret is charged before South Gondar High Court. A date had been fixed by the court. He appeared before the court on the date fixed, hence, the court after verifying the identity of the parties (the accused in fact) read the charge. However, Ato Meseret raised an objection stating that he had been asked on the same cause of action before North Gondar High court and was acquitted.

In such case, the court cannot settle the objection immediately because whether the objection of Ato Meseret is valid or not cannot be known instantly so the court should order the accused to produce evidence which proves his allegation, i.e. objection. It is only by then that his objection is accepted and the case be dispensed forthwith on account of the principle of prohibition of double- jeopardy.

Hence, the court shall not see the merit of the case before deciding on preliminary objections raised accordingly. Again in principle, preliminary objections should be invoked at the early stage possible. Late objections are admissible only exceptionally on the grounds discussed above.

### **7.3. Plea of accused**

Once after a charge has been read out and explained by the presiding judge, the latter shall also ask the accused whether he pleads guilty or not guilty, i.e. whether he admits or denies the charge. Where there are more than one charge, the judge shall read each charge one by one and ask, then record the plea of the accused in respect of each charge separately.

It is the duty of the judge to record the plea of the accused without including or substituting any word of his own to what is stated by the accused. It should however be neither condensed nor extended. It should be clear enough in deciding that there is plea of guilt or not.

Where the accused denies the charge or admits the same with reservation or if the accused says nothing in answer to the charge the plea of not guilty shall be entered.

Consequently, the plea of guilty-admission shall be entered only where the accused admits the charge without reservation either by stating the offence in its terms or by admitting every ingredients of the offence charged.

However, it should be noted that even if the accused pleads guilty, the judge need not accept the plea. If from the behavior, appearance or words of the defendant during the

pleading/arraignment/ process, the judge is led to believe that a defendant is mentally incompetent, or somehow does not seem to understand what is happening or that the plea may be involuntary or greatly inaccurate in terms of what actually happened. The court may not accept the plea of guilty or delay its acceptance. This is to allow psychiatric diagnosis or to enable the accused confer with counsel. If the judge simply rejects the guilty plea, it shall set a trial date as if the accused had pleaded not guilty.

In deciding whether to accept a plea of guilty, judges are required to personally address the accused and make inquiries to establish:

1. The accused knows of his/her right to a trial and that a guilty plea is a waiver of this right
2. The accused is pleading guilty voluntarily (i.e. was not forced or threatened into the plea)
3. The accused understands the nature of the charge.
4. The accused is aware of the possible maximum sentence that can be imposed if he pleads guilty.

As being discussed above after the accused pleads not guilty, it is obvious that the next process is that the prosecutor be ordered to produce evidence, oral witnesses in particular because he is alleged a commission /omission/ of a crime the burden of proof lies on him. However, if the accused pleads guilty and it has been recorded by the court, the prosecutor shall be asked his opinion which normally be demanding the court to convict the accused forthwith. The court may on its own discretion either convict the accused forthwith or demand the prosecutor to produce evidence and corroborate the plea. This depends on how that particular judge (s) is/are convinced.

***What possible grounds would lead the court demand production of further evidence in disregard of the accused's plea of guilty?***

Practically the nature of the offence has an impact on the decision of the court to accept or not the plea of guilt by the accused. In most serious offences, such as aggravated homicide, our courts opt in the production of corroborating evidence though the accused pleads guilty and the prosecutor requests for immediate conviction.

***State the possible rationales do you envisage for the courts to demand corroborating evidences even no matter how the accused pleaded guilty?***

Sometimes prosecutors request the introduction of evidences after the accused pleads guilty with the view of showing the criminal disposition or demeanor of the accused so that punishment would be aggravated in serious offences.

In the course of proceeding after the court entered the plea of guilty of the accused, the court may amend the plea on its own motion or upon the application of the accused pursuant to Art 135 of the CPC. The court may then change the plea to one of not guilty. Where a plea of guilty had been entered following which the suspect had been convicted, sub article 2 of Art 135 provides that the conviction shall be set aside.

***The CPC allows amendment of plea from guilty to not guilty. How about the vice versa?***

#### **7.4. Opening of Cases and Presentation of Evidences.**

It has been discussed that the court which has jurisdiction over the case shall fix a date for hearing and sends a summons with the view of notifying the accused that a charge as against him is filed and he shall appear personally on such a date as mentioned in the summons. On such date the accused may appear in person or not for different reasons. If he appears what the court should do first is establishment of his identity thus, his name, address, occupation, age and other relevant information could be asked with the view of clearly identifying the person's identity. In case any of these do not fit to what has been provided by the public prosecutor in the charge, it may not be necessary even to deep into the merit of the case unless otherwise the public



prosecutor makes a valid objection to this effect, in which case the court would order as it thinks just.

Once after the identity of the accused is established and the information fit to what is already in the charge, the court has to read out and explain the charge to the accused. Then ask him if he understood what charge he has to answer and if he has got any objection to the charge.

**Refer to our discussion on different kinds of objections.**

If the accused raises any objection the court has to take down the objection and ask the public prosecutor if he has anything to say in relation to the objection. The public prosecutor may admit the objection as appropriate in which case the court would settle it without further complication. However, if the public prosecutor challenges the objection of the accused, where it is possible for the court to decide on objection(s) by having regard to the evidences already produced and the law, the court shall decide forthwith. Where the decision cannot be made forthwith Art 131 of the CPC provides that where the decision cannot be made forthwith for lack of evidence, the court may order that the necessary evidence be produced. If the objection is made based on the fact that the case is pending before another court, for instance, the accused must produce the appropriate evidence to show the alleged fact and the court shall make its decision as soon as the necessary evidence is produced. It is, therefore, only after the court settle such objection that it can go in to the merit of the case. Then, the presiding judge asks the accused whether he pleads guilty or not guilty.

Where there are more than one charge the judge –the presiding judge as the law envisages, shall read these charges one by one and the accused’s plea accordingly. The judge should not only read the charge but explain the same to the accused, too, if then the accused admits the court must be sure that such admission is with full understanding of the charge, hence, the court may even be required to ask the existence of every elements of the offence only after which the plea of guilty be entered.

Once after the accused pleads guilty and this has been recorded by the court, then later on by its own discretion either convicts the accused forthwith or demand the prosecution to corroborate the plea with evidence. If the court is convinced that the crime has actually been committed and it has been committed by the accused and the latter has made convincing statements and show that it was him and no one else committed the crime, it shall convict the accused forthwith. If not however, it shall order the evidence be produced by the prosecutor .

*In your opinion when do you think the court would order the public prosecutor produce evidence irrespective of the accused's plea?*

*Do you think that the nature of the offence has an in pact on the discretion of the court?*

It is only then after that the issues of opening of cases comes in to being. Thus, the prosecutor in opening his case, shall state the charge(s) he proposes to prove and the nature of evidences he tenders in respect of each fact in doing so the public prosecutor is supposed to do in an impartial way as being provided under Art 136/1/ of our CPC.

#### **7.4.1. Presentation of evidence**

As mentioned before, if the court recorded/entered the plea of not guilty or where the plea of guilty has been entered but the court orders the plea be corroborated with evidence, the court shall, call up on the prosecutor to produce his evidences. Thus, the public prosecutor shall give the registrar list of witnesses and experts, if he has any, who shall testify in respect of the charges, and the latter shall issue summons to them requiring to appear on such day and hour as fixed by the court. The public prosecutor also has the responsibility for ensuring that all exhibits are produced at the trial in the court the day fixed for hearing. If any documentary evidence they are annexed to the charge.

Evidences to be produced by the public prosecutor in support of his allegations are *oral*, in most cases, documentary, and exhibits. As documentary evidences are normally annexed (not to the copy which is to be given to the accused in the earlier practice) to the charge, the court has the opportunity to examine it in time. Exhibits also as supported by witnesses who explain about the

exhibit shall be produced for the examination of both the court and the accused during the trial when it is appropriate.

However it should be noted that production of evidence is to be produced not by the public prosecutor only for the accused, too, can do the same in support of defense but only after the prosecutor proves his case to the satisfaction of the court beyond shadow of doubt normally *proof beyond reasonable doubt*.

The major types of evidences in criminal cases are oral evidence and the law provides for relatively detailed rules on examination of witnesses.

#### **7.4.2. Examination of Witnesses**

On the date fixed for hearing after the case has been opened and the court ordered the production of evidences, the public prosecutor who normally begins the case shall call up on all relevant witnesses so as to prove his case and explain about the issues to be proved by the witnesses or separately if the issues to be proved are different. Such witnesses then shall tender an oath or make an affirmation one by one, by a lay or expert witness before giving testimony. Witness shall be:

- \_\_\_ examined – in-chief by the public prosecutor
- \_\_\_ cross-examined by the accused or his advocate
- \_\_\_ re-examined by the public prosecutor

This is applicable to witness called by the accused mutata mutandis.

The public prosecutor conducts examination – in - chief to his witness to enable him tell the court whatever he knows about the offence. Thus, questions may be related to any fact that is directly or indirectly related to the offence that is to be proved. During examination-in-chief, however, leading questions are prohibited. This is because what the court wants to hear is the testimony of the witness and not that of the proponent. Rather, neutral questions only directing to

him as to what about the witness shall testify, as he is to give testimony and not to deliver speech before the court may be put to him to make him free to use his own words and explain the facts in his own way.

The CPC Art 137 provides the forms of questions to be put during examination-in-chief, it states that:

- i. 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 .
- ii. No leading questions shall be put to a witness without the permission of the accused or his advocate or the public prosecutor, as the case may be.

Hence, only questions shall relate to facts which are relevant and to the knowledge of the witness that are to be asked during examination-in-chief. Relevant facts having to do with what is stated in the charge or which are important to prove the allegation of the prosecutor/proponent. Thus, where the proponent puts a questions relating to a fact which is not important may raise the objection of relevancy. The other rule in examination-in-chief is that questions to be asked at this stage should relate to facts of which the witness has direct or indirect knowledge. Direct knowledge is acquired by that 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 sense, heard smelt touched/felt or tested the fact if it is perceivable in such away. It is believed that the witness can give reliable testimony in relation to such facts.

Questions during examination-in-chief may also 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.

Often it is argued that testimony given based on indirect knowledge is not acceptable as it is hearsay for it is based on the testimony of another party who never appears before the court to be thereby the truthfulness of his testimony is not tested. They even go ahead in saying that making hearsay evidences admissible is against the accused's constitutional right. But, the CPC does not accept the hearsay rule.

***How do you see the latter argument in the light of FDRE Constitution?***

In principle leading questions are prohibited during examination-in-chief, however, there are exceptional circumstances where such questions could be asked at this stage if:

1. the accused or his advocate gives his permission; 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 who does not have good command of language for the purpose of assisting him; or
4. the witness does not know as to where to start, to refresh his memory; or
5. the witness turns out to be hostile.

***When is a witness said to be hostile?***

In the normal course of things, a proponent calls a witness believing that he will testify in his favor. Exceptionally, however, the witness turns out to be hostile to the person who called him. Had the calling party known before that the witness is going to be hostile to him, he would not have called him at least. Yet just it happens before the court. When this happens and makes the proponent surprise, he may, up on the permission of the court put leading questions to such witness during examination –in- chief, hence the examination turns to cross-examination.

Once the prosecutor is over with the examination-in-chief, the accused or his advocate *may*/emphasis added / conduct cross-examination. The purpose of cross-examination being to destroy what has already been established during the examination-in-chief by showing the

testimony is not true; it is contradictory or not reliable, i.e. destroying, falsifying or shading doubt on what has been established during the examination –in –chief.

Art 137/3/ of the CPC provides questions to be put by the adversary/opponent shall tend to show to the court what is erroneous, doubtful or untrue in the answer given during examination-in-chief.

If the purpose of cross-examination is to destroy/falsify what has been established during examination- in- chief by showing that is not reliable questions asked at this stage should base much as possible related to facts testified during examination-in-chief. Leading questions are allowed to be put at this stage because as in most cases such witness is hostile to the adverse party seems very unlikely for such party to find a suggested answer from the witness.

To ask questions during cross-examination or not is discretionary to the adverse party but it should be noted that asking or not in most cases has a very significant impact on the outcome of the case, hence advisable to raise as much relevant questions as possible. However, the fact that cross-examination is not conducted at all or no question has been put to the witness during cross-examination in respect of certain facts does not constitute an admission of the truth of the point (s) by the person who would have cross-examined the witness – the proponent .

The third stage of examination of witness is that of re-examination. Re-examination is to be conducted by the party who conducted the examination-in-chief once after cross examination is over. The purpose of re-examination is to reestablish what has been demolished during the cross-examination or to clarify what has been confused during cross-examination. In view of its purpose, therefore, the facts that are to be raised during re-examination are limited to those, which were raised during the cross-examination. If there is no cross-examination at all, again there cannot be a re-examination as nothing has been destroyed by cross-examination from what has been established by the examination-in-chief.

Art 136/4 / of the CPC provides that the court may put any relevant- questions which appear necessary for the just decision of the case, question to the witness any time. The testimony of the

witness, therefore, should be recorded by the court accordingly. The record shall start with the name, address, occupation and age of the witness and there shall be an indication whether he has sworn or affirmed. The evidence 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. Because it is difficult to record every statement of the witness during the hearing the judge often writes the answers of the witness only in a form of narration and points which he thinks have to do with the questions asked. However, recently, a transcribing machine has been fixed in many federal and regional courts to record court proceedings.

Witnesses are to be called by parties as there are also court witnesses who are called by the court on its own motion if it deems their presence vital for it would enable the court render just decision. Such witnesses could be called any time before judgment is given. In which case obviously it is going to be the court that would conduct examination in – chief and that the party against whom these witnesses testify would conduct cross-examination. The court may ask in place of the parties or disallow the question in its discretion.

In principle, the public prosecutor shall state all the witnesses in his charge according to the practice. However, Art 143 of the CPC widens the prosecutors right to call witnesses whose name does not appear in the list of witnesses mentioned in his charge provided the court is satisfied that the person is material witness and the prosecutor informs the accused in writing that the name of the witness he proposes to call and of the nature of the testimony he will give.

***What would happen if the witness-all or some fail to appear for different reasons such as death, absence in capacity cannot be found?***

Art 144 of the CPC has some solution to this

## 7.5. Post Evidence Procedure

Evidences that could be produced before the court to prove the commission on an alleged crime by the accused could be documentary and/or oral. Documentary evidence could be the confession of the accused either before the investigating police officer as per Art 27/2/ or before a court by virtue of Art 35 or any other document, which may be material proof to the fact in issue. It may also be an exhibit, which has been used as a means for the commission of the crime like knife or gun, or a thing which is the fruit of an offence such as a stolen or robbed property or a document produced illegally or a thing against which the crime has been committed such as a document which has been forged, or an item from which its parts are looted.

The court after going through all admissible evidences produced by the public prosecutor primarily and examining where relevance to the proof of the fact (s) in issues shall reach in to a decision, which is referred as “**Beyen**” in Amharic.

### 7.5.1. No Case Motion and Acquittal

The court has to evaluate the weight of the evidences based on a certain standard. In the continental Europe for the accused to be convicted a judge needs to have the “interim conviction” which is literarily mean internal conviction. In Anglo American system, on the other hand, the court must be convinced to the degree of “beyond reasonable doubt” that the accused is guilty. In our legal system there is no such fixed standard of proof required But it can be said that the Anglo-American system has a significant influence and practically we have the standard called “beyond reasonable doubt” degree of proof.

*What does beyond reasonable doubt mean?*

*Does it mean no doubt at all?*

*In your opinion, is it possible to have proof with absolute certainty?*

In criminal cases, it is the public prosecutor that has the duty to prove his case and only if he proved his case with the required degree of proof that the accused would be given the chance to



defend himself by producing witnesses if he has or if he wishes to do so. The acontrario reading of this is that unless the evidences produced by the public prosecutor proves the case to the satisfaction of the court that the accused committed the alleged crime the later shall be set free thus, no case motion/no case for prosecution.

Art 141 of the CPC reads:

When the case for the prosecution is conducted, 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.

Thus, once after the court examine the evidences and measured its weight shall decide whether the case is proved to the extent of the required degree against the accused or not. If the court is not convinced that the case is sufficiently proved, it shall acquit the accused without requiring him to defend himself and enter an order of release of the accused if he is in custody pursuant to Art 141 of the CPC.

### **7.5.2. Case for Prosecution**

Where the case is not dispensed pursuant to the above discussion, i.e. Art 141, in other words, if the court is satisfied with evidences produced and is convinced that the accused had committed the alleged crime unless rebutted by the evidences to be produced by him it shall require him to produce all possible evidences he has to defend himself.

Art142 of the CPC:

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 up on his defense and shall inform that he may make a statement in answer to the charge and may call witness in his defense.

It is this, i.e. the fact that the court orders the accused to produce his evidences and defend himself that we call “case for prosecution”. The Accused then shall give the list of all relevant evidences he has to the registrar of the court and the latter shall give him summons requiring witnesses, ordinary and/or experts to appear on the date fixed for hearing in case he has not done at the earliest possible opportunity.

Here it should be noted that the court should be cautious before passing an order for the accused to produce his evidences i.e. ‘for the case for prosecution’. In doing so, the court must believe that based on the evidences of the prosecution, that the accused would be convicted if he fails to rebut the case made against him. The writers of this material believe that the fact that accused ordered to defend himself i.e. a case for prosecution, is no less than giving the final judgment because as the foregoing discussion the court shall order the accused defend himself only when it believes that “ based on the evidences of the prosecutor the accused is guilty”, hence, the purpose of giving the accused this the right to defend himself has is to see if he can rebut this strong believe and show that he /the accused did not committed the alleged crime or show that somebody else committed that crime, if in fact is referred as the best defense. Look, the accused, specially he who has no lawyer, in doing so is going to be confronted with the judge, who though is duty bound to be impartial and avoid any bias, is now of the opinion that the accused committed the crime –in fact waiting if he can rebut and the public prosecutor who is skilled and experienced what to ask and how to challenge testimonies all this makes the assignment of the accused too hard to be successful and we observe that a very insignificant number of accused were lucky to be set free /acquitted once after the case has been set for prosecution and they produced their defense. Therefore, we would like to say that judges should seriously consider things before reaching on such decisions in particular.

### **7.5.3. Judgment: Conviction/Acquittal**

All the criminal prosecutions are made with the ultimate destination of rendering judgment which would either be conviction or acquittal. To put it in simple terms, the accused would be convicted if the evidences produced by the prosecutor convinced the court to the extent of the

required degree that the accused committed the alleged crime and his evidence, if any, could not rebut such evidences and affects the court's conviction. On the other hand, is the defense evidence(s) produced by the accused can falsify the evidence of the prosecution or at least shad a reasonable doubt, the court must decide for the acquittal of the accused and be released from prison if had been in custody. It is one of the responsibilities of a judge to give reason for any of its decisions

#### **7.5.4. Sentencing**

Where the accused is found guilty, the court shall ask the prosecutor whether he has anything to say as regards sentence by way of aggravation or mitigation as being provided under Art 149/3/ of the CPC. It is at this stage of the procedure that public prosecutor could reveal to the court aggravating grounds such as previous conviction(s) of the accused so that the court could take this fact in to consideration in the determination of the sentence.

Once after the public prosecutor is given the chance to mention aggravating or mitigating grounds to the court the later shall give to the accused so that he can reply and mention any mitigating grounds he could raise, if any. The court may demand the production of evidences to prove these grounds. In practice most of our courts do not ask the production of prove to mitigating/aggravating ground mentioned by the parties. The prosecution also tends to state only aggravating circumstances while the law requires him to mention mitigating circumstances as well.

*What could be the punishment to be rendered by the court?*

**Refer to different kinds of punishment under the material “sentencing and execution”**

## **CHAPTER EIGHT**

### **SPECIAL PROCEDURES LEADING TO JUDGMENT**

So far we have seen the ordinary criminal proceedings but there are cases where all these proceedings may not be applicable for different reasons in the following sections we shall see some of the special proceeding.

#### **8.1. Private Prosecutions**

Even though the CPC has provisions governing private prosecution, it is not realized in practice. It has also lost much significance in other parts of the world. For further understanding refer to infra chapter two section 2.1.

#### **8.2. Default Proceedings**

Under the ordinary proceeding, which we have been looking above, the accused is required by law to attend the trial personally not through representative. However, a representative can appear before the trial court and explain the reason(s) for the accused's non appearance and request an adjournment of the case until the accused will be able to appear only. The court then if satisfied with the reason for the non-appearance of the accused as explained by the representative would adjourn the case by virtue of Art 94/2/a/ of the CPC. However, if no representative appeared to explain the reason why the accused fail to appear or the reason is not satisfactory, the court shall issue arrest warrant for the accused's arrest presuming that he is hiding himself from the court /justice. Normally arrest warrant is issued up on the request of the public prosecutor and be executed by the police officer as the latter can find the accused. If the accused cannot be found or known to have fled abroad the court has to resort to Art 160/3/ of the CPC and see if it can see the case even in the absence of the accused i.e. *if trial in absentia/default proceeding is possible.*

Trial in absentia may be held only in respect of certain grave offences, of specific offences that are committed by adult offenders. Such offences are either punishable with rigorous

imprisonment for not less than twelve years or offences that are provided for under Art 354-365 Of the PC ( Offences against the fiscal and economic interest of the state), which are punishable with rigorous imprisonment of fine exceeding five thousand birr. Even then, default judgment possible if the accused is not young person.

After going through the law, the court shall decide for the trial of the case in absentia and then, shall order the publication of the summons which shall show the date fixed for hearing. Though the law says the court shall order summons published, it does not mention as to how such summons be published. Practically, however, it is normally published in a national newspaper often Addis Zemen Gazette.

Once after this the court shall continue to see the case just like any other ordinary cases no matter how the accused fails to appear regardless of all these proceedings pursuant to Art 163/1/ of the CPC. The court then will render a judgment –convicting or acquitting the accused after evaluating all the evidences the prosecutor produces.

***Should one see the minimum or maximum punishment to determine cases to be tried in absentia?***

***What happen if the person who has been convicted in a proceeding held in his absence appears?***

***What if a person absconds being on bail? Is publicity still required?***

Art 197-202 of the CPC provides the possibility of making an application to set aside judgment made in default where the accused has been convicted in his absence and now appears and make an application with good cause for his non appearance. Such application is made to the rendition court within thirty days from the date on which the applicant became aware of the judgment given in his absence. Where the applicant is aware and is not able to file an application within those thirty days, his advocate may file the application and the applicant may have afterwards a sufficient time to appear before the court as his personal presence. Obviously, such application should be based on a reason (s) and the law under Art 198 of the CPC recognizes only two reasons. These are:

- i. the accused has not received summons to appear ; or
- ii. the accused has received the summons but prevented by force majeure from appearing in person or by advocate.

Once after such application is made, the court shall order it be given to the public prosecutor fixing a date for its hearing. The court then enters a decision after hearing the parties on the date fixed and its decision could either be accepting or not the application to set aside the decision given in default. If the court accepts the reason and grant the setting aside of the judgment, it shall order the retrial of the case and the public prosecutor institutes a charge before the pertinent court. The decision of the court on the application is final, therefore, the accused cannot go anywhere if his application to set aside the judgment given in absentia is not acceptable yet he can lodge an appeal as *against the sentence* that has been determined in the judgment rendered in default within fifteen days of the dismissal of the judgment rendered in default. However, it should be noted that no appeal is possible in respect of the *conviction* for it would amount to granting the application to set aside the application.

***Discusses what possible causes could warrant setting aside such judgments?***

***Assuming that you are a judge, what are you going to do if the public prosecutor fails to appear on the date for trial?***

***Is cassation possible on a decision not to set aside in absentia judgment?***

As we have seen before, there is what we call private prosecutions. In such prosecution, it is a private person who is a party to the case taking the position of the public prosecutor. If the private prosecutor fails to appear the court shall strikeout the case unless someone appears before it and explain the reason why the private prosecutor failed to appear to the satisfaction of the court, in which case the court may adjourn the case pursuant to Art 165/1/ of the CPC.

*Explain the effects of striking out a case*

**8.3. Summary Proceedings: Petty Offences and Contempt**

Contraventions are minor crimes. Pursuant to Art 735 of the CC, contraventions are violation of administrative regulations or the rules of the CC relating to petty offences. They may entail loss of liberty or payment of fine. But, the arrest ordered is not comparable to that of normal crime. It is undertaken in a detention center for that purpose. The penalty ranges from one day to three months.

The CPC regulates its enforcement. For petty offenses, the law follows a simplified procedure. For example one may not be supposed to go to court. It is possible to send a document certifying guilt. The court should not call upon the accused unless it intends to impose arrest. The proceeding can be held orally. Thus, the law wants to simplify the procedure for contraventions.

With regard to court contempt, unlike the civil procedure code, the CPC does not have provisions regulating it. However, court contempt can happen in a criminal court. The CC has procedural provisions regulating the summary handling of such cases. So, a criminal bench can use the provisions of the CC in case any person commits court contempt in the process of adjudication.

Read Art 167-170 of the CPC and Art 734-865 and 449 of the CC.

*What is the rationale for treating contraventions separately?*

*What are the procedures followed in petty offence cases?*

**8.4. Juvenile Procedures**

In many countries, there is what we call juvenile court which is a special court designed to see cases in which young persons /juveniles are parties. Such courts grew up as a reaction to the traditional practice, which used to adjudicate young offenders under ordinary courts where adults are tried. Some of the innovations claimed for juvenile court 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 cause of anti-social behavior in the juvenile, and on the rehabilitating him through affecting his environment rather than on fixing his blame and punishment. In most 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 favor of more neutral words with the view of protecting the juvenile from any connotation of crime and punishment.

In general, juvenile courts and boards, which have the same function in some countries, frequently dispense procedural protections for the juvenile who is subject to such treatment as being provided by law.

Coming to the existing Ethiopian laws, we find chapter ten of the CPC that deals about procedures concerning young persons. Thus, issues concerning complaint and accusation, arrest, investigation, charge, plea, trial, judgment, sentence and appeal are dealt and supposed to be governed pursuant to provisions listed therein.

**Read Articles: 171- 180 of the CPC; Art 40 of the Convention on the Rights of the Child and Art 17 of African Charter on the Rights and Welfare of the Child.**

*Compare and contrast the ordinary procedure with that of the juvenile?  
Is bail formality applicable for juvenile case?*

## **8.5. Corruption Crimes**

### **Relevant Laws**

Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005  
Art 402-419 of the CC

The last type of special criminal procedure to be discussed in this document is corruption offences. Separate rules are enacted to regulate the arrest, investigation, search and seizure, bail, injunction, restraining order, remand, prosecution, trial, evidence, standard of proof,



confiscation, appeal, etc of corruption crimes. These provisions are mainly found under the proclamation dealing with procedural and evidentiary matters of corruption cases and the CC. Thus, there are special procedural and evidentiary rules pertaining to corruption offences.

An arrested person on corruption case has bail right. But, there will not be bail if the crime entails more than 10 years imprisonment. It is not clear whether the minimum or maximum penalty should be considered to determine bail matters. Both sides could appeal on the decision of bail question. If there is appeal on the release of the suspect or accused on bail, it will not be enforced in case the investigator or prosecutor brings appeal. The court has to wait for reasonable time to let the appeal is filed. The investigator may also release the suspect on legally set grounds. Unlike other criminal cases, the court is empowered to order other conditions besides the bail. These conditions are prohibition of tampering with evidence, restriction of movement to certain places, periodic reporting obligation, and prohibition of leaving the country. The court may also grant restraining order on the properties of the suspect or accused upon request supported by affidavit. There are also specific provisions dealing with search and seizure. The court handling matters related to investigation of corruption crimes is only the Federal High Court and regional high courts in their respective jurisdiction.

There are two modes of handling the trial. These are the ordinary criminal procedure approach and the special procedure designed for conducting trial for corruption offences. The choice is dependent upon the complexity of the matter. The purpose of the special procedure is to facilitate the process, easy understanding of the matter and clarification of issues. For complex matters, there will be pre-trial hearing. At this stage, there will be mainly exchange of evidence as well as ruling on the admissibility of evidence and issue of law. There could be appeal on the rulings made. The elements to be proved and the standard of proof are also different from other criminal cases. The law also protects prosecution witnesses from possible attack. It tries to encourage whistle blowing.

To sum up, like other developed criminal justice systems, the Ethiopian criminal procedure adopts differentiated case management system. Corruption offences are one of the specially treated areas. Even the law identifies simple and complex corruption crimes and stipulates

separate procedures to be followed. The system is like a modern high way devising different ways to allow smooth traffic.

*What are the justifications for having special rules concerning corruption crimes?*

*Compare and contrast the procedures of ordinary criminal procedure and the special criminal procedures designed for corruption offences?*

*Can a remand bench release a suspect unconditionally if it finds out that the arrest was made by mistake?*

*How should a court determine the reasonableness of the time to bring appeal in case a suspect or accused is released on bail?*

## **CHAPTER NINE**

### **POST JUDGMENT PROCEEDINGS**

So far we have seen that following the accusation/complaint /personal observation a police undergone investigation and submit the report of the investigation to public prosecutor who in turn shall take the appropriate step among which is framing a charge and file the same to the court with jurisdiction. The court then follows the procedures and finally decides the case according to the law. The case is decided may not be it is over there for the parties –both or one of them may not be satisfied with the decision of the court for whatever reason. The public prosecutor may not be happy because the accused is acquitted or discharged or has been convicted under an article which is of lesser gravity than which he has been charged with or a lesser penalty has been imposed on him. The accused on the other hand may not be happy on the conviction at all or he thinks he is convicted under an article, which is more graver in nature, and the penalty it carries or he might think the penalty, which has been passed on him is more than what he actually deserves. The parties may feel these things and look for a means with which they could rectify the unfairness there by look for the *review* of the judgment. Where no review is sought for the parties are not unsatisfied or not interested the next step is the execution of the judgment. There is also a possibility for pardon and amnesty. These matters are highlighted in this chapter.

#### **9.1. Review of Judgment by the Court of Rendition**

Review of judgment by the court of rendition is a procedure, which is about reopening of a case, by the trial court once after it pronounced judgment for various reasons. In our legal system, however, there is no law enforce that envisaged such proceeding. The draft code prepared by the Justice and Legal System Research Institute, however, introduces this idea of ‘review of judgment’ and it provides under Art 237 that “an application to reopen a case after final judgment may be submitted by the defendant (the convicted person) on any of the grounds provided for by the law to the court that renders the judgment that is sought to be reopened.

The Draft Code also provided that the application for the reopening of the case is to be filed before the court that renders the judgment against which such application is made. It also provides that the application for review of judgment be prepared in the form of memorandum of appeal containing such grounds as are provided for the law as grounds of the review of the case and to which evidence of such facts are annexed. Art 239/2/ Of the draft provides that such application be filed within sixty days of the discovery of or knowledge of the new evidence or the discovery of the falsity of the testimony of a witness or the opinion of the expert, an evidentiary document or a translation.

Once the application is submitted and the court received the same, the latter shall send a copy of such application and the evidence supporting the allegation to the prosecutor to submit to the court any objection to reopening of the case if he has any on the date fixed. However from the reading of the provision, it is not clear as to what the ground of objection of the public prosecutor could be. The absence of those grounds on which the application for the reopening of the case may be based, seem to be ground for the public prosecutor to object the reopening of the case. After evaluating the evidence(s) produced by the two parties for and against the reopening of the case, the court shall give a ruling granting or refusing the application. Should the court grant the review of the judgment; it shall rehear the case again. If it refuses it on the other hand, the applicant may lodge an appeal to the next higher court as any other appeal.

***What do you think is the rationale for allowing review by the court of rendition?***

***Read Art of the draft Criminal Procedure Code and try to find if application for reopening of a case once a decision, which convicted the accused is rendered is possible. If so, how do you see it with the constitutional principle of the prohibition of double jeopardy?***

Art 238 of the Code provides the grounds of the application for reopening of the case once after final judgment. These are:

- I. discovery of new circumstances, after the exercise of due diligence, were not in the knowledge of the defendant at the time of the giving of the judgment.
- II. the establishment of the falsity of the testimony of the witness or the opinion of an expert, an evidentiary document or of a translation which has resulted in the delivery of the judgment and which, after the exercise of due diligence, was not within the knowledge of the public prosecutor or the defendant now the convicted person at the time of the giving of the judgment.

In times when the convicted person is unable to file an application for reopening of a judgment for different reasons beyond his control, such as, not being in a position to give his consent, his legal representatives, spouse, ascendants or descendants, as the case may be may apply for the reopening of the case on his behalf. It is also provided that the public prosecutor could apply on behalf of the convicted person in the interest of justice.

## **9.2. Right of Appeal and Powers Appellate Court.**

All the above proceedings would ultimately take us to the decision of the court. Once after the court render decision one or both of the parties may not be satisfied with such decision, in other words the public prosecutor may not be happy because the accused is acquitted or has been convicted with under an article which is of lesser gravity than which he has been charged with or a lesser penalty has been imposed on him. On the other hand the accused may not be happy on the conviction at all or he thinks that he is convicted under an article, which is more grave that it carries greater penalty or that the penalty imposed on to him is more than what he deserves. Under such cases, the party may sought for remedy, one of which is lodging appeal.

Thus, appeal may be lodged either by the accused or the public prosecutor or by both as the case may be .The convicted person obviously may appeal against his conviction or the sentence that has been passed on him or against both. If the accused pleaded guilty as per Art 134 of the CPC, such admission serve as estoppels and the convicted person cannot appeal against his conviction rather only in respect of the extent and legality of the sentence. In cases of joinder of civil and criminal cases, where the court granted joinder, it shall decide on the issues whether to grant compensation to the victim, if so the amount to be awarded as well. Thus, if the court decided

refusing the compensation, the victim may appeal against such decision (refusal). However, where the court grants the compensation, the convicted person, who is supposed to pay the compensation to the victim, may lodge an appeal against such decision.

It should be noted that the right of lodging appeal is given not only to the accused and victim but it could also be made by the public or private prosecutor as against the decision of the court on the acquittal of the accused person or on the sentence that has been passed on the convicted person.

Though appeal is recognized as a fundamental right, constitutional right, too, of any aggrieved party to the case there are certain legal conditions and limitations to the exercise of this right. The law provides that there is no interlocutory appeal or there is no appeal on decisions on interlocutory matters. Stated other ways appeal is possible only in respect of final decisions.

***Can a person convicted on a guilty plea challenge the conviction on the ground that the plea of guilty is not properly handled?***

***What is meant by interlocutory matter?***

Art 184 of the CPC provides only three classes of interlocutory matters from the decision of which no appeal lies. These are:

- i) granting or refusing an adjournment under Art 94; or
- ii) regarding an objection under Art 131; or
- iii) regarding the admissibility or non admissibility of evidences under Art

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Thus , we can understand that interlocutory decisions are decisions which do not dispose the case finally- finally in respect of that particular court which is trying the case. An adjournment may be granted or refused; the objection of the accused saying , for instance, the case is pending in another court or he has been charged and acquitted or convicted for the same offence may be sustained or granted; the objection of the party on the admissibility of item of evidence may be

sustained or rejected by the court. These rulings of the court are not final in the sense that the case is still pending and not disposed of *en toto*.

We have seen that appeal is a right of any aggrieved party yet it could only be exercised once. A person can make an appeal from the decision of Federal First Instance Court to Federal High Court and from decision of the Federal High Court to Federal Supreme Court. However, there is what we call “second appeal” in respect of matters that were decided by Federal First Instance Court. That is if the Federal High Court, in its appellate jurisdiction varies or reverses the decision of the Federal First Instance Court, a party dissatisfied with such decision may lodge his appeal to Federal Supreme Court. Whatever the decision of the Federal Supreme Court may be, its decision is final legally and practically as there is no higher court. If the Federal High Court, on the other hand, confirms the decision of the Federal First Instance Court, however, there is no second appeal to the Federal Supreme Court.

It has been provided that the party who is not satisfied with the decision of a court, if he wants to lodge his appeal to the next higher court, it shall submit his notice of appeal to the court which renders the judgment in respect of which appeal is sought. Such notice, however, shall be filed to the court within fifteen days of the delivery of the judgment. The court then prepares the copy of the judgment appealed against and hands to the appellant or his advocate without delay. Where the appellant is in custody the copy shall be sent to the superintendent of the prison, where he is confined in, for service on the appellant. The date on which the copy is handed to the appellant, his lawyer or the superintendent of the prison shall be fixed on the copy by the registrar of the court.

The law provides that the memorandum of appeal, the notice of appeal and the copy of the judgment shall be filed in the registrar of the court, which renders the judgment appealed against. Where the appellant is in custody, the superintendent of the prison where in the appellant is confined shall forward the memorandum of appeal without delay to the court against whose decision an appeal is made. It sounds that the law envisages an integrated work between the different level of courts and the court which renders the judgment against which the appeal is

made shall forward the memorandum of appeal as accompanied by the notice of appeal and the copy of the judgment.

*Try to see if the practice is in line with the above discussion.*

Memorandum of appeal shall contain the grounds of objection to the judgment appealed against in a very concise way and without argument. If the objections are more than one, they shall be listed under separate headings and numbered consecutively. It shall also state the nature of the relief sought and be accompanied by the judgment. Finally, it shall be signed by the appellant and his advocate, if he has any.

For appeal is to be lodged to the next higher court, first instance courts do not have appellate jurisdiction. Appeal from the decision of Federal First Instance Court lies to the Federal High Court. appeal form Federal High in its first instance or appellate jurisdiction where it reversed or varied the decision of the Federal First Instance Court lies to Federal Supreme Court. If the case has been tried by regional high court in its delegated jurisdiction appeal lies to the Regional Supreme Court. Once the case is taken to the Supreme Court, both Federal and Regional, no appeal lies for there is no higher court. There is but a possibility for cassation.

Up on receipt of the memorandum of appeal, if the appeal is based on the record of the court and, if the court, after going through the documents produced, is satisfied that the grounds of the appeal are not justified, some argue that, the court may dismiss the case even without calling the respondent. Where the appellant relies, however, also on other things such as calling additional witnesses or producing other evidences, a copy of the statement of appeal shall be served on the respondent.

The appellant in filing his appeal primarily sought for the review of the judgment but if he has been so convicted and is serving the sentence, he may also request for the stay of the execution of the sentence of imprisonment. Such application, for stay of execution of the judgment may be made to the court of appeal at any time before the appeal is heard or during the hearing of the



appeal. No guideline as to how or on what grounds the court has to grant or deny the application for the stay of execution.

***Is it legal for the appellate court to reject appeal without calling the other party like that of the law and the practice in a civil case?***

***What possible grounds do you envisage for the court to grant stay of execution of the judgment rendered as against which appeal is lodged?***

Though the law specified the period within which a person could legally file his appeal, it may not be possible for the appellants to do so because of some reasons in which case Art 191 of the CPC provides solutions, which would enable late appellants file an *application for leave to appeal out of time*. Thus, the appellate court may grant the appellant lodge his appeal even after the lapse of the time provided by the law if it is satisfied with the reasons the appellant stated in his application. Before granting such appeal be made, the court must be satisfied that the cause for the appellants delay is not within his control. Whilst the court grants leave to appeal out of time, it shall fix the date within which the memorandum of appeal be field to the registrar.

If appeal is field to the court, the later shall fix the date for hearing and the parties be notified of such date so that they can appear. It is the appellant who shall normally open his case then, the respondent reply and the appellant be given to reply. If the appellant or his advocate fail to appear after dully being notified of the date for hearing, the appeal shall be struck off, unless he can show to the satisfaction of the court that he was absent for reasons that are beyond his control, after which the case may be restored to the list. However, if the respondent fails to appear, the appeal shall be heard in his absence.

Normally, appeal is based on facts and evidences which were raised during the lower court but if the appellate court deems the production of additional evidences is necessary for justice, it may order the production of such additional evidences on its own motion or accept the application of the parties to this effect.

Pursuant to Art 195 /2/ of the CPC, the possible decision of the appellate court once after going through the appeal as:

- i). on an appeal from an order of acquittal or discharge reverse such order and direct that the accused be tried by a court of competent jurisdiction or find him guilty and sentence him according to the law ; or
- ii). on an appeal from conviction and sentence
  - a). reverse the finding and sentence and acquit the accused; or
  - b). with or without altering the finding maintain , increase or reduce the sentence.
- iii). on an appeal from conviction only reverse the finding and sentence and acquit the accused;
- iv). on an appeal from the sentence, only maintain, increase or reduce the sentence .

Where the court confirms the decision appealed against, there is no second appeal. If the appellate court reverses or varies the decision of the lower court, be it on guilt or sentence , a second appeal lies to the next higher court.

Sometimes an appeal may concern several convicted persons but only one of them lodged the appeal, the court may order that the judgment be applied also to the other convicted persons as though they had appealed where:

- a. the judgment is to the benefit to the appellant ; and,
- b. had the accused been appealed they would have been benefited similarly.

***Do you think that the appellant court can render decision which is prejudicial to the appellant i.e. to the convicted person? How is the practice in your locality?***

***If your answer to the above is in affirmative, is not the court giving a decision on issues up on which no appeal lies, for the public/private prosecutor did not lodged an appeal?***

### 9.3. Review in cassation

Be it once or twice for appeal a case has to come to an end sometime. This, however, does not mean that the case is dispensed correctly nor that the parties are satisfied with such decision. Thus, leaving the case untouched might result in further injustice. To combat this, the law devises a mechanism for review of cases finally decided by way of cassation.

Review of cases by cassation is the power of the supreme judicial bodies be it federal or regional. Thus, it is the power of the federal or regional supreme courts to review cases that were finally decided by subordinate courts or itself and which have exhausted appeal.

Art78/2/ of the FDRE Constitution provides that the supreme federal judicial authority is vested in the Federal Supreme Court and thus, it has the power of cassation over any final court; decision containing basic error of law.

Decisions over which the Federal Supreme Court has cassation power are listed under Art 80/3/a/ of the FDRE Constitution as:

- \_\_\_ final decision of the Federal High Court rendered in its appellate jurisdiction;
- \_\_\_ final decision of the regular division of the Federal Supreme Court; and
- \_\_\_ final decision of the regional supreme court rendered as a regular division or in its appellate jurisdiction.

#### ***Does state supreme courts have inherent cassation power?***

Once a case has been decided by a court finally but one or both of the parties are dissatisfied and want to lodge appeal, appeal lies to the next higher court on the issues of either law or facts or both. Upon receipt of the memorandum of appeal the appellate court may dispose the case having regard to the preliminary matters or consider the merit of the case depending on the grounds of the application. The court may reject the appeal, or upon the admitting, the appeal

court may confirm, vary or reverse the decision of the lower court based on issue of law or fact in respect of both or either issue guilt or sentence.

For the Federal Supreme Court to review a case by cassation, first the case must be finally decided by the subordinate court or by itself as in the cases discussed above and the decision should contain fundamental error or law.

To see whether the conditions required for a case to be reviewed by cassation are fulfilled or not, a panel of three judges of the Federal Supreme Court sees the application. The three judges then evaluate whether there is a fundamental error of law, in the absence of which they shall reject the application as implied from the provisions. In doing so they are making a kind of some preliminary selection of cases which may be reviewed by cassation and which are not. Thus, the application should contain the reasons for claiming the grounds for review by cassation i.e. there is a fundamental error of law in the final judgment against which review is claimed in which it is implicit that appeal has been exhausted and the case has been finally decided.

An application for review of a case by way of cassation shall be filed within ninety days from the date of final judgment against which the applicant is claiming review and such application shall be accompanied by copies of such judgment and the judgment of the first lower court in respect of which appeal had been lodged before the second lower court, which rendered the final judgment.

The cassation court reviews a case only if it contains fundamental error of law and not error of law(s). Though the law says this, the cassation courts practically reviews fundamental errors of facts in not few cases.

***Define what fundamental error of law mean.***

The five, at least, judges at the cassation division then may reject the application on the ground that there is no error of law or the said error of law is not fundamental, however, if it finds the application valid it would accept and examine the case, then finally renders a judgment, confirm,

reverse or vary the decision of the appellate court. Ethiopia is getting the common law legal system in to it by making the decision of the Federal Supreme Court decision in their cassation power to be final and binding up on all other similar cases to be decided by subordinate court. Thus, such decisions are becoming what we call *case laws* or *judge made laws*. Any subordinate court, therefore, is duty bound to refer to these kinds of decisions in dealing with cases of similar nature and has to cite such decisions in their judgments, just like it cites any other relevant laws.

#### **9.4. Execution**

A judge at the end of the judgment in general and the sentence in particular write, among other things an order to the pertinent organ normally prison administration or police to effect the execution of the judgment for a mere decision without it being executed is nothing. Readers are advised to read the material on ***Law of Execution and Enforcement prepared by Justice and Legal System Research Institute.***

#### **9.5. Pardon and Amnesty**

##### **Relevant Laws**

Art 28, 74/7, FDRE Constitution

Art 229-231, CC

Procedure of Pardon Proclamation No. 395/2004

Pardon and amnesty are possible avenues for persons convicted and sentenced for committing crime. Amnesty can be available before prosecution or judgment. The other major distinction between the two lies on their effect on the criminal record. Pardon does not cancel the criminal record. However, in case of amnesty, the convicted persons will be made free of negative consequences of criminal record which is considered to be absent.

Both may be granted conditionally or unconditionally. In case it is given upon the fulfillment of certain conditions, there is a possibility for the enforcement of the judgment for failure to comply with those conditions. They may also be made for the whole or part of the penalty.

However, there is a limitation upon the power of the government to grant pardon and amnesty. The FDRE Constitution prohibits pardon and amnesty for crimes against humanity as defined by international agreements ratified by Ethiopia and other laws of the country. These include genocide, summary executions, forcible disappearances and torture. But, the President of the nation could commute death penalty into life imprisonment.

As regards their effect on civil liability, the CC provides that the civil remedy is not affected. The law tries to distinguish between reparations made and damages paid to private persons and the state. Unless there is reservation on the order granting pardon and amnesty, damages to be paid to the state will be remitted automatically. But, the wording of the law is subject to controversy. It says costs payable to the state. It may be costs of the criminal proceeding or the damage incurred due to the commission of the offence.

Thus, pardon is available for convicted and sentenced persons. Amnesty is possible for persons not yet prosecuted or convicted. Committing certain categories of crime could be a ground to absolutely bar the possibility of pardon and amnesty. They could be made conditionally or unconditionally. The civil effects remain in relation to private persons. Amnesty has the advantage of deleting criminal record.

***Distinguish between pardon and amnesty.***

***What are the constitutional limitations upon pardon and amnesty?***

***What is the procedure followed to grant or revoke pardon and amnesty?***

***What could be the possible conditions attached to pardon and amnesty?***

***Is the cost indicated under Art 231/2 of the CC incurred for prosecution or as a result of the commission of the crime?***

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