Ethiopian CRIMINAL PROCEDURE

A TEXT BOOK

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September, 2012

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Acknowledgment

This book is prepared and published through the financial support of the American Bar Association. I am enormously grateful to the Association.

I would also like to thank my students at the Addis Ababa University Law School who, for about ten years, have provided me with wonderful opportunities to teach and learn the law of criminal procedure.

I would like to extend my great appreciation to the editor.

Introduction

This textbook is organized into four parts. Part One presents background information about traditional criminal procedure practices in Ethiopia and policy issues relating to the law of criminal procedure in general. Part Two concerns the reporting and investigation of crime. This part discusses the laws regulating the role of ordinary citizens in initiating a criminal process and the laws dealing with police investigation. Part Three discusses the laws dealing with powers and responsibilities of the public prosecutor after a police investigation is finalized. Part Four deals with criminal trial and appeal.

Except for Part One, which draws heavily on literature, Ethiopian laws that regulate criminal proceedings are the major sources of this textbook. These include the Constitution of the Federal Democratic Republic of Ethiopia (the "FDRE Constitution"), the 1961 Criminal Procedure Code of Ethiopia ("Criminal Procedure Code," "Cr. Pro. Code," or "Code"), and other federal laws on matters of criminal procedure. Because in Ethiopia legislation is more important than court judgments, the book focuses on the texts of relevant legislation. Since 2005, interpretations of law made by the Cassation Division of the Federal Supreme Court have had binding status on lower courts. So far, however, the practical significance of the Court's decisions as precedent is negligible, because only a handful of cases involving issues of criminal procedure have been decided by the Court. Additionally, because Ethiopian courts usually give oral rulings on issues of criminal procedure, it is difficult to locate recorded court rulings on procedural issues. Even when a court's ruling is reduced to writing, it is so brief that it simply indicates the conclusions of the court on a given procedural issue without showing the reasons for reaching those conclusions. Despite this, this textbook includes as many court decisions as possible.

This textbook also includes comparative materials. It references literature and court judgments relating to the law of criminal procedure of other jurisdictions, with a view to exposing students to different ways of dealing with issues of criminal procedure in different jurisdictions. Because there is no clear evidence as to which jurisdiction's criminal procedure code formed the basis of the Ethiopian Criminal Procedure Code, the book does not focus on the code or case law of any particular jurisdiction. If some jurisdictions are referred to more frequently than others, it is simply attributable to the relative ease of accessing legal materials relating to those jurisdictions.

The notes and questions portion of each chapter raises thought-provoking issues and suggests ways to approach them. To the extent possible, information is included about how similar issues are addressed in other jurisdictions. Although an attempt is made to confine the text to matters relating to the law of Criminal Procedure, in some cases relatively detailed discussions have been included of the law of evidence, constitutional law, and human rights, in order to provide a broader context for the study of criminal procedure.

Although there are more than a dozen law schools in Ethiopia, there are no standard textbooks for many of the legal courses including the law of criminal procedure. Stanley

Z. Fisher's book, "*Ethiopian Law of Criminal Procedure*," published four decades ago, has been the single most important reference material for criminal procedure courses. However, major developments have taken place in the Ethiopian law of criminal procedure since the publication of Fisher's book, limiting the utility of the book in today's class discussions. This textbook, by dealing with Ethiopian criminal procedure, including the major recent developments in the field, is intended to provide a comprehensive and updated survey of the field, and to make the teaching and learning processes easier. Students are advised to read the book in conjunction with the relevant sections of the FDRE Constitution, the Criminal Procedure Code, and relevant Proclamations.

For simplicity and consistency, the book uses masculine pronouns.

PART ONE

BACKGROUND

This part of the textbook includes two chapters, both of which provide background information to the study of the Ethiopian Law of Criminal Procedure. The first chapter traces the development of the law in Ethiopia relating to criminal procedure. The second chapter discusses the functions, models and values of criminal procedure, and includes a discussion of the major policy issues relating to criminal procedure. Both chapters, without addressing the substance of the law, provide general information and raise general questions that students should bear in mind throughout their study of the Ethiopian Law of Criminal Procedure.

Chapter One

Development of Ethiopian Criminal Procedure

This chapter is organized into three sections. The first section deals with the customary rules of criminal procedure in Ethiopia, including practices that were in use before the introduction of modern laws regulating criminal proceedings. This section uses Fisher's article "Traditional Criminal Procedure in Ethiopia"[1] as a major source. The next section discusses the development of the modern law of criminal procedure in Ethiopia, focusing on the drafting process of the 1961 Criminal Procedure Code of Ethiopia and raises questions about the relationship between the traditional criminal procedure rules and the Code. The third section discusses how Ethiopia's adoption of a federal form of government affected the law of criminal procedure.

Section I. Customary Rules of Criminal Procedure[2]

Codified criminal laws have existed in Ethiopia since the reign of Emperor Zara Yakob (1434-1468).[3] The first compilation of laws was the short-lived "*Fewuse Menfessawi*,"[4] which was produced in 1450 with 62 articles. Unsatisfied with the capacity of the *Fewuse Menfesawi* to deal with civil as well as criminal matters, the Emperor obtained a copy of a comprehensive law book known as the "*Fetha Nagast*" from Egypt and applied it in Ethiopia.[5] The *Fetha Nagast* was applied in Ethiopia until the Ethiopian Penal Code of 1930 was enacted.[6] The 1930 code remained in force until repealed and replaced by the 1957 Penal Code.[7]

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[1] Stanley Z. Fisher, "Traditional Criminal Procedure in Ethiopia," 19 *The American Journal of Comparative Law* 709-746 (1971), (hereafter Fisher, "*Traditional Crim. Pro.*").

[2] In 1930 a modern law defining a crime was promulgated for the first time in Ethiopia. In the absence of law that defines a crime, technically it is not logical to talk about criminal procedure, since the latter refers to processing a criminal case. But for the purpose of this Section of the book, "customary rules of criminal procedure" refers to the procedures that were used to resolve disputes arising from the commission of an act that was considered a crime under then-current laws.

[3] Lowenstein indicates that until the 17th Century, "the penal law of Ethiopia was primarily a matter of diverse customary practices." Steven Lowenstein, "The Penal System of Ethiopia," 2 *J. Eth. Law*, at 383(1965) (hereafter Lowenstein, "*Penal System of Ethiopia*").

[4] This means spiritual remedy or canonical penance. Aberra Jembere, *Legal History of Ethiopia 1434-1974: Some Aspects of Substantive and Procedural Laws*, (Rotterdam: Erasmus Universiteit; Leiden: Afrika-Studiecentrum, 1998), at 184 (hereafter, Aberra, *Legal Hist. Eth.*). The *Fetha Nagast*, in its preface, acknowledged the "*Fewuse Menfesawi*," its predecessor, as the first law in a book. A copy of the *Fewuse Menfesawi* is available at the Institute of Ethiopian Studies. Aberra, *Legal Hist. Eth.*, at 184, note 381.

[5] For the details of the process of obtaining the book from Egypt and putting it in use in Ethiopia, see Aberra, *Legal Hist. Eth.*, at 184-190.

[6] Lowenstein, "*Penal System of Ethiopia*," at 384. For different stories on the time when it began to be applied in Ethiopia see Aberra, *Legal Hist. Eth.*, at 190.

[7] Aberra, *Legal Hist. Eth.*, at 183-185. The first paragraph of the preamble of the 1957 Penal Code indicates that the progress achieved at the time necessitated the replacement of the 1930 Penal Code by the 1957 Penal Code.

Despite the fact that a codified substantive criminal law had been in use since the mid-15th century, a codified criminal procedural law was not enacted until five centuries later with the passage of the Cr. Pro. Code in 1961. In the meantime, substantive criminal laws were enforced through customary rules of criminal procedure.

It would be misleading to refer to one Ethiopian customary criminal procedure, because Ethiopia is home to many nations and nationalities with their own traditional ways of settling disputes.[8] Aberra confirms the problems inherent in discussing a "national" customary law in Ethiopia,[9] which, a recently published study confirms, are still in operation.[10] In the absence of an Ethiopia-wide customary criminal procedure, this section focuses on the traditional methods of settling criminal cases in the highlands of Ethiopia. The highlands area was selected for two reasons. First, in the pre-code era the rulers of Ethiopia came from the highlands; thus, the culture and tradition of the people of that area influenced the broader culture. Second, the Author was able to locate and review materials that provide a detailed and accurate account of the customary practices in that part of Ethiopia.

Using information about highlands area practices, this section discusses the customary rules of criminal procedure *vis-à-vis* the major steps in a criminal proceeding: Investigation, prosecution, trial and appeal.

1.1. Investigation

Under the customary rules of Ethiopia, the procedure to be followed when a crime was committed depended on whether the victim knew the wrongdoer or not. If the wrongdoer was unknown to the victim, two major[11] methods of investigation and identification of the criminal were used: *affersata*[12] and *lebashai*.

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[8] Donovan and Getachew claim that there are more than sixty customary law systems in Ethiopia. Dolores A. Donovan and Getachew Assefa, "Homicide in Ethiopia: Human Rights, Federalism, and Legal Pluralism," 51 *The American Journal of Comparative Law*, at 505 (2003) (hereafter, Donovan and Getachew, "Homicide in Ethiopia").

[9] Aberra, Legal Hist. Eth., *at* 40.

[10] Tsegaye Regassa et al., *Restorative Justice in Oromia Baseline Study*, at 59 (2008) (hereafter Tsegaye et al., *Rest. Just.*).

[11] In Addis Ababa there was an institution known as *market guard*, which was in charge of maintaining peace and order in the City. The market guard was empowered to detain persons suspected to have committed a crime and bring them before competent municipal court. There was a special unit of the *market guard* known as the *secret guard*. Members of the *secret guard* moved around market areas, squares, hotels and bars to prevent the commission of crime in those areas. This institution continued to discharge its duty of prevention of crime until 1936. The *market guard* and *secret guard* were also involved in the investigation of crime. Aberra, Legal Hist. Eth., at 240.

[12] Aberra states that *affersata* was referred as "*awchachine*" or "*ewese*" in some regions of Ethiopia. Ibid. at 239, note 511. Fisher indicated that the word "*affersata*" was related to the verb "*affersa*" ("to fan") in Oromifa, which is applied to the process by which bits of husk are separated from kernels of corn. Fisher, "Traditional Crim. Pro.," at 716.

1.1.1. The Affersata

When a crime was committed, [13] investigation into the identification of the wrongdoer was conducted in a public gathering known as an *affersata.* Fisher describes the way the gathering was initiated as follows.

> An *affersata* to discover a criminal's identity was called by a local official such as the district governor, either upon request of the injured party, or, in cases of serious public disturbance, on government initiative. The technique used was to summon all inhabitants of the neighborhood where the crime was committed, and to sequester them until they named the criminal. [14]

To ensure that all the inhabitants[15] attended the gathering, those who did not attend were charged an "absence fine."[16]

Walker's description of the *affersata* procedure follows.

> The crowd of those shut in will select seven or eight or nine "mirtocc," or chosen ones, who will sit apart with the clerk. First each of the chosen will take the oath, for a small hole will have been dug and fire lighted within. Then preparing water each will swear, saying, "What I saw and heard I will not hide," saying, "The guilty man is my brother. Even if he is my father I will tell." So quenching the fire with the water he adds, "If I spoke a lie, may God likewise extinguish me!" and sweeping the ground with the stalk of maize and its cob he swears, "May God thus sweep away our seed if I lie." Also there may be closed eggs, a closed gourd, and a sickle, on which each will swear, saying, "If I conceal what I have seen and heard, may He close me as this gourd and cut my stomach thus!" So all present will take the oath. Also there will be two or three "birds" who swear that they will tell what they hear to none but the clerk. Or perhaps the chosen ones will pass from group to group questioning each person and will find someone who saw or heard. Then they will return to the clerk and say, "We have heard the mouth of the bird tell that so-and-so was the thief." — when the birds have spoken, the priest will come bearing the Cross and Picture of Mary and will sit beside the chosen ones. Then one by one they will all pass and strike the Cross and Picture and swear, "May He perforate me as the Cross! May he obliterate me as the Gospel! I saw not!" But the "bird" will swear, "Having seen I spoke not with lies," having related all in secret to the chosen ones.[17]

Once the chosen ones had heard everyone present in the *affersata*, they prepared a report to the gathering classifying the evidence obtained into three categories: statements of eye witnesses (known as needles), hearsay evidence (known as birds), and statements of those

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[13] Aberra indicates that the *affersata* would be ordered by the local chief when the victims reported that cattle had been stolen, or that they had been robbed, or that a relative had been murdered. Aberra, Legal Hist. Eth., at 239.

[14] Fisher, "Traditional Crim. Pro.," at 717.

[15] Aberra writes that only men were required to attend the *affersata.* Aberra, *Legal Hist. Eth.*, at 239.

[16] Fisher, "Traditional Crim. Pro.," at 717.

[17] C.H Walker, *The Abyssinian at Home* (London: The Sheldon Press, 1933), at 154 (quoted in ibid., at718) (hereafter Walker, *The Abyssinian at Home*).

who witnessed facts and circumstances related to the commission of crime (known as stones).[18] Failure of the gathering to identify one or more persons responsible for the crime would result in a communal liability to compensate the damage caused by the crime.[19] "The wish to avoid this liability, together with the serious hardship caused by sequestration of the whole community (it was reportedly decreed: 'not a cow be milked nor a baby suckled' until the investigation was over), provided ample incentive to name the offender if that was possible."[20]

As described by Pollera, the report prepared by the chosen ones looked something like the following.[21]

> The committee, composed of (names of members), having carried out the *Affersata* for discovery of the authors of the crime ...., having assembled on such and such a day, in such and such a place, declares that this evidence has been collected:
>
> Such and such . . . needles: they have said to have seen such a person(s) carry out the crime.
>
> Such and such . . . stones: they have declared that, for the facts and circumstances observed a little before or a little after the crime, they consider the guilty are such and such.
>
> Such and such . . . birds: they have claimed to have heard from a third party that the guilty would be such and such.

The practice of *affersata* was not popular. Some *affersata* procedures abused the requirement that informants remain anonymous and accused innocent persons of committing the crime. Two more reasons existed for the unpopularity of the *affersata*. First, participants were required to commit substantial time to the *affersata*, sometimes spending days at the specified location and involved in the process before the criminal was identified. Second, the residents of the area where the *affersata* took place were required to feed the administrators of the *affersata*. With a view to curbing these and other problems associated with *affersata*, Emperor Haile Sellassie passed the *Affersata* Proclamation in 1933.[22]

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[18] Fisher, "Traditional Crim. Pro.," at 718-19. Aberra writes that the eyewitnesses were known as "birds" and those who testified to have heard from others that someone had committed the crime were known as "stones." He does not make any reference to what Fisher called "needles." Aberra, Legal Hist. Eth., at 239.
[19] Fisher, "Traditional Crim. Pro.," at 717.
[20] Ibid.
[21] A. Pollera, *L'Abissinia di ieri* (Rome: Scuola tipografica Pio X, 1940), at 133 (quoted in Fisher, "Traditional Crim. Pro.," at 719) (hereafter Pollera, *L'Abissinia di ieri*).
[22] The Proclamation is reproduced in Mahtama Sellassie Wolde Meskel, *Zikre Negar* (1950), at 95 (as indicated in Fisher, "*Traditional Crim. Pro.*," at 720-21).

The Proclamation's preamble[23] recites the justifications for the Proclamation, including the protection of innocent persons from false accusation. To achieve this end, the Proclamation required those who revealed the identity of the suspect to appear and testify before a court of law, giving the accused an opportunity to confront his accusers.[24]

1.1.2. Lebashai (Thief Seeker)

Another traditional method of investigation was the *lebashai*, which was used to identify the wrongdoer's identity and the location of any fruits of the crime. *Lebashai* involved drugging a young boy and using him to "sniff out" the criminal.[25] In this practice, a person whose property was stolen would inform a chief thief seeker, who administered *lebashai* in the area. The chief thief seeker would send a virgin boy with the complainant to the scene of the crime or the home of the victim, where a servant of the chief thief seeker would administer a drug to the boy. The boy, accompanied by the parish headman, the headman's servants, and witnesses, would then walk from house to house searching for the thief. The owner of the hut in front of which the boy fell[26] or into which he entered[27] would be deemed the thief and would be required to pay a fine.[28]

As with the practice of *affersata*, various abuses of *lebashai* have been reported. Fisher provides the following description of the abuses.

> Frequently, it seems, no corroborating evidence was required beyond the boy's "sniffing out" of the accused, which sufficed as a basis for application of sanctions. Since the thief-seeker's fee was collected out of the guilty party's payment, in restitution and compensation, to the injured party, the incentive for false accusations was increased. There were numerous reports of such abuses, extending even to accusations that the thief-seeker acted in cahoots with thieves, corruptly agreeing to provide "protection" by seeing that innocent parties were always "tagged" by the boy. Not surprisingly, therefore, there has been some government regulation of the practice such as maximum fee amounts and sanctions against accusations of innocent parties.[29]

Despite its unpopularity, *lebashai* continued to be practiced until it was abolished by Empress Zewditu.[30] The following paragraph from Emperor Haile Sellassie's

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[23] The preamble states in pertinent part: "[W]hereas innocent people have been said to have done an act by informers who change their names only to harm their enemies, for the future we make the following law." Affersata Proclamation, 1933, Preamble (para. 2).

[24] Aberra, Legal Hist. Eth., at 240.

[25] For accounts of the origin and details of this procedure, refer to Alexander Naty, "The Thief-Searching (Leba Shay) Institution in Aariland, Southwest Ethiopia, 1890s-1930s,"', 33 *Ethnology* 261 (1994), at 264-265 (hereafter Naty, "*Thief-Searching*").

[26] Ibid., at 262.

[27] Walker, *The Abyssinian at Home*, at 157-158.

[28] Naty, "Thief-Searching," at 262.

[29] Fisher, "Traditional Crim. Pro.," at 723.

[30] Quoting Blaten Geta Mahteme Sellassie, Aberra attributes the abolition of the *leba shay* practice to the following incident, in which the unreliability of the practice was established. "When the *leba shay* practice was used to investigate and identify one who had stolen a certain garment from the palace, the chief of the *leba shay*, who was not in good terms with some one – a well known personality among the imperial

autobiography summarizes how unreliable the practice of *lebashai* was and how it was abolished.

> For the past hundred years or so, if someone was robbed of money or of other possessions and chattels, there were men – from a family related by descent or by marriage – who claimed to be able to find the thief by giving a drink of medicine to a boy under the age of 15; these men used to live, wandering about at Addis Ababa and in all other districts, by seeking thieves, with the permission of the government, administering the medicine, and receiving payment from people who had lost money. They would claim to have found the thief if the boy, to whom they administered the medicine, went and entered a man's house and lay on the bed in a trance, or seized the man hitting him with his knee (or forcefully) and lay upon him. If things were done in this way, the man was seized by force by this procedure alone, without there being any indications or witnesses to the theft, and was under an obligation to make payment to the owner who had lost his property. Since deeds like these were being carried out by lies and fraud, they were in a position to hypnotize the liebasha and to introduce him into the house of an innocent man who had not stolen anyone's property or to arrest and oppress by causing the boy to hit someone and lie upon him in a trance. But afterwards We gave orders for the liebasha method to cease, as We were convinced, after proper investigation, of the fact that it was impossible to find a thief by administering medicine, unless a theft like this had been subject to an examination by a judge or proper evidence or witnesses. Consequently, there was great rejoicing in every province, as We had protected the people from the iniquities that came upon them in this matter." [31]

Notes and Questions

1. Neither *affersata* nor *lebashai* is a good way of identifying a criminal. However, in the absence of a police organization tasked with investigating crimes, Ethiopians had no better alternative to these unscientific methods of investigation. Moreover, since the public believed these systems to be effective at identifying criminals, their deterrent effect should not be underestimated. Given that there was no better way of identifying a criminal at the time, discuss the relative merits of these two traditional methods of investigation. Which of the two systems would more accurately identify the criminal?
2. After you study the modern methods of investigation in subsequent chapters of this textbook:
    2.1. Identify currently recognized rights and procedures which would be violated if the traditional means of investigation were applied.
    2.2. Identify which features of the two practices, if any, are incorporated in the modern law of investigation.

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courtiers – hinted the boy to point to that person as the one who had stolen the garment. The boy did as hinted. This incident made imperial courtiers to question the reliability of the *leba shay* particularly when it was later discovered that the garment was stolen by a maid in the palace and found in a market offered for sale." Aberra, Legal Hist. Eth., at 239.

[31] Autobiography of Haile Sellassie I, *My Life and Ethiopia's Progress (1892-1937)* (Oxford: Oxford University Press, 1976), at74-75 (quoted in Naty, "*Thief-Searching*," at 269).

3. *Affersata* was criticized for many reasons. The procedure exposed citizens to oppression, "for it was they who had to provide the visiting officials and soldiers with food and drink for as long as it lasted."[32] As a consequence, the residents rushed into wrongly accusing someone for the crime so that they would be relieved of the duty to provide for the officials and soldiers; in some cases, a citizen might even have falsely confessed to a crime simply in order to end the process.[33] To what extent do you think that the oath administered during the process assisted in ensuring that participants did not lie?

1.2. Prosecution

Traditional criminal procedure had a civil character, in that the victim of a criminal act was obligated to initiate and process the case himself and ultimately to execute the punishment. Fisher described this aspect of traditional criminal procedure as its major defining feature. "In the great bulk of offences considered 'criminal' by modern laws the injured party initiated and prosecuted the action."[34] It has also been confirmed by Aberra that criminal cases were initiated by aggrieved persons until 1943, when the office of the public prosecutor was first established by law. [35] In cases of homicide, where the deceased had no next of kin who could initiate and follow the criminal case, the Lord Chamberlain and the chief administrator of prisons were required to process the criminal case, thereby playing the role of the public prosecutor.[36] "Not only was the method of criminal prosecution 'civil' in character, but such offenses were usually 'compoundable' in the sense that the injured party could accept restitution and thereby save the offender, even after conviction, from penal sanctions."[37]

1.3. Dispute Settlement Process

Where the victim knew the criminal, there was no need to conduct an *affersata* or *lebashai*. The victim would simply request the accused to submit to a dispute settlement institution. The accused had an obligation to accompany the accuser to the institution where the accuser wished to present the case.[38] If the accused refused to comply with the accuser's demand, any member of the community could stand on the side of the accused and take measures to ensure that the suspect appeared before the appropriate institution to deal with the case.[39]

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[32] Edoardo Poletti, *Il Codice penale abissino* (Milan: Hoepli, 1938), Pt.III, at 256 (quoted in Fisher, "Traditional Crim. Pro.," at 719).
[33] Fisher, "Traditional Crim. Pro.," at 719.
[34] Ibid., at 742.
[35] Aberra , Legal Hist. Eth., at 242.
[36] Mahteme-Sellassie Wolde-Mesqel, *A Study of Ethiopian Culture* (Addis Ababa, Artistic Printing Press, 1961 E.C) (cited in Aberra , *Legal Hist. Eth.*, at 241).
[37] Fisher, "Traditional Crim. Pro.," at 713.
[38] D'Abbadie indicated that it was the accused, but not the accuser, that has the right to choose the judge before whom to appear. Arnaud-Michel D'Abbadie, *La Procedure en Éthiopie* (Paris: L. Larose et Forcel, 1888) (Nouvelle Revu Historique de Droit Francais et etranger, 12th yr.,) at 462, 463 cited in Fisher, "Traditional Crim. Pro.," at 727, note 90.
[39] Ibid., at 726.

1.3.1. Securing Submission of the Wrongdoer to Dispute Settlement

As Fisher has stated,

> Under...customary law any person had the power to "arrest" a suspected law-breaker by ordering the latter to submit to custody in the name of the Emperor or some other royal personage. If the suspect ignored the injunction to stop he could be apprehended by force, a situation which presumably raised a community social obligation to assist. The person against whom this oral injunction was issued was further obliged to accompany his accuser before whatever formal or informal body the accuser wished to submit the dispute to.[40]

Once the accused submitted to the legal process, two major types of restraint were employed to assure his continued attendance at the proceedings: ambulatory custody (*koragna*) and conditional release to sureties.

> Ambulatory custody refers to the practice of physically linking the accused and his accuser by knotting together one corner of each of their cotton togas (shammas); the pair thus joined were under an obligation not to break the knot unless ordered to by a judge. In a variation of the practice, the accused's right wrist was chained to the accuser's left. They had to live together thus until either the case was resolved or the accused produced acceptable sureties for his conditional release. But the accuser had the right to substitute for himself any of his dependent family or retainers to serve as a "walking prison." It should be stressed that this "prison" often depended for its power of constraint on the accused's acceptance of community expectations that he submit peaceably, rather than on the use of force.... Apparently, ambulatory custody could be imposed by the accuser himself or, at his demand, by any passer-by, or by a judge.[41]

The other way of securing the continued attendance of the suspect before a dispute settlement institution was a personal guarantee. A third party would undertake an obligation to make the accused available whenever needed in the criminal case instituted against him. Fisher indicated that once the accused appeared before a "judge," a personal guarantee, rather than ambulatory detention, was the usual method of ensuring the continued attendance of the accused.[42]

1.3.2. Trial

1.3.2.1. Where the Wrongdoer Was Identified through Affersata or Lebashai

Differing accounts exist as to whether a person identified as responsible for the commission of a certain crime in an *affersata* or *lebashai* would automatically be treated as guilty or would be subjected to further trial by court. Aberra, quoting *Fitawrari* Abebe

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[40] Ibid., at 726-27.

[41] P. Merab, *Impressions d'Ethiopie* (Paris, 1929), Vol. 3, at.214 (quoted in Fisher, "Traditional Crim. Pro.," at 727-28) (hereafter Merab, *Impressions d'Ethiopie*). The practice of ambulatory custody and the non-custodial nature of the penalty under the Ethiopian traditional criminal procedure indicate that prisons were not known before the modern era. Ibid.

[42] Fisher, "Traditional Crim. Pro.," at 729.

Gabre, a former judge knowledgeable about the traditional mode of litigation, writes, "the person...identified as the offender [by the *affersata*] would be prosecuted and convicted before a court without having the chance to confront the witnesses for the prosecution."[43] Knutsson indicates that proof was required to be adduced at an *affersata* in addition to accusation.[44] Sandford suggests that one who was accused at an *affersata* would be tried before a judge, at which time his accusers would testify.[45] Nebiyeleuel Kifle[46] reports that if the accused failed to confess at an *affersata*, the neighborhood was required to reconvene and reveal the names of the "birds" who identified his accusers; the "birds" would then appear in court to testify against him. On the other hand, Pollera indicated that the person accused at an *affersata* could appeal against the testimony of the "birds" but not against that of "needles" and "stones."[47] The *Affersata* Proclamation, passed on August 2, 1933, clearly required a person who revealed the identity of the wrongdoer to testify before a court of law[48] for the latter to be convicted and punished.

Aberra indicated that the person identified as responsible for committing the crime by the *lebashai* process would also be brought before a court of law.[49] Other authorities indicate, however, that under *lebashai*, the boy's "sniffing out" of someone was sufficient for conviction and application of sanction.[50]

1.3.2.2. Where the Wrongdoer was known by the Victim

Two methods existed for settling a case where the victim knew the accused. The first, and preferred, method was the informal one. As criminal cases were considered purely of a private nature, it was common to settle them in this way. The second and formal method was employed when the informal method failed.

1.3.2.2.1. Informal Method of Settlement

The following text on the traditional, informal method of settlement of criminal cases is taken from Fisher's *Traditional Criminal Procedure.*[51]

> Conciliation definitely appears to have been a part of Ethiopian criminal procedure, but the sources do not, in general, reveal any group certain from whom the conciliators were drawn. There are some reports indicating that elders (shemagalye) were preferred, and one which points to the involvement of the

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[43] Aberra, Legal Hist. Eth., at 239.
[44] K.E. Knutsson, Authority and Change (Gotenborg: Ethnografiska Museet, 1967) at 122 (cited in Fisher, "Traditional Crim. Pro.," at 719, note 44).
[45] Christine Sandford, Ethiopia Under Haile Sellasie (London: Dent, 1946), at 83 (cited in Fisher, "Traditional Crim. Pro.", at 719, note 44).
[46] Nebiyeleuel Kifle, "Issuance of Arrest Warrants in Ethiopian Law" (Addis Ababa University Law School, 1965) (cited in Fisher, "Traditional Crim. Pro.," at 719, note 44).
[47] Pollera, L'Abissinia di ieri, at 133.
[48] Aberra, Legal Hist. Eth., at 240.
[49] Ibid., at 239.
[50] William.C. Harris, The Highlands of Ethiopia (London: Longman, Brown, Green and Longmans, 1843), at 115 (cited in Fisher, "Traditional Crim. Pro.," at.723); Gordon MacCreagh, The Last of Free Africa, 2d ed. (New York: Appleton-Century 1935), at 186 (cited in Fisher, "Traditional Crim. Pro.," at 723).
[51] Fisher, "Traditional Crim. Pro.," at 726.

> parish head-man, but some observers remark that any passerby could and might be pressed into service as a judge, "in the name of Menelik" or some other royal personage. The complainant would simply request the stranger to be his judge, and the person so approached had to convene a tribunal on the spot to hear the case.
>
> On the other hand, it is suggested by some writers that the "passerby judge" did not actually hear the case, but had only the task of ensuring, that the defendant accompanied the complainant to the nearest (official) judge, i.e., that he acted to issue (or bolster) compulsory process.
>
> It is also not clear whether or in what circumstances the decisions of these "impromptu" tribunals were binding. Walker, stressing the conciliatory aspect, quotes the...proverb, "If it burns me, with my spoon; if it burns me not, with my hand," meaning "if you decide fairly, I'll accept the decision; if not, I'll go to a (real) judge." But others describe a true arbitral procedure, where the parties make solemn oath that they wili accept the "decision of the elders."
>
> The likely explanation for this apparent conflict is that the writers in question were describing different institutions. Both types of settlement procedure may have existed – conciliations and arbitrations. But it should be noted that even those describing conciliatory procedures cite the strong pressure of public opinion on the litigants to accept the decision.

1.3.2.2.2. Formal Trial Process

A formal trial process could result both in cases where the wrongdoer was identified by the victim and where he was identified in *affersata* or *lebashai*. In cases where the wrongdoer was identified by the victim, the formal trial process was triggered only if the parties could not settle their dispute amicably.

A. Features of the Trial

The traditional trial process consisted of the following features.

i. Publicity: When a dispute was to be settled formally by a judge, the two parties confronted one another before the judge and the dispute was disposed of in public. The Ibo that states "[a] case forbids no one," is said to properly describe the public nature of the Ethiopian traditional trial.[52] As stated by Pollera, "it is traditional...that procedures of any kind have to take place in a public place, accessible to all. Each region, with such an intention, possesses a place where in the shade of an old tree, the leader administers justice."[53]

The traditional trial process was not only accessible to the public, but also involved the public in the actual decision making. The public participated in the decision making process in two major ways. First, members of the audience were allowed to interject their

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[52] Taslim O. Elias, *The Nature of African Customary Law* (Manchester: Manchester Univ. Press, 1956 (in Fisher, "Traditional Crim. Pro.," at 731).

[53] Pollera, *L'Abissinia di ieri* , at 113.

own questions and comments any time during the trial, thereby influencing the trial process.[54] Second, trial attendees might be invited to serve as jurors.[55]

ii. Adversarial Process: A judge was expected to settle the dispute in the presence of both parties. The *Fetha Nagast* prohibited the judge from receiving litigants in the absence of their adversaries.[56] In fact, it went so far as to prescribe that the sentence the judge passed be applied to the judge himself if he rendered a decision on the basis of *ex parte* argument.[57]

iii. Representation: The principle of a party to a court proceeding being represented by another person is said to be deep rooted in the Ethiopian traditional trial process.[58] Although Ethiopian litigants typically preferred to defend themselves rather than to secure representation,[59] it was not uncommon for the parties to a dispute to be represented by family members or professional practitioners.

In traditional trial proceedings, each party was allotted a particular place before the tribunal: the parties stood in front of the judge, the accuser to the judge's right and the accused to his left. Walker rationalizes the allocation of the place to the parties as follows. "I, being the accuser, will take the right like the Saints, whose work is to the right towards God. And do thou take the left like Satan, whose work is left-handed and deceitful."[60]

B. Steps During Trial

i. Opening Statements: The accuser first would make a presentation to the court about the injury that the defendant caused on him. The judge would then ask the defendant whether the accusation was true, and the defendant was given time to respond. It was forbidden to interrupt one who had the floor. Speaking out of turn or engaging in other disruptive conduct was strictly prohibited, and could result in contempt sanctions.[61]

The *Fetha Nagast* imposed a heightened responsibility on the judge to protect each part's right to speak. The *Fetha Nagast* states: "[I]f one insults the other or says shameful words, the judge shall cut him short; if he does this again, the judge shall reproach him, and if he persists in this, the judge shall excommunicate him."[62]

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[54] S. Messing, "High Land-Plateau Amhara of Ethiopia" (Ph.D. thesis, University of Pennsylvania, 1957), at 330 (cited in Fisher, "Traditional Crim. Pro.," at 732).
[55] Fisher, "Traditional Crim. Pro.," at 732.
[56] *Fetha Nagast*, at 253 (cited in Fisher, "Traditional Crim. Pro.," at 732).
[57] *Fetha Nagast*, at 258 (cited in Fisher, "Traditional Crim. Pro.," at 732).
[58] Fisher, "Traditional Crim. Pro.," at 732.
[59] A. B. Wylde, *Modern Abyssinia* (London: Methuen & Co., 1901) at 310 (cited in Fisher, "Traditional Crim. Pro.," at 733).
[60] Walker, *The Abyssinian at Home*, at 179 (cited in Fisher, "Traditional Crim. Pro.," at 734).
[61] Fisher, "Traditional Crim. Pro.," at 734.
[62] *Fetha Nagast*, at 258 (cited in Fisher, "Traditional Crim. Pro.," at 734).

ii. Wager: If the accused admitted the accusation lodged by his accuser, the judge automatically passed an appropriate sentence.[63] However, if the accused did not admit his accuser's allegations, the trial would continue. In such cases, before witnesses were called to testify the parties traditionally made wagers.[64] Both parties proposed the wager that they thought was appropriate to the claimed offence, and then they would negotiate an agreed-upon wager. Agreement on a wager could take some time, since it involved a process of offer and counteroffer. Once the wager was fixed, the parties proceeded to produce their witnesses.

The practice of wager had both negative and positive aspects. Because an accused's unwillingness or inability to wager disqualified him from proceeding with his case, the practice of wager had a significant impact on the accused's access to justice. This impact was not confined to the poor. It affected parties of all economic means, as there were times where one might even "end in the wagering of his hand, eye, or very life."[65] The problem was considered so serious that rulers were compelled to pass laws to regulate the practice of wager. For example, Emperor Menilik passed Proclamation limiting the type and amount of a wager. The relevant part of the Proclamation states:[66]

> I proclaim that henceforth no bets should be contracted in which the losing party in the litigation shall receive a certain number of whippings. From now on honey should be used as a possible payment. At the most let the parties promise a horse or a mule. The judge should not permit an amount greater than this to be staked. If a party loses on a mule, he may pay twenty dollars; on a horse, ten dollars; on honey, four dollars.

In 1932, Emperor Haile Sellassie issued a Proclamation which further reduced dollar equivalents for bets of a "mule," "horse," etc.[67] Of course, the negative aspects of the practice of wager did not detract from its important purpose – deterring accusers from making unfounded allegations.

iii. Production of Evidence: Modes of Proof

Oral Testimony

Once the wager was made, the next step was production of witnesses by the accuser. The accuser did not generally disclose the names of his witnesses before the time of their testimony for fear of subornation.[68] The accused was not allowed to call witnesses. He could only object to taking testimony from one or more witnesses of the accuser based on good cause. A presumption of good cause existed for barring testimony of a witness called by the accuser if the witness was a servant or another dependent of the accuser or a relative by blood or marriage within the fourth degree. Moreover, the accused could prevent his enemies from being called as witnesses against him.

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[63] Fisher, "Traditional Crim. Pro.," at 734.
[64] For the details on the different types of wagers, see ibid., at 734-738.
[65] C. Conti-Rossini, *Principi di diritto consuetudinario dell' Eritrea* (Rome: Tip. dell' unione editrice, 1916) (cited in Fisher, "Traditional Crim. Pro.,"at 736).
[66] Mahtama Selassie Wolde Meskel, *Zikre Nega*, at 896 (quoted in Fisher, "Traditional Crim. Pro.," at 736).
[67] Ibid., at 103.
[68] Fisher, "Traditional Crim. Pro.," at 737

If the witnesses resided far from the trial location, the court would typically employ the practice of "taking evidence by commission." The court would appoint an agent who, accompanied by the accused and the accuser, would travel to the homes of the accused's witnesses to record their testimony in writing.[69]

Oaths

Oaths played a critical role in deciding a case. Three types of oaths existed. Testamentary oaths were undertaken by the party to validate his evidence, and by the witness to validate his testimony. Where the evidence of the accuser was not adequate, in and of itself, to prove his allegations, the accused would be required to take one of two additional types of oath before his release. As the *Fetha Nagast* says, "it is the accuser who must produce witnesses to prove something, and the accused who must take the oath."[70]

The oath the accused was required to undertake depended on the gap in the evidence. If the accuser did not have acceptable evidence to prove the main issue of litigation, the accused would be required to take what was known as a "decisory" oath. This type of oath was administered to the accused by the accuser or the religious authorities. The decisory oath was so critical that "if the accused took the decisory oath, he won the case; if he refused, he lost."[71] If, instead, the accuser's evidence proved a significant part of his allegations but a specific gap existed in his evidence, the accused would be required by the judge to take a "suppletory" oath.[72]

Ordeal

Although it was not a common mode of proof under Ethiopian traditional criminal practice, reports suggest that the practice of ordeal was sometimes utilized. Observers reported two types of ordeals. One required theft suspects to eat a large piece of bread. The belief was that one who committed theft would not able to swallow because his mouth would be too dry. [73] Another type of ordeal was forcing one suspected of being a "witch" to drink a "truth-inducing" beverage.[74]

iv. Judgment

After the evidence was heard, citizens who were observing the trial might be invited to serve as jurors to give their opinions on the case. Walker reported that a judge would typically call on trial attendees to serve as jurors in cases he believed to be important.[75] Alternatively, the judge might invite the parties to nominate persons to serve as jurors.[76]

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[69] Ibid.

[70] *Fetha Nagast*, at 258 in ibid., at 738.

[71] Fisher, "Traditional Crim. Pro.," at 739 (also containing details on the content and form of oath).

[72] Felice Ostini, *Trattato di diritto consuetudinario dell'Eritrea* (Asmara: Officina grafica della S.A. Corriere eritreo, 1956), at 26-27 (cited in Fisher, "Traditional Crim. Pro.," at 738).

[73] H. de Monfried, *Vers les Terres Hostiles de l'Ethiopie* (Paris: Grasset et Fasquelle, 1933), at 213-14 (cited in Fisher, "Traditional Crim. Pro.," at 738).

[74] Osteni, *Trattato di diritto consuetudinario dell'Eritrea*, at 43-44 (cited in Fisher, "Traditional Crim. Pro.," at 739).

[75] Walker, *The Abyssinian at Home*, at 138-139 (cited in Fisher, "Traditional Crim. Pro.," at 732).

[76] Fisher, "Traditional Crim. Pro.," at 732.

The judge gave the final verdict only after hearing the opinions of the jurors and/or elders.[77]

1.4. Appeal

A party aggrieved by the decision of the trial court could appeal to a superior court.[78] Conflicting reports exist, however, regarding the actual practice of appeal. Ludolph reported that appeals were rarely taken from trial court decisions:

> It is lawful to appeal from Inferior Sentences either to the King or the Court-Tribunals: but that is seldom done; by reason of the poverty of the people, and the tediousness of Travelling: and partly out of the little hopes they have of redress. For the Governors and Judges of Provinces are offended with appeals, as seeming to them an accusation of Injustice; and therefore the wrong'd Parties fearing their displeasure, rather choose to lose their right, than the favor of the Judges.[79]

Other commentators[80] have described a very strong tradition of taking appeals, including appeals on minor interlocutory issues.[81]

An appeal of a trial court's decision resulted in consequences to the trial judge. First, the judge was required to appear before the appellate court to defend his decision. As Merab stated, "the judge who sat at first instance is called to give his account of the proceedings and to give the reasons which motivated his sentence."[82] Second, if the appellate court found that the lower judge's judgment was arbitrary or unjust, it might take disciplinary measures against him.[83]

Section II. Codified Law of Criminal Procedure

It is unclear how long the traditional rules of criminal procedure remained in place. A modern and comprehensive Code of Criminal Procedure was promulgated in 1961. The Code was not, however, the first written law on criminal procedure in Ethiopia. Several pieces of earlier legislation relating to aspects of criminal procedure were in existence by the time of the Code's promulgation. Such laws include the 1942 Police Proclamation[84]; Administration of Justice Proclamation[85]; and the 1942 Public Prosecutors Proclamation.[86] Most importantly, the 1955 Revised Constitution incorporated several criminal procedure

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[77] Ibid., at 740.

[78] Aberra, *Legal Hist. Eth.*, at 256. However, Fisher notes that a party dissatisfied by a judgment of the district court could petition for the judgment to be reviewed by the provincial court. To ensure that his petition would get attention, the petitioner was obligated to present gifts to the person deciding the petition, which made appeal difficult for the poor. Fisher, "Traditional Crim. Pro.," at 741.

[79] H. Ludolph, *A New History of Ethiopia* (London: Samuel Smith, 1682), at 238 (cited in Fisher, "Traditional Crim. Pro.," at 740).

[80] D'Abbadie, "La procedure en Ethiopie," at 467 (cited in Fisher, "Traditional Crim. Pro.," at 740).

[81] Aberra, *Legal Hist. Eth.*, at 255-256.

[82] Merab, *Impressions de l'Ethiopie*, Vol. 3 at 238 (cited in Fisher, "Traditional Crim. Pro.," at 741).

[83] Ibid; Walker, *The Abyssinian at Home*, at 146-47 (cited in Fisher, "Traditional Crim. Pro.," at 741).

[84] A Proclamation to Provide for the Organization Discipline Powers and Duties of the Police Force and for matters incidental thereto, 1 *Consolidated Laws of Ethiopia*, at 295-99.

[85] Administration of Justice Proclamation, Ibid., at 87-90.

[86] A Proclamation to Provide for the Appointment and Control of Public Prosecutors, Ibid., at 113-14.

provisions.[87] Because many such laws were introduced following the Italian occupation of Ethiopia, some consider 1935 the cutoff point between the periods of traditional and modern criminal procedure in Ethiopia.[88]

In keeping with the general post-war attitude in Africa that rapid modernization was desirable and that laws were an integral part of the process, Ethiopia commissioned the preparation of a series of new codes[89] in 1950s and 60s. The desire to advance the then-existing social system was another factor that led the government to modernize its laws instead of continuing to rely on heterogeneous customary laws.

Once Ethiopia decided to modernize its laws, it had to choose whether to follow the common law or civil law approach. Ultimately, it chose the civil law approach followed in continental Europe. Aberra has reported that the decision to adopt the continental approach was made after extensive deliberation and was attributable to four factors. First, Ethiopia was familiar with civil law, having employed in its early history codified laws such as *Fethe Menfesawi* and *Fetha Nagast*. Second, Italy's colonization of Eritrea had resulted in implementation of the Italian law (civil law) in Eritrea. Third, the relative simplicity, completeness, and economy of the French Codes contrasted with the difficulties and uncertainties of reviewing British and American case law. Fourth, the lesson taken from the successful transplantation of codified laws from Swiss to China and from Germany to Japan.[90]

The task of drafting the Ethiopian Criminal Procedure Code was originally entrusted to Jean Graven, a prominent Swiss scholar.[91] He engaged in the drafting work from August 1955 to November 1959, when he submitted his final draft of the Code to the Codification Commission, which was in charge of supervising the codification process. [92] Graven's *avant-projet* was then given to Sir Charles Mathew for revision and amendment. Mathew, a prominent English jurist and advisor to the Ministry of Justice, used Graven's draft as a basis, but exercised full authority to simplify and modify the draft.

Stanely Z. Fisher describes the role of the two drafters in shaping the 1961 Criminal Procedure Code as follows.

> The history of the law of criminal procedure is in a way the story of gradual discarding of Professor Graven's initial drafting work.... A major alteration of the draft occurred when, apparently in 1957, the Commission decided that the Code

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[87] To mention a few: Article 43 recognizes the right to due process of law; Article 51 prohibits restriction of liberty without a court warrant; Article 52 provides for the right of the accused to a speedy trial; Article 54 prohibits a presumption of guilt.

[88] Fisher, "Traditional Crim. Pro.," at 713.

[89] John H. Beckstrom "Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia," 21 *The American Journal of Comparative Law* (1973), at 559 (hereafter Beckstrom, "Trans. Legal Syst.").

[90] Aberra, *Legal Hist. Eth.*, at 194.

[91] Stanley Z. Fisher, *Ethiopian Criminal Procedure: A Sourcebook* (Addis Ababa:The Faculty of Law Haile Sellassie I University, 1969) at ix (hereafter Fisher, *Eth. Crim. Pro.*).

[92] Ibid., at ix-x.

> should contain the draft's many general provisions dealing with judicial organization, jurisdiction, evidence, etc., but that those provisions...should be shifted to a separate code.... 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.[93]

The referral of the draft prepared by the Swiss scholar to the Englishman was made with a view to making the code more adversarial than inquisitorial. Ethiopian courts had been more acquainted with British-oriented adversary procedures since 1941; the Commission worried that a significant change in type of procedure might confuse Ethiopian lawyers.[94]

Emperor Haile Sellassie's statement that "no modern legislation which does not have its roots in the customs of those whom it governs can have a strong foundation"[95] underscored the importance of custom being recognized in the transition from traditional practices to modern laws. Accordingly, the government assigned a group of people to collect Ethiopian judgments passed on the basis of customary laws so that the major principles and values of the customary laws could be included in the developed codes.[96] The group collected some 7,290 court judgments and compiled them in a systematic manner.[97]

Given this background, it is logical to expect the 1961 Criminal Procedure Code to incorporate traditional rules that were applicable before it came into effect. However, despite the statement of the Emperor and the collection of thousands of court cases decided under customary rules to serve as input in the codification process, a close look at the codes reveals that Ethiopia's approach to customary law was remarkably negative.[98]

Fisher summarized as follows the various reasons given why the customary laws of Ethiopian were not made part of the modern Code.

> Post-hoc justifications of this policy have been published by some of the code drafters as well as by scholars. They range from denial that customary law really existed in Ethiopia, to negative comments on its changeability, lack of uniformity, incompleteness, obscurity, and low status. These commentators also point out that some customs have been incorporated into the new laws, or otherwise permitted to operate within the new legal framework, that uniformity of laws is necessary and

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[93] Ibid., at x-xi.
[94] Ibid., at xi.
[95] Fisher, "Traditional Crim. Pro.," at 709.
[96] There is an opposing view on whether effort was made to incorporate the customary laws. Fisher reported that "the codifiers apparently made no attempt to review existing written sources on the customary legal systems in operation throughout the Empire, much less to initiate or encourage systematic studies to supplement the scanty information available." Ibid., at 710.
[97] Aberra, *Legal Hist. Eth.*, at 195. As reported by Singer "a substantial number (7296) of case summaries were prepared by the Ministry of Justice on the order of the Emperor to guide the Commission." Norman J. Singer, "Modernization of Law in Ethiopia: A Study in Process and Personal Values," 11 *Harv. Int'l. L. J.* 73, at 85 note 44 (1973).
[98] Fisher, "Traditional Crim. Pro.," at 710.

> desirable for a country as heterogeneous as Ethiopia, and, finally, that the abandonment of custom is not a serious worry because for a long time to come the codes will not be applied in large parts of the Empire.[99]

Notes and Questions

1. Unlike customary rules dealing with civil cases, traditional criminal procedure has not been formally and expressly abolished by a provision of law.[100] None of the Proclamations, including Proclamation No. 185 of 1961 (commonly called the 1961 Criminal Procedure Code of Ethiopia) included a single provision on the previously applicable rules of criminal procedure. Can Article 1 of the Code[101] be interpreted as tacitly repealing traditional rules of criminal procedure? If not, can a judge apply the traditional rules at least on matters not addressed by the Code? Fisher is of the view that this provision "impliedly repeals inconsistent ...customary rules but does not settle the status of practices which are not inconsistent with any provisions of the Code."[102]
2. Both Fisher[103] and Aberra[104] state that the 1961 Criminal Procedure Code lacks major components of a codified law such as comprehensiveness and consistency. Both criticize the code for being full of gaps. Fisher states that it is difficult to fill these gaps through interpretation[105] and that the legislative intent cannot be deduced because the law lacks cohesiveness and no single country's legislation was substantially adopted.[106] Bear this critique in mind and evaluate its wisdom throughout your study of the course.
3. Fisher describes the move from the traditional rules of criminal procedure to the modern Code as drastic[107] for, in his view, no attempt was made to incorporate the traditional rules in the modern Code. According to him, the 1961 Criminal Procedure Code is a compilation of foreign laws that fails to incorporate the traditional criminal procedure of Ethiopia. This state of affairs led some to be pessimistic about the practicability of the modern codes. Schiller described the new codes as "'fantasy law,' which may serve to put a modern 'face' on the country but, at least for some time to come, will not have any serious impact on the conduct of its affairs."[108] Beckstorm, in

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[99] Ibid.

[100] Article 3347 (1) of the 1960 Civil Code provides: "unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed."

[101] Article 1.—Scope of application.
(1) Unless otherwise provided, the provisions of this Code shall apply to all persons alike.
(2) Unless otherwise expressly provided, the provisions of this Code shall apply to all matters coming within the jurisdiction of the courts, the prosecution and police authorities.

[102] Fisher, "Traditional Crim. Pro.," at 744.

[103] Fisher, *Eth. Crim. Pro.* at xii.

[104] Aberra, *Legal Hist. Eth.*, at 208.

[105] Fisher, *Eth Crim. Pro.*, at xii.

[106] Simeneh argues that the principal source of the 1961 Criminal Procedure Code was the Malayan Code of Criminal Procedure. Simeneh Kiros Assefa, *Criminal Procedure Law Principles, Rules and Practices* (United States of America: Xlibris Corporation, 2010), at 40 (hereafter Simeneh, *Crim. Pro. Law).*

[107] Fisher, "Traditional Crim. Pro.," at 710.

[108] Schiller, "The Challenges and Adjustments Which Should be Brought to the Present Legal Systems of the Countries of Africa to Permit them to Respond more Effectively to the New Requirements of the

his earlier appraisal of the reception of Western Laws by Ethiopia,[109] expresses his concern that Ethiopia's isolation from the outside world and the fact that it has its own deep-rooted culture might make it difficult to implement the modern codes, including the 1961 Criminal Procedure Code. Beckstorm considered low literacy rate, weak economy, and poor administration and technical capacities prevalent at the time when the modern codes were adopted as additional factors militating against the enforcement of the modern rules.[110] Compare the Criminal Procedure Code and traditional practice to identify the gaps (if any) and comment on the predictions of the scholars, discussed above. Are the comments still valid?

4. Though the Emperor expressed his view that one should not lose sight of tradition while codifying modern law, a reading of the Criminal Procedure Code clearly shows that it is detached from the traditional rules discussed in the preceding pages. Once you study the Ethiopian law of criminal procedure, identify the areas of the law in which these rules could play a role.
5. Although the law does not seem to incorporate customary practices relating to criminal cases, these practices have continued to influence dispute settlement in criminal cases. Donovan and Getachew conclude that traditional laws relating to homicide are not protective of human rights and that they have continued to be applied to such an extent that they challenge the Ethiopian government's ability to guarantee protection of human rights.[111] A baseline study about restorative justice in the Oromia Regional state disclosed that traditional ways of settling disputes, which the study calls "Indigenous Justice Systems," are prevalent everywhere in Ethiopia.[112] Where a criminal case is addressed in an informal manner by out-of-court settlement the process is likely to be governed by customary practices. The studies referenced above confirm that modern criminal procedure is set aside when criminal cases are settled out of court. Is this proof of the Emperor's statement, "no modern legislation which does not have its roots in the customs of those whom it governs can have a strong foundation"? Some have gone so far as arguing for the recognition of indigenous justice systems to deal with some criminal cases.[113]

Section III. Federalism and Criminal Procedure

In a federal arrangement, legislative, judicial and executive powers relating to criminal procedure matters are divided between the federal government and the states. The following pages discuss the issue of legislative[114] jurisdiction over criminal procedure under the Ethiopian federal arrangement. Initially the issue is approached from the perspective of relevant provisions of the FDRE Constitution. Because both the federal and state law-making bodies have passed several laws on criminal procedure since Ethiopia

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Development of the Countries" in André Tunc (ed.), *Les aspects juridiques du développement économique* (Paris: Dalloz, 1966), in Fisher, "Traditional Crim. Pro.," at 710.

[109] Beckstrom, *Trans. Legal Syst.*, at 558.

[110] Ibid.

[111] Donovan and Getachew, *Homicide in Ethiopia*, at 506-07.

[112] Tsegaye et al., *Rest. Just.*, at 59.

[113] Ibid., at 150-52.

[114] On jurisdiction of courts in criminal cases, see Chapter 12 below.

adopted a federal form of government, these laws will also be reviewed to determine whether they suggest a trend toward legislative jurisdiction on the law of criminal procedure.

3.1. Federal Constitutional Provisions

The FDRE Constitution incorporates criminal procedure provisions in a general fashion.[115] By virtue of Article 13(1) of the Constitution, the three organs of the governments both at the federal and state level are required to respect and enforce Chapter Three of the Constitution, which contains the aforementioned criminal procedure provisions.[116]

Another part of the Constitution that is relevant to criminal procedure issue is its Chapter Five, which is comprised of Articles 50-52. This part provides for division of power between the two prominent actors in a federation. Article 50(1) of the Constitution states that the Federal Democratic Republic of Ethiopia comprises the federal government and the state members. Article 50(2) provides that both the federal government and state members have their own legislative, judicial, and executive powers. Sub Articles 3-7 of Article 50 identify the various organs of the federal government and the member states through which these powers are to be exercised.

As provided by Article 50(8) of the Constitution, federal and state powers are defined by the Constitution. Accordingly, Articles 51 and 52 provide a list of powers of the federal government and the member states respectively. Neither of the provisions refers to criminal procedure. From a reading of Article 55, which specifically provides for the law-making power of the federal government, it is not evident that the law of criminal procedure falls within the jurisdiction of the federal law-making body.

Article 52 (1) of the Constitution talks about matters that are not expressly given to the federal government, the states, or both. It provides: "all powers not given expressly to the federal government alone, or concurrently to the Federal Government and the States are reserved to the States." The law-making power over criminal procedure is given neither expressly to the federal government alone nor concurrently to the federal government and the states. It follows that this power is among the powers envisaged by Article 52(1) of the Constitution. Thus, it is safe to conclude that the Constitution gives to the states the power to make laws regarding criminal procedure.

Other jurisdictions with a federal form of governments take a variety of approaches to legislative jurisdiction on matters of criminal procedure. In the United States, the power to legislate on substantive law is shared between the two governments and both assume legislative jurisdiction on the law of criminal procedure to be applied to enforce their

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[115] Articles 19 and 20 of the Constitution are the most pertinent of these.

[116] Unlike the U.S. Constitution which, before the adoption of the 14th Amendment, had been binding on the federal government, the FDRE Constitution, under its Article 13(1), expressly requires both member states and the federal government to respect and enforce human rights provisions of the Constitution.

respective criminal laws.[117] In Canada, there is a single substantive and procedural criminal law passed by the federal government which is applicable throughout the country.[118] In Germany, the Basic Law[119] empowers the federal government to legislate and the states to execute the federally legislated laws. Thus, both the substantive and procedural laws are enacted by the federal government, to be enforced by member states. One thing is common in all these federations. It is the government (whether federal or state) that has passed the substantive criminal laws that has the power to pass criminal procedural laws to enforce the substantive criminal laws. Thus, the powers to legislate on substantive and procedural criminal laws are coextensive.

3.2 The Practice

The Criminal Procedure Code enacted in 1961 has continued to be applied both by federal and state courts after the federal structure was introduced. Neither the federal government[120] nor the states have passed a law through which they endorse the Code as their own law. Their institutions (police, public prosecutor, courts at both levels) simply continue to apply provisions of the Code.

With regard to laws passed after Ethiopia adopted a federal structure, an array of practices exists. Some procedural laws passed by the House of Peoples' Representatives are expressly made applicable at both the federal and state levels. The Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation[121] and the Vagrancy Control Proclamation[122] are among these laws. The Criminal Justice Policy, recently approved by the Council of Ministers, is intended to be applicable both at the federal and state levels.[123] There are, however, laws dealing with issues of criminal procedure passed by the House that are applicable only at the federal level. To this category belong the Anti-

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[117] Miller Canfield, "Criminal Procedure in the United States and Canada," www.millercanfield.com/media/--/200071_criminalprocedure.pdf, at 4 (accessed September 24, 2011) (hereafter Canfield, *Crim. Pro. in U.S.*).

[118] Ibid.

[119] Articles 83-85 of the Basic Law for the Federal Republic of Germany.

[120] Subject to the following discussion on legislative jurisdiction over matters of criminal procedure, Article 2(3) of the Federal Courts Proclamation which defines "Laws of the Federal Government" might be construed as referring, *inter alia*, to the Cr. Pro. Code. It states: "'Laws of the Federal Government' includes all previous laws in force which are not inconsistent with the Constitution and relating matters that fall within the competence of the Federal Government as specified in the Constitution." Federal Courts Proclamation, Proc. No. 25/1996, Art. 2(3), *Fed Neg. Gaz.*, Year 2, no. 13 (hereafter Federal Courts Proc.).

[121] Article 3 of the Proclamation provides: "this Proclamation is applicable to corruption cases falling under the Federal and Regional jurisdictions." Revised Anti-Corruption Special Procedures and Rules of Evidence Proclamation, Proc. No. 434/2005, *Fed. Neg Gaz.*, year 11, no. 19 (hereafter Revised Anti-Corruption Proc.).

[122] A reading of Articles 1(2) and 5(2) of the Proclamation implies that the Proclamation is applicable both at the federal and state level. Vagrancy Control Proclamation, Proc. No. 384/2004, *Fed. Neg. Gaz.*, year 10, no. 19 (hereafter Vagrancy Control Proc.)

[123] Section 1.6 of the Policy, which defines the Scope of the Policy, indicates that it is to be applied by concerned federal and state organs. Criminal Justice Policy of the Federal Democratic Republic of Ethiopia, *Yekatit* 25, 2003 E.C. (hereafter Criminal Justice Policy).

Terrorism Proclamation[124] and the Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation.[125]

All the member states incorporate criminal procedure provisions in their constitutions that are a replica of the language of Articles 19 and 20 of the FDRE Constitution. It is not only in their constitutions that States deal with criminal procedure. State Councils have legislated on matters of criminal procedure through subsidiary laws as well. For instance, the Council of the Oromia National Regional State passed a Proclamation establishing state courts. The Proclamation, *inter alia*, deals with the right of the accused to defence counl. It provides: "the court shall assign a defence council to an individual who is accused of a crime punishable with a rigorous imprisonment not less than five years."[126]

Notes and Questions

1. As indicated above, the criminal procedure provisions of state constitutions are copies of provisions of the federal constitution. In view of Article 13(1) of the FDRE Constitution, which requires the three organs of the government both at federal and state level to respect and enforce fundamental human rights incorporated under its Chapter Three to which criminal procedure rights belong, what purpose does such replication serve? Can the replication be considered a double protection to state citizens? That might be the case if the state constitutions provided better[127] protection than that accorded under the federal Constitution, as is the case in the United States of America. Member states of the United States of America, to which Bill of Rights Sections of the U.S. Constitution are applicable by virtue of the 14th Amendment, exercise their jurisdiction over matters of criminal procedure by providing better protection to their citizens through their constitutions.[128]
2. The Federal House of Peoples' Representatives invokes Article 55(1) of the Constitution as its source of power to legislate over matters dealing with criminal

[124] Article 2(11) of the Proclamation implies that the state police are to conduct investigation in accordance with this law where the federal police delegate their power to them. Article 31 of the Proclamation empowers the Federal Supreme Court and Federal High Court to try terrorism cases. Thus, by virtue of Article 2(10) and Article 31, the Proclamation is to be applied only by these federal courts. Anti-Terrorism Proclamation, Proc. No. 652/2009, *Fed. Neg. Gaz.*, year 15, nNo. 57 (hereafter Anti-Terror Proc.).

[125] Articles 2(8), 2(9), 3(2), 7(1)-(4), 8(1), and 9(1)-(4), *inter alia*, indicate that the Proclamation is applicable in cases tried by the federal courts. Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation, Proc. No. 699/2010, *Fed. Neg. Gaz.*, year 17, no. 16 (hereafter Protection of Witnesses Proc.).

[126] Article 17 (2) of the Proclamation to Provide for the Re-establishment of Oromia National Regional State Courts, Proc. No. 141/2008, *Megeleta Oromia*, year 16, no. 10.

[127] Lesser protection is not a possibility, for that would contravene the supremacy clause (Article 9(1) of the FDRE Constitution) and Article 13 (1) of the FDRE Constitution. Where a law contravenes any provision of the FDRE Constitution, it is void by virtue of Article 9(1) of the Constitution.

[128] For more on how the member states of the U.S. federation accord protection to criminal defendants, see David C. Brody, "Criminal Procedure Under State Law: An Empirical Examination of Selective New Federalism," 23 *The Justice System Journal 75* (2002).

procedure.[129] The provision states: "The House of Peoples' Representatives have the power of legislation in *all matters assigned by this Constitution to Federal jurisdiction.*" Does this provision empower the House to legislate on criminal procedure? As indicated above, the powers of the federal government are listed in Article 51 of the Constitution. Thus, the italicized phrase refers to the federal powers provided under Article 51. Which of the matters listed under Article 51 is/are related with criminal procedure? Does the language of Article 51 support the claim, made by several Proclamations relating to criminal procedure, that the House is exercising a legislative power on a federal matter listed under Article 51?

3. Article 55(5) of the FDRE Constitution empowers the House of Peoples' Representatives to enact a penal code.[130] Can one argue that the power of the federal government to legislate on matters of criminal procedure (which is a means to enforce a penal code) emanates from its power to enact the Penal Code? This argument assumes that the procedural law is part and parcel of the substantive criminal law, for the substantive law is of no practical significance without a procedure for its enforcement/application. How do you assess the wisdom of this argument? The phraseology of Article 52(1) of the Constitution, which states: "all powers not given *expressly* to the federal government alone, or concurrently to the Federal Government and the States are reserved to the States" indicates that powers of the federal government are limited to those clearly listed and are not to be inferred from the powers expressly granted. In other words, the federal government is given a list of specified fields of jurisdiction and the states are given the rest. Given this provision, wouldn't inferring a federal power from a power expressly given to the federal government risk transfer of a state power to the federal government in violation of Article 50(8)?[131]
4. Article 55(5) of the Constitution recognizes not only the power of the federal government; it also provides for the power of states to enact penal laws on matters not addressed by the Federal Penal Code. Following the logic/argument raised in the previous question, States would have power to legislate on criminal procedure. Their power to enact laws of criminal procedure, as that of the federal government, can be inferred from their power to enact penal laws. That is, states are empowered to enact laws of criminal procedure as a means to enforce their own penal laws. However, the 2004 Criminal Code is so comprehensive that it is nearly impossible to find an area not covered by it. Thus, as a practical matter, the legal argument regarding state power to enact laws of criminal procedure retains only nominal significance.
5. The British North America Act of 1867 empowers the Canadian federal government to enact a Penal Code.[132] Though there is no clear provision that empowers the federal

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[129] To mention a few: Preamble, 3rd para., Vagrancy Control Proc.; Preamble, 5th para., Revised Anti-Corruption Proc.; Preamble, 6th para., Anti-Terror Proc.; Preamble, 4th para., Protection of Witnesses Proc.

[130] For the implications of this provision on the division of jurisdiction of courts in criminal cases, refer to Chapter 12, below.

[131] It states: "Federal and State powers are defined by this Constitution. The states shall respect the powers of the Federal Government. The Federal Government shall likewise respect the powers of the States." The Constitution of the Federal Democratic Republic of Ethiopia, Proc. No. 1/1995, Fed. Neg. Gaz., year 1 , no. 1 (hereafter FDRE Constitution).

[132] British North America Act of 1867, Section 91(27).

government to legislate on criminal procedure, the federal parliament assumes legislative jurisdiction over criminal procedure and legislates on it as part of its criminal law power.[133] That is, perhaps, because in Canada, unlike in Ethiopia, the residuary powers are allocated to the federal government.[134] The U.S. Constitution incorporates what is commonly known as the *"necessary and proper clause,"*[135] which empowers the federal legislative body to make laws that are necessary and proper to carry out the expressly given power. To what extent are the Canadian and U.S. approaches relevant to deal with this issue in the Ethiopian context? The Ethiopian federal constitution is different from both. Unlike the U.S. Constitution, it does not incorporate the *"necessary and proper"* clause. Unlike the British North America Act, it gives the residuary power to the States.

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[133] Canfield, *Crim. Pro. in U.S.* at www.millercanfield.com/media/---/200071_criminalprocedure.pdf.

[134] Section 91 of the British North America Act states: "for the Peace, Order and good Government of Canada, *in relation to all Matters not coming within the classes of subjects by this Act assigned exclusively to the legislature of the Provinces.*" (emphasis mine).

[135] Article I Section 8(18) of the U.S Constitution states that the Congress shall have the power "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof."

Chapter Two

Functions, Models and Policy Issues in the Law of Criminal Procedure

This chapter deals with general criminal procedure framework issues in the context of which a given criminal justice system, including that of Ethiopia, should be understood and analyzed. The fact that most of the sources used for the discussion in this chapter are literatures developed in the context of U.S. criminal procedure does not undercut the discussion's relevancy to the study of Ethiopian criminal procedure.

Section I. Functions of the Law of Criminal Procedure

Many may think of criminal justice as an instrument designed solely to apprehend and punish criminals. That is perhaps why defence lawyers do not come to our mind when we think of actors of criminal justice. The truth is that criminal justice is concerned not only with apprehension and punishment of criminals but also with ensuring that the criminal process (investigation, prosecution. and trial) is made fairly. Generally, there are two functions of the law of criminal procedure. First, it serves as a means of enforcing the substantive criminal law. Second, it serves its own independent functions.

1.1. Enforcement of Substantive Criminal Law

A substantive criminal law proscribes wrong behaviors and provides for different types and degrees of punishment. It aims at ensuring "order, peace and the security of the State, its peoples, and inhabitants for the public good."[136] It warns members of society as to what is not allowed and of the consequences of violating the prohibition.[137] Members of society are normally expected to take advantage of such notice and to refrain from acting in a proscribed manner. Where, despite the notice given, a person acts contrary to the law, he will face the consequence of his action—punishment. Various purposes of punishment have been advocated by different schools of thought.[138] For any of those purposes to be served, the punishment should be inflicted on a real offender. Punishing an innocent will have a counterproductive effect on any of the purposes meant to be served by punishment.

For the substantive law to be applied to the wrongdoer, it is necessary to have a system for society to ascertain whether a crime has been committed and by whom. This is one of the functions of the law of criminal procedure. Criminal procedure law is "composed of the

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[136] The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, art. 1, para. 1(hereafter Criminal Code.)

[137] Ibid., at art. 1, para. 2.

[138] On different theories of punishment, see Joshua Dressler, *Understanding Criminal Law* (3rd ed., Lexis Publishing, 2001), at 11-23.

rules that regulate the inquiry into whether a violation of a criminal law has occurred, and whether the person accused of the crime committed it."[139]

Many kinds of offences and offenders would not be detected if special powers were not provided to the police and other law enforcement agencies to perform acts which would otherwise constitute torts or crimes. By allowing the police to, *inter alia*, restrict the liberty and privacy of the suspect and question the suspect, the law of criminal procedure assists in identification of the real criminal. In this sense, the law of criminal procedure is a means to an end.

Criminal procedure facilitates enforcement of the substantive law not only through assisting in the determination of guilt but also by providing a mechanism through which the appropriate disposition of the guilty offender is determined. Arenella identifies three ways through which criminal procedure assists in sentencing and disposition.

> First, the procedural mechanism used to determine substantive guilt should provide the sentencing authority with some of the information it needs to make an appropriate sentencing decision. Second, the guilt-determining process should minimize the effect of the parties'. tactical choices upon appropriate sentencing decisions. Finally, criminal procedure should protect the substantive criminal law's proportionality principle—that the defendant's degree of punishment not exceed his "just deserts"—by providing some check against legislative abuse of its sentencing powers.[140]

1.2. Independent Functions

The previous subsection dealt with the instrumental function of criminal procedure as a means to enforce the substantive criminal law. The law of criminal procedure has its own independent functions as well. Allocation of power among the actors in a criminal proceeding is one of those functions.[141] It is the law of criminal procedure that allocates powers to the police, the prosecutor, the judge, and perhaps to the victim and the defence lawyer.[142] As will be discussed in the following section, characterization of a given criminal justice system as adversarial or inquisitorial; due process and crime control are based, *inter alia*, on this allocation of power.

Another independent function of criminal procedure is legitimation,[143] which Forst considered "essential to a well-functioning citizen-supported criminal justice system."[144] When the criminal justice system operates to enforce the substantive criminal law it

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[139] Joshua Dressler, *Understanding Criminal Procedure* (3rd ed., Lexis Publishing, 2002), at 1 (hereafter Dressler, *Understanding Crim. Pro.*).
[140] Peter Arenella, "Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies," 72 *Geo. L. J.* 185, at 198 (1983-84) (hereafter Arenella, "Rethinking the Functions").
[141] Ibid., at 199.
[142] As to the several factors that affect the allocation of power, see ibid., at 199-200.
[143] Ibid., at 200.
[144] Brian Forst, *Errors of Justice: Nature, Sources, and Remedies* (Cambridge: Cambridge University Press, 2004), at 2-3 (hereafter Forst, *Errors of Justice*).

inevitably entails use of coercive power by the state over individuals. Use of such coercive force needs to be justified.[145] That is what the law of criminal procedure does, "by articulating fair process norms that place some substantive and procedural limits on the state's exercise of power."[146]

The fair process norms incorporated in the criminal justice system play a legitimation function in several ways. Some are valued for their role in bringing about accurate results—reliable conviction of the guilty and exoneration of the innocent.[147] "At the heart of criminal justice system," says Greer, "lies a public quest for adequate justifications to support decisions that given persons should be deemed guilty or not guilty of specific offences."[148] The criminal process being a struggle between unequal parties (the government armed with incomparable resources, whether material or human, as compared to the suspect), the law of criminal procedure attempts to level the playing field. It does so by incorporating a multitude of rights for the accused, with a view to preventing the inherent inequality between the parties from impacting the process and affecting the reliability of the outcome.

Fairness norms exist that contribute to legitimation irrespective of their "result-efficacy."[149] Most of these fair-process norms are valued for ensuring that an individual suspect is treated with dignity and respect. The right of the suspect to remain silent and the privilege against compulsory self-incrimination are among such norms. The content of these dignitary norms are said to reflect "society's normative aspirations, embodied in its positive laws, customs, religions, and ideologies about the proper relationship between the individual and the state."[150] Some of the other norms, such as the exclusionary rule, "reflect procedural values...that underlie society's conception of rule of law."[151]

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[145] N. Lacey (ed.), *A Reader on Criminal Justice* (Oxford: Oxford University Press, 1994) at 4 (cited in Andrew Sanders and Richard Young, *Criminal Justice*, 2nd ed. (London: Butterworths, 2000), at 5 (hereafter Sanders and Young, *Crim. Just.*).

[146] Arenella, "Rethinking the Functions," at 200.

[147] Such norms include, but are not limited to, the requirement of proof beyond a reasonable doubt, timely disposition, independent adjudication, and assistance of counsel.

[148] Steven Greer, "Miscarriages of Criminal Justice Reconsidered," 57 *The Modern Law Review* 58, at 61 (1994) (hereafter Greer, "Miscarriages of Cr. Just.").

[149] As stated by Summers, "in legal ordering man does not live by results alone." Summers, "Evaluating and Improving Legal Process – A Plea for Process Values," 60 Cornell L. Rev. 1, at 51 (1974) (cited in Arenella, "Rethinking the Functions," at 200).

[150] Arnella, "Rethinking the Functions," at 200.

[151] Ibid., at 200-201.

Section II. Models of Criminal Justice[152]

Normally the different functions of the law of criminal procedure are compatible. For instance, the fairness of the criminal process (one of the functions) increases the probability that the outcome of the process will be accurate, a necessary precondition for the other function—crime control. However, this is not always true. Instances may exist where fairness of the proceeding impedes the truth-seeking process, thereby resulting in an erroneous conclusion which, in turn, impacts the law-enforcement function. That is, the fairness of the process may result in acquittal of the real offender,[153] in which case the truth-seeking function of the law is not served.

Herbert Packer identifies two models of criminal justice on the basis of different factors, one of which is how such a conflict is to be resolved: the Crime Control Model and the Due Process Model.[154] According to the Crime Control Model, as its name suggests, the conflict is to be resolved by giving precedence to the law-enforcement purpose of the law of criminal procedure over the fairness purpose. The Due Process Model, on the other hand, gives priority to the fairness of the proceeding over the purpose of enforcing the criminal law. According to Sanders and Young, neither model corresponds to reality. Rather they represent extremes on a spectrum of possible ways of administering criminal justice.[155]

2.1. Crime Control Model

Scholars have identified different features of this model, all of which are essentially reflections of the vital value this model assigns to crime control. In the Crime Control Model, repression of criminal conduct is the most important function to be performed by the criminal process[156] and the police institution has a central role in the process. As stated by Kent Roach, "most fact-finding in the crime control model is conducted by the police in the streets and station-houses, not by lawyers and judges in the courts."[157]

There are several reasons why the police have a pivotal role in this model. In view of the fact that resources are very limited compared to the high level of crime, the model depends for success on speed and minimizing the opportunities for challenge of the government's

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[152] Several scholars have suggested alternative Models of Criminal Justice. See, *e.g.*, Herbert L. Packer, "Two Models of the Criminal Process," 113 *University of Pennsylvania Law Review* 1 (1964) (hereafter Packer, "Two Models"); Arenella, "Rethinking the Functions"; Douglas Evan Beloof, "The Third Model of Criminal Process: The Victim Participation Model," 1999 *Utah Law Rev.* 289; John Griffs, "Ideology in Criminal Procedure or A Third 'Model' of the Criminal Process," 79 *Yale L.J.* 359 (1970); Kent Roach, "Four Models of the Criminal Process," 89 *J. Crim. L. & Criminology* 671 (1999) (hereafter Roach, "Four Models").

[153] This would be the case where, for instance, due to the exclusionary rule, one of the rules which are meant to guarantee fairness of the criminal process, reliable evidence is declared inadmissible for being collected illegally and there is no other evidence that is adequate to warrant conviction.

[154] Packer, "Two Models," at 1-68.

[155] Sanders and Young, *Crim. Just.*, at 22.

[156] Dressler, *Understanding Crim. Pro.*, at 26.

[157] Roach, "Four Models," at 681.

case.[158] With a view to increasing the efficiency of the process, the police are allowed to establish facts through interrogation. This model shortens the judicial process by conducting the investigation in such a manner that it will result in a plea of guilty by the accused, based on which he will be convicted forthwith. Hence, the police strive to extract confessions from those they presume to be guilty, which more or less guarantees their plea of guilty at their trial.[159]

The police's central role in this model is explained not only on efficiency grounds. The model holds that pre-trial administrative processes are more likely to produce reliable evidence of guilt than a formal court procedure. The system assumes that, by application of their expertise, the police will quickly screen out of the process individuals who are probably innocent ones while passing on to prosecution individuals who are probably guilty.[160] It follows that this model functions on the assumption that most suspects are factually guilty of the offence for which they are being prosecuted. This model is less concerned with the legal guilt requirement, applicable at trials, that presumes the innocence of the accused.[161]

Because investigation is so important in this model, Packer defines the model in terms of administrative fact finding. As he states of the Crime Control Model "when reduced to its barest essentials and operating at its most successful pitch, it offers two possibilities: an administrative fact finding process leading (1) to exoneration of the suspect or (2) to the entry of a plea of guilty."[162] For Packer "the center of gravity" in this model "lies in the early, administrative fact finding stages."[163] The model places confidence in the administrative fact finding activities that take place in the early stages of the criminal process, so that "trials with their formality, rigid rules of evidence, and adversarial conditions are delayed as long as possible or avoided entirely through guilty pleas."[164] Where there is a trial, it will be relatively perfunctory, having no significant impact on efficiency.[165]

This model recognizes the possibility that mistakes may be committed in identifying the probably guilty and the probably innocent. Conviction of an innocent person for a crime that he has not committed is not seen as a problem *per se*. The model tolerates such mistakes insofar as they are not counterproductive to the major function of the criminal justice system—crime control. If too many guilty people escaped or too many innocent people were prosecuted and convicted, the deterrent efficacy of criminal law would be

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[158] Sanders and Young, *Crim. Just.*, at 22.
[159] Ibid.
[160] Ibid.
[161] Dressler, *Understanding Crim. Pro.*, at 27.

[162] Herbert L. Packer, The Limits of the Criminal Sanction (Standford: Stanford University Press, 1968) at162-63 (cited in Sanders and Young, *Crim. Just.*, at 23). (hereafter Packer, "Limits of Cr. Sanction"
[163] Packer, "Limits of Crim. Sanction" at 162 (cited in Dressler, *Understanding Crim. Pro.*, at 27, note 15).
[164] Dressler, *Understanding Crim. Pro.*, at 26-27.
[165] Packer, "Limits of Crim. Sanction," at 160-61 (cited in Sanders and Young, *Crim. Just.*, at 22).

The model is based on the firm conviction that excluding evidence in such circumstances demonstrates to officials that there is nothing to be gained by abusing power and breaking rules. Moreover, the exclusionary rule is believed to be an important way to encourage and affirm law-abiding behavior. For the Due Process Model, making use of illegally obtained evidence would undermine the moral condemnation which is meant to be conveyed by a finding of guilt. [172]

Third, the model advocates for the ideal of equality. Thus, whenever the system affords a theoretical right to represent a client, the Due Process Model insists that public funds be allocated to those who cannot afford the cost of retaining a lawyer. Adherents of this model believe that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[173] Each party must have the opportunity to be represented by a lawyer to give practical effect to the remedies and sanctions which the model recognizes as guarantors of due process.[174]

2.3. Relation between the Two Models

The difference between the "values" of the two models is vividly seen in the report of the Runciman Commission.[175] One point the Commission addressed was the role of the Court of Appeals in an appeal from a conviction based on illegally obtained evidence. The view of the majority of the Commission reflected a typical crime-control position: "where there was sufficient reliable evidence of guilt, even the most serious misconduct by the prosecution should not result in the conviction being quashed."[176] Professor Michael Zander's dissent, on the other hand, represents a classic due process model. It states:

> If the behavior of the prosecution agencies has deprived a guilty verdict of its moral legitimacy the Court of Appeals must have a residual power to quash the verdict no matter how strong the evidence of guilt. The integrity of the criminal justice system is a higher objective than the conviction of any individual.[177]

Sanders and Young contrasted the two models as follows.[178]

> Crime control values prioritize the conviction of the guilty, even at the risk of the conviction of some (fewer) innocents, and with the cost of infringing the liberties of suspects to achieve its goals; while due process values prioritize the acquittal of

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[172] Sanders and Young, *Crim. Just.*, at 24-25.
[173] *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (cited in Dressler, *Understanding Crim. Just.*, at 28).
[174] Sanders and Young, *Crim. Just.*, at 25.
[175] The Royal Commission on Criminal Procedure, which was also known as the Philips Commission, was set up in 1981 following wrongful convictions of three youths in England. Sanders and Young, *Crim. Just.*, at 17-18. The Commission was established to "examine the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent, having regard to the efficient use of resources." The Report of the Royal Commission on Criminal Justice (London: HMSO, 1993) Cm 2263, at i (cited in Greer, "Miscarriages of Cr. Just.," at 58) (hereafter Report of the Royal Comission).
[176] Report of the Royal Comission, at 221 (cited in Sanders and Young, *Crim. Just.*, at 25).
[177] Ibid.
[178] Sanders and Young, *Crim. Just.*, at 25-26.

> the innocent, even if risking the frequent acquittal of the guilty, and giving high priority to the protection of civil liberties as an end in itself.

Contrasting the two models, Dressler writes:

> All else being equal, a system modeled on Due Process values will be less efficient, more inclined to favor an active judiciary vis-à-vis the legislature, more apt to protect individual liberties, more interested in bringing about equality in the justice system, less likely to convict innocent persons, and more likely to allow the guilty to go free, than one based on Crime Control values. [179]

Though the above assertions show a conflict in values between the two models, it does not follow that they are mutually exclusive. Packer indicated that the polarity between the two models is not absolute and that the ideology of one is not the converse of the other. Thus, he suggested that it would be extreme to support one to the exclusion of the other. [180]

Some authorities have suggested ways both models can work together in a single system. Smith argues that "'the Crime Control Model is concerned with the fundamental goal of the criminal justice system, whereas the Due Process Model is concerned with setting limits to the pursuit of that goal. Due Process is not a goal in itself.'"[181] Similarly, Ashworth suggests that the two models can be reconstructed in such a manner that "crime control is the underlying purpose of the system but that pursuit of this purpose should be qualified out of respect to due process."[182]

In sum, both models accept crime control as socially desirable and recognize the need for limiting the power of the government to pursue this socially desirable end. Their difference is that "they represent very different points of view about what those limits should be."[183]

Notes and Questions

1. Irrespective of which one of the models predominantly governs a given criminal procedure, the purpose remains the same – to control crime, with some protection for suspects. There is no jurisdiction with a criminal procedure system which perfectly fits either of the models. Where to place a given criminal procedure system on the spectrum of possibilities represented by the two models depends on the nature and extent of the protections accorded to suspects. After having reviewed the various aspects of Ethiopian criminal procedure, where do you place it on Packer's spectrum?
2. The law as written and the law as practiced may reflect different models. For example, Packer noted that the U.S. criminal procedure as it appears in books expresses the due process ideology, while the actual operation of the criminal process reflects crime

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[179] Dressler, *Understanding Crim. Pro.*, at 29.
[180] Packer, *"Limits of Crim. Sanction"*, at 154 (cited in Sanders and Young, *Crim. Just.*, at 26).
[181] D. Smith, "Case Construction and the Goals of Criminal Process," 37 *British Journ. Crim.* 319, at 335 (1998) (cited in Sanders and Young, *Crim. Just.*, at 26-27).
[182] A. Ashworth, *The Criminal Process*, 2nd ed. (Oxford: Oxford University Press, 1998), (cited in Sanders and Young, *Crim. Just.*, at 26).
[183] Sanders and Young, *Crim. Just.*, at 27.

control.[184] The same conclusion has been articulated concerning British criminal procedure.[185] Comment on the consistency between the law of criminal procedure as written and as practiced in the Ethiopian context.

3. In which one of the models, do you think, is ethics, professionalism, knowledge, and expertise of the police more significant? Why?
4. The Crime Control Model achieves efficiency by avoiding a formal fact-finding process before a court of law. The model claims that administrative fact finding is more likely to produce reliable evidence of guilt than judicial fact finding. Where the police have an obvious interest in the outcome of the investigation how is the partiality of the police to be checked under this model?
5. Conviction of an innocent *per se* is not a major concern for the Crime Control Model. Erroneous convictions become a concern for this model only when the number of wrongful convictions is high enough to have a counterproductive effect on the crime-control objective. In the Due Process Model, too, conviction of an innocent is not something to be prevented at any cost. The saying "ten guilty man should escape rather than one innocent man should suffer"[186] indicates that the model does not prefer the acquittal of any number of guilty persons over conviction of one innocent. In fact, the only way to guarantee that no innocent will be convicted would be not to prosecute anyone[187]—something countenanced by neither of the models. The difference between the models is only a matter of degree because both models tolerate conviction of an innocent person. But for the Due Process Model, unlike the Crime Control Model, conviction of an innocent person is an independent concern without considering the impact on the crime-control purpose of criminal law. That is, the Due Process Model is concerned with the erroneous conviction of an innocent even where it does not have impact on the crime-control purpose of the criminal law.

Section III. The Role of Truth in Criminal Justice

Truth has a central role in a criminal justice system.[188] Criminal law is said to be properly enforced where those who infringe the law are prosecuted and punished and those who are

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[184] Packer, "Limits of Crim. Sanction", at 239 (cited in Sanders and Young, *Crim. Just.*, at 31).

[185] Sanders and Young, *Crim. Just.*, at 32.

[186] 1 Lew CC 261 (cited in ibid., at 10).

[187] Sanders and Young, *Crim. Just.* at 10.

[188] Arenella has criticized such propositions as oversimplified and misleading for such a label, in his view, "ignores the moral content and force of substantive guilt and the resulting need for a process that evaluates the moral quality of the defendant's actions." He expresses his concern as follows. "Most commentators assume that the primary goal of any criminal process is to discover the 'truth.' But what 'truth' are we trying to discover? To many, the concept of truth-discovery implies that guilt is an empirical fact ready to be discovered and verified.... Equating the substantive criminal law's concept of guilt with historical fact would be defensible if crimes were defined solely in terms of the defendant's acts. But the criminal law usually refuses to predicate criminal liability on acts alone...the substantive criminal law's definition of guilt protects individual autonomy and preserves the moral force of the criminal sanction by requiring some showing of the defendant's moral culpability. ...[S]ubstantive criminal law requires a moral evaluation of the actor's conduct by including some mental element (e.g., purpose, knowledge, recklessness, or negligence) in its definition of most offences and by its recognition of affirmative defences that either justify the defendant's conduct or excuse it. Since substantive guilt includes both facts and value judgments about

innocent are not affected. As Hart says, "in order to legitimate a specific punishment 'a moral license is required in the form of proof that the person punished broke the law....'"[189] As discussed above, one of the purposes of criminal procedure is to help the criminal law hit its proper target—the criminal. That is possible only where the criminal process brings about an accurate outcome.

By suggesting that the legitimacy of the criminal procedure be measured by two goals, both of which are to be achieved through accurate results, Fisher[190] attaches vital significance to the accuracy of outcome of a criminal proceeding. The first goal is the extent to which the system facilitates the enforcement of criminal law by apprehending, prosecuting, and convicting real offenders. The second is the extent to which innocent citizens are left unaffected.

In a perfectly accurate criminal process, there would be no arrests of innocent persons. Or in a less perfectly accurate process, innocent persons might be arrested but they would be released prior to trial or would be acquitted at the conclusion of trial. Similarly, a perfect criminal process allows society to apprehend all guilty persons, or at least to convict all guilty persons who are arrested. As it is not practically possible to ensure that the criminal process is error free, it is inevitable that errors will be committed.[191] The error may result in acquittal of real offender (an error of impunity) or it may bring about conviction of an innocent (an error of due process). In both cases there is a miscarriage of justice.[192]

3.1. Error of Due Process[193]

An error of due process is said to be committed where an innocent person is harassed, detained, or sanctioned.[194] Excessive intrusions against those who violate the law are also considered an error of due process.[195]

Though arresting an innocent person is wrong, it is hardly avoidable. The criminal procedure cannot eliminate or avoid arresting or prosecuting innocent persons. But it should not allow their conviction. The standards employed in criminal proceedings reveal the possibility that an innocent person could be erroneously subjected to the criminal process. The process becomes progressively stricter as it goes from the investigation to the trial stage. The procedural system can be seen as a series of "screening devices" designed

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the actor's moral culpability, criminal procedure must provide a procedural mechanism that reliably reconstructs historical facts and morally evaluates their significance. The combination of these two procedural functions – reliable historical fact reconstruction and moral evaluation – cannot be equated with 'truth discovery.'" Arenella, "Rethinking the Functions," at 197-98.

[189] H. L. A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968) at 22 (cited in Sanders and Young, *Crim. Just.*, at 9).

[190] Fisher, *Eth. Crim. Pro.*, at 3.

[191] Greer, "Miscarriages of Crim. Just.," at 73.

[192] Miscarriages of criminal justice are defined as "occasions upon which the justifications offered for a finding of guilt or a 'non finding of guilt' are seriously defective." Ibid., at 61. Forst defines error of justice as "any departure from an optimal outcome of justice for a criminal case." Forst, *Errors of Justice*, at 4.

[193] For sources, consequences, and management of due process errors see Forst, Errors of Justice, at 16-21.

[194] Ibid. at 4.

[195] Ibid., at 4, 10.

to hold only probable offenders and to let others pass out again into freedom. Arrest is justified on having a "reason to believe" that the person to be arrested has committed a crime; in contrast, conviction is justified by evidence that shows the suspect has committed the crime "beyond reasonable doubt." In fact, the standard of proof required for conviction itself (beyond reasonable doubt as opposed to beyond doubt) admits the possibility that an innocent may be convicted. However, the system is still healthy in so far as there is a review mechanism which may reverse erroneous convictions.

3.2. Error of Impunity[196]

An error of impunity is said to be committed where a real offender escapes punishment or where he receives an insufficient sanction. It refers to a lapse of justice that allows a culpable offender to remain at large[197] or where he receives an insufficient sanction.[198] Although its seriousness depends on the extent and number of errors involved, an error of impunity puts the crime-control function of the criminal law in question. The more culpable offenders are set free, the more the enforcement of criminal law is compromised, because the criminal procedure law is failing to serve its major function—facilitating enforcement of the substantive criminal law. If the system does not empower society to punish those who transgress its criminal law, the deterrent purpose of the criminal law is lost.

A question exists whether an error of impunity occurs whenever conviction and punishment of a real offender are avoided or only when the avoidance is based on specific grounds. Greer states:

> [There is] a fine line between, on the one hand, cases in which the real offender is acquitted because of reasonable doubts about his guilt—which should not be regarded as injustices—and, on the other, cases where the prosecution of the true offender is handled so incompetently that the tribunal of fact is left with no option but to acquit or the jury ineptly mistakes the point of the prosecution case—which could be regarded as injustices.[199]

In his view, it is not correct to treat as an unjustified acquittal cases in which the real offender is acquitted because the trier of fact retains doubts about the prosecution evidence.[200] Instead, Greer seems to suggest that release of a real offender should not be treated as a case of miscarriage of justice where it is a result of proper application of the law.[201]

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[196] For sources, consequences, and managing errors of impunity see ibid., at 22-30.
[197] Ibid., at 23.
[198] Ibid., at 4.
[199] Greer, "Miscarriages of Crim. Just.," at 66.
[200] Ibid., at 65.
[201] However, for Greer where a real offender escapes conviction and criminal liability due to exclusionary rules of evidence the procedural law has resulted in unjust acquittals thereby contributing to the occurrence of miscarriage of justice. Ibid., at 63. On the other hand, where the prosecutor's decision not to charge the suspect is 'genuinely' based on public interest, there is no miscarriage of justice. There would be so, where the prosecutor uses public interest as a pretext for his decision. Ibid., at 64-65.

3.3. Major Policy Issues Relating to Truth and Criminal Justice

Although there is a general consensus on the vital place of truth in criminal justice, scholars disagree about fundamental questions revolving around this critical goal. Three of the questions are treated below. The first is the role of truth *vis-à-vis* other values in criminal justice. The second is identifying a better way of discovering truth. Because a criminal justice system cannot be free from error, the third question relates to which of the two errors—error of due process and error of impunity— is more undesirable than the other.

3.3.1. Truth versus other Values of Criminal Justice

There is no consensus as to the place of truth in the criminal justice system. Some argue that truth should always be given priority over other values. Others contend that truth is not necessarily the most important value of criminal justice.

For some, "subordination of the truth to any other value is indefensible; when truth is not discovered, or its implications ignored, the system necessarily fails in its mission."[202] For those who espouse this approach, what is most important is that the criminal process brings about accuracy of result. Rights of the accused are recognized on the assumption that protection of those rights advances the truth-seeking process. Amar argues that criminal procedure provisions of a constitution are meant "to protect the innocent. The guilty, in general, receive...protection only as an incidental and unavoidable by-product of protecting the innocent because of their innocence."[203] As construed by Dressler, this view suggests that a rule of law which calls for the exclusion at trial of trustworthy evidence simply because it was illegally secured by the police is an imprudent rule.[204]

The opposing view is that the criminal justice system should not focus exclusively on the truth-finding process. Indicating that this view is more acceptable than the one discussed above, Dressler states:

> Many observers would claim that the truth is too expensive if it is obtained by government use of torture or violation of other important human rights. In such circumstances society may consider it preferable to allow a potentially guilty party to go free—either out of respect for the accused's human rights, concern about the moral integrity of the justice system, or as a means of deterring future official abuses—than to use tainted evidence to obtain a conviction.[205]

In his article "Miscarriages of Criminal Justice Reconsidered," Greer concludes that "...the pursuit of truth should be seen as a second rather than a first order priority of criminal trial." [206] Similarly, Blackmun notes that "the accusatorial system of justice

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[202] Dressler, *Understanding Crim. Pro.*, at 31.
[203] Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* (New Haven: Yale University Press, 1997), at 154 (cited in Dressler, *Understanding Crim. Pro.*, at 31) (hereafter Amar, *The Constitution and Crim. Pro.*).
[204] Dressler, *Understanding Crim. Pro.*, at 31.
[205] Ibid.
[206] Greer, "Miscarriages of Crim. Just.," at 74.

adopted by the Founders affords a defendant certain process-based protections that do not have accuracy of truth-finding as their primary goal."[207]

In particular in regard to constitutional law, many would agree with the observation that "the pursuit of truth...is not the only, or even, perhaps, the most important, principle at work...."[208] Forst suggests that constitutional criminal procedure provisions are designed not only to protect the innocent but also "to prevent excessive intrusions against everyone, including those who violate the law."[209]

As observed by one English Court, "truth, like all other things, may be loved unwisely—may be pursued too keenly—may cost too much."[210] In support of this view, the Law Reform Commission of Canada notes that "truth must find its place in the context of a larger concern to do justice."[211]

3.3.2. How to Discover the Truth: Adversarial Versus Inquisitorial Systems of Justice

Any criminal process is triggered by a commission or alleged commission of a crime. It enables the society to identify and punish the criminal, thereby serving its purpose of enforcing the substantive criminal law. Any system of criminal justice believes that the guilty should be punished and the innocent should not be affected.[212] It follows that discovery of the truth is a fundamental aim for any criminal justice system.[213] In fact, discovery of the truth is a necessary prerequisite for one of the functions of the law of criminal procedure—enforcement of substantive criminal law—to be served. Criminal justice systems differ in their fundamental assumptions regarding the best way of revealing the truth. There are two broad approaches to achieving the goal of rational fact finding: the adversarial and inquisitorial systems.

In the following two paragraphs, Reichel shows that both systems are linked with societal evolution.

> The Adversarial system is often considered the successor to 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

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[207] *Sawyer v. Whitley*, 505 U.S. 333, 356 (1992) (cited in Dressler, *Understanding Crim. Pro.*, at 31 note 35).
[208] Dressler, *Understanding Crim. Pro.*, at 31.
[209] Forst, *Errors of Justice*, at 10.
[210] *Pearse v. Pearse*, 63 Eng. Rep. 957, 970 (1846) (cited in Dressler, *Understanding Crim. Pro.*, at 31).
[211] Law Reform Commission of Canada, *Our Criminal Procedure*, Report 32 (Ottawa: Law Reform Commission of Canada, 1988) at 10 (cited in Dressler, *Understanding Crim. Pro.*, at 31).
[212] Nico Jörg, Stewart Field, and Chrisje Brants, "Are Inquisitorial and Adversarial Systems Converging," 1995, in P. Fennell et al., eds., *Criminal Justice in Europe: A Comparative Study* (Oxford: Clarendon Press, 1995), at 42 (hereafter Fennel et al., *Crim. Just.)* (cited in Philip L. Reichel, *Comparative Criminal Justice Systems: A Topical Approach*, 5th ed. (Upper Saddle River: Prentice Hall, 2008) at 165 (hereafter Reichel, *Comp. Cr. Just.*).
[213] Ibid.

> 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 as adversaries.
>
> The inquisitorial process also shows societal evolution but along a different path. Here the wronged person is eliminated as 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."[214]

In the adversarial system, "a contest between two equal parties, seeking to resolve a dispute before a passive and impartial judge, with a jury...pronouncing one version of events to be the truth"[215] takes place. Goodpaster describes the trial stage of an adversarial criminal justice as "a regulated storytelling contest between champions of competing, interpretive stories."[216] In this system, the parties in dispute present their versions of the events to a passive and impartial judge who will finally decide on who wins and who loses.

Under the Inquisitorial system, "the investigation of an event and the persons involved in that event...is conducted by the state."[217] The judge, instead of serving as a passive decision maker leaving the matter to the parties to investigate and present the facts, conducts the factual and legal investigation himself. Thus, the judge is said to be "at the center of the fact gathering process."[218] The state appears in two capacities in the criminal process—as the "'fact-collecting' prosecutor on the one hand and, on the other, as an impartial and independent judge actively involved in truth finding."[219] A trial in this system is more like a continuing investigation rather than a battle between opposing sides. The parties simply provide a list of evidence in support of their positions. Then the judge, not the attorneys for the parties, calls and examines witnesses.

Each system has proponents who claim it is the best means of revealing the truth. Some argue that an adversarial system is appropriate, for "truth is best discovered by powerful statements on both sides of the question."[220] In their view, this is the only way to prevent

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[214] Ibid., at 165-66.
[215] Fennel et al., *Crim. Just.*, at 42.
[216] Gary Goodpaster, "On the Theory of American Adversary Criminal trial," 78 *J. Crim. L. & Criminology* 120 (1987) (cited in Dressler, *Understanding Crim. Pro.*, at 32).
[217] Fennel et al., *Crim. Just.*, at 42.
[218] Reichel, *Comp. Cr. Just.*, at 166.
[219] Fennel et al., *Crim. Just.*, at 42.
[220] *United States v. Cronic*, 466 U.S. 648, 655 (1984) (quoting Lord Eldon in Kaufman, "Does the Judge Have a Right to Qualified Counsel?," 61 *A.B.A. J.* 569 (1975) in Dressler, *Understanding Crim. Pro.*, at 33; Ex p Lioyd (1822) Mont 70, 72 n. (cited in Sanders and Young, *Crim. Just.*, at 14).

an arbiter from judging a controversy too swiftly with the possible risk of reaching at unreliable conclusion.[221] According to proponents, the adversarial process is a free and open competition between the parties as to who has the correct facts that leads to truth.[222] Other supporters argue that "real equality of parties and the dialectical process of persuasion involved in courtroom procedure will somehow lead to truth emerging."[223]

Others opine that "the adversarial process is not conducive to a reliable verdict."[224] They contend that this system attains truth "only as a convenience, a byproduct, or an accidental approximation."[225] If what is needed is the truth, in their view, "the judge should take a more active role at trial."[226] Moreover, if truth has to be discovered, they suggest that reliable evidence including the defendant's own trial testimony, even where obtained involuntarily, should not be suppressed.[227]

Though inquisitorial systems are portrayed "as involving a preeminent commitment to search for the truth,"[228] there is a risk that the "inquisitor" may come to favor one particular view of the matter,[229] thereby impacting the accuracy of the final verdict and legitimacy of the system questionable. The reliability of the system requires "an inordinate amount of faith in the integrity of the state and its capacity to pursue truth unprompted by partisan pressures of individual self-interest and untrammeled by equality of arms."[230] Experience shows that jurisdictions with this system have been compelled to take measures in response to the inquisitor's failure to rise to the system's expectations.[231]

Because adversarial systems emphasize the parties' responsibility to prove their case, there is a risk that proceedings under these systems can lose sight of the truth. First, parties on either side might have an interest in hiding the truth; for example, one or both might deliberately suppress relevant evidence for tactical reasons. Second, the accused may lack adequate resources or access to expertise needed to counterbalance the arguments of his opponent.[232]

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[221] Dressler, *Understanding Crim. Pro.*, at 33.
[222] Reichel, *Comp. Cr. Just.*, at 169.
[223] Fennel et al., *Crim. Just.*, at 42.
[224] Gary Goodpaster, "On the Theory of American adversarial Criminal Trial," 78 J. *Crim. L. & Criminology* 121-22 (1987) in Dressler, *Understanding Crim. Pro.*, at 34.
[225] Marvin E. Frankel, "The Search for Truth: An Umpireal View," 123 *U. Pa. L. Rev.* 1037 (1975) in Dressler, *Understanding Crim. Pro.*, at 34.
[226] Dressler, *Understanding Crim. Pro.*, at 34.
[227] Ibid.
[228] J. McEwan, "Adversarial and Inquisitorial Proceedings," in R. Bull and D. Carson (eds.), *Handbook of Psychology in Legal Contexts* (Chichester: Wiley, 1995) (cited in Sanders and Young, *Crim. Just.*, at 15) (hereafter McEwan, "Adversarial and Inquisitorial Proceedings").
[229] Sanders and Young, *Crim. Just.*, at 14.
[230] Fennel et al., *Crim. Just.*, at 43.
[231] "The problem of abuse in the inquisitorial system, and doubts about the effectiveness of the judge d'instruction led to their abolition in Germany in 1975. Corruption amongst investigative judges led to abolition in Italy in 1988." Sanders and Young, *Crim. Just.*, at 17.
[232] J. McEwan, "Adversarial and Inquisitorial Proceedings," (cited in Sanders and Young, *Crim. Just.*, at 15).

Another aspect of the difference between the adversarial and inquisitorial systems relates to the role of the government and the suspect in the process of discovering the truth. An adversarial system of criminal justice is founded on the belief that "the government seeking to punish an individual must produce the evidence against him by its own independent labors."[233] In its pure form, this system requires the government to shoulder the entire load. It follows that the government may not convict a person by obtaining evidence of guilt from him involuntarily. As a reflection of the government's entire responsibility in proving the case against the suspect, the suspect is presumed to be innocent and need not assist those who would convict him. [234] On the contrary, the inquisitorial system in its most extreme form, allows the government to collect evidence against the accused by coercion.[235] This system empowers the judge to compel an accused to testify against himself.[236]

In reality, it is not possible to find a purely adversarial or inquisitorial system. The U.S. system, a typical adversarial one, requires the accused to assist the government in the truth-seeking process through participating in a line-up, having his blood extracted and tested, and being finger printed. As indicated by the U.S. Supreme Court, the U.S. system of justice "is, and has always been, an inquisitorial one at the investigatory stage."[237] There are limits to the inquisitorial system as currently practiced. For example, no jurisdiction with an inquisitorial system expressly authorizes compulsory self-incrimination. In practice, then, whether a given jurisdiction has an "adversarial" or "inquisitorial" system of justice is a matter of degree; the question is whether the system is *more* accusatorial or inquisitorial, not whether it is purely one of the two.[238]

3.3.3. Whether Error of Due Process and Error of Impunity are equally undesirable

As discussed above, it is humanely impossible to make the criminal justice system error free. The question then is whether the system should be designed in such a manner that it prefers erroneous conviction to erroneous acquittal or *vice versa* – or should it be indifferent to both types of errors?

Whereas the civil law uses a "guilt-innocent neutral"[239] approach to error allocation, the common law tradition prefers an "innocent-weighted" approach. The common law's preference to acquittal of the guilty to conviction of the innocent is expressed in different ways. In one case, a U.S. Supreme Court Justice is quoted to have said, "it is far worse to

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[233] *Miranda v. Arizona*, 384 U.S. 534, 541 (1966) (cited in Dressler, *Understanding Crim. Pro.*, at 32).
[234] Abrham S. Goldstein, *"Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure,"* 26 *Stan. L. Rev.* 1017 (cited in Dressler, *Understanding Crim.Pro.*, at 32).
[235] Sanders and Young, *Crim. Just.*, at 14-15.
[236] Dressler, *Understanding Crim. Pro.*, at 33.
[237] *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991) (cited in ibid).
[238] For more on convergence of the two systems see: Fennel et al., *Crim. Just.* (cited in Reichel, *Comp. Cr. Just.*, at 41-56).
[239] Tom Stacy, "The Search for the Truth in Constitutional Criminal Procedure," 91 *Colum. L. Rev.* 1407 (1991) (cited in Dressler, *Understanding Crim. Pro.*, at 29).

convict an innocent man than to let a guilty man go free."[240] Similarly, Blackstone claimed that "the law holds that it is better that ten guilty persons escape, than that one innocent suffer."[241] Maimonides argued that "it is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death."[242] Under this view, protecting the innocent is more important than convicting the guilty.

Hence "a process that devises an even playing field is in fact improperly balanced; rather the law should place a heavy thumb "on the defendant's side of the scales of justice."'[243] That is to be done through recognizing rights of the accused, such as the presumption of innocence. By recognizing this presumption, the criminal procedure "deliberately places the risk of factual error on the state to protect the integrity and moral force of a guilty verdict."[244] The presumption of innocence is described as "the main theoretical safeguard"[245] to minimize the risk of erroneous conviction. This presumption places the burden of proof on the prosecution and requires the prosecution to meet a high standard of proof—proof beyond reasonable doubt.[246] Thus, Greer maintained that "the innocent have an absolute right to acquittal but the 'right of society' to convict the guilty is conditional upon the satisfaction of certain rigorous tests."[247]

Others argue that "from a purely retributive perspective the two forms of error are equally wrong: it is wrong to punish an innocent person, but it is equally unjust for a guilty person to avoid paying his debt to society."[248] Those who advocate this utilitarian view even go as far as suggesting that erroneous acquittal is more dangerous that erroneous conviction. For them, "a system of rules that makes it easier for guilty people to go free may send a dangerous message to would-be offenders; and the wrongful release of particularly dangerous individuals may result in more societal pain than is caused by the infliction of punishment of an equal number of innocent persons."[249]

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[240] *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (cited in Dressler, *Understanding Crim. Pro.*, at 30).

[241] William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Oxford: Clarendon Press, 1765), at 358 (cited in Dressler, *Understanding Crim. Pro.*, at 30). This was confirmed in *Hobson*, decided in 1823, where Holroyd, J. stated that "it is a maxim of English law that 10 guilty men should escape rather than one innocent man should suffer." 1 Lew CC 261 (cited in Sanders and Young, *Crim. Just.*, at 10). Giving priority to protection of "the factually innocent from wrongful conviction over bringing the factually guilty to justice" is said to be the rhetoric of English Criminal Justice. Dressler, *Understanding Crim. Pro.*, at 10.

[242] Maimonides, Sefer Ha'Mitzvot [Book Of Commandments], Negative Commandment 290 in Boaz Sangero, "Miranda is not Enough: A New Justification for Demanding 'Strong Corroboration' to a Confession," 28 *Cardozo L. Rev.* 2791, at 2821(2006-2007) (hereafter Sangero, "Miranda is not Enough").

[243] Barbara D. Underwood, "The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases," 86 *Yale L.J.* at 1299 (1977).

[244] Arenella, "Rethinking the Functions," at 197.

[245] Sanders and Young, *Crim. Just.*, at 10.

[246] Ibid., at 10-11.

[247] Greer, "Miscarriages of Crim. Just.," at 74.

[248] Dressler, *Understanding Crim. Pro.*, at 30.

[249] Ibid. For more on the debate see Jeffrey Reiman and Ernest van den Haag, "On the Common Saying that it is Better that Ten Guilty Persons Escape than that One Innocent Suffer: Pro and Con," 7 *Soc. Phil. & Policy*, at 226 (cited in Dressler, *Understanding Crim. Pro.*, at 30, note 29).

Note on the Relation between Resources and Criminal Justice

"None of the great thinkers," says Forst, "has yet discovered a way to eliminate due process errors without incurring unacceptably high crime and resource costs."[250] Resources play a vital role in the smooth functioning of any criminal justice system. In a resource-constrained jurisdiction, because the capacity of the police to collect evidence is limited, the chance is low of obtaining adequate evidence in a lawful manner against one who has committed a crime. On the contrary, in jurisdictions where there are (relatively) adequate resources, the police have a higher chance of finding available evidence without violating the law.

In resource-constrained jurisdictions, the difficulty of collecting evidence in a lawful manner can result in a strong temptation to resort to unlawful or coercive methods of investigation, such as compelling a suspect to confess. Thus, in jurisdictions with inadequate resources to conduct the necessary investigation, either the police will not have adequate evidence or they may have to resort to unlawful or coercive methods of investigation to obtain evidence. Both scenarios increase the chance for real offenders to escape and for innocent persons to be convicted.

On the other hand, in jurisdictions where there is no shortage of resources, normally the police will not have any difficulty collecting adequate evidence in a lawful way. Hence, the risk of real offenders escaping or innocent persons being convicted will be minimal. These explain Richard Posner's contention that "unless the resources devoted to determining guilt and innocence are increased, the only way to reduce the probability of convicting the innocent is to reduce the probability of convicting the guilty as well."[251]

Notes and Questions

1. Are the criminal procedure provisions of constitutions and other international human rights instruments intended to protect innocent persons who might be wrongly accused or both the innocent and real offenders who are subject to the justice machinery? Some argue that criminal procedure constitutional provisions are intended to protect only the innocent – and not real criminals.[252] Those who advance this position contend that real criminals benefit from the human rights of the accused only because they are presumed innocent until the court declares them guilty of the crime, and in the meantime, it is impossible to know whether they are guilty or not. That is, had there been a means to know in advance that a person is actually guilty, they would not have been afforded the same rights. Others argue that the rights are properly afforded to any accused regardless of whether he committed the crime. For proponents of this idea, the provisions of criminal procedure are designed not only to protect the innocent, but also to prevent excessive intrusions against everyone, including those who violate the law.[253] Those

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[250] Forst, *Errors of Justice,* at 21.
[251] Richard A. Posner, *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990) at 216 (cited in Dressler, *Understanding Crim. Pro.*, at 30).
[252] Amar, *The Constitution and Crim. Pro.* (cited in Dressler, *Understanding Crim. Pro.*, at 31).
[253] Forst, *Errors of Justice*, at 10.

who argue that the provisions apply only to innocent persons find an error of due process only if the provisions are breached in criminal proceedings against factually innocent persons. No error of due process occurs where these provisions are "violated" in criminal proceedings against factually real criminals. In contrast, under the opposing view there is error of due process whenever the provisions are not respected, regardless of whether the criminal proceeding involves factually real criminals or innocent persons.

2. Which of the two errors of justice is worse than the other? Is it worse to convict an innocent or to acquit the real offender? Or are they equally undesirable, so that it is acceptable for the criminal justice system to be indifferent to both errors? Where a crime is committed and an innocent is convicted (error of due process) the conviction also necessarily implies an error of impunity because the real offender has escaped conviction and punishment. It is only where an innocent is convicted without a crime having being committed that such an error does not result in an error of impunity.

3. How compatible are the values of the Due Process and Crime Control Models? Does the due process requirement advance or obstruct the crime-control function of the criminal justice system? Should due process values necessarily be sacrificed for the criminal justice system to effectively serve a crime-control function? For Posner, it depends on the availability of resources. In a resource-constrained jurisdiction, respect for due process increases the chance of acquittal for real offenders, thereby affecting the crime-control function of the criminal justice system. Where there is no resource constraint, due process does not significantly affect the crime-control function. Insofar as an error of due process implies an error of impunity, it is difficult to see how an increase in errors of due process (being at the same time an increase in errors of impunity) can advance the crime-control function of criminal justice. Even in cases where an error of due process is committed without a corresponding error of impunity, it will have a counterproductive effect on the overall crime-control function of the law. In *In re Winship*, the U.S. Supreme court declared that "the moral force of the criminal law [is] diluted by a legal process that leaves people in doubt whether innocent men are being condemned."[254]

4. The FDRE Constitution recognizes the presumption of innocence as one of the fundamental rights of accused persons. The presumption has two aspects, both of which are important safeguards against erroneous convictions. First, the presumption imposes the burden of proof on the public prosecutor; second, it requires a high standard of proof to be met by the prosecution – namely, beyond reasonable doubt.[255] The Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No.

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[254] *In re Winship*, 397 U.S. at 364 (cited in Dressler, *Understanding Crim. Pro.*, at 30).

[255] Sanders and Young, *Crim. Just.*, at 10-11; UN Human Rights Committee, General Comment No. 32, Article 14, Right to Equality before Courts and Tribunals and to Fair Trial, 23 August 2007, available at: http://www.unhcr.org/refworld/docid/478b2b2f2 (accessed October 9, 2011).

434/2005[256] includes a provision that lowers the standard of proof that the prosecution is required meet. The Criminal Code[257] includes a provision that reverses the burden of proof. Do these provisions suggest that with respect to corruption offences error of due process and error of impunity are equally undesirable? If so, do you see any possible justification for making the choice between erroneous acquittals and erroneous convictions dependent on the type of crime?

[256] Its Article 33 on presumption of intent provides: "the standard of proof required todetermine any question arising as to whether a person has benefitted from criminal conduct, or the amount to be recovered shall be that applicable in civil proceedings."

[257] Its Article 403 on "presumption of intent to obtain advantage or to injure" provides: "unless evidence is produced to the contrary, where it is proved that the material element (the act) has been committed as defined in a particular Article providing for a crime of corruption perpetrated to obtain or to procure undue advantage or to cause injury, such act shall be presumed to have been committed with intent to obtain for oneself or to procure for another an undue advantage or to injure the right or interest of a third person."

PART TWO
CRIME REPORTING AND POLICE INVESTIGATION

One of the functions of the law of criminal procedure is to enforce the substantive criminal law. However, the justice machinery can only begin to identify and punish the criminal only when the authorities are aware that a crime has been committed. A police officer on patrol may witness the commission of only a fraction of crimes that occur in the area.[258] In contrast, only rarely do crimes remain unknown to the public. Hence, for the criminal justice to function properly, there is a need for a link to be established between the public—the source of information—and the police. As stated in a U.S. government report, "without prompt crime reporting by citizens, the chance of apprehending criminals diminishes significantly."[259] One of the major areas that the law of criminal procedure regulates is the different ways through which the police receive information about the commission of crimes.

Once the police receive information about the commission of a crime,[260] they are required to conduct an investigation in accordance with the law. The law of investigation deals with proper ways of bringing the suspect before the court or police and of collecting evidence relating to the alleged crime. It aims at balancing the human rights of the suspect against the interest of the state in collecting evidence and deals with the substantive and procedural conditions for arrest, interrogation, and search and seizure.

This part of the book, which is comprised of seven chapters, deals with the different ways the police receive information about the commission of a crime; the legally prescribed methods for conducting investigation activities; other procedural matters that arise during investigation; and the effect of non-compliance with prescribed methods of investigation and procedure.

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[258] A study in the United States indicated that the proportion of crime directly discovered by the police may be less than six percent of the total crime committed. Rob I. Mawby, "Witnessing Crime: Toward a Model of Public Intervention," 7 *Crim. Just. & Behav.* 437, at 443 (1980).

[259] Bureau of Justice Statistics, U.S. Dep't of Justice, *Report to the Nation on Crime and Justice* (1983), at 7 (cited in J. Wenik, "Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime," 94 *Yale L. J.*, at 1787 (1985) (hereafter Wenik, "Forcing the Bystander"). The vitality of reporting to the criminal justice system is capitalized by Feinberg. Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, 1984) (cited in J. Bagby, "Justifications for State Bystander Intervention Statutes: Why Crime Witnesses should be Required to Call for Help" 33 *Ind. L. Rev.* 571, at 580 (2000) (hereafter Bagby, "Justifications for State Bystander Intervention Statutes").

[260] Criminal investigation is not necessarily confined to crimes which have already been committed. It can be conducted where there is information that a certain criminal activity is planned or started but not completed. Criminal Justice Policy, Section 3.4.

Chapter Three

Reporting the Commission of a Crime

Section I. Setting Justice in Motion

Because justice machinery is assumed to be always in motion,[261] the phrase "setting justice in motion" used in the Cr. Pro. Code[262] seems an inaccurate or at least vague designation. Reference to the Amharic translation (which is binding)[263] clarifies the meaning of the phrase: it means starting investigation and prosecution. So, setting justice in motion refers to making the justice machinery start operating with respect to a particular offence.[264] The Cr. Pro. Code classifies offences into two types for purposes of how to set justice in motion: ordinary (non flagrant) and flagrant offences. The procedure for setting justice in motion for ordinary offences is found in Code Articles 11–18; the procedure applicable to flagrant offences is provided in Articles 19–21.

1.1. Ordinary Offences

It was once stated that "the most important opportunity available to the average citizen in his attempt to reduce crime was to report all crime to the police."[265] The Code provides mechanisms of citizen participation through communicating the commission of a crime to the police. Whether a citizen's participation is a right or a duty depends on the type of offence committed. The commission of certain offences gives rise to an obligation on the part of those who are aware of the commission of the offence to report it to the police. Other types of offences give rise only to a right to report to the police. The commission of a third category of offences entitles only a specific category of citizens to report their commission. The latter types of offences are known as offences which are punishable only upon formal complaint.

1.1.1. Right to Report

The objective of the Code is "to ensure order, peace and the security of the State, its people, and inhabitants."[266] Ensuring peace and security of the state and the people is in the interest of every peace-loving citizen and inhabitant. It follows that enforcement of the criminal law is in their interest. The corollary of this is that any crime – conduct that frustrates this golden aim of the law – prejudices the interest of citizens. Thus, they have an interest to see to it that anyone who transgresses the law and jeopardizes their peace

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[261] Semeneh, *Crim. Proc. Law*, at 89.
[262] See title of Book II, Title I, Chapter 1, 1961 Crim. Pro. Code.
[263] Negarit Gazeta Establishment Proclamation, Proc. No. 1/1942, Fed. Neg. Gaz., year 1, no. 1.
[264] Semeneh, *Crim. Pro. Law*, at 89.
[265] The President's Commission on Law Enforcement and Administration of Justice, in Robert E. Meale, "Misprision of Felony: A Crime Whose Time has Come, Again," 28 *U. Fla. L. Rev.* 199, at 209-210 (1975) (hereafter Meale, "Misprision of Felony.")
[266] Criminal Code, Article 1.

and security is brought before justice. Consequently, any person has the right to report an offence to the authorities[267] whether or not he has witnessed its commission, so the criminal will be brought to justice.[268]

Because crime, as opposed to fault in the civil context,[269] is a public wrong, state authorities are in charge of handling criminal proceedings.[270] This does not preclude citizens from reporting the commission of crime.[271] While processing a known criminal case is a public proceeding, setting justice in motion is not. Thus, when a crime is committed, everyone has the right to report this fact to the authorities concerned.

1.1.2. Duty to Report

It is not on all offences that citizens have a right to report. The commission of certain crimes creates a duty to report on those who are aware of it. These types of crimes are identified in Articles 254, 335 and 443 of the Criminal Code. The first two provisions refer to specific crimes, while the third one is of more general application. Article 254 requires reporting of the commission, attempt to commit, or preparation to commit crimes against the Constitution or the state identified in Articles 241-243, injurious and insulting conduct to the state identified in Articles 244 and 245, and crimes against the external security and defensive power of the state identified in Articles 246, 252-258.[272] Article 335 requires one who is aware of plans to commit or the commission of mutiny or desertion to report to the authorities.[273]

Another provision that requires reporting of the commission of a crime is Article 443 of the Code. Subarticle 1(a) imposes an obligation to report commission of a crime of whatever nature that is punishable by death or rigorous imprisonment for life. The obligation extends to anyone who is aware of the commission of the crime. Subarticle (b), instead of creating a duty to report, simply cross-references the obligation of those who are specifically required by another law or rules of their profession to notify the authorities of certain crimes or certain grave facts.

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[267] As provided under Article 16 (1) of the Cr. Pro. Code, the police and the public prosecutor are the competent authorities to report to. If the report concerns a young person, it has to be made to the court. Cr. Pro. Code, Arts. 172 and 173.

[268] Article 11 (1) of the Code reads: "any person has the right to report any offence, whether or not he has witnessed the commission of the offence, with a view to criminal proceedings being instituted."

[269] For the definition of fault see Article 2030 of the 1960 Civil Code.

[270] Article 211 of the Criminal Code. Right of Complaint or Accusation in General
(1) Prosecution with a view to a judgment — is a public proceeding and is instituted by the public prosecutor in all cases where the law does not otherwise expressly provide.

[271] Article 211 of the Criminal Code. Right of Complaint or Accusation in General
(2) Prosecution by the public prosecutor does not exclude the right of lodging a complaint or accusation to the competent public authorities

[272] Note that where the crime has not yet been committed, Article 254 of the Criminal Code requires the concerned person to prevent the commission of those crimes to the best of his ability.

[273] Note that the provision imposes an obligation on the concerned person to try his best to prevent the commission of the crimes where that is feasible.

The Anti-Terrorism Proclamation[274] imposes a duty to report on anyone who has *information or evidence* that is helpful in preventing commission of a terrorist act or in arresting one suspected for a terrorist act.

Duty to Report and the Knowledge Requirement

The criminal law provisions discussed above impose a duty to report on anyone who is aware of or knows about the commission or preparation of the specified offences. When is one said to be *"aware of"* or *"know"* these facts? Is personal knowledge or firsthand information necessary? What degree of knowledge about the commission of a crime gives rise to the obligation to report or to criminal liability for failing to do report the crime? Is the answer the same for purposes of Article 12 of the Anti-Terrorism Proclamation? The concept of *"willful blindness"* in England and in the United States "attributes knowledge to a person who suspects the existence of a situation that might render his conduct criminal."[275] This notion of *"willful blindness"* requires a person who suspects commission of any crime that gives rise to a duty to report to verify his suspicion and report if the facts confirm his suspicion. On the other hand, R.E. Meale argues that "it is necessary that any rationale misprision statute demand that the reporter's knowledge of the crime be the result of direct, personal observation, in order to guarantee greater accuracy in reporting as well as to avoid placing too burdensome a duty on the would-be reporter"[276] Similarly, in *Sykes v. Director of Public Prosecutions*, the House of Lords employed the notion of "just limitations" to the offence of misprision and required "a personal, reasonable knowledge – not mere gossip or rumor."[277] The U.S. state of Ohio's criminal statute stating, "No person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities,"[278] was criticized for being overly broad and vague. According to the critics, the statute's failure to define "knowledge" leaves open the possibility that persons with only second-hand information concerning a crime, or perhaps with only mere rumor or suspicion of crime, may be under an obligation to report.[279] Do the above approaches of foreign jurisdictions give helpful guidelines on how to construe "knowledge" or "being aware of" under Articles 254, 335 and 443 of the Criminal Code?

Duty to Report and Confidentiality

The impact of crime-reporting laws on trust relationships is immense. If the information that must be reported is obtained in the context of a trust relationship (professional, family

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[274] Anti-Terror Proc., Art.12.

[275] Miriam Gur-Arye, "A Failure to Prevent Crime – Should it be Criminal?," 20 *Crim. Just. Ethics* 3, at 12 (2001) (hereafter Gur-Arye, "A Failure to Prevent Crime"). For the meaning of "willful blindness" see Andrew Ashworth, *Principles of Criminal Law* (Oxford: Clarendon Press, 1991), at 161-168 (cited in ibid., at 28, note 102).

[276] Meale, "Misprision of Felony," at 212.

[277] Wenik, "Forcing the Bystander,"

[278] Ohio Rev. Code Ann., at 1982, para. 2921.22 (cited in ibid., at 1803).

[279] Wenik, "Forcing the Bystander," at 1803.

tie, or close friendship), a dilemma exists whether to obey the law and breach the trust or breach the law and remain faithful to the trust. R.E. Meale suggested that such laws not be applicable in the context of communications between doctor and patient, lawyer and client, priest and parishioner, and the like.[280] J. Wenik[281] disagrees, saying that these professionals have a duty to protect society against crime and thus should not have the right to conceal information about criminality.

In fact, only few legal systems that impose a notification duty grant exemption to trust relationships. Paragraph 137 of the criminal code of the Netherlands and paragraph 19 of the Finnish criminal code fully exempt family members of various degrees; paragraph 139(3) of the German criminal code provides that the exemption granted to family members does not apply to particularly serious offences like homicide.[282]

Whenever there is a duty to report under Articles 254 and 335 of the Ethiopian Criminal Code, official or professional secrecy is not recognized as a defence for failure to report. Article 335, unlike Article 254, recognizes kinship or close ties as a defense provided that the crime is not committed in times of emergency or general mobilization of war. Article 443 of the Criminal Code recognizes any "good cause" which perhaps includes professional or official secrecy and kinship as a defence. How can such differences among Articles 254, 335 and 443 of the Criminal Code be explained?

1.1.3. Reporting Private Offences

The following two paragraphs are taken from Philippe Graven's article[283] on offences that are to be investigated and prosecuted only where a formal complaint is lodged by the victim.

> There are offences 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 thereby 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.
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> In these situations, the institution of criminal proceeding 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.

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[280] Meale, "Misprision of Felony," at 212.
[281] Wenik, "Forcing the Bystander," at 1804.
[282] Gur-Arye, "A Failure to Prevent Crime," at 10, note 84.
[283] Philippe Graven, "Prosecuting Criminal Offences Punishable Only upon Private Complaint," 2 *J. Eth. L*, at 121 (1965).

The offences which are described as punishable only where a complaint is made by the victim can be identified from the reading of provisions dealing with such offences – the provisions clearly indicate that the offence is punishable upon complaint. As provided under the Criminal Code, "where the law in the Special Part of this Code or in any other legislation that complements criminal law provides that a crime is punishable upon complaint, no charge shall be instituted against the criminal unless the injured party or his legal representative institutes a complaint."[284]

Crimes which predominantly affect private interests are referred by both the Criminal Code[285] and the Cr. Pro. Code[286] as "*offences punishable only upon formal complaint.*" The phrase implies that it is only infliction of punishment that is conditioned on formal complaint. However, formal complaint is a necessary condition for the whole criminal proceeding, from investigation to judgment. Article 13 of the Cr. Pro. Code, though inappropriately captioned as "offences punishable on complaint," indicates that the offences are *prosecuted and punished* only upon formal complaint. Still this provision fails to indicate that investigation of such crimes is conditional upon complaint.

1.2. Flagrant Offences

Articles 19 and 20 of the Code include three types of cases within the category of flagrant offences. The first is a "*perfectly*" flagrant offence which refers to a case where "the offender is found committing the offence, attempting to commit the offence or has just committed the offence."[287] The second, which is known as a quasi-flagrant offence, refers to a situation where "after it (the offence) has been committed, the offender who has escaped is chased by witnesses or by members of the public or when a hue and cry has been raised."[288] In the third type (assimilated case), an offence is deemed to be flagrant when "the police are immediately called to the place where the offence has been committed"[289] or "a cry for help has been raised from the place where the offence is being or has been committed."[290]

Article 21 of the Code provides that accusation or complaint is unnecessary for investigation to begin where the offence committed fulfils the requirements of Code articles 19 or 20. As discussed above, justice is usually set in motion either in the form of accusation or complaint; in the absence of reports from citizens, it would be impossible for police officers to be aware of every offence committed. Reporting would become unnecessary, save for private offences, only where the police officer has witnessed the commission of an offence. A close reading of the definitions of flagrant offences reveals

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[284] Criminal Code, Article 122.
[285] Ibid. Article 212
[286] Cr. Pro. Code, Article 13.
[287] Ibid., at Article 19(1).
[288] Ibid., at Article 19 (2).
[289] Ibid., at Article 20 (a).
[290] Ibid., at Article 20 (b).

that none of the offences requires police presence at the time of the commission of the crime. It is not clear how investigation could be started without accusation or complaint if no police officer was present at the scene of the crime.

Article 19(1), apart from specifying that the offender was found at the scene of the crime while attempting, committing or just after committing the crime, no mention is made as to who is to find him. If he is found/caught by a police officer, to disregard the requirement of accusation or complaint is understandable. Otherwise, in order to trigger an investigation, the fact that the offender was found while committing, attempting or just after commission of the crime must be communicated to the police officer by the finder or someone else.

In quasi-flagrant cases, too, there is no way for the police officer to be aware of the commission of the crime unless informed about the crime by a member of the public. What makes an offence "quasi flagrant" is the fact that the offender, who has escaped or left the scene of the crime after committing the offence, is chased by those who have witnessed the commission of the offence, by other members of the public, or when a hue and cry has been raised. Article 19(2) of the Code does not require a police officer to be among the witnesses or those who chase the offender or raise a hue and cry. Hence, the offence can satisfy the conditions under Article 19(2) without being witnessed by the police officer. In this case, information is given to the police by one who is aware of the commission of the quasi-flagrant offence—that information constitutes accusation or complaint.

Article 20 envisages two scenarios which are deemed to be flagrant. In one, the police are immediately called to the place where the offence has been committed. The question arises how "immediate" a call was made in any particular case; since someone has to report the commission of the offence to the police, the act of reporting could arguably constitute accusation or complaint and, depending on circumstances, might fall under Article 12 of the Code. In the second scenario—raising a cry for help from the place where the offence is being or has been committed—the police similarly would be unaware of the commission of such crime unless someone reported it. Therefore, the second scenario also could be said to fall under Article 12 of the Code.

In sum, if flagrancy were limited to commission of an offence in the presence of a police officer, Article 21(1) of the Code, which disregards the importance of accusation or complaint to trigger investigation, would make sense. But, since none of the definitions of flagrant, quasi-flagrant, or assimilated offences requires that the crime be witnessed by a police officer, it is unrealistic to assume that an investigation could be started without accusation or complaint being made. Such a scenario would be practically impossible.

Notes and Questions

1. Two societal interests conflict in the context of reporting the commission of a crime. First is the societal interest in obtaining information regarding the commission of

crimes. Second is the societal interest in ensuring that information given to the police is accurate. Accuracy is important; inaccuracy could injure the reputation of one wrongly accused and could waste police time and resources. Hence, the Criminal Code criminalizes and punishes false accusations under Articles 446 and 447. Article 11(1) of the Code does not require the informant to have witnessed the commission of the crime. How certain should the informant be about the commission of the crime to avoid being charged with false accusation under Articles 446 or 447 of the Criminal Code? Would he automatically be criminally responsible for a false accusation simply because subsequent investigation shows that the information he gave to the police was wrong or because the accused is acquitted?

2. Article 14 of the Code requires the report made to the police, whether an accusation or complaint, to be reduced into writing and signed by the reporter. What purpose does this requirement serve? Is it (and should it be) a necessary condition to start investigation? Or does/should it serve only to guarantee that the information given is genuine and, if the information is found to be inaccurate, to serve as evidence of false accusation? What are the consequences if the reporter refuses to sign? Does it depend on whether or not the crime reported is punishable upon formal complaint? Does a failure to sign simply make the report mere information (neither accusation nor complaint) without having impact on instigating an investigation? Refer to Article 23 of the Cr. Pro. Code.
3. Article 12 of the Code requires investigation to be conducted even if the informant is unknown provided that three conditions are fulfilled. The first condition is related to the gravity of the reported offence: the crime alleged to have been committed must be grave. The other two conditions are related to the credibility of the anonymous accusation: the report has to be circumstantial and credible. What factors should a police officer consider while evaluating an anonymously made accusation with a view to verify the fulfillment of these conditions?
4. Regarding the details of setting justice in motion and other related issues regarding offences punishable upon formal complaint, Article 13 of the Cr. Pro. Code refers to Articles 217-222 and 721 of the 1957 Penal Code. During the drafting of the 2004 Criminal Code, however, the drafters omitted this part of the 1957 Penal Code based on their understanding that matters regulated by those provisions, being procedural in nature, would be made part of the Revised Criminal Procedure Code (which was then in the process of revision). The 2004 Criminal Code thus contains a single provision relating to these offences (providing for a formal complaint to be made by the injured party or his legal representative in order for a charge to be instituted); and the Revised Criminal Procedure Code is yet to be promulgated. Pending the revision, how should matters which were regulated by the repealed provisions of the Penal Code—such as withdrawal of complaint, indivisibility of complaint, and effect of death of the injured person—be treated pending the promulgation of the Revised Criminal Procedure Code?

Section II. Adequacy of the Reporting Mechanisms

In principle, everyone is *entitled* to report that a crime, except those which are punishable upon formal complaint, has been committed. In contrast, the Criminal Code *requires* reporting the commission of a crime only in limited circumstances. Recognizing reporting as a right gives discretion to the citizens. Where reporting is a right, crimes come to the attention of the police to the extent that citizens are not hesitant (for whatever reason) to exercise their right. Several reasons exist, however, why citizens who have the information about the commission of a crime may elect not to report.

2.1. Causes of Underreporting

Social psychology researchers have provided scientific explanations for underreporting of crime. Chief among the factors cited is diffusion of responsibility. The presence of several bystanders disperses individual responsibility and blame for not reporting.[291] This dispersal tends to place the responsibility for the control of criminal activity on specific groups in the population, such as the police or politicians, which discourages bystanders from reporting the crime.[292]

> Closely related to diffusion of responsibility is the tendency of individual behavior to be influenced by the behavior and expectation of others. Bystander behavior reflects this "social influence" in a number of ways. First, the behavior of others serves as a model for bystanders. Thus, the inaction of other witnesses may encourage an individual bystander to do nothing, while positive social influence may encourage certain bystander behavior. Research has found that verbal encouragement and interpersonal influence can increase crime reporting. Second, bystanders sometimes perceive that others are evaluating their reactions and behavior in response to a crime. Calling this concern "evaluation apprehension," researchers have theorized that an anonymous bystander who is immune from negative evaluations is less likely to intervene than one who is not. Thus, the underreporting of crime may be due in part to a lack of perceived social pressure. Finally, social norms play a role in encouraging bystander behavior. For example, the norm of male assertiveness may encourage intervention by males, particularly when in the presence of females.
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> Another factor affecting bystander reactions is the immobilization that occurs due to indecision. Onlookers' failure to intervene is not the result of a conscious decision but rather due to an unresolved internal conflict concerning whether to act, and what course of action to take. This indecision stems from the lack of information available to the bystander.... The more ambiguous the crime, the less likely it is that bystanders will report the situation. Even if a witness determines that an event is a crime, indecision over what type of intervention is necessary

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[291] Contrary to the theory of diffusion of responsibility, some researchers have postulated the existence of a "norm of social responsibility" reinforced by the presence of additional bystanders, which encourages helpful behavior, in this case reporting. Yinon et al., "Escape From Responsibility and Help in Emergencies Among Persons Alone or Within Groups," 12 *Eur. J. Soc. Psychology* 304 (1982) in Wenik, "Forcing the Bystander," at 1789.

[292] Wenik, "Forcing the Bystander," at 1788.

> may result in a complete failure to act. Once informed of the proper course of action, however, a bystander is more likely to intervene.
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> Others in the field have proposed a cost-benefit model of crime reporting suggesting that the bystander weighs the costs and benefits of reporting and then acts accordingly. The bystander will take into account both psychological costs such as guilt, and more tangible ones, such as possible legal repercussions or physical reprisal by the criminal.[293]

Moreover, the inconvenience of going to a police station to report a crime (and taking time out of his own affairs for that period) and later to a court to testify can discourage an information holder from reporting.

Questions

Both federal and state police commissions frequently admit that crime is underreported. They do not have precise information as to the extent of the crimes not reported, nor has a study conducted on the possible reasons for the underreporting. Which of the factors identified in the extract above are likely to cause underreporting in the Ethiopian context and to what extent? With a view to providing protection for whistleblowers and witnesses, the Federal House of Peoples' Representatives passed a Proclamation to Provide for the Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation. This Proclamation lists several protection measures.[294] To what extent do you think this Proclamation addresses some of the causes of underreporting?

2.2. Aptness of Imposing a Duty to Report Commission of Crime

Because there is no guarantee that citizens will voluntarily report crimes and because the police can directly observe only a small portion of criminal acts, it seems necessary to make reporting obligatory from the viewpoint of enforcement of criminal law. However, as discussed in the previous section, Ethiopian law requires citizens to report crime in only a handful of instances. In view of the desire for enhancing reporting, should the law require reporting of "any offence" under pain of punishment? In other words, is widening the scope of the law that requires reporting advisable or not? Can those factors to which underreporting are attributed be addressed by legislation that imposes an obligation to report? Arguments exist both for and against criminalization of failure to report.

2.2.1. Arguments for Criminalization of Failure to Report

The ultimate purpose of a criminal statute is to direct individuals toward socially acceptable forms of behavior through both the deterrent effect of sanctions, and the moral force of criminal law. The capacity of criminal law to encourage positive behavior is

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[293] Ibid., at 1789-1790 (footnotes omitted).
[294] Protection of Witnesses Proc., Article 4.

demonstrated by one study which found that a mandatory child-abuse reporting law produced a significant permanent increase in the reporting of child abuse.[295]

Having identified the possible causes for witnesses of crimes not to report,[296] J. Wenik proposes a statute that imposes a duty to report the commission of crime as a solution to address root causes of underreporting. For Wenik, "a criminal statute is much better suited for the task of increasing crime reporting."[297]

> By limiting its application to those persons who have actually witnessed a felony, the proposed statute avoids the potential for overbroad coverage. At the same time, the proposed statute avoids too limited a scope by providing for the reporting of all types of felonies, rather than just those of violence. Problems of notice are avoided by limiting the reporting obligation to those felonies that are "of such a nature that a reasonable person in the same circumstances would know it to be a serious offence."[298]
>
> Although like any other human behavior, crime reporting may be influenced by a host of variables, mandatory crime reporting would be effective in responding to the main social-psychological factors that lead to underreporting. By informing the public that it is everyone's personal legal duty to report crime, the proposed statute will counter the effect of diffusion of responsibility. Mandatory crime reporting can also serve as a substitute for, or a supplement to, the social influence that traditionally came from sources such as the community, family, and religion. By making the failure to report crime a criminal offence, the proposal combats indecision through its provision of an accepted course of action and its explicit determination that a decision to ignore crime reporting is wrong and socially unacceptable. Finally for those who engage in a cost-benefit analysis prior to reporting a crime, the possibility of a criminal sanction would tilt the balance in favor of reporting."[299]

For some the establishment of modern police institutions cannot excuse citizens from reporting crimes. Kelly argues that "even if the police have assumed primary responsibility for the keeping of the peace, it does not necessarily follow that the crime of 'misprision of felony' has become unnecessary/obsolete. The pressures generated by our crowded urban society have resulted in increased crime and violence and the police alone are unable to protect the peace."[300] Communal responsibility is needed to help the police in their effort to protect society. In this connection, the President's Commission suggests not only that "the law enforcement specialist alone could not control crime, but that the

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[295] Darwin O. Sawyer and Ann Maney, "Legal Reform in Child Abuse Reporting," 5 *Evaluation Rev.* 758, 777 (1981) (cited in Wenik, "Forcing the Bystander," at 1799).
[296] Wenik, "Forcing the Bystander," at 1788-91.
[297] Ibid., at 1798.
[298] Ibid., at 1800.
[299] Ibid., at 1802-03.
[300] Michael Kelly, "Misprision of Felony Not A Crime In Florida," 30 *Miami L. Rev.* 222, at 229-230 (1975) (hereafter Kelly, "Misprision of Felony").

complexity of modern...life should not be allowed to disguise the need for the traditionally active community response to crime."[301]

2.2.2. Arguments against Criminalization of Failure to Report

Two major arguments are advanced against criminalization of failure to report. The first is related with the shift of responsibility for ensuring peace and security of the society from the public to the organized police institution. The other is related to features of the statutory provision criminalizing failure to report.

i. Shift of Responsibility from Community to Police

One of the challenges against laws that impose a duty to report commission of crime is the fact that the police institution is established to protect the people from crimes through prevention and investigation. Because the people contribute, in the form of tax, to the salary of police officers and other expenses of the police institution, it would not be fair to *require* taxpayers to do something that the police are supposed to do.

Literature shows that in the past the public bore responsibility for apprehending and bringing criminals to justice.[302] Anyone above a certain age who witnessed a crime was required to raise a hue and cry, or to approach an officer of the peace who would raise a hue and cry, which would signal the beginning of the chase. However, now that police institutions exist to protect society from criminals, the traditional reason for the requirement to report crime no longer applies[303] The Supreme Court of the U.S. state of Florida once stated that currently, professional police work, not communal responsibility, is relied upon to keep the peace. As argued by the Court, due to this shift in responsibility, the law that requires citizens to report the commission of crime is outdated. [304] It is on the assumption that "an offence grounded upon the public's responsibility to apprehend criminals and bring them to justice was inappropriate to legal systems that placed such responsibility in the hands of an organized police force" that most U.S. states do not impose a general duty to report crimes that have been committed. [305]

ii. Features of the Law Criminalizing Failure to Report

The interpretation by the U.S. federal courts of the duty of reporting incorporated under the federal criminal code of the United States is instructive in depicting the shortcomings of statutes criminalizing failure to report commission of crime. The relevant section of the U.S. federal criminal code stipulates: "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not

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[301] The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, DC: Government Printing Office, 1967), at 97 (cited in Meale, "Misprision of Felony," at 209).
[302] Gur-Arye, "A Failure to Prevent Crime," at 4.
[303] *Holland v. State*, 302 So. 2d 806 (2d D.C.A. Fla. 1974) (cited in Kelly, "Misprision of Felony," at 227).
[304] Ibid.
[305] Gur-Arye, "A Failure to Prevent Crime," at 5.

as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined...or imprisoned...."[306]

The federal courts have refused to define the offence to include entirely omissive non-reporting. Relaying upon the words "conceals and does not make known," the courts have interpreted the offence as requiring that an affirmative act of concealment be committed in addition to failure to provide information about the crime.[307]

Evaluating the suitability of a common law "misprision felony" to contemporary social conditions, U.S. courts[308] have found as a matter of law that misprision is philosophically unsuited to the needs of modern American society and became reluctant to criminalize "merely" negligent failure to report commission of crime. The reasons for the courts to declare misprision as ill-suited to the requirements of modern society include the following characteristic defects of the crime.

Vagueness: Misprision being understood as "the bare failure of a person with knowledge of the commission of a felony to bring the crime to the attention of the proper authorities," the courts[309] found that the definition of the crime was vague in two respects. First, it was impossible for the court to determine the identity of the "proper authorities." Second, it was impossible to know the kind of knowledge of crime—direct or vicarious—for which a person may reasonably be held liable. In *State v. Michaud,* [310] the defendant was charged with misprision for her failure to report to police "her knowledge," which was gained through rumor and gossip rather than direct observation, of a couple's adulterous affair. By requiring that the knowledge be personal rather than second hand, the court construed the crime to presuppose a positive act of concealment.[311]

Gravity of the Offence Whose Concealment Would Merit Prosecution: Misprision refers to one's failure to report the commission of any felony. The courts limit it to the failure to report an exceptionally grave offence which risks a societal interest of paramount importance. In such cases, the courts reason, criminalization of the failure to report a crime is acceptable because society's interest in reducing crime outweighs the individual's interest in preserving his freedom from the responsibility of reporting crime. Where the crime is not that grave, the interest of the individual in preserving his freedom outweighs society's interest in reducing crime, which militates against criminalization of the omission. As stated by Chief Justice Marshall of the U.S. Supreme Court, "it may be the duty of a citizen to accuse every offender and to proclaim every offence which comes

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[306] 18 U.S.C. Sec. 4 (1970) (cited in ibid.).
[307] Gur-Arye, "A Failure to Prevent Crime," at 5. For a survey and examination of the federal cases in this area, see 21 *Am Jur.2d*, Secs. 33 and 146 (cited in ibid., at 24, note 31).
[308] See *Holland v. State*, 302 So. 2d 806, 808 (2d D.C.A. Fla. 1974); *People v. Lefkowitz*, 294 Mich. 263, 270, 293 N.W. 642, 643 (1940) (cited in Meale, "Misprision of Felony," at 201, note 9).
[309] *Holland v. State*, 302 So. 2d 806, 807 (2d D.C.A. Fla. 1974) (cited in Meale, "Misprision of Felony," at 202).
[310] *State v. Michaud*, 150 Me. 479, 114 A.2d 352 (1955) (cited in Meale, "Misprision of Felony," at 205).
[311] Ibid.

to his knowledge; but the law which would punish him in every case, for not performing this duty, is too harsh for man."[312]

Risk of Self-Incrimination: Cases may exist where the obligation to report the commission of a crime might incriminate the reporter himself. In *Commonwealth v. Lopes,*[313] Lopes was charged for his failure to report to the police his discovery of the body of a ten-year-old girl. It was while Lopes and a woman were on a mutually adulterous excursion deep into the Massachusetts woods that they discovered the body. To avoid publicity, both decided to "conceal" their discovery. The court dismissed the charge on the ground that Lopes did not intend by his concealment "to prevent or delay the administration of Justice."

The concerns discussed above led U.S. courts to reinterpret the elements of the crime of misprision and to qualify it in ways that have functionally eliminated the crime by merging it with other crimes such as acting as an accessory after the fact or obstructing justice.[314]

Miriam Gur-Arye analyzes the positive and negative sides of the two arguments on criminalization of failure to report and concludes that criminalization is necessary. For Gur-Aye, the argument that citizens should not be required to report has a powerful downside. Because criminals should not go free, in the absence of a duty on the part of citizens to notify the police about the commission of crime, the police institution must rely on its own resources to collect information about crimes that have been committed. This would require the police to employ undercover agents for surveillance, and to resort to wiretapping and other intrusive methods. Such intelligence-gathering methods would infringe privacy on a broad basis. To encourage the police to refrain from untargeted and routine intrusions for the purpose of gathering information, society should have legislation that obliges its members to report.[315]

Notes and Questions

1. To what extent are the concerns raised by the U.S. courts about misprision as it traditionally existed relevant to criminalization of failure to report commission of crime under Articles 254, 335 and 443 of the Criminal Code?

   Assume that, while committing another crime, one discovers the commission of any one of the offences covered under Articles 254, 335 or 443 of the Criminal Code. If reporting the crime would lead the police to discover that the reporter has committed a

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[312] *Marbury v. Brooks*, 20 U.S. (7 Wheat.) 556, 575-76 (1822) (cited in Meale, "Misprision of Felony," at 202).
[313] *Commonwealth v. Lopes*, 318 Mass. 453, 61 N.E.2d 849 (1945) (cited in Meale, "Misprision of Felony," at 204).
[314] Meale, "Misprision of Felony," at 205-206.
[315] Gur-Arye, "A Failure to Prevent Crime," at 7.

crime, does the reporter have good cause not to report (*e.g.*, a privilege against compulsory self-incrimination)? Are Articles 20(3) of the FDRE Constitution and Article 30(2) of the Code relevant? In one case,[316] the U.S Supreme Court held:

> Tension between the State's demand for disclosure and protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual's claim to constitutional protection on the other.

In a prosecution under the U.S. state of Ohio duty to report statute, the Ohio Court of Appeals held, in *State v. Wardlow*,[317] that the statute was unconstitutionally applied if the statute was understood as allowing the defendant to incriminate himself. R.E. Meale suggests that "common sense or reasonableness demands that a misprision statute not interfere with a defendant's Fifth Amendment[318] right against compelled self-incrimination."[319] It is easier for a person charged under Article 443 of the Criminal Code and Article 12 of the Anti-Terrorism Proclamation than one charged under Articles 254 and 335 to raise "risk of self-incrimination" as a defence. The former provisions, by recognizing "good cause" as a defence, do not foreclose the room for defence. Articles 254 and 335 include no such "good cause" defence.

2. For the concerned person to discharge his obligation to report the commission of crime he must give the information to "the competent authorities," in the words of Article 443, or to the "proper authorities," in the words of Articles 254 and 335. Who are these competent or proper authorities? Are they the police and the public prosecutor – institutions referred to in Article 16 of the Code? Wouldn't such a construction make the duty to report too cumbersome or burdensome for rural people, since there are no such institutions nearby in rural areas?
3. In connection with the nature of the offence whose concealment would merit prosecution, R.E. Meale states "it is...necessary to limit the crimes capable of concealment under the statute to only the most serious. As in the case of treason, only the gravest crimes are capable of satisfying the balancing test in terms of the conflicting social and personal interests present in misprision cases."[320] Considering a similar issue, the House of Lords stated, "misprision comprehends an offence which is of so serious a character that an ordinary law-abiding citizen would realize he ought to report it to the police."[321] Are the crimes identified in Articles 254, 335 and 443 of the Criminal Code grave enough to justify the proscription against failure to report?

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[316] *California v. Byers*, 402 U.S. 424, 427 (1971) (cited in Meale, "Misprision of Felony," at 203, note 22).
[317] 484 N.E.2d 276 (Ohio Ct. App. 1985) (cite in Bagby, "Justifications for State Bystander Intervention Statutes," at 589).
[318] The relevant part of Amendment V to the U.S. Constitution reads: "nor shall be compelled in any criminal case to be a witness against himself."
[319] Meale, "Misprision of Felony," at 212.
[320] Ibid.
[321] Lord Denning in *Sykes v. D.P.P.*, (1961) 3 All E.R. at 40 (cite in Gur-Arye, "A Failure to Prevent Crime," at 4).

Chapter Four

Arrest

Introduction

Where an individual is reasonably suspected to have been involved in the commission of a crime, there is a good reason for his arrest and appearance before an investigating police officer or judge. First, the police can collect evidence from the suspect himself through interrogation or medical or physical examinations such as fingerprinting or blood tests. Second, measures to ensure that the suspect will stand trial (if and where necessary) can be taken once he is arrested. He may be released conditionally or detained throughout the criminal proceeding if no guarantee exists that he will stand trial. His attendance is guaranteed through arrest and detention—measures that impact his right to liberty recognized by the FDRE Constitution[322] and other international human rights instruments.[323]

The Constitution, the African Charter and the International Covenant on Civil and Political Rights ("ICCPR") impose substantive and procedural requirements on restriction of a suspect's liberty; however none of these authorities requires involvement of the court in the decision to restrict liberty. Both the Constitution and the ICCPR, in their Articles 19(4) and 9(4) respectively, simply entitle persons whose liberty is restricted to challenge the decision before a court of law—an *ex post facto* review. Provisions of the Criminal Procedure Code regulating the attendance of the suspect before a court of law are intended to ensure that a person's constitutionally recognized security and liberty rights are not abridged without good cause. Different rules of arrest apply, depending on whether the crime is flagrant or not. In flagrant cases, where there is no doubt as to the suspect's

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[322] Article 17 of the FDRE Constitution:

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

[323] Article 3 of the UDHR

Everyone has the right to...liberty...---.

Article 9 of the ICCPR

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

Art. 6 of the African Charter on Human and Peoples' Rights ("ACHPR")

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

involvement in the commission of the crime,[324] arrest is automatically authorized because there is no risk that the wrong person will be apprehended.[325] In other cases, the law includes preconditions to be satisfied before a police officer can make an arrest.

Three different laws deal with arrest: the Cr. Pro. Code, the Vagrancy Control Proclamation, and the Anti-Terrorism Proclamation. Under the Code, the arrest in non-flagrant cases may be made with or without warrant depending on circumstances; under the other two laws arrest can always be made without warrant.

Section I. Substantive Requirement for Arrest: Reasonable Suspicion

All jurisdictions require a certain degree of suspicion or belief on the part of the arresting officer that a person to be arrested has committed a crime in order to restrict his liberty for the purpose of criminal investigation. This requirement is intended to balance two competing needs: "safeguarding citizens from rash and unreasonable interferences with their liberty" and "giving fair leeway for enforcing the law in the community's protection."[326]

The Code and other relevant Proclamations provide for a certain level of suspicion as a precondition for restricting one's liberty by arrest. This section explores the degree of certainty that is necessary for the police officer to arrest someone for purpose of criminal investigation. Where an arrest in non-flagrant cases[327] is to be made, the police officer has discretion to effect the arrest with or without a summons. Article 25 of the Code provides that a police officer is allowed to issue a summons and require the appearance of a person before him where he has *"reason to believe"* that the person has committed an offence. Article 51(1) (a), (d), (e), (g) and (h) of the Code require "reasonable suspicion" that the identified crimes have been committed. Article 19(1) of the Anti-Terrorism Proclamation authorizes the police officer to arrest without warrant any person he *"reasonably suspects"* to have committed, or who is committing, a terrorist act. Article 6(1) of the Vagrancy Control Proclamation allows a police officer to arrest without warrant any person who may *"reasonably be suspected"* of being a vagrant.

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[324] In quasi-flagrant cases and in cases assimilated with flagrant offences, as defined under Articles 19(2) and 20 of the Code, there are possibilities where the criminal may not be known because in these types of cases there is no requirement that one be witnessed while committing a crime. What is certain in such cases is the commission of a crime.

[325] Of course, even in flagrant cases where there is no doubt that one has committed an offence arrest is not allowed if the offence is minor. Article 50 of the Code allows arrest without a warrant in flagrant cases only where the crime is punishable for not less than three months. .

[326] *Brinegar v. United States*, 338 U.S. 160, 176 (1949) (cited in Dressler, *Understanding Crim. Pro.*, at 141).

[327] In cases where one commits a flagrant offence, as defined under Articles 20 and 21 of the Code, there is no reasonable risk that the wrong person might be arrested. So, the substantive requirement to restrict an individual's liberty in the context of flagrant offences is not treated separately.

For the following reasons the "reasonable suspicion" requirement is relevant to arrest with a warrant as well. First, the wording of Article 25 of the Code indicates that it has general application. That is, it is relevant not only where an arrest is to be made without a warrant but also where the arrest requires a warrant. Second, a close reading of the two subarticles of Article 26 of the Code suggests that the police officer may issue a summons even in cases where arrest has to be made with a warrant. Third, the requirement that the suspect "cannot be obtained otherwise" under Article 54 of the Code[328] strengthens the construction given to Article 25 and 26.

The requirement of "reasonable suspicion" is equally applicable to issuance of a summons as a necessary step in securing a court warrant. That is, if the police officer should first try to obtain custody of the suspect by issuing a summons before applying for a court warrant, he needs to have a "reason to believe" that the person to be arrested has committed the crime. The factual premise of arrest with a warrant, as in the case of arrest without a warrant, is a reasonable suspicion that the person to be arrested has committed a particular offence.

Therefore, the central requirement in all cases of arrest, with or without warrant, is the existence of "reasonable suspicion" or "having a reason to believe" that the person to be arrested is involved in the commission of the crime being investigated. The reasonableness of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention. Arbitrary arrest and detention are prohibited under the Constitution and regional and international human rights instruments.

1. The Meaning of Reasonable Suspicion or Reason to Believe

Ethiopian law does not define the concepts "reason to believe" or "reasonable suspicion." No instructive analysis has ever been made by Ethiopian courts on this matter.[329] In the absence of clear definition, and court analysis, of these standards it is instructive to review how they are treated in other jurisdictions.

The Fourth Amendment to the U.S. Constitution requires the arresting officer to have *"probable cause"* that the crime is committed by the person to be arrested. Article 5(1) (c) of the European Convention on Human Rights conditions an arrest for the purpose of

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[328] See subsection 1.2.2(ii), below.

[329] In view of the fact that most arrests (both in law and in practice) are made without a warrant, normally the police determine whether there is a "reasonable belief" or "reasonable suspicion." The issue would come to the attention of the court only where an application for a court warrant is made or in cases of arrest without a warrant where, following the arrest, the arrestee is brought before the court in accordance with Article 19(3) of the FDRE Constitution and Article 59 of the Code (if lack of "reasonable belief" or "reasonable suspicion" is articulated by the arrestee and raised as an issue before the court). The courts have been extremely reluctant to question, on their own initiative, whether the arresting authority acted upon reasonable suspicion.

criminal investigation on *"reasonable suspicion"* that the person to be arrested has committed a crime. The U.S. Supreme Court and The European Court of Human Rights have interpreted these standards in various opinions.

As defined by the U.S. Supreme Court, *probable cause* exists where "the facts and circumstances within an officer's personal knowledge, and of which she has reasonably trustworthy information, are sufficient in themselves to warrant a person of reasonable caution in the belief that an offence has been committed and the person to be arrested committed it."[330] The European Court of Human Rights defines *"reasonable suspicion"* as a "plausible suspicion."[331] The Court indicated that the material put forward by the prosecuting authority must be sufficient to persuade an objective observer that the person concerned may have committed the offence.[332]
Do the above interpretations shade light on what a *"reasonable suspicion"* or *"having a reason to believe"* mean under Ethiopian law? Do you see any significant difference between these standards as used by the two foreign courts? If there is any difference, which one should be adopted by Ethiopian courts in defining the standard?

2. Reasonable Suspicion/Belief: Subjective or Objective Standard

Whose mind is relevant in the reasonable suspicion or belief inquiry? Is it that of the arresting officer or that of a reasonable person or both? There is a slight variance in the wording of the articles that authorize arrest without warrant under Ethiopian law. Articles 25 and 51(1) (a) of the Code[333] and Article 19(1) of the Anti-Terrorism Proclamation require that the *police officer "reasonably suspects"* the person to be arrested to have committed a crime. Article 51(1) (d), (e), (g), and (h) of the Code and Article 6(1) of the Vagrancy Control Proclamation require that the person to be arrested be *"reasonably suspected."*

The difference in the wordings of the provisions makes a difference as to whose mind is relevant in the "reasonable suspicion" inquiry. Under the first category of provisions, the state of mind of the arresting officer is crucial. He must personally suspect the person he is considering arresting for a particular offence. Personal suspicion, though not adequate, is required. In the second category of provisions, as the requirement is purely objective, the state of mind of the arresting officer, at least theoretically, seems insignificant. Rather, it is the state of mind of a reasonable person that is crucial. Do you see any justification for adopting different standards of arrest? Or is it simply attributable to bad drafting?

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[330] *Brinegar v. United States*, 338 U.S. at 175-76 (quoted in Dressler, *Understanding Crim. Pro.*, at 142).
[331] *Murray v. United Kingdom*, para. 60; *KF v. Germany*, para. 57; *Berktay v. Turkey*, para. 199 (cited in Stefan Trechsel, ed., *Human Rights in Criminal Proceedings* (New York: Oxford University Press, 2005), at 424 (hereafter Trechsel, *Human Rights*).
[332] Ibid.
[333] There is still a slight difference in the wordings of Article 25 and Article 51(1)(a). Unlike the latter, the former simply requires that the officer "has a reason to believe" instead of requiring him to "reasonably suspect" that a person has committed a crime.

In the first category of provisions, an arrest becomes unlawful where the arresting officer does not personally suspect the person to be arrested of committing an offence. This is true even if facts and evidence are present that would make a reasonable person suspect that the person has committed a crime. That is not the case under the second category of provisions. Insofar as the facts and evidence in the hands of the officer are such that a reasonable person would suspect the person to have been involved in a crime, the arrest would be lawful despite the fact that the arresting officer did not believe the person was involved.

The same issue—Whose state of mind is relevant in a reasonable suspicion analysis?—was raised and addressed by Barrister in connection with Section 12(1)(b) of the British Prevention of Terrorism (Temporary Provisions) Act 1984.[334] The Section authorizes a police officer to arrest without warrant any person "whom he has reasonable grounds for suspecting to be...a person who is or has been concerned in the commission, preparation, or instigation of acts of terrorism...." The writer indicated that the provision stipulates a state of mind possessed by the arresting officer as a jurisdictional precondition to the discretion to arrest. In the writer's view, if the arresting officer lacks the requisite state of mind, he does not have the discretion to arrest. The author capitalized on the significance of the officer's state of mind by stating that "a central issue of substance in unlawful arrest cases usually relates to the arresting officer's state of mind at the time of arrest."

The "*probable cause*" standard, a standard applied to arresting someone on suspicion that he has committed a crime, is considered in U.S. law to be a purely objective concept. The U. S. Supreme Court in one case indicated that an officer's lack of belief that he has probable cause, in itself, does not exclude a finding to the contrary.[335]

Both interpretations (the U.S. Supreme Court's and Barrister's) are relevant to the inquiry into whose state of mind is relevant in the reasonable suspicion inquiry under Ethiopian. The European approach is closer to Articles 25 and 51(1) (a) of the Code[336] and Article 19(1) of the Anti-Terrorism Proclamation. The U.S. approach is similar to Article 51 (1) (d), (e), (g), and (h) of the Cr. Pro. Code and Article 6(1) of the Vagrancy Control Proclamation.

3. What Does the Law Require of the Arrestor Where His State of Mind is Relevant?

The wordings of the relevant provisions have different implications on whether the arresting officer must personally suspect that the person to be arrested has committed a

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[334] A. Barrister, "Reasonable Suspicion and Planned Arrests," 43 *N. Ir. Legal Q* 66, at 67 (1992) (hereafter Barrister, "Reasonable Suspicion").

[335] *Florida v. Royer*, 460 U.S. 491, 507 (1983), in Dressler, *Understanding Crim. Pro.* at 142.

[336] There is still a slight difference in the wordings of Article 25 and Article 51(1)(a). Unlike the latter, the former simply requires that the officer "has a reason to believe" instead of requiring him to "reasonably suspect" that a person has committed crime.

crime. Strictly speaking, the phrase "where the investigating police officer has reason to believe that" under Article 25 does not require that the arresting officer entertains a genuine suspicion of the person's involvement in the commission of a crime. He might or not personally believe that the person has committed the crime – his state of mind does not affect the legality of the arrest. All that is required is the existence of reasons that would convince a person in his position that the person was involved in the commission of the crime – even if the arresting officer is not personally convinced. Hence, whether or not the officer was in fact convinced is not part of the inquiry into the lawfulness of an arrest made in accordance with Article 25 or 26 of the Code. The same is true of arrests under Article 51(1) (d), (e), (g) and (h) of the Cr. Pro. Code. In these provisions, state of mind of the arresting officer is clearly irrelevant. What is relevant is the state of mind of a reasonable person.

Among the provisions that authorize arrest without a warrant, the state of mind of the arrestor is relevant only under Article 51 (1) (a) of the Code and Article 19(1) of the Anti-Terrorism Proclamation. The phrase "whom he reasonably suspects" under these provisions shows that the arresting officer must personally suspect that the person to be arrested committed a crime. The existence of grounds that would make a reasonable person believe that the person committed a crime, in and by itself, is not adequate in this case. The arresting officer must accept or believe the information before him and thereby form the suspicion that the person was involved in the offence. The requirement, being subjective, can easily be satisfied to make the arrest lawful. To meet this subjective requirement of "genuine" suspicion, it will generally be enough for the arresting officer to say that as a result of considering the material laid before him, his state of mind was that he suspected the arrestee of the matters specified in the arrest power.[337] In this case, unlike the other two categories of provisions, the existence of a reason to objectively believe in the person's involvement in the commission of crime does not suffice for the arrest to be lawful. That reason must make the arresting officer personally suspect the person's involvement in the crime.

4. Judgment on Reasonableness of the Officer's Suspicion

As discussed above, under article 51(1) (a) of the Code and Article 19 of the Anti-Terrorism Proclamation, the arresting police officer must believe that the person to be arrested has committed a crime. In the other provisions (Articles 25, 51(1)(e), (g) , and (h) of the Code and Article 6(1) of the Vagrancy Control Proclamation), there is no such requirement. However, in both cases the suspicion or belief that a person has committed a crime must be reasonable.

Assessing reasonableness of a suspicion or belief involves an objective review of its basis by the court. The court asks: was there a reason to believe or was the belief of the arrestor (where the arresting officer has actually believed) founded on reasonable grounds? Where

[337] Barrister, "Reasonable Suspicion," at 69.

an arrest is challenged on *substantive grounds*, the court's answer to this question will determine the outcome.

In *Hanna v Chief Constable of the Royal Ulster Constabulary,*[338] a British court described the test of reasonableness under Section 12(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1984 which authorizes a police officer to arrest without warrant any person "whom he has reasonable grounds for suspecting to be…a person who is…concerned in" a crime. The Court indicated that while it is for the court to judge the reasonableness of the suspicion or belief, the judge is not deciding whether he himself would have formed the same suspicion or belief.[339] The court's task is to decide whether a person acting reasonably might, on the facts known to him or reasonably believed by him to be true, have formed that belief or suspicion. If the court is convinced that the facts are adequate for a reasonable person to form the suspicion, then the officer is said to have a reasonable suspicion. If the court believes otherwise, then the officer's suspicion would fall short of being reasonable.

In order to ascertain whether there is probable cause for arrest under U.S. law, the court asks two questions: "1) is the information available to the arresting officer trustworthy?; and 2) if it is, is the evidence sufficient to constitute probable cause?"[340]

Both the British and U.S. courts seem to focus on the credibility and sufficiency of the evidence available to the officer. Furthermore, courts have indicated the quantum of evidence necessary to establish probable cause or reasonable suspicion.

Emphasizing the term "suspicion," which suggests an element of uncertainty, the European Court of Human Rights stated that "the guilt of the person concerned does not have to be already established, as it is the purpose of investigation to verify whether such guilt is sufficiently probable to enable the preparation of indictment."[341] The police do not even need evidence which would be sufficient to enable the bringing of a charge.[342]

The U.S. Supreme Court, in quantifying the concept of "probable cause," indicated that "less evidence is required to justify an arrest than to convict a person at trial, but more is required than bare or mere or even reasonable suspicion."[343] The Court went further, stating that the probable cause standard "does not demand any showing that such a belief

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[338] [1986] NI 103 (cited in ibid.).
[339] Ibid.
[340] Dressler, *Understanding Crim. Pro.*, at 148.
[341] *NC v. Italy*, para. 45 (quoted in Trechsel, *Human Rights*, at 424).
[342] *Gusinskiy v. Russia*, para. 53 (cited in Trechsel, *Human Rights*, at 424).
[343] *Brineger v. United States*, 338 U.S. 160, 175 (1949) (quoted in Dressler, *Understanding Crim. Pro.*, at 161. Unlike Ethiopian criminal procedure law, U.S law recognizes different degrees of intrusion into one's privacy or liberty. "Reasonable suspicion" in the United States is required to justify the lesser intrusion of liberty or privacy than that caused by arrest or search. See ibid., at 141-143, 161.

be correct or more likely true than false."[344] In other words, probable cause refers to a less than a "50% +" likelihood of accuracy.[345]

5. Planned Arrest

It is not uncommon for a criminal investigation to be conducted by a senior police officer while a junior officer who was not involved in the investigation makes the arrest and delivers the arrestee into police custody. The arresting officer may simply be briefed that a certain person is suspected to have committed a specified offence without the ground for the suspicion being disclosed to him. This is what is referred to as "planned arrest."

5.1. In such cases, should the junior officer simply accept what he is told and execute the instruction, or should he inquire into the grounds for the suspicion by the senior officer and the reasonableness of the suspicion? If he should do so, should he also refuse to execute the instruction given by the superior officer if he is not convinced that reasonable grounds exist to suspect the person to be arrested? Article 40(2) of the Federal Police Commission Administration Council of Ministers Regulation No. 86/2003 provides, "Any police officer shall *notwithstanding the provisions of the Penal Code*, obey any *lawful orders* of his superior. His superior shall be responsible for the orders he has given."[346]

5.2. Would it be in accordance with the words and spirit of the legal provisions of the Code, the Anti-Terrorism Proclamation, and the Vagrancy Control Proclamation authorizing arrest without warrant, for the junior officer to take the instruction from the senior officer, without more, as adequate ground to form a "reason to believe" that the person to be arrested has committed a crime? In *Brady v. Chief Constable of the Royal Ulster Constabulary,*[347] the arresting officer was simply told that the reason for the arrest was that Brady had been involved in the murder of a man, a terrorist crime. No further information was given to the officer. Carswell, while upholding the validity of the planned arrest, stated that "it was... reasonable for the arresting officer to accept what he had been told and to suspect the plaintiff"[348] – the person whom he was ordered to arrest. In *Millington,* a case that involves a similar issue, Forbes stated that he did not have:

> [T]he slightest doubt that a police officer is entitled to arrest a man whom he reasonably suspects to be the man referred in some police communication as wanted for an arrestable offence even though he himself

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[344] *Texas v. Brown*, 460 U.S. 730, 742 (1983) (quoted in Dressier, *Understanding Crim. Pro.*, at 161).
[345] Dressler, *Understanding Crim. Pro.*, at 161.
[346] Federal Police Commission Administration Council of Ministers Regulation, Reg. No. 86/2003, Art. 40(2), Reg. No. 86. *Fed. Neg. Gaz.*, year 9, no. 39 (hereafter Federal Police Regulation).
[347] [1991] 2 NIJB 22 (quoted in Barrister, "Reasonable Suspicion," at 66).
[348] Ibid.

> knows nothing of the details of the offence beyond its description in the communication.[349]

In both cases, the court emphasized the credibility of the information communicated to the arresting officer. Neither court specified how much information must to be shared with the arresting officer to justify the arrest.

In the Northern Ireland Court of Appeal in *McKee*, the Lord Justice stated:

> It seems to me that when a constable receives instructions from a superior officer or an equal it is sufficient if he *bona fide* accepts the suspicion that those instructions contain or imply. The suspicion of the other becomes the arrestor's suspicion when accepted.[350]

Section II. Procedural Requirements

An arrest can be made in two ways: with or without a court warrant. A literal reading of Article 49 of the Code indicates that under normal circumstances a suspect is to be arrested with prior authorization from the court; arrest without court warrant is an exception. Two reasons exist for this reading of Article 49. First, the phrase "save as is otherwise expressly provided, no person may be arrested unless a warrant is issued" shows that arrest without warrant is an exception. Second, the second statement of Article 49 is "an arrest without warrant may only be made on the conditions laid down in this section." However, a close look at Articles 25-29 and Article 54 of the Code reveals a departure from the requirements of Article 49.

2.1. Arrest Without Warrant

A police officer may arrest a suspect without a court warrant in two ways: by issuing a summons requesting the suspect to come voluntarily to a police station (arrest on summons) in accordance with Article 25 or by going directly to the place where the suspect is found in accordance with Article 56 of the Code.

2.1.1. Arrest on Summons

As provided under Article 25 of the Code, "where the investigating police officer has reason to believe that a person has committed an offence, he may by written summons require such person to appear before him." A reading of various provisions of the Code shows that the purpose of the summons is to arrest the suspect. Once the summoned person appears pursuant to the summons, he is treated as an arrested person for all purposes and intents of the law.[351] That is, the person who appears before a police officer

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[349] Quoted in Barrister, "Reasonable Suspicion," at 70.

[350] [1984] NI 169, 174 (quoted in Barrister, "Reasonable Suspicion," at 68).

[351] Stanley Z. Fisher, "Some Aspects of Ethiopian Arrest Law: the Eclectic Approach to Codification," 3 *J. Eth. Law* 463, at 472-74 (1966) (hereafter Fisher, "Some Aspects").

by summons in accordance with Article 25 of the Code will be treated similarly to a person who appears without summons by a direct arrest in accordance with Article 50 or 51or 26 of the Code.

When the summoned person appears before the investigating police officer, the officer will, in accordance with Article 27 of the code, interrogate the summoned person. Once interrogation is over, the police officer may at his discretion release the summoned person on bond if one of the conditions listed under Article 28 of the Code is fulfilled. If the officer does not release the summoned person, the latter will stay in police custody to be brought before a court of law in accordance with Articles 29 and 59 of the Code.

Article 54 of the Code, which provides for issuance of an arrest warrant, reinforces the above reading of Articles 25 and 26-29 of the Code. One of the conditions that must be proved by the applicant police officer under Article 54 is that the suspect "cannot be obtained otherwise." One way of showing that the person cannot be obtained otherwise is by proving his refusal to appear before a police officer when summoned.[352]

2.1.2 Arrest Without Summons

2.1.2.1 Flagrant Offences[353]

Article 21 (2) of the Code provides for arrest without a warrant in the case of certain flagrant offences. The provision does not authorize arrest in all flagrant cases, however. Apart from flagrancy, there are two additional requirements to effect a lawful arrest. First, the offence should not be an offence punishable only upon formal complaint.[354] Second, the flagrant offence must be punishable with simple imprisonment for not less than three months.[355] Article 50 of the Code authorizes both police officers and ordinary citizens to arrest the offender in cases where all three conditions are fulfilled.

Notes and Questions

1. The actual punishment to be served by an offender will only be known when the court decides it. So, for the purpose of deciding whether arrest without a warrant in flagrant

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[352] See subsection 1.2.2 (ii), below.

[353] According to Articles 21 and 50 of the Code, these include cases which are referred as "quasi-flagrant" under Article 19(2) and "assimilated cases" envisaged under Article 20 of the Code. For a comparison between the Ethiopian and French law on flagrant offences see Fisher, "Some Aspects," at 478-81; on other continental law countries see ibid., at 478, note 66.

[354] Of course, even if the offence is punishable only upon formal complaint, the victim of the flagrant offence who is entitled to lodge a formal complaint is entitled to arrest the offender if the other condition is satisfied. It should be noted that the criminal proceeding relating to such an offence is made to be conditional upon formal complaint by the victim, and arrest by other persons is prohibited in the interest of the victim.

[355] Article 51(1)(b) of the Cr. Pro. Code allows a police officer (not private persons) to arrest a person who is *in the act of committing* a breach of the peace. As provided under Articles 490-493 of the Criminal Code, acts which are treated as breach of peace are punishable with simple imprisonment for less than three months.

cases is allowed, reference must be made to the relevant statutory provisions under which the offence falls. But when is an offence "punishable with simple imprisonment for not less than three months"? Does this language refer to the *maximum* possible punishment or the *minimum* possible punishment? Fisher suggests that the maximum punishment should be the basis for deciding whether arrest without a warrant is allowed under Article 50 of the Crim. Pro. Code.[356] Fisher states that if, for example, one is caught while committing an offence which is punishable from "*one month to one year*" his arrest will be lawful because the maximum punishment is one year, which exceeded three months. But there is also a chance for this person to be punished for less than three months if he receives a minimal punishment for the offence. That is, the offence is *punishable for less than three months* because there is a possibility for the criminal to be punished for less than three months. Does this offence fall under Article 50 of the Code, which requires that the offence be punishable *for not less than three months*? No, it is only where the minimum possible punishment is not less than three months that the offence falls under Article 50. Thus, the minimum, rather than the maximum, punishment determines whether arrest without a warrant is lawful.

2. How does a police officer or a private person know whether the requirement of punishment (that the offence is punishable with simple imprisonment for not less than three months) is fulfilled at the time of arrest? Does the law assume that police officers and private persons know the punishment prescribed for each offence? Is that a realistic assumption?
3. According to Articles 21 and 50 of the Cr. Pro. Code, arrest without a warrant is allowed in flagrant cases only in circumstances where a formal complaint is not required. Is it possible to know instantaneously whether or not the offence is punishable only upon complaint?

2.1.2.2. Non-Flagrant Cases

Article 51(1) of the Code provides for instances where a police officer may arrest someone without a warrant in non-flagrant cases.[357] The power of the police to arrest a criminal suspect without warrant is also recognized under Article 19(1) of the Anti-Terrorism Proclamation and Article 6(1) of the Vagrancy Control Proclamation. In such cases, the police officer has two options. First, he may issue a summons in accordance with Article 25 of the Code and secure the attendance of a person who is "reasonably suspected" to have committed a crime. Second, he may go to the suspect's location and effect the arrest instead of sending a request for the suspect's appearance before him.

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[356] Fisher, *"Some Aspects,"* at 480-81.

[357] Article 51(1) (b) of the Code is an exception because it concerns flagrant offences.

The Relationship Between the Two Types of Arrest Without Warrant: Arrest With Summons and Without Summons

The first Chapter under Book II Title II of the Code concerns arrests. As their respective captions indicate, Section 1 is about arrest without a warrant. Article 49, a provision under Section 1, provides governing principles for the procedural requirement of arrest without a warrant. In its first statement, Article 49 requires an express statutory authorization for arrest of a person without a warrant. The second statement of Article 49 authorizes arrest without a warrant only in accordance with Articles 50 and 51 of the Code—the only two provisions under the Section of the Code referred to in the statement. The second statement, unlike the first seems to confine arrest without warrant only to cases referenced under Articles 50 and 51; the statement appears not to recognize other express statutory provisions authorizing arrest without a warrant. This statement thus apparently conflicts with Article 25 of the Cr. Pro. Code which, as argued above, authorizes a police officer to arrest a suspect through issuing a summons. How can this apparent contradiction be reconciled? Are there grounds to argue that Article 49 refers only to involuntary arrest without a warrant and not to "voluntary" arrest to be effected via summons? Or can one argue that Article 25 of the Code authorizes the police officer to issue a summons where he has reason to believe that someone has committed one of the crimes listed under Article 51, in which case the contradiction between Article 49 and Article 25 would remain superficial? That is, can one argue that the scope of Article 25 is circumscribed by Article 51?

2.2. Arrest with a Warrant

Article 26(1) of the Code authorizes an investigating police officer to take such steps as are necessary to arrest a suspect. According to Article 26(2), the police officer is required to apply to the court for a warrant only if the suspect refuses to appear after being summoned and the police cannot arrest the suspect despite his refusal.

There are no specific requirements for the content of the application or whether it should be in writing. However, certain requirements can be inferred from the provisions of the Code. By authorizing an application for a warrant to be made by telephone or telegraph only in cases of urgency, Article 55(1) seemingly implies that in other cases the application must be made in writing. By requiring that the application which was made by telegraph or telephone to be confirmed in writing within 24 hours, Article 55(2) supports this reading of Article 55(1).

An application for a court warrant is not only a formality requirement and a warrant is not issued on demand. The cumulative reading of Articles 52(1) and 54 of the Code requires the fulfillment of two conditions for the court to issue a warrant of arrest: the attendance of the person before the court and the inability to otherwise obtain custody of the person.

The content of the application for arrest warrant can, therefore, be implied from Article 54 of the Code. Because the court would grant the warrant only where "the attendance of a

person before the court is absolutely necessary and cannot otherwise be obtained," the application must include facts that demonstrate fulfillment of these conditions. Upon verifying the fulfillment of the conditions, the court will issue a warrant authorizing arrest.

2.2.1. The Requirement of "Absolute Necessity"

One of the conditions that the court must verify before issuing a warrant authorizing arrest of a person is that "the attendance of the person before the court is absolutely necessary." Two points are to be noted in connection with this requirement: the person to be arrested is to appear before the court, and his appearance is absolutely necessary. It is not only Article 54 that indicates the suspect must appear before the court; the requirement is reiterated in the Form of Arrest Warrant (Form VI) in the Third Schedule of the Code.

It is difficult to imagine circumstances under which the appearance of the suspect before the court would be indispensable. The suspect's appearance before a police officer may be necessary for several reasons, including interrogation, medical examination, and forensic examination or preventing him from destroying evidence, interfering with witnesses, and the like. Where the arrest is justified for such purposes, the court issues a warrant not because it needs the suspect to appear before it for its own purpose, *i.e.* not because his appearance before the court is absolutely necessary, but because the suspect's arrest is necessary for the investigation to bear fruit. Simeneh rightly argues that during the investigation stage of a criminal proceeding, the suspect's appearance before the court cannot be required.[358] He attributed such requirement under Article 54 of the Code to poor draftsmanship.[359]

Article 65 of the Code supports Simeneh's position. According to this provision, the court issuing an arrest warrant has discretion to direct, by endorsement on the warrant, that the suspect be released without being brought before the court. Prior to his release, the suspect will be required to post a bail bond on terms determined by the court. This shows that there are instances where it may not be necessary for the person to be arrested to appear before the court. In those instances, the only necessity is to ensure his compliance with the conditions of the bail bond rather than his immediate appearance before the court.

According to Simeneh, the appearance of the suspect before the court is absolutely necessary only where the offence cannot be tried in the absence of the accused.[360] This interpretation is flawed. A warrant would not be obtainable in cases where trial *in absentia* is possible (since in such cases appearance of the suspect before the court would not be deemed to be necessary) even though an arrest would be necessary for investigative purposes. Moreover, while the investigation is in progress it may be difficult to know under which provision the accused will finally be charged. How, then, should the requirement of "absolute necessity" be construed in view of these and other concerns?

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[358] Simeneh, *Crim. Pro. Law*, at 155.
[359] Ibid.
[360] Ibid.

Should it be interpreted as referring to the significance of the arrest or to the successful completion of the investigation, in which case appearance of the person before a court of law would not be even necessary (let alone absolutely necessary) ?

In other jurisdictions, arrest is to be effected to facilitate investigation. In England, "the original purpose of arrest was to secure a suspect in order that he could be charged and brought before court."[361] Hence, the police were supposed to have enough evidence to justify a charge before making the arrest. However, 20th century police increasingly relied on interrogation as a way to develop evidence. The Judge's Rules that prohibited interrogation after arrest were changed to allow it. Then, arrest for the purpose of questioning was legitimized.[362] In Argentina, a warrant that authorizes arrest is required to show why the arrest it is vital to the success of the investigation.[363]

Ethiopian courts should, whenever an application for warrant is made, verify the purpose of the proposed arrest. If the arrest is for the sake of investigation, then the court must issue the warrant provided it meets the "absolutely necessary" requirement. If the application is made to ensure a suspect's attendance during his trial, the court must act in accordance with Article 65 of the Code unless there are reasons indicating that the suspect should not be released on bail.

2.2.2. The Requirement of "Cannot be Obtained Otherwise"

As discussed earlier, there are two ways of effecting arrest without warrant: arrest with a summons (which can be described as a voluntary method) and without a summons (involuntary). Arrest can be made directly, without first summoning the suspect, if his case falls under Articles 50 or 51 of the Code, Article 12 of the Anti-Terrorism Proclamation, or Article 6 of the Vagrancy Control Proclamation. In all other cases, arrest without a warrant can be made only by summoning a suspect[364] to appear before a police officer. It follows that resort to a court warrant would be necessary only where a person who is suspected to have committed a crime not envisaged by Article 51 of the Code, Article 12 of the Anti-Terrorism Proclamation, or Article 6 of the Vagrancy Control Proclamation is summoned but has refused to appear. By showing that the suspect was summoned but declined to comply and that he is suspected of an offence for which a police officer could not make an arrest without a warrant, the police officer proves to the court that the suspect "cannot be obtained otherwise." Simeneh confirms this argument.[365] According to him, except in cases where issuance of a summons amounts to providing advice to the suspect to escape, the officer is required to try to obtain the suspect voluntarily (arrest by summons) before applying for an arrest warrant; only where the

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[361] David J. Feldman, "England and Wales," in Craig M. Bradley, ed., *Criminal Procedure: A Worldwide Study* (Durham: Carolina Academic Press, 1999) at 96 (hereafter, Bradley, *Crim. Pro.*).
[362] Ibid.
[363] Alejandro D. Carrio and Alejandro M. Garrio, "Argentina," in ibid., at 9.
[364] A person must have been suspected to have committed an arrestable offence. A person who is suspected for a petty offence, for instance, is not to be summoned.
[365] Simeneh, *Crim. Pro. Law*, at 156.

suspect refuses to comply with the summons is the requirement of the "suspect cannot otherwise be obtained" fulfilled.

The cumulative reading of the phrases "where the arrest cannot be made without warrant" and "where a warrant is required by law to be issued by a court before a person is arrested" under Articles 26(2) and 52(1) of the Code, respectively, indicates that a warrant of arrest is to be sought only where there is no other way of obtaining a suspect.

Summary:

Based on procedures applicable to arrests, three categories of cases exist.

1. Cases under Article 50 of the Code. Where a case fulfills all the requirements of Article 50, a private person or a police officer can arrest the person who is caught in the act of committing a crime.
2. Cases under Article 51 of the Code, Article 19(1) of the Anti-Terrorism Proclamation, and Article 6(1) of the Vagrancy Control Proclamation. In such cases, the police officer may arrest the suspect without a warrant in two ways. The first option is to send a written request (summons) to the suspect asking him to appear before the officer. (Issuing a warrant is not advisable where a risk exists that doing so would make him flee.) The second option is to arrest the suspect by going to his location. As the two are not mutually exclusive, the second option can be taken where the first fails,[366] or can even be taken without trying the first option. The law does not provide a hard and fast rule as to the circumstances in which each method is to be applied. However, the law makes a distinction between cases where a court warrant is necessary and where it is not needed. In cases where the court warrant is not needed, the officer has discretion as to which methods to use to obtain the suspect.
3. Cases which fall under neither of the two categories above. In such cases, the officer must issue a summons asking the suspect to come to the police station (unless doing so is likely to alert the suspect and give him an opportunity to flee). If the suspect complies with the request, he will be treated as an arrestee. If he refuses to comply with the summons, the officer shall make an application for a court warrant. In this category of cases, unlike cases under Article 51 of the Code, Article 19(1) of the Anti-Terrorism Proclamation, and Article 6(1) of the Vagrancy Control Proclamation (category two, above), the police officer should first try to obtain the suspect voluntarily. Only where such efforts do not produce results can the officer show the court that "obtaining him otherwise" is impossible.

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[366] In its relevant part Article 26 of the Cr. Pro. Code provides "where the person summoned under Article 25 fails to appear, the investigating police officer shall take such steps as are necessary to effect his arrest."

Adequacy of Provisions of the Code to Protect one's Liberty from Arbitrary Interference

According to the FDRE Constitution, the Universal Declaration of Human Rights ("UDHR"), the American Convention on Human Rights ("ACHR"), and the ICCPR, restriction of an individual's liberty is allowed only on grounds and under procedures provided by law. As can be inferred from Article 49 of the Cr. Pro. Code, the normal method of arrest appears to be with prior authorization from the court. Arrest may only exceptionally be made without a court warrant. If arrest with a warrant were the norm, a procedural safeguard would be in effect to guarantee that, except in a few cases, a neutral and detached judge rather than the police officer would decide whether restriction of liberty is appropriate. But, as argued above, a close reading of Articles 25, 26, 50, 51, 52 and 54 of the Cr. Pro. Code, Article 6 of the Vagrancy Control Proclamation, and Article 19 of the Anti-Terrorism Proclamation shows that arrest without a warrant is the rule. According to these provisions, arrest without warrant is allowed whenever the police officer has a reason to believe that a person has committed a crime. In cases envisaged under Articles 50 and 51 of the Code, Article 19 of the Anti-Terrorism Proclamation, and Article 6 of the Vagrancy Control Proclamation, the police officer may go directly to the suspect's location and effect the arrest. In other cases, the officer may make the arrest by summons.

Ethiopian law thus lacks an appropriate mechanism for ensuring that the right to liberty is restricted only when there is a tangible and objective reason to do so. The procedural laws give plenary power to a police officer to arrest solely upon his own evaluation of the existence of reasonable suspicion that the person to be arrested has committed a crime. In view of the fact that arrest without a warrant is the norm, the effectiveness of the provisions of the Cr. Pro. Code is questionable in enforcing provisions of the FDRE Constitution and other human rights instruments that prohibit arbitrary restriction of liberty.

In other jurisdictions there are clear provisions to ensure that arrest is made only with prior authorization from the court. Section 495 of the Criminal Code of Canada allows a police officer to arrest a person whom he or she believes on reasonable grounds to have committed or to be about to commit an indictable offence.[367] In the U.S., an arrest made without a warrant in a non-flagrant case where there was time to procure a warrant is considered "unreasonable" even if the case is supported by reliable informant. If the officer does not have personal knowledge about the person's involvement in the commission of a crime, arrest shall be made with a warrant. Regarding the significance of the arrest warrant, the U.S. Supreme Court has stated that it "serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause.[368]

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[367] Kent W. Roach, "Canada," in Bradley, *Crim. Pro.*, at 55.

[368] *Wong Sun v. United States*, 371 U.S. 471, 481-482 (1963) (cited in M.C. Walther "When is an Arrest Warrant Required?," 8 *St. Louis U. L. J.* 415, at 419 (1963-1964).

Arrest of Suspects in Israel

Arrests in Israel are divided into two categories: arrests by warrant and arrests without a warrant.

> Arrest warrants can be issued against a suspect at any stage of police investigation. Having received and reviewed an application for arrest made by a police officer, a judge can issue an arrest warrant if: the judge has a "reasonable suspicion" that the suspect has committed an arrestable offence; and the judge is convinced that the police investigation would be jeopardized if the suspect is not arrested, or that the personal security of an individual, the community's safety or the security of the State of Israel would be facing danger on the part of the suspect, if he is not arrested. Exceptionally, an arrest warrant may be issued solely for the purposes of the suspect's interrogation by the police (i.e., even in the absence of dangerousness).
>
> The required "reasonableness suspicion" may be based upon any relevant evidence, even when the latter is not admissible in a criminal trial. There is also a "necessity requirement" that accords an unbending preference to the minimal curtailment of the suspect's freedoms. This requirement is an offshoot of the broader "minimization of the individual's harm" principle, which is firmly embedded in the law of arrests and in the Israeli constitutional law in general. An arrest warrant therefore can be issued only if the objective of the arrest cannot be attained in a way that would be less damaging to the suspect's freedom, e.g., by releasing the suspect on bail and by stipulating in the bail conditions that the suspect will not leave his home and will avoid any contact with the prospectant witness. [369]

Notes and Questions

1. If a person is arrested with a court warrant because his appearance before court is "absolutely necessary," as contemplated under Article 54 of the Cr. Pro. Code, can the arresting officer interrogate or order a medical examination to be conducted on the arrestee prior to bringing him before the court?
2. Is it the requirement for arrest with a warrant or without a warrant more stringent under the Ethiopian law of arrest? Should there be a difference in the requirements? In the U.S., where an officer effects arrest without a warrant, a court subsequently called upon to determine the reasonableness of the arrest determines whether the officer had probable cause at the time of the arrest. That is, the court assesses whether a judge

[369] Eliahu Harnon and Alex Stein, "Israel," in Bradley, Crim. Pro., at 221.

would have issued a warrant if one had been sought[370]—thus, the same standard is applied to arrests both with and without a warrant.

3. Normally, arresting a person requires a search of the place where the person to be arrested is suspected to be located. Article 32(2)(a) of the Code authorizes search of a premise with a view to arrest the offender. Does a warrant of arrest necessarily authorize search of any place where the person to be arrested is suspected to be found? The content of an arrest warrant, as can be seen from Form VI of the Third Schedule in the Code, does not authorize search of the location where the person is arrested. Shouldn't it indicate the place to be searched? In Argentina, the law requires issuance of a search warrant but not an arrest warrant even if the sole purpose of the warrant is to detain an individual.[371]

Section III. Effecting the Arrest

Certain procedural requirements apply to all arrests, whether with or without warrant. This section deals with those requirements.

3.1. Verifying the Identity of the Person to be Arrested

In view of the obvious inconvenience and discomfort arrest causes the arrestee, maximum care should be taken to ensure that the right person is arrested. Hence, Article 56(1) of the Cr. Pro. Code requires the police officer making an arrest to take the necessary precautions to establish the identity of the person to be arrested. The wording of this provision wrongly implies that the arrest is to be made only by a police officer; however, Article 50 of the Code authorizes ordinary persons to arrest.[372] This discrepancy can be explained by the fact that ordinary persons are allowed to arrest offenders only in flagrant cases where there is no *real risk* of apprehending the wrong person. In such cases it is unnecessary to provide for such precaution.) Risk of apprehending the wrong person can be minimized by collecting as much information as possible about the suspect before rushing into making an arrest.[373]

3.2. Right to Know the Reason for Arrest

Article 19(1) of the FDRE Constitution and Article 9(2) of the ICCPR entitle arrested persons to know the reason – or cause – for their arrest. Article 56(2) and (3) of the Code refers only to arrest with a warrant as if only in such cases the person to be arrested is entitled to know the reason for his arrest. Where the person is arrested while committing a flagrant offence, the reason for the arrest may be seen as too obvious to be communicated

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[370] Dressler, *Understanding Crim. Pro.*, at 143.

[371] Alejandro D. Carrio and Alejandro M. Garro, "Argentina," in Bradley, *Crim. Pro.*, at 9.

[372] Simeneh attributed the erroneous implication to the fact that the provision is found under the part of the Code regulating arrest on warrant, which is to be executed only by a police officer. Simeneh, *Crim. Pro. Law*, at 167. However, Article 56 is found neither under Section 2, regulating arrest with warrant, nor under Section 1, dealing with arrest without warrant. It is found under Section 3, the caption of which is "General Provisions," which implies the section's relevance to both types of arrest.

[373] To the extent their application enables the officer to know the identity of the suspect better, Articles 15 and 30 of the Cr. Pro. Code would be helpful.

to the arrestee. But in other cases of arrest without a warrant,[374] where the reason for arrest is not necessarily obvious to the suspect, it is constitutionally required that the reason for arrest be communicated to the person to be arrested. No specific law is in place, however, to enforce this requirement.

The purpose of the requirement of notice of cause in the FDRE Constitution and the ICCPR is not clear. In the U.S, "the purpose of the requirement of notice of cause is to protect personal liberty from unlawful interference."[375] A person whose liberty is threatened by illegal restriction (illegal arrest) has the right to resist the illegal arrest and preserve his liberty.[376] The right to know the basis for the arrest gives the person to be arrested an opportunity to verify whether or not the arrest to be effected upon him is lawful, which in turn enables him to determine whether he should submit or resist.

Although Article 56(2) of the Code requires a police officer to read the warrant to the person to be arrested and to show the warrant if requested,[377] it does not expressly indicate whether this procedure is intended to inform the person to be arrested of the reason for his arrest or to show that the court has ordered his arrest. Furthermore, no authority suggests that the reason for communicating the reason for the arrest is to allow the suspect to decide whether the arrest is lawful or whether to submit to or resist the police officer.[378]

The right to know the reason for arrest is so important in England that the reason for the arrest should be communicated to the arrestee at, or as soon as practicable after, the arrest.[379] Failure to inform the suspect of the reason for arrest renders the arrest illegal. When the reason is communicated to the arrestee some time after arrest, the period of detention prior to the provision of information to the suspect is illegal.[380]

Regarding the time when the suspect is to be informed of the reason for the arrest, there seems a variation between the FDRE Constitution and the ICCPR. Article 19(1) of the FDRE Constitution provides, "*persons arrested* have the right to be informed

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[374] Arrests are to be made in accordance with Articles 25 and 51 (1) of the Code, Vagrancy Control Proc., and Anti-Terror Proc.

[375] *Johnson v. State*, 19 Ala. App. 141, 95 So. 583, 585 (1923) (cited in Peter C. Cobb, "Notice of Cause of Arrest," 25 *Md. L. Rev.* 48, at 51(1965) (hereafter Cobb, "Notice of Cause").

[376] *United States v. Angelet*, 231 F.2d 190,193 (2d Cir. 1956); *People v. Dreares*, 15 App. Div. 2d 204, 221 N.Y.S.2d 819, 821 (1961) (quoted in Cobb, "Notice of Cause," at 51).

[377] The warrant to be issued by the court has to be similar to what is written under Form VI of the Third Schedule to the Cr. Pro. Code. Such a warrant would indicate the offence for which the person to be arrested is suspected.

[378] In view of the fact that the provision is applicable only to cases of arrest with warrant it seems that the purpose of the reading of the warrant is to tell the suspect that his arrest is being made in accordance with court order, rather than telling him the reason for the arrest.

[379] Police and Criminal Evidence Act 1984(PACE), Section 28 (3), (5) (quoted by David J. Feldman, "England and Wales," in Bradley, *Crim. Pro.*, at 97).

[380] *Lewis v. Chief Constable of the South Wales Constabulary* [1991] 1 All E.R. 206, C.A. (cited in David J. Feldman, "England and Wales," in Bradley, *Crim. Pro.*, at 97, note 34).

promptly...of the reasons for their arrest...." Article 9(2) of the ICCPR provides "Anyone who is arrested shall be informed, *at the time of arrest*, of the reasons for his arrest...." Can one tell from the wording of the Constitution and the Covenant as to at what stage in the arrest process the reason should be communicated? Is it to be done before, during, or after the arrest? Where arrest is to be made with a warrant, the cumulative reading of the second[381] and third[382] subarticles of Article 56 suggest that the reason must be communicated before the arrest is effected.

Notes and Questions

1. As discussed above, an investigating police officer may arrest a suspect via summons. The content of the summons is not specified by law. The summons being issued by police officers in practice, which has the following form and content,[383] does not seem to provide the reason for arrest.

   To: _____

   Our office seeks your presence for questioning and you are hereby ordered, as per Article 25 of the Cr. Pro. Code, to appear before the Criminal Investigation Department of_____Police Station, Office No.___ on the day of_____ at ____O'clock.

   Name (of the investigating police officer or chief of the investigation department)

   Signature

   Does the phrase *"our office seeks your presence for questioning"* give a clear reason for summoning the person? If not, does that make the summons unlawful? Will the arrest be illegal if the officer decides to arrest the summoned person after questioning him, and tells him at that point the reason for the arrest?

2. Suppose an investigating police officer, who has reason to believe that "Mr. S" has committed a crime which is punishable for not less than one year,[384] approached the latter to arrest him. In fact, "Mr. S" did not commit the crime. Before making the arrest, the officer tells "Mr. S" the reason for his arrest. "Mr. S," knowing that he has not committed the crime that the officer is referring to, resists the officer. Is the conduct of "Mr. S" lawful? Note that had the arrest been effected, it would have been lawful despite the fact that the arrestee has not committed the crime, for the officer had

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[381] Article 56(2) of the Code states: "where the arrest is made with a warrant, the police officer shall read out the warrant to the person *to be arrested* and shall show it to the person arrested if he so requests." (emphasis added).

[382] Article 56(3) of the Code states: "He shall *then actually touch or confine the body of the person to be arrested* unless there be a submission to his custody by word or action." (emphasis added).

[383] Simeneh, *Crim. Pro. Law*, at 143.

[384] According to Article 51(1) (a) of the Cr. Pro. Code, a police officer is allowed to arrest, without warrant, a person suspected of such offence.

"reason to believe" that "Mr. S" committed the crime. The fact that he did not commit the crime does not make the arrest illegal. Does that make "Mr. S"punishable under Article 440(1) (a) of the Criminal Code for "resisting a lawful authority"? What if the officer was in possession of a court warrant authorizing "Mr. S's" arrest?

3. Suppose that an officer, who has a reason to believe that "Mr. S" has committed a crime, is about to arrest him without communicating the reason for the arrest. "Mr. S" insists that he be informed of the reason for the arrest but the officer ignores his request. While the officer is trying to restrain "Mr. S", "Mr. S" uses proportionate means against the officer to resist the arrest. Is such resistance allowed under Ethiopian law or is it punishable under Article 440(1)(a) of the Criminal Code? Does it depend on whether the arrest was made with or without a warrant? Suppose the officer eventually succeeds in arresting the person. Can the validity of the arrest be challenged? If it is found to be illegal, what would be the consequence?

4. Can the suspect challenge a charge against him if the charge alleges that he has committed a crime different from the one he was told about at the time of arrest?

5. Article 56(2) of the Code presupposes that the person effecting the arrest is in possession of the warrant. Would it be illegal for an officer not in possession of the warrant to arrest a suspect for whom the warrant was issued? Should every officer have a copy of the warrant, if several officers are looking for the person to be arrested in different jurisdictions? Both the FDRE Constitution and the ICCPR are interested in the reason being communicated to the suspect, not in the warrant being made available and being read by the suspect. In England, any constable is allowed to arrest anyone for whom an arrest warrant has been issued even if the constable is not personally in possession of the warrant.[385]

6. Where a person is suspected of more than one offence, is the investigating police officer required to tell the person about all the offences or does it suffice to inform him of only one of the crimes?

3.3. Use of Force

The law provides an orderly, multi-step procedure for effecting arrest. Where the arrest is to be made by summons, a written request is sent to the suspect to come to the police station voluntarily. Where the arrest is made with a court warrant, the officer is required to read the warrant to the person to be arrested and effect the arrest by word or action. Where the arrest is to be made without a warrant, as discussed above, the officer is constitutionally required to tell the person to be arrested the reason for the arrest. If the person does not voluntarily submit to the officer's custody by word or action, the officer is

[385] Magistrates' Courts Act 1980, section 125 (2); R. v. Purdy [1975] q.b. 288, C.A., in David J. Feldman, "England and Wales," in Bradley, *Crim. Pro.*, at 95-96.

authorized to make the arrest by touching or confining the body of the person. If the person forcibly resists the officer's efforts to arrest or attempts to evade the arrest, the officer may resort to the use of force. There is, however, a limit on the force to be applied. Article 56(4) of the Code authorizes use of any means *"proportionate to the circumstances"* to effect the arrest. Article 38(1) of the Federal Police Commission Administration Council of Ministers Regulations No. 86/2003 requires any use of force by a federal police officer to be "reasonable, supported by law and on the basis of legal authorization." In particular, in connection with arresting a suspect, Article 38(2) of the Regulation requires the federal police officer to "use reasonable force as may be necessary in order to apprehend a person who commits a crime...." There is no explicit provision regarding the right of ordinary citizens to use similar force to effect arrest.

Notes and Questions

1. Article 56(4) of the Code conditions the use of (proportionate) force by a police officer on *forcible resistance* from the person to be arrested. The Federal Police Administration Council of Ministers Regulation No. 86/2003 does not include such a condition; it merely requires the officer to "use reasonable force as may be necessary in order to apprehend a person who commits a crime."

    1.1. Do you see any difference between the two laws? Can the use of force be justified under the Regulation even where there is no forcible resistance, such as where the suspect flees? Does the Code allow use of force in such cases?

    1.2. How is *proportionality* of force to be measured? What factors should be taken into consideration? The requirement of proportionality presupposes two competing variables. The factors relevant to whether the force applied by the officer was proportional are the forces employed by the person to be arrested and the forces employed by the officer. Because the purpose of use of force by the officer is to arrest, if the person resists the arrest by force, to effect an arrest the force employed by the officer has to be capable of overcoming the force/resistance of the suspect. Note that the law requires proportionate but not equal force. If there are different gradations of force that could overcome the resistance of the arrestee, the officer must apply the least damaging force sufficient to overcome the resistance. If the force used by the officer exceeds the necessary degree of force, it becomes disproportionate. In addition to the degree of resistance by the arrestee, Simeneh suggests the seriousness of the offence should be another factor in judging the proportionality of the force employed by the police officer.[386]

    1.3. How is *Reasonableness* of Force Assessed?

2. Is use of deadly force[387] in the process of effecting arrest allowed under Ethiopian law? Is use of *deadly* force compatible with the purpose of use of force recognized

[386] Simeneh, *Crim. Pro. Law*, at 170.

[387] For more on the appropriateness of use of deadly force see: Ronald C. Griffin, "The Appropriateness of Deadly Force," 15 *Howard L. J.* 306 (1968-1969) (hereafter Griffin, "Appropriateness of Deadly Force").

under the Federal Police Commission Regulations No. 86/2003 and the Code—ensuring the arrest of the suspect? Objecting that the use of deadly force is inappropriate in any arrest attempt, Simeneh argues that the FDRE Constitution has set the absolute limit to the use of force under Article 56 (4) of the Code.[388] He relies on Article 15 of the Constitution, which prohibits deprivation of one's life "except as a punishment for a serious criminal offence determined by law." This constitutional provision, in Simeneh's view, prohibits the use of deadly force with a view to effect arrest.[389] In contrast, U.S state courts have affirmed the use of deadly force in the process of arresting a suspect. In one case, a U.S. court stated: "if the suspect resists, the officer is entitled to use such force as may be required, even to the extent of taking a life."[390] Another U.S. court once stated, "a homicide committed in attempting to arrest or prevent the escape of a felon is generally justifiable where the arrest cannot be made or the escape otherwise prevented."[391] By recognizing the lawfulness of homicide in preventing the escape of a felon,[392] the U.S. courts legitimize the use of force even if it does not result in making the arrest, or in bringing the arrestee in alive.

3. Assuming that the use of deadly force is allowed under some circumstances, should the nature of the crime the person to be arrested is suspected of be relevant? R. C. Griffin[393] suggests that if deadly force is resorted to it should be lawful only for effecting felony arrests. For Griffin, it would be "anachronism to say that a man, who could be sentenced to a few years in prison for the crime, can justifiably be shot by a policeman before there is even proof of his guilt." If it is the degree of force used by the person to be arrested (as suggested by Article 56(4) of the code) that justifies use of force by the officer, the officer must be in a state of self-defence to apply deadly force against the arrestee. In the case of self-defence, the nature of the offence would not be relevant. However, if deadly force is used to prevent the suspect from escaping, the gravity of the offence he is suspected of might be relevant.

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[388] Simeneh, *Crim. Pro. Law*, at 171.

[389] This does not seem a good reason to conclude that deadly force is not allowed. Article 14 and 16 of the FDRE Constitution recognize the right to protection against bodily harm. Following Simeneh's line of argument would lead us to the absurd conclusion that the use of force should not cause bodily injury on the person to be arrested, for it would be unconstitutional – as is killing. For that matter, the Constitution, unlike in the case of the right to life, does not recognize even the court's power to restrict the right to the bodily security of a person. But it is to demand the impossible to authorize police officer to use force but not to cause bodily injury. Hence, causing bodily injury to the person to be arrested should not be treated as an infringement of right to bodily integrity of the person. Rather, it is a lawful way of restricting the right. Moreover, as acknowledged by Simeneh, despite Article 15 of the FDRE Constitution, there are lawful ways of taking a life without court order, such as where a person is in a state of necessity or legitimate defence.

[390] *Vaccaro v. Collier*, 38 F.2d 863 (D. Md. 1930) (quoted in Griffin, "Appropriateness of Deadly Force," at 360).

[391] *Holloway v. Moser*, 193 N.C. 185, 136 S.E. 375 (1927) (quoted in Griffin, "Appropriateness of Deadly Force," at 360).

[392] Ibid.

[393] Griffin, "Appropriateness of Deadly Force," at 312).

Section IV. Release of the Arrestee on Bond

Once a suspect is arrested on suspicion that he has committed a crime there are many steps to be taken pending a criminal proceeding. The criminal proceeding may take as long as several years to be finalized. Conditional release (release on bail or on bond) is an answer to the question as to where the arrestee should stay during this period. Under the Cr. Pro. Code, where the release is ordered by a police officer it is known as "release on bond."[394] The Code calls the release ordered by a court of law a "'release on bail."[395] Under Article 4 of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005 both releases (by the police officer or the court) are known as "release on bail." The Amharic versions of the Code and the Proclamation use the same terminology for both types of release.

Following are provisions regulating the police power to release arrestees conditionally.

Art. 28 of the Code. Release on bond.

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

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

Art.4 (2) of Proc. No. 434/2005

The investigator may release, on bail, with or without surety, a person arrested for corruption offences where;

a) It is doubtful that the offence complained of has been committed, or
b) It is doubtful that the arrested person has committed the offence complained of, or
c) The offence for which the person arrested is not punishable with rigorous imprisonment.

Notes and Questions

1. The law provides for conditions under which an investigating police officer or the court may order conditional release of the suspect. Why does the law allow for conditional release to be ordered by the police officer instead of requiring every release to be ordered by the court?

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[394] Cr. Pro. Code, Article 28.
[395] Ibid., Articles 59, 63-79.

2. Both Article 28(1) of the Code and Article 4(2) of the Proclamation provide for three alternative grounds for an investigating police officer to release an arrestee on bond. As the three grounds need not coexist, the existence of only one of them suffices for the police officer to order the arrestee's conditional release. The person is arrested or summoned because the officer had "reason to believe" in his involvement in the commission of a crime. Is it when the "reason to believe" vanishes that the police officer is said to have a doubt as to whether the crime has been committed or as to the arrestee's involvement in the crime? What degree of uncertainty would justify (or require) the officer to say that he is in doubt as to the commission of the crime or the arrestee's involvement?
3. Does the discretion of the officer to order conditional release of the arrestee depend on whether the arrest was made with or without a warrant? Is it only where the arrest is made without a warrant that the officer would have such discretion? Where the arrest is made with a warrant, the arrest warrant instructs the police officer to arrest the particular person and bring him before court of law unless ordered otherwise in accordance with Article 64 of the Code. Article 28 seems of general application irrespective of whether the person is arrested with or without a warrant; it distinguishes between cases only based on the severity of the offence. If the person's appearance before the court is absolutely necessary under Article 54, the police might not have the power to authorize his conditional release.
4. Article 28(1) of the Cr. Pro. Code allows the police officer to release an arrestee on bond, *inter alia*, where the offence suspected to have been committed is not punishable with rigorous imprisonment *as a sole or alternative punishment.* Article 4(2)(a) of the Proclamation allows the officer to release a suspect where the corruption offence alleged to have been committed *is not punishable with rigorous imprisonment.* Does that mean the officer can release an arrestee suspected to have committed a corruption offence which is punishable with *simple imprisonment or rigorous imprisonment*? If, for instance, the arrestee is suspected under Articles 407(1), 408(1), or 409(1) of the Criminal Code, where the accused, upon conviction, may be sentenced to *simple or rigorous* imprisonment?
5. Suppose an investigating police officer, from his conversation with the arrestee, is convinced that the crime was not committed or that the arrestee did not commit the crime.

    5.1. Can the officer release the arrestee unconditionally even though there is no clear statutory provision to that effect? The English Court of Appeals addressed a similar question when interpreting Section 38 of Magistrates' Court Act, 1952—a provision similar to Article 28 of the Code:

> Section 38 is dealing only with cases of two kinds: (1) those cases where the inquiry at the police station discloses a case to be answered, and (2) those cases where the inquiry cannot be completed forthwith. The sectior does not mention cases of a third kind namely, those cases where on inquiry at the police station it appears that there is no sufficient ground on which to proceed

> further against the man. Clearly, in those cases, the man should be released forthwith. There was no need in the statute to mention that contingency. It is too obvious for words."[396]

To what extent is the Court's approach relevant to the interpretation of Article 28 of the Code?

5.2. Can one advance the following argument? Article 17(1) of the FDRE Constitution prohibits deprivation of liberty except on grounds established by law. If the arrestee is no longer a suspect (where the reason to believe that he has committed a crime disappears) there is no reason to keep him under arrest. Nor is there a reason to make his release conditional, for there is no need to secure his reappearance. After his innocence is ascertained, the arrest is unacceptable under Article 17 of the FDRE Constitution. Article 13 of the FDRE Constitution obliges the officer to work towards the enforcement of the rights under Chapter Three of the FDRE Constitution, one of which is the right to liberty. Therefore, the officer is required to release the arrestee unconditionally.

6. Where one of the grounds for release on bond exists, what if a police officer refuses to release an arrestee on the ground that Article 28(1) of the Code does not oblige him to release the arrestee? Can the arrestee apply to the public prosecutor or superior police officer objecting to the officer's refusal? What is the legal basis for such an objection? Or should the arrestee simply apply to the court in accordance with Article 28(2) of the Code? Note that Article 19(6) of the FDRE Constitution does not refer to the right of the arrestee to be released conditionally by a police officer.

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[396] Fisher, *Eth. Crim. Pro.*, at 38.

Chapter Five

Police Interrogation and Confession

Introduction

A person is arrested when he is reasonably suspected to have committed a crime. One of the reasons for arresting a suspect is to obtain evidence from him.[397] The most common means of obtaining evidence from the suspect is interrogation. After the apprehension of the suspect, the police investigation is mostly directed at extracting a confession. In fact, subject to the following discussion, the suspect's own admission is the best evidence in proving his guilt,[398] for it is believed to be a result of "the strongest feelings of guilt."[399] Hence, confession is said to be considered the "queen of evidence."[400] That is true, however, only where the confession is given voluntarily.[401]

Although the arrestee is entitled to a "presumption of innocence," practically speaking investigating police officers rarely give effect to the presumption. Because police officers arrest a person only when they have *a reason to believe* that he has committed a crime, they become uneasy if the arrestee is not willing to admit his participation in the crime. First, they suspect that even though he is *denying* his involvement, he did in fact commit

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[397] He may be arrested even where the officer does not want any information from the arrestee. Under the law, a police officer is allowed to arrest a person the officer has a reason to believe has committed a crime. It is not the fact that the suspect is needed for interrogation that justifies his arrest. Rather, it is the suspicion of his involvement in the commission of a crime. Once the suspect is arrested, the officer will decide what to do next. If he thinks that he will get relevant information from the suspect, he has the discretion to interrogate him. If not, he must have arrested him to ensure his presence during his trial or whenever he is wanted. So, depending on several factors, the officer will decide to release the suspect on bond or bring him before a court of law for one of the several possible rulings by the court.

[398] The arrestee's admission that he has committed the crime has other several advantages. He may be relieved of the anxiety he might have as a result of committing the crime and may feel better for confessing. Although the arrest is made where the police, on the basis of information and evidence, have developed a *reason to believe* that the arrestee has committed a crime, they cannot be certain that they have caught the right person. The confirmation of their suspicion by the arrestee's own admission would relieve them of uncertainty as to whether the arrestee is the real offender.

[399] Sangero, "Miranda is Not Enough," at 2794.

[400] Harold J. Berman, *Introduction to Soviet Criminal Law and Procedure: The RSFSR Codes*, trans. Harold J. Berman and James W. Spindler (Cambridge: Harvard University Press, 1966), at 92 (cited in ibid) (hereafter Berman, *Soviet Criminal Law*).

[401] However, there are several reasons for the confession to be involuntary and/or untrustworthy. See discussion in the text. Moreover, from the arrestee's viewpoint, once under arrest he may feel that he has to please the officers so that he will not be mistreated during the investigation. "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." Stanley Z. Fisher, "Involuntary Confessions and Article 35, Criminal Procedure Code," 3 *J.Eth. L*, at 330 (1966) (hereafter Fisher, "Involuntary Confessions").

the alleged crime. Second, because their belief in his involvement is not supported by the suspect's own words. They begin to doubt their initial assessment. In such cases, officers may resort to compelling the arrestee to confirm their suspicions.

Consensus exists that a confession obtained by employing methods such as physical violence, psychological intimidation, inducements, and promises that are likely to overcome the interrogee's will should not be admitted as evidence during the trial of the confessor.[402] Some legal systems expressly prohibit methods they consider improper to be applied during interrogation, and build prophylactic measures into their criminal justice system to protect arrested persons from improper interrogation methods that have the potential to result in involuntary confession. Others go further, by banning police officers from receiving a confession that might be used as evidence.

The problem relating to confession and interrogation does not end there. The prophylactic measures (where fully complied with) can only guarantee that the confession would not be untrustworthy, or otherwise unacceptable, for any of the reasons attributed to the interrogation methods. Voluntariness of the confession does not guarantee its reliability. It is still possible for the arrested person for his own personal reasons to give a false confession, which may expose him to conviction despite his innocence while the real offender remains at large. Because a voluntary confession may be untrustworthy, most legal systems do not pass judgment on the guilt of the accused exclusively based on an admission of guilt. Instead, evidence corroborating confession is required.

This chapter focuses on four major points. The first section deals with the status of confession as evidence under Ethiopian law. The second section discusses different legislative measures adopted to guarantee voluntariness of a confession. The third section concerns the weight of voluntary confession as evidence. The fourth section discusses enforcement mechanisms.

Section I. Status of Confession under Ethiopian Law

Some legal systems, such as India, do not recognize police interrogation as a proper method of obtaining confession to be used as evidence.[403] Though the practice differs from the law, the legislative scheme in Argentina does not allow the police to conduct interrogations.[404] In Argentina, a confession given to the police "shall lack evidentiary force and shall not be used at trial."[405] To be used as evidence, the confession must be made before a competent court.[406] Similarly, in South Africa if a confession is made to a

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[402] Ibid.
[403] Ibid., at 332.
[404] Alejandro D. Carrio and Alejandro M. Garro, "Argentina," in Bradley, *Crim. Pro.*, at 25.
[405] Law No. 23465, 47 ADLA-A-100 (Amending Article 316 of the former Code of Criminal Procedure) in ibid., at 26.
[406] Ibid.

police officer it must be confirmed in the presence of a magistrate or justice of the peace[407] before it is used in evidence.

However, most legal systems recognize police interrogation as a legitimate way of collecting evidence. It is only where the voluntariness of the confession obtained through police interrogation is doubtful that the confession is not to be used as evidence. That is so, for instance, in Canada,[408] England,[409] France,[410] and Germany.[411] In the United States, a confession made before a police officer, though an out-of-court statement is admissible as an exception to the basic rule of evidence that hearsay is inadmissible.[412] This section deals with the position of Ethiopian law on the status of confession made before a police officer.

In the course of police investigation, an arrestee, in Ethiopia, may give his statement in a police station or before a court of law. Provisions of the Cr. Pro. Code dealing with statements of the arrestee before both fora are reproduced below.

Art. 27.—Interrogation

1. *Any person summoned under Art. 25 or arrested under Art. 26, 50 or 51 shall, after his identity and address have been established, be asked to answer the accusation or complaint made against him.*
2. *He shall not be compelled to answer and shall be informed that he has the right not to answer and that any statement he may make may be used in evidence.*
3. *Any statement which may be made shall be recorded.*

Art. 35. — Power of court to record statements and confessions

1. *Any court may record any statement or confession made to it at any time before the opening of a preliminary inquiry or trial.*
2. *No court shall record any such statement or confession unless, upon questioning the person making it, it ascertains that such person voluntarily makes such statement or confession. A note to this effect shall be made on the record.*
3. *Such statement or confession shall be recorded in writing and in full by the court and shall thereafter be read over to the person making the statement or confession, who shall sign and date it. The statement shall then be signed by the president of the court.*

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[407] Section 217(1) of the Criminal Procedure Act of 1977 (cited in P.J. Schwikkard and S.E. van der Merwe, "South Africa," in Bradley, *Crim. Pro.*, at 341-42).
[408] Kent W. Roach, "Canada," in Bradley, *Crim. Pro.*, at 67-68.
[409] John Sprack, *A Practical Approach to Criminal Procedure*, 10th ed. (Oxford: Oxford University Press, 2004), at 34 (hereafter Sprack, *Practical Approach*); David J. Feldman, "England and Wales," in Bradley, *Crim. Pro.*, at 108-110.
[410] Richard S. Frase, "France," in Bradley, *Crim. Pro.*, at 157-159.
[411] Thomas Weigend, "Germany," in Bradley, *Crim Pro.*, at 200-202.
[412] Sangero, "Miranda is Not Enough," at 2801.

Stanley Z. Fisher argues that Ethiopian criminal procedure does not allow investigating police officers to interrogate an accused and receive a confession that might be used as evidence during his trial. Fisher asserts that the drafters of the Cr. Pro. Code intended "to require all confessions which the police wish to have proved at trial, recorded and certified 'voluntary' under Article 35" of the Code. His reasons follow. The strong similarity between Article 35 of the Code with Section 164 of the Indian Code of Criminal Procedure suggests that the drafters of the Code were influenced by Section 164 of the Indian Code. This Section of the Indian Code authorizes the magistrate to record confessions, for only confessions so recorded are admissible in evidence at trial.[413] In Ethiopia, too, his argument goes, the Code does not allow confessions not judicially recorded to be admitted as evidence against the accused. In Fisher's opinion, the drafters of the Code did not expressly state this requirement because admissibility issues are a matter to be governed by evidence law.[414]

Reference to the Draft Evidence Rules[415] shows that confessions not recorded by the court are not to be admitted into evidence. Fisher notes that the wording of Article 27 (particularly the phrase *"any statement he may make may be used in evidence"*) and Article 97[416] of the Cr. Pro. Code (which requires statements taken under Article 27 of the Code to be marked and numbered by the registrar for possible use later in the trial) might be construed to imply that unrecorded confessions made to the police are admissible in accordance with Article 35 of the Code. However, he dismisses this construction on the ground that these provisions refer only to "*statements*," as opposed to *confessions,* to be used during the trial of the accused. In Fisher's opinion, there is a difference between a "*statement*" and a "*confession*" in that the latter is necessarily incriminating whereas the former is not. He continued to argue that the failure of Articles 27 and 97 of the Code to mention *confessions* can be taken as demonstrating the intent that only non-confessional statements are contemplated.[417] One may argue that a similarly worded phrase in Article 19(2) of the FDRE Constitution – "*that any statement they may make may be used as*

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[413] According to Sections 25 and 26 of the Indian Evidence Act, no confession made to a police officer or while in police custody shall be proved as against a person accused of any offence." Fisher, "Involuntary Confessions," at 332. This is replicated in the evidence rules of Ethiopia, which remained in draft form. See note 415, below.

[414] Fisher, "Involuntary Confessions," at 332-334.

[415] Draft—Evidence Rules, April 5, 1967

When Confession may be proved

26. (1). No confession made to a police officer shall be proved as against a person accused of an offence.

(2). No Confession made by a person while in the custody of the police shall be proved as against such person accused of an offence unless it has been recorded in accordance with the provisions of Article 35 of the Criminal Procedure Code.

[416] Art. 97.—Exhibits. All exhibits including depositions and statements under Art. 27 and 30 shall be marked and numbered by the registrar of the court. Such exhibits shall be kept by the registrar in a safe place and shall not be withdrawn without an order of the court.

[417] Recognizing the possible confusion that may arise from the wording of the law and the lack of express provision excluding confessions not recorded under Article 35, Fisher recommended that Article 35 of the Code be construed as a mandatory procedure if confession is to be used as evidence. Fisher, "Involuntary Confessions," at 335.

evidence against them in Court" – shows that only *statements* but not *confessions* given to the police are admissible as evidence, thereby indicating that the Constitution does not change the preexisting position.

The practice is quite different from Fisher's position on the matter. Confessions given to the police, to be used as evidence, need not be recorded under Article 35.[418] It is uncommon for accused persons to object to the admissibility of their confession on the ground that it was not recorded by a court of law. Applications for suppression of confession, which are few, are based on the ground that the confession was not given voluntarily. The issue was raised before and addressed by the Federal Supreme Court of Ethiopia in *Public Prosecutor v. Tamirat Layne et al.*[419]

In this case, the accused persons were charged with corruption and other related crimes. Among the evidence submitted by the public prosecutor were confessions of the accused persons alleged to have been given to an investigating police officer. The defence lawyers raised two objections on the admissibility of the confessions, one of which was that a confession given to a police officer by a suspect is not admissible as evidence under Ethiopian law. The Court addresses the issue as follows.

> Under Ethiopian law an accused gives his words regarding the accusation against him at different stages in the criminal proceeding. Provisions relevant to the issue at hand are Article 19 of the FDRE Constitution and Article 27 of the Cr. Pro. Code. Article 19(2) of the FDRE Constitution requires information to be given to arrested persons, in a language they understand, that statement they make may be used in evidence. It is not difficult to understand, from this constitutional provision, that statements made out of court by arrested persons are to be used as evidence. Moreover, a look at Article 27 of the Code does not indicate that a confession given to the police is inadmissible as evidence. Rather, its second sub article requires the police to inform the arrestee that any statement he may make voluntarily may be used in evidence against him. The provisions of both the Constitution and the Code prohibit use of force by the police during interrogation and require that the arrestee be informed of his right to remain silent. Both allow a voluntarily given statement to be submitted to court to be used as evidence.
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> On the other hand, Article 19(5) of the Constitution provides that arrested persons may not be compelled to confess and that evidence obtained through coercion is inadmissible as evidence. What we can understand from these provisions is that it is not any confession given to the police but only that obtained under coercion that is inadmissible as evidence. The lawyers' argument that a statement given to the police by the suspects cannot be used as evidence under Ethiopian law for it is presumed to have been obtained by threat and pressure, apart from being

[418] See, *e.g.*, *Public Prosecutor v. Tamirat Layne, et al.* (Fed. Sup. Ct., Cr. F. No. 001/1989) and *Public Prosecutor v. Leyekun Sergualem* (Fed. Sup. Ct., Cr. App. No. 6359, Miazia 20, 1994 E.C.).
[419] *Public Prosecutor v. Tamirat Layne et al.* (Fed. Sup. Ct., Cr. F. No. 001/1989).

> inconsistent with the clear provision of the Constitution, emanates from the assumption that the police, who is supposed to enforce law and order, collect evidence illegally which is unacceptable.
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> The lawyers invoked foreign laws to support their argument. Legal issues in general and issue of admissibility of evidence in particular has to be treated in accordance with relevant laws of the concerned country. Where a reference to foreign laws is appropriate for the better understanding of our own laws, the reference has to be made to jurisdictions having laws similar to ours. Confession given to the police, in the jurisdictions cited by the lawyers, is inadmissible for they have clear legal provisions to that effect. Because evidence is to be inadmissible only where the law provides so, in the absence of such laws we believe that courts should admit the produced evidence and weigh it. Where on the one hand there is no clear provision that prohibits the admission, into evidence, of confession made to the police and on the other there are both constitutional and procedural provisions which envisage the admissibility of confessions given to the police, we do not accept the lawyers' objection on the admissibility of the confession given by the accused persons." [420]

Notes and Questions

1. Fisher's argument is that because Article 35 of the Cr. Pro. Code is similar to Section 164 of the Indian Criminal Procedure Code, which requires all confessions to be used as evidence to be judicially recorded, and Article 35 is copied from Section 164 of the Indian Criminal Procedure Code, Article 35 should be understood in light of Section 164 of the Indian Code. Though the court recognized that there are instances where a reference to foreign law to understand our own law is appropriate, it did not accept the lawyers' objection (which echoed Fisher's argument) on the admissibility of confession not recorded under Article 35. The Court emphasized that there is no clear provision under Ethiopian law that provides for inadmissibility of confessions not judicially recorded. Of course, under the Indian Evidence Act, as opposed to the Ethiopian, there is a clear provision that prohibits a confession not recorded by the court from being used as evidence. That is what the Court meant when it stated that in jurisdictions where confession given to the police is not used as evidence, there are explicit provisions to that effect. Note that the Draft Evidence Rule, which Fisher relied on to show the intention of the drafters of Article 35 of the Code, expressly prohibits a confession not recorded in accordance with Article 35 from being used as evidence.
2. Under Articles 27 (2), 97 and 145 of the Code and Article 19(2) of the FDRE Constitution which envision the words of the suspect to be used in evidence during trial the word "*statement*" instead of "*confession*" is consistently used to refer to the information given by the suspect during his interrogation by the police officer. However, Article 35 of the Code, under which the court is authorized to receive what the suspect states, refers to both "*statement*" and "confession." That suggests the validity of Fisher's argument that no confession, but only statements, are to be used in evidence unless recorded under Article 35 of the Code. For Fisher, statements and

[420] The decision is written in Amharic; the translation is mine.

confessions are different under Ethiopian Criminal Procedure law.[421] In *Public Prosecutor v. Tamirat Layne et al.*, the Federal Supreme Court uses the two terms interchangeably. In South Africa, confession is understood as a statement which is "an unequivocal acknowledgment of guilt, the equivalent of a plea of guilty before a court of law."[422]

3. Who decides whether the arrestee can give a statement or confession to the court in accordance with Article 35? Is it only when the police officer wishes or can it also be made upon the request of the arrestee? In light of the fact that Article 35 is silent as to who may request that a person appear before court of law for his statements and confessions to be recorded, can the arrestee request the police to let him appear before court for his statements and confession be recorded? If so, an arrestee who might have confessed to the police under influence may have the opportunity to freely tell the court his version of the story about the allegations against him.
4. Would the inconsistency between the statements made under Article 27 to the police and under Article 35 to the court have any relevance in deciding whether or not the confession or statement made by the accused was given voluntarily and hence in deciding whether or not it should be used in evidence? In *Public Prosecutor v. Leyekun Sergualem*,[423] the accused admitted to the police (under Article 27) that he had committed the crime but denied his involvement when he appeared before court (under Article 35). The Federal Supreme Court ruled that the inconsistency between the statements made under Articles 27 and 35 of the Code does not necessarily lead to the conclusion that the statement given under Article 27 was obtained under coercion. Rather, in view of the fact that his admission under Article 27 was compatible with other evidence of the prosecutor, the inconsistency between the statements made to the police and to the court simply indicated that the accused had changed his mind rather than suggesting the involuntariness of the confession given under Article 27.

   In *Sisay Dagne Yirdaw v. Public Prosecutor*,[424] the Federal Supreme Court expressed its position on the weight of a confession given under Article 27 of the Code and its value *vis-à-vis* a confession made under Article 35. In that case, the only evidence of the prosecutor was the confession made under Article 27 of the Code. The trial court accepted the confession as adequate to establish the prosecution's case and ordered the accused to present his defence. As a defence, the accused introduced the statement he

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[421] Fisher, "Involuntary Confessions," at 334, note 19.

[422] *R v. Becker*, 1929 AD 167 (cited in P.J. Schwikkard and S.E.van der Merwe, "South Africa," in Bradley, *Crim. Pro.*, at 341). In South Africa, there is another category of statement by a suspect which is known as "informal admission." It refers to "a statement made out of court by an accused which is adverse to her case, but which does not admit to all the elements of the crime charged." Both confessions and admissions are admissible as evidence but with different preconditions. As provided under Section 219A of the Criminal Procedure Act of 1977, voluntariness is the only requirement for an admission to be accepted as evidence. According to Section 217(1) of the Act, for a confession to be admitted in evidence, it should have been given voluntarily and "in sound and sober senses and without undue influence." Ibid.

[423] *Public Prosecutor v. Leyekun Sergualem* (Fed. Sup. Ct., Cr. App. No. 6359, Miazia 20, 1994 E.C.).

[424] *Sisay Dagne Yirdaw v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 17739, Tahisas 28, 1997 E.C.).

made before a court of law under Article 35 of the Code in which he denied his involvement in the crime. The trial court convicted the accused for the charged offence because it did not accept the accused's evidence as adequate to rebut the prosecution's case. The convict lodged an appeal to the Federal Supreme Court.

The appellate court indicated that the accused should not have been required to present his defence as the confession given under Article 27, in and of itself, was not adequate to prove the prosecution's case beyond a reasonable doubt. According to the Court, even if the confession were adequate evidence to require the accused to present his defence, the statement he made before a court of law under Article 35 should have been considered adequate to rebut the prosecution's case, which was established exclusively by the confession made under Article 27. The court incidentally found that the statements given before the court in accordance with Art. 35 were believed to have been made freely and were hence more credible than those made under Article 27 of the Code.

Note on the (In) significance of Article 35

A suspect has several opportunities to tell what he knows about the crime that he is suspected of. During investigation he might make a confession to the police (under Article 27) and/or to the court (under Article 35).[425] It is not clear what factors govern the officer's decision to record the confession himself in accordance with Article 27 or to seek judicial recording of the confession in accordance with Article 35. Since a confession given to the police under Article 27 can be used in evidence, admissibility of confession cannot be a reason for the police to bring the accused before a court of law for judicial recording of a confession. Nor is burden of proof[426] a justification for the police to seek judicial recording of a confession. Furthermore, the fact that a confession was given before a court under Article 35 of the Code does not make it immune from the voluntariness test.[427] As Article 35(2) of the Code requires ensuring the voluntariness of the statements and confessions given by the accused, the court's failure to comply with this requirement might be a ground to challenge the admissibility of the confession. In *Getachew Biru v. Public Prosecutor,*[428] the appellant challenged the voluntariness of his confession given under Article 27 although it was confirmed in accordance with Article 35. The Federal High Court accepted the appellant's evidence and disregarded the confession.

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[425] The accused also has other opportunities to testify in connection with the alleged crime during the trial stage in accordance with Articles 132 and 142 (3) of the Code.

[426] Courts require the accused to prove that the police used improper methods during interrogation and that these methods made him confess. See *Public Prosecutor v. Tamirat Layne et al.* (Fed. Sup. Ct., Cr. F. No. 001/1989).

[427] In fact, Article 35 of the Code is of little significance in guaranteeing voluntariness of the confession as, in practice, there is still a chance that the police influence might extend to this stage, for the accused will go back to the police station after giving his confession and/or statement to the court.

[428] *Getachew Biru v. Public Prosecutor* (Fed. High Ct., Cr. App. No. 173/93, Tahisas 15, 1995 E.C.).

Section II. Voluntariness of Confession

Under section one we concluded that Ethiopian law, subject to the limitations discussed above, recognizes a confession as evidence if it is made voluntarily by the suspect. The Ethiopian Constitution and Criminal Procedure Code incorporate detailed provisions that are intended to ensure that any confession made by an arrestee is uncoerced. The law attempts to prevent involuntary confessions in two major ways. First, the law expressly prohibits methods which are potentially capable of influencing the interrogee to confess without his own free will. Such methods include, but are not limited to, physical or psychological compulsion, promise, and inducement. Second, the law requires the police to take certain positive steps to ensure that the accused is responding to interrogation out of a sense of free will. Such steps include informing the interrogee that he has the right to remain silent and allowing the suspect to consult his lawyer – measures that can be described as prophylactic in nature. The latter kind of requirement is justified by the need to dispel the compulsion inherent in the custodial interrogation. As stated by the U.S. Supreme Court, "without proper safeguards the process of in-custody interrogation of persons suspected or accused of a crime contains inherently compelling pressures which work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely."[429]

2.1. Safeguards Against Involuntary Confession

2.1.1. Prophylactic Measures

In the law of criminal procedure, a prophylactic rule is meant to prevent a violation of a constitutional right.[430] Rules recognizing the right of the arrestee to remain silent, to be informed of his right to remain silent, and to obtain counsel are prophylactic in nature, for these rules are intended to protect the arrestee's right against compulsory self-incrimination.[431]

2.1.1.1. Right to Remain Silent and to be Informed of That Right

Article 19(2)[432] of the Constitution and Article 27 (2)[433] of the Cr. Pro. Code recognize the right of arrested persons to remain silent and to be informed of their right to do so. Both the Constitution and the Code impose an obligation on the interrogating police officer to warn the suspect that any statement he makes during interrogation may be used in evidence if his case continues to trial.

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[429] *Miranda v. Arizona*, 384 U.S. at 467 (cited in Sangero, "Miranda is Not Enough," at 2801).
[430] Dressler, *Understanding Crim. Pro.*, at 73.
[431] The U.S Supreme Court is reported to have referred to these rights as prophylactic in nature. Ibid., at 72.
[432] It states: "Persons arrested have the right to remain silent. Upon arrest, they have the right to be informed promptly, in a language they understand, that any statement they make may be used as evidence against them in court."
[433] It states: "He (the arrestee)…shall be informed that he has the right not to answer and that any statement he may make may be used in evidence."

Approaches in Other Jurisdictions

The U.S Supreme Court, in *Miranda v. Arizona*,[434] reasoned that the right to be informed of the right to remain silent and that anything the arrestee says can be used against him in a court of law are among the Fifth Amendment safeguards in the U.S. Constitution. The Fifth Amendment provides, *inter alia*, that no person shall be compelled in any criminal case to be a witness against himself. This interpretation of the Court was criticized for lack of historical and textual support. As argued by Professor Albert Alschuler, "neither the English nor the American version of the privilege afforded suspects and defendants a right to refuse to respond to incriminating questions."[435] In England and America the privilege was not meant to be applied at the stage of police interrogation. In England, the privilege against compulsory self-incrimination applied only to judicial interrogations.[436] In the United States, too, the phrase "no person...shall be compelled to be a *witness* against himself" is construed to be applicable at his criminal trial.[437]

In France, although suspects are not duty bound to answer police questions, they do not have the right to be informed of their right to silence at any stage of police interrogation.[438] Chinese law requires suspects to answer truthfully the questions posed by investigative officers. Suspects only have the right to refuse to answer questions irrelevant to the case. Article 12 of the Chinese Criminal Procedure Law provides:[439]

> When interrogating a criminal suspect, investigation personnel shall first ask the criminal suspect whether or not he has engaged in a criminal act and let him state the circumstances of guilt or explain his innocence before putting questions to him. The criminal suspect shall answer the questions put by the investigation personnel according to the facts. However he has the right to refuse to answer questions irrelevant to the case.

There is no consensus on the appropriateness of recognizing the rights to remain silent and to be informed of that right. Some jurisdictions consider recognition of these rights unacceptable because it might obstruct the truth-discovery process.[440] For others, it has vital significance in guaranteeing the voluntariness of a confession. The U.S Supreme

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[434] *Miranda v. Arizona*, 384 U.S. at 436, 479 (1966) (cited in Russell L. Weaver et al., *Principles of Criminal Procedure* (St. Paul, Minnesota: West Group, 2004), at 174-75 (hereafter Weaver et al., *Principles of Crim.*).

[435] Albert W. Alschuler, "A Peculiar Privilege in Historical Perspective: Right to Remain Silent," 94 *Mich. L. Rev.* 2625 (1996) (quoted in Dressler, *Understanding Crim. Pro.*, at 467).

[436] Dressler, *Understanding Crim. Pro.*, at 467-68.

[437] Ibid., at 468.

[438] Richard S. Frase, "France," in Bradley, *Crim. Pro.*, at 159.

[439] Liling Yue, "China," in Bradley, *Crim. Pro.*, at 86.

[440] Paul Cassell argues of the danger of "lost confessions" – namely, confessions that are not obtained due to the requirement that the police inform the accused of his right to remain silent and that his statement may be used in evidence – in resulting in release of real offenders, thereby impacting the truth-finding process. Paul G. Cassel, "The Guilty and the 'Innocent': An Examination of Alleged Cases of Wrongful Conviction from False Confessions," 22 *Harv. J. L. & Pub. Pol'y* 523 (1999) (cited in Sangero, "Miranda is Not Enough," at 2796.

Court justifies the right to be informed of one's right to remain silent by the inherently coercive nature of custodial interrogation.[441] For the Court, extracting statements from the suspect against his free will and using those statements against him at trial impacts two fundamental rights: the Privilege Against Compulsory Self-Incrimination and the Right to Due Process of Law. If an interrogee is not informed of his right to remain silent – the procedural safeguard against an inherently coercive environment – was not properly communicated to him, any confession made by the interrogee would be considered coerced even if no illegitimate pressure was exerted. It follows that a confession obtained under such condition would not be considered as freely made; meaning use of the confession at trial would violate the accused's right to due process of law and his privilege against compulsory self-incrimination.[442]

Indeed, by instructing the police to inform the arrestee of his rights, the law serves two purposes. First, because there is a high chance that arrestees do not know that they have such a right and do not understand effects their words could have on their case (which is often the case in Ethiopia), the law ensures that they will not be victims of their own ignorance of the law. Second, when the suspect hears the officer telling him that he has the right to remain silent, he will have confidence that the officer is ready to respect the right—neutralizing what the U.S. Supreme Court described as the "inherently coercive" environment of custodial interrogation.

Unlike in Ethiopia, the right to be informed of one's right to remain silent does not have a constitutional status in many countries. These countries include the United States. In the U.S, although great importance is attached to *Miranda* warnings, one of which is informing the accused that he has the right to remain silent, the U.S Supreme Court[443] considers these warnings non-constitutional prophylactic rules[444]— rules that prevent a violation of constitutional right— but not constitutional rules in themselves. Hence, in the U.S if an accused who is being interrogated is not informed of his right to remain silent (the prophylactic measure), the failure to warn him would not actually violate the constitution. Such a result would not possible in Ethiopia, because the police's obligation to inform the accused of his right is a constitutionally recognized prophylactic rule.

2.1.1.2. Right to Counsel

Both the FDRE Constitution[445] and the Cr. Pro. Code[446] recognize the right of the accused to be assisted by a lawyer. As succinctly put by John Sprack,[447] the rationale for allowing

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[441] Weaver et al., *Principles of Crim.*, at 174.
[442] Dressler, *Understanding Crim. Pro.*, at 427-28.
[443] Ibid., at 73.
[444] For more on "prophylactic measures," see ibid., at 74-75.
[445] Its Article 20(5) states: "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."

a person under police custody to consult a lawyer has to do with preventing the prejudicial effects of the arrestee's ignorance of the law.

> Suspects questioned by the police are frequently at a disadvantage in that they have little or no knowledge of the law or police powers. Thus, although cautioned, they do not appreciate the arguments for and against staying silent, or realize that, by answering that, they may supply the police with vital admissions without which there would not even be a case to answer or the possibility of a prosecution. Similarly, a detainee at the police station is naturally anxious to be released as soon as possible. If he does not know for how long the police can lawfully hold him, he may in desperation give the police officers the answers he thinks they want in the hope they will then bail him, not realizing that they would in any event be obliged to let him go or charge....

For Sprack, the purpose of allowing the arrestee to consult a lawyer at the investigation stage is to fill the knowledge gap and make sure that the arrestee understands his rights.[448]

Article 61 of the Cr. Pro. Code recognizes the right of the arrestee to consult a lawyer upon request. Because the provision requires the authorities to allow the arrestee to consult his advocate "forthwith," the suspect must be allowed to consult his lawyer at whatever stage the suspect expresses the desire to do so. If, for instance, he asks to speak to a lawyer before interrogation, the police officer may not delay the consultation with his lawyer until he is interrogated. Unlike the right to remain silent, the police officer does not have a duty to inform the suspect that he has the right to consult a lawyer. The provision does not entitle the arrestee to state-appointed counsel; it allows him to retain a lawyer at his own expense.

Unlike the Cr. Pro. Code provision, Article 20(5) of the FDRE Constitution, which recognizes the accused person's right to counsel, does not seem to recognize the right of an arrestee to consult a lawyer during the investigation stage of a criminal proceeding. It is when he appears before court for trial that the arrestee is entitled to the presence of appointed or retained counsel. Article 14 (3) of the ICCPR[449] and Article 7 of the African Charter on Human and Peoples' Rights[450] (Banjul Charter) confirm that the accused has the right to counsel during the trial stage of a criminal proceeding. Article 19 of the FDRE Constitution, which provides for the rights of arrested persons, does not include the right to consult a lawyer.

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[446] Its Article 61 states: "Any person detained on arrest or on remand shall be permitted forthwith to call and interview his advocate and...."

[447] Sprack, *Practical Approach*, at 39.

[448] Ibid.

[449] Its Article 14(3) states: "in the *determination* of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing."

[450] Its Article 7 (1) states: "Every individual shall have the right to have his *cause heard*. This comprises: (c) the right to defense, including the right to be defended by counsel of his choice." (emphasis added)

In some jurisdictions, such as the U.S., the right to counsel before interrogation is one of the necessary conditions to ensure that the confession given by the arrestee is voluntary. In *Brewer v. Williams*, the U.S. Supreme Court expressly stated that "once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."[451] It is important to note that the right of the suspect to consult a lawyer during interrogation does not come from the Sixth Amendment to the U.S Constitution, which recognizes one's right to be assisted by a lawyer for his defence. The Sixth Amendment right to counsel, which is similarly phrased in Article 20(5) of the FDRE Constitution, attaches where adversary judicial criminal proceedings begin.[452] The right of the suspect to consult a lawyer during interrogation is simply a *Miranda* right, the purpose of which is to "protect the suspect's privilege against compulsory self-incrimination."[453] The *Miranda* right to counsel, as opposed to the right to counsel on request in Article 61 of the Code, requires the police officer to inform the accused that he has the right to consult a retained or appointed lawyer.

In Germany, the Code of Criminal Procedure[454] allows suspects to consult a lawyer before, but not during, interrogation. It is only during interrogation by a prosecutor or by a judge that a suspect can have retained counsel (but not state-appointed counsel) present during interrogation.[455] As provided in paragraph 141, Section 3 of the Code of Criminal Procedure, it is only upon special motion of the prosecutor's office that counsel may be appointed before trial.[456]

Other jurisdictions, such as China, do not allow suspects to consult a lawyer before interrogation. Article 96 of the Chinese Criminal Procedure Law provides that suspects may only hire a lawyer after being first interrogated by the investigating organ.[457] In France, the arrestee is allowed to consult a lawyer only after a certain time has passed since the arrest; the time varies depending on the nature of the offence. [458] Normally, an arrestee may speak to a lawyer after 20 hours from the time of his arrest. In cases such as conspiracy and extortion, the arrestee must wait for up to 36 hours to speak to a retained or appointed attorney, and for drug and terrorism cases he must wait for up to 72 hours after the arrest.[459] However, counsel is not allowed to be present during questioning.[460]

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[451] *Brewer v. Williams*, 430 U.S. 387, 388 (1977) (cited in Weaver et al., *Principles of Crim.*, at 171.
[452] Dressler, *Understanding Crim. Pro.*, at 429.
[453] Ibid.
[454] Para. 136 section 1 Code of Criminal Procedure, (cited in Thomas Weigend, "Germany," in Bradley, *Crim. Pro.*, at 200).
[455] Ibid., at 201.
[456] Ibid.
[457] Liling Yue, "China," in Bradley, *Crim Pro.*, at 86.
[458] French Code de proce`dure pe`nale (CPP) Art. 63-4 (cited in Richard S. Frase, "France," in Bradley, *Crim Pro.*, at 158-59).
[459] Ibid.
[460] Ibid.

Notes and Questions

1. Ethiopian law does not recognize the right to be informed of the right to consult a lawyer. Whether or not an arrestee has a right to consult a lawyer itself is not clear. Apparently, the FDRE Constitution gives recognition to the right to counsel at the trial stage. However, Article 61 of the Cr. Pro. Code entitles an arrestee or a detainee to consult a lawyer. Unlike the right to remain silent, the Code does not require the police officer to tell the arrestee that he has the right to consult a lawyer. The law tells police officers simply not to prohibit an arrestee from consulting a lawyer. Can a suspect demand the presence of his lawyer during his interrogation? To what extent is the voluntariness of the confession undermined by the fact that there is no right to consult a lawyer before or during interrogation and no right to be informed of the right to consult a lawyer? In showing how important it is for the accused to consult a lawyer during the investigation stage of a criminal proceeding, the U.S. Supreme Court stated that the right to counsel at trial "would be a very hollow thing" if defendants were denied counsel at the "critical" stage "when legal aid and advice are surely needed."'[461] According to the Court, "attaching the right to counsel to the trial stage would make the trial no more than an appeal from the interrogation."[462]
2. In practice, a lawyer is appointed for suspects at state expense only at the trial stage.[463] The practice governing the right of a suspect to consult his privately retained counsel is not uniform. Some police officers allow the arrestee to talk to his lawyer before interrogation. Others do not. What is the significance of consulting a lawyer before interrogation for guaranteeing voluntariness of the confession? In particular, what is the significance where the interrogating police officer informs the interrogee of the right to remain silent and that if he confesses the confession will be used as evidence against him? Normally, lawyers advise their clients, even when they know they are criminals, to deny the charges or not to confess, which obstructs the path to the truth.

2.1.2. Prohibition Against Improper Methods

The Prophylactic rules discussed above require police officers to do something proactively. In here we will consider what police officers should not do.

2.1.2.1. Compulsion

In Ethiopia, use of force by a police officer while interrogating a suspect is prohibited by various laws ranging from international instruments to Council of Ministers Regulation. Arrested persons are protected from compulsion by virtue of Articles 18(1) of the FDRE Constitution,[464] Article 7(1) of the ICCPR,[465] and Article 5 of the Banjul Charter,[466] all of

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[461] *Escobedo v. Illinois*, 378 U.S. 478 (1964) (cited in Weaver et al., *Principles of Crim.*, at 173).
[462] Ibid.
[463] Muradu Abdo, "The Indigent's Right to Defense Counsel in Ethiopia" in Wondwossen Demissie (ed.), 3 *Ethiopian Human Rights Law Series* (Addis Ababa: Addis Ababa University, 2010), at 145-146 (hereafter Muradu, "Indigent's Right").
[464] It states: "Everyone has the right to protection against cruel, inhumane or degrading treatment...."
[465] It states: "No one shall be subjected to torture or to cruel, inhumane or degrading treatment...."

which prohibit torture, bodily harm, or any other kind of inhuman treatment. Article 27(2) of the Cr. Pro. Code expressly prohibits compelling a person being interrogated to answer the questions raised during the interrogation. Article 38 of the Federal Police Commission Administration Council of Ministers Regulation No. 86/2003 requires any use of force by a police officer to be reasonable, supported by law, and based on legal authorization. As applied to interrogation, the Regulation provision means that as the arrestee has the right to remain silent and not to be compelled to answer questions raised during interrogation, use of force to elicit information from the arrestee is disallowed because it is not reasonable or supported by law.

In *Brown v. Mississippi,*[467] the U.S. Supreme Court held that to use involuntary confession extracted through physical torture[468] is a violation of Due Process. As reasoned by the Court, "the use of such coerced confessions at trial 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.'"[469] The Court in *Lisenba v. California*[470] justified the Due Process prohibition of coerced confession based on two needs: the need to prevent the use of "presumptively false evidence" in court, and the need to prevent unfairness "in the use of evidence whether true or false."

2.1.2.2. Inducement, Threat, Promise or any other Improper Method

Art. 31 of the Cr. Pro.Code. *No inducement to be offered*

1. *No police officer or person in authority*[471] *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.*

This provision is so general that it is applicable both to witnesses and suspects examined by the police. It is not only coercion that may make suspects to admit commission of crime involuntarily: because an arrestee is in a vulnerable condition, any of the methods

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[466] In its relevant part it states: "All forms of exploitation and degradation of man particularly…torture, cruel, inhuman or degrading…treatment shall be prohibited."

[467] 297 U.S. 278 (1936) (cited in Weaver et al., *Principles of Crim.* at 165).

[468] In *Brown v. Mississippi*, 297 U.S. 278 (1936), police officers told three defendants that they would be physically tortured until they confessed. Furthermore, "one was hanged three times from a tree and suffered two bouts of severe whipping and the other two were whipped with a strap until their bare backs were cut to pieces." Weaver et al., *Principles of Crim.*, at 165.

[469] 297 U.S. 278 (1936) (quoted in Weaver et al., *Principles of Crim.*, at 165).

[470] 314 U.S. 219, 234-236 (1941) (cited in Weaver et al., *Principles of Crim.*, at 166).

[471] The prohibition under this provision should be seen in light of its purpose. It should not be construed as allowing persons other than a police officer or a person in authority to threaten…a person being examined by the police. But, where a threat comes from a police officer or a person in authority it may have the effect of making the confession or testimony inadmissible. However, if the threat comes from other persons it may not have impact on the admissibility of the confession or statement without prejudice to the arrested person's right to institute action against these persons.

listed and envisaged in Article 31 has the potential to make him admit against his free will that he has committed a crime.

i. Personal Scope of Article 31(1): What Does "Person in Authority Refer To?

The provision clearly forbids any police officer (not only the one who conducts the interrogation/examination) from employing the listed improper methods of interrogation. The other person prohibited from resorting to such wrong methods is a "person in authority." The phrase "person in authority" is not defined under Ethiopian law. Nor is there a court case in which the phrase is defined and analyzed.

In the U.S., there is a clear requirement of official overreaching for the involuntariness of a confession to be relevant for admissibility issue. As stated by the U.S. Supreme Court, "the most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause."[472] For the Court, in order to exclude a confession on due process grounds, there must be a "link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other."[473] Where there is no official overreaching, the involuntary confession will be admitted into evidence, although its weight is still subject to scrutiny in accordance with the relevant laws of evidence. [474]

Despite the lack of clear requirement of "official overreaching," because the person contemplated under Article 31(1) of the Code has to be one who is "*in authority*," the language of the Code seems to refer to one who has legal authority to participate in the criminal proceeding, such as the prosecutor, the judge, and the private complainant (for an offence punishable only upon formal complaint).

Defining the phrase "person in authority" to mean a person who in one way or another could influence the outcome of a criminal proceeding would present its own problems. This approach would exclude from the phrase persons who do not participate in a criminal proceeding but who are nonetheless capable of compelling or inducing an arrested person to make a confession. A confession compelled or induced by an ordinary person could be as involuntary and untrustworthy as one compelled or induced by a person in authority. It is difficult to see the logic in saying that a confession influenced by state authorities is more unreliable than one influenced by ordinary persons.

The U.S Supreme Court addressed this concern in *Colorado v. Connelly,*[475] linking the prohibition against the police or other persons in authority exerting illegitimate pressure on the interrogee to the Due Process of Law requirement rather than to the unreliability of

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[472] *Colorado v. Connelly*, 479 U.S. 157, 165-66 (1986) (cited in Dressler, *Understanding Crim. Pro.*, at 443-44).
[473] Ibid.
[474] Ibid.
[475] *Colorado v. Connelly*, 479 U.S. 157, 165-66 (1986) (cited in Joshua Dressler, *Understanding Crim. Pro.*, at 443-444).

such confessions. In *Colorado*, the court indicated, D's confession, motivated as it was by perceived orders from God, was as involuntary—and, potentially as untrustworthy—as a confession wrung from him by the police. Nonetheless, the court concluded that the "involuntary confession" jurisprudence is entirely consistent with the settled law requiring some sort of "state action" to support a (due process clause) violation.[476]

The Court stated that "the potential unreliability of a confession is a matter that "the constitution rightly leaves...to be resolved by...laws governing the admission of evidence."[477] In a partial concurrence, one of the Justices observed "the fact that the statements made by D were involuntary does not mean that their use for whatever evidentiary value they may have is fundamentally unfair or a denial of due process."[478]

Under Article 31(1) of the Cr. Pro. Code, a police officer or a person in authority is prohibited not only from directly employing the methods listed and contemplated there under. The phrase "no police officer or person in authority shall...or *cause* to be offered, made or used any inducement, threat, promise or any other improper method..." indicates that persons in authority are also prohibited from influencing the arrestee indirectly.

ii. Methods Prohibited: What Does "Any Other Improper Method" Mean?

According to Article 31 (1) of the Code, inducement, threat, and promise are just examples of methods that should not be used against a person examined or interrogated by the police. The provision generally prohibits what it calls "*any other improper method*." What methods are considered "improper"? In *Bram v. United States,*[479] the U.S. Supreme Court states that a confession "must not be extracted by any sort of threat or violence, nor obtained by any implied promises, however slight, nor by the exertion of any improper influence." In connection with the type of influence, the Court indicated that because "the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner," it would hold a confession inadmissible "if any degree of influence" was exerted.

If "improper" refers to any method that may influence the suspect to confess against his free will, as suggested by the U.S. Supreme Court, isn't the restriction on the police so broad as to leave them with no meaningful way of eliciting the truth?

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[476] In that particular case, D, a person suffering from chronic schizophrenia, in a psychotic state and responding to "command hallucinations" (he heard "the voice of God" order him to confess or commit suicide), approached a police officer on the street and confessed to a murder. According to expert testimony, D's mental condition "interfered with his volitional abilities; that is, his ability to make free and rational choices," including the decision whether to confess. Despite this, the Court did not accept it as a ground for excluding the admission D made, for there was no state involvement. Ibid.

[477] Ibid.

[478] Ibid.

[479] 168 U.S. at 532, (1897), in ibid., at 447, note 65.

Promise and Threat

Interrogation tactics that threaten a suspect with harsh punishment if he does not confess, or offer express or implied promises of significant sentencing advantages if he does, may exert such unfair pressure on the suspect as to render the resulting confession involuntary.[480] White takes the position that not all promises or threats should be considered as resulting in involuntary confession.[481] As opposed to the U.S. Supreme Court's position[482]– that any promise or threat is prohibited -- White argues that only a harsh threat or a significant promise should be considered to result in an involuntary confession.

Deception

Is it wrong for a police officer to display false sympathy for the accused, to falsely claim to have incriminating evidence proving the accused's guilt, to suggest that the suspect confess to obtain leniency in punishment, or to use other means of deception with a view to making the suspect confess? Understandably, such deception may make a real offender confess, for he can easily believe the story told by the police officer. But it is hardly possible for an innocent person to believe the story of the officer and be tempted to confess in hopes of leniency. A reasonable offender may wish to take advantage of what is suggested by the police –mitigated punishment. But a reasonable innocent person would not confess, for his innocence gives him confidence that he will be acquitted without any punishment at all. Why should he look for lenient punishment?[483] Insofar as deception has the potential to make real offenders but not innocent persons confess, should it be treated as an improper method of interrogation? Or is it a proper method? In Canada, it is lawful for the police to lie and engage in deception to secure a confession.[484] In Israel, as in the U.S.,[485] police deception is not considered a wrongful method of interrogation insofar as it does not affect the search for truth.[486]

Cross-Examination

Would it be wrong for the police officer to cross-examine a suspect during interrogation? Doesn't cross-examination amount to compulsion prohibited under Article 27(2) of the Code? Obviously, if the suspect does not want to confess and the cross-examination pressures him to confess by showing that his statements are inconsistent or that they reveal his involvement in the commission of the crime, it can be said that he is being made to

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[480] W. S. White, "What is an Involuntary Confession Now?," 50 *Rutgers L. Rev.* 2001, 2052, (1998) (hereafter White, "What is Involuntary").

[481] Ibid.

[482] Ibid.

[483] Of course, there is no doubt that an arrestee who does not have confidence on the criminal justice system may trust that the officer's story is true, although he knows he is innocent. In such cases, the deception might be capable of influencing the innocent person to confess.

[484] Kent W. Roach, "Canada," in Bradley, *Crim. Pro.*, at 70.

[485] Welsh S. White, "False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions," 32 *Harv. C.R.-C. L. Rev.* 105 (Winter 1997) (cited in Sangero, "Miranda is Not Enough," at 2802)

[486] Eliahu Harnon and Alex Stein, "Israel," in Bradley, *Crim. Pro.*, at 234.

confess involuntarily. If the suspect is cornered by the cross-examination questions and decided to confess, how can his admission be treated as voluntary? Moreover, since article 142 of the Code does not allow the public prosecutor to cross-examine an accused who decides to testify on his own behalf, it is unlikely that the law would allow the police to cross-examine a suspect being interrogated.

Lengthy Interrogation

No matter how benign the process, virtually continuous questioning by the police will at some point become unfair because it exerts too much pressure on the suspect. The long interrogation may subject the suspect to exhaustion, resulting in substantial impairment of his free will. Also, interrogating the suspect several times indicates that the officer is insisting on getting what he wants from the suspect. Thus repeated interrogation is likely to make the suspect decide to confess, especially if the interrogation involves repeatedly asking the suspect similar questions. In *Ashcraft*, the U.S. Supreme Court held that the fact that an interrogation that continued for 36 hours made it "inherently coercive."[487]

In *Culombe v. Connecticut,*[488] the U.S. Supreme Court stated that questioning the suspect repeatedly suggests that the officer is looking to obtain specific answers, which is an important factor pointing towards involuntariness. Under Germany's Code of Criminal Procedure, though there is no formal time limit for interrogation, statements obtained when the suspect or witness is exhausted are not admissible as evidence.[489]

In a criminal appeal filed by *Demissew Zeryehun and Yakob Haile,*[490] the Federal Supreme Court of Ethiopia expressed its position on a related issue. In this case, the prosecutor produced a confession made by Yakob Haile as part of his evidence. The confession document shows that Yakob was interrogated twice on a similar issue—whether or not he had committed the crime that he was suspected of. The Federal Supreme Court noted that once an arrestee is interrogated by the police, he should not be interrogated for the second time on the same matter. This was one of the reasons for the Court to conclude that the confession was not taken in accordance with the law. In *Tessema Bizachew v. Public Prosecutor,*[491] one of the grounds of appeal for Tessema was that the trial court disregarded his statement given under Article 27 of the Code. The Federal Supreme Court noted that the record of the lower court showed that the suspect was interrogated on three separate occasions –twice the day he was arrested and once the following day. The Court indicated that subjecting the suspect to such repeated interrogation is not in accordance with the spirit of Article 27 of the Code.

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[487] *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

[488] 367 U.S. 568 (1961) (cited in White, "What is Involuntary," at 2012.

[489] Para. 136a section 1, 3 German Code of Criminal Crocedure (cited in Thomas Weigend, "Germany," in Bradley, *Crim. Pro.*, at 201).

[490] *Demesew Zeryehun and Yakob Haile v. Federal Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 35768), reported in *J. Eth. L.*, vol. 22, no.2 (2008), at 20.

[491] *Tessema Bizachew v. Public Prosecutor* (Fed. Sup.Ct., Cr. App. No 28308, Miazia 29, 1999).

Notes and Questions:

1. The FDRE Constitution and the ICCPR prohibit subjecting anyone to "cruel, inhumane or degrading treatment." What methods of interrogation do these instruments prohibit for being "cruel, inhumane or degrading"? Does the prohibition apply only to physical torture (use of force) or to other means such as denial of food and water, promise, or threat?
2. Article 27(2) of the Cr. Pro. Code prohibits compelling a suspect to answer questions administered during his interrogation. What does compulsion refer to? When is a suspect said to be compelled to answer a question? Is it where he is deprived of his freedom of choice? How intense must the pressure be to amount to "compulsion"? Does it depend on the person against whom the pressure is being applied? In view of the fact that compulsion can be psychological or physical, to what extent are the notions of *"absolute coercion"* and *"resistible coercion"* under Articles 71 and 72 of the Criminal Code relevant to understand "compulsion" as used under Article 27 (2) of the Code? Are both types of coercion prohibited? Does repetitive and lengthy questioning amount to compulsion? What about denial of food and water? Prohibition of the suspect from being visited by his family? Can one conclude that compulsion refers to any method that can make the suspect confess involuntarily? Are there methods that may compel a person to do things voluntarily? Is promise an appropriate means to convince someone to admit his involvement in the commission of a crime? If yes, how do you distinguish compelling and convincing someone to do something?

Section III. Weight of Confession – The Need for Corroborating Evidence

A discussion of various legislative measures intended to make interrogation free from illegitimate pressure so that confession of the interrogee will be voluntary and admissible into evidence has been made in the previous Section. This section deals with the weight, as opposed to admissibility, of confession. Suppose that a suspect, who was interrogated in accordance with the requirements of the law, has confessed. What weight is to be attached to this evidence? Is a voluntary confession adequate to prove the guilt of the accused where, for instance, the prosecutor does not have additional evidence?

A confession given voluntarily following an interrogation which is conducted in accordance with the law has been described as the "queen of evidence." [492] In such cases, there is no issue of the privilege against compulsory self-incrimination or Due Process of Law. The only concern is the trustworthiness of the confession. This section discusses two major subjects. The first is assessment of the possibility that a confession is false despite its being voluntary. The second is assessment of the appropriateness of convicting the accused exclusively based on a confession and, if not appropriate, what more should be required?

[492] Berman, *Soviet Criminal Law*, at 92 (cited in Sangero, "Miranda is Not Enough," at 2794).

3.1. Risk of False Confession

In the previous section, we saw that one of the reasons for prohibition of illegitimate pressure by the police or a person in authority during the interrogation of the suspect is the potential for making the confession untrustworthy. Illegitimate pressure being only one of causes for a confession to be untrustworthy its absence guarantees only the voluntariness of confession. It does not guarantee the reliability of the confession.

Studies show that suspects make false confessions even in the absence of illegitimate pressure from the police. An Israeli Commission of experts[493] identified three risk factors that may cause interrogees to make a voluntary false confession: the personality structure of the interrogee, the effect of detention conditions, and social pressure.

The personality structure factor refers to cases where interrogees have some sort of immaturity or mental disorder and hence are not in a position to distinguish between fantasy and reality, "wish to atone for past behavior that was forbidden,"[494] or have self-destructive tendencies. The Commission identified the emotionally or mentally handicapped, minors, and persons who are under the influence of drugs or alcohol as likely to make a false confession even without pressure from the police.[495]

The second factor – the interrogation or detention factor – refers to the harsh conditions of detention and the exhaustion that interrogees may be subjected to. Detention conditions, such as lack of direct sunlight, severe overcrowding, and poor ventilation, or the mental exhaustion arising from the pressure of the interrogation might make an interrogee confess to a crime that he did not commit simply to end the interrogation or detention. Sometimes the interrogee might even make a confession to gain immediate release from custody, while believing that his innocence will be discovered later in the criminal proceeding.[496]

The Commission confirmed that social pressure, without any sort of illegitimate pressure from the police, caused many people to make false confessions for sometimes strange reasonsway such as to impress a girlfriend/boyfriend or to prove that a mistaken conviction was possible. Other factors have been identified as pressures that have made innocent persons confess to a crime they did not commit. Such factors include fear of the death penalty or a desire to cover for friends, to avoid the burden of trial, or to obtain financial rewards for their relatives from a criminal organization.[497]

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[493] *Report of the Commission for Convictions Based Solely on Confessions and for Issues Regarding the Grounds for Retrials* (1994) (cited in Sangero, "Miranda is Not Enough," at 2798) (hereafter the Goldberg Commission Report).
[494] Ibid.
[495] Ibid.
[496] The Goldberg Commission Report (cited in Sangero, "Miranda is Not Enough," at 2798-2799).
[497] Ibid.

Empirical data shows the actual occurrence of false confession and subsequent conviction of innocent persons. The Innocence Project disclosed that genetic testing proved the falsity of confessions in 130 cases. Of these, in 35 cases the confession resulted in the conviction of the accused person/s.[498] Bedau and Radelet discovered that 49 of the 350 cases they studied entailed false confessions. Of the 49 false confessions, 17 were found to have been made without illegitimate external pressure.[499]

What makes the problem of false confession worse is the difficulty of identifying and preventing it. Unlike external causes, which can be prevented by law, causes which internally motivate the accused to confess are not within the law's ability to prevent. While research proves that many cases exist where innocent persons confess to committing a crime they did not commit,[500] research also indicates that law enforcement officials and judges are unable to distinguish such false confessions from real ones.[501]

3.2. Appropriateness of Convicting the Accused Based on Confession

Despite the above-mentioned possibilities for false confession and the attendant risk of convicting the innocent, no consensus exists on the undesirability of convicting an accused based on a confession alone. There are arguments for and against conviction based on a confession.

The argument against conviction exclusively based on a confession points to the risk of false confession. Maimonides made clear that because a confession, though made without external pressure, may still be false due to internal pressure, it should not be used as adequate evidence to warrant conviction.[502] Where an accused is convicted based on his confession, the reliability of which cannot be verified, there is a risk of convicting the innocent and thereby letting the criminal remain at large. Hence, the argument goes, confession needs to be corroborated by other evidence before an accused is convicted.

A major argument advanced in support of conviction based on a confession alone is that there are times where no corroborating evidence is available. Hence, the argument goes, requiring additional evidence, at least in such cases, would have the effect of acquitting

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[498] http://www..innocenceproject.org (cited in ibid., at 2795).

[499] Hugo Adam Bedau and Michael L. Radelet, "Miscarriage of Justice in Potentially Capital Cases," 40 *Stan. L. Rev.* 56-63 (1987) (cited in Sangero, "Miranda is Not Enough," at 2795.

[500] Sangero, "Miranda is Not Enough," at 2820.

[501] Ibid. In support of his assertion, Sangero cited a study on the matter that revealed two findings. First, police investigators do not have a special skill or any other quality to enable them identify false confessions any better than laymen. Second, police investigators are unable to differentiate false and true confessions, "so much so that, where there are an equal number of true and false confessions, the same results could have been achieved by simply flipping a coin." Saul M. Kassin, Christian A. Meissner and Rebecca J. Norwick "I'd Know a False Confession if I Saw One," in ibid.

[502] Maimonides, Mishneh Torah, Book of Judges, Hilchot Sandhedrin (cited in Sangero, "Miranda is Not Enough," at 2821).

real offenders who have confessed but whose confession cannot be supported by other evidence.[503] Wigmore argues that where the suspect confesses freely, requiring corroboration is unacceptable.[504] McCormick, relying on protection afforded to an interrogee by the Fifth Amendment and the *Miranda* rules, opines that a corroboration requirement is not necessary.[505] English law reflects this position. It does not require a confession to be corroborated to warrant conviction of the accused. It is possible for a conviction to be based exclusively on a confession. [506]

Because the possibility of false confession cannot be ruled out and because the law cannot prevent or identify false confessions deliberately made by the accused, the argument for conviction on confession alone tolerates conviction of innocent persons. This has been described as the greatest injustice.[507]

The argument against conviction exclusively on confession admits that there is a chance for a real offender who confesses to be acquitted for lack of supporting evidence. It also recognizes the undesirability of letting the real offender go free for lack of corroborating evidence despite his confession. It is a matter of choosing the lesser evil – letting the real offender go free despite his voluntary confession or convicting the innocent who for his own internal reasons makes a false confession. The position that releasing the real offender is far better than convicting an innocent has been eloquently expressed in various ways. Maimonides argued that "it is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death."[508] Justice Harlan of the U.S. Supreme Court, in his concurring opinion, stated that "it is far worse to convict an innocent man than to let a guilty man go free."[509] Of course, both quotations suggest that there is a limit; that is, circumstances exist in which releasing a real offender instead of convicting an innocent might not be desirable. Studies suggest that in reality the number of real offenders that escape punishment for lack of corroborating evidence is not so high as to exceed the tolerable limit.

Citing the English Runciman Commission's empirical finding, Boaz Sangero argues that the possibility for real offenders to be acquitted for lack of corroborating evidence is not high enough to cause serious concern. The Commission concluded that "corroborative evidence exists in the overwhelming majority of cases"[510] in which the accused confessed.

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[503] Sangero, "Miranda is Not Enough," at 2820.
[504] Ibid., at 2804.
[505] Ibid.
[506] L. Andrew and T. Choo, "Confessions and Corroboration: A Comparative Perspective," Crim .L. Rev. 867, 868 (1991) (cited in ibid., at 2810).
[507] Sangero, "Miranda is Not Enough," at 2792.
[508] Maimonides, Sefer Ha'Mitzvot [Book Of Commandments], Negative Commandment 290 (cited in ibi., at 2821).
[509] *In re Winship*, 397 U.S. 358, 372 (1970) (cited in Dressler, Understanding Crim. Pro., at 30).
[510] Royal Commission On Criminal Justice, *Report* (1993), at 65 (cited in Sangero, "Miranda is Not Enough," at 2820.

According to the Commission "in a considerable number of those cases where it (corroborating evidence) has not been found, the police would have been capable of finding such evidence if only they had been required to do so."[511]

3.3. The Need for Corroboration[512]

Confession is said to be "a unique type of evidence that blinds both juries and judges, because they tend to attribute tremendous, conclusive weight to such evidence"[513] at the risk of convicting an innocent defendant. As has been said, "a requirement for additional evidence that strongly corroborates a confession could significantly reduce the terrible danger that innocent persons would be convicted on the basis of false confession."[514]

Former Israeli Supreme Court Justice Dalia Dorner, in a dissenting opinion, argues for a confession to be supplemented by strong corroborating evidence to conclude that the accused is guilty of the crime.

> The confession of an accused person is suspicious evidence, even if it was made without external pressure having been exerted on the accused. For, without other conclusive evidence, which could prove the defendant's guilt even in the absence of a confession, in many cases a confession is an irrational act, and taking the irrational step itself of making a confession raises a suspicion regarding the veracity of the confession. This suspicion is not merely theoretical, but rather it has been proven several times by human experience.[515]

Israeli law[516] requires *"something in addition"* from the prosecution to convict a person based on his voluntary confession. Once the court admits a confession, after verifying it was free and voluntary, it examines the weight of the confession in light of two tests. The first is examining the signs of truth in the confession itself (internal test) and the second is considering additional evidence supporting the accused's involvement in the commission of the crime (external test). Because Israeli case law shows that the requirement of corroboration can be satisfied by minimal additional evidence, the required corroborating evidence—something in addition— is described as "light as feather"[517] and has been

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[511] Ibid.

[512] In English law, "corroboration" is defined as independent evidence which affects the accused by connecting or tending to connect him with the crime, by confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it. Sangero, "Miranda is Not Enough," at 2818, note 97.

[513] Ibid., at 2810.

[514] Requiring additional evidence corroborating a confession has another important objective. Where law enforcement officials know that confession, without supporting evidence, cannot result in conviction, they will make a greater effort to obtain objective, external, tangible evidence instead of focusing on extracting confession. By doing so, the police may discover evidence that either confirms or disproves the confession and leads the police to another person. Ibid., at 2803, 2818, 2821.

[515] Cr. F. H 4342, 4350/97 *Israel v. Al Abid*; *Al Abid v. Israel*, 51(1) P.D. 736,836 (cited in ibid., at 2800).

[516] This rule was established by the Israeli Supreme Court. Crim A 3/49 *Andlersky v. Attorney General*, 2 P.D. 589, 592 (cited in Sangero, "Miranda is Not Enough," at 2813).

[517] CrimA 428/72 *Ben Lulu v. Israel*, 28(1) P.D. 270 (cited in Sangero, "Miranda is Not Enough," at 2813).

criticized as not being adequate to avoid or significantly reduce the chance of an erroneous conviction based on a false confession.[518]

Under U.S. law, in order to convict a person who confessed, the confession must be corroborated by other evidence or the prosecution should present "substantial independent evidence which would tend to establish the trustworthiness of the statement."[519] Both of these requirements, however, have been criticized as inadequately protecting against conviction based on false confession.[520] The corroborating evidence is required to establish the *corpus delicti* – the body of the crime – but not the involvement of the accused in the commission of the crime. And it suffices that the additional evidence proves the *corpus delicti* only by "slight" corroborative evidence.[521]

Though requiring evidence corroborating the commission of the alleged crime might disprove some false confessions and thereby avoid some wrongful convictions, limiting the corroboration requirement to proof of the *corpus delicti* is criticized for being inadequate to ensure that one will not be convicted by a false confession. That is, though the commission of a crime is proved by additional evidence, it is still possible for the accused who confessed to be innocent. Critics note that because "in the overwhelming majority of cases the police possess strong evidence that a crime was indeed committed, the central question regarding confession must be whether or not the suspect is the person who actually committed the offence."[522]

An Israeli Commission of experts[523] suggested three levels of corroborating evidence depending on the weight attached to the confession: "strong corroboration" or "something providing support" (an intermediate level) or "something in addition" (slight additional evidence). The Commission's formula establishes "an inverse relation between the weight of the confession and the weight of the required additional evidence."[524] That is, the lower the weight of the confession, the greater the weight of the additional evidence required, and *vice versa*. The Commission's proposal gives discretion to the court to decide, on a case-by-case basis, the weight of the corroborating evidence required for conviction.[525]

Boaz Sangero does not agree with the Commission's suggestion. To him, the lower standards of additional evidence ("something in addition" and "something providing

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[518] Ibid., at 2813.
[519] *Opper v. United States*, 348 U.S. 84, 93 (1954) (cited in Sangero, "Miranda is Not Enough," at 2805).
[520] For more on the critics, see Sangero, "Miranda is Not Enough," at 2803-2806.
[521] John W. Strong, ed., *McCormick on Evidence*, 5th ed. (student edition) (1999), at 214 (cited in ibid., at 2803) (hereafter, *McKormick on Evidence*).
[522] Sangero, "Miranda is Not Enough," at 2804.
[523] The Goldberg Commission ReportFor Convictions Based Solely On Confessions And For Issues Regarding The Grounds For Retrials (1994), (cited in ibid., at 2818).
[524] Ibid.
[525] Ibid.

support") do not prevent the conviction of innocent persons, so they fail to serve the objective of requiring corroboration. He suggests that "strong corroboration" be required in all cases of conviction based on a confession.

3.4. Ethiopian Approach

There is neither a clear statutory provision nor a binding or instructive court case dealing with the issues of weight of confession and the requirement of corroboration. A review of cases where the issue was raised does not lead to a clear conclusion. As demonstrated by the following cases, it is impossible to know how a particular court will view these issues.

In the Federal Supreme Court case *Tsegaye Korcho v. Public Prosecutor*,[526] Tsegaye Korcho was charged before the Federal High Court for raising an armed rebellion against the state in violation of Articles 32(1)(a) and 252(1)(a) of the 1957 Penal Code. The Federal High Court convicted Tsegaye Korcho, who challenged the judgment of the Court on the ground that his conviction was exclusively based on the confession that he gave by force. In response, the prosecutor argued that since the conviction was based on the appellant's own confession and the testimony of one witness, there was no mistake on the part of the trial court.

The appellate court noted that the prosecution introduced not only the confession of the appellant but also the testimony of one witness. The trial court disregarded the witness's testimony as irrelevant to the case to be decided and observed that the conviction of the appellant was, in effect, exclusively based on his confession. The court noted that a confession constitutes adequate evidence to prove the commission of an offence admitted by the accused. But as the confession, in the case at hand, proved not what was alleged by the prosecutor (raising an armed rebellion against the state) but participation of the accused in a terrorist activity, the appellate court, in accordance with Article 113(2)of the Code, found the appellant guilty under a separate statutory authority – Article 252(2) of the 1957 Penal Code, which criminalizes participating in a terrorist activity.

In *Public Prosecutor v. Zembelachew Desalegne,*[527] a certain Zembelachew was charged under Article 17(1) of the Revised Special Penal Code Proc. No. 214/1981 for causing damage to property. The prosecutor produced a confession of the accused and one witness as evidence to prove the charge. Convinced by the prosecutor's evidence, the Federal High Court (the trial court in this case) ordered the accused to present his defence. Having heard the testimony of the defence witnesses, the court noted that the witnesses testified that the accused was somewhere else (not at the place where the crime was allegedly committed) at the time of commission of the crime. Nonetheless, the court convicted the accused as charged and sentenced him to five years rigorous imprisonment on the ground that he did not disprove his own confession.

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[526] *Tsegaye Korcho v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 27720, Miazia 29, 1999 E.C.).
[527] *Public Prosecutor v. Zembelachew Desalegne* (Fed. High. Ct., Cr. F. No. 02838, Nehase 8, 1998 E.C.).

The defendant appealed to the Federal Supreme Court, seeking reversal of the decision of the Federal High Court.[528] The Federal Supreme Court noted that if the accused has established that he was not at the place of the commission of crime when the alleged offence was committed, he has successfully disproved the prosecutor's allegations. According to the Court, even if the evidence of the accused disproves only the testimony of the prosecution's witnesses (as the trial court ruled it did in this case), the prosecutor is then left only with the accused's confession. The Court reversed the judgment of the lower court on the ground that confession, without other corroborating evidence, is not adequate to prove the guilt of the accused.

In another case,[529] the Federal Supreme Court indicated that a confession made under Article 27 of the Code. in and of itself, is not adequate to prove the charges of the prosecutor. The Court went as far as stating that the absence of other concrete evidence may support the appellant's allegation that the confession itself was not obtained voluntarily.

In *Sisay Dagne Yirdaw v. Public prosecutor,*[530] Sisay Dagne appealed the lower court's decision to the Federal Supreme Court on the ground that the prosecutor's case was not supported by adequate evidence. The judgment of the Supreme Court shows the following. In the trial court, the prosecutor introduced the confession made under Article 27 of the Code and two witnesses. The trial court disregarded the testimony given by the two witnesses as irrelevant to the facts alleged in the charge. However, the trial court ordered the accused to present his defence and finally convicted him exclusively on the basis of his confession. The Federal Supreme Court found that a confession is not adequate evidence to prove the prosecutor's case beyond a reasonable doubt, so the prosecution failed to make its case against the accused. In these circumstances, the accused should not have been ordered to enter into his defence, let alone be convicted. The lower court's judgment was reversed and the appellant was set free.

Because there are no detailed rules of evidence in Ethiopia, there is no express provision dealing with the weight of confession. However, one may approach the question of whether confession, in and of itself, is adequate for conviction from the requirement that the prosecution prove guilt of the accused beyond a reasonable doubt. The question is whether one's confession is adequate to prove his guilt beyond a reasonable doubt. The answer to this question depends on the trustworthiness of the confession. Reliability of the confession can be verified in two ways. One is to show that there is no reason for the accused to make a false confession. The second is to produce independent evidence that the crime was committed by the accused—corroborative evidence. As there is no reliable

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[528] *Zembelachew Desalegne v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 26686, Tahisas 19, 1999 E.C.).
[529] *Birhane v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 27537, Megabit 11, 1999 E.C.).
[530] *Sisay Dagne Yirdaw v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 17739, Tahisas 28, 1997 E.C.).

way of ruling out the possibility of false confession, the feasible method of verifying the reliability of confession is to produce corroborating evidence. In the absence of corroborating evidence it is difficult to conclude that the confession is true and that the guilt of the accused is proved beyond a reasonable doubt – "close to one hundred percent certainty."[531] As argued by Boaz Sangero, the very fact that it is impossible to get external evidence to prove that an accused who has confessed has committed the crime raises a reasonable doubt as to his involvement in the commission of the crime. Such a doubt demands an acquittal.[532]

Notes and Question

Some scholars do not see the prophylactic measures – measures such as the right to remain silent and to be informed of that right, and the right to consult a lawyer – as methods appropriate to interrogation. Paul Cassell went as far as identifying these measures as possible causes for conviction of innocent persons.[533] Cassell argues that "the danger of 'lost confessions' – namely, confessions that are not obtained due to the Miranda rules and because of the concern for protection of the rights of suspects and defendants – is graver than the risk of convicting the innocent on the basis of false confessions."[534] To Cassell, because not enough confessions are extracted from guilty persons due to the prophylactic measures, other innocent persons are convicted instead.[535] However, the overwhelming majority of scholars do not consider Cassell's fear justified.[536] Boaz Sangero, for instance, argues that "if the focus on extracting confessions from interrogees is ceased, then it may be inferred that fewer innocent persons would be convicted (even if not enough confessions would be extracted from the guilty)."[537] What is your assessment of the benefits and disadvantages of the prophylactic measures in the truth-finding process?

Section IV. Enforcement Mechanisms

4.1. Criminal Liability

Article 424 of Criminal Code. Use of improper Methods

1. *Any public servant charged with...interrogation of a person who is under suspicion, under arrest, summoned to appear before a court of justice...who in the performance of his duties, improperly induces or gives a promise, threatens or treats the person concerned in an improper or brutal manner or in a manner which is incompatible with human dignity or his office, especially by the use of blows, cruelty or physical or*

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[531] *Coffin v. United States*, 156 U.S. 432, 453, 460-66 (1895) (cited in Sangero, "Miranda is Not Enough," at 2822.

[532] Sangero, "Miranda is Not Enough," at 2822.

[533] Ibid., at 2796.

[534] Ibid.

[535] Ibid.

[536] Paul G. Cassel, *Miranda's Social Costs: An Empirical Reassessment*, 90 *Northwest U. L. Rev.* (1996), at 387 (cited in ibid., at 2797, note 21).

[537] Sangero, "Miranda is Not Enough," at 2797.

mental torture, be it to obtain a statement or a confession...is punishable with simple imprisonment or fine, or in serious cases, with rigorous imprisonment not exceeding ten years and fine.

2. *Where the crime is committed by the order of an official, such official shall be punished with rigorous imprisonment not exceeding fifteen years and fine.*

Notes and Questions

1. Article 31 of the Cr. Pro. Code prohibits application of "improper methods," not only by a person in charge of interrogation but also by any other "person in authority." Does Article 424 of the Criminal Code punish a person (where he is a person in authority for the purpose of Article 31) other than a public servant *who is in charge of interrogation*? Should the Criminal Code provision be interpreted in such a way that its scope is same as that of Articles 27 and 31 of the Cr. Pro. Code? If the scope of the Criminal Code provision is narrower than that of the Cr. Pro. Code provisions, it will be inadequate to deter improper methods employed by all persons involved in an interrogation.
2. What methods are incompatible with human dignity or the office of the public servant for purposes of Article 424(1) of the Criminal Code? All improper methods envisaged under Article 31 of the Code (such as deception)? If not, the Criminal Code provision is narrower in scope than that of the Cr. Pro. Code provision, making it inadequate to deter the use of improper methods of interrogation.
3. What judicial and legislative measures do you recommend to enable Article 424 of the Criminal Code to categorically discourage the employment of interrogation methods not allowed under the Code?

4.2. Civil Liabilities

Art. 2028 of the Civil Code. – General Principle

Whosoever causes damage to another by an offence shall make it good.

Art. 2035. – Infringement of a law

1. *A person commits an offence where he infringes any specific and explicit provision of a law, decree or administrative regulation.*
2. *Ignorance of the law is no excuse.*

Notes and Questions

1. Conducting interrogation contrary to Articles 27 or 31 of the Code constitutes an *offence* for the purpose of Article 2035(1) of the Civil Code, resulting in civil liability of the officer under Article 2028 of the Civil Code. Article 2028 of the Civil Code requires the plaintiff (the person subjected to improper methods of interrogation) to establish damage that he has sustained as a result of the improper method employed by the officer. What sort of damage may the plaintiff establish for the officer to be civilly liable? Can the confession being used as evidence resulting in his conviction and punishment be considered damage for the purpose of Article 2028 of the Civil Code? In fact, even where there is neither material nor moral damage, the officer may be

required to pay compensation, though a purely nominal amount, by virtue of Article 2104 of the Civil Code.

2. What is the relation between civil and criminal liability of an investigating officer and exclusion of confession as evidence? Is exclusion of the improperly obtained confession a necessary precondition for the officer to be civilly liable? If so, must the plaintiff prove in a separate civil hearing (by a preponderance of the evidence) that the confession was obtained improperly? Does it depend on who has the burden of proof and what the standard of proof is? What does Article 2149 of the Civil Code imply?[538]

4.3. Exclusion of Involuntary Confession

Exclusion of involuntary confession is one of the means to enforce the law of interrogation, which generally requires police officers to extract a voluntary confession after satisfying the necessary preconditions. Empowering the court to exclude confessions improperly obtained is described, by Lord Hailsham in *Wong Kam-Ming v. R*,[539] as required in a civilized system of criminal jurisprudence.

The U.S. Supreme Court and scholars have identified several values that underlie the exclusion of involuntary confessions.[540] First, there is a high risk of false confessions which might result in the conviction of innocent persons "if the police are permitted to obtain statements from suspects through coercive means."[541] Second, even where there is independent evidence supporting a coerced confession, there is another reason to exclude such confession – "the police should 'obey the law while enforcing the law.'"[542] Third, coerced confessions are "so offensive to a civilized system of justice that they must be condemned."[543] The fourth reason is related to the accusatorial nature of a criminal proceeding. One principle of an accusatorial system is "the mind, as the center of the self, may not be pressed by the government into an instrument of its own destruction."[544] Fifth, "values of human dignity, personal autonomy and mental freedom support the premise that a person should not be convicted on the basis of a confession unless it is the 'untrammeled exercise of personal determination.'"[545] Finally, the exclusion of a coerced confession deters police overreaching and, thus, prevent the wrongs potentially done in a police interrogation room.[546]

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[538] Article 2149 of the Civil Code states: "in deciding whether an offence [fault] has been committed, the court shall not be bound by an acquittal or discharge of a criminal court."

[539] *Wong Kam-Ming v. R* (1980) A.C. 247, 261, (1979) 1 All E.R. 939,946 (cited in Sangero, "Miranda is Not Enough," at 2806-07).

[540] Dressler, *Understanding Crim. Pro.*, at 442-443.

[541] *Spano v. New York*, 360 U.S. 315, 320 (1959) (cited in ibid., at 442).

[542] Ibid.

[543] *Miller v. Fenton*, 474 U.S. 534, 541 (1961) (quoted in Dressler, *Understanding Crim. Pro.*, at 442-443).

[544] H. Richard Uviller, "Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint," 87 *Colum. L. Rev.* 1137, 1146 (1987) (quoted in Dressler, *Understanding Crim. Pro.*, at 442).

[545] Dressler, *Understanding Crim. Pro.*, at 443.

[546] *Colorado v. Connelly*, 479 U.S. 157, 165-66 (1986) (cited in ibid.).

Joshua Dressler argues for exclusion of coerced confessions on two constitutional grounds in the context of U.S. criminal procedure.[547] First, as the use at trial of a compelled statement of the defendant effectively makes the defendant a witness against himself, "exclusion of coerced confession" is required by the Fifth Amendment privilege against self-incrimination. He goes further, arguing that exclusion of coerced confessions, as opposed to exclusion of evidence obtained as a result of illegal search and seizure, is not simply a remedy for violation of a constitutional right but an element of the right not to be compelled to be a witness against oneself. Second, the use of a coerced confession at the trial of the accused to achieve his conviction violates due process of law.

In the U.S., a statement obtained through police coercion is inadmissible under the Due Process Clause and the privilege against compulsory self-incrimination. Where such a confession is admitted despite the accused's objections and the accused is convicted, the U.S. appellate courts used to reverse the judgment even where there was independent evidence proving the defendant's guilt. This position of the courts changed in *Arizona v. Fulminate*.[548] Since *Arizona*, judgment is to be reversed only where other evidence of the government is not adequate to show the guilt of the accused beyond reasonable doubt.[549]

As held by the Argentine Supreme Court,[550] a confession extracted under coercion is to be excluded irrespective of its reliability because the confession was obtained in violation of Article 18 of the National Constitution which, *inter alia*, prohibits compelling one to provide evidence against himself. For the Argentine Court, admitting such a confession "would turn the criminal justice system into an accomplice to the illegal methods used by the police."[551] In Canada, admissibility of a coerced confession depends on whether the confession is considered reliable or not. Though involuntary confessions are inadmissible as a matter of principle, they can be used in evidence "to the extent that they are confirmed as true by subsequent tangible evidence."[552]

In Ethiopia, a Constitutional provision expressly requires exclusion of confession obtained through coercion. Article 19 (5) of the FDRE Constitution provides, "Persons arrested shall not be compelled to make confession or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible." The first statement of Article 19(5) of the Constitution prohibits compelling an arrestee to make confessions or admissions, while the second sentence provides for the exclusion of evidence obtained in violation of the prohibition articulated in the first sentence. It is interesting to note that the Constitution excludes confessions, whether made before a court

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[547] Dressler, *Understanding Crim. Pro.*, at 445.
[548] 499 U.S. 279 (1991) (cited in ibid., at 441).
[549] Ibid.
[550] *Montenegro*, CSJN, 303 Fallos 1938 (1981) (cited by Alejandro D. Carrio and Alejandro M. Garro, "Argentina," in Bradley, *Crim. Pro.*, at 29).
[551] Ibid.
[552] Kent W. Roach, "Canada," in Bradley, *Crim. Pro.*, at 70.

of law in accordance with Article 35 or before a police officer under Article 27, insofar as they are obtained through coercion. In relevant part, the commentary on the draft provisions of the FDRE Constitution states:

> Though Article 27(2) of the Cr. Pro. Code prohibits obtaining confession through compulsion; the law is silent on the effect of a confession obtained through coercion. This silence of the law together with the undemocratic nature of the previous regimes made suspects to be subjected to inhumane and cruel methods of investigation with a view to make them admit their responsibility in the commission of the crime. This draft constitution is meant to change the practices relating to treatment of arrested persons. The constitution makes it clear that an arrested person shall not be compelled to admit. Any evidence obtained through torture, threat or promise shall not be used as evidence.
>
> Irrespective of the seriousness of the crime under investigation and no matter how the involuntary confession of the suspect is useful for further investigation and even if the police officer is certain that the arrestee has committed the crime, confessions obtained involuntarily do not have effect – the suspect would not be deemed to have admitted and the evidence shall be deemed to be non-existent.[553]

4.3.1. Relationship between Articles 27 and 31 of the Code and Article 19(5) of the FDRE Constitution

The wording of the first part of Article 19(5) of the FDRE Constitution prohibits compulsion, similarly to Article 27(2) of the Code. When is a person said to be *compelled* for purposes of Articles 19(2) and 27(2)? Does compulsion refer to the method of the interrogation or the method's effect on the suspect? The U.S. Supreme Court has answered this question differently at different times. In *Bram v. United States*, the Court interpreted prohibition of compulsion to extract a confession to mean that "a confession must not be extracted by any sort of threat or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[554] Furthermore, the Court noted that "because the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner" it would consider a confession to have been obtained through compulsion "if any degree of influence" was exerted.[555]

The Court changed its understanding of compulsion in *Dickerson v. United States*.[556] In that case, the Court indicated that voluntariness of a confession is to be assessed not only by considering the methods that the interrogator applied but also by assessing "the totality of circumstances—considering both the characteristics of the accused and the details of the interrogation."

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[553] *Brief Commentary on the Draft Constitution Approved by the House of Peoples' Representatives*, at 31-34 (987) (hereafter *Commentary*).
[554] *Bram v. United States*, 168 U.S. 532 (1897) (cited in Dressler, *Understanding Crim. Pro.*, at 447).
[555] Ibid.
[556] *Dickerson v. United States*, 530 U.S. 428,434 (2000) (cited in Dressler, *Understanding Crim. Pro.*, at 447).

In England the common-law "*voluntariness requirement*" for admissibility of a confession made by the accused has transformed into the "*credibility requirement.*"[557] As stated in Section 76(2) of the Police and Criminal Evidence Act (PACE), a confession by the accused is admissible only if the accused accepts, or the prosecution proves beyond reasonable doubt, that it was not obtained by oppression or in consequence of anything said or done *which was likely to render the confession unreliable.*

The U.S. Supreme Court's position in *Bram* is closer to the interpretation given to "compulsion" under Article 19(5) of the FDRE Constitution. As indicated in the commentary on the draft provisions of the FDRE Constitution relating to its Article 19(5), "for an arrestee has the right to remain silent under Article 19(2) of the Constitution, he shall not be compelled to confess. Compulsion is to be committed not only by physical torture. A person may also be compelled by threat or promise. The prohibition of compulsion under Article 19(5) applies to physical torture, threat or promise."[558] Hence, "compulsion," as used under Article 27(2) of the Code, refers to physical and psychological coercion but not to those improper methods listed or contemplated under Article 31 of the Code. "Compulsion" as used under Article 19(5) of the Constitution is broad enough to encompass all the means prohibited under Articles 27 and 31 of the Cr. Pro. Code.

4.3.2. Burden of Proof

Article 19(5) of the Constitution provides for the exclusion of evidence obtained through coercion. When the fact that the confession of the accused resulted from coercion is known, the consequence is clear—the confession cannot be used as evidence. A major controversy that arises in relation to the enforcement of this provision relates to burden of proof. Where there is a dispute between the public prosecutor and the accused as to whether the confession was a result of coercion, on whom does the burden of proof lie? Should the prosecutor prove that the confession is obtained in accordance with the law or should the accused prove that coercion was employed during the interrogation? Whoever has the burden, what should be (and what is) the standard of proof? What sort of evidence can be produced by the party who has the burden?

Boaz Sangero reasons that, "given the centrality of the confession in the conviction of accused persons and given the terrible danger that the innocent will be convicted on the basis of false confessions, it is proper to require that the voluntariness of the confession be proven beyond reasonable doubt before it is relied upon for a conviction."[559]

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[557] David J. Feldman, "England and Wales," in Bradley, *Crim. Pro.*, at 113.
[558] *Commentary*, at 31-34.
[559] Sangero, "Miranda is Not Enough," at 2808.

In Argentina, the accused, rather than the prosecution, has the burden of proving that the confession was coerced.[560] The Argentine Court of Appeals, however, opined that "because custodial interrogations generally take place in the 'privacy' of a police station, there is no way to verify in any effective manner whether the suspect had been actually warned of his rights."[561] The Court furthermore stated that the rule "that it is for the defendant to prove that his confession was extracted under physical coercion or duress defies reality."[562] In England, when there is a dispute on the voluntariness of a confession it is the public prosecutor's burden to prove beyond a reasonable doubt that "it was not obtained by oppression or in consequence of anything said or done which was likely to render the confession unreliable."[563] Unlike in the United States, where the prosecutor is required to prove the voluntariness of a confession by preponderance of evidence,[564] the standard applied in England is to prove beyond a reasonable doubt that the confession was voluntary.[565]

In Israel, confession by the accused is admissible only where "the prosecution has produced evidence as to the circumstances in which it was made and the court is satisfied that it was free and voluntary."[566] The prosecution discharges his burden by proving the voluntariness beyond a reasonable doubt.[567]

The issue of burden of proof under Ethiopian law was raised and extensively addressed by the Federal Supreme Court in the case of *Public Prosecutor v. Tamirat Layne et al.*[568] In this case, one of the arguments raised by the defence lawyers for the exclusion of a confession made to the police was that the confession was obtained through influence and that it was not consistent with the plea the defendants made before the court.

One of the arguments advanced by the defence lawyers for the exclusion of the confessions of the defendants was that "as the accused persons gave their confession without consulting their advocates and they were not allowed to visit a court of law for a longer period than forty eight hours, the confession they gave cannot be said to be free from influence. That the confessions were given under influence can be inferred from the inconsistency between the content of the confessions and their plea given to the court."[569] Addressing this argument, the court stated:

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[560] Alejandro D. Carrio and Alejandro M. Garro, "Argentina," in Bradley, *Crim. Pro.*, at 29.
[561] *Cohan de Broger*, CNCrim-IV, 26 May 1987, LL, 1987-D-403 (cited in ibid., at 25).
[562] Ibid.
[563] Section 76 (2) of the Police and Criminal Evidence Act 1984 (PACE Act). Section 76(8) indicates that "oppression" includes torture, inhumane or degrading treatment, and the use or threat of violence. (Cited in Sangero, "Miranda is Not Enough," at 2807).
[564] *Lego v. Twomey*, 404 U.S. 477 (1972) (cited in Sangero, "Miranda is Not Enough," at 2808).
[565] Ibid.
[566] Section 12(a) of the Israeli Evidence Ordinance 1971 in Sangero, *"Miranda is Not Enough,"* at 2811.
[567] CrimA 38/49 *Kandil v. Attorney General*, 2 P.D. 810, 824-825 in Sangero, *"Miranda is Not Enough,"* at 2811.
[568] *Public Prosecutor v. Tamirat Layne et al.* (Fed. Sup. Ct., Cr. File no. 1/1989).
[569] Ibid.

As provided under Article 19(5) of the FDRE Constitution, a confession made before a police officer is to be inadmissible where it is obtained under coercion. In so far as the exertion of coercion is not proved by evidence, we do not find the reasons mentioned by the defense to be adequate to conclude that the confession was obtained under coercion. For the evidence to be excluded on the ground that it was obtained under coercion evidence that proves the existence of coercion has to be produced before the court. For the police and other government institutions are assumed to function in accordance to the law and order, the burden of proving the fact that the confession was obtained under coercion is on the party who alleges it. Inconsistency between the confession and the plea of the persons accused does not automatically make the confession to be excluded. Rather in such cases of inconsistency, the correct/valid one will be identified by relating the two with other items/pieces of evidence produced by the prosecutor. In so far as the confession document shows that the accused persons read what was written and signed on it confirming what was recorded is their own confession, the fact that the name of the investigator is not indicated and non-fulfillment of other technical matters do not make the result of the investigation unacceptable.[570]

Notes and Questions

1. In *Public Prosecutor v. Getachew Biru,*[571] as in the case of *Public Prosecutor v. Tamirat Layne et al,* the Federal Supreme Court ruled that an accused who challenges the voluntariness of his confession must prove his allegation. During the trial stage of *Getachew Biru*, the accused called two witnesses who visited him in custody. They testified that they saw the accused not capable of walking properly and saw his skin bruised when they visited him at the police station where he was detained. Furthermore, both witnesses testified that the accused, at the time when they visited him, told them that the police officers tortured him to force him to admit to the crime. The Federal First Instance Court did not accept the witnesses' testimony as adequate to show that the accused gave his confession under coercion. On appeal by the convict on this particular issue, the Federal High Court reversed the finding of the First Instance Court. The Public Prosecutor lodged an appeal of the Federal High Court's decision to the Federal Supreme Court.

   The Supreme Court was not satisfied that the testimony given by the witnesses of the accused proved that the confession was made through coercion. The Federal Supreme Court expressly stated that coercion was not proved because the witnesses, apart from restating what they were told by the accused, did not testify that they saw him when he was coerced to confess. More importantly, the Supreme Court noted, the accused confirmed the confession he made to the police in accordance with Article 27 of the Cr. Pro. Code by another confession he made before a court of law under Article 35 of the Cr. Pro. Code. On the other hand, the Federal High Court took the testimony given by the witnesses as adequate to conclude that the confession was given involuntarily.

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[570] Ibid.

[571] *Public Prosecutor v. Getachew Biru* (Fed. Sup. Ct., Cr. App. No. 10965, Tir 26, 1996).

In view of the fact that interrogations are conducted in private, is it practically possible for accused persons to satisfy what the Federal Supreme Court demands—producing an eye witness who can testify that he saw the accused being coerced?

2. Should voluntariness of a given confession be decided based on the "voluntariness" of that particular confession—whether in making that confession the defendant's will was overcome by police methods? Or should voluntariness instead be decided based on whether the interrogation methods were of the sort prohibited by law as creating too great a risk of inducing a false confession? The U.S. Supreme Court has indicated that the Due Process inquiry must focus on the propriety of the interrogation methods, not the reliability of the particular confession.[572] White emphatically argues that in the U.S., under both the pre- and post-*Miranda* due process test, confessions resulting from interrogation methods likely to produce untrustworthy statements should be considered involuntary regardless of whether the particular confession before the court is untrustworthy.[573] Allowing the admission of confessions obtained through the use of methods that are likely to produce an unreliable confession, apart from offending the dignity and autonomy of the individual subjected to interrogation, is believed to offend basic tenets of the adversarial system.[574] In Germany, too, if prohibited means of interrogation are employed, exclusion does not require a showing that the statement was in fact involuntary.[575] It will be assumed that the confession was actually caused by the improper methods.[576] English law[577] requires causation as an essential element—the confession, to be excluded, must have been obtained by one of the prohibited means. In South Africa, a confession which is known to have been given voluntarily will not be used in evidence if the presence of inducement or undue influence is proved.[578]

In *Public Prosecutor v. Tamirat Layne et al.*,[579] the Federal Supreme Court ruled on admissibility based on the voluntariness of the specific confession instead of the illegality of the methods employed during interrogation. As stated by the Court, the fact that the accused persons were not brought before court within the prescribed time and were not allowed to consult their lawyers did not necessarily show that their confession was given involuntarily. According to the Court, in order for a confession to be excluded as involuntary, the accused persons must establish that the irregularities caused them to make the confession involuntarily. According to the Ethiopian Federal

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[572] White, "What is Involuntary," at 2022.
[573] Ibid., at 2009; McCormick is said to have argued that causation is required in American law. *McCormick on Evidence*, at 216 (cited in Sangero, "Miranda is Not Enough," at 2808, note 62).
[574] White, "What is Involuntary," at 2022-23.
[575] Thomas Weigend, "Germany," in Bradley, *Crim. Pro.*, at 204.
[576] BGHSt. 13, 60 at 61 (1959) (cited in ibid.).
[577] Section 76 (2) of the Police and Criminal Evidence Act 1984 (PACE Act).
[578] *S v. Pietersen* 1987 (4) SA 98(C) (cited in P.J. Schwikkard and S.E.van der Merwe, "South Africa," in Bradley, *Crim. Pro.*, at 342).
[579] Public Prosecutor v. Tamirat Layne et al. (Fed. Sup. Ct., Cr.File No. 001/1989).

Supreme Court, establishing that improper methods were used during interrogation, in itself, does not suffice for the confession to be excluded.
By prohibiting a "*confession obtained through coercion*" from being used as evidence against the confessor, does Article 19(5) of the Constitution refer to the *method of interrogation* or the *actual voluntariness* of the confession?

In *McNabb*,[580] the U.S Supreme Court excluded a confession made by arrestees who were not brought before a judicial officer in time on the ground that the confession was given "during the improper detention." The U.S. Court excluded the confession because it was convinced that doing so would enforce the requirement that an arrestee be brought promptly to court. Also, in France violation of the 48 hours rule resulted in a "presumption of prejudice to the accused's interest, and thus invalidated the procedure and the resulting confession even though the confession was obtained before the end of the 48th hour of detention."[581]

3. According to the extract from the commentary on the draft provisions of the FDRE Constitution, Article 19(5) of the Constitution prohibits evidence from being used during trial if it was obtained through coercion, promise, threat, inducement or other improper methods. Since neither the text nor the commentary on Article 19(5) of the Constitution deals with the effect of the officer's failure to tell the person to be interrogated that he has the right to remain silent and that his statement may be used in evidence, how should such a procedural irregularity be remedied when it occurs? Can the court invoke Articles 19(2), 9(1) and 13(1) of the Constitution and exclude the confession obtained without requisite warning? Does the officer's omission result in criminal or civil responsibility? If not, how can the rule that the arrestee must be informed of his right to remain silent (Article 19(2) of the FDRE Constitution and Article 27(2) of the Cr. Pro. Code) be enforced?

4.3.3. The Scope of Evidence to be Excluded under Article 19(5) of the Constitution

A confession obtained through coercion is generally inadmissible. However, the scope of this exclusionary rule varies from jurisdiction to jurisdiction. When a suspect is compelled to confess and based on the information he gave another piece of evidence is discovered, there is no consensus on whether the latter evidence should be excluded. That is, different jurisdictions take different positions on whether an instrumentality used in the offence, for instance, that would not have been obtained but for the information provided in the coerced statement should be introduced at trial.

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[580] *McNabb v. United States*, 318 U.S. 332 (1943) (cited in Weaver et al., *Principles of Crim.*, at 169).
[581] 1996 Bull. Crim. No. 443 (Dec.3) (cited in Richard S. Frase, "France," in Bradley, *Crim. Pro.*, at 162).

Although Argentine police are not allowed to obtain a confession[582] that might be used in evidence against the accused, in practice statements of the suspect may be relied upon to uncover incriminating evidence which can legitimately be used as evidence in court. Hence, fruits of police misconduct are admissible into evidence.[583] In England, as stated under Section 76(5), (6) of the Police and Criminal Evidence Act (PACE) the prosecution may "tender evidence obtained as a result of an excluded confession as long as no evidence is given of the way in which it was found."[584] The fruit of poisonous tree doctrine does not exist in Germany. "Evidence derived from unwarned or coerced statements"[585] are admissible in German courts.

Notes and Questions

1. What type of evidence is subject to exclusion under Article 19(5) of the Constitution on the ground of coercion?
2. If an arrestee is coerced/compelled to confess that he has committed the crime he is suspected of and subsequently leads the police to discover facts which confirm his confession, will both the confession and the fact be excluded from evidence? The first part of Article 19(5) prohibits compelling an arrestee "*to make confession or admissions*" but the second part provides for the exclusion of "*any evidence* obtained under coercion." The commentary on Article 19(5) of the Constitution simply reiterates the provision word by word. It seems safe to conclude that if the source of the discovery of the evidence in question is a coerced confession the constitutional provision does not allow that evidence to be introduced at trial.

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[582] Article 184 of the Argentine Code of Criminal Procedure, in Alejandro D. Carrio and Alejandro M. Garro, "Argentina," in Bradley, *Crim. Pro.*, at 29).
[583] Ibid., at 29-30.
[584] David J. Feldman, "England and Wales," in Bradley, *Crim. Pro.*, at 113.
[585] Thomas Weigend "Germany," in Bradley, *Crim. Pro.*, at 204.

Chapter Six

Search and Seizure

Introduction

Other types of evidence, in addition to statements or confessions of the accused and oral testimony of third parties, may be used as evidence in a criminal trial. Such evidence includes, but is not limited to, tools which were used to commit a crime and the fruits of the crime. These types of evidence are to be obtained through restriction of privacy – a search of a suspect's person or his premises, or interception of verbal or written communications. "Seizure" refers to the actual possession of a thing obtained through search to be used as evidence. Search and seizure are among the activities that an investigating police officer might engage in during an investigation in order to collect evidence for trial.

Different jurisdictions define "search" differently. Though there is consensus that search refers to a restriction of privacy, jurisdictions take differing views of what constitutes privacy, the scope of the protected privacy interest, and the like.[586] Despite the fact that there are several provisions dealing with search and seizure under the FDRE Constitution and the Cr. Pro. Code, none defines "search" or "seizure." The meaning of the terms in the context of Ethiopian criminal procedure can only be inferredfrom a reading of the provisions that refer to the concept of search and seizure.

This chapter discusses search and seizure as regulated under Ethiopian law in six sections. The first section discusses in general terms the scope of, and protection accorded to, the right to privacy under the FDRE Constitution. The second and third sections deal with search pursuant to a court warrant and without a court warrant, respectively. The fourth section concerns the major controlling mechanism against general searches – the specificity/particularity requirement. The fifth section discusses the law governing the actual execution of search and seizure. The last section addresses the law dealing with enforcement of the rules of search and seizure.

Section I. Constitutional Protection of Privacy[587]

Article 26 FDRE Constitution. Right to Privacy

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[586] See note 593 below, and accompanying text.

[587] The right to privacy is recognized as one of the fundamental rights under the International Covenant on Civil and Political Rights. In its Article 17, the Covenant states: 1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence…; 2) Everyone has the right to the protection of the law against such interference…."

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

1.1. Scope of the Right to Privacy

This subsection addresses three questions related to the scope of Article 26 of the Constitution. The first question is the scope of the interests the right to privacy protects. The second is the scope of persons who are envisioned by this provision as beneficiaries of the recognized right. Essentially this part deals with whether or not fundamental rights in general and the right to privacy in particular are applicable to juridical persons. The third question is the scope of the persons bound by Article 26.

1.1.1. Protected Interests

The first part of Article 26(1) of the FDRE Constitution recognizes everyone's right to privacy. Its second part provides an illustrative list of what the right holder is protected from. Apparently, the right to privacy, as recognized under Article 26(1) of the Constitution, protects the right holder from two types of intrusions. One is search of the right holder's home, person, or property – things over which the right holder is deemed to have a "privacy interest." The other is protection of the right holder from dispossession of any property under his personal control.[588] Article 26(2) of the FDRE Constitution provides for the inviolability of one's notes and correspondence by means of postal letters, telephone, telecommunications, and electronic devices.

Protection against intrusion into one's home[589] and inviolability of correspondence[590] were for the first time recognized in Ethiopia under the 1931 Constitution. Later, both the 1955

[588] Normally a seizure that would cause infringement/restriction of privacy does not exist without a search. It is where one's visibly possessed property is seized that seizure would take place without search. Such cases of seizure would be clear violations of one's property right (be it possession or ownership), but not of one's privacy interest. Because there is no seizure (that would cause restriction/infringement of privacy) without search, and insofar as the prohibition against seizure of property does not itself contribute to the protection of the right to privacy, it is not clear why the constitution expressly states that the right to privacy includes the right not to be subjected to "seizure." Prohibition of search would have sufficiently protected the individual's privacy interest. Perhaps this confusion is attributable to the complexity of the relationship between the privacy interest and the right to property. See note 592 and accompanying text.

[589] Its Article 25 prohibits search of a domicile except in cases provided by law.

[590] Its Article 26 states: "except in cases provided by law no one shall have the right to violate the secrecy of the correspondences of Ethiopian subjects."

Revised Constitution[591] and the 1987 Constitution of the People's Democratic Republic of Ethiopia[592] extended the protection to one's "person," but both failed to include a provision on the protection of correspondence and notes.

Article 26 of the FDRE Constitution, although it recognizes everyone's right to privacy and prohibits search and seizure, defines neither privacy nor search. Moreover, the phrase "shall include" in the provision suggests that the provision simply gives an illustrative list of things which cannot be searched, seized, or intercepted. The provision gives neither an exhaustive list of things protected by the right to privacy nor general guidelines based on which the other (unlisted) things cannot be searched, seized or intercepted can be identified. For example, it is not clear whether Article 26(1) of the FDRE Constitution which expressly provides for the right to privacy to include "the right not to be subject to searches of...home, person or property" protects one's business place or office from search. Nor is it clear if the provision protects one's vehicle from search. Hence, in order to understand which interests are protected by the right to privacy, it is central to define what "privacy" refers to.

Search is linked with privacy in only a few jurisdictions.[593] Even in the United States, where there is a developed jurisprudence on search and privacy, it took some time before a link between prohibition of search and the right to privacy was established. Originally,

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[591] Its Article 61 states: "all persons and all private domiciles shall be exempt from unlawful searches and seizures."

[592] Its article 43 states: "1) Ethiopians are guaranteed inviolability of the person; 2) Ethiopians are guaranteed inviolability of the home. No one may enter the home of another against his will, except as prescribed by law."

[593] In many jurisdictions provisions exist which regulate search and seizure without necessarily relating it to the right to privacy. In England, there are laws dealing with search and seizure, but some take the view that English law does not recognize the right to privacy as such. *R. v. Khan* (Sultan) [1997] A.C. 558, H.L. (cited in David J. Feldman, "England and Wales," in Bradley, *Crim. Pro.*, at 104). Generally, the Argentine courts are said not to have developed "a constitutional jurisprudence aimed at extending the protection expressly granted to private dwellings and private documents to other spaces or communications surrounded by a reasonable expectation of privacy." The constitutional protection against illegal or arbitrary searches has been applied only to searches of homes, personal dwellings, and personal written documents. Alejandro D. Carrio and Alejandro M. Garro, "Argentina," in Bradley, *Crim. Pro.*, at 10, 14. However, the Argentine Supreme Court, in *Fiorentino*, is said to have made "reference in one passage to the connection between the constitutional protection against warrantless searches of private dwellings and the right to privacy." Fiorentino, CSJN, 306 Fallos 1752, paragraph 9 (cited in ibid., at 14). French law deals only with search of houses but does not have definition of a search comparable to the laws of the U.S. and Canada. Richard S. Frase, "France," in Bradley, *Crim. Pro.*, at 154. Lack of detailed laws on search and seizure was the ground for the European Court of Human Rights to conclude that "French law did not sufficiently protect the right to privacy recognized under Art.8 of the European Convention." Tomlison, "The Saga of Wiretapping in France: What It Tells Us About the French Criminal Justice System," 73 *La. L. Rev.* 1091 (1993) (quoted in ibid.); in Germany, the exact limits of what constitutes search is not much litigated and there is no law that clearly interrelates search and seizure and the privacy interest. Thomas Weigend, "Germany," in Bradley, *Crim. Pro.*, at 192-93. Italian law simply deals with the details of search without relating it with privacy, Rachel VanCleave, "Italy," in Bradley, *Crim. Pro.*, at 251-58.

prohibition of unreasonable search as provided under the Fourth Amendment[594] was understood to protect property interests of citizens, and was unrelated to the notion of "privacy." Thus, there were times when communications were not protected by the prohibition of unreasonable search under the Fourth Amendment to the U.S. Constitution. In *Boyed v. United States*, the U.S. Supreme Court interprets the prohibition of unreasonable searches as being inapplicable "in the absence of a physical intrusion (trespass) into a constitutionally protected area, most especially a 'house'[595] In *Olmstead v. United States*,[596] federal officials "used wiretaps to intercept the conversations of D and others conducted by telephone from their homes and offices." The U.S. Supreme Court rejected the Fourth Amendment challenge to police tapping of a telephone wire on the outside of a home, because the Court could not find a physical trespass to property.[597] The Court held that the conduct of federal officials falls outside of the Fourth Amendment protection because "conversations are not 'persons, houses papers or effects.'"[598] The following paragraph from *Olmstead* clearly shows that in the Court's at early jurisprudence the Fourth Amendment was devoid of the notion of privacy.

> [T]he houses and offices from which the conversations arose are protected by the Fourth Amendment, but only from physical intrusions or trespass; eyes and ears cannot "search" or "seize" as neither can trespass; and the wiretaps used to listen to the conversations, which can trespass, did not do so here because they were installed on telephone lines outside D's property.[599]

This property right/trespass approach to the Fourth Amendment to the U.S constitution was abandoned in *Katz v. United States.*[600] The *Katz* Court found that because "the Fourth Amendment protects people and not simply 'areas' against unreasonable searches and seizures...the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[601] In *Katz,* the Court interpreted "search" as used under the Fourth Amendment to mean intrusion into one's "reasonable expectation of privacy" instead of "trespassing into one's property."

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[594]The Fourth Amendment to the U.S. Constitution reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[595] 116 U.S. 616 (1886) in Dressler, *Understanding Crim. Pro.*, at 94-95.

[596] *Olmstead v. United States*, 277 U.S. 438 (1928) (cited in Dressler, *Understanding Crim. Pro.*, at 95).

[597] Weaver et al., *Principles of Crim.*, at 82.

[598] *Olmstead v. United States*, 277 U.S. 438 (1928) (cited in Dressler, *Understanding Crim. Pro.*, at 95).

[599] Ibid.

[600] 389 U.S. 347 (1967) (cited in Dressler, *Understanding Crim. Pro.*, at 96). In that case, federal officials subjected D to warrantless surveillance of his conversations in a public phone booth. The federal officials "attached electronic listening device to the outside of a telephone booth from which D conducted conversations." The Court reasoned that "by shutting the door on the booth and paying the toll, D was "surely entitled to assume that the words he utter[ed]...[would] not be broadcast to the world.' As a result the Government's activities...violated the privacy upon which he justifiably relied...."

[601] *Katz v. United States*, 389 U.S. 347 (1967) (cited in Weaver et al., *Principles of Crim.*, at 83).

The "reasonable expectation of privacy" standard is also applied in other legal systems. Canadian courts have interpreted Section 8 of the Canadian Charter, which states, "Everyone has the right to be secured against unreasonable search or seizure," as protecting citizens from "state actions that invade a reasonable expectation of privacy."[602] Israeli law prohibits police from engaging in activities which infringe or violate a person's "reasonable expectation of privacy."[603]

In *Katz*, the U.S. Supreme Court defined the "reasonable expectation of privacy" standard in terms of two elements. First, the concerned individual must display an actual expectation of privacy – the subjective element. Second, the individual's expectation must be that society is ready to accept it as legitimate – the objective component. If either of the two does not exist, the police conduct does not constitute search – rendering the issue of right to privacy irrelevant. It follows that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[604]

In view of the fact that Article 26 of the FDRE Constitution recognizes right to privacy through prohibition of search and seizure (as does the Fourth Amendment to the U.S. Constitution) and the protection extends not only to homes or properties but also to notes and communications (as does the Fourth Amendment), lesson can be drawn from the U.S Supreme Court's approach to identify the interest that Article 26 protects.That is, for both subarticles 1 and 2 of Article 26, which provide only an illustrative list of "things" over which an individual might have privacy interest, the U.S's *"reasonable expectation of privacy"* standard may be used to identify other items intended to be protected under these subarticles.

As argued above, one way of including offices and other places of business as protected places in Article 26(1) of the Constitution is to adopt the U.S. Supreme Court's definition of privacy. The European Court of Human Rights has also opined that the notion of private life is relevant to activities of a professional or business nature.[605] According to the Court, "tapping an individual's business calls or the calls he or she makes from business premises, as well as searches that are directed solely against a natural person's business activities, fall within the scope of the right to privacy."[606] Indeed, the term "home" under Article 26(1) itself might be construed as including offices or business places. As stated in

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[602] Kent W. Roach, "Canada," in Bradley, *Crim. Pro.*, at 59.
[603] Eliahu Harnon and Alex Stein, "Israel." in Bradley, *Crim. Pro.*, at 228.
[604] *Katz v. United States*, 389 U.S. 347, 360, 361 (1967) (cited in Weaver et al., *Principles of Crim.*, at 83).
[605] European Court of Human Rights, Judgment of 16 November 1992, *Niemietz v. Germany*, Appl. 13710/88, par. 29 (criminal) (cited in P.H.P.H.M.C. van Kempen, "Human Rights and Criminal Justice Applied to Legal Persons: Protection and Liability of Private and Public Juristic Entities under the ICCPR, ECHR, ACHR and AfChHPR," 14.3 *Electronic Journal of Comparative Law* at 18 (2010)http://www.ejcl.org (hereafter van Kempen, "Hum. Rights")
[606] Ibid.

paragraph five of the General Comment No. 16, the term "home," as used in article 17 of the ICCPR, includes the place where a person resides or carries out his usual occupation."[607] By virtue of Article 13(1) of the FDRE Constitution,[608] the interpretation given to Article 17 of the ICCPR can be adopted to define the term "home" in Article 26 of the FDRE Constitution.

In *Niemietz v. Germany*, which concerned the search of a lawyer's office, the European Court decided that "the right to respect for one's home extends to a professional person's office."[609] In the U.S. the term "house" is applied broadly so as to include hotel rooms,[610] offices, stores and other commercial buildings.[611] Although the French criminal procedure code does not expressly regulate searches of places other than houses, French courts have applied some of the procedure code's restrictions applicable to domicile searches to other searches and seizures.[612]

1.1.2. Whose Right is protected?

Both domestic and international laws are reported to have increasingly recognized criminal liability of non-natural juridical persons.[613] The 2004 Criminal Code of Ethiopia reflects the trend, incorporating provisions that impose criminal responsibility on juridical persons.[614] In light of these provisions of the Criminal Code and in view of the fact that juridical persons may have communications or properties in which they may have a privacy interest, the question arises whether the rights to privacy under Article 26 of the Constitution and Article 17 of the ICCPR are applicable to juridical persons. First, we will review the applicability of fundamental rights in general to juridical persons, then we will focus on whether juridical persons are recognized as beneficiaries of the right to privacy.

P.H.P.H.M.C. van Kempen's article[615] assesses the position of the ICCPR and three major regional human rights instruments (the African Charter on Human and Peoples' Rights ("AfChHPR"), the European Convention on Human Rights ("ECHR"), and the ACHR on the applicability of human rights provisions to juridical persons in general. The author

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[607] UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, April 8, 1988, available at: http://www.unhcr.org/refworld/docid/45388f922.html (accessed September 2011).

[608] According to Article 13(2) of the FDRE Constitution, "the fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to...International Covenants on Human Rights... adopted by Ethiopia." The provision refers to Chapter Three of the Constitution, which includes Article 26.

[609] European Court of Human Rights, Judgment of 16 November 1992, *Niemietz v. Germany*, Appl. 13710/88, par. 30 (criminal) (cited in van Kempen, "Hum. Rights.," at 18).

[610] *Stoner v. California*, 376 U.S. 483 (1964) (cited in Dressler, *Understanding Crim. Pro.*, at 90).

[611] *See v. City of Seattle*, 387 U.S. 541 (1967) (cited in Dressler, *Understanding Crim. Pro.*, at 91).

[612] Richard S. Frase, "France," in Bradley, *Crim. Pro*, at 154.

[613] Van Kempen, "Hum. Rights," at 1.

[614] Criminal Code, Articles 513, 524, 530, 599 and 632.

[615] Van Kempen, "Hum. Rights," at 1-34.

addresses the question from two angles: whether these entities have direct protection under the legal instruments, and whether the entities are protected indirectly through the protection accorded to their constituent stakeholders.[616] In relation to the first question, van Kempen concludes that juridical persons do not qualify as direct beneficiaries of the rights recognized under the ICCPR and the ACHR; but juridical persons are accorded direct protection under the AfChHPR and the ECHR.[617]

The ICCPR's approach can be inferred from its preamble, which asserts that "these (human) rights derive from the inherent dignity of the human person."[618] That legal persons do not qualify as beneficiaries of the rights recognized in the Covenant is confirmed by the Human Rights Committee.[619] Moreover, some authorities claim that drafters of the Covenant clearly intended to exclude legal persons from the ambit of the Covenant.[620]

A close reading of the two subarticles of Article 1 of the ACHR makes its position clear. After indicating in subarticle 1 that the rights recognized in the Convention are intended to be applicable to "persons," in subarticle 2 it defines "person" as referring to a "human being." The Inter-American Commission reportedly explained its decision not to accord human rights protections to juridical persons by saying, "legal persons are legal fictions and lack real material existence, while the essential rights of man are based upon 'attributes of the human personality' and the need to create conditions that will enable all persons to achieve 'the ideal of free men enjoying freedom from fear and want.'"[621]

Similarly, most of the provisions of the ECHR, by referring to "anyone has the right" or "no one shall," seem to refer to natural persons. However, van Kempen, quoting the decisions of the former European Commission,[622] argues that this language has never proved to be an obstacle to applying the Convention provisions to juridical persons.[623]

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[616] For details on van Kempen's finding regarding the second question, see ibid., at 7-12.
[617] Ibid.
[618] International Covenant on Civil and Political Rights, preamble, para. 3.
[619] UN Human Rights Committee (HRC), *General Comment No. 31 [80], the Nature of the General Obligation Imposed on States Parties to the Covenant*, May 26, 2004, CCPR/E/21/Rev.1/Add.13, available at: http://www.unhcr.org/refworld/docid/478b26ae2.html (accessed on October 10, 2011).
[620] Emberland, M., "The Corporate Veil in the Jurisprudence of the Human Rights Committee and the Inter-American Court and Commission of Human Rights," 4(2) *Human Rights Law Review* 257, at 261 (2004) (cited in van Kempen, "Hum. Rights," at 3).
[621] Inter-American Commission ("I-ACionHR"), Report of 27 September 1999, *Bendeck-Cohdinsa v. Honduras*, Report 106/99, para. 17; I-ACionHR, Report of 11 March 1999, *Mevopal, S.A. v. Argentina*, Report 39/99, para. 17 (cited in van Kempen, "Hum. Rights," at 5).
[622] European Commission on Human Rights ("ECionHR"), Report of 3 October 1968, *N.V. Televisier v. the Netherlands*, Appl. 2690/65, p.4; ECionHR, Report of 21 March 1975, *Times Newspaper Ltd., The Sunday Times, Harold Evans v. the United Kingdom*, Appl. 6538/74, para. 1 (cited in van Kempen, "Hum. Rights," at 3).
[623] Van Kempen, "Hum. Rights," at 3.

Van Kempen's argument is confirmed by the case law[624] of the European Court of Human Rights ("ECtHR"). Unlike the ACHR, which justifies human rights on "the ideals of humanity and the value of human beings and humankind," the ECHR focuses on the value of human rights for maintaining and developing the rule of law as well as peace, unity, and justice in Europe, thus confirming van Kempen's conclusions. Although only Article 1 First Protocol ECHR on the right to property expressly provides for legal persons as beneficiaries of fundamental rights, van Kempen maintains that the other human rights in the Convention are also applicable to legal persons.[625]

Van Kempen relies on cases decided by the African Commission on Human and Peoples' Rights to conclude that, though the exact extent is far from clear, the AfChHPR also provides protection of fundamental rights to legal persons. In *Civil Liberties Organization v. Nigeria* (101/93),[626] the Commission held that the challenged Nigerian Legal Practitioners' Decree infringed the free association of the Nigerian Bar Association, thereby violating Article 10 of AfChHPR. Van Kempen concludes that the Commission's decision, by regarding the Association as a victim of a human rights violation, implies that the Association is a right holder.[627] However, van Kempen's following concluding remark on fundamental rights protection that the AfChHPR accorded to legal persons[628] makes clear that the Charter only indirectly provides protection to legal persons.

> The African Commission does not consider the protection of fundamental rights of legal persons to be a Charter objective on its own; it merely seems to provide that protection as instrumental for the protection of human beings. This nevertheless leaves legal persons the possibility to acquire human rights protection when they are the object of criminal investigations or proceedings.

Having analyzed the application of the four human rights instruments to juridical persons in general terms, let us now review their positions on the applicability of the right to privacy to juridical persons. As indicated above, juridical persons are not right holders under the ICCPR and the ACHR. Only the ECHR and the AfChHPR extend protection of fundamental rights to juridical persons. Hence, a discussion on whether the right to privacy, as one of the fundamental rights, is applicable to juridical persons makes sense only in the context of the latter two. Unfortunately, the AfChHPR does not incorporate right to privacy, making the Charter irrelevant for the purpose of the discussion at hand. This leaves the ECHR as the only relevant instrument for purposes of discussion.

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[624] European Court of Human Rights ("ECtHR"), Judgment of 16 April 2002, *Société Colas Est v. France*, Appl. 37971/97, para. 41 (regarding right to privacy in Art. 8 ECHR) (cited in ibid., at 3, note 10).
[625] Van Kempen, "Hum. Rights," at 3.
[626] African Commission on Human and Peoples' Rights ("AfCionHPR"), Decision of 1995, *Civil Liberties Organization v. Nigeria*, Comm. 101/93 (1995), para. 37 (cited in ibid., at 5).
[627] Van Kempen, "Hum. Rights," at 5.
[628] Ibid., at 6.

The right to privacy is recognized under Article 8 of the ECHR. Van Kempen, relying on the cases decided by the ECtHR, observes that the right to privacy under the ECHR has been applied to juridical persons. In *Colas Est v. France,*[629] which involved a search of both the head and branch offices of public limited companies and a resulting seizure of documents, the Court applied the right to respect for one's home to the legal entity.[630] In other cases, the court decided that the right to respect for one's correspondence is also applicable to a legal entity.[631]

The position of the FDRE Constitution is unclear on the question whether human rights provisions are applicable to juridical persons. Unlike some jurisdictions, such as South Africa, where the Constitution indicates that juristic persons may exercise rights in the Constitution's Bill of Rights Section "to the extent required by the nature of the rights and the nature of that juridical person,"[632] the FDRE Constitution is silent on the matter.

In the absence of clear Constitutional language, one way of gauging the constitution's position on the matter is by reference to the approach of the human rights instruments to which Ethiopia is signatory, because the Constitution's Bill of Rights Section is to be interpreted in light of those instruments.[633] As discussed above, the ICCPR and the AfChHPR are both integral parts of the law of Ethiopia[634] and both are identified by Article 13(2) as points of reference for interpreting provisions of Chapter three of the Constitution. These instruments, however, take contradictory positions: the former does not recognize juridical persons as right holders, while the latter does. If we interpret the Constitution in light of the ICCPR, Chapter three of the Constitution, including Article 26 which recognizes the right to privacy, would not apply to juridical persons. If, on the other hand, we interpret the Constitution in light of the AfChHPR, part of the Constitution on human rights would be relevant to juridical persons. However, the right to privacy is absent from the AfChHPR, so the Charter's approach is not be helpful with regard to the applicability of the right to privacy to juridical persons. Thus, regardless of whether Article 26 of the constitution is interpreted in light of the ICCPR or the AfChHPR, juridical persons would not be protected by Article 26 of the FDRE Constitution.

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[629] ECtHR, Judgment of 16 April 2002, *Société Colas Est v. France,* Appl. 37971/97, para. 41-42 (criminal) (cited in ibid., at 18).

[630] This position of the Court was maintained in ECtHR, Judgment of 28 April 2005, *Buck v. Germany,* Appl. 41604/98, para. 31 (criminal); ECtHR, Decision of 11 October 2005, *Kent Pharmaceuticals Limited v. the United Kingdom,* Appl. 9355/03, para. 1 (criminal); ECtHR, Judgment of 15 November 2007, *Khamidov v. Russia,* Appl. 58243/00, para. 131 (administrative/civil) (all cited in van Kempen, "Hum. Rights," at 18.

[631] ECtHR, Judgment of 16 October 2007, *Wieser & Bicos Beteiligungen GmbH v. Austria,* Appl. 74336/01, para. 45 (criminal); ECtHR, Judgment of 28 June 2007, *Association for European Integration and Human rights & Ekimdzhiev v. Bulgaria,* Appl. 62540/00, para. 60-62 (criminal/administrative); ECtHR, Judgment of 1 July 2008, *Liberty v. the United Kingdom,* Appl. 58243/00, para. 55-57 (criminal/administrative) (all cited in van Kempen, "Hum. Rights," at 18).

[632] Article 8(4) of the Constitution of the Republic of South Africa.

[633] FDRE Constitution, Article 13(2).

[634] By virtue of Article 9(4) of the FDRE Constitution, "all international agreements ratified by Ethiopia are an integral part of the law of the land."

1.1.3. Who Has the Obligation?

As provided under Article 26(3) of the Constitution, the government has the constitutional obligation to respect and not to interfere with the citizen's right to privacy. That is, a private person's intrusion into another's home or interception of another's correspondence is not a violation of Article 26 of the Constitution, though it might violate other provisions of criminal law.[635] However, this does not mean that Article 26 of the Constitution allows the government to use private persons to seize evidence by interfering with another person's privacy. In such cases, though not directly through public officials, the government is involved. Thus, Article 26 would apply in cases where the private person acts as an instrument or agent of the government. The same approach is adopted by the U.S. Supreme Court in relation to private searches and seizures under the Fourth Amendment.[636]

1.2. Preconditions to Restrict Privacy

Article 17(1) of the ICCPR, in express terms, prohibits arbitrary or unlawful interference with a person's privacy. Its second subarticle requires that the right to privacy be protected by law. Article 26(3) of the FDRE Constitution provides three conditions that must be fulfilled for the restriction of privacy not to be arbitrary or unlawful. The first condition is existence of a specific law that authorizes the restriction. The second condition is related to the purpose of the specific law that authorizes the restriction of privacy: the law should serve one or more of three purposes – the safeguarding of national security or public peace, the prevention of crimes, or the protection of health, public morality, or the rights and freedoms of others. The third requirement is the existence of a compelling circumstance that calls for the restriction of privacy. These conditions are discussed in general terms below.

The Specific Law Requirement: For a right to be restricted, both the Constitution and the ICCPR require that a clear provision of law authorize the restriction. That is, the enjoyment of the right to privacy is to be limited only on the basis of laws which are in existence at the time the restriction is to be made. Public officials are to make sure that laws exist that authorize restriction of privacy in specific circumstances and to follow those laws where there is a need to restrict a person's privacy. The commentary on the draft provisions of the FDRE Constitution emphatically states that at all times the right to privacy is to be limited on the basis of law.[637] In connection with prevention and investigation of crime, three laws currently provide for restriction of privacy, namely, the Criminal Procedure Code, the Revised Anti-Corruption Special Procedure and Rules of

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[635] Criminal Code, Article 601(1) (a).
[636] *Burdeau v. McDowell*, 256 U.S. 465 (1921), *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989) (cited in Dressler, *Understanding Crim. Pro.*, at 83).
[637] *Commentary*, at 58-60.

Evidence Proclamation, and the Anti-Terrorism Proclamation. The Criminal Justice Policy contemplates provisions authorizing restriction of privacy by an investigating police officer. The policy calls for specific laws that allow the police officer, with or without a court warrant, to intercept communications of persons who are suspected of having committed, or to be about to commit, an offence that is punishable with rigorous imprisonment.[638]

Purpose of the Law: The mere existence of a law that authorizes restriction of privacy does not make a search proper. The law that authorizes the search must serve one of the purposes listed under Article 26(3) of the Constitution. That is, the law that permits the search must have the purpose of safeguarding of national security or public peace, the prevention of crimes, or the protection of health, public morality, or the rights and freedoms of others. Unlike the other two conditions, which limit the power of public officials to restrict the right to privacy, this condition restricts the types of legislation authorizing search that the legislature may enact. If the law authorizing the search does not serve any of these purposes, the search, though lawful, would remain arbitrary, in violation of Article 17 of the ICCPR.

The searches allowed under the Criminal Procedure Code and the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, as discussed below, are to be made as part of the investigation of a crime. Some of the searches authorized by the Anti-Terrorism Proclamation may be made to prevent the commission of a terrorist act, while others may be made in order to investigate a terrorist act which has been committed. Hence, most of the searches authorized by the laws reference above are not *directly* related to the purposes privacy can be restricted under Constitutional Article 26(3). In other words, the purpose of the searches envisaged by the aforementioned laws—collection of evidence— , does not squarely fit with any one of the purposes that laws restricting right to privacy are supposed to serve.

Even if investigation of crime or collection of evidence is not expressly identified as one of the legitimate purposes of search under Article 26(3) of the Constitution, in a broader sense, searches authorized under the Code and the Proclamations can be justified by their importance in safeguarding national security or public peace, or in the prevention of crimes or protection of the rights and freedoms of other people. The reading of the Commentary on the draft provisions of the FDRE Constitution confirms this interpretation. In its explanation of Article 26, the Commentary refers to Articles 32 and 33 of the Criminal Procedure Code as examples of the specific laws envisaged under Article 26(3) of the Constitution.[639]

Compelling Circumstances: Still another requirement for a limitation on the right to privacy to be compatible with the Constitution and the ICCPR is the existence of

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[638] Criminal Justice Policy, Sections 3.17.2-3.17.3.
[639] *Commentary*, at 56-57.

compelling circumstances. Even if there is a law that allows search, the search is to be conducted only where there are compelling reasons that call for the search. If any of the purposes of the law authorizing restriction of privacy can be served without the search, no compelling circumstance is considered to exist. Only as a last resort may public officials apply the law authorizing restriction of privacy.

In the context of a criminal investigation, compelling circumstances exist when either the police do not have adequate evidence to prove the allegation against the suspect (and additional evidence is likely to be obtained through search and seizure), or the instrument or fruit of the crime must be seized, not to serve as evidence, but to prevent its destruction. Hence, for the search under the Criminal Procedure Code or the Proclamation to be Constitutional, the investigating police officer must be able to show that there is a compelling reason to act under the search-authorizing provisions of the Criminal Procedure Code, the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, or the Anti-Terrorism Proclamation.

Notes and Questions

1. For the restriction of privacy to be proper, the Constitution requires, *inter alia*, that a compelling circumstance exist. As discussed in the following pages, privacy may be restricted with or without prior court authorization. Which one of the three organs of the government should decide whether the requirement "compelling circumstance to restrict privacy" is fulfilled? Is it the court (where search is to be made with a warrant) and the law-enforcement officials (where search is to be made without a warrant) – or the legislature in both cases?

   If the court and law-enforcement officials make these decisions, then a search may not be conducted even where all the requirements of the specific law (the Cr. Pro. Code or the Proclamations) are fulfilled, for the second requirment—existence of compelling circumstance— might still be lacking. If the legislature decides, then the court and law-enforcement officials simply verify whether the requirements of the specific laws authorizing the court to issue the search warrant, or authorizing the officers to search without a warrant, are fulfilled. The fulfillment of the specific legislative requirements automatically guarantees the fulfillment of the compelling circumstance requirement.

   The latter approach makes it meaningless to state the two requirements—specific law and compelling circumstances—under Article 26(3) of the Constitution separately. Moreover, the legislature, compared with the court, is not in as good a position to determine what constitute compelling circumstances.[640] Does the rule of positive interpretation, then, support the first approach?

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[640] For a discussion relating to the role of the court and the legislature in the determination of circumstances where bail may be granted or denied, refer to Wondwossen Demissie "The Right to Bail in Ethiopia:

2. Where the requirements under the criminal procedure code for conducting a search with or without a warrant are fulfilled, to what extent does the Constitutional requirement of "compelling circumstance" for the restriction of the right to privacy affect the legality of the search?

Section II. Search with Court Warrant

The Constitution simply requires that one's right to privacy be restricted, *inter alia*, in accordance with specific laws. Unlike the Fourth Amendment to the U.S. Constitution, which specifically prefers search with a warrant),[641] Article 26 of the FDRE Constitution is silent as to whether the search must be conducted with prior court authorization (search with a warrant) or without prior court authorization (search without a court warrant). Nor does Article 17 of the ICCPR provide for a specific type of search. Both the Constitution and the Covenant left this matter to the law-making body. Thus, the legislature promulgated laws on search and seizure which provide for both types of searches and set out necessary preconditions for each. This section discusses search with a warrant as authorized under various laws.

2.1. Search of Premises

Two bodies of law deal with search of premises with a court warrant: the Criminal Procedure Code and the Anti-Terrorism Proclamation No. 652/2009. This subsection discusses each in turn.

2.1.1. Criminal Procedure Code

Part of Article 32 (2) of the Cr. Pro. Code states: "no premise may be searched unless the police officer or member of the police is in possession of a search warrant in the form prescribed in the Third Schedule to this Code except...." This language tells us two things. First, normally a premise is to be searched only with prior authorization from the court. Only exceptionally may search be conducted without authorization from the court. Though a search warrant is not constitutionally required, the Code provides that search of premises with a warrant is the normal method of search. The rationale for the warrant preference, as succinctly put by the U.S. Supreme Court, is "the desire...to maximize the number of occasions in which individual privacy is protected because law enforcement searches or seizures are reviewed – prior to the time they take place – by judicial officers." The other thing that Article 32(2) tells us is that the warrant to be issued by the court must be prepared in the manner prescribed in the Third Schedule to the Code.

When is a Search Warrant to be Granted?

Respective Roles of the Court and the Legislature" 23 *J. Eth. L.*, at 19 (2009) (hereafter Wondwossen, "Right to Bail").

[641] In *Ornelas v. United States*, the U.S. Supreme Court emphatically indicated that "the Fourth Amendment demonstrates a 'strong preference for searches conducted pursuant to a warrant.'" The court justified the preference on the ground that the requirement will subject the police officer's probable cause determination to the neutral and detached scrutiny of a judge. Weaver et al., *Principles of Crim.*, at 61.

Article 33 of the Cr. Pro. Code. Issue of Search Warrant
(1) *....No search warrant shall be issued unless the court is satisfied that the purposes of justice or of any inquiry, trial or other proceedings under this code will be served by the issue of search warrant.*

In light of Article 26(3) of the FDRE Constitution which requires, *inter alia*, that restriction of privacy be made in compliance with specific provisions of the law, the court has a paramount responsibility to confine the issue of search warrants to the strict requirements of the law. It is clear from Article 33(1) of the Code that warrants are not to be issued upon demand, or even lightly. The court's power is not nominal – the law wants to safeguard citizens against unfounded and arbitrary searches. The law is equally interested in ensuring that investigating police officers are not unreasonably hampered in their effort to investigate and collect evidence. Article 33(1) of the Cr. Pro. Code, having provided only a guideline as to what is needed to support the issuance of a search warrant, entrusts to the court the responsibility of balancing these two conflicting interests. That is, the applicant police officer must convince the judge that the warrant would serve the purposes stated under Article 33(1).

The court's decision whether the search would serve "*the purposes of justice or of inquiry, trial, or other proceedings under the Cr. Pro. Code*" is to be based on information presented by the applicant police officer. If the officer needs the search warrant in order to access private premises to seize items expected to be found on the premises, the warrant is being sought for a proper purpose. That is, the officer should not be proposing a "fishing expedition" to find out whether an alleged crime was committed. The applicant police officer's suspicion that he will find items on certain premises should be based on personal knowledge or information he has obtained from informants. Whatever the source of the officer's suspicion, it must be disclosed, so the court can evaluate the reasonableness of the suspicion.

Despite the vagueness of Code Article 33(1) regarding what the police officer must show, and what the court must verify, before issuance of a search warrant, the following can be safely said. A court will issue a search warrant if it is satisfied that doing so will serve the interests of justice – that is, where the court is convinced that: 1) on the basis of the information that the officer has received or his personal knowledge there is a "*reasonable*" possibility that the items sought to be seized will be found on the premises to be searched; 2) the items, if found and seized, will be used in evidence (the relevancy test); and 3) the items to be seized are so important that the prosecution's case would fail if they are not seized (the compelling circumstance requirement).

i. Likelihood of the Items to be Found in the Premise to be Searched
Because a search warrant is needed in order to explore certain premises with a view to seize evidence, there should be some degree of probability that the items will be found in the premises to be searched. The Fourth Amendment to the U.S. Constitution requires

search warrants to be supported by probable cause. That is, the government must show "*a fair probability*" that the specified items sought are presently located at the specified place described in the search warrant application.[642] Article 224 of the Argentine criminal procedure code requires "*reasons to believe*" that the objects pertaining to a crime or a person suspected of having committed a crime may be found in specified place in order to issue a search warrant.[643] In Italy, to secure a search warrant, the law requires the police officer to show existence of "*well-founded grounds*" to believe that evidence may be discovered or the defendant may be found in a certain place.[644] For the Italian Supreme Court, "a search warrant may not be based upon mere suspicions; rather there must be "important circumstantial evidence pointing to a probability that the subject of the search will be found...in the place to be searched."[645]

Unlike the jurisdictions discussed above, where the standard for obtaining a search warrant is provided either in their constitution or other subsidiary laws, Ethiopian law does not specify the degree of probability of obtaining the items that the police officer must show in order to obtain search warrant. Nor is the issue addressed by any court cases. In practice, courts do not follow the form prescribed in the Third Schedule to the Code. They simply fill out a form with broad statements conferring wide discretion on the police officers in charge of the search. Thus, a reading of the warrants does not reveal whether the court has made an assessment of the likelihood that the items will be found in the specified place. Although Ethiopia does not have laws comparable with the foreign laws stated above, Article 26 of the Constitution and Article 33(1) of the Cr. Pro. Code, taken together, seem to suggest that mere suspicion of the police officer that the items to be seized will be found on certain premises is not adequate to obtain a search warrant. Rather, the law seems to require a certain degree of probability that the items the police are seeking will be found on the premises. After all, search is not a trial and error exercise.

If the court must verify that the police officer has met a certain degree of proof, it must inquire into the basis of the officer's suspicion or belief that the articles to be seized are found on the premises to be searched. The officer must have developed the suspicion or belief from his own personal knowledge or from information from third parties. The court must evaluate the basis of the officer's suspicion and should find acceptable the officer's conclusion that the items are likely to be found on the premises.

In the United States, the government relies on informant information (hearsay) as the basis for probable cause that the items are likely to be found in a specified place. However, the information must meet a two-pronged test: 1) it must provide the court with information that sufficiently explains how the informant obtained the information (this is known as the "underlying circumstances" prong); and 2) it must provide the magistrate with information

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[642] Weaver et al., *Principles of Crim. Pro.*, at 64.
[643] Alejandro D. Carrio and Alejandro M. Garro, "Argentina," in Bradley, *Crim. Pro.*, at 12.
[644] Rachel VanCleave, "Italy," in Bradley, *Crim. Pro.*, at 253.
[645] Cass. V, Ord. 899 (May 23, 1992) (cited in ibid.).

that supports the informant's "veracity" and "reliability" (this is known as the "credibility" prong).[646] The court then decides whether to issue the requested warrant.

ii. Relevance of the Items to be Seized

When an application for a search warrant is made, the court is required to verify whether the items to be seized are relevant. The phrase "and it has been made to appear to me that the production of the articles...is essential to the inquiry" in the content of the Form prescribed in the Third Schedule of the Code suggests that the judge, before issuing the warrant, should be convinced of the relevance of the items to be seized. The purpose for which the items to be seized must be relevant varies from case to case. The phrase "the purpose of justice or of any inquiry, trial or other proceedings under this Code will be served by the issue of such warrant" in Code Article 33(1) shows the breadth of purposes for which warrants can be issued.

While items to be seized may be used as evidence at trial, they may serve a variety of other functions, as well. They may assist in developing a reason to believe that someone is responsible for the commission of an offence, which would justify arrest of the suspect. In this case, though the items might also be used as evidence at trial, their primary purpose is to decide whether someone should be arrested. Second, where it is rumored that a certain crime has been committed but no tangible evidence is available, the police may inquire into tangible evidence, and may begin a formal investigation on the basis of that evidence. In this case, too, the purpose of the inquiry or search is not to seize items for use as evidence at trial, but to assist the police to obtain concrete information so that they can decide whether to launch a formal, full-fledged investigation. The outcome of the search might clear the suspicion and/or it may enable them to decide whether to start formal investigation.

iii. Compelling Circumstances

In addition to the existence of specific laws authorizing restriction of privacy, Article 26(3) of the FDRE Constitution requires that compelling circumstances be present for the application of the specific laws. Compelling circumstances exist justifying a search if the search serves "the purposes of justice or of any inquiry, trial or other proceedings under the Cr. Pro. Code" and those purposes cannot be served otherwise than through the search. This standard applies literally; if, for instance, the prosecutor has adequate evidence to prove his case against a suspect, there is no need to conduct a search to seize items for use as evidence. The language "the production of the articles specified in the Schedule below is essential to the inquiry" in the Form prescribed in the Third Schedule underscores that need must exist in order to justify a search.

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[646] Weaver et al., *Principles of Crim.*, at 64. In *Illinois v. Gates*, decided in 1983, the U.S. Supreme Court "rejected the two rigidly-constrained categories of proof as necessary elements to establish probable cause" and introduced the "totality of circumstances" approach. 426 U.S. 213 (1983) (cited in ibid.).

In explaining "compelling circumstances" under Article 26(3) of the FDRE Constitution in the context of a criminal investigation, the document prepared to explain the draft provisions of the FDRE Constitution states that the term presupposes that crime has been committed. The term does not contemplate use of a search to prove the crime. Although the Constitutional provision lacks clarity, "compelling circumstances" seems to include administrative searches that may be needed in the event of an epidemic or a civil war, but does not seem to include searches made for the purpose of criminal investigation.

2.1.2. Anti-Terrorism Proclamation

2.1.2.1. Covert Search[647]

Article 17 of the Anti-Terrorism Proclamation requires the police officer to request a covert search warrant from the court when he has reasonable grounds to believe that two conditions exist. The first condition relates to the officer's suspicion that a crime has been or is likely to be committed. This condition is satisfied where he has reasonable grounds to believe that "a terrorist act has been or is likely to be committed"[648] or that "a resident or possessor of a house to be searched has made preparations or plans to commit a terrorist act."[649] The second condition is related to the importance of the covert search. A police officer needs to have reasonable grounds to believe that "covert search is essential to prevent or take action against a terrorist act or suspected terrorist activity."[650] Unlike under Article 33 of the Code, where the requirements to obtain a warrant can only be deduced through interpretation, here the conditions for a warrant are clearly provided by the legislature.

Article 18 of the Anti-Terrorism Proclamation articulates two factors the court must use to decide on the application by a police officer for a covert search warrant. The first is "the nature or gravity of the terrorist act or the suspected terrorist act."[651] The court's ruling on the application partly depends on the nature or degree of seriousness of the committed or suspected terrorist act. What constitutes a terrorist act is defined under article 3 of the Proclamation. The implication of Article 18(1) (a) is that in some circumstances the court may deny a covert search warrant on the basis of the nature of the terrorist act or on the ground that the terrorist act is not grave enough. In view of the facts that all terrorist acts are by nature illegal, serious in consequence and that similar punishment is prescribed for all types of terrorist acts, it is unclear how the court would distinguish among terrorist acts, allowing a covert search warrant for some and not for others.[652]

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[647] The following three paragraphs on the restriction of privacy as provided under the Ethiopian Anti-Terrorism Law are taken from Wondwossen Demissie, "Reflective Analysis of the Evidentiary and Procedural Aspects of the Ethiopian Anti-Terrorism Law,' in Wondwossen Demissie (ed), 3 *Human Rights Law Series* 42, at 67-69 (2010) (hereafter Wondwossen, "Reflective Analysis").

[648] Anti-Terror Proc., Art. 17 (1).

[649] Ibid., at Article 17(2).

[650] Ibid., at Art. 17(3).

[651] Ibid., at Art. 18(1) (a).

[652] There is another anomaly. As this factor, unlike the other one, is related to the nature and gravity of the offence, and as what constitutes a terrorist act is exhaustively listed in the Proclamation, the legislature could

The second factor that the court is required to consider is the importance of the warrant. The law states that the court must consider "the extent to which the measures to be taken in accordance with warrant would assist to prevent the act of terrorism or arrest the suspect."[653] As discussed above, the police officer is only empowered to request a covert search warrant if he has reasonable grounds to believe that covert search is necessary to prevent or to take action against the terrorist activity. The judgment of the officer will be scrutinized by the court, however, instead of being taken for granted. The court will issue the covert search warrant only if it is convinced that the warrant would significantly contribute to prevention of the act of terrorism or the arrest of the suspect.[654]

Notes and Question

The Amharic version of Article 17 of the Proclamation states that "covert search" refers to *secret search*. Why do you think the search envisaged under Article 17 is characterized as "*covert*" or "'*secret*"? The characterization is misleading for the following reasons. First, the search is to be conducted of premises or a house, not of communications,[655] which could be easily searched or seized in secret using technological information-gathering instruments. Second, the search is to be made after authorization from the court – unlike searches under Article 16 of the Anti-Terrorism Proclamation (so-called "sudden searches," where a court warrant is unnecessary). It is unclear what is so different about a search under Article 17 of the Anti-terrorism law that it is treated as a "covert" or secret search instead of a search with a warrant under Article 33 of the Criminal Procedure Code.

2.2. Search of Communications: Interception and Surveillance

Unlike the 1931 Constitution, which contained a provision protecting one's interest in his communications, the 1955 Revised Constitution contained no such provision. Consequently, the 1961 Criminal Procedure Code does not contain a provision dealing with restriction of privacy interests over notes and correspondence. Currently, only the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation and the Anti-Terrorism Proclamation incorporate provisions on interception of communications.[656] This subsection deals with the provisions of the Anti-Terrorism Proclamation.

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have stipulated in which of the cases envisaged under the Proclamation a covert search warrant is allowed. There is no convincing reason to leave the matter to the discretion of the courts.

[653] Anti-Terror Proc., Art.18(1)(b).

[654] It is interesting to note that the law does not empower the court to check the reasonableness of the officer's assessment that a crime has been or is likely to be committed.

[655] Anti-Terrorism Proc., Arts. 17(2) and 18(2) (a). Most importantly, the Amharic phrase "*ye mibereberew bet*" in Article 17(2) and the phrase "*ye mederegew birbera*" in Article 17(3) clearly show that it is a house or premise that is to be searched.

[656] The Criminal Justice Policy provides for specific laws that broaden the instances where interception of communications might be employed. See Sections 3.17.2 and 3.17.3.

The following discussion of restriction of privacy through interception and surveillance, as provided for in Anti-Terrorism Proclamation No. 652/2009, are taken from Wondwossen's "Reflective Analysis of Procedural and Evidentiary Aspects of the Ethiopian Anti-Terrorism Law," in *Ethiopian Human Rights Law Series.*[657]

> Article 14(1) of the Proclamation empowers the National Intelligence and Security Service (hereafter to be referred as NISS) to intercept or conduct surveillance on electronic communications with a view to prevent and control an act of terrorism. The power to gather information through surveillance for the same purpose is also given to the Police under Article 14 (4) of the Proclamation.
>
> Whether the interception and surveillance is to be made *only* to prevent a terrorist act from being committed or to investigate a suspected case of terrorism as well is not very clear. It can only be inferred. The phrases that appear at the beginning of sub article 1 which reads "*to prevent and control a terrorist act...*," and under sub article 4 which goes "*The NISS or the police may gather information by surveillance in order to prevent and control acts of terrorism*" indicate that the primary purpose of the interception or surveillance is to prevent the commission of a terrorist act.[658] According to this interpretation, the information to be gathered would be used to abort one's plan[659] to carry out a terrorist act but not to be used as evidence for the terrorist act which has already been committed. By providing for the secrecy of the information to be obtained through interception, sub article 2 strengthens this interpretation.
>
> On the other hand, sub article 1(a), which provides for whose communications are to be intercepted, by stating that the NISS may "intercept or conduct surveillance on telephone, fax...of a person *suspected* of terrorism" can be construed to mean that the person whose communications are to be intercepted is *suspected of having already committed* the terrorist act and, therefore, the information to be gathered is to be used as evidence against him. Perhaps this information might be among those intelligence reports envisaged under Article 23(1) of the Proclamation.[660]

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[657] Wondwossen, "Reflective Analysis," at 60-62.

[658] The law of England does not allow any information obtained through interception to be used as evidence. Such information may be used in evidence in exceptional cases not related with criminal trial. These exceptional cases are: offences related to interception itself, offences relating to official secrets and non-criminal proceedings such as Special Immigration Appeals Commission hearings. Normally, British Authorities use intercepted information to devise mechanisms to disrupt and prevent serious crimes and terrorist acts. Such information may also be used to decide what investigation and surveillance methods to employ so as to secure evidence that may be used in court. A finding of a cross party review chaired by Sir John Chilcot (the Chilcot Review) suggested that it should be possible to use interception as evidence under some conditions. See: http://security.homeoffice.gov.uk/ripa/interception.

[659] Of course, the information/evidence collected through surveillance might be used as evidence where one is prosecuted for planning to commit a terrorist act by virtue of Article 4 of the Anti-Terrorism Proclamation.

[660] The relevant part of Article 23 of the Proclamation states: "...the following shall be admissible in court for terrorism cases: 1/intelligence report prepared in relation to terrorism, even if the report does not disclose the source or the method it was gathered...."

However, that phrase may also be construed to mean a person who is suspected to be one who is likely to commit a terrorist act.

Be the purpose of the information to be gathered as it may, the interception and the steps to be taken so as to effect it under this provision are to be made only with prior authorization from the court. Another unclear point is on what the decision of the court depends where an application for warrant is made before it. If the court has the power to deny or grant the search warrant, the factors, at least general guidelines, that the court should base its decision should have been clearly spelt out in the law. But comparing the contents of article 14 on the one hand and Articles 17 and 18 (which are also related with search) on the other would reasonably lead one to conclude that under article 14 search warrant is to be given on demand. First article 17 states that "the police may *request* the court ---for covert search warrant" which has a clear implication on the power of the court to grant or deny the warrant whereas article 14 simply states "---the NISS may after getting court warrant---" where the court's power to deny, unlike under article 17, is not so clear. Second, Article 18 expressly provides for factors that should be taken into consideration by the court for making a decision on whether to grant or deny warrant. There is no corresponding provision in connection with the search warrant envisaged under article 14 which may be construed to imply that the court does not have power to reject an application for warrant.

Moreover, the law does not require the police or NISS to report to the court as to how the interception was executed in the absence of which the court would not have an opportunity even to make a post facto review into whether the search was carried out in accordance to its instruction.

Notes and Questions

1. The text taken from Wondwossen's article states that different provisions of the Proclamation suggest different purposes for the interception, surveillance, and gathering of information under Article 14 of the Anti-Terrorism Proclamation. What is your opinion? Are these activities to be used to prevent a terrorist act from being committed or to investigate a terrorist act which has already been committed – or for both?
2. If, as Wondwossen argues, the court must grant the warrant for interception on demand and has no power to check whether the search was conducted in accordance with the warrant because of a lack of procedure for *post facto* review, what purpose does the court's involvement in the interception process under Article 14 of the Anti-Terrorism Proclamation serve?

2.3 A Court Competent to Issue Search Warrant

When a police officer wishes to search a given premises, he must apply to a court of law, which will decide whether to accept the application and grant the warrant. Article 33(1) of the Cr. Pro. Code provides that any court may issue a search warrant; however, this provision is no longer applicable to searches of premises in connection with corruption offences. Article 7(4) of the Revised Anti-Corruption Special Procedure and Rules of

Evidence Proclamation provides that applications to conduct a search and other matters relating to investigation of corruption offences must be made to a court with jurisdiction over corruption offences. Nor is the Cr. Pro. Code provision applicable to searches to be conducted within the territory of the city of Addis Ababa. Article 2(2) of the Addis Ababa City Government Revised Charter (Amendment) Proclamation No. 408/2004 vests the Addis Ababa City Courts with sole jurisdiction over cases brought within the city under Article 33 of the Criminal Procedure Code (without prejudice to the jurisdiction of federal courts on the substance of federal offences).

Notes and Questions

1. When an application for a search warrant is made to court of law in Ethiopia, on what basis does the court decide on whether to grant or deny the application?
2. Where there is no clear standard specifically applicable to obtaining a search warrant, and where applying the law without such a standard would be arbitrary, would it be appropriate to apply the standard provided for a search without a warrant under article 32 (2) (b) of the Cr. Pro. Code? As discussed below, the provision, *inter alia*, requires the police officer to have *reasonable cause* to suspect that articles which may be used in evidence are concealed on the premises. Can one read such requirements into Article 33(1) by analogy?

Section III. Search without Court Warrant

As discussed in the previous section, apart from stating that a restriction of privacy should be made on the basis of law, neither the FDRE Constitution nor the ICCPR prefers a specific type of search. The specific laws provide for both searches with and without a warrant. The subject of this section is the law that deals with search without a warrant. Thus, this section discusses exceptional circumstances that may justify searches of premises, communications, and persons without a warrant.

3.1. Search of Premises

Art. 32. of the Cr. Pro. Code. *Searches and seizures*

(1) *No premises may be searched unless the police officer or member of the police is in possession of a search warrant in the form prescribed in the Third Schedule to this Code except where:*

(a) An offender is followed in hot pursuit and enters premises or disposes of articles the subject matter of an offence in premises;

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

Search of premises without a court warrant, unlike search of persons, is an exception to the rule that a warrant is required to authorize a search. Police officers may carry out a search of premises without prior authorization from a court of law in only two circumstances – in case of hot pursuit and exigency.

3.1.1. Case of Hot Pursuit

If a person who commits a flagrant offence, as defined under Articles 19 and 20 of the Cr. Pro. Code, is not caught but is being followed in "hot pursuit," the premises into which he enters or where he disposes of the fruits or instrumentalities of the offence may be searched without warrant. Two conditions must be met for the search to be lawful. First, the hot pursuit must be lawful. The person who committed a flagrant offence is followed in hot pursuit with a view to arrest him. Hence, the arrest must be justified by the offence the person has committed. Article 50 of the Cr. Pro. Code provides that arrest without warrant in cases of flagrant offences is allowed where the offence is punishable with simple imprisonment for not less than three months. Moreover, the crime committed should not be one that is punishable only upon complaint – that is, where the police officer may not arrest the offender without getting authorization from the victim of the offence. Second, the purpose of the search is very specific: if the person himself enters into a certain premise, then the premises may be searched only to the extent necessary to effectuate his arrest. Hence, any part of the premises where the suspect is not likely to be found should not be searched. If the person being followed in hot pursuit, instead of entering the premises, simply throws materials that may be used in evidence into the premises, the search is to be made only to seize these materials. Searching part of the premises where the materials are not likely to be found would be illegal.

Because Article 50 of the Cr. Pro. Code allows ordinary persons to arrest one who has committed a flagrant offence, a possibility exists that a person who committed a flagrant offence will be followed in hot pursuit by ordinary persons. If the suspect disposes of articles that are the subject matter of an offence on given premises, the persons following the offender in hot pursuit may not enter the premises to conduct a search. Doing so, unlike effecting arrest, is exclusively reserved for the police officers.

3.1.2. Exigent Circumstances

If there is a need to act quickly, the police officer may conduct a search of the premises without a warrant. According to Article 32(2) (b) of the Code, the search without warrant must be justified by the existence of a pressing emergency and the need to take prompt action. In addition, several conditions must be satisfied.[661] First, the commission of the

[661] Whereas the English version suggests that the fulfillment of these requirements to be assessed in the eyes of the police officer, the Amharic version indicates that the assessment is to be made in the eyes of a reasonable person. Whether the assessment is to be made in the eyes of a reasonable person or a police officer, the provision requires two judgments (which combine both subjective and objective assessments) to be made: likelihood of the evidence to be found in a certain place, and that the evidence would be removed

offence must have been reported (by accusation or complaint) to a police officer in accordance with Article 14 of the Cr. Pro. Code. Second, the offence must be punishable with more than three years imprisonment. The reported offence must be so grave that there is a possibility for the accused, if convicted, to be punished with more than three years imprisonment. This requirement is fulfilled where the ceiling of the punishment prescribed for the offence exceeds three years. Third, an investigating police officer must have received information from informants that articles which may be used in evidence are likely to be found in a certain place. The officer may not rely on his own personal knowledge to conduct the search without a warrant even where other conditions/requirements are fulfilled. Fourth, the information should be circumstantial and from a credible source so that there is reasonable cause for suspecting that articles which may be used in evidence are found in a certain place. The Amharic version of Article 32 (2) (b) of the Cr. Pro. Code, which is the binding version, conveys the fourth requirement very clearly. This requirement is not so explicitly articulated in the English version of the Code. The fifth requirement establishes a standard of true exigency for a warrantless search: it requires good reason to believe that the articles which are reported to be found in the premises to be searched would be removed if an attempt were made to obtain a search warrant. A clear case is where the articles are in the process of removal or destruction, but that is not the only case that meets the standard. The officer must be in a position where effecting the seizure after obtaining a search warrant is impracticable. For a search without a warrant to be justified under Article 32(2) (b), the officer must be faced with the choice of risking the immediate destruction or removal of evidence or entering the premises and conducting a search.

The issue of search in exigent circumstances was raised in the case of *Public Prosecutor v. Tamirat Layne et al.*[662] In that case, defence lawyers objected to the admissibility of certain documents which were seized without a court warrant on the ground that they were seized in an illegal search. The lawyers argued that, as the search was not conducted in accordance with the provisions of the FDRE Constitution and the Criminal Procedure Code, it should be declared illegal and the seized documents should be inadmissible as evidence.

Because there was no indication that the search was made under court order, the Federal Supreme Court considered whether the search fulfilled the requirements of Article 32(2) (b) of the Cr. Pro. Code, which authorizes search of premises without a warrant. The Court noted that the provision allows the police to conduct a search without a warrant where the following conditions are cumulatively fulfilled: 1) an accusation relating to an offence punishable with more than three years imprisonment was lodged withto the police; 2) the police received information indicating that evidence relating to the offence is found in a

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if an attempt to obtain a search warrant is made, instead of conducting a search and seizing the same without a warrant.

[662] *Public Prosecutor v. Tamirat Layne, et al.* (Fed. Sup. Ct., Cr. File No. 001/1989).

certain place; and 3) it is believed that the evidence would be removed by reason of the delay in obtaining a search warrant.

The Court based its evaluation of whether these conditions were satisfied on the testimony given by the sixth prosecution's witness. The witness testified how the documents were seized. He stated that a search was conducted while an investigation was underway, that the police officers conducted the search to collect evidence related to the case being tried, that there was an attempt to remove evidence, that some of the evidence was seized in the *Teklehaymanot* and *Kolfea* areas while it was being removed, and that the rest of the evidence was found in a vehicle.

From the testimony, the Court deduced that compelling conditions existed to conduct the search at the time it was conducted. The Court noted that there was an attempt to remove documents that were to be used as evidence and that the attempt was being realized to some extent. The Court found that the warrantless search, which it noted was undertaken while evidence was being removed, was not illegal. Moreover, the Court reasoned that because the suspects were charged with an offence punishable with more than three years imprisonment the search without warrant fulfilled the conditions under Article 32(2) (b) of the Code.

Notes and Questions

1. As rightly interpreted by the Federal Supreme Court, one of the conditions required for a search to be lawful under Article 32(2)(b) of the Code is that the officer has received information from third-party informants that the things to be seized are located on the premises to be searched. In *Public Prosecutor v. Tamirat Layne et al.*, the witnesses did not testify that the police received such information from third parties. Nor did the court try to verify whether this condition was satisfied. Do you think the court's position would have been different had it noted that this point was not established by the prosecution's evidence?
2. If the police officers, on the basis of their own knowledge rather than information received from informants, suspect that evidence would be removed if they were to try to obtain a court warrant, can they conduct a search without a warrant in order to seize the evidence under Article 32(2)(b)? What purpose does the requirement of information from informants serve?

3.2. Search of Communications

Article 42 of the repealed Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 236/2001 introduced provisions on restriction of privacy interests over communications for the first time. Currently, collection of evidence through interception

of correspondence and letters is allowed by law[663] only in connection with terrorism[664] and corruption offences. This subsection deals with the law that authorizes interception of communications for investigation of corruption offences.

Article 46 of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005, captioned "*Interception of Correspondence and Letters*," states as follows.

1. *Where it is necessary for the investigation of corruption offence, head of the appropriate organ may order the interception of correspondence by telephone, telecommunications and electronic devices as well as by postal letters.*
2. *Where it is necessary, evidence gathered through video camera, sound recorder, and similar electronic devices may be produced as evidence.*
3. *An order given in accordance with sub-article (1) of this Article shall indicate the offence which gives rise to interception, and the duration of interception, and, if it is a telephone or telecommunication, the link to be intercepted. Unless head of the appropriate organ decides otherwise, the duration of the interception may not exceed four months.*

Article 46(1) should not be understood as restricting privacy interests on all matters listed under Article 26(2) of the FDRE Constitution. It allows only interception of communications, whether verbal or oral, between two or more persons. It does not allow seizure of private notes.

Article 46(1) is an authorization to intercept "live" communications. If a communication has already been made and recorded, or a letter has already reached its destination, it is too late for interception. In such cases, the record or the letter can only be seized in a search of premises made pursuant to a court order in accordance with Articles 32 and 33 of the Code. The agency head is empowered only to order the "*interception*" of communications while they are occurring, not the seizure of previously recorded communications. That is, "interception" extends to current communications or letters only, while cassettes or letters that have reached their destination would be subject only to seizure.

The phrase "where it is necessary for the investigation of corruption offence" under Article 46(1) is consistent with the "compelling circumstance" requirement of the Constitution. The concerned person may order interception under Article 26 only where there is no other effective and adequate way of collecting evidence. It is only then that the interception is said to be "*necessary.*" In other words, the concerned person considers other ways of conducting a successful investigation before rushing into giving permission for interception of correspondence and letters. If a successful investigation can be conducted without it, interception should not be allowed, for in such cases it is

[663] This method of collecting evidence for other types of offences is not authorized by law. It cannot be employed without authorization, because doing so would contravene the requirement of specific and express authorization of restriction of privacy under Article 26(3) of the FDRE Constitution.

[664] See Section 2.2., above.

unnecessary. Unlike searches under Article 33(1) of the Code, which may be justified for purposes other than serving investigation, interception can only be justified if needed for investigation.

When interception is ordered and made, the evidence obtained through this means need not be used as evidence during trial. As provided under Article 46(2) of the Proclamation, it is only "where...necessary" that the evidence gathered through interception using a video camera, sound recorder, or similar electronic device may be produced as evidence. That is, if the prosecutor is convinced that he has other evidence adequate to prove his case, he shall not use the evidence collected through interception. Evidence collected through interception is necessary to be produced under Article 46(2) of the Proclamation only if the prosecution's case is likely to fail if presented without it. Therefore, the requirement of being "necessary" is relevant not only at the time when the interception order is given but also at the time of producing the evidence discovered through interception. Discovery of other credible evidence, such as an eye witness, based on the information obtained through the interception (or otherwise) may make use of the evidence obtained through interception unnecessary.

Article 42 of the repealed Anti- Corruption Special Procedure and Rules of Evidence Proclamation No. 236/2001 empowered the court to give permission for interception of correspondence and letters. Under current law, the head of the appropriate organ, not the court, has the power to order interception of correspondences and letters. Appropriate organ is defined, under Article 2(3) of Proclamation No. 434/2005, as "an organ which is empowered to investigate and/or prosecute corruption offences." As can be understood from the reading of Article 7 of the Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation No. 433/2005, the organ primarily responsible for investigation and prosecution of corruption offences is the Federal Ethics and Anti-Corruption Commission. The same Proclamation, under its Articles 8 and 9, respectively, empowers the Commission to delegate its power of investigation and prosecution to other organs, in which case the heads of the institutions given such a delegation may have the power to give orders of interception.

3.3. Search of Persons

Article 26 of the FDRE Constitution recognizes an individual's privacy interest over his person and guarantees the right not to be subjected to searches of his person except in accordance with specific laws. The Cr. Pro. Code and the Anti-Terrorism Proclamation incorporate a couple of provisions on search of persons. Both laws empower the law enforcement officials to search persons without a search warrant from a court of law.

3.3.1. Criminal Procedure Code

The Code authorizes both bodily search and physical examination, as discussed below.

3.3.1.1. Bodily Search—Search Incident to Lawful Arrest

Art. 32 of the Cr. Pro. Code. Searches and seizures

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

As discussed before, a court warrant is issued only for a search of premises. Where the conditions required by law to search a person are fulfilled there is no need to secure a court warrant. The police officer can conduct the search in his own discretion; however, three conditions must be present to effect a lawful search of person. First, the person to be searched should first be lawfully arrested. For the arrest and subsequent search of the person to be lawful, the officer must have reason to believe that the person to be searched has committed an arrestable crime. Second, the arrested person must reasonably be suspected to have articles about his person. Third, these articles must be of a nature to serve as material evidence of the offence the arrestee is suspected to have committed.

Some jurisdictions require a search warrant to conduct a search of a person's body. Article 230 of the Argentine criminal procedure code states, "the judge shall order the requisition of a person by virtue of a reasoned ruling, as long as there are sufficient reasons to believe that he hides in his body objects related to the crime."[665]

3.3.1.2. Physical Examination

Art. 34 of the Cr. Pro. Code. Physical examination

1. *...where an investigating police officer considers it necessary, having regard to the offence with which the accused is charged, that a physical examination of the accused should be made, he may require a registered medical practitioner to make such examination and require him to record in writing the results of such examination. Examination under this Article shall include the taking of a blood test.*
2. *An investigating police officer may, with the agreement of the victim of an offence...require a registered medical practitioner to make such physical examination as the offence being inquired into would appear to require. He shall require the registered medical practitioner to record in writing the results of such examination.*

Search under this provision is appropriate in the context of certain types of offences. If, for instance, an individual is suspected of consuming an illegal drug, a medical examination can determine whether he has consumed the drug. Similarly, if the person is suspected of

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[665] Article 230 of the Argentine Code of Criminal Procedure requires a court warrant, which is to be issued only where the court is satisfied that there is "a reason to believe that the [suspect] hides in his body objects related to the crime." Alejandro D. Carrio and Alejandro M. Garro, "Argentina," in Bradley, *Crim. Pro.*, at 11.

spreading a disease, such as HIV, the appropriate medical examination can ascertain whether he carries the disease.

Court permission is not required to obtain evidence of an offence by physical examination. Nor is there a need for consent by the person to be examined.[666] The police officer may order a competent medical person to make the examination. One of the consequences of being suspected of a crime is that the suspect cannot invoke Article 20 of the 1960 Civil Code to refuse to submit himself to a medical examination. Article 21 of the Anti-Terrorism Proclamation empowers the police to order a person suspected of acts of terrorism to undergo a medical test and to provide, among other things, samples of his blood, saliva, and other body fluids for analysis.

In Canada, a judicial warrant is required if the suspect is not willing to provide a blood sample. Seizure of a blood sample without consent of the suspect or a court warrant will result in exclusion of the blood sample from evidence.[667]

3.3.2. Anti-Terrorism Proclamation[668]

Sudden Search[669]

Article 16 of the law (Anti-Terrorism Proclamation) provides cases where a search of person or property, without a court warrant,[670] may be made with a view to

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[666] When it comes to physical examination of a victim, though there is no need to get authorization from the court, the police officer has to secure the consent of the victim himself or his guardian as the case may be, to whatever examinations the offence being inquired into requires. Criminal Procedure Code, Article 34(2).

[667] Kent W. Roach, "Canada," in Bradley, *Crim. Pro.*, at 58-59.

[668] This excerpt on "sudden search" – search of pedestrians and vehicles on the street, as provided under the Anti-Terrorism Proclamation, is taken from Wondwossen, "Reflective Analysis," at 63-66. Minor modifications are made in footnotes.

[669] It is probably the fact that the search envisaged under Article 16 is made of vehicles or pedestrians on their way to another location that makes the search unexpected and thus a "sudden search." Otherwise, searches are normally classified into "with warrant" – where a court gives permission for the search to be conducted, and "without warrant" – where the search is conducted without prior permission from a court. For the person whose privacy is to be restricted, the search can always be a sudden one – something which was not expected, something that comes by surprise – whether it is conducted with or without a warrant. Even where the search is to be conducted with a warrant, an investigating police officer is not supposed to inform the person concerned in advance of the time that his property, home, or body will be searched, so in effect any search is a sudden search. A search under Article 16 of the law is to be made without a warrant from the court.

[670] It is interesting to note that under both Articles 14 and 16, the primary purpose of the search is to prevent the commission of a terrorist act. Article 14 deals with interception of different types of communications where a court warrant is necessary. Article 46 of the Revised Proclamation to Provide for Special Procedure and Rules of Evidence on Anti-Corruption empowers the head of the appropriate executive organ to authorize interception of communications. Article 16 relates to search of property and body, where permission from the Director of the Federal Police or his representative suffices. In both cases, there is no requirement that the materials seized or communications intercepted be reported to the concerned authorities – those which give the permission to search. It is not clear why a court warrant is required in the first case, while the second case requires permission from the Director of the Federal Police.

prevent the commission of a terrorist act, which is known as sudden search. Two preconditions need to exist to conduct the search under this provision. First, the concerned police officer needs to have a "reasonable suspicion"' about the possibility of a terrorist act to be committed. Second, the officer should believe that it is "necessary" to make the search in order to prevent the act. Upon ascertaining the fulfillment/existence of the two conditions, the police officer is supposed to get permission from the Director General of the Federal Police or his representative to carry out the search.

Though not explicitly mentioned in the law, the Director or his representative, before giving the permission, is supposed to verify the fulfillment of the two conditions[671] – whether or not there is a "reasonable suspicion" and whether or not the sudden search is "necessary to prevent the commission of the suspected terrorist act."[672] Under what condition is a sudden search deemed to be "necessary to prevent a terrorist act"? That is so where a police officer has got information that there is a plot to commit a terrorist act in a given area and there are indications that materials to be used for the intended terrorist act are being transported or moved from one place to another by vehicles or pedestrians.[673]

If this interpretation is correct and if as is provided by law the concerned police officer has to get permission from the Director of the Federal Police or his representative, there may still be a delay to get the permission during which time the act may be committed or evidence destroyed or removed. It is not difficult to think of instances where getting a warrant from the nearest court would be faster than getting the permission from the Director or his agent.[674] If it is sense of urgency...that motivated the law maker to include the concept of sudden search it

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[671] Article 16 of the Anti-Terrorism Proclamation requires the public officer to get permission from the Director or his representative. The law does not give discretion to the Director or his representative, yet it establishes no grounds for his decision. In the absence of any other authority, the decision should be made on the basis of fulfillment of the two conditions that the public officer is supposed to prove to secure the permission.

[672] The provision lacks clarity as to the purpose of the sudden search. On one hand, it indicates that the search is needed to prevent commission of a terrorist act; on the other, it indicates that evidence may be seized during the search which implies that a crime has been committed. As planning and preparation to commit a terrorist act are punishable, the law might have envisaged cases where a person is at such stages to commit a terrorist act, in which case the search can be effected to prevent him from implementing the act of terrorism and at the same time to collect evidence proving his plan or preparation to commit the act. It seems clear that once a terrorist act is committed, a search to collect evidence related to the act is not authorized under this provision. Note that the Amharic version of this provision refers to what is to be seized under this provision as "*merejawoc*" rather than "*maserejawoch*" – which literally mean "information" and "evidence," respectively.

[673] One can contrast the sudden search under the Anti-Terrorism Proclamation and the search without warrant under Article 32(2) (b) of the Cr. Pro. Code. In the latter case, the place where the material to be seized is found is known, whereas in the case of the former, sudden search it is unknown in which vehicle or on which pedestrian the materials being searched for are found.

[674] If a terrorist act is suspected in one of the remotest Woredas of the country, it may be easier for the police to get a warrant from the *Woreda* court than to get the consent of the Director in Addis Ababa or his agent, who would most likely be in regional capital cities.

might be more appropriate to give the discretion to the concerned police officer to make the decision as does the Criminal Procedure Code.[675]

If there is a suspicion that the concerned police officer may abuse his power if not required to get permission from the Director or his agent a post facto revision of the search made by the officer, which can be rightly done by court of law, can be seen as a better alternative.[676] In the context of special investigation techniques,[677] the European Court of Human Rights recommended legislative measures that would ensure adequate control by judicial authorities through prior authorization, supervision during the investigation or *ex post facto* review.[678] On the appropriateness of review of the officer's decision to restrict privacy or liberty, the U.S. Supreme Court stated that the preferable arbiter on the existence of probable cause so as to conduct search is a "neutral and detached magistrate" rather than a police officer "engaged in the often competitive enterprise of ferreting out crime."[679]

This approach would serve both the interest of the government to move swiftly and prevent the commission of a terrorist act or seize evidence and safeguards innocent persons from being harassed by investigating police officers. Though the review, being after the fact, does not guarantee protection of citizens from unwarranted restriction of privacy, such law would make police officers to think twice before rushing into search of vehicles and pedestrians so that the search they conducted will pass the post facto scrutiny by the court. Where there are such laws, it is only where the officer believes that he has convincing reason that would be accepted by court as reasonable that he may conduct the sudden search.

Notes and Questions

Unlike searches under the Cr. Pro. Code, in which the investigating police officer determines whether conditions exist for the search without a warrant, in the case of the Anti-Terrorism Proclamation (covert search) and the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation (interception), the investigating police

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[675] Where the conditions envisaged under Article 32(2) (a) or (b) of the Code exist, an individual investigating police officer is allowed to conduct a search and seizure without consulting the court or even his superior.

[676] In view of the concerns raised above, the following is suggested. First, the Federal Police should develop guidelines to be used by investigating police officers in cases envisaged by Article 16. The guidelines would indicate circumstances where the police officer has a "reasonable suspicion" and where the sudden search is "deemed to be necessary." Second, the individual police officer should decide, on the basis of the guidelines, information and facts at hand, and his own experience, whether a sudden search (search without warrant) is appropriate in a given case. Third, the court should review the search made by the police officer. Though the revision is *post facto*, its preventive role should not be underestimated.

[677] Special investigation techniques are methods and procedures that involve serious interference with an individual's privacy rights, normally through covert practices on the part of law enforcement agencies. See OSCE Office for Democratic Institutions and Human Rights, *Countering Terrorism, Protecting Human Rights, A Manual* (2007), at 204.

[678] Ibid., at 206.

[679] *Johnson v. United States*, 333 U.S. at 13-14 (cited in Dressler, *Understanding Crim. Pro*, at 143).

offer cannot conduct the search or interception without authorization from superior officers/officials. Can the latter category of search/interception thus be considered as made with a warrant? The U.S. requires permission for a search or interception from a detached and neutral magistrate; this requirement is not met where the person granting the warrant is a member of the executive branch.[680] Similarly, in Canada the warrant must be issued by an impartial and neutral official who can act judicially.[681] Even if the requirement to secure permission from superior officers does not amount to a court warrant, do the Cr. Pro. Code or the Proclamations better protect against arbitrary restriction of a person's privacy?

Section IV. At What point in a Criminal Proceeding is search to be conducted?

A search warrant may be issued at any time prior to or during a criminal proceeding. This contrasts with arrests, which may be ordered only when there is a reason to believe that someone has committed a crime, which would arise only after at least a preliminary investigation. The phrase "the production of the articles...is essential to the inquiry now being made (or about to be made) into the said offence (or suspected offence)..." in the Form prescribed in the Third Schedule clearly shows that the search can be made at any time during a criminal proceeding or prior to its commencement.

The fact that a search warrant can be issued when an inquiry is about to be made into a "suspected" offence indicates that a search warrant can be issued in the absence of definite and legally admissible material about the commission of an offence. Thus, it is proper to issue a search warrant before a formal investigation has begun, as part of an ongoing investigation, or after the police file is remanded by the prosecutor for further investigation. Moreover, by virtue of Article 94(2) (c) of the Cr. Pro. Code, a warrant can be issued even after trial begins.

In *Kalinga Tubes LTD. v. Suri*, the Oriss High Ct. in India considered the issue of at what stage in a criminal proceeding a search may be conducted. The applicants argued for the search to be declared illegal on the ground that the warrants were issued before the commencement of any investigation. The applicants asserted that under the circumstances the search warrant could not be said to have been issued "for purposes of any such 'inquiry.'" The Court addressed the applicant's argument in accordance with Section 96 of the Indian Criminal Procedure Code, which contains language identical to that of Article 33(1) of the Cr. Pro. Code. The Court found:[682]

> The phrase "for purposes of" is so to be construed as not, in itself, implying either the pendency of the specified proceedings or the immediate or imminent initiation thereof. It appears to me, therefore, that what is necessary is that the Magistrate

[680] *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971) (cited in Dressler, *Understanding Crim. Pro.*, at 193).
[681] Kent W. Roach, "Canada," in Bradley, *Crim. Pro.*, at 61.
[682] Fisher, *Eth. Crim. Pro.*, at 110.

> should be reasonably satisfied that the search is likely to be a link in the chain which in the normal course will lead to an inquiry under the Cr. P. C., if the expected material is found on the search, and that he should also be satisfied that there is reasonable ground for the expectation.

A warrant for interception and surveillance under Article 14 of the Anti-Terrorism Proclamation is to be issued even before the terrorist act is committed, because the purpose of the warrant is to prevent the commission of the act. Similarly, as provided in article 17(3) of the Proclamation, a warrant for covert search may be issued by the court to prevent a terrorist act.

This is not true for a search without warrant. Unlike a search with a warrant, the Cr. Pro. Code authorizes a search without a warrant only where there is good cause to believe that a crime has been committed. Article 32(1) of the Code contemplates search incidental to lawful arrest and, as discussed in Chapter four, a person can be arrested only when there is reason to believe that he has committed a crime. Article 32(2) (a) of the Code, which authorizes a search without a warrant, contemplates a situation where "an offender is followed in hot pursuit" and there is no doubt that the person being followed in hot pursuit committed a crime. Article 32(2) (b) also envisions issuance of a warrant after the offence has taken place. In Article 32(2) (b) cases, the search is related to an offence that has been reported by formal complaint, and third parties have given information to the police suggesting that evidence relevant to prove the commission of the reported offence is found in the location to be searched.

Unlike searches pursuant to the Criminal Procedure Code, which are intended to collect evidence to be used at trial, the Anti-Terrorism Proclamation, in its Article 16, authorizes a police officer to conduct a sudden search to prevent commission of a terrorist act – but not to collect evidence for use at trial.

Section V. Specificity Requirement

Search and seizure can be classified into two types – general and specific – depending on how much discretion is given to the police officer to conduct the search and seize materials. General search warrants give the discretion to the police officer to determine the locations to be searched and the items to be seized. For example, Chinese law requires a warrant to conduct a search. However, the law does not provide limits on the search once the warrant is secured. "The police search wherever they suspect evidence to be hidden and seize whatever they consider to be evidence."[683] Where a general search warrant is issued, there is no significant purpose to be served by involving the court, as it is the police officer who actually decides the places/areas to be searched and items to be seized.

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[683] Liling Yue, "China," in Bradley, *Crim. Pro.*, at 84.

5.1. Search with Warrant

Art. 33 (2) of the Cr. Pro. Code. Issue of search warrant

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

The content of the search warrant, as prescribed in the Third Schedule of the Code (referenced in Article 32(2) of the Cr. Pro. Code), clearly shows that both the premises to be searched and the items to be seized should be described as precisely as possible. Article 33(2) of the Code and the Form make clear that judicial search orders must be given in writing and must be specific. However, there is no clear guideline on how "*specific*" a search warrant should be in describing places to be searched and things to be seized.

The approach of the U.S. Court of Appeals for the Eighth Circuit might give an insight on how specific a search warrant should be in describing a location to be searched. In determining whether a certain place to be searched is sufficiently described by a search warrant, the court inquires into: 1) whether the place is described in such a manner that the executing officer, with a reasonable effort, can locate it; and 2) whether there is any reasonable possibility for another place to be mistakenly searched. Where both are answered in the affirmative, the requirement of particularity is fulfilled.[684]

The warrant should describe both the premises to be searched and the things to be seized in such a manner that there is no room for the police officer to decide what is to be searched or seized. Thus, the U.S. Supreme Court has indicated that "the validity of a search warrant must be judged in light of the information available to the officers at the time of the search."[685] The warrant should be so clear and specific as to what is to be searched and seized that the officer simply executes it.

The Form in the Third Schedule in the Cr. Pro. Code indicates that the search warrant, in addition to describing the places to be searched and things to be seized, should identify the offence being investigated. Italian law has the same requirement of particularity: the warrant is to indicate the things to be seized and the nature of the crime to which they relate.[686] The Supreme Court of Italy (*Corte di Cassazione*) is reported to have nullified a search warrant for not indicating the things to be seized even though the warrant referred to the type of offence the accused was suspected of having breached.[687]

Art. 18(2) of the Anti-Terrorism Proclamation states the following.

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[684] *United States v. Gitcho*, 601 F. 2d (8th Cir. 1979)(cited in John G. McCormick, "Criminal Procedure – Expansion of the Good Faith Exception to the Exclusionary Rule – *United States v. Owens*, 848 F. 2d 462 (4th Cir. 1988)," 62 *Temp. L. Rev.* 1351, at 1361-62 (1989) (hereafter McCormick, "Crim. Pro.").

[685] 848 F.2d at 465 (cited in ibid., at 1355).

[686] Rachel Van Cleave, "Italy," in Bradley, *Crim. Pro.*, at 253.

[687] Cass. I, Sent. 2379 (May 19, 1994) (cited in ibid.)

A warrant issued in accordance with this Article[688] *shall specify:*

a) *The address of any premise to which the warrant relates, and the names of the occupiers, if known;*
b) *The maximum duration being 30 days, the period during which the warrant is valid and the date on which the warrant is issued; and*
c) *If necessary, the type of description of evidences to be searched for and seized*

The following paragraph is taken from the present author's[689] writings in connection with the content of a search warrant under Article 18(2) of the Anti-Terrorism Proclamation.

> ...It (covert search warrant) is supposed to specify the place to be searched, the duration within which the warrant would remain valid, and where appropriate the items to be searched and seized. As far as the premises to be searched are concerned the law requires search warrants to be specific as opposed to general search warrants. "The address of any premise to which the warrant relates, and the names of the occupiers, if known" should be specified on the warrant. However, when it comes to the articles to be seized, the law seems to have left the discretion to the court to or not to specify those articles. As is provided under Article 18 (2) (c) of the Proclamation, it is where the court deems it necessary that it may specify "the type or description of evidences to be searched for and seized." The law specifies the maximum period for the validity of the search warrant to be 30 days as of date of issue. However, the court is free to shorten the period during which the warrant is valid.

Article 14 of the Anti-Terrorism Proclamation requires the National Intelligence and Security Service to obtain a court warrant for any searches/interceptions it conducts, but does not state how specific the warrant should be. While warrants for interceptions authorized under the Anti-Corruption Special Procedure and Rules of Evidence Proclamation must specify the link to be intercepted and the duration of the interception, Article 14 of the Anti-Terrorism Proclamation includes no such requirement.

5.2. Search without Warrant

5.2.1. Persons and Premises

The scope of searches, whether of persons or premises, without a court warrant is defined by the purpose justifying the search. Article 32(1) of the Code is so specific that it literally authorizes the police officer to search only the physical body of the arrested person. It does not seem to allow the police officer, for instance, to search the vehicle that the arrested person was driving or materials that he carried at the time of the arrest. Moreover, Article 32 (1) authorizes seizure only of material that may be used in evidence against the arrestee for the crime in connection with which he is arrested. It does not seem even to

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[688] This refers to the covert search warrant envisaged under Article 18(1) of the Anti-Terror Proc.
[689] Wondwossen, "Reflective Analysis," at 69.

authorize bodily search with a view to dispossess the arrestee of his weapon or the seizure of the weapon.

The police's power to search premises and seize materials without a warrant is strictly controlled by the purpose of the search. In a case of hot pursuit envisaged under Article 32(2) (a), a premise may be searched where one of two conditions exist. The first is where the person being followed in hot pursuit enters the premises. In such a case, only the premises or part of the premises where the person is likely to be found may be searched, and only the person may be seized. The second condition is where the person being followed in hot pursuit throws into the premises materials that may be used in evidence. In such cases, as the purpose of the search is to seize those materials, the only part of the premises that may be searched is the area where the materials are likely to be found.

Similarly, the scope of the search and seizure to be made under exigent situations contemplated by Article 32 (2) (b) of the Code is controlled by the purpose of the search. The investigating police officer is authorized to search a place when, on the basis of information he has received, a crime has been committed that is punishable for more than three years imprisonment, materials relating to the crime are to be found in the identified place, and the materials are to be used as evidence in proving the crime. Only the identified materials are to be seized.

5.2.2. Interception

Article 46(3) of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation requires the order given for the interception of correspondence and letters to be specific. First, the corruption offence in connection with which the interception is ordered must be specified in the order. The authorization of interception is not to be given for a "fishing expedition" to find out whether a certain corruption offence was committed. Second, the order should indicate the period for making the interception. The fact that an order does not specify the duration of the authorization does not make it invalid; rather, the duration shall be presumed to be not more than four months. Thus, the period must be specified if the interception needs to continue for more than four months. Third, if a communication by telephone or telecommunication is to be intercepted, the order must identify the specific communication to be intercepted; the authorization to intercept does not extend to any and all communications involving the suspect.

Article 16 of the Anti-Terrorism Proclamation does not require the search to be specific. It includes no criteria for stopping or searching vehicles or pedestrians. If a police officer has reasonable suspicion that a terrorist act may be committed and he deems it necessary to make a sudden search in order to prevent the act, he may stop any vehicle or pedestrian and conduct a search. This is an example of a general search. In practice, such searches generally involve searching all pedestrians and/or vehicles found in a given location.

Section VI. Making Search and Seizure

The investigating police officer must comply with certain conditions while effecting a search and seizure. The specificity requirement is important at the time of execution of the search and seizure. The whole purpose of requiring the warrant authorizing search and seizure to be specific, rather than general, is to limit the discretion of the police officers who are in charge of the search and seizure.

Where search is conducted with a warrant, Article 33(2) of the Code explicitly prohibits police officers from seizing anything not listed in the search warrant. There is no similar provision in relation to a search without a warrant; however, the premises or parts of the premises to be searched and things to be seized should not be left to the discretion of the police officer. Rather, the scope of a search conducted without a warrant should be determined from the legislative provisions authorizing such searches and seizures. That is, only materials related to the offence in connection with which the search is conducted are to be seized and only the place where these things are likely to be found is to be searched.

In the United States, there is a "*plain view*" exception to the prohibition against seizure of an object not listed in the warrant.[690] This exception allows seizure of additional objects (but not search of additional location) where certain conditions are fulfilled. As stated by Russell L. Weaver and others, "when the police are in a place where they have the right to be (as when they are conducting a lawful search), either pursuant to a warrant or pursuant to an exception to the warrant requirement," the plain view exception entitles the police to seize objects that they find in plain view.[691] Joshua Dressler similarly describes the exception as allowing the seizure of "an object of an incriminating nature...without a warrant if it is in "plain view" of a police officer lawfully present at the scene."[692] The U.S. Supreme Court has identified three elements that must exist for a seizure without a warrant under the plain view exception. An article is considered to be in "plain view," and the police officer is allowed to seize the article without a warrant, if: "(1) she observes it from a lawful vantage point; (2) she has a right of physical access to it; and (3) its nature as an object subject to seizure (i.e., that it is contraband or a fruit, instrumentality, or evidence of a crime) is immediately apparent when she observes it (i.e., she has probable cause to seize it)."[693] Israeli law similarly allows police officers to seize an item found in plain view if they believe that the item is connected with the commission of a crime.[694]

Two interrelated arguments justify seizure of an object that is in plain view of an officer executing a lawful search. The first argument is that "what an officer observes from a

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[690] For more on the "plain view" doctrine, see Dressler, *Understanding Crim. Pro.*, at 253-63.
[691] Weaver et al., *Principles of Crim.*, at 89-90.
[692] Ibid., at 253.
[693] *Horton v. California*, 496 U.S. 128 (1990); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Arizona v. Hicks*, 480 U.S. 321 (1987); *Texas v. Brown*, 460 U.S. 730 (1983) (all cited in Dressler, *Understanding Crim. Pro.*, at 253).
[694] Eliahu Haron and Alex Stein, "Israel," in Bradley, *Crim. Pro.*, at 228.

lawful vantage point is not a search, because a person cannot maintain a reasonable expectation of privacy regarding anything visible to naked eye from that position." [695] In fact, the seizure "constitutes invasion of the owner's possessory interest,"[696] yet without affecting the owner's privacy interest. It follows that seizure of such a thing does not violate the privacy of the owner. The second argument is that, even if viewed as a search, a warrantless seizure of an object discovered in plain view is only "a minor peril to Fourth Amendment protections, [but]...a major gain in effective law enforcement."[697] Prohibiting an officer from seizing what he sees in plain view would simply be "needless inconvenience, and sometimes [might be] dangerous—to the evidence or to the police themselves."[698]

The plain view doctrine does not exist in Ethiopian law. In view of the rationale behind the recognition of this exception in other jurisdictions, it does not seem likely that Ethiopian lawmakers considered and deliberately rejected this exception. Rather, it appears that the idea of a "plain view" exception did not cross the lawmakers' minds at the time of drafting the Code of Criminal Procedure. Under the law as it stands, seizure of a thing not listed in the search warrant is prohibited regardless of whether it is plain view and irrespective of its evidentiary significance.

With regard to interception, it would be impossible to require that only information related to the offence being investigated be intercepted/recorded. Thus, the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation simply requires identification of the link to be intercepted so that intrusion into the suspect's privacy can be minimized. According to Article 47 of the Proclamation, after the interception is made the entity that carried out the interception selects the portions of the correspondence that are relevant and presents only those portions to the Anti-Corruption Commission.

Unlike an arrest with a warrant, where the police officer is required to read out the warrant and if necessary show it to the suspect, in a search without a warrant no obligation exists to inform the suspect of the basis or scope of the search. The Italian Code of Criminal Procedure requires a copy of the search warrant to be given to the accused. Where the accused is not present, the Code requires the copy to be given to a "cohabitant, neighbor, or superintendent of the building."[699]

Once the search with a warrant is made and the properties seized, Art. 33(3) of the Code requires the investigating police officer to prepare a list of items seized and, where possible, have the list checked and signed by an independent person. There is no similar requirement for searches without a warrant. The purpose of involving an independent person is to use him as a witness in case a dispute arises concerning the seizure (if, for

[695] Dressler, *Understanding Crim. Pro.*, at 261.
[696] Weaver et al., *Principles of Crim.*, at 90.
[697] *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (cited in Dressler, *Understanding Crim. Pro.*, at 254).
[698] Ibid.
[699] Article 250(2) (quoted in Rachel Van Cleave, "Italy," in Bradley, *Crim. Pro.*, at 254).

example, during trial the prosecutor introduces an incriminating item he says was seized in the accused's home, and the accused denies it was found there). Thus, it is not clear why the requirement applies only to searches with a warrant. There is no requirement in Article 17 of the Anti-Terrorism Proclamation to list the items or to have the list checked and signed by an independent person.

As stated in Article 33(5) of the Cr. Pro. Code, unless expressly authorized by a court of law, searches and seizures are to be conducted during the daytime. Some jurisdictions make a distinction among different types of searches with respect to the time of search. In Spain, for example, a search of a private domicile is to be made only during daytime, while a search of shops or garages can be made at any time.[700]

Notes and Questions

1. Article 33(2) of the Criminal Procedure Code, which deals with search with a warrant, expressly prohibits seizure of materials other than those listed on the search warrant. Such prohibition does not exist in Articles 32 (1) and 32(2) (a) and (b) of the Code, both of which deal with search without a warrant. Does that mean there is a room for the "plain view doctrine" to be applicable in the latter type of cases?
2. What if an interception of correspondence that was made in accordance with Article 46 of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation discloses a different offence from the one that triggered the interception authorization? What if a police officer, while executing a lawful search in connection with a certain crime, smells something that makes him suspicious that another crime has been committed? Can he look for the object he smells? Dressler says that U.S. courts have rightly expanded on the "plain view" doctrine to also allow for "plain hearing" and "plain smell."[701] According to Dressler,

   > [A] person cannot have a reasonable expectation of privacy regarding her oral communications, if they can h[b]e heard by someone, lawfully positioned within ear shot ("plain hearing"); nor can she legitimately expect that an officer will not use her sense of smell to detect incriminating evidence from a lawful position.[702]

3. Subarticles 4 and 5 of Article 33 of the Cr. Pro. Code deal with the use of force to effect search and the time of search, respectively. The caption of Article 33 suggests that these provisions are applicable to searches made with a warrant. Is it appropriate to construe these provisions as applying in both types of search despite the caption of the Article?

4. By restricting the search to the arrestee's physical person, Article 32 of the Cr. Pro. Code does not seem to allow police officers to search the vehicle that the arrested

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[700] Richard Vogler, "Spain," in ibid., at 379-381.
[701] Dressler, *Understanding Crim. Pro.*, at 261.
[702] Ibid., at 261-262.

person is driving or the materials that he is carrying at the time of the arrest. Article 33(2) of the Code expressly prohibits seizure of any materials other than those listed on the search warrant. Thus, it does not allow an investigating police officer who was executing a search warrant to seize prohibited drugs or unlicensed guns even if they were in plain view of the officer while he was executing the search warrant. Article 32 (2) (a) and (b) contain a similar prohibition. Thus, only materials indicated by the Code provisions may be seized during the search process. No matter how reasonable or logical an expanded search and seizure might be, it is void under the FDRE Constitution because it is not authorized by a specific law. Although the specificity requirement under Articles 32 and 33 of the Cr. Pro. Code can be seen as an important safeguard of the privacy of citizens, doesn't the restriction on the scope of the search and seizure unreasonably handcuff the police, thereby impeding law enforcement? Note that widening the scope of a search in the case of a search of a person under Article 32(1) or widening the scope of materials to be seized under Articles 32(2) and 33(2) to include additional items in plain sight (or hearing or smell) would not necessarily contravene the specificity requirement.

5. As discussed in Chapter four, arrest, whether with or without warrant, is to be made only where there is a *reason to believe* that the person to be arrested has committed a crime. For a search to be lawful, does the law of search require that the person whose privacy is to be restricted through search be "*reasonably suspected*" to have committed a crime? Does it depend on whether the search is to be made with or without a warrant?

   In *Steagald v. United States*, the U.S. Supreme Court explained the difference between an arrest warrant and a search warrant as follows.

   > An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offence and thus the warrant primarily serves to protect an individual from an unreasonable seizure. A search warrant, in contrast, is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of (by) the police.[703]

6. The term "property" under Article 26(1) of the FDRE Constitution refers to different things that can be owned, including vehicles. Because an individual's privacy interest in his vehicle is recognized under Article 26(1) of the FDRE Constitution, his vehicle may not be searched except on the basis of specific laws envisaged under Article 26(3) of the Constitution. None of the provisions of the law of search and seizure authorizes search of vehicles. The Form in the Third Schedule of the Cr. Pro. Code partly reads, "---describe the *house* or *place* or *part* thereof, to which the search is to be confined," indicating that the warrant to be issued is to be applicable to a search of a broad range of premises. Similarly, Article 32(2) (b) of the Cr. Pro. Code, one of the subarticles that authorize search without a warrant, allows search of "any place" where articles are suspected to be found. Can a vehicle be treated as a "place"? If so, does it mean that

[703] *Steagald v. United States*, 451 U.S. 204 (1981).

Ethiopian law does not allow search of vehicles with a warrant, but does allow it without a warrant?

In *Public Prosecutor v. Tamirat Layne et al.*,[704] the police officers seized documents in a search of vehicles without s warrant. The court, without considering whether search of vehicles falls under Article 32(2)(b) of the Cr. Pro. Code, simply checked whether other requirements of the provision were fulfilled, and admitted the documents into evidence. Although the defence lawyers argued for suppression of the documents, they did not base their argument on the proposition that Article 32(2) (b) does not allow search of vehicles.

Section VII. Enforcement Mechanisms

7.1. Criminal Liability

Article 422 of the Criminal Code. Abuse of the Right of Search or Seizure

(1) Any public servant who, without legal authority, executes acts of search, seizure or sequestration of a person's property is punishable with rigorous imprisonment not exceeding seven years.

(2) Any public servant who, even when lawfully authorized to carry out searches or to effect seizure, enters another person's house or premises by using excessive force, or who executes acts of search, seizure or sequestration other than those authorized by law or without due regard for the conditions and forms thereby prescribed, is punishable with rigorous imprisonment not exceeding five years and fine.

Article 422 of the Criminal Code criminalizes searches not conducted in accordance with law. Its first subarticle criminalizes and punishes the execution of acts of search and/or seizure without legal authority. This subarticle applies where a public servant searches and/or seizes a person's property without a court warrant in the absence of the conditions justifying search and seizure without a warrant. In these circumstances, the public servant has acted without legal authority.

The second subarticle criminalizes improper execution of search and seizure even where the public servant is legally authorized to carry out the search and seizure. This subarticle envisages a public servant who is lawfully authorized to carry out a search and seizure either because he is in possession of a search warrant or the necessary conditions exist for conducting a search and seizure without a warrant. The problem addressed by this subarticle is wrongful exercise of authority. The types of improper search and seizure included under this subarticle are those where the public servant enters another's house or premises by using excessive force, or executes a search and seizure that is not authorized

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[704] *Public Prosecutor v. Tamirat Layne, et al.* (Fed. Sup. Ct., Cr. F. No. 001/1989).

by law, or effects the search and seizure without due regard for the conditions and forms prescribed by law.

Notes and Questions

1. If a defective warrant is issued by the court (for instance, a general search warrant contrary to Art. 33(2) of the Code) and executed by the police officer, would the officer be criminally responsible under Article 422 of the Criminal Code? Under which subarticle? Should the officer refuse to execute the search warrant? Does it depend on whether the officer is aware defective?
2. What about the judge? Would issuance of a defective warrant constitute grounds to charge the judge before the Judicial Administration Council for being grossly incompetent?
3. In such cases, can one argue that the warrant, even if issued by a court of law, is void because it was not issued in accordance with the FDRE Constitution and specific laws envisaged by the constitution? Can one further argue that the resulting search and seizure was conducted "*without legal authority*," bringing the case under Article 422(1) of the Criminal Code?
4. Article 422 of the Criminal Code applies only where the restriction on the individual's privacy interest in his house or premises is wrongly made. It does not seem to be applicable where the individual's privacy interest in his person or correspondence and communication are infringed. The most relevant provision of the Criminal Code in the latter case is its Article 420, which prescribes a punishment of a fine not exceeding Birr 1,000 or simple imprisonment not exceeding two months (this punishment is much lower than that prescribed under its Article 422). Does that imply that the individual's privacy interest in his house or premises is much more important than his privacy interest in his person or correspondences/communications?

7.2. Civil Liability

The following provisions of the Civil Code are relevant to the issue of what claim to compensation a person has when his privacy is violated.

Art. 2053. Trespass.

A person commits an offence where, without due legal authority, he forces his way, on the land or into the house of another, against the clearly expressed will of the lawful owner or possessor of the property.

Art. 2035 .Infringement of a law

(1) A person commits an offence [fault] where he infringes any specific and explicit provision of a law, decree or administrative regulation.

Art. 2028.

Whosoever causes damage on another by an offence [fault] shall make it good.

7.3. Exclusion of Evidence

Because Ethiopia has no comprehensive law of evidence, there is no specific provision dealing with the effect of illegality of search or/and seizure on the admissibility of the

seized item as evidence during trial.[705] The FDRE Constitution provides guidelines for conducting the search and seizure but, unlike in the case of confession obtained through coercion, does not require exclusion of illegally obtained evidence. Nor has the Cassation Division of the Federal Supreme Court ever addressed the matter. In the absence of a clear provision or authoritative court case law, one can only resort to legal interpretations and the experiences of other countries.

The South African High Court used to exclude evidence obtained in breach of a person's privacy even in cases where there was neither a statutory nor constitutional provision that expressly provided for its exclusion.[706] The court exercised such power on the ground that "*there had to be a discretionary exclusionary rule which could protect constitutional rights and force the police to operate within the law.*"[707]

Canadian courts make a distinction between the validity of the search and the admissibility of evidence. In Canada, illegality of search in and of itself does not result in the exclusion of the illegally seized evidence.[708] "Even if a search is invalid and unconstitutional, the accused has the burden of establishing on a balance of probabilities that the admission of the evidence would bring the administration of justice into disrepute."[709] The accused need only meet this burden if the prosecution "establishes on a balance of probabilities that evidence would inevitably or independently have been obtained."[710]

In Ethiopia, the commentary on the draft provisions of the FDRE Constitution relating to Article 26 emphatically states that restriction of privacy not made in accordance with express and specific law is unacceptable.[711] The commentary takes the position that even where there are genuinely compelling reasons to restrict privacy, if there is no law authorizing the privacy restriction under the circumstances, the restriction is an infringement of the privacy right guaranteed by the Constitution. The approach of the commentary is consistent with Article 9(1) of the FDRE Constitution, which declares the supremacy of the Constitution: "a decision of an organ of the state or a public official which contravenes this constitution shall be of no effect." Article 26(3) of the FDRE Constitution expressly requires the search and seizure to be conducted only on the basis of specific laws (the Criminal Procedure Code and other laws to be enacted as may be

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[705] The Criminal Justice Policy, under its section calls for laws that expressly provide for exclusion of evidence obtained illegally.

[706] *S v. Motloutsi*, 1996 (1) SACR 78 (C). The case was decided when the interim Constitution of South Africa, which had no provision for the exclusion of unconstitutionally obtained evidence, was in place. The current Constitution of South Africa has a provision to that effect. P. J. Schwikkard and S.E. van der Merwe, "South Africa," in Bradley, *Crim. Pro.*, at 333-34.

[707] Ibid.,at 333.

[708] Kent W. Roach, "Canada," in Bradley, *Crim. Pro.*, at 65.

[709] Ibid.

[710] Ibid.

[711] *Commentary*, at 56-60.

necessary). Thus, if an officer conducts a search and/or seizure otherwise than as provided under the Criminal Procedure Code, his actions contravene the Constitution.
If the search or seizure is determined to contravene the Constitution and thus has "no effect," (per the language of Article 9(1) of the FDRE Constitution), the seized material or intercepted information will be treated as "non-existent" and hence not to be used as evidence. Once this conclusion is reached, the trial court is required by Article 13(1) of the FDRE Constitution to exclude the material or information, thereby discharging its responsibility to respect and enforce the provisions of Article 26 of the Constitution. The logical conclusion of this argument is that the "*exclusionary rule*" applies to all evidence obtained in contravention of any of the provisions of the Human Rights Chapter of the FDRE Constitution.

Some constitutions incorporate provisions that expressly provide for the exclusion of evidence obtained in violation of their human rights sections. Section 35(5) of the South African Constitution states that evidence "obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."[712] Section 24(2) of the Canadian Charter of Rights and Freedoms provides that "where a court concludes that evidence was obtained in a manner that infringed or denied any rights under the Charter, the evidence must be excluded from a criminal trial if its admission would, in all the circumstances, bring the administration of justice into disrepute."[713]

7.3.1. Status of Articles Seized on the Basis of a Defective Warrant

As discussed earlier, in principle, search must be conducted pursuant to a warrant and the warrant must be specific. A warrant is defective if it fails to satisfy any of the requirements of the law. The question, then, is what effect the warrant's defectiveness has on the subsequently conducted search and the seized materials. Should the warrant be treated as invalid, making the subsequent searches and seizures nonexistent and resulting in exclusion of the evidence obtained on the basis of the warrant?

In the United States there is what is known as a "*good faith exception to the exclusionary rule.*" According to the exception, evidence seized pursuant to a technically deficient warrant need not be inadmissible even though the warrant may eventually be found to be invalid.[714] This exception is applicable "when officers, exercising good faith, reasonably rely on a warrant that is *subsequently* found to be defective."[715] The U.S. Supreme Court

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[712] P.J. Schwikkard and S.E. van der Merwe, "South Africa," in Bradley, *Crim. Pro.*, at 335.
[713] Kent W. Roach, "Canada," in Bradley, *Crim. Pro.*, at 63.
[714] McCormick, "Crim. Pro.," at 1357.
[715] *United States v. Leon*, 468 U.S. 902 (1984) (cited in ibid., at 1363).

in *United States v. Leon*[716] deals extensively with the rationale for not excluding evidence obtained on the basis of a deficient warrant.

The following excerpt from McCormick[717] explains the Court's justification for the recognition of the "good faith exception to the exclusionary rule."

> Application of the exclusionary rule should continue where a fourth amendment violation has been substantial and deliberate, but should be modified to permit the introduction of evidence obtained by officers reasonably relying on a warrant issued by a detached and neutral magistrate. The Supreme Court reasoned that...the exclusionary rule was designed to deter the police misconduct rather than to punish the errors of judges.... According to the court, the exclusion of evidence seized pursuant to a warrant has no discernable deterrent effect on an issuing judge or magistrate. The court reasoned that as neutral judicial officers, the magistrates have no stake in the outcome of particular prosecutions and therefore the threat of exclusion cannot be expected to deter them. The court found that if the officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way. The court concluded that the marginal benefits produced by suppressing evidence obtained in objectively reasonable reliance upon a subsequently invalidated search warrant could not justify the substantial cost of exclusion.

The Court noted four instances where exclusion is appropriate, even though an officer has seized articles pursuant to a search warrant. The first instance is where the judge issued the deficient warrant due to misleading information provided by the affiant, either due to reckless disregard for the truth or a deliberate falsehood; the second is where the judge did not discharge his judicial role properly, such as where he issued a general search warrant; the third is where "an affidavit is so lacking in indicia of probable cause to render official belief in its existence entirely unreasonable"; and the fourth is where a warrant is so facially deficient that the executing officers cannot reasonably accept it as valid.

7.3.2. Standing

Issues of standing may arise in connection with the exclusionary rule. In the United States, a defendant can raise violation of the Fourth Amendment as a ground for exclusion of evidence only if he was a victim of the alleged violation (because the Fourth Amendment Right is considered a personal right). This is known as the "standing" requirement.[718] That is, if evidence against "A" was obtained in violation of the right to privacy of "B," illegal restriction of B's privacy cannot be raised as a ground for the suppression of the evidence.

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[716] 468 U.S. 897 (1984). In that case, a search warrant was issued without being supported by probable cause. The district court rejected the evidence because it was obtained based on a warrant which was issued without probable cause. The Supreme Court reversed the district court's ruling. Ibid.

[717] Ibid., at 1357-58, note 55.

[718] Dressler, *Understanding Crim. Pro.*, at 81.

Similarly, in Canada an individual must have standing in order to argue for suppression of evidence under Section 24(2) of the Canadian Charter of Rights and Freedoms.[719]

In the absence of a clear standing requirement under Ethiopian law, whether a court must refuse to give effect to evidence obtained in violation of Article 26 of the Constitution – irrespective of whose right was violated—is arguable. The interpretation that the court should reject evidence seized in violation of the privacy provision of the Constituion finds support in Articles 9 (1) and 13(1) of the FDRE Constitution, which declare, respectively, that a governmental act contravening the Constitution is void, and that the Court has the responsibility not only to respect but also to cause the Human Rights Chapter of the Constitution to be respected. In fact, the purpose of the exclusion is not to make the criminal proceeding fair to the accused; the accused is an incidental beneficiary of the exclusion. The key purposes of the exclusion are to comply with the court's obligation not to give effect to unconstitutionally seized evidence and to deter the police from engaging in unlawful search and seizure activities. Section 35(5) of the South African Constitution, which provides for the exclusion of illegally obtained evidence, does not require standing. Experts suggest that the accused can rely on this constitutional provision even where the privacy right that was violated in obtaining the evidence was not his, but someone else's.[720] In Argentina, though in principle only a defendant whose right to privacy is infringed may challenge the admissibility of evidence seized during a challenged search, in many cases a defendant may argue for the suppression of evidence based on it being obtained in violation of another's right to privacy. In *Rayford*, the Argentine Supreme Court decided that "a co-defendant may be allowed to suppress evidence obtained in violation of the constitutional rights of another defendant."[721]

Notes and Questions

If the argument advanced above on the exclusion of evidence obtained through illegal search and seizure is correct – *i.e.,* that any evidence obtained in violation of Chapter Three of the Constitution is unacceptable – what purpose does Article 19(5) of the FDRE Constitution serve by expressly providing for the exclusion of evidence obtained through coercion? Does Article 19(5) of the Constitution cast a doubt on the validity of the above argument relating to the exclusion of evidence? The commentary[722] on the provisions of the draft FDRE Constitution notes that the Constitution includes an express provision on confession obtained through coercion because the previous regime notoriously used coercion as a means of collecting evidence from suspects. Does that mean Article 19(5) is simply an indication that the Constitution prohibits the collection of evidence specifically through coercion, as opposed to prohibiting collection of evidence through all types of illegal search and seizure?

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[719] Kent W. Roach, "Canada," in Bradley, *Crim. Pro.*, at 65-66.
[720] P.J. Schwikkard and S.E. van der Merwe, "South Africa," in Bradley, *Crim Pro.*, at 334.
[721] *Rayford*, CSJN, 13 May 1985, 308 Fallos 733 (quoted in Alejandro D. Carrio and Alejandro M. Garro, "Argentina," in Bradley, *Crim. Pro.*, at 20).
[722] *Commentary*, at 31-34.

Chapter Seven

Duration of Investigation

Introduction

Under Ethiopian law, once the police have information as to the commission of a crime, they are required to carry out the necessary investigation.[723] There is no law dealing with when to start the investigation. Legally speaking, insofar as the case is not barred by a statute of limitations, the investigation can be started any time after the police receive the information. Once an investigation is started, however, various provisions of law deal with its duration. The issue of duration of an investigation is treated by the FDRE Constitution and other subsidiary laws – the Criminal Procedure Code, the Vagrancy Control Proclamation, and the Anti-Terrorism Proclamation. A close reading of these laws shows that the length of investigation depends chiefly on whether a person suspected to have committed a crime is under arrest.

The issue of time of investigation was addressed for the first time under the Criminal Procedure Code.[724] At the constitutional level, only the current Constitution incorporates a provision concerning the time allowed for investigation; none of the previous Ethiopian constitutions dealt with the issue. Nor is the issue addressed in major international human rights instruments.[725] The Criminal Justice Policy[726] envisages different durations of investigation to be provided by law depending on the complexity and nature of the offence.

This chapter is intended to acquaint students generally with the laws regulating the period of investigation. The chapter will explain the respective roles of the legislature, law-enforcement officials and the court in the determination of the duration of investigation. The laws deal with two types of periods of investigation. The first relates to the duration of a remand – time given to the police to conduct additional investigation and to report their progress to the court (with the possibility for additional time on remand to be granted). The second relates to the total period of investigation, the expiry of which results in termination of the investigation and referral of the case to the prosecutor.

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[723] Cr. Pro. Code, Articles 22 and 23

[724] See Chapter 1 for how the matter was dealt by traditional criminal procedure.

[725] There are provisions of human rights instruments recognizing the right to be tried without unnecessary delay. See Article 14(3)(c) of the ICCPR and Article 7(1) (d) of the African Charter on Human and Peoples' Rights. However, these provisions are related more closely to Article 20(1) of the FDRE Constitution, which provides for the right to be tried within a reasonable time after having been charged, than to Article 19(4) of the FDRE Constitution, which relates to duration of investigation.

[726] Criminal Justice Policy, Section 3.7.

Section I. Duration of Investigation Where a Suspect is Not Under Arrest

Art. 37 of the Cr. Pro. Code. Report of police investigation

1. *Every police investigation under this Chapter shall be completed without unnecessary delay.*

The fact that an individual is suspected to have committed a crime does not necessarily mean that the police will arrest him. It is possible for the police to conduct an investigation without arresting or otherwise informing the suspect. Even if the suspect is arrested, the police may release him on bond.[727] The arrestee may also be released on bail.[728] Where the suspect is released conditionally, strictly speaking there is no time limit within which the investigation must be completed. The only restriction is that the investigation be completed before the expiry of the statute of limitations for prosecution. This does not mean, however, that the law is silent as to the time for completing an investigation that has already been started. Art. 37(1) of the Cr. Pro. Code requires every investigation (including those in which the suspect is under arrest or was conditionally released after arrest) to be completed without unnecessary delay. If the suspect is not under arrest, he has little interest in following the speed with which the investigation is being conducted. As a result, when a suspect is not under arrest, a case of delay of investigation is unlikely to come before a court of law. Without such a case, the court lacks the opportunity to supervise the progress of the investigation.

Notes and Questions

1. How is Article 37 of the Code to be enforced against the police when no one is under arrest? Can a person who is arrested but released on bond apply to a court of law requesting an order of completion of the investigation of a crime without unnecessary delay? Who else, in such a case, may apply to the court objecting that the police are not conducting their investigation in accordance with Article 37 of the Code? If no one, does that mean that only self-restraint and loyalty to the law would motivate the police and the prosecutor to comply with Article 37 of the Code? How reliable are those motivations?
2. One of the options available to the prosecutor, where he receives a completed investigation file from the police, is to order the concerned police officer to undertake further investigation.[729] Does Article 37 regulate such instances?

[727] Article 28 of the Cr. Pro. Code. See Chapter Four, above, for the preconditions to release the suspect on bond.
[728] For more on conditional release on bail, see Chapter Nine, below.
[729] For more on the options of the prosecutor, see Chapter Ten below.

Section II. Duration of Investigation where a Suspect is under Arrest

Article 37 of the Cr. Pro. Code, which applies whether or not the suspect is under arrest, requires the investigation to be completed without unnecessary delay. Where a suspect is under arrest, his interest in the speedy completion of the investigation needs no explanation. Thus, the law emphasizes on the duration of investigation where the suspect is under arrest. Both the Constitution and subsidiary laws address this issue. In cases where the suspect is under arrest, determination of the length of the investigation is not left to the arresting officer; instead, the lawmakers either establish the duration of investigation themselves or empower the court to do so. Emphasizing the importance, in particular for those who are not released on bail, of finalizing the police investigation within the time determined by law, the Criminal Justice Policy indicates that those responsible for failing to complete the investigation or institute the charge shall be held accountable.[730] Following are legal texts relevant to the matter.

Article 19(4) of the FDRE Constitution
"...The court may...when requested, remand him (the arrestee) for a time strictly required to carry out the necessary investigation. In determining the additional time necessary for investigation, the court shall ensure that the responsible law enforcement authorities carry out the investigation respecting the arrested person's right to a speedy trial."

Art. 59 of the Cr. Pro. Code. Detention

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

Art. 20 of the Anti-Terrorism Proclamation. Detention and Remand Order

2. *If the investigation is not completed, the investigating police officer may request the court for sufficient period to complete the investigation.*

3. *Each period given to remand the suspect for investigation shall be a minimum of 28 days; provided however that the total time shall not exceed a period of four months.*

Art. 7 of the Vagrancy Control Proclamation. Remand

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[730] Criminal Justice Policy, Section 3.7.

1. *The investigating police officer who has arrested a person on suspicion of vagrancy shall complete his investigation and submit the investigation file to the public prosecutor within twenty-eight days of the arrest.*

2.1. Duration and Frequency of Remand Vis-à-Vis Total Period of investigation

The Cr. Pro. Code, the Anti-Terrorism Proclamation, and the Vagrancy Control Proclamation take different approaches to the duration of a single remand and the total period of investigation. Under the Code, the legislature establishes the duration of a single remand, leaving the power to determine the number of such remands – the duration of the total period of investigation – to the court.

In the Vagrancy Control Proclamation, the legislature determines the maximum period of investigation. Article 7(1) of the Proclamation specifies that the length of investigation is not to exceed 28 days. The Proclamation does not contain a provision on remand as such. Although the caption of Article 7 of the Proclamation is "*remand*", it addresses the total period of investigation rather than the duration of a single remand.

The Anti-Terrorism Proclamation, in its Article 20, provides for both the duration of a single remand and the total period of investigation. If the police officer applies for an additional time for investigation, the law requires the court to accept the application and to grant a minimum of 28 days of investigation for each application. However, the law commands the court to ensure that the total period of investigation does not exceed four months.

Duration and Frequency of Remand[731]

> As stated under Article 20 (1) and (2) of the Proclamation where investigation is not completed, the court may order the arrestee to remain in custody--remand for investigation. The idea incorporated in the third sub article of Article 20 is a new approach to the issue of remand. Many have been expressing their concern on Article 59 of the Criminal Procedure Code which is silent for how many times a case may be remanded for investigation.[732] The drafter of the Proclamation seems to have this problem in mind and intended to make sure that similar problems would not arise in connection with terrorism cases. The Anti-terrorism law provides for the duration of a single remand not to be for less than 28 days[733] and

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[731] This excerpt deals with two issues: the organ of the government which the constitution empowers to determine the duration of investigation, and the compatibility of Article 20(3) of the Anti-Terrorism Proclamation with Article 19(4) of the FDRE Constitution in particular. Wondwossen, "Reflective Analysis," at 55-60. Some modifications in footnotes have been made.

[732] Stanley Z. Fisher expressed his concern about the possibility of an arrested person being remanded multiple times under Article 59 of the Criminal Procedure Code, thereby affecting his right to a speedy trial. Fisher, *Eth. Crim. Pro.*, at 147-148.

[733] A cumulative reading of Article 20(2) of the Proclamation, which allows the police officer to request sufficient time for an investigation, and Article 20(3), which provides for the period of each remand to be a

the total duration of investigation not to exceed 4 months, in which case there cannot be more than five remands.[734]

Apparently, by determining the total duration of investigation the Proclamation contributes to the enforcement of the right of the suspect to a speedy completion of his case which is to be seen positively from the view point of the interest of the arrested person.[735] Part of Article 20(3) which provides for 28 days as a minimum period of a single remand raises a constitutional issue: whether or not fixing the minimum duration of a single remand is compatible with the right of arrested person to a speedy completion of investigation as recognized under Article 19(4) of the FDRE Constitution?

The relevant part of Article 19(4) reads as follows:

> Where the interest of justice requires, the court may order the arrested person to remain in custody, or, when requested, *remand him for a time strictly required to carry out the necessary investigation.* In *determining the additional time necessary for investigation,* the court shall ensure that the responsible law enforcement authorities carry out the investigation respecting the arrested person's right to a speedy trial. (Emphasis mine)

As phraseology of the above provision shows, the responsibility to determine the time necessary to carry out the investigation is given to the court. That is understandably because it is the court, as opposed to the legislature, that would have an opportunity to see the real, as opposed to hypothetical, case and evaluate the application for additional time of investigation on the basis of the information provided by both the arrested person and the law enforcement official. The constitution requires the court to remand the arrested person, where appropriate, only for a time strictly required to carry out the necessary investigation. The constitution orders the court to be mindful of the arrested person's right to a speedy trial while determining the time necessary for investigation. If, for instance, the court, after considering what is to be done by the investigating police officer(s) and how difficult is doing the same, believes that ten days is adequate to complete the investigation, the constitution requires the court to remand the arrested person exactly for ten days. If the court believes that 5 days is adequate it shall remand the arrestee only for 5 days, no more no less!

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minimum of 28 days, indicates that the court can remand a case for more than 28 days without exceeding the four-month limit.

[734] Although Article 20(3) of the Proclamation provides for the minimum period of a single remand to be 28 days, where the court allows the police to use the four months, the fifth remand, the last one, is bound not to exceed eight days.

[735] Determining the absolute maximum period of investigation may have a prejudicial effect on the interest of the public. It may happen that the investigation is not completed within four months despite the diligent and responsible effort of the investigating police officer(s). If, in such a case, the court cannot allow additional time for investigation, critical evidence might not be discovered and there would be a possibility for real criminals to escape simply because the investigation (of a complicated terrorism case) could not be completed within four months.

Article 20(3) of the Proclamation by stating that *"each period given to remand the suspect for investigation shall be a minimum of 28 days"* makes it impossible for the court to discharge its constitutional responsibility. The minimum period of remand is already determined by the law-maker to be 28 days which makes remanding the suspect only *"for a time strictly required to carry out the necessary investigation"* impossible. That is, even if the court believes that less than 28 days (let us say ten days) is adequate to complete the investigation, it cannot remand the arrested person only for ten days because of Article 20(3) of the Proclamation. The law has effectively deprived the court of its constitutionally given power to determine the adequate time necessary for investigating a particular case. The discretion that the Anti-terrorism law has left to the court is to decide whether or not to remand the arrested person for investigation.[736] If it decides to remand, then it has to give a minimum of 28 days even where it is obvious that what is to be done by the police officers would not take more than a day. Where the court is convinced that it would not take 28 days to finalize the investigation it would have two options. The first alternative is to allow additional time for investigation which would be unacceptably prejudicial to the interest of the arrested person as it would have the effect of making him remain in custody more than necessary. The second alternative is not to allow remand so that the arrested person would not be required to remain in custody for more than necessary. But the second alternative has its own problem. It is prejudicial to the interest of the public as, in this case, even the time that is necessary to complete the investigation would not be given to the law enforcement officials. In both cases the interest of justice would not be served.[737]

Article 20(3) of the Proclamation, not being compatible with article 19(4) of the FDRE Constitution, should not have a force of law.[738] As the court's power to disregard the law for being unconstitutional is controversial,[739] Article 20(3) of the Proclamation would remain in force until and unless it is declared by the House of Federation to be void.[740] In the mean time, where the court believes that less than 28 days is adequate to complete the investigation, the only way through which it may assist the arrested person, without unnecessarily prejudicing the interest of the public, is by using a *diplomatic* means to convince the concerned law enforcement officials to finalize the investigation without unnecessary delay. As the 28 days requirement is not binding to the law enforcement

[736] Article 20(2) reads: "if the investigation is not completed, the investigating police officer may *request* the court for sufficient period to complete the investigation." The law does not require the court to accept the application. It simply provides that if the application is accepted, the time to be given may not be less than 28 days.

[737] Though Article 19(4) of the Constitution requires the court to be mindful of the right to speedy trial of the arrested person in allowing remand and determining its duration, obviously the Constitution does not require the court to safeguard the interest of the arrestee at the expense of the public interest. However, Article 20(3) of the Proclamation makes it impossible for the court to safeguard the interest of the arrested person without inappropriately sacrificing the interest of the public.

[738] By virtue of Article 9(1) of the FDRE Constitution, any law that contravenes the Constitution shall be of no effect.

[739] See generally Yonatan Tesfaye, "Whose Power is it Anyway: The Courts and Constitutional Interpretation in Ethiopia," 22 *J. Eth. Law*, at 128-44 (2008). See also Assefa Fisha, "Constitutional Interpretation: The Respective Role of Courts and the House of Federation," in Civil Service College Law Faculty (ed.), *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution* (2000), at 6-26.

[740] By virtue of Articles 62(1) and 83(1) of the FDRE Constitution, the House has the power to resolve constitutional disputes through interpretation of the Constitution.

officials, they can complete their investigation without waiting for the expiry of the 28 days and report the same to the court so that it can remand the accused for trial.

A point that may be raised in connection with the maximum period of investigation being fixed by the Proclamation is the effect of lapse of the period without the investigation being finalized. This issue is very likely to arise in reality for investigation of terrorism cases, being complicated, may take several months. For Article 20(3) of the Proclamation to be meaningful, no additional time for investigation should be allowed after the lapse of the 4 months period. That is, upon expiry of the four months duration, the investigating police officer has to send the investigation file to the concerned public prosecutor who will decide, on the basis of the evidence already collected, whether or not to file a charge.[741]

The Anti-terrorism law envisages several anti-terrorism departments to be established within the different executive organs.[742] The coordinated functioning of these organs may help complete investigation in a relatively short period of time. Apart from mitigating the problem of delay in investigation, the involvement of different executive organs cannot totally do away with the difficulty. It follows that determining the absolute maximum period of investigation may have an unavoidable prejudicial effect on the interest of the public. It may happen that the investigation is not completed within 4 months despite the diligence and responsible effort of the concerned investigating police officer(s) due to the complicated/complex nature of the case. If, in such cases, the court could not allow additional time for investigation, decisive evidence might remain undiscovered as a consequence of which real criminals may escape from justice. A system that allows real criminals to escape justice simply because the investigation (of a complicated terrorism case) could not be completed within 4 months is not healthy.

In sum, part of Article 20(3) of the law that provides for the minimum period of a single remand being 28 days is unconstitutional. To the extent that the provision sets the maximum period of investigation being 4 months, it is prejudicial to the interest of the public. It would have been appropriate to simply provide guidelines, as does Article 19(4) of the FDRE Constitution, on the basis of which the court will decide the optimal period of investigation for a case before it. This approach would allow the court to determine the duration needed for investigation in the light of the nature of the case and by balancing interests of both the arrested person and the public thereby discharging its constitutionally granted mandate."

Notes and Questions

1. Article 37 of the Cr. Pro. Code requires the investigation to be finalized without unnecessary delay. All three organs of government have their own role in determining the duration of investigation. If the suspect is not under arrest, the law enforcing official determines what time is adequate to complete the police investigation. If the

[741] One may wonder if the public prosecutor may, in such cases, be allowed to order further investigation in accordance with Article 38 of the Cr. Pro. Code. If further investigation is allowed without any time limitation, then the purpose of the law, which is ensuring the speedy completion of investigation, would be defeated.

[742] Anti-Terror Proc., Arts. 28(2), 28(3), 29 and 30.

suspect is under arrest, the Criminal Procedure Code empowers the court to determine the maximum period of investigation. In both the Anti-Terrorism Proclamation and the Vagrancy Control Proclamation, the maximum period of investigation is set by the legislature. Do you agree with the excerpt that Article 19(4) of the Constitution indicates that the power to determine the time necessary to carry out the investigation is given to the court? The argument in the excerpt leads to the conclusion that the Cr. Pro. Code, is consistent with the role allocated by the Constitution but the Proclamations are not. Do you agree?

2. The excerpt argues that deciding the minimum period of remand, as the Anti-Terrorism Proclamation does, is prejudicial to the legitimate interest of the accused in the speedy completion of the investigation. What reasons are forwarded in support of this conclusion? To what extent do you agree with the idea?
3. Issues of constitutionality aside, the excerpt suggests that the court, not the legislature, has the opportunity to see the real, as opposed to hypothetical, case and to assess the police officer's application for additional time of investigation based on information from the officer and the arrestee. According to the excerpt, the period necessary for investigation is to be decided on a case-by-case basis, which makes it impracticable for the legislature to determine the period of investigation. Do you agree?
4. In cases of terrorism and vagrancy, the excerpt suggests that under no circumstances should additional time be given to the officer when the period of investigation established by the law has lapsed. Do you agree? What should happen to the case under investigation and the arrestee where no adequate evidence is collected within the time provided by law even though investigating police officers have been working diligently? Would it be fair to terminate investigation of a complicated case and let criminals go free simply because the police, though working diligently, were not able to complete the investigation within a time period arbitrarily determined by the legislature? Do such scenarios indicate that the power to determine an adequate period for investigation should be given to the courts?
5. Where an application for an additional period of investigation is made by a police officer, under the Cr. Pro. Code the court has discretion to accept or reject the application (this approach contrasts with that of the Vagrancy and Anti-Terrorism Proclamations, which bind the court to accept the application). Where the court accepts the application, Article 59(3) of the Criminal Procedure Code limits it to granting no more than 14 additional days of investigation at one time. The limitation applies even when it is clear the investigation will require several months. The time limitation is intended to empower the court to gauge the progress of the investigation, which in turn will motivate the police to conduct the investigation diligently. However, the Vagrancy Control Proclamation and the Anti-Terrorism Proclamation do not impose such a time limitation on the court.
    5.1. By providing that the investigating police officer shall complete the investigation and submit the file to the public prosecutor within 28 days, does Article 7 of the Vagrancy Control Proclamation render Article 59(3) of the Code irrelevant, hence carving out vagrancy cases from the 14-day restriction? What is the relevance and implication of Article 14 of the Proclamation, which

declares laws inconsistent with the Proclamation to be inapplicable on matters addressed by the Proclamation?

5.2. By providing that "each period given to remand the suspect for investigation shall be a minimum of 28 days; provided however, that the total time shall not exceed a period of four months," does Article 20(3) of the Anti-Terrorism Proclamation No 652/2009 substitute the 28-day period for the 14-day period provided under the Criminal Procedure Code? In other words, does Article 20(3) provide for a compulsory breakdown of the four months time? Since the provision sets the minimum period of remand, would it be illegal for the court to give more than 28 days, perhaps even months, so long as the given time does not exceed the four months limit?

5.3. From the viewpoint of the accused and the allocation of roles under Article 19(4) of the FDRE Constitution, do you see any difference whether the legislature provides for the maximum period of remand (as in the Criminal Procedure Code) or the minimum period of remand (as in the Anti-Terrorism Proclamation)?

2.2. Approaches of Other Jurisdictions

Periods of Remand[743]

Sprack writes the following relating to the duration and frequency of remand under British law.

> Subject to what follows, it is provided under Section 128(6) of the Magistrates' Courts Act that when magistrates remand an accused in custody prior to committal proceedings or summary trial, the period of the remand must not exceed eight days. The limitation on remands in custody is inconvenient when period of several weeks or months is bound to elapse before the committal or summary trial can take place. Again subject to what follows, the accused has to be brought before the court each week, even though the virtually forgone conclusion of his appearance is that he will be remanded in custody for another week. The pointlessness of his appearing in the dock just to be told that his case is further adjourned until such and such a date is accentuated by the fact that, since the decision of the Divisional Court in *Nottingham Justices ex p Davies* (1981) QB 38, the defense have basically only been allowed one, or at most two, fully argued bail applications. Once they have exhausted those applications, they can only re-open the question of bail if fresh considerations have arisen which were not placed before the bench that originally refused bail. Obviously, if the defense is prevented from arguing on bail, the remand hearing turns into a charade.
>
> In recognition of the fact that unsatisfactoriness of successive remands in custody and the necessity for the accused's presence at each remand, the Criminal Justice Act 1982introduced several new subsections into s 128 of the Magistrates Court Act, the basic effect of which is to allow the accused to consent to being remanded

[743] Sprack, *Practical Approach*, at 92-94.

in custody for up to a 28 days without attending court. The system is that, on the first or any subsequent occasion when magistrates propose to adjourn prior to committal or summary trial and remand the accused in custody, they must if he is legally represented in court, inform him of the possibility of further remands being made in his absence. If, and only if, he consents, they may then remand him thrice without his being brought to court. On the fourth occasion he must attend whether he wishes or not. The possibility of custodial remand in absence does not arise if the accused is unrepresented or if he is a juvenile. There are also detailed provisions about his initially agreeing to a remand in absence and then withdrawing his consent, and about his ceasing to be legally represented whilst on remand. Two main points to notice, however, are that (under the provisions now being discussed) the accused can insist on being produced for each remand hearing, however much the court and the advocates hint that it is a total waste of time, and – even if there is consent to not being produced – the case has to be listed and mentioned each week, just so that the magistrates may formally remand in custody again.

Although probably the bulk of defendants who will have to be remanded in custody for substantial periods do sooner or later agree to remands in absence, the Government apparently came to think that, given the pressures under which the prison service is currently working, it was unsatisfactory to burden the service with the task of bringing remandees to court when no useful purpose could possibly be served by that being done. Accordingly, the Criminal Justice Act 1988 inserted a new Section (s 128 A) into the Magistrates' Courts Act which allow a Magistrates' court to remand an accused in custody for up to 28 clear days, whether or not he consents. It enables a magistrates' court, once it has set a date for the next stage of the proceedings to take place, to remand an accused in custody for a period ending on that date, or for a period of 28 days, whichever is the less. Importantly, it does not apply on the occasion of a first remand in custody but only if at a second or any subsequent remand the court again decides to refuse bail. Section 128A thus dovetails with the statutory provisions about argued bail applications, because the defence has a right to make an argued bail application both on the occasion of the accused's first appearance in connection with the charge and (if bail is then refused) at the next hearing. Thus, it is only when the ration of argued applications has been used up that the court may remand in custody up to 28 days. If they are considering an extended remand under s 128A, magistrates should have regard to the total period of time the accused would spend in custody if they were so to remand him.

Remand under Israeli Law[744]

Eliahu Harnon and Alex Stein provide the following discussion of the time for remand under Israeli law.

> The initial detention period following arrest is limited to 15 days and it can be judicially extended. Detention exceeding 30 consecutive days can be authorized by a judge only upon application confirmed by the Attorney General. The total

[744] Eliahu Harnon and Alex Stein, "Israel," in Bradley, *Crim. Pro.*, at 222.

period of detention prior to bringing an indictment against the suspect is 75 days. This period can be extended on special grounds only by a Supreme Court Justice.

A person suspected of a crime against state security may be arrested under a different set of provisions. Any such suspect may be arrested for 15 days by a senior police officer, an arrest that subsequently can be extended up to four months by consecutive 30-day arrests ordered by a Supreme Court Justice. Applications for such extensions need to be brought by the Attorney General.

In France, the duration of pretrial detention depends on the type of the offence for which the detainee is suspected. Where the arrestee is suspected for a major felony, he may remain in custody for one year with a possibility of extension for up to six months period.[745] In delict cases with a prescribed punishment of at least two years imprisonment, the suspect may remain in custody for four months. This period of custody is subject to extension of up to eight months depending on the gravity of the offence and the accused's prior convictions.[746]

Note on the Difference between British and Ethiopian Law

According to the excerpt on British law, the Magistrates' Courts Act restricted the period of remand to eight days and required the arrestee to appear before the court every week for reconsideration of his right to bail. If there is no possibility that the arrestee's bail application will be reconsidered, there is no purpose for bringing him before court each week. That is, there is no point in requiring the police to bring the arrestee every week where it is obvious that the arrestee will be remanded again and again for several months. Therefore, in cases where no possibility exists that the court will order the arrestee released on bail, the only possible purpose for requiring his appearance before the court is for the magistrate to gauge how speedily the investigation is advancing. The British government now believes, however, that this purpose can be served without requiring the arrestee to appear every time his case is adjourned. The Ethiopian Vagrancy Control Proclamation and the Anti-Terrorism Proclamation, which incorporate provisions authorizing longer periods of remand, might have been informed by this idea. However, there is one big difference between the British law and the Proclamations. Under British law, it is only the accused who is remanded for 28 days. The case itself is remanded for only up to eight days and the suspect is represented during the proceeding. Under the Proclamations, there is no such separate remand for the case/file and the arrestee. The British approach provides the court an opportunity to follow the progress of the investigation, and even if the arrestee does not personally appear, he is represented at each court date. The Proclamations do not include either of these safeguards; Israeli law is more consistent with the Proclamations than with British law.

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[745] Criminal Procedure Code of the French Republic, Article 145-2 (quoted in Richard S. Frase, "France," in Bradley, *Crim. Pro.*, at 165).

[746] Criminal Procedure Code of the French Republic, Articles 144 and 145 (cited in ibid., at 165-166).

Chapter Eight

Habeas Corpus

This chapter deals with the institution of habeas corpus. After discussing the theories and laws on habeas corpus, the text discusses three court cases that demonstrate the difficulties in the practical application of Ethiopian laws regulating habeas corpus.

Section I. Origin and Meaning of Habeas Corpus

The Latin term *habeas corpus* which means "you have the body"[747] refers to "the judicial determination of the legality of a person's detention."[748] Though there is a consensus that the writ of habeas corpus originated in English Common law,[749] there is no agreement as to the time of its origin. Some[750] trace it back to 1679, when the Habeas Corpus Act was enacted. Others write that the writ was in use before that time.[751] Before it acquired its current meaning, the writ was used in different contexts, and its meaning for purposes of British law had had changed over time.[752] The right to habeas corpus spread to British colonies over time; some colonies incorporated it in their Criminal Procedure Acts,[753] while others adopted local habeas corpus legislation.[754] The right to habeas corpus was recognized for the first time as a constitutional guarantee of liberty in the United States.[755] The export of the right to habeas corpus was not limited to British colonies – it was

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[747] Larry W. Yackle, *Federal Courts: Habeas Corpus* (New York: Foundation Press, 2003), at 1 (hereafter Yackle, *Habeas Corpus).*

[748] Brian Farrell, "From Westminster to the World: The Right to Habeas Corpus in International Constitutional Law," 17 *Mich. St. J. Int'l L.*, at 551(2008-09) (hereafter Farrell, "From Westminster").

[749] See, *e.g.*, ibid., at 551-52; Yackle, *Habeas Corpus*, at 9-19; Thomas Fleiner, *Common Law and Continental Law: Two Legal Systems* (2005), at 2-3, available at http://www.Federalism.ch/files/documents/legalsystems_fulltext_2009.02_final.pdf (accessed September 6, 2011) (hereafter Fleiner, *Common Law*); Trechsel, *Human Rights*, at 462-63.

[750] For example, Trechsel, *Human Rights*, at 462-463, argues this. Also, Professor Fleiner argues that the writ's root is the *Magna Charta* in the Habeas Corpus Act of 1679. Fleiner, *Common Law*, at 17.

[751] Yackle, *Habeas Corpus*, at 9-15; Brian R. Farrell, "Access to Habeas Corpus: A Human Rights Analysis of U.S. Practices in the War on Terrorism," 20 *Transitional Law and Contemporary Problems* 3, at 5-6 (2011), available at http://www.uiowa.edu/~tlcp/TLCP_Articles/20-1/Farell.Final.JYZ.04132011.PDF (hereafter Farrell, "Access to Habeas").

[752] Writ of Habeas Corpus was originally used "to compel the presence of an individual before a court for judgment." W.S. Holdsworth, 9 *A History of English Law* (London : Methuen, Sweet and Maxwell, 1926) (cited in Farrell, "From Westminster," at 553. It was then used by superior courts "as a means of inquiring into the grounds of an individual's detention by inferior local courts." Farrell, "Access to Habeas," at 5.

[753] Such countries include India, Fiji, the Gambia, Kenya, Malaya, and others. Farrell, "From Westminster," at 557, note 35.

[754] David Clark and Gerard Mccoy, *The Most Fundamental Right: Habeas Corpus In The Commonwealth* (Melbourne, Oxford: Oxford University Press, 2000) (cited in ibid., at 557).

[755] Farrell, "Access to Habeas," at 6.

recognized in other parts of the world as well.[756] By 1945, the right to habeas corpus was recognized in the national constitutions of 34 countries.[757] A survey of national constitutions reveals that the right to habeas corpus is now recognized in 118 constitutions.[758]

Various Ethiopian legal authorities recognize the right to habeas corpus. The right was first introduced to Ethiopia by the 1965 Civil Procedure Code,[759] and was incorporated into the current Constitution which recognizes one's right to apply for physical release.[760] The ICCPR also incorporates a provision dealing with the right to habeas corpus.[761] Citing the drafting history of the Universal Declaration of Human Rights in general and its Article 8 in particular, Brian Farrell argues that the right to habeas corpus is implicitly guaranteed by Article 8 of the Declaration.[762]

Section II. Purpose and Essence of the Right to Habeas Corpus

Trechsel writes,

> Personal liberty could be described as a "preferential freedom" because it is equipped with two instruments of protection which the other rights contained in the international treaties do not enjoy. One of them is the guarantee which we are concerned with here, namely the right to a specific remedy. The other is the right to compensation for unlawful interference with the right... The inclusion of a specific right to take proceedings to review the lawfulness of detention (habeas corpus) might appear superfluous in the light of the existence of the general right to an effective remedy set out in Article 2 (3) (a) of the ICCPR.... The protection of persons deprived of their liberty, however, goes further than the right to a general remedy in at least two respects: it provides for access to a *judicial* authority and it requires that the decision be given *speedily and effectively*. This notion of effectiveness dictates that it be possible to obtain immediate release which considerably enhances the protection on the domestic level. The purpose of habeas corpus proceedings is not just to verify whether the detention can be justified as such, but also to examine whether other formal guarantees, such as those concerning persons detained on remand, have been respected.[763]

The scope of the persons eligible for a habeas corpus proceeding differs between the FDRE Constitution and the Civil Procedure Code, on the one hand, and the ICCPR, on the other.

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[756] Ibid.
[757] American Law Institute, "The Statement of Essential Human Rights by Representatives of the Principal Cultures of the World," *Annals Am. Acad. Pol. & Soc. Sci.* 18, at 21, art. 8, cmt. 243 (Jan. 1946) (cited in Farrell, "From Westminster," at 560).
[758] Farrell, "From Westminster," at 564.
[759] 1965 Civil Procedure Code of Ethiopia, Articles 177-179.
[760] FDRE Constitution, Article 19(4).
[761] ICCPR, Article 9(4).
[762] Brian Farrell, "Does the Universal Declaration of Human Rights Implicitly Guarantee a Right to Habeas Corpus?," at 2-3, available at http://www.wcl.american.edu/hrbrief/16/1farrell.pdf?rd=1 (accessed September 6, 2011).
[763] Trechsel, *Human Rights*, at 463-464.

Under Article 9(4) of the ICCPR, "*anyone who is deprived of his liberty* by arrest or detention shall be entitled to take proceedings before a court, *in order that the court may decide without delay on the lawfulness of his detention* and order his release if the detention is not lawful." Thus, the guarantee is available to any arrestee or detainee irrespective of the lawfulness of the arrest or detention. Habeas corpus is thus distinguishable from a remedy for victims of a wrongful deprivation of liberty. The right to habeas corpus simply guarantees to anyone whose right to liberty is restricted— a judicial determination on the lawfulness of the deprivation of liberty. Hence, unlike compensation for illegal arrest, which is obviously available only to those who are victims of illegal arrest, the right to habeas corpus is guaranteed to everyone who is deprived of liberty.

Under Article 177 (1) of the Civil Procedure Code, only a person whose liberty is restrained *otherwise than in pursuance of an order duly made in accordance with the Civil or Criminal Procedure Codes* may apply for habeas corpus. Article 19(4) of the FDRE Constitution recognizes the arrestee's right to petition the court to order his physical release only where *the arresting police officer fails to bring him before a court within forty eight hours and to provide reasons for his arrest.* Under the domestic laws, then, the right to habeas extends only to arrests that are illegally made (mainly for procedural reasons). Those who are lawfully detained or arrested are not entitled to apply for habeas corpus.

Because the Constitution and the Civil Procedure Code both recognize a right to habeas corpus only for those whose right to liberty is unlawfully restricted, they imply a very different rationale for habeas corpus than that articulated by scholars and international and regional human rights instruments. According to Article 19(4) of the FDRE Constitution, arrestees petition the court "*to order their physical release,*" not to obtain court review of the lawfulness of their arrest. Similarly, provisions of the Civil Procedure Code on habeas corpus imply that the whole purpose of an application for habeas corpus is to get the court to order release of the arrestee, not to obtain a determination of the lawfulness of the arrest.

Trechsel notes that a habeas proceeding has a twofold purpose: theoretical and practical. "*The theoretical aim requires a determination of the lawfulness of the deprivation of liberty; the pragmatic one seeks liberty.*"[764] Of course, only those who are arrested illegally will reap any practical benefit from the habeas corpus proceeding, since the court will order the release only of those whose detention is found illegal. However, as argued by Trechsel[765] it would defy logic if the right to habeas corpus were only granted in those cases where it would also be successful. In his view, as the very purpose of the proceeding is to ascertain whether the detention is lawful, the illegality of arrest should not be a

[764] Ibid., at 468.
[765] Ibid., at 465.

prerequisite for the guarantee to apply. The European Court of Human Rights upheld[766] this understanding of the right to habeas corpus in interpreting Article 5(4)[767] of the European Convention on Human Rights, which is framed in terms similar to Article 9(4) of the ICCPR.

Section III. Procedural Issues Relating to Habeas Corpus

3.1. The Time Element in a Habeas Proceeding

Two time-related questions are raised in relation to habeas corpus proceeding. First, does the right to a review arise immediately after an arrest or only after some time has lapsed? And second, is the court required to decide on the application speedily?

Article 19(4) of the Constitution[768] indicates that the right to petition for physical release arises only after 48 hours from the time of the arrest. There is no such time limitation under the ICCPR[769] or the Civil Procedure Code.[770] Under the FDRE Constitution, the right to habeas corpus is guaranteed neither to all arrestees nor to all illegally arrested persons. Only arrested persons who are not brought before court within 48 hours may petition the court to order their physical release. Thus, for the right to arise, the arrestee must wait until the conclusion of the statutory 48-hour period. Under the Civil Procedure Code, any aspect of unlawfulness of the arrest (including lapse of more than 48 hours before the arrestee is brought before court) serves as a ground to petition for habeas corpus. In the absence of any time limitation, it is only logical to assume that the arrestee may exercise his right to habeas corpus immediately after his arrest. (This would not, of course, be the case only where the arrest or detention is to be challenged for expiry of a given time limit, such as unjustified expiry of 48 hours before an arrestee is brought before court or failure to bring a charge within 15 days after an investigation is completed.)[771] Under the ICCPR, where illegality of the arrest is not a precondition to exercise the right to habeas corpus, the application can be made any time after arrest.

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[766] De *Wile, Ooms and Versyp v. Belgium*, para. 73; *Winterwerp v. Netherlands*, para.53 (cited in ibid.).

[767] The provision states: "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

[768] In its relevant part the provision states: "All persons have an inalienable right to petition the court to order their physical release *where the arresting police officer or the law enforcer fails to bring them before a court within the prescribed time....*" As provided under Article 19(3) of the Constitution and Article 29 (1) of the Cr. Pro. Code, the police officer is required to bring the arrestee before a court of law within 48 hours of the latter's arrest.

[769] Article 9(4) states: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

[770] The relevant part of Article 177(1) states: "An application for habeas corpus may be made...by any person restrained otherwise than in pursuance of an order duly made under this Code or the Criminal Procedure Code."

[771] Article 109(1) of the Cr. Pro. Code requires the public prosecutor to frame a charge within 15 days of the receipt of the police report or the record of a preliminary inquiry.

It is not clear why the FDRE Constitution requires the arrestee to wait for 48 to exercise his right to habeas corpus, since the arrest can be challenged for many reasons other than the police officer's failure to bring the arrestee before the court within 48 hours. The right of the arrestee to be brought before court within 48 hours of his arrest should not be an obstacle to exercising the right of habeas corpus even before the 48-hour period lapses. The 48-hour time limit should apply to the arresting officer but not to the arrestee.

In the context of the European Convention on Human Rights, Trechsel[772] suggests that an arrestee has the right to challenge the validity of his arrest in accordance with Article 5(4) – habeas corpus proceeding – even before he is brought to a judge in accordance with Article 5(3) of the Convention, which guarantees a right to be brought before court promptly. In *De Jong, Baljet and Van den Brink v. Netherlands*,[773] a Dutch law requiring arrestees to wait for six, seven, or thirteen days (depending on circumstances) before they could challenge the legality of their arrest was challenged before the European Court of Human Rights as violating the applicants' right to habeas corpus. The Court, affirming that the right to apply for judicial review of the lawfulness of a deprivation of liberty is due immediately after the arrest or detention, found the law to be incompatible with the right to habeas corpus recognized in Article 5(4) of the European Convention on Human Rights.[774]

Regarding the time within which the court must decide the petition for habeas corpus, Trechsel states that one of the reasons that makes a specific right to habeas corpus proceeding different from the general right to an effective remedy for unlawful interference with any right is that the former "requires that the decision be given speedily and effectively."[775] As the application seeks the court's decision on the lawfulness of the arrest, and release if the arrest is found to be unlawful, an immediate decision of the court is. If the court takes weeks or months to decide on the application, the purpose of the right to habeas corpus is vitiated.

Neither the FDRE Constitution nor the Civil Procedure Code requires the court to decide a habeas corpus proceeding speedily. Article 19(4) of the Constitution, apart from recognizing an individual's right to petition the court to order his physical release, does not specify how speedily the petition must be decided. Article 178 of the Civil Procedure Code requires the court, on receiving an application for habeas corpus, to issue a summons "forthwith" to the custodian of the restrained person, ordering him to appear before the court on the day fixed in the summons. The Article does not, however, require the court to decide on the application "forthwith," and it does not include any other language regarding the speed of the court's decision. The ICCPR, under its Article 9(4), expressly

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[772] Trechsel, *Human Rights*, at 466.
[773] *De Jong, Baljet and Van den Brink v. Netherlands*, para. 58 (cited in ibid.).
[774] Ibid.
[775] Trechsel, *Human Rights*, at 464.

requires the court before which an application for habeas corpus is submitted to decide "without delay" on the lawfulness of the detention or arrest. Article 5(4) of the European Convention on Human Rights requires a court of law before which a habeas corpus application is made to pass its decision "speedily."

Since Article 19(4) of the FDRE Constitution is silent as to how soon a habeas corpus application must be decided, resort may be made to Article 9(4) of the ICCPR by virtue of Article 13(2) of the FDRE Constitution.[776] Hence, it is within the spirit of the Constitution to argue that the court before which a habeas corpus application is made is required by law to decide on the application speedily.

3.2. Release Pending Habeas Corpus Proceeding[777]

The possibility exists for the arresting authority to release the applicant after an application for habeas corpus is filed before a court of law. Because neither the Civil Procedure Code nor the FDRE Constitution clearly requires that the application of habeas corpus be decided immediately, this possibility is not implausible in the context of Ethiopian law and procedure. What would be the effect of such a release on the habeas corpus proceeding?

The European Court of Human Rights in several cases[778] decided that release of the concerned person has no bearing on the habeas corpus proceeding. The Court has found that if the person concerned manages to escape after having applied for habeas corpus, but before his request has been decided, he remains entitled to a speedy decision on the application. According to the Court, the guarantee would lose its effect if no possibility existed of reviewing the lawfulness of the detention after the measure has ceased to be executed. In connection with this issue, Trechsel notes the following.

> The aim of the right to a speedy review of the lawfulness of any deprivation of liberty is twofold, encompassing a theoretical and a more pragmatic objective. The theoretical aim requires a determination of the lawfulness of the deprivation of liberty; the pragmatic one seeks liberty. The primary aim should be the pragmatic one. Once a person has been released, there may still be a certain interest in knowing whether the detention was lawful, for instance, for the purposes of compensation, but this is in any case covered by the general guarantee of an effective remedy (ECHR, Art. 13; ICCPR, Art. 2 (3) (a)). This would mean that

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[776] Article 13(2) of the Constitution states: "the fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia." The right to habeas corpus as provided under Article 19(4) is one of the rights envisaged under this provision of the Constitution.

[777] This subsection is relevant only where a person is released after he files a habeas corpus application. A person who was arrested may not apply for habeas corpus for a retroactive determination of the lawfulness of his arrest after his release. Trechsel, *Human Rights*, at 466.

[778] *Van der Leer v. Netherlands, Keus v. Netherlands, Zamir v. UK, Xv. United Kingdom, Herz v. Germany* (all quoted in ibid., at 467, note 66, 468 note 68).

> Article 5(4) of the ECHR would not be violated by the discontinuation of habeas corpus proceedings after release.[779]

In Trechsel's view, in cases where the applicant is released there is no pragmatic purpose to be served by the habeas corpus proceeding, because he has achieved his goal – getting his liberty back. The only purpose that the continuation of the habeas corpus proceeding would serve is the theoretical one – determination of whether the arrest or detention was lawful. As the latter purpose can be served by a proceeding to claim compensation for unlawful interference with the right to liberty (under Article 13 of the European Convention on Human Rights and Article 2(3) (a) of the ICCPR), the discontinuation of the habeas corpus proceeding following the release of the applicant would not affect his interests.

Adopting Trechsel's approach in Ethiopia might be worrisome for two reasons. First, Article 2(3) (a) of the ICCPR is of general application; unlike Article 4(5) of the ECHR, it is not intended to catch particular attention on a deprivation of liberty. Second, it is uncommon for our courts to apply international instruments.

Trechsel's view makes sense from efficiency point of view, in light of the fact that Article 179 of the Civil Procedure Code authorizes the court before which a habeas corpus application is filed only to determine the lawfulness of the arrest or detention and to order release (with or without bail). If the habeas corpus proceeding continues even after the applicant is released, the court can only determine the lawfulness of the arrest to which the applicant was subjected to. It cannot order his release, for he has already been freed. Nor can the court order compensation for procedural errors. If the person who was arrested but released wishes to be compensated, he must file a separate civil case in accordance with the relevant provisions of Title XIII of the Civil Code and the Civil Procedure Code. Such a scenario renders the habeas proceeding useless.

Section IV. Scope of Habeas Proceeding

4.1. Grounds to Petition for Habeas Corpus

Article 17 of the FDRE Constitution allows restriction of right to liberty upon fulfillment of two interrelated conditions. First, the restriction should be made based on grounds provided by law. Second, the restriction has to be made in accordance with procedures established by law. The restriction of liberty without the two conditions being satisfied is unconstitutional. It follows that the habeas corpus proceeding should allow the court to verify if both conditions are fulfilled. As provided under Article 177 of the Civil Procedure Code the arrestee may petition the court for physical release if the arrest is not made in accordance with the requirements established by either of the two procedural codes. The Criminal Procedure Code provides both the substantive ground – reasonable

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[779] Trechsel, *Human Rights*, at 468.

suspicion that the person to be arrested has committed a crime – and the procedures to be followed in order to restrict one's liberty. Hence, the arrest would not be considered to have been made in accordance with the Criminal Procedure Code where someone is arrested in the absence of a substantive ground for arrest. Therefore, the review by the habeas court must be wide enough to enable the examination of both conditions, as required under Article 17 of the Constitution. When an arrestee makes a habeas corpus application, the court has to examine not only compliance with the procedural requirements set out in the Criminal Procedure Code but also the reasonableness of the suspicion resulting in one's arrest and legitimacy of the purpose pursued by the arrest.

As discussed earlier in this text, by providing that "anyone who is deprived of his liberty…shall be entitled to take proceedings before a court, in order that the court may decide…on the lawfulness of his detention," Article 9(4) of the ICCPR allows anyone whose liberty is restricted to exercise his right to habeas corpus. It does not condition the right to habeas corpus on the illegality of the deprivation of liberty, which is something to be decided by the court once the application is made.

4.2. Habeas Proceeding where the Arrest was Ordered by Court

As provided under Article 9(1) of the ICCPR, Article 6 of the African Charter on Human and Peoples' Rights, and Article 17 of the FDRE Constitution, an individual's liberty cannot be restricted except on grounds provided by law. Arrest or detention without compliance with substantive or procedural conditions is prohibited as arbitrary. Can a person arrested on a court order bring a habeas corpus application challenging the validity of the arrest?

Article 19 of the FDRE Constitution guarantees the right to habeas corpus to any arrested person, whether the arrest is made with or without court order (warrant), provided he is not brought before court within 48 hours of the arrest. Similarly, Article 177 of the Civil Procedure Code states that the arrestee has the right to habeas corpus if his arrest is not made in accordance with the provisions of the Civil or Criminal Procedure Codes. That is, even if the arrest is made upon court order, insofar as the order is not made in accordance with the law, the arrestee is entitled to challenge the lawfulness of the arrest. Generally, under both the FDRE Constitution and the Civil Procedure Code, the fact that the arrest was made upon court order does not seem to be a barrier for the arrestee to exercise his right to habeas corpus.

Addressing this issue, the European Court of Human Rights indicated that recourse to a court challenging the validity of an arrest or detention is allowed in cases where the decision to deprive the arrestee of his liberty was made by an administrative authority. When the decision is made by a court at the close of a judicial proceeding, the supervision required by a habeas corpus proceeding is *incorporated* in the decision. The court explained the notion of "incorporation," stating that the control of the detention is said to be "incorporated" in the initial court decision where "the procedure followed has a judicial

character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question."[780]

4.2.1. Habeas Corpus where Arrest was Ordered by a Court

Trechsel[781] approaches the issue of whether a person arrested pursuant to a court warrant has the right to habeas corpus by asking the question to what extent the "incorporation" theory[782] applies to this type of arrest. He states that the "incorporation" theory is not applicable where the suspect is arrested on the basis of an arrest warrant, because no appropriate procedure exists to guarantee the arrestee an opportunity to express his objections to the arrest. If the warrant is issued in a non-adversarial procedure, the procedure lacks judicial character and does not accord the arrestee protections appropriate to the type of deprivation of liberty – a necessary condition, according to the European Court of Human Rights, to find that the question of "habeas corpus" is incorporated in the court decision.

Despite this theoretical argument, Trechsel is of the opinion that where the arrest is made with a warrant (and is lawful), the next step is regulated by Article 5(3) of the Convention. Article 5(3) requires the immediate appearance of the arrestee before a court of law, at which time the lawfulness of the arrest will be determined in the presence of the arrestee.[783]

As far as Article 19(4) of the FDRE Constitution is concerned, the arrestee is entitled to petition the court only if he is not brought before court within 48 hours of his arrest. Whether he is arrested with or without a warrant, the constitutional provision does not allow him to apply for his physical release before the expiry of the prescribed time. If he is brought before court within the prescribed time, the lawfulness of the arrest will be determined at that moment by the court with no need for a separate habeas corpus application. However, the arrestee may petition the court in accordance with Article 177 of the Civil Procedure Code even before the expiry of the prescribed time where the warrant on the basis of which he is arrested is issued without fulfillment of the requirements of Article 54 of the Criminal Procedure Code, for in such cases the arrest, though made by a court order, is not effected pursuance to the Criminal Procedure Code.

Under the Civil Procedure Code, if the arrestee is convinced that his arrest (whether with or without warrant) is lawful, he is not entitled to apply for habeas corpus before the expiry of the 48 hours. In such cases, only when the arrestee is not brought before court within the prescribed time does the arrest become unlawful – providing a ground to

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[780] Ibid., at 469-470.
[781] Ibid., at 469.
[782] For more on the "incorporation theory," see ibid., at 468-70.
[783] Ibid., at 469.

petition for habeas corpus both under the Civil Procedure Code and the FDRE Constitution.

4.2.2. Imprisonment after Conviction

The European Court of Human Rights has stated that a person serving a sentence after conviction by a competent court cannot invoke the right to habeas corpus. Instead, "recourse to a court is required in cases where the decision to deprive someone of his or her liberty was taken by an administrative authority."[784] In *De Wide, Ooms and Versyp v. Belgium*, the court stated that "there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case the supervision required by a habeas corpus proceeding is incorporated in the decision."[785]

Trechsel has difficulty accepting the position of the European Court of Human Rights that Article 5(4) of the ECHR, which guarantees a right to habeas corpus to everyone who is deprived of his liberty by arrest or detention, is inapplicable where a person is detained after conviction by a competent court. Trechsel believes that, while it is certainly correct to say that habeas corpus proceedings cannot lead to the re-examination of a judgment, a number of other issues may arise through habeas that constitute grounds to challenge the detention, such as the identity of the prisoner with the person sentenced, or a statute of limitations issue.

In the U.S., habeas corpus is a known means of collateral attack on a detention based on a final judgment rendered by a competent court. It is considered a collateral attack because it is not a continuation of the criminal process. The prisoner may petition for release under habeas corpus on the grounds that his conviction was obtained in violation of the U.S. Constitution or the laws or treaties of the United States,. If the petitioner proves his allegations, the habeas court is empowered to discharge the petitioner from custody. The most common grounds of habeas corpus claims are said to be ineffective assistance of counsel, incriminating statements obtained by illegal police interrogation, improper judicial or prosecutorial conduct, and insufficient evidence.[786]

The way Articles 177-179 of the Civil Procedure Code and Article 19(4) of the FDRE Constitution are framed forecloses the opportunity for a convict to challenge the judgment on the basis of which he is detained and demand his physical release. Essentially, habeas corpus in a criminal proceeding is to be exercised as a pretrial right that an arrestee, but not a convict, may avail himself of. Once a person is convicted by a court judgment, appeal is his only resort. Ethiopia recognizes no collateral attack through habeas corpus after an individual is convicted by a final court judgment.

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[784] Ibid.
[785] *De Wide, Ooms and Versyp v. Belgium*, para. 76 (cited in ibid.).
[786] Weaver et al., *Principles of Crim.*, at 400-405.

Section V. Remedy in a Habeas Corpus Proceeding

In a habeas corpus proceeding, a court is to order the release of the arrestee/detainee where the arrest or detention is found to be unlawful. Article 9(4) of the ICCPR clearly recognizes the power of the court to order the release of the arrestee/detainee upon finding the unlawfulness of the arrest or detention. Article 179 of the Civil Procedure Code provides for two alternatives to the court at the conclusion of the proceeding. First, where the court is convinced that the restraint is unlawful, it shall order the immediate release of the person restrained. Second, where the court has doubt as to the lawfulness of the restraint, it may order his conditional release. Obviously, where the arrest is found to be lawful, the court shall confirm the lawfulness of the arrest and reject the application for release.

Article 19(4) of the FDRE Constitution takes a different approach not only to the possible grounds for habeas corpus, as discussed earlier, but also to the possible ruling of the court. The provision empowers the court to allow continuation of the arrest despite the fact that the arrest was illegal for failure of the police to bring the arrestee before court within the prescribed time. The Constitution's provision conditions the court's power to order continuation of the "illegal" arrest on the interests of justice. Unlawfulness of arrest is not adequate for the arrestee to be released. Moreover, the interests of justice should not require the continuation of the "unlawful" arrest. The latter requirement is so subjective that the arrestee cannot predict the outcome of the habeas proceeding, which renders the review envisaged under Article 19(4) different from a habeas corpus-type review.

In *Girma Wokjera and Getachew Assefa v. Special Public Prosecutor*, the Federal First Instance Court invoked the "interest of justice" as provided under Article 19(4) of the FDRE Constitution to order the continuation of the arrest of the applicants, who remained in police custody for about four months without court order.

Girma Wokjera and Getachew Assefa v. Special Public Prosecutor[787]

Background of the Case

The arrested persons, through their agents, filed an application for habeas corpus before the Federal First Instance Court on Tikemet 28, 1992. The application alleged that Girma Wokjera and Getachew Assefa were arrested on the 20th day of Sene 1991 without a court order and had been in custody of the Woreda 16 Police Station in Addis Ababa since then. The petitioners requested the court to order their physical release.

When asked by the court to explain why the petitioners should not be released, the Woreda Police told the Court that the petitioners were arrested by order of the Special Public Prosecutor. The Special Public Prosecutor was ordered to appear before the court

[787] *Girma Wokjera and Getachew Assefa v. Special Public Prosecutor* (Fed. F. I. Ct., Cr. F. No. 214/92, Hidar 16, 1992 E.C.).

and to show cause why the arrestees should not be released. In a letter to the Court, the Special Public Prosecutor indicated that the arrestees were suspected of genocide and crimes against humanity. Moreover, the letter it stated that a charge had been filed before the Federal High Court against them on *Tikemet* 15, 1992 and that the Special Public Prosecutor was waiting for the day of trial to be fixed by the court. The Special Public Prosecutor attached a copy of the charge and a document indicating that the charge was filed before the Federal High Court.

The applicants disclosed to the Court that in *Nehasie* 1991 the Special Public Prosecutor brought the arrestees before a court of law and asked for their remand. The prosecutor's application was dismissed by the remand court because the arrested persons were brought before it after expiry of 48 hours of their arrest. The Special Public Prosecutor admitted the statements of the applicants.

Ruling of the Court[788]
The Court stated:

> As provided under Articles 19(3) of the FDRE Constitution and 29(1) of the Cr. Pro. Code, an arrestee shall be brought before court within forty eight hours of his arrest without including the time required for the journey. Both the Special Public Prosecutor and other law enforcing authority are required to respect these legal provisions. Failure of the arresting authority to bring the arrestee within the prescribed time makes the arrest unlawful.
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> Though the Special Public Prosecutor has filed a charge before the Federal High Court and he is waiting for the day of the trial, because he shows neither that a court of law has allowed him to arrest the persons, on whose behalf the application is made, nor does he show that they are remanded by a court order till their trial begins. On the other hand, he admitted that the petitioners were arrested for over four months. From these facts we concluded that their arrest is unlawful.
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> Article 179(2) of the Civil Procedure Code provides for the court to order the release of the arrestee where it finds the arrest to be unlawful. However, the court is convinced that it is necessary to refer to Sub Articles 3 and 4 of Article 19 of the FDRE Constitution. Sub Article 3 provides that arrested persons shall be brought before court within Forty eight hours and be given the reasons for their arrest. Sub Article 4 entitles arrested persons to petition the court to order their physical release where the arresting police officer fails to bring them before a court within the prescribed time and to tell the reason for their arrest. This sub article provides that where the interest of justice requires the court may order the arrested person to remain in custody or remand him for a time strictly required to carry out the necessary investigation.

[788] Ibid. The court's order is written in Amharic; the translation is mine.

According to Sub Article 4, the court has two options where it learns that the petitioner is arrested unlawfully. The first and normal measure to be taken by the court is to order the release of the unlawfully arrested person. The second option is to order the arrestee to remain in custody. To order the arrestee to remain in custody the court has to ensure that the interest of justice requires it or there is a need for additional time of investigation. In the case at hand, as the investigation has been completed and charge filed, the court could not order the arrestees to remain in custody for additional investigation. The decision whether to order their release or continuation of their arrest is to be based on whether or not the interest of justice requires continuation of their arrest.

Interest of justice is related with the possibility of the arrestees to abscond if released. If the arrestees are released and disappeared, they will not be tried and punished thereby defeating the purpose that would have been served upon enforcing the punishment which in turn defeats justice. The Court found it appropriate to consider the issue of whether or not the interest of justice requires the petitioners to remain in custody from this angle. The Special Public Prosecutor charged the petitioners under Articles 281 and 522(1)(a) of the 1957 Penal Code. Article 281 is about genocide and crimes against humanity, which are punishable with rigorous imprisonment from five years up to life or with death. Article 522(1)(a) criminalizes aggravated homicide and prescribes a punishment of rigorous imprisonment for life, or death.

Article 63 of the Criminal Procedure Code does not allow bail where a person is charged with the above referred provisions. As indicated above, if the petitioners are released, they may disappear making their punishment impossible thereby defeating justice. The court, for the reasons mentioned above and on the basis of Article 19(4) of the FDRE Constitution, does not accept the request of the petitioners to be released.

As to for how long should the petitioners remain in custody, the Constitution provides that it should be for a time strictly required to bring them before court of law. There is no clear provision stating the duration of this time. It is left to the court. The petitioners have been in custody since *Sene* 20, 1991 – for about five months. It has been a month since the prosecutor filed a charge on *Tikemet* 15, 1992. Though the workload of the Federal High Court is obvious, it should not affect the right to speedy trial of the petitioners. In light of the long duration that the petitioners had remained in custody, ordering them to continue to be in custody for additional long time does not serve the interest of justice. The court in accordance to Article 19(4) of the Constitution ordered the petitioners to remain in custody for 15 additional days.

Notes and Questions

1. Article 19(4) of the FDRE Constitution contemplates circumstances where a person who is not brought before a court within the prescribed time petitions the court, requesting an order for his physical release. The provision envisions instances where the petitioner, despite the fact that he was not brought before court of law within the time required by law, may be ordered to remain in custody where doing so is in the interests of justice. Can you think of such instances?
2. Can Article 19(4) of the FDRE Constitution be disregarded, by virtue of Article 13(2) of the FDRE Constitution, to the extent that it allows the court to order continuation of the unlawful arrest contrary to Article 9(4) of the ICCPR? Would such an approach be inconsistent with Article 9 of the Constitution,[789] which declares its supremacy? How do you reconcile Articles 13(2), which apparently gives primacy to the international human rights instruments, and Article 9(1), which declares supremacy of the Constitution?
3. In an extensive discussion, the Court tried to define the meaning of the phrase "interest of justice" under Article 19(4) of the FDRE Constitution. Does it amount to interpretation of the Constitution, and hence usurpation of power of the House of Federation,[790] or is it a normal judicial function?
4. The Court related the notion of "interest of justice" with the issue of bail. The Court concludes that a court may order an arrestee's physical release if he is suspected of a bailable offence and he was not brought before a court within the prescribed time. However, even in those circumstances, the court may order the arrestee to remain in custody if it believes that additional time is needed for investigation. Do you agree with the Court's analysis? If not, how should Article 19(4) of the Constitution be understood?

The Case of Yoseph Metaferia

Background of the Case

Yoseph Metaferia was arrested on suspicion that he had committed homicide. The federal police brought him before the Federal First Instance Court in Addis Ababa and repeatedly applied for, and obtained, additional periods for investigation in accordance with Article 59(2) of the Code. On *Hidar* 6, 1998, the Court closed the remand file[791] and denied the police's application for an additional period of investigation. The police neither released Yoseph nor forwarded his case to the public prosecutor for further steps.

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[789] On the supremacy of the FDRE Constitution, its Article 9 states: "1) the constitution is the supreme law of the land. Any law…which contravenes this Constitution, shall be of no effect.... 4) All international agreements ratified by Ethiopia are an integral part of the law of the land."

[790] Article 62(1) of the FDRE Constitution empowers the House of Federation to interpret the Constitution. See also Articles 83 and 84 of the Constitution, Council of Constitutional Inquiry Proc. No. 250/2001, *Fed. Neg. Gaz.*, year 7, no. 40, and Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities, Proc.No.251/2001, *Fed. Neg. Gaz.*, Year 7, no. 41.

[791] *Public Prosecutor v. Yoseph Metaferia* (Fed. F. I. Ct., Cr. F. No. 29189, 6 of Hidar 1998 E.C.).

Yoseph petitioned a civil bench of the Federal First Instance Court, asking for an order of physical release on the ground that his detention by the federal police was unlawful. The police told the court that Yoseph was originally arrested with a court warrant. According to the police, although the remand court closed the remand file and refused the police's application for an additional period for investigation, the court did not order his release, either conditionally or unconditionally. Moreover, the police stated to the court that releasing a person arrested on suspicion of homicide is not within the police power.

Ruling of the Court
The court made the following ruling on Yoseph's application for physical release.

> The court learned that Yoseph Metaferia was arrested by a court warrant on suspicion that he committed homicide which makes his arrest lawful. An application by virtue of Article 177 of the Civil Procedure Code is to be made where one is restrained otherwise than provided by law. In the case at hand, the applicant was arrested lawfully and had been remanded by court order. The court dismissed Yoseph's petition stating that "where a charge has not been framed after the remand file is closed, the applicant may only apply to the Federal First Instance Court bench which closed the remand file but not to this bench.[792]

Appeal and Petition for Cassation
Yoseph Metaferia appealed against the above ruling. The appellate court confirmed the ruling of the lower court and dismissed the appeal.[793] Yoseph then petitioned the Cassation Division of the Federal Supreme Court, alleging that the lower courts had erred in applying the law of habeas corpus. However, a division of three judges rejected the application, indicating that it did not see any fundamental error of law in the ruling of the lower courts.[794]

Second Application to the Federal First Instance Court
Despite the successive rejection of his application, Yoseph Metaferia made a new habeas corpus application to another bench of the Federal First Instance Court. This time the habeas court ruled in his favor.

Ruling of the Court[795]
The court made the following ruling.

> The applicant requested the court to order the federal police to release Yoseph Metaferia who had been illegally detained since Hidar 6, 1998. The representative of the Federal Police stated to the court that Yoseph had remained in custody for

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[792] *Yoseph Metaferia v. Federal Police Commission*, (Fed. F. I. Ct., Civ. F. No. 63837, Tir 26, 1998 E.C.).
[793] *Yoseph Metaferia v. Federal Police Commission*, (Fed. H. Ct., Civ. F. No. 44349, Yekatit 3, 1998 E.C.).
[794] *Yoseph Metaferia v. Federal Police Commission*, (Fed. Sup. Ct., Cassation F. No. 23261, Yekatit 15, 1998 E.C.).
[795] *Yoseph Metaferia v. Federal Police Commission*, (Fed.F. I. Ct., Civ. F. No. 65353, Megabit 1, 1998 E.C.).

the remand court closed the remand file but the public prosecutor does not allow him to be released on bond.

Article 177(1) of the Civil Procedure Code allows a person who is arrested or restrained without a court order to apply to the court to order his release. Article 179(2) of the Code provides that the court orders the release of the arrestee where it is satisfied that the arrest is unlawful. In the case at hand, the court learned from the respondent that Ato Yoseph's arrest is without any court order. As the arrest is illegal, the respondent is hereby ordered to release the arrestee in accordance to Article 179(2) of the Civil Procedure Code.

Notes and Questions

1. In light of the fact that the bench of the Federal First Instance Court that saw Yoseph's application for the first time made its ruling on the 80th day after the remand file was closed, is it compatible with the purposes of habeas corpus as guaranteed under the ICCPR and the Civil Procedure Code to disclaim jurisdiction over the matter? In its ruling, the Court indicates that Yoseph's application had to be made to the bench that ordered the remand file to be closed. Was the Court suggesting that there was no issue of habeas corpus or that the issue of habeas corpus must be entertained by the criminal bench? Note that Articles 5 and 14 of the Federal Courts Establishment Proclamation No. 25/1996, which empowers the Federal First Instance Court to entertain applications of habeas corpus, makes habeas corpus a civil rather than a criminal matter. Apart from that, the law does not confer jurisdiction over issues of habeas corpus to any particular bench of the Federal First Instance Court.
2. Where the applicant challenges the validity of his detention on the ground that the 15-day period has expired within which a charge has to be prepared per Article 109 of the Cr. Pro. Code, is it right for the court to conclude that the arrest was lawful based on the fact that the arrest was pursuant to a court warrant?
3. Is a ruling on application of habeas corpus appealable? The European Court of Human Rights indicates that under the European Convention on Human Rights, a detainee does not have a right to challenge a ruling of the first instance habeas court to a superior court.[796]
4. The Federal First Instance Court bench to which the arrestee, for the first time, made an application for his physical release rejected his application. The other bench of the Federal First Instance Court to which he applied for habeas corpus, after dismissal of his application by the Cassation Division of the Federal Supreme Court, ordered his release. Wasn't the application barred by *res judicata* when it was submitted for the second time? Was it appropriate for the bench to entertain the matter after it was finally decided by an appellate court and the petition for cassation was rejected? How can the court's decision to review the case be justified?
5. It was almost four months after Yoseph applied for the first time that he obtained a remedy. In light of the requirement of speedy disposition of an application for habeas corpus under the ICCPR, can it be said that Yoseph's right to habeas corpus was not

[796] Trechsel, *Human Rights*, at 489.

respected? Can he claim compensation for the delay before he obtained the remedy pursuant to Article 2 of the ICCPR and for illegal detention under Article 9(5) of the ICCPR?

Aklilu W/Amanuel v. Head of the Debre Birhan Correctional Institution[797]

Background of the Case

On Sene 23, 1987 Aklilu W/Amanuel petitioned the Central High Court, stating that Nigussie Tesfaye, his relative by blood, was arrested on Tir 29, 1987 and remained in custody until the date of application. The petition stated that Nigussie was held without a court order from the date of arrest until Miazia 11, 1987 in *Debre Sina* Correctional Institution, and thereafter in *Debre Birhan* Correctional Institution. The petitioner requested the court to order the physical release of the arrestee with or without bail.

The High Court ordered the head of *Debre Birhan* Correctional Institution to appear before it and explain why the detainee should not be released. The head appeared and told the Court that Nigussie's detention was in accordance with an order given by a Woreda Court on Miazia 10, 1987. The petitioner replied that from Tir 29, 1987 until Miazia 10, 1987, Nigussie remained in custody without a court order. Only on Miazia 10 did the Woreda Court order Nigussie to be detained for an unspecified period. The petition argues that, as provided under Article 59 of the Cr. Pro. Code, a court may not order detention for an unspecified period. The maximum period for which a court may remand an arrestee to custody is fourteen days. Nigussie had been in custody for about ten weeks as of the date he was remanded.

After hearing the arguments of the parties involved in the case, the habeas court reviewed the Woreda Court File (File No. 134/87) in which the Woreda Court ordered Nigussie Tsegaye to remain in custody. From reading the file, the Court learned that on Miazia 9, 1987 the Woreda Court remanded the arrestee to custody for an unspecified period.

Ruling of the Court

The Court ruled:

> Though the petitioner, in his petition written on the 23rd of Sene 1987, stated that Ato Nigussie is arrested without a court order, the court ascertained that the arrest was made on the basis of an order given by the Woreda Court. Thus, the Court did not accept the petitioner's statement that says Nigussie was arrested without court order. [798]

Next, the Court considered the petitioner's argument that since Article 59 of the Cr. Pro. Code does not allow the Woreda court to remand the arrestee for more than 14 days, the

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[797] *Aklilu W/Amanuel v. Head of Debre Birhan Correctional Institution* (Central H. Ct., Civ. F. No. 50/87, Hamle 04, 1987 E.C.).

[798] Ibid.

Court's order directing remand for an unspecified period was invalid. The Court ruled that "in so far as the detention is made by a court order, such procedural irregularities raised by the petitioner cannot be grounds for petitioning habeas corpus under Articles 36 and 37 of Central Courts Proclamation No. 40/1993."[799] The court closed the case and dismissed the petition.

Notes and Questions

1. The Central High Court ruled that once the arrest is made in accordance with a court order, procedural irregularities that occur after the order was made cannot be grounds to petition for habeas corpus. To what extent is the Court's ruling consistent with Article 177 of the Civil Procedure Code, which allows an individual to apply for habeas corpus when he is restrained otherwise than pursuant to an order duly made under the Criminal Procedure Code? Isn't a detention made contrary to Article 59 a restriction of liberty otherwise than provided by the Code? How do Articles 36 and 37 of the Central Courts Proclamation, which are replications of Articles 177 and 178 of the Civil Procedure Code, support the court's conclusion?
2. Should the High Court have to taken as a ground to order his release the fact that from *Tir 29* to *Miazia 9 Nigussie* was detained without a court order?
3. Does Article 59 of the Code allow a court to remand an arrestee for more than 14 days? What is the effect if the court remands the arrestee for more than 14 days? In the case of *Aklilu W/Amanuel v. Debre Birhan Correction Institution*, the Central High Court did not accord significance to this irregularity. The court stated that a remand of more than 14 days does not even constitute a ground for petitioning in habeas corpus.
4. As discussed earlier, Article 19(4) of the FDRE Constitution and Article 9(4) of the ICCPR differ on the scope of persons to whom the right to habeas corpus is guaranteed. How should the conflict be resolved? Should Article 19(4) of the Constitution be read to be consistent with Article 9 of the ICCPR by virtue of Article 13(2) of the FDRE Constitution? Can this be done by a court or should the issue be decided by the Constitutional Inquiry Council?
5. What does being deprived of one's liberty mean? Does it require detention or arrest in a police station? Or does it also include restriction of movement in a limited region or place? Do you see any difference among the Civil Procedure Code, the FDRE Constitution and the ICCPR in this respect?
6. If a person is arrested without being informed of the grounds for the arrest, can the failure to inform him constitute a ground for an action of habeas corpus? Where the arrest is to be made without a warrant, Article 56 of the Criminal Procedure Code does not require the arresting officer to inform the arrestee of the reason for the arrest. Can the arrestee, then, argue that the arrest was not made in accordance with the Cr. Pro. Code?
7. Should the "incorporation" theory be read into Article 177 of the Cr. Pro. Code and Article 19(4) of the FDRE Constitution?

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[799] Ibid.

8. Does Article 9(4) of the ICCPR allow a habeas corpus proceeding to be used as a means of collateral attack, as it is used in the U.S.? The Criminal Justice Policy[800] requires the adoption of laws that allow a convict, who discovers evidence which incontrovertibly shows his innocence of the crime for which he was convicted, to apply to the court which gave the final decision to reconsider its judgment. However, the Policy does not make clear whether the application by the convict is a habeas corpus application.

[800] Criminal Justice Policy, Section 4.8.1.3.

Chapter Nine

Release on Bail

Introduction

After a person is arrested on suspicion that he has committed a crime, it will take some time for the court to decide whether the suspected person has committed the crime. Whether the arrestee should remain in custody or be released pending the decision of the court is one of the central questions in any criminal proceeding. Release on bond and bail are introduced as a response to this question. In both cases the suspect is released pending his criminal case on condition that he will appear where he is needed. As discussed in chapter three, the Criminal Procedure Code gives discretion to an investigating police officer to release arrested persons on bond where any of the conditions provided by law is fulfilled. If the arrested person is not released on bond, he will have another chance to be released conditionally—release on bail, in which a court orders release of the arrestee on condition that he will appear before the court whenever he is needed. The right to be released on bail is a fundamental right recognized by the FDRE Constitution and the ICCPR. As will be made clear in subsequent discussion, like other rights, release on bail is not an absolute right. There are instances where an arrestee/accused may be denied bail.

This chapter deals with the details of the Ethiopian laws regulating release on bail. Cases are included in order to show how the courts apply different provisions of the law dealing with the right to bail.

Section I. Origin and Essence of Bail

1.1. Origin of Bail

Bail has figured since ancient times in both English and Roman law. In both systems, the history of bail antedates recorded law,[801] making it difficult to know its original purpose. As far as their recorded histories show, bail served different purposes under the two systems. Under Roman law, the system of bail from the start was introduced to ensure the continuous attendance of the accused.[802] As the following excerpt shows, in Anglo-American law the idea of bail was originally introduced to relieve sheriffs from the

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[801] For the history of bail under Anglo-American law, see Stephen, A History of the Criminal Law of England 233 (London: MacMillan,1883) (cited in Note, "Bail: An Ancient Practice Reexamined," 70 *Yale L. J.* at 966 (1961) (hereafter Note, "Bail"). For the history under Roman law, see Willem Petrus De Villiers, "Problematic Aspects of the Right to Bail Under South African Law: A Comparison with Canadian Law and Proposal for Reform" (Ph.D. thesis, University of Pretoria Faculty of Law, 2000), available in part at www.upetd.up.ac.za/thesis/submitted/etd-03202006-154631/.../00front.pdf (hereafter De Villiers, "Problematic Aspects").

[802] De Villiers, "*Problematic Aspects*," Chapter Two.

responsibility of attending detainees who were in their charge. In due course bail evolved to serve its current function.

1.1.1. The Development of Bail in Anglo-American Law[803]

The following excerpt discusses the development of the law of bail in England and America.

> The modern institution of release on bail pending trial has evolved from a practice which goes back at least to pre-Norman England. The process of change, however, seems to have occurred without any clear perception of the functions bail ought to serve, with the result that the institution of bail currently consists of an incoherent amalgam of old and new ideas serving more to defeat than to achieve the aims of the criminal process.
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> Since the general notion of bail pending trial antedates recorded English law, its original *raison d'etre* is not altogether certain. It probably arose from the medieval sheriff's desire to avoid the costly and troublesome burden of personal responsibility for those in his charge. Trials were delayed by the infrequent visits of itinerant justices, and many accuseds died because of unsanitary conditions in the prisons. Whether motivated by a concern for their prisoner's well being, or by a desire for pecuniary gain, sheriffs commonly released prisoners either on their own recognizances, with or without requiring the posting of some sort of bond, or on the promise of a third party to assume personal responsibility for the accused's appearance at trial. These *ad hoc* arrangements between sheriff and accused were not systematized and codified into the English legal framework until the Statute of Westminster. The statute attempted to standardize the practice of bail. It specified the conditions under which pretrial release was permissible, limited the power of the sheriff to determining sufficient security in each case, a power subsequently transferred to justices of the peace. To ensure that the accused would reappear on the date set for his trial, a third party, or surety, had to assume a personal responsibility for the accused, on penalty of forfeiture of his own property.
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> In time the granting or denying of bail in England became almost completely a discretionary function of the judiciary. In America, however, federal law and most state laws provide an absolute right to bail in all but capital cases. This emphasis on the individual's absolute right to bail led to practical difficulties in a large country whose frontier territories beckoned invitingly to those with a dim view of their chances for acquittal. The initial judicial reaction was to remind the party furnishing bail that he was a quasi-judicial officer with powers of a jailer, and that he was responsible for procuring the accused's attendance at trial. But since private sureties could not effectively conduct nationwide searches for their itinerant charges, their promise to produce the accused gradually became a promise merely to pay money should the accused fail to appear.

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[803] This text on the development of bail in England and America is taken from Note, "Bail," at 966-70.

> The original reasons for releasing prisoners pending trial are, of course, no longer valid. But a different and less pragmatic justification for pretrial release has been developed. It emphasizes the importance of the presumption of innocence in our system of criminal justice, and decries the imposition of sanctions prior to trial and conviction. A related purpose is to give the accused maximum opportunity to prepare his own defense. In many cases, the accused may be the only person who can identify potential witnesses, or who can win their confidence in learning the whereabouts of others.
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> In theory, if the presumption of innocence is to be given full effect, all prisoners ought to be unconditionally released before trial. But a countervailing consideration limited the scope accorded this presumption. The state must make sure that the accused will appear for trial. It is on this ground that the requirement of posting bond is justified—a financial deterrent to flight. For the same reason the otherwise absolute right to bail has been made discretionary with the judge in capital offences, on the theory that the likelihood of flight is increased where a man is given the "choice between hazarding his life before a jury and forfeiting his or his sureties' property." Even here, however, additional factors might indicate that the risk of flight is insubstantial, and one court has stated that in such case discretion should be exercised in favor of release.

1.1.2. Origin of Bail in Ethiopia

Though there is only scanty information on bail under traditional Ethiopian criminal procedure, there are indications as to the existence of the institution of bail before the existing Cr. Pro. Code was promulgated. W. Plowden is reported to have written the following paragraph in relation to bail in Ethiopian history.[804]

> After an accusation, before the pleadings can commence, both parties must give security approved of by the "af-a-negoos." These bails or securities are answerable for the execution of the sentence whatever it may be, or must suffer it themselves should the principals abscond. But at the end of the trial these first securities may declare off in case of doubting their principals, and others must be found; the only alternatives to the convicted party being chains.

Similarly, Fisher indicates that conditional release on personal guarantee had been regarded as the norm for accused persons under traditional Ethiopian criminal procedure.[805] Only where the accused could not produce an acceptable surety for his conditional release would he be subject to ambulatory custody.[806] For Fisher, the fact that the accuser was responsible for the welfare of the accused while in ambulatory custody, including providing food and shelter, operated as a deterrent to the arbitrary rejection of

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[804] From J. Hotten (ed.), *Abyssinia and its People* (London: Wyman & Sons, 1868), at 121 (excerpting W. Plowden's travel report from the year 1852-53) (cited in Fisher, *Eth. Crim. Pro.*, at 151).
[805] Fisher, "Traditional Crim. Pro.," at 729.
[806] Ibid., at 727.

persons nominated as sureties,[807] thereby increasing the chance that the accused would be released on bail.

1.2. Essence of Bail

The following three paragraphs[808] briefly explain the essence of bail and the purposes it serves.

> An arrestee's interest in release pending a criminal proceeding is of great importance. In highlighting the significance of the arrestee's fundamental interest in liberty the U.S. Supreme Court stated that it is *"second only to life itself in terms of constitutional importance."* An arrestee's right to pre-conviction release is related with the presumption of innocence. The U.S. Supreme Court indicated the strong link between the right to bail and presumption of innocence stating *"unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."* Moreover, detention may prejudice the arrestee's ability to prepare his defense which increases the likelihood of conviction. In fact, studies indicate that *"some defendants unable to make bail are, for that reason alone, more likely to be convicted...and more likely to be sentenced to jail."*
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> Another equally important interest is that of the public. Once a person suspected to have violated the law is arrested, the community has a legitimate interest to ensure that he will continue to be subjected to the criminal process and eventually to punishment if found guilty. Another interest of the public that calls for continuity of the arrestee's detention is the risk that he, if released, may intimidate or otherwise make witnesses change their mind or destroy other evidence. Moreover, the public has an interest in insuring that a person released pending trial will not commit another offence. These public interests demand an adequate assurance that neither of these risks will materialize following release of the arrestee.
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> The bail system – a system which allows the arrestee to be released upon complying with a condition(s) the court sets – is introduced to accommodate both interests. The system provides an opportunity for the suspect to be out of jail pending his trial. And, the condition to be set by the court will be a disincentive for the released suspect not to abscond, destroy evidence or commit another offence, safeguarding the interests of the public.

Section II. Relevant Factors in a Bail Proceeding

In recognition of the significance of bail in the administration of criminal justice, both the FDRE Constitution[809] and the ICCPR[810] provide for the right of a suspect to be released

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[807] Ibid., at 728.

[808] Wondwossen, "Right to Bail," at 3-4.

[809] Article 19(6) of the FDRE Constitution states: "Persons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person."

on bail. As can be implied from the wording of the relevant provisions of both instruments, in principle accused/arrested persons should be released conditionally pending their trial. However, neither instrument rules out the possibility of denial of bail.

From a reading of the relevant laws on bail, one can identify three major factors that influence the court's decision whether to grant bail. These are: the status of the investigation, the type of offence the suspect is alleged to have committed, and the reported behavior of the suspect. This section deals with these circumstances. As discussed below, the denial of bail may be provisional or permanent depending on the ground for denial.

2.1. Status of the Investigation

Art. 59 of the Cr. Pro. Code. Detention

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

(2) *Where the police investigation is not completed, the investigating police officer may apply for a remand for a sufficient time to enable the investigation to be completed.*

The first subarticle requires the court to decide on its own motion whether the arrestee should be released on bail or remain in custody when a police officer brings an arrestee before it within the prescribed time. The court's decision under this subarticle is to be based on the reported behavior of the arrestee[811] and the type of the offence of which he is suspected.[812]

When the investigation is not complete at the time the arrestee appears before a court, per the second subarticle the investigating police officer may bring this fact to the attention of the court and the court will take it into account in its decision whether to grant bail. An investigating police officer may apply for a "remand" on the ground that the investigation is not completed. Literally, the term "remand" refers to sending or returning something back. The English version of Article 59(2) of the Cr. Pro. Code does not make clear whether the term "remand" is used to refer to sending the arrestee or the police investigation file, or both, back to the police station. Both the caption and content of the

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[810] Article 9(3) of the ICCPR provides: "Anyone arrested or detained on a criminal charge...shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."

[811] Article 67 of the Cr. Pro. Code and Article 4(4) of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation.

[812] Article 63 of the Cr. Pro. Code, Article 4(1) of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Articles 19 and 20 of the Anti-Terrorism Proclamation, and Article 6(3) of the Vagrancy Control Proclamation. On whether making the type of the offence a relevant factor to decide on the question of bail, see Wondwossen, "Right to Bail," at 4-37.

Amharic version of Article 59 clearly indicate that the provision refers to sending the arrestee back to the police station which, of course, necessarily includes sending the file as well.

Fisher,[813] after analyzing the alternatives available to the court under Article 59, suggests that "remand" under Article 59(2) refers to sending back to the police station the accused, the case, or both the accused and the case. Whatever the term refers to, the remand is not necessarily for the purpose of further investigation. Fisher suggests that three types of remand are envisaged by Article 59: (1) *remand in custody for trial*, in which the court orders continued custody of the accused for a reason not related to the investigation (remand under Article 59(1)); (2) *investigative remand in custody*, in which the court orders continued custody of the accused for further investigation and suspends the decision whether to grant bail (remand in accordance with Article 59(2)); and *investigative remand with bail*, in which the court sends the case back to the police for further investigation while releasing the accused on bail (remand in accordance with Article 59 (2)).

The first type of remand has nothing to do with the investigation; it is an alternative to release on bail under Article 59(1) of the Code. This remand is to be ordered by the court where the accused is not allowed to be released on bail. According to Fisher's interpretation, the remand under Article 59(2) refers to a remand ordered so that the police will have time to complete the remaining part of their investigation. In his view, where investigation is not completed and where there is no convincing reason to keep the accused in custody for the completion of the remaining part of the investigation, only the case may be remanded to the police for further investigation (the third type of remand). Where the investigation is not completed and there is something yet to be collected from the suspect (if, for instance, he has not yet been interrogated or there is a need to take his fingerprints or blood samples), both the case and the accused should be remanded (the second type of remand).

Notes and Questions

1. Fisher's interpretation of remand under Article 59(2) is not supported by the caption and content of the Amharic version of Article 59. In the Amharic version, the term "remand" is used to mean *sending the arrestee* back to the police station (keeping him in custody). The Amharic version does not envision what Fisher calls *investigative remand with bail*. To which versions should we give effect? In practice, the 14-day duration of remand under Article 59(3) is enforced only where the accused is remanded (either because bail is denied or because the issue of bail is suspended pending completion of the investigation). Once the court releases a suspect on bail, it pays no attention to the 14-day requirement even if the investigation continues and the file is remanded to the investigating police officer.

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[813] Fisher, *Eth. Crim. Pro.*, at 145-146.

2. Should the court, under Article 59(2) of the Code, grant remand whenever the police report that investigation is not completed? In other words, should remand be granted upon demand? Shouldn't the police officer be required to show by either or both of the following that detention of the suspect is necessary to carry out the remaining part of the investigation? 1) that the suspect is not yet interrogated (for some convincing reason such as the condition of his health) or other evidence (such as blood samples or fingerprints) are yet to be taken from the suspect; 2) that release of the suspect on bail before the investigation is completed would have a negative impact on the success of the investigation (for example, because he is likely to interfere with witnesses or tamper with the evidence, justifying denial under Article 67(c) of the Code). In other jurisdictions, the fact that the investigation has not been completed does not serve in and of itself as a ground for denial of bail. In Canada,[814] for example, bail is to be denied where the prosecutor proves that detention is necessary to ensure attendance at trial or for the protection or safety of the public (*i.e.*, a substantial likelihood exists that the accused, if released, will commit a crime or interfere with the administration of justice).

2.2. Type of Offence

Three different laws provide that the type of offence at issue is relevant to the bail proceeding. As provided under Article 63(1) of the Cr. Pro. Code, "whosoever has been arrested may be released on bail where the offence with which he is charged does not carry the death penalty or rigorous imprisonment for fifteen years or more and where there is no possibility of the person in respect of whom the offence was committed dying." Two Proclamations tie the decision whether to grant bail to the type of offence involved. Article 4(1) of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation prohibits release on bail of an arrested person charged with a corruption offence punishable for more than ten years. Article 6(3) of the Vagrancy Control Proclamation prohibits release on bail of a person reasonably suspected of being a vagrant.

If a person is charged with an offence covered by one of the above three provisions, the court is instructed by the legislature not to grant bail to the person. Hence, the type of the offence the accused is charged with is vitally important in the decision whether or not to grant bail.

In some other jurisdictions, legislatures have also enacted laws prohibiting the court from granting bail in certain circumstances. According to Article 316 of the Argentine Criminal Procedure Code, a court is prohibited from granting bail to person who is arrested on suspicion that he has committed a crime that is punishable for more than eight years.[815] Moreover, there are other federal and state laws in Argentine that expressly prohibit bail

[814] The Criminal Code of Canada, Section 515(10) (cited in Kent W. Roach, "Canada," in Bradley, *Crim. Pro.*, at 71).

[815] Alejandro D. Carrio and Alejandro M. Garro, "Argentina," in Bradley, *Crim. Pro.*, at 35.

for persons who are charged with certain types of offences.[816] Though such laws are criticized on constitutional grounds, the Argentine Supreme Court has refused to nullify such laws.[817]

Notes and Questions

1. *Constitutionality of Laws that Prohibit Bail* Apriori:

Does Article 19(6) of the FDRE Constitution allow the legislature to pass laws such as Article 63 of the Code, Article 4 (1) of the Revised Anti-Corruption Special Procedure, and Rules of Evidence Proclamation and Article 6(3) of the Vagrancy Control Proclamation, which prohibit bail *a priori*? This issue was raised before the Federal Supreme Court and the Federal High Court. The same issue was brought to the attention of the Council of Constitutional Inquiry. In *Federal Ethics and Anti-Corruption Commission v. Assefa Abrha et al,*[818] the Federal Supreme Court ruled that as the Constitutional provision, far from recognizing the right to bail as an absolute right, envisages instances where the right may be restricted by law, the legislature is within the scope of its power when it passes laws that provide for *a priori* denial of bail. In the case of *Public Prosecutor v. Engineer Hailu Shaoul et al,*[819] the Federal High Court took the same position on the issue. Wondwossen[820] and Semeneh[821] argue that, although Article 19(6) of the Constitution recognizes exceptions where the right to bail may be restricted, it does not contemplate laws that totally preclude the court from entertaining the question of bail. Though the Council of Constitutional Inquiry agreed with this interpretation of Article 19(6) of the Constitution, it held that laws providing for *a priori* denial of bail do not deprive the court of its discretion to grant or deny bail.[822] According to the Council, even under such laws the court still has the power to evaluate whether the reason for arresting the suspect and to order his release where insufficient reason exists. Note that though the wording of Article 19(6) of the Constitution does not seem to envisage laws such as Article 63(1) of the Code, which removes the Court's discretion to grant bail in connection with certain offences, the commentary[823] on the draft provisions of the FDRE Constitution indicates that Article 19(6) of the Constitution does contemplate laws such as Article 63.

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[816] Ibid., at 37.
[817] Ibid.
[818] *Federal Ethics and Anti Corruption Commission v. Assefa Abrha et al,* (Fed. Sup. Ct., Cr. F. No. 7366, Tikemet 26, 1994 E.C.).
[819] *Federal Public Prosecutor v. Engineer Hailu Shaoul, et al.* (Fed. H. Ct., Cr. F. No. 43246, Hidar 25, 1998 E.C.).
[820] Wondwossen, "Right to Bail," at 16-23.
[821] Semeneh, *Crim. Pro. Law*, at 71.
[822] This position of the Council is reflected in its recommendation on the constitutionality of such laws to the House of Federation in response to the petition submitted to it by Tilahun Abaye and others. "Council of Constitutional Inquiry's Opinion on the constitutionality of a law that prohibits bail for those suspected of Corruption Offence," 23 *J. Eth. Law,* at 146-53 (hereafter "Council's Opinion").The English summary of the Opinion is reported at 23 *J. Eth. Law.*, at 154-56.
[823] *Commentary*, at 34-35.

2. *Meaning of Article 63:* When is an accused eligible for bail under Article 63 of the Code? When is he not eligible?

In *Birhanu Degu et.al v. Public Prosecutor,*[824] the Federal Supreme Court ruled that bail is *to be prohibited* under Article 63 of the Code only where both of two conditions exist – the accused persons are charged for an offence punishable for fifteen years or more, and that the victim against whom the crime is committed is dead or likely to die. In *Birhanu Degu*, the appellants were charged under Articles 27, 32(1)(a), and 238(1) of the Criminal Code for attempting to commit outrages against the constitutional order. This offence was punishable with rigorous imprisonment from three to 25 years. Although the appellants were charged for an offence punishable with 15 years or more, the court ruled that denial of bail was not justified under Article 63 of the Code because the second condition – death of the victim – did not exist. In other similar cases,[825] the Federal Supreme Court has taken a similar position regarding the meaning of Article 63.

In *Public Prosecutor v Tamirat Layne,*[826] the Federal Supreme Court interpreted Article 63(1) of the Code in a completely different way. In that case, the accused persons were charged under the Special Penal Code of an offence punishable with more than 15 years imprisonment. The Court refused to release the accused persons because Article 63 allows bail only where the accused persons are charged with an offence not punishable with 15 years rigorous imprisonment or more or with the death penalty.

According to *Birhanu Degu et.al v. Public Prosecutor,* bail is to be denied where two conditions (punishment and status of the victim) are cumulatively fulfilled. That is, bail is to be *denied* where:

Condition One: The offence with which the accused is charged is punishable with 15 years or more rigorous imprisonment or with the death penalty (*the punishment element*);

AND

Condition Two: The victim against whom the offence (referred in condition one above) has been committed has died or there is a risk that he will die (*status of the victim*).

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[824] *Birhanu Degu et al v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 25845, Tikemet 10, 1999).
[125] *Yasin Shifa and Mesfin Gebere v. Federal Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 25993, Tikemet 10, 1999); *Isayas G/Hiwot et al., v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 26012, Tikemet 30, 1999); *Shimeles Dejene and Dereje Gutema v. Federal Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 26858, Hidar 19,1999).
[826] *Public Prosecutor v.Tamirat Layne et al.* (Fed. Sup. Ct., Cr. F. No. 001/1989).

Although the court did not put it so clearly, under *Public Prosecutor v. Tamirat Layne*, **either** of the above two conditions (punishment or status of the victim) suffices to *deny* bail. That is, bail is not to be granted where:

Condition One: The offence with which the accused is charged is punishable with 15 years or more rigorous imprisonment or with the death penalty (*the punishment element*);

OR

Condition Two: The victim against whom the offence (referred in condition one above) has been committed has died or there is a risk that he will die (*status of the victim*).

With which interpretation do you agree? By starting with the phrase "whosoever has been arrested *may be released on bail*," Article 63 provides for cases where an arrestee is to be released on bail. It is only by *a contrario* reading (by way of inference) that the treatment of non-bailable cases can be inferred from the provision. The direct reading of the provision tells us that *it is where the two conditions discussed above are cumulatively fulfilled that bail may be granted*: the offence alleged to have been committed by the accused *does not carry* the death penalty or 15 years or more rigorous punishment (punishment element) and where there is *no actual or risk* of death of the victim (status of the victim). If two conditions are required to grant bail, then the *acontrario* reading suggests that *nonexistence of one of the conditions would make the case non-bailable*. That is, if the offence with which the accused is charged *is punishable* with 15 years or more imprisonment or with the death penalty, or if the victim of the crime *is* dead or there is a risk of death, then the accused will not be released on bail because the conditions for release on bail are not satisfied.

Let us illustrate the provision by example. Assume that Mr. X is charged with having committed rape in violation of Article 620(2)(a) of the Criminal Code, which is punishable up to twenty years rigorous imprisonment. Further assume that there is no risk that the victim will die as a consequence of the rape. In this case, the accused will not be released on bail because one of the conditions (punishment not to be rigorous imprisonment for 15 years or more) is not fulfilled.

Assume that Mr. X is charged with having committed negligent homicide in violation of Article 543 (1) of the Criminal Code, which is punishable with simple imprisonment from six months to three years or with a fine of Birr 2,000-4,000. Here, too, the accused will not be released on bail for one of the conditions (no actual or risk of death) needed for bail to be granted is missing.

3. To what does the phrase "*the person in respect of whom the offence was committed dying*" under Article 63 of the Cr. Pro. Code refer? According to the interpretation that Article 63 of the Code requires fulfillment of two conditions for denial of bail, should bail be denied if the arrestee is suspected of *any* crime that involves human life (such as

aggravated robbery in which human life was lost) or only if he is suspected of a crime that *targets* human life (homicide or genocide)? In *Public Prosecutor v. Engineer Hailu Shaoul,* in which the accused persons were charged with seven counts, none relating to homicide, the issue was raised before the Federal High Court. Both the Court and the prosecutor interpreted Article 63 as requiring fulfillment of both conditions (punishment with 15 years or more rigorous imprisonment or death and actual or potential death of the victim) to deny bail. The accused argued that the second requirement (actual or potential death of the victim *in respect of whom* the crime was committed) is fulfilled only where a person is accused of homicide or genocide. The accused argued that when a person is charged for committing a crime against the Constitutional order, the victim is the Constitution and the Constitutional order but not an individual. This is true, the argument went, even if individuals die in the course of the perpetration of the crime. Hence, in the view of the accused the mere fact that an individual has died or is likely to die is not relevant to the decision whether to grant bail. Rather, bail should be denied only in cases of crimes targeting a person, as only such cases fulfill the requirement of "*the victim in respect of whom the crime was committed dying.*" The court did reject this argument on the ground that the offence involved in the case (crime against the Constitution and the Constitutional order) resulted in the loss of human life. The Court's position was that actual or risk of loss of human life suffices to fulfill the second requirement (even where the loss of life is incidental to the perpetration of other crime); there is no requirement that the crime be aimed at taking human life.

4. According to the interpretation of Article 63 which prohibits bail where one of the two conditions, how would the issue of bail be addressed where one is charged with numerous offences? Should the court consider the possible punishment to be inflicted on the accused if he is found guilty for all the crimes? Should the court consider the maximum or minimum punishment for each crime, and total up the numbers for each? Can the accused apply for severance of the charges pursuant to Article 116 of the Code on the ground that joinder is prejudicial to him?

Requirement of a *Prima Facie* Case in Bail Proceedings

Logically, in situations where no possibility of bail exists, the suspect will have a keen interest in knowing whether the prosecution's evidence warrants his arrest and continued detention. Hence, suspects usually request the court to confirm whether the prosecutor has a *prima facie* case evidencing the commission of the crime and linking them to the offence. Prosecutors argue that, under Ethiopian law, courts are not allowed to assess the weight of evidence at the time of the bail hearing. To what extent is the court allowed to verify whether the prosecutor has a *prima facie* case during bail proceedings, in particular where bail is prohibited on the basis of the type of offence involved?

In addressing a petition by *Tilahun Abaye and others* for a declaration of unconstitutionality of the Anti-Corruption Special Procedure and Rules of Evidence

(Amendment) Proclamation No. 239/2001, the Council of Constitutional Inquiry incidentally indicated that the court has the power to check whether the prosecutor has probable cause to arrest and prosecute the accused.[827] However, the courts have consistently ruled that the law does not allow them to verify that the prosecutor has a *prima facie* case during a bail hearing. In *Public Prosecutor v. Engineer Hailu Shaoul et al.*,[828] a case decided after the Council made the aforementioned statement, the Federal High Court ruled that no legal basis exists for evaluating the prosecution's evidence during a bail hearing. Some of the defendants appealed against the ruling of the trial court. On appeal, in *Daniel Bekele v. Public Prosecutor*[829] the Federal Supreme Court confirmed the position of the Federal High Court. The Appellate Court indicated that if the trial court weighs evidence of the prosecution during a bail proceeding, there is a risk that it will take a position on the weight of the prosecution's evidence at a preliminary stage, which impacts the court's impartiality during the trial process.

The ruling in *Public Prosecutor v. Andarge Yalew et al.*[830] makes clear the court's firm position on the issue. In this case, the defendants were charged under Articles 58(1), 32(1)(a), and 523 of the 1957 Penal Code. The defendants applied to the court to check whether the prosecutor had probable cause to show that they had committed ordinary homicide. They argued that the prosecutor cited Article 523 of the Penal Code not because he had evidence proving his allegation but to ensure they would not be released on bail. The court rejected the defendants' application, and they appealed the ruling. The appellate court, confirming the lower court's ruling, in black and white terms stated that the bail court *must only consider the punishment prescribed under the law that the prosecutor has alleged to have been violated, not the evidence of the prosecutor.* Wondwossen[831] argues that the purpose of bail, the Constitutional provisions entitling the accused to a specific explanation for his arrest, and the court's duty to enforce the right to liberty call for the court to verify that the prosecutor has a *prima facie* case before it gives a ruling denies bail.

Foreign Experience[832]

> The idea that pretrial detention (denial of bail) is to be allowed only after considering the existence of a *prima facie* case is almost universally accepted. ...[I]n the United States, one of the factors to be considered during bail or detention hearing is the substantiality of the government's evidence against the arrestee.[833] In Canada, bail is to be denied where detention is necessary in order to maintain the confidence in the administration of justice provided that, inter alia,

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827 "Council's Opinion."
828 *Public Prosecutor v. Engineer Hailu Shaoul, et al.* (Fed. H. Ct., Cr. F. No. 43246, Hidar 25, 1998).
829 *Daniel Bekele et al. v. Public Prosecutor* (Fed. Sup. Ct., Cr. F. No. 22909, Megabit 3, 1998).
830 *Public rosecutor v Andarge Yalew, et al.* (Fed. H. Ct., Cr. F. No. 1007/93, Sene 15,1993).
831 Wondwossen, "Right to Bail," at 30-34.
832 Taken from ibid., at 34-35. Minor modifications have been made to footnotes.
833 Para. 3142(g) of the Bail Reform Act of 1984 (cited in Lloyd L. Weinreb (ed.), *Leading Constitutional Cases on Criminal Justice* (New York: Foundation Press, 2001), at 862.

the prosecutor's case is apparently strong.[834] Under Israeli law, the accused cannot be detained in the absence of *prima facie* evidence that substantiates the accusations specified in the indictment.[835] Israeli Supreme Court, in *Zada v. Israel*, has gone to the extent of declaring that "the prosecution's evidence must be subjected to a serious scrutiny that goes far beyond the examination of the evidence in rulings concerning direct dismissal of charges."[836] Article 384 (1) of the Italian *Code Penal Procedure* expressly provides that there must be serious circumstantial evidence of guilt, not mere suspicions, for one suspected of crime to be detained.[837] The Supreme Court of Italy elaborated this standard as follows: "where the circumstantial evidence would lead one to reasonably conclude that the crime charged occurred and that the suspect committed it," the statute is satisfied."[838] Argentine law does not regard weight of evidence/existence of probable cause as relevant to decide on whether or not an arrested person should be released on bail.[839]

2.3. Reported Behavior of the Accused

Article 67 of the Cr. Pro. Code. Bail not allowed

An application for bail shall not be allowed where:

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

This provision authorizes preventive detention in that it requires denial of bail to prevent the arrested person from taking certain future actions. There is no consensus on the appropriateness of denying bail based on the anticipated behavior of the arrestee: arguments exist for and against it. The following paragraphs summarize the debate concerning preventive detention.

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[834] Section 515(10)(c) of the Criminal Code of Canada; Kent W. Roach, "Canada," in Bradley, *Crim. Pro.*, at 71, note 82.
[835] Criminal Procedure Law, Section 2(a)(1), (cited by Eliahu Harnon and Alex Stein, "Israel," in Bradley, *Crim. Pro.*, at 222).
[836] *Zada v. State of Israel*, 50(2) P.D. 133 (1995) (quoted in Eliahu Harnon and Alex Stein, "Israel," in Bradley, *Crim. Pro.* at 222).
[837] Rachel Van Cleave, "Italy," in Bradley, *Crim. Pro.*, at 248.
[838] Ibid.
[839] *Alurralde*, CSJN, 54 Fallos 264 (1893) (cited in Alejandro D. Carrio and Alejandro M. Garro, "Argentina," in Bradley, *Crim Pro.*, at 35).

The Policy Debate[840]

Dressler includes the following discussion on the policy debate relating to preventive detention.

> Critics of preventive detention claim that anticipatory confinement runs contrary to the presumption of innocence, and the principle of limited government authority. Detention of a person simply on the ground that he may do something wrong in the future violates the tenet that "leaving people free to pursue their own projects, free to act in accord with their choices and to take consequences, enhances liberty, dignity, and respect for the individual as a moral agent—albeit at the cost of increasing risk to others."
>
> Put another way, critics maintain that it is wrong to jail persons on the basis of what society fears they will do in the future, rather than for what they have done in the past. Preventive detention statutes violate society's historical belief in human free will, i.e., in the belief that a person has a right to his liberty until it is proven (beyond reasonable doubt) that he has chosen to abuse it.
>
> From a utilitarian perspective, critics contend that it is exceedingly difficult to justify anticipatory confinement (especially in light of the moral principles favoring non-confinement). Too many persons innocent of future dangerousness must be incarcerated in order to ensure the detention of dangerous individuals.
>
> Defenders of preventive detention reason that it is hard to sustain the argument that the government should *never* have the power to detain a person prior to trial, regardless of the circumstances. For example, suppose that an extremely wealthy defendant, one who could pay any bail imposed and who is charged with being a serial rapist-murderer, tells the magistrate, "If you release me, I will be on my private jet within the day to a country that will not extradite me." Or, worse, suppose that he says, "If you release me, I will walk out the door and resume raping and killing until the day I am jailed." Are we to say that the defendant in these extreme circumstances *must* be given the opportunity to be released, even if the magistrate has good reason to believe that the threats are genuine?
>
> Cases involving a high degree of certainty of future flight or criminal conduct, such as that posed in the hypothetical, are admittedly rare. But, if one concedes that preventive detention is justifiable in *this* example, the question no longer is whether the government has the right to preventively detain, but instead is: under what circumstances should society use its legitimate power? As professor Alschuler writes, "sensible people usually do not allow murderers and highwayman to roam among them." Therefore, detention may be justifiable if – but only if – there is "substantial preliminary proof" that those whom society intends to detain are, indeed, "murderers and highwaymen."

[840] Dressler, *Understanding Crim. Pro*, at 643-645.

2.3.1. Unlikely to Comply with Bail Conditions

The first ground in Article 67(a) of the Code for keeping the suspect in custody via denial of bail is that he is "of such a nature that it is unlikely that he will comply with the conditions laid down in the bail bond." This ground triggers two questions. What do "the conditions" refer to? And how can the court reach the conclusion that it is unlikely for the accused to comply with these conditions?

a. "The Conditions"[841] Established in the Bail Bond:

As provided under Article 68 of the Code, if the court allows the application for bail it then determines the conditions on which bail is granted. Simeneh[842] interprets the term "conditions" to mean the continual attendance of the suspect in the criminal proceeding. As the main purpose of bail is to ensure the reappearance of the suspect, Simeneh is right in that the obvious condition to be attached with his release on bail is that he will appear at the time and place determined by the court. The content of the model bail bond on Form VII on the Third Schedule in the Code confirms this interpretation. However, Article 67(a) of the Code uses the word in the plural (conditions/obligations) implying that there is more than one condition/obligation to be in the bail bond. The phrase "the court may at any time…reconsider the *conditions* on which bail has been granted" under Article 74 of the Code also suggests the plurality of the conditions to be imposed on the bail bond. What other conditions may the court then impose on the suspect? Article 6 of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation authorizes the court to order: a) the restriction of the suspect's movement within a limited region or place; b) the suspect not to reach places where he might tamper with evidence; c) the suspect to report to the relevant authority within a prescribed time; and d) the suspect not to go abroad. The court is expressly authorized to impose these conditions in corruption cases. Can the court impose similar conditions in other cases as well? What other conditions can the court impose? Since the conditions under Article 6(a), (c), and (d) of the Proclamation are intended to minimize risk of flight (the principal condition), there is no reason for the court not to be able to impose such conditions in the bail bond by exercising its power to set bail conditions under Article 68 of the Code.

b. Unlikelihood of the Applicant to Comply with the Condition(s):

As suggested by Simeneh,[843] it is a difficult job for the court to determine whether the arrestee is likely to comply with the bail conditions. The decision concerns the future conduct of the applicant, which presents the risk of arbitrary decision making. In light of the vital interests at stake – deprivation of liberty on the part of the individual and risk of flight on the part of the public – the court should be extremely careful to avoid arbitrariness in its decision making. Case law shows that the gravity of the offence and

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[841] The Amharic version of the provision refers to "obligations," instead of "conditions."
[842] Simeneh, *Crim. Pro. Law*, at 246.
[843] Ibid.

facts stated on the charge are taken by the courts as relevant factors in deciding whether the arrestee is likely to comply with the bail conditions.

Gravity of the Offence

In *Federal Public Prosecutor v. Isayas G/Hiwot et al.*,[844] Federal *Public Prosecutor v. Eyob Tilahun*,[845] and *Federal Public Prosecutor v. Birhanu Degu et al.*,[846] the accused persons were charged with attempting to commit outrages against the Constitution or Constitutional order in violation of Articles 27(1), 32(1)(a) and 238(1)(a) of the Criminal Code. In all three cases, the Federal High Court, by majority, considered the gravity of the offence that the accused persons were alleged to have committed (and the possible punishment to be inflicted upon conviction) as a ground to conclude that the applicants were not likely to comply with the conditions of bail.

In all cases, the accused persons appealed against the ruling of the Federal High Court. The appellate Court ruled in all three appeals[847] that the Federal High Court's reliance on the gravity of the offence to deny bail under Article 67 was unacceptable, and reversed the lower court ruling on the ground that the public prosecutor had not adduced adequate evidence to establish that the applicants would not attend the trial if released on bail. In *Eyob Tilahun v. Public Prosecutor*,[848] the Court expressly stated that the allegation on the charge that a grave offence has been committed in itself is not to be considered as adequate reason to deny bail under Article 67 of the Code.

Facts Stated in a Charge

In *Federal Public Prosecutor v. Abaynhe Admasu et al.*,[849] the Federal High Court, on the basis of the facts in the charge describing the manner of commission of the crime, reached at the conclusion that it was not possible to assume that the accused persons would attend their trial and it was difficult to believe that they would not commit other crimes. The court denied bail on these grounds. The ruling of the trial court was challenged before the Federal Supreme Court. The appellate court affirmed the lower court's ruling and dismissed the appeal, stating that the major basis for the decision on the question of bail is the charge itself.[850]

In another case,[851] the Federal Supreme Court disregarded the facts alleged in the charge as not relevant in a bail proceeding. Melese Bekele[852] was charged under Article 407 (1)

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[844] *Federal Public Prosecutor v. Isayas G/Hiwot, et al.* (Fed. H. Ct., Cr. F. No. 45071, Ginbot 15, 1998 E.C.).
[845] *Federal Public Prosecutor v. Eyob Tilahun* (Fed. H. Ct., Cr. F. No. 45727, Hamle 13, 1998 E.C.).
[846] *Birhanu Degu et al v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 25845, Tikemet 10, 1999).
[847] *Ibid.*; Isayas *G/Hiwot et al. v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 26012, Tikemet 30, 1999); and *Eyob Tilahun v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 27093, Hidar 8, 1999).
[848] *Eyob Tilahun v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 27093, Hidar 8, 1999).
[849] *Federal Public Prosecutor v. Abaynhe Admasu et al.* (Fed. H. Ct., *Cr. F. No.* 45988, Sene 1, 1998 E.C.).
[850] *Abaynhe Admasu et al. v. Federal Public Prosecutor* (Fed. Sup. Ct., Cr. App. No.26133, Fed. Sup. Ct., Tikemet 10, 1999).
[851] *Melese Bekele v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 28370, Tir 18, 1999).

(c) of the Criminal Code. The trial court denied bail on the ground that the charge alleged that he tried to escape arrest and that his arrest was made possible with the help of the public. The court denied bail for it concluded that the accused, if released on bail, would not attend his trial and would tamper with evidence. The appellate court ruled that because the charge alleged that the accused attempted to escape and his arrest was effectuated with the help of the public, and the accused denied those allegations, the charge had yet to be proved by evidence. The court emphatically stated that *it is not proper to assume that the arrestee has done what is alleged in the charge and to deny bail based on that assumption.*

Notes and Questions

1. The Federal High Court and the Federal Supreme Court have opposite views on the relevance of the gravity of the offence to the determination whether the accused is likely to comply with the bail conditions. With which court do you agree? Isn't the gravity of the offence taken into consideration by the legislature itself under Article 63 of the Code? Once the offence is found to be bailable (because it will not result in punishment of rigorous imprisonment for 15 years or more), should the seriousness of the offence be taken into consideration for the purpose of proving factors listed under Article 67?
2. In deciding whether to grant or deny bail under Article 67(a) of the Code, what standard of proof should the court apply to a showing by the prosecution that the accused is not likely to comply with the bail conditions?
3. The Federal Supreme Court took contradictory positions in the two cases as to the relevance of facts alleged in the charge to the decision whether the accused is likely to comply with the bail conditions. With which position do you agree? And why?

2.3.2. Likely to Commit Other Offences

Another ground to deny bail is the suspicion that the applicant, if released, will commit other offences. If the applicant, after released on bail, commits another offence, it is unlikely he will return to the court to attend the criminal proceeding relating to the original crime. So, if bail is denied based on a reasonable suspicion that he will commit another crime, the denial serves dual purposes: to prevent him from committing another offence and to ensure that he will continue to attend his trial.

There is no definite way of knowing whether an applicant released on bail will commit other offences, for this factor, like the first, relates to future behavior. The court can only try to minimize arbitrariness in its ruling by carefully weighing factors predictive of the likelihood of the accused to commit a crime following his release. It is not easy to identify these factors. The Federal Supreme Court has relied on facts alleged in the charge brought by the prosecutor to infer the likelihood that the accused will commit a crime after his release on bail.

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[852] *Federal Public Prosecutor v. Melese Bekele* (Fed. H. Ct., Cr. F. No. 50095, Hidar 15, 1999).

Facts Stated in a Charge

In the case of *Abaynhe Admasu et al. v. Federal Public Prosecutor*[853] the accused persons were charged for attempting to commit outrages against the Constitution and the Constitutional order in contravention of Articles 27(1), 32(1)(a) and 238(1)(a) of the Criminal Code. The Federal Supreme Court emphasized the significance of the content of the charge in ruling on the question of bail in general as well as the specific question of the likelihood the applicant would commit a crime if released on bail. The Court found that, although the accuracy of allegations in the charge is to be determined based on evidence produced at trial, the allegations can be trusted for the purpose of the bail proceeding. The facts stated in the charge are indicative of the possibility that accused persons, if released on bail, would commit other crimes.

In the case of *Major Argaw Habtamu et al. v. Federal Public Prosecutor*,[854] Major Argaw and others were charged under Articles 27(1), 32(1)(a), 238(1) (a), and 258 of the Criminal Code. The trial court, relying on the facts alleged in the charge, concluded that the accused persons were likely to commit other crimes if released on bail, and denied their bail. The accused persons appealed against the ruling of the lower court.

The Federal Supreme Court made the following observations in connection with the significance of the content of the charge in a bail proceeding.

> As we have seen from the details of the charge, the accused persons, in support of the call by a secretly established illegal group identifying itself by the name "*Yetegibar League*" with the objective of overthrowing the government by force and riots, are found in possession of illegal writings and illegal arms. Without prejudice to the fact that whether or not this criminal activity has been committed is to be seen in the future in light of the evidence to be produced during trial, for the purpose of bail the facts on the charge can be taken into account in order to assess whether the accused persons, if released on bail, are likely to commit the offence.
>
> The charge shows that there is an illegal and secretly established and armed group. The accused persons are found while moving in support and for the accomplishment of the aims/objectives of this group. Supporting the armed and secretly established group through collecting/gathering illegal arms and preparing provocative written materials, in itself, suggests that it is not possible to assume that they will not commit a crime if released on bail.
>
> Therefore, on the basis of the content of the charge we assume the possibility stated under Article 67 and rejected/dismissed the appellant's appeal in accordance to Article 75 (2) of the Code.[855]

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[853] *Abaynhe Admasu et al v. Federal Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 26133, Tikemet 10, 1999E.C.).

[854] *Major Argaw Habtamu et al. v. Federal Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 26578, Tahisas 26, 1999E.C.).

[855] Ibid.

Notes and Questions

1. By what standard of proof should the public prosecutor or the police establish that the applicant is likely to commit other offences? List some standards.
2. Since the accused is entitled to a presumption under Article 20(3) of the FDRE Constitution that he has not committed a crime for which he has been arrested, does it make sense to retain Article 67(b) of the Code, which contemplates cases an accused may be presumed to commit a crime in the future? In *Public Prosecutor v. Isayas G/Hiwot*,[856] the accused persons were charged with attempting to commit outrage against the Constitution and the Constitutional order in violation of Articles 27(1), 32(1) (a) and 238(1)(a) of the Criminal Code. The Federal High Court took the gravity of the offence (punishable with rigorous imprisonment from three to 25 years) as a ground to conclude that the accused persons were likely to commit another offence if released on bail. The court thus denied bail under Article 67(b) of the Code.
3. The Federal Supreme Court on several occasions[857] has emphasized that the public prosecutor must produce clear and convincing evidence substantiating the risks envisaged under Article 67 in order to justify a denial of bail under that article. The Court has stressed that courts should not make their own assumption that the applicant, if released on bail, may commit a crime or may not comply with the bail conditions.

2.3.3. Likely to Interfere with Evidence of the Prosecutor

The third ground to deny bail based on the supposed behavior of the arrestee is the likelihood that he might interfere with the criminal proceeding through interference with the prosecution's evidence. Trechsel justified this ground of denial of bail on the right and obligation of the state to see that justice is done.[858]

This ground of denial of bail is recognized in other jurisdictions, too. In the U.S., the Bail Reform Act of 1984 authorizes refusal of bail where a risk that the arrestee, if released, "will obstruct justice or attempt to obstruct justice or interfere with a prospective witness or juror" cannot be averted through a condition or combination of conditions.[859] The Canadian criminal code requires a court of law to allow continuation of detention where there is a substantial likelihood that the arrestee, if released, will interfere with the administration of justice.[860] The French criminal procedure code recognizes interference

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[856] *Public Prosecutor v. Isayas G/Hiwot* (Fed. H. Ct., Cr. F. No. 45071, Ginbot 15, 1998 E.C.).

[857] *Birhanu Degu et al v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 25845, Tikemet 10, 1999); *Yasin Shifa and Mesfin Gebre v. Federal Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 25993, Tikemet 10, 1999); *Isayas G/Hiwot et al. v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 26012, Tikemet 30, 1999); *Shimeles Dejene and Dereje Gutema v. Federal Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 26858, Hidar 19, 1999 E.C.); and *Eyob Tilahun v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 27093, Hidar 8, 1999).

[858] Trechsel, *Human Rights.*, at 525.

[859] 18 U.S.C. Sec. 3142(f)(2)(B).

[860] The Criminal Code of Canada Sec. 515(10) (cited in Kent W. Roach, "Canada," in Bradley, *Crim. Pro.*, at 71).

with witnesses or evidence as a legitimate ground to deny bail to an accused charged with a major felony.[861]

The European Court of Human Rights decided a case involving the issue of interference with the prosecution's evidence.[862] The case concerned an applicant who was arrested on suspicion of his involvement in a mafia-type organization. At the time of his arrest, the applicant was Deputy Director of the Civil Secret Service for Sicily, in Palermo. In the past he served in several top governmental positions including Head of the Criminal Investigation Police and Principal Private Secretary to the Anti-Mafia High Commission. Taking into account the nature of the offence and the applicant's personal connection with many of the witnesses, the Court held that "the fear of the authorities that he would, if released, 'exert pressure on witnesses or tamper with other evidence' was justified."[863]

Relation Between Articles 63 and 67 of the Criminal Procedure Code

Both Articles 63 and 67 of the Code deal with factors to be taken into consideration where bail is at issue. Even if the offence that the suspect is alleged to have committed is not classified as non-bailable under Article 63(1) of the Code or other relevant laws, there is still a possibility that the suspect will not be released on bail. Article 63(3) of the Code reminds the judge to refer to its Article 67, which lists grounds for denial of bail for otherwise bailable offences. These grounds are purely related to the reported behavior of the suspect. Article 67 recognizes three different grounds to deny bail. As can be inferred from Article 63(3), in cases where the alleged offence is bailable, upon application of the police or prosecutor the court should inquire into the existence of any of the conditions listed under Article 67. Where the offence is not bailable, there is no point in resorting to Article 67.

The rulings in *Public Prosecutor v. Yasin Shifa and Mesfin Gebre*[864] and *Public Prosecutor v. Isayas G/Hiwot et al.*[865] clearly show that the Federal High Court misunderstands the relationship between the two provisions. In both cases, the accused persons were charged with attempting to commit outrages against the Constitution or the Constitutional order in violation of Articles 27(1), 32(1) (a), and 238(1) (a) of the Criminal Code. The offences were punishable with more than 15 years rigorous imprisonment, so Article 63 of the Cr. Pro. Code prohibited the court from releasing the accused persons on bail (making reference to Article 67 unnecessary and perhaps inappropriate). However, the Court denied bail on the ground that the cumulative reading of Articles 63 and 67 led to the conclusion that the persons, if released on bail, would not comply with the bail conditions and would commit other offences.

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[861] Richard S. Frase, "France," in Bradley, *Crim. Pro.*, at 165.
[862] *Contrada v. Italy* (ECHR 1998) (cited in Trechsel, *Human Rights*, at 525).
[863] Ibid.
[864] *Public Prosecutor v. Yasin Shifa and Mesfin Gebre* (Fed. H. Ct., Cr. F. No. 45670, Sene 7, 1998 E.C.).
[865] *Public Prosecutor v. Isayas G/Hiwot et al.* (Fed. H. Ct., Cr. F. No. 45071, Ginbot 15, 1998 E.C.).

Note and Question

For the court to refuse bail on any of the grounds listed under Article 67 of the Cr. Pro. Code, what standard of proof should the prosecution's showing need to meet? In the United States, the prosecutor is not supposed to "directly" establish the likelihood that the given risks are likely to happen if the accused is released on bail. Rather, the prosecution is to "indirectly" convince the court to refuse bail based on one or more risks. According to the Bail Reform Act of 1984, a judicial officer should order the detention of an accused where the prosecution, by clear and convincing evidence, demonstrates that no condition or combination of conditions will reasonably assure that these risks would not occur.[866]

Section III. Amount of Bail

If the court decides to release the accused on bail, the next difficult decision is determining the amount to be deposited or guaranteed as bail. As provided under Article 69(1) of the Code, in principle, the choice of the guarantors and the amount to be guaranteed are matters within the discretion of the court. However, the discretion is not absolute. The legislature provides guidelines, under Article 69(2) of the Code, which bound the court's discretion. The court is to consider together the four factors listed in Article 69(2) for purposes of determining the appropriate amount of bail and choosing guarantors.

Dawit Kassu v. Public Prosecutor[867]

Dawit Kassu, the appellant, was charged under Article 657(1) of the 1957 Penal Code for writing two cheques with insufficient funds to Amare Wodajo. During a bail proceeding, the public prosecutor informed the trial court, in this case the Federal High Court, that the accused planned to abscond and requested the court to take this factor into consideration in determining the amount of bail. The accused stated that he had no intention of leaving the country and objected that the prosecutor's application was unfounded. The Court accepted the prosecutor's application and ordered the accused to deposit Birr 350,000 or provide a guarantor for that amount.

Dawit Kassu appealed the amount of bail to the Federal Supreme Court. In his memorandum of appeal, he stated that though the lower court is supposed to decide the amount of bail on the basis of factors listed under Article 69(2) of the Code, it wrongly based its decision on the unsubstantiated allegations of the prosecutor and required him to deposit an amount not affordable to him. He requested the appellate court to reduce the bail amount to a sum he could afford.

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[866] 18 U.S.C. Sec. 3142(f) (cited in Dressler, *Understanding Crim. Pro.*, at 642).

[867] *Dawit Kassu v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 11554, Ginbot 22, 1995 E.C.).

The prosecutor stated that because the amount determined by the lower court was based on the fundamental purposes of bail (affording an opportunity for the accused to be conditionally released and to ensure that he would continue to attend his trial), there was no reason to object it. The prosecutor thus requested the appellate court to dismiss the appeal and confirm the decision of the lower court.

The appellate court noted that the lower court rightly granted bail because the offence the appellant was charged with was bailable. The court observed that the lower court's determination of the amount of bail was influenced by information provided by the prosecutor that the appellant planned to escape. However, the prosecutor did not produce any tangible evidence to support his allegations. Nor did the lower court, by its own motion, try to verify the prosecutor's allegations. Though Article 69(2) of the Code lists factors that the court should consider in determining the amount of bail, the record of the lower court's ruling did not show that the factors were taken into account. The lower court thus lacked justification for requiring the appellant to deposit the stated amount. The Federal Supreme Court found that requiring an excessive amount of bail without legal justification amounts to a denial of bail, which is unacceptable.

Finally, in order to decide the appropriate amount, the appellate court sought information about the appellant from the appellant himself. The appellant stated that he had a permanent address and a job, that he had a business license to import materials and to do business domestically, and that he had various business materials in stock at a value of over Birr 850,000. The court reduced the required bail amount to Birr 20,000, indicating that it made the decision by taking into account the factors listed under Article 69(2) of the Code.

Notes and Questions

1. *Seriousness of the Charge*: The more serious the charge, the higher the amount of bail to be required. How is the seriousness of the charge measured? Should the court consider to the gravity of the offence as reflected by the punishment attached to it? Should aggravating and mitigating circumstances be taken into consideration at this stage?
2. *The Likelihood of the Accused's Appearance*: The more likely the appearance of the accused, the lower the amount of bail – and *vice versa*. What factors determine the likelihood of the appearance of the accused? Should factors such as his tie to the community, his social status (married or not, employed or not, etc.) be taken into consideration? Should an accused who is married and/or employed be required to deposit a lower amount of money than a single or unemployed person? Doesn't such a distinction on the basis of social status conflict with the language of Article 25 of the FDRE Constitution that states: "the law shall guarantee to all persons equal and effective protection without discrimination on grounds of...or other status"?
3. *The Danger to Public Order which his Release May Occasion*: The relevance of this factor to the amount of bail is not that clear. Logically, this factor is related to the question of whether the accused should be released on bail rather than to the amount of

bail. If his release would be dangerous to the public order, perhaps because he is suspected for a heinous crime, it is hardly possible to see how setting a higher amount of bail would mitigate or avoid the danger to the public order. The reason for the problem is the fact of his being released, not the amount of bail he is required to deposit. The French criminal procedure code contains a similar provision. Under its Article 145, persons charged with major crimes *may be denied bail* where the magistrate finds, *inter alia*, that pretrial detention is the only way to end the exceptional and persistent disturbance of the public order, caused by the seriousness or circumstances of the offence. In *Letellier v. France*,[868] the European Court of Human Rights stated that such a justification for denial of bail could only be allowed in exceptional cases, upon proof of an actual threat to the public order if the defendant were to be released.

4. *The Resources of the Accused and his Guarantors*: This is the most relevant factor in determining the amount of money to be deposited or guaranteed because it directly relates to the accused's capacity to meet bail. The wealthier the suspect and his guarantors, the higher the amount of bail, and *vice versa*. Does that mean that two persons suspected to have committed a similar offence may be required to deposit a different amount of bail if their economic condition is different? Is there an absolute minimum below which the court should not go in determining the amount of bail? Should there be? If the suspect is an indigent with no money to deposit or having no guarantor, how would the court deal with the question of his bail? If this person is not released simply because he is poor, wouldn't that constitute discrimination on the basis of wealth, which is prohibited by Article 25 of the FDRE Constitution?
5. *Interplay between the Different Factors*: What weight should be attached to each factor under Article 69? In *Public Prosecutor v. Ayelech Tesfaye*,[869] the accused was charged under Articles 27(1) and 523 of the 1957 Penal Code. The crime was punishable with rigorous imprisonment from five to 20 years. The trial court decided to release her upon a deposit of Birr 1,000. On appeal, the Federal Supreme Court stated that the lower court failed to consider Ayelech's economic status, and reduced the bail amount to Birr 300 on the ground that she, as a daily laborer, could not afford more than that amount. In *Public Prosecutor v. Dawit Kassu*,[870] the accused was charged under Article 657(1) of the 1957 Penal Code for drawing a cheque with insufficient funds, which is punishable with simple imprisonment or, depending on the gravity of the case, with rigorous imprisonment not exceeding five years and a fine. The trial court required the accused to deposit bail in the amount of Birr 350,000. On appeal, the Federal Supreme Court reduced the amount to Birr 20,000.

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[868] Richard S. Frase, "France," in Bradley, *Crim. Pro.*, at 165, note 159.

[869] *Public Prosecutor v. Ayelech Tesfaye* (Fed. H. Ct., Cr. F. No. 34760, Tahisas 3, 1999 E.C.).

[870] *Public Prosecutor v. Dawit Kassu. The ruling of the court can be traced from Dawit Kassu v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 11554, Ginbot 22, 1995 E.C.).

As is evident from the two cases, the person who was suspected of a serious offence (attempted homicide in the second degree) was required to deposit a lesser amount of bail than the person suspected of a less serious offence (drawing a cheque on insufficient funds). To what do you attribute this disparity? Should there be guidelines for the courts so as to prevent arbitrariness in setting the bail amount? Should the analysis vary from case to case or can a certain formula be developed? Or could each factor be allocated a percentage weight?

Where one factor calls for a high bail amount and the other for a reduced amount, how may the court determine the appropriate amount of bail? In the case of Ayelech, for example, the crime she was suspected of was a "serious" one calling for a high bail amount, but she had no resources, calling for a lower amount. How does the court determine the amount required to be deposited? Is there any explanation for giving more weight to her economic condition than the gravity of the offence? Does such an approach increases the chance the accused will be released (one purpose of bail) while decreasing the capacity of the bail to compel the released person not to abscond? Do we have any reason to give more weight to one of the purposes of bail than the other

6. *Practice Considering the Relevant Factors while Determining the Amount of Bail*: Article 69 provides the factors for determining the amount of bail. The Federal Supreme Court has repeatedly emphasized the importance of taking these factors into consideration in determining the amount of bail. The Court has expressly stated that a bail set without taking these factors into consideration would be excessive, which would indirectly amount to a denial of bail. For example, in *Dawit Kassu v. Public Prosecutor*, the Court criticized the Federal High Court for not taking these factors into consideration. Making similar comments on the rulings of lower courts, the Supreme Court in *Wolela Ahemed Mehamed v. Public Prosecutor*[871] reduced the amount of bail from Birr 50,000 to Birr 10,000; in *Mohamed Muctar v. Public Prosecutor*[872] from Birr 6,000 to Birr 2,000; in *Mekuanent Birhanu v. Public Prosecutor*[873] from Birr 7, 000 to Birr 2,000.

However, in all these cases, apart from a statement by the Federal Supreme Court that it took the factors in Article 69(2) into account, the record does not show that the amounts fixed by the Court were made on the basis of those factors. Nowhere in the decision does the Court indicate its decision on the amount of bail was influenced by the seriousness of the offence, the likelihood of the accused's appearance, the threat to public order which his release may cause, and the resources of the accused and his guarantor.

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[871] *Wolela Ahmed Mehamed v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 15255, Miazia 15, 1996).
[872] *Mohamed Muctar v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 14646, Megabit 9, 1996).
[873] *Mekuanent Birhanu v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 28455, Yekatit 15, 1999).

Section IV. Review of a Ruling on Question of Bail

4.1. Review by the Court that Gave the Ruling

A court can review its own ruling on a question of bail upon application of either party. Basically, the review will result in a change of the court's previous ruling if new facts are presented or if the facts have changed on which the ruling was based.

The court's power to review its ruling is provided under Article 74 of the Cr. Pro. Code. This provision authorizes the court to reconsider its ruling and to revoke bail and order the released person to be detained where facts which were unknown when bail was granted are later disclosed. The court may reconsider its decision by its own motion or upon application by the prosecution. A similar provision is incorporated into Britain's Bail Act 1976. Section 5B of the Act empowers the court to reconsider the question of bail upon application of the prosecution where information which could change the previous ruling of the court comes to light after the court decides on question of bail.[874] Similarly, the U.S. 1984 Bail Reform Act allows a judicial officer to reopen a detention hearing after a determination is made where information having a significant effect on the decision whether bail should be granted, which was not known at the time of the hearing, is afterwards disclosed.[875]

Neither the Cr. Pro. Code nor any other law expressly authorizes the accused to apply for a review of the ruling denying bail. In other jurisdictions, laws require courts to review their decisions (by their own motion or upon application of the detainee) if the accused remains in custody. For instance, in Canada, it is mandatory for the court to conduct automatic judicial reviews where an accused who is suspected of a less serious offence remains in custody for more than 30 days, or an accused charged with a serious offence remains in custody for 90 days.[876]

In England, accused persons used to renew their bail applications each time they appeared before a court of law during the investigation stage of a criminal proceeding. To put an end to such successive bail applications, the Divisional Court, in *Nottingham Justices Davies (1981),* held that "a decision by one bench of magistrates that bail should be refused was a finding to which *res judicata* or something akin to it applied, and the defence could not therefore re-open the question of bail unless they had some fresh argument to put forward which had not been before the magistrates who originally remanded in custody."[877] The issue of successive application of bail was later addressed by Part IIA of the Criminal Justice Act 1988. According to this law, the accused has the right to make two applications for bail: at the time when he appears before a court of law for the first time and when he is brought before the court for the second time, which is

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[874] Sprack, *Practical Approach,* at 107-08.
[875] Bail Reform Act of 1984 (18 U.S.C. Sec. 3142 (f)).
[876] Kent W. Roach, "Canada," in Bradley, *Crim Pro.*, at 72.
[877] Sprack, *Practical Approach,* at 104.

normally one week after his first appearance. Unless the defence produces new arguments, once the second application is rejected any subsequent application would be considered in the discretion of the court. Although the arrestee does not have a right to make further applications for bail, the law requires the court that has refused bail to consider at each subsequent hearing whether reasons exist to reverse its previous decision.[878]

Though Ethiopian law is silent on this point, an accused who is not granted release on bail may be able to make another application for bail to the same court, depending on the ground of denial. If the court's decision is based on either the fact that investigation is not completed or one of the factors listed under Article 67 of the Cr. Pro. Code, the reason for denial of bail could become irrelevant at some point, making the continued detention unreasonable. At that time, there is no reason for the accused not to apply to the court to revise its previous decision. As noted by the European Court of Human Rights, in the long run, "justifications of the investigation no longer suffice and 'in the normal course of events the risks diminish with the passing of time as inquiries are effected, statements taken and verifications carried out.'"[879] The Court indicated that "release has to be ordered as soon as the 'continuing detention ceases to be reasonable.'"[880]

On the other hand, if the court's decision was based on the fact that the accused is charged with a non-bailable offence it would be pointless for the accused to make further applications unless the public prosecutor changes the charge against the accused from a non-bailable to a bailable offence.

Notes and Questions Article 74

1. Article 74 of the Code seems to assume that facts supporting revision of the previous decision of the court were not known to the court or the prosecution when the previous decision was made. What if the prosecution on the earlier occasion omitted to supply the missing facts to the court? The legislature that passed the Bail Act 1976 foresaw that "there may be other occasions in which, through negligence, the prosecution has made a mistake and it might not be appropriate to withdraw someone's bail because of another mistake in the system."[881] In support of this, John Sprack indicated that "information is 'available to the court' even if it was not introduced by the prosecution on the earlier occasion,"[882] in which case the information cannot be considered new.

2. If an accused's application for bail at the first bail hearing is refused by a court, should the accused apply to the court to revise its previous ruling or should the court, by its own motion, consider at each subsequent hearing whether its decision should be

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[878] Ibid., at 105.
[879] *Clooth v. Belgium*, para. 43; *W v. Switzerland*, para. 35; *IA v. France*, para. 109; *Debboub alias Husseini Ali v. France*, para. 44 (all cited in Trechsel, *Human Rights*, at 526).
[880] *Jablonski v. Poland*, para. 83(cited in Trechsel, *Human rights*, at 516).
[881] *Hansard* (HC, Standing Committee B) 27 January 1994, col. 336 (cited in Sprack, *Practical Approach*, at 108).
[882] Ibid.

changed? Does Article 13 (1) of the FDRE Constitution, which requires all state organs including the court to respect and enforce human rights, empower the court to play an active role in enforcing the individual's right to be released on bail?

4.2. Review through appeal

Art. 75 of the Cr. Pro. Code—Application to court of Appeal where bail refused

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

Art.5 of Proc. No. 434/2005

1. *Any one aggrieved by the decision of the lower court on the issue of bail has the right of appeal in accordance of Article 4.*
2. *Where an appeal is taken objecting to? the decision granting bail or the amount of bail, the decision of the lower court shall stay from being executed*
3. *Where the court decides to release the suspect or the accused on bail, it shall state in its decision that the suspect or the accused be released upon completion of the necessary formalities within such reasonable time as it deems necessary unless the investigator or prosecutor produces evidence showing it has lodged an appeal against it in the appellate court.*

The principle of appeal in criminal cases is provided under Article 181 of the Code, which allows an appeal only from a judgment convicting, discharging, or acquitting an accused person. Article 184, by expressly prohibiting appeals on interlocutory matters of any kind, indicates that appeal is to be lodged only where the case is finally disposed of. Article 75 of the Code, which authorizes appeal from a bail ruling, can be seen as an exception to the principle governing appeal in criminal cases.

Notes and Questions

Article 75 expressly authorizes an accused whose request for bail was denied by the lower court to appeal the denial to the superior court.

1. If the court allows the accused to be released on bail upon depositing a certain amount of money, does Article 75 allow him to appeal the amount of bail? Is it right for the prosecutor to challenge the appeal on the ground that the lower court did not refuse to

release the appealant on bail? In *Mehamed Muctar v. Public Prosecutor,*[883] the appellant, who was charged under Article 657(1) of the 1957 Penal Code before the Federal High Court for issuing a cheque with insufficient funds, challenged the High Court's bail ruling on the ground that the amount required to be deposited (Birr 6,000) was not computed based on the criteria provided by law. One of the objections raised by the prosecutor was that the law does not allow an appeal (challenging the amount of bail) where the court does not refuse bail. The Federal Supreme Court ruled that even if the appellant is granted bail, if he cannot afford the amount of bail he will not, practically, be released. This amounts to a denial of bail. Hence, the court ruled that an appeal challenging the amount of bail is within the spirit of Article 75 of the Code. Do you agree?

2. What is the implication of the ruling of the Supreme Court in *Mehamed Muctar v. Public Prosecutor*? Does the ruling suggest that the right of the accused to appeal is conditional on whether the amount is *affordable* to him rather than whether the amount is determined on the basis of factors listed under Article 69? If the accused disagrees with the amount of his bail, but nonetheless deposits the required amount before lodging an appeal, might the fact that he paid his bail undermine his appeal by suggesting that the amount of bail is affordable to him?
3. Article 5(2) of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation expressly states that the prosecutor may appeal the amount of bail in cases where the court allows a person accused of corruption to be released on bail. Can the prosecutor appeal the amount of bail under Article 75 of the Code in cases other than corruption offences?
4. Does Article 75 of the Cr. Pro. Code allow the prosecutor to appeal a court ruling granting bail to an accused? The following two cases show that the Regular Criminal Division and the Cassation Division of the Federal Supreme Court have taken different positions on this issue.

Public Prosecutor v. Derebe Demissie et al.[884]

In this case, the respondents were charged before the Federal High Court for causing terror in violation of Articles 32 (1)(a) & (b) and 252 (1)(a) of the 1957 Penal Code. They applied to the trial court to be released on bail. The prosecutor objected to their application on the ground that the offence was not bailable under Article 63 of the Code. The Court rejected the prosecutor's objection and granted bail. The prosecutor appealed this ruling to the Federal Supreme Court.

The appellate court, before considering the merits of the decision of the lower court, addressed the issue of whether the Code allows the public prosecutor to appeal a ruling of the lower court granting bail. For two interrelated reasons, a majority of the court concluded that the prosecutor was not allowed to appeal the lower court ruling. First, provisions of the Code relating to appeal under its Book V are applicable to appeals from

[883] *Mohamed Muctar v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 14646, Megabit 9, 1996).
[884] *Public Prosecutor v. Derebe Demissie et al.,* (Fed. Sup. Ct., Cr. App. No. 16659, Tikemet 30, 1997).

a judgment having the effect of disposing the case – conviction, acquittal, and discharge. Hence, these provisions cannot be relied upon to appeal a ruling relating to bail. Second, Article 75(1) of the Code, which relates to appeal from a bail ruling, clearly allows the accused to appeal if bail is denied. It does not allow the prosecutor to appeal if bail is granted. Furthermore, the court noted that Article 19(6) of the Constitution declares that the accused has the right to be released on bail, and Article 20(6) the Constitution recognizes the right of the accused to appeal an order or a judgment of the court. The Constitution does not, however, provide for the public prosecutor's right to appeal.

According to the majority, even if the prosecutor believes that the court should have denied bail because exceptional circumstances exist justifying denial under Article 19(6) of the Constitution, the procedure does not allow the prosecutor to challenge the court's ruling through appeal. Hence, the court dismissed the prosecutor's appeal on procedural grounds.

One of the Justices, in a dissenting opinion, stated that the clear right of the accused to appeal a denial of bail under Article 75 of the Code, coupled with silence as to the prosecutor's right to appeal, should not be construed as a prohibiting an appeal by the prosecutor. In the dissenting Justice's view, interpreting the Code to prevent appellate review of erroneous decisions made by lower courts relating to granting of bail would cause an unacceptable result.

Amhara National Regional State v. Sergent Mekonnen Negash[885]

The Cassation Division of the Federal Supreme Court addressed the issue of whether the prosecutor can appeal from a bail ruling differently from the Regular Division of the Federal Supreme Court. The summary of the case, as it appears in the Journal of Ethiopian Law,[886] is reproduced below.

Summary of Judgment

1. *Background of the Case*

   The respondent, who is arrested on suspicion that he committed negligent homicide, requested the *Woreda* court in Chilga to allow him to be released on bail while investigation of his case is pending. The court ruled against Negash's application on the ground that the offence he is suspected of is non bailable under Article 63 of the Code. Negash appealed to the North Gonder Zonal High Court.

   Stating that Article 63 of the Code does not prohibit bail to one who is suspected of negligent homicide, nor is there an indication as to the existence of any of the conditions

[885] *Amhara National Regional State v. Sergent Mekonnen Negash*, (Fed. Sup. Ct., Cass. F. No. 35627, Hamle 8, 2000 E.C.).
[886] 23 *J. Eth. Law*, at 16-17.

envisaged under Article 67 of the Code, the appellate court, by a majority, reversed the ruling of the *Woreda* Court. Dissatisfied by the High Court's decision, the zonal public prosecutor took the case before the Supreme Court of the State of Amhara.

The State Supreme Court, after noting that whether the ruling of the court granting bail is appealable is controversial, rejected the prosecution's appeal on the ground that another appeal is not allowed once the ruling by the first instance court is reviewed by the next superior court. The petitioner brought his application to the Cassation Bench of the Federal Supreme Court objecting the ruling of the State Supreme Court.

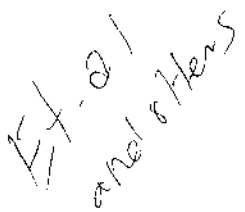
2. Holding of the Cassation Bench of the Federal Supreme Court

2.1. On the Public Prosecutor's right of Appeal in general

Article 75(1) of the Code allows a suspect who is denied bail to appeal to the superior court which may, as per Article 75(2) of the Code, dismiss the application or accept it and grant bail. Though it is understood that Article 75 of the Code provides for the right of the suspect, who is denied bail, to appeal, the provision can be interpreted by analogy so as to mean that it allows the public prosecutor to appeal where s/he does not agree with the bail decision. Analogy, for being thought to be prejudicial to the accused, is unacceptable only in relation to interpreting provisions of substantive criminal law.

2.2. on the Public Prosecutor's right to appeal in this Particular Case

By stating that no appeal shall lie against a decision given by the court of appeal, Article 75(2) of the Code prohibits the suspect from lodging a second appeal following dismissal of his application by the first appellate court. The provision does not indicate that the public prosecutor cannot appeal where the first appellate court reversed the lower court's ruling and granted bail. Hence, the ruling of the State Supreme Court that the prosecutor cannot appeal once a decision by the court of appeal envisaged under Article 75(1) of the Code is made contains basic error of law. The State Supreme Court is ordered to accept the application of the petitioner and decide on its merit.



PART THREE

POST-INVESTIGATION POWERS OF THE PROSECUTOR

Over time, the public prosecutor assumed responsibility for prosecuting criminal cases on behalf of society. Under traditional Ethiopian criminal procedure, the victim was responsible for proceeding against the wrongdoer, and there was no clear delineation of which wrongs affected private interests and which affected the public at large. Under the 1930 Penal Code, certain wrongs that were considered to affect the public at large were selected and criminalized. The public prosecutor was established in 1942 with a mandate to enforce these laws.[887]

This part is concerned with the power of the public prosecutor after the investigation is carried out. Chapter ten addresses alternatives available to the public prosecutor once he receives the police investigation report, the grounds on which he decides whether to prosecute, and the various mechanisms that the law introduces to make sure the public prosecutor does not abuse his power. Among the options available to the prosecutor once he receives the police investigation report – preliminary inquiry and preparation of charge – will be further discussed in chapter eleven. Studying this part will enable students to appreciate the critical role of the public prosecutor in a criminal proceeding.

[887] A Proclamation to Provide for the Appointment and Control of Public Prosecutors, Consolidated Laws of Ethiopia, at 113-14.

Chapter Ten

Powers of the Public Prosecutor

Section I. Options of the Prosecutor

Alternatives available to the public prosecutor following completion of investigation, as well as the factors guiding the selection of alternatives, are provided in Articles 38-42 of the Cr. Pro. Code. These and other factors are included in Sections 3.9-3.12 of the Criminal Justice Policy as grounds to drop a criminal investigation. The Criminal Justice Policy states that two major factors influence the prosecutor's decision on the fate of a criminal case. These are sufficiency of evidence and public interest.[888]

As provided under Articles 38[889] and 39[890] of the Cr. Pro. Code, the public prosecutor has five alternatives after receiving the police investigation report. The Criminal Justice Policy envisages another option, known as an "alternative solution" available to the public prosecutor.[891] Office of the Central Attorney General of the Transitional Government of Ethiopia Establishment Proclamation No. 39/1993,[892] the Proclamation Relating to Attorneys (Proclamation No.74/1993),[893] and the Criminal Justice Policy[894] authorize and

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[888] Criminal Justice Policy, Section 3.10.

[889] Art. 38. Action by public prosecutor on receiving report

On receiving the report under Article 37, the public prosecutor may:

(a) Prosecute the accused on a charge drawn up by him under Arts. 109-122; or
(b) Order that a preliminary inquiry be held under Arts. 80-93; or
(c) Order further investigation; or
(d) Refuse to institute proceedings under Art. 42

[890] Art. 39. Closure of police investigation file.

(1) The public prosecutor shall close the police investigation file where the accused:
  (a) Has died; or
  (b) Is under nine years of age; or
  (c) Cannot be prosecuted under any special law or under public international law (diplomatic immunity)

[891] Criminal Justice Policy, Section 4.6.

[892] Office of the Central Attorney General of the Transitional Government of Ethiopia Establishment Proclamation, Proc. No. 39/1993, *Fed. Neg. Gaz.*, year 52, no. 24, Articles 9(2) and 11(1)-(3) (hereafter Office of the Central Attorney Proc.). Though this Proclamation has been repealed by Attorneys Proclamation, Proc. No. 74/1993, *Fed. Neg. Gaz.*, year 53, no. 5, part of the former Proclamation on the rights and obligations of the prosecutor are retained by the latter proclamation (hereafter Attorneys Proc.)

[893] Attorneys Proc., Article 13.

require the public prosecutor to participate at the investigation stage of a criminal case. Assuming the prosecutor actually engages in the investigation, most of the decisions[895] envisaged under Articles 38 and 39 of the Code and Sections 3.9-3.12 of the Criminal Justice Policy can be made even before investigation is completed. Only on rare occasions do grounds supporting closure of the case or refusal to institute a proceeding occur after the investigation is completed. It is where the decision whether to prosecute is to be made after the investigation is completed that the prosecutor must wait until the investigation is finalized. Thus, it would not be appropriate to make a decision based on the adequacy of evidence and/or consideration of the public interest while an investigation is ongoing, even if the prosecutor is participating in the investigation.

1.1. Ordering Further Investigation

As provided under Article 37 of the Code, the police officer sends the investigation file to the prosecutor when he believes the investigation is completed. Upon reviewing the police investigation file, the public prosecutor may discover some gaps in the file. In such cases, the prosecutor considers whether these gaps can be filled through further investigation. If the prosecutor believes so, he will order further investigation in accordance with Article 38(c) of the Code. If the gap cannot be filled by further investigation, the prosecutor will decide whether or not to institute a criminal charge depending on how crucial the gap is to his case.

Notes and Questions

1. Article 109 requires the public prosecutor to institute a criminal charge within 15 days after investigation is completed. In cases where the suspect is not released on bail, expiry of this period without a charge being filed has been used as a ground to petition for habeas corpus on the ground that the detention is illegal. When the prosecutor orders further investigation, should the additional investigation be completed and the charge instituted within the 15-day period from the time the police initially send the file to the prosecutor? Or may the investigation take as much time as necessary? The Vagrancy Proclamation clearly limits the duration of further investigation. As stated under Article 7(4) of the Proclamation, further investigation shall not exceed five days.
2. In cases where the accused is not released on bail pending investigation, Article 19(4) of the FDRE Constitution and Article 59 of the Cr. Pro. Code require the Court to ensure that the duration of investigation does not affect the accused's right to a speedy trial. If the police investigation report was sent to the prosecutor becausefor the investigation was terminated court order, may the prosecutor return the case to the police for further investigation? Or is this power available to the prosecutor only when the investigation is completed by decision of the police?

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[894] Criminal Justice Policy, Section 3.5.

[895] Such decisions include closure of the police investigation file for reasons of age and diplomatic immunity; refusal of institution of proceedings for reasons related to a period of limitation, pardon or amnesty; refusal of institution of a charge because there is no possibility of finding the suspect and the case is one that cannot be tried in the absence of the suspect.

1.2. Ordering a Preliminary Inquiry

The other option available to the public prosecutor once he receives police report is to order a preliminary inquiry. As provided in Article 80(1) of the Code, the prosecutor has an obligation to order a preliminary inquiry to be conducted in two instances: where the case relates to aggravated homicide or aggravated robbery. In principle, the prosecutor does not have the power to bypass the preliminary inquiry in such cases. However, the public prosecutor may request the High Court to allow him to file a charge without conducting a preliminary inquiry. The court will accept the application if it is satisfied that the trial can be held immediately.

The prosecutor has discretion whether to order a preliminary inquiry when the case relates to other offences that are within the first instance jurisdiction of the High Court. In such cases, a preliminary inquiry can only be conducted if the High Court prosecutor so orders.

Notes and Questions

1. At the time the Code was promulgated, the then-Imperial Supreme Court did not have first instance jurisdiction over criminal cases. Hence, the law provides that only cases within the first instance jurisdiction of the High Court are eligible for preliminary inquiry. Currently, both Federal and State Supreme Courts do have first instance jurisdiction. What is the effect of this change on jurisdiction on cases that are eligible for preliminary inquiry? May the prosecutor order a preliminary inquiry to be conducted on cases within the jurisdiction of the Supreme Court? If so before which court would the inquiry be conducted? At the High Court or the first instance court?
2. Can the public prosecutor order a preliminary inquiry if the case relates to a theft that may be tried by any court? What does the word "only" refer to?

1.3. Other Solutions

The third "option" of the public prosecutor, which the Criminal Justice Policy simply calls 'alternative solutions,' is yet to be incorporated by law. It is envisaged by the Criminal Justice Policy as an option to be established in future. This mechanism of dealing with the criminal emphasizes letting him accept his guilt and regret about his wrong doing instead of prosecuting him.[896] As stated in the Policy document, this option is to be taken where, in view of the nature of the crime and the behavior of the suspect, it better serves the interest of the public than a formal prosecution would.[897]

Following paragraph is on the vital importance of such alternative solutions as opposed to the formal criminal process, and the critical role of the prosecutor in implementing alternative solutions.

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[896] Criminal Justice Policy, Section 4.6.2.1 (a).
[897] Ibid., Sections 4.6.2.1. (b), 4.6.2.2.

> In some cases invocation of the criminal process against marginal offenders seems to do more harm than good. Labeling a person a criminal may set in motion a course of events which will increase the probability of his becoming or remaining one. The attachment of criminal status itself may be so prejudicial and irreversible as to ruin the future of a person who previously had successfully made his way in the community, and it may foreclose legitimate opportunities for offenders already suffering from social, vocational, and educational disadvantages. Yet a criminal code has no way of describing differences between a petty thief who is on his way to becoming an armed robber and a petty thief who succumbs once to a momentary impulse. The same criminal conduct may be the deliberate act of a professional criminal or an isolated aberration in the behavior of a normally law abiding person. The criminal conduct describes the existence of a problem, but not its nature or source. The system depends on prosecutors to recognize these distinctions when bringing charges.[898]

The Policy document provides that this option is to be taken where the crime is not serious and the suspect is a juvenile, a woman, or a person with a disability. These and other guidelines relating to alternative solutions are provided in the Policy document.[899]

1.4. Prosecuting the Accused

Another option available to the prosecutor under Article 38(a) of the Code is to proceed with the criminal case. Under Article 40(1) of the Coe, the prosecutor should institute a charge against the accused and proceed with the case "whenever he is of the opinion that there are sufficient grounds for prosecuting the accused."

The prosecutor has sufficient grounds for prosecuting the accused where the investigation report clearly shows that a crime has been committed and that the crime was committed by the suspect at hand. In such cases, Article 40 of the Code requires the public prosecutor to institute a criminal charge before a court of law, provided that none of the grounds listed under Article 42 exists.

Subject to future implementation of the "alternative" envisioned by the Criminal Justice Policy, the prosecutor has no option other than prosecution if he has adequate evidence that warrants conviction. As stated above, in some cases, the Criminal Justice Policy would allow the prosecutor to consider alternative solutions even where there is adequate evidence for conviction. Moreover, the Policy[900] calls for laws that empower the General Attorney to refrain from instituting a proceeding on a suspect against whom there is adequate evidence, where it would serve the public interest.

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[898] President's Commission On Law Enforcement And Administration Of Justice, The Task Force On The Administration Of Justice, *Task Force Report: The Courts* (1967) (cited in Yale Kamisar et al., *Advanced Criminal Procedure: Cases, Comments and Questions*, 10th ed. (St. Paul, Minnesota: West Publishing Co., 2002) at 847-48 (hereafter Kamisar et al., *Adv. Crim. Pro.*).

[899] Criminal Justice Policy, Section 4.6.2.3.

[900] Ibid., Section 3.12.

1.5. Refusal to Institute a Charge

Article 42 (1) of the Cr. Pro. Code provides four grounds for the public prosecutor not to institute a charge. These are: insufficiency of evidence, absence of the accused in a case where prosecution in absentia is not allowed, period of limitation, pardon or amnesty and public interest.[901] The second subarticle of Article 42 provides that the prosecutor may not refuse to prosecute the accused on any other ground. The Criminal Justice Policy expressly recognizes the possibility of instituting a criminal proceeding where new evidence is obtained after the prosecutor has dropped the case for any one of the reasons listed under Article 42(1) of the Code or other reasons envisaged by the policy.[902]

1.5.1. Insufficiency of Evidence

The first ground that may cause the public prosecutor not to institute a criminal charge is related to the adequacy of the evidence. As per Article 42(1) (a) of the Code, if the prosecutor believes that there is *no sufficient evidence to justify conviction*, he shall not institute criminal proceedings.

1.5.1.1. Standard for Instituting a Criminal Proceeding

A. Ethiopia

A police officer is required to have *reason to believe* that someone has committed a crime before he may arrest that person. It seems logical to demand that the prosecutor make a stronger case when he decides to charge the suspect than he was required to make when seeking the arrest.

The *acontrario* reading of Article 42(1) (a) of the Code tells us that evidence justifying conviction exists when the prosecutor believes that his evidence will satisfy the *requirement for conviction.* No provision of law articulates what standard a court should apply for conviction. Hence, what the prosecutor must verify before deciding to institute a criminal charge depends on the standard of proof required for conviction, which is not explicitly addressed by law. If the standard to be applied by the court for conviction is, for example, "beyond a reasonable doubt", the prosecutor must be of the opinion that his evidence will prove that the accused has committed the crime "beyond a reasonable doubt." If, on the other hand, the standard applied by the court is "conviction of the judge," the prosecutor must measure the adequacy of his evidence in light of this standard.

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[901] This ground of refusal was repealed by Office of the Central Attorney Proc., Article 24 (2). The Criminal Justice Policy has restored it as a possible ground not to institute a criminal proceeding. Criminal Justice Policy, Section 3.12.

[902] Criminal Justice Policy, Section 3.11, para. 2.

The Human Rights Committee, in its General Comment No. 32,[903] suggested use of the standard to rebut the presumption of innocence as recognized under Article 14 of the ICCPR, thereby requiring that conviction of an accused be beyond reasonable doubt. Article 13(2) of the FDRE Constitution makes this interpretation relevant to the standard to be applied by Ethiopian courts. Therefore, for the purpose of Article 42(1)(a), the public prosecutor should find that there is not sufficient evidence to justify a conviction where he believes that his evidence would not prove the guilt of the suspect beyond reasonable doubt.

In one case,[904] W/o Lidya Abate and other six persons were arrested on suspicion that they produced and distributed damaged foodstuffs. The police investigated the allegation and collected both oral and documentary evidence that they believed were relevant to prove the commission of the alleged crime. The Public Prosecutor reviewed the investigation file, assessed the relevance and weight of the evidence, and closed the case under Article 42(1)(a) of the Code on the ground that the evidence was not sufficient to prove that the suspects committed the crime "*beyond a reasonable doubt.*"

B. Other Jurisdictions

In Argentina, the investigative magistrate has the power to decide whether a charge is to be filed. The prosecutor has no power over the matter. He simply makes what is known as a *prosecutorial request* where he believes that all the elements of an offence subject to public prosecution have been met. According to Article 306 of the Argentine criminal procedure code the investigative magistrate decides, within ten days after judicial interrogation, whether there are "sufficient elements of persuasion" to believe that a criminal offence has been committed and that the defendant participated in the crime. If the magistrate finds "sufficient elements of persuasion," he issues a charging decision. If, on the other hand, he does not find "sufficient reasons of persuasion," there is no prosecution. However, it is far from clear what quantum of evidence is needed to find that there are "sufficient elements of persuasion."[905]

The German prosecutor, unlike its Argentine counterpart, has the exclusive power to make the decisions whether a suspect should be prosecuted. According to Paragraph 170 section 1 of the German criminal procedure code, the prosecutor files charges whenever there is "sufficient" suspicion that the suspect has committed a crime. The standard of sufficiency to be applied is "likelihood that the suspect will be convicted after trial."[906]

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[903] UN Human Rights Committee (HRC), *General Comment No. 32, Article 14, Right to Equality Before Courts and Tribunals and to Fair Trial*, August 23, 2007, CCPR/C/GC/32, available at: http//www.unhcr.org/refworld/docid/478b2f2.html (hereafter, *General Comment No. 32*).

[904] Kirkos Sub City Police Cr. F. No. 37/2001; Federal First Instance Public Prosecutor Criminal File No. 05548/00.

[905] Alejandro D. Carrio and Alejandro M. Garro, "*Argentina,*" in Bradley, at 37.

[906] Thomas Weigend, "*Germany,*" in Bradley, *Crim. Pro.*,at 205.

In Italy, the prosecutor determines if there is sufficient evidence to request that the defendant be bound over for trial. Before the current criminal procedure code was enacted in 1989, prosecution was the norm. Dismissals were limited to cases where allegations relating to the crime were manifestly groundless. However, under the 1989 code, dismissal is allowed where the evidence acquired during the preliminary investigation is insufficient to support conviction.[907]

In South Africa, the prosecutor decides whether charges should be instituted. A charge may be filed against the suspect if the prosecutor believes there is a "reasonable prospect of a successful prosecution."[908]

In England, Crown prosecutors have sufficient evidence to prosecute where they are satisfied that there is enough evidence for a "realistic prospect of conviction." They are required to take into account the likely defence of the accused. In order to institute a charge, the prosecutor should be convinced that the jury or bench magistrate *would more likely than not* convict the accused of the charge alleged.[909]

The U.S. Supreme Court has made the following statement in connection with the standard for prosecution.

> It is not possible to state categorically how much evidence is required before the prosecutor is justified in charging a suspect with a crime, as the law does not expressly provide a distinct probability of guilt standard for the charging decision. ...[T]hough it is clear that an arrest warrant may issue only upon "probable cause," this phrase has been interpreted by courts only in cases where the warrant was challenged as a basis for arrest rather than as a basis for the decision to charge. If a lawful arrest has been made, it does not necessarily follow that charging would be proper on the same evidence, as the arrest may be based upon "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." [910]

The Criminal Code of the State of Washington deals with the issue of "evidentiary sufficiency" for prosecution. The Code makes a distinction between crimes against persons and other crimes. In both cases, the screening threshold is higher than "probable cause." For crimes against persons, a charge is to be filed where "sufficient admissible evidence exists, which, when considered with the most plausible, reasonable foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact finder."[911] With regard to other crimes, a charge is to be filed if "the

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[907] Rachel Van Cleave, "*Italy,*" in Bradley, *Crim Pro.*, at 269-270.
[908] P.J. Schwikkard and S.E. van der Merwe, "*South Africa,*" in Bradley, *Crim. Pro.*, at 347.
[909] Sprack, *Practical Approach,* at 73-74.
[910] *Brinegar v. United States*, 338 U.S. 160 (1949) (cited in Kamisar et al., *Adv. Crim. Pro.*, at 847).
[911] State of Washington Criminal Code, Section 9.94A.440(2)(a) (cited in Peter Krug, "Prosecutorial Discretion and Its Limits," 50 *The American Journal of Comparative Law* 643 , at 651-52, note 55 (2002). (hereafter Krug, "Pros. Discr.").

admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised."[912]

1.5.1.2. Relevant Factors

The prosecutor must evaluate the case in light of various factors. Once the prosecutor has decided what crime to charge the suspect with, he must consider the relevancy, admissibility and weight of the evidence collected during the investigation. Moreover, he must consider any exculpatory evidence he is aware of. By taking into account these and other relevant factors he should reasonably be convinced that the evidence he has at hand is likely to cause the conviction of the suspect. The prosecutor may take into account to the following factors in deciding whether sufficient evidence exists to justify conviction.

i. Relevance

The prosecutor must make sure that all the evidence collected during the investigation is relevant to proving his case. Irrelevant evidence, no matter how credible, will be of no use in proving the prosecutor's allegation as it will not even be considered by the court

ii. Admissibility

Another factor regarding admissibility is whether or not the evidence was obtained in accordance with the law. If the evidence was obtained unlawfully, a high risk exists that it will be excluded by the court, which may have a prejudicial effect on the prosecutor's case.

iii. Weight of Evidence

Once the prosecutor ascertains both the relevance and admissibility of his evidence, next he must assess the weight of that evidence. Once he has made such an assessment, he can file a charge only if he has confidence that he will obtain a conviction. The prosecutor must apply the standard that the court applies to convict an accused since the standards for prosecution and conviction are the same under Ethiopian law. Hence, to charge a suspect the prosecutor must be convinced that he will meet the standard of conviction. If, for instance, the court applies a "beyond a reasonable doubt standard" to convict an accused, the prosecutor must be convinced that his evidence will satisfy this standard. If he believes that his evidence, though stronger than he had at the time of arrest, will not satisfy the standard for conviction he is said to have no adequate evidence to institute a charge, in which case he shall not institute a criminal charge by virtue of Article 42(1) (a) of the Code.

1.5.2. Absence of a Suspect

Another circumstance in which the public prosecutor shall not institute a proceeding despite sufficient grounds for prosecution is provided under Article 42 (1) (b) – it is not possible to find the accused and the case is not to be tried in his absence. This is a

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[912] Ibid.

combination of factual and legal reasons. The factual reason is the difficulty or impossibility of finding the suspect. This may be the case for one of two reasons. One is that the police and the prosecutor do not know the whereabouts of the suspect. (If the public prosecutor knows the suspect to be dead, the case will be closed by virtue of Art. 39(1) of the Code.) The other reason is that the public prosecutor cannot arrest the suspect and bring him before the court even though he knows where the suspect is found. This circumstance arises when the suspect resides in a foreign country with which Ethiopia does not have an extradition treaty. When the public prosecutor is not sure where the suspect is or when it is impossible to obtain him for jurisdictional reasons, the prosecutor determines whether he can prosecute in the absence of the accused. If not, he may decide to drop the case.

The issue of trial in absentia is addressed by Articles 160 and the following provisions of the Code. There are two categories of cases where a criminal trial can be conducted in the absence of the accused. The first category is provided under Article 161(2) (a) of the Code – the crime is so grave that it is punishable for not less than 12 years. The second category includes crimes on the fiscal and economic interests of the state as provided under Article 161(2)(b) of the Code. A person suspected of such a crime may be tried in his absence as provided under Articles 343-354 of the Criminal Code provided that the offence he is suspected of is punishable with rigorous imprisonment or fine exceeding Ethiopian Birr 5,000. Where the crime the person is suspected for does not fall under one of the two categories, the case cannot be tried in his absence. Hence, the prosecutor shall not institute a proceeding in accordance with Article 42(1)(a) of the Code.

1.5.3. Period of Limitation, Pardon and Amnesty

Period of Limitation

The Criminal Code stipulates periods within which a criminal action must be instituted. There are two types of periods of limitation: ordinary and absolute. Article 217 of the Criminal Code lists the ordinary periods of limitation for different category of public crimes. These range from 3 to 25 years depending on the gravity of the crime. Article 218 sets the statute of limitation for crimes punishable upon complaint at two years.

Articles 220 and 221 of the Criminal Code, respectively, provide for cases where the ordinary of limitation may be suspended or interrupted. The period cannot be interrupted or suspended indefinitely. Article 222 deals with absolute limitation. It provides that the prosecution and criminal action shall be barred absolutely when a period equal to double the period of limitation under Article 217 has passed, or when a period under Article 218 is exceeded by half. Article 216 of the Criminal Code specifies the consequences when time has run out under either type of statute of limitations. First, expiry of these periods may bar the institution or continuance of a criminal action depending on circumstances. A related effect is that expiry of the limitation period extinguishes the defendant's liability to punishment. Once the limitation period has expired, the court may no longer make a conviction or impose a punishment/penalty.

Where the ordinary limitation period expires without an investigation being commenced, the investigation cannot be commenced thereafter because it is barred by the ordinary statute of limitations. Even if an action is commenced but interrupted or suspended, when the absolute period of limitation expires the criminal action shall be terminated. Grounds for suspending or interrupting ordinary periods of limitation do not justify continuation or commencement of the criminal process once the absolute period expires.

The public prosecutor thus is prohibited from instituting a criminal proceeding when the case has already been barred by an ordinary or absolute statute of limitations. As provided under Article 28 of the FDRE Constitution, crimes against humanity are not barred by statutes of limitations. Also, limitation periods are inapplicable to terrorism cases per Article 24 of the Anti-Terrorism Proclamation.

Pardon and Amnesty

Pardon and amnesty are related but different concepts. A reading of the Criminal Code[913] and the Proclamation to Provide for the Procedure of Granting Pardon[914] points up three major differences between the two. The first difference is who is entitled to grant them. Pardon is to be granted by the president of the Federal Democratic Republic of Ethiopia. Amnesty is to be granted by the legislature. The second difference relates to the stage in the criminal process at which they may be granted. Pardon is to be granted only after conviction, while amnesty may be granted before, during, or after conviction. The third difference relates to the effect of the two mechanisms. Pardon does not cancel the conviction or the sentence; the entry of both remains in the judgment register of the criminal. Amnesty, on the other hand, cancels both the sentence passed and the legal consequences of the sentence. The conviction is presumed nonexistent and the entry is deleted from the judgment register of the criminal.

In both cases, Article 42 (1)(a) provides that the public prosecutor shall not proceed with the case by instituting a criminal charge. In fact, where the reason for not instituting a criminal case is that the accused was granted a pardon, the prosecutor may also refuse to institute a criminal proceeding on the ground that prosecution would subject the accused to double jeopardy. The same is true where amnesty was granted after the person was convicted in a previous criminal proceeding. These grounds are not relevant however, to the decision whether to prosecute in the context of crimes against humanity.

1.5.4. Public Interest

The Cr. Pro. Code, under its Article 42(1)(d), empowered the Minster of Justice to order the public prosecutor not to institute proceedings where such order is in the interest of the public. This provision opened the door for the prosecutor to decide in the public interest not to institute a charge even where there was adequate evidence. The decision was to be

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[913] Criminal Code, Articles 239 and 240.

[914] Procedure of Pardon Proclamation, Proc. No. 395/2004, *Fed. Neg. Gaz.*, year 10, no. 35 (hereafter Pardon Proc.).

made by the Minister rather than the prosecutor. This provision of the Code was repealed by the Proclamation that established the Office of the Central Attorney General of the Transitional Government of Ethiopia.[915] Moreover, Article 42(2) of the Code now expressly prohibits the public prosecutor from refusing to institute a criminal proceeding for any ground other than those listed under Article 42(1) of the Code. Even where the prosecutor is in doubt as to whether proceedings should be instituted, he has no power to decide not to prosecute. Rather, in case of doubt Article 41 of the Code requires him to seek instruction from his superior.

The Criminal Justice Policy[916] recognizes the public interest as a ground not to file a criminal charge. As the Policy indicates, where not filing a charge is found to be in the interest of the public, no charge shall be instituted even if there is adequate evidence to prosecute the suspect.[917] The Policy empowers the Attorney General to decide whether to refuse to institute a criminal charge for public interest reasons.[918] The Policy provides a list of factors for the Attorney General to base his decision on.[919]

Notes and Questions

What is the relationship between policy and law? The Cr. Pro. Code provision that authorized the Attorney General to decide not to prosecute a suspect based on the public interest was repealed by the Office of the Central Attorney General of the Transitional Government of Ethiopia Establishment Proclamation. Thus, the law no longer recognizes the public interest as a possible ground for not prosecuting a suspect against whom the prosecutor has adequate evidence. Article 42(2) of the Cr. Pro. Code prohibits the use of any ground for not prosecuting other than those listed under Article 42(1). The Criminal Justice Policy restores the public interest as a ground for not prosecuting a suspect. How should this contradiction between the law and the Policy be resolved? Note that the Policy was passed by the Council of Ministers but the Cr. Pro. Code and the Proclamation are enacted by the House of Peoples' Representatives.

Section II. Prosecution Systems in Other Jurisdictions

Broadly speaking, there are two approaches to the power of the public prosecutor to decide what path to follow after investigation is completed. The first approach gives a wide discretion to the prosecutor to decide whether to prosecute – this is a *discretionary prosecution system*. The second approach requires the public prosecutor to prosecute a suspect whenever there is sufficient evidence to obtain a conviction except in certain situations specified by law – this is *compulsory prosecution*.

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[915] Office of the Central Attorney Proc., Article 24 (2).
[916] Criminal Justice Policy, Section 3.12.
[917] Ibid.
[918] Ibid.
[919] Ibid.

2.1. Discretionary Prosecution

Different authors have developed their own definitions for prosecutorial discretion. Joseph defines it as "the power held by an agency or official charged with enforcement of the law to exercise selectivity in the choice of occasions for the law's enforcement."[920] Professor Davis describes discretionary decisions as "those made without 'the application of known principles or laws.'"[921] In this system of prosecution, the prosecutor is a dominant actor. The major feature of this system is the prosecutor's power not to subject a defendant to a criminal process despite the fact that there is sufficient evidence to support prosecution.[922] The major criterion the prosecutor applies is whether the prosecution promotes the public interest in light of different factors. If there is no public interest to be served through prosecution, the prosecutor will drop the case even in the face of adequate evidence to justify conviction. The other major feature of this system is the prosecutor has the power to decide with what offence or offences an accused is to be charged.[923] The Canadian public prosecutor, for instance, has broad prosecutorial discretion including, for many offences, a decision whether to prosecute by indictment or as a less serious summary conviction matter.[924]

These are simply the two typical features of discretionary prosecution system. There are variations within the system. For example, the American prosecutor has pervasive and relatively uncontrolled discretionary powers as compared to his Japanese counterpart. Discretion by the Japanese prosecutor is exercised on the basis of strict guidelines. The Japanese Code of Criminal Procedure provides guidelines to be considered by the prosecutor in deciding whether to prosecute.[925] The American system of prosecution does include strict guidelines for prosecutors, which makes the discretion of American prosecutors broader than that of Japanese prosecutors.[926] Though both U.S. and Japanese prosecutors may decide not to prosecute suspects for non-evidentiary reasons, U.S. prosecutors do not release suspects on such grounds as often as their Japanese counterparts

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[920] Roger P. Joseph, "Review Ability of Prosecutorial Discretion: Failure to Prosecute," 75 *Columbia Law Review*, at 130 (1975) (hereafter Joseph, "Review Ability").
[921] K. Davis, *Discretionary Justice: A Preliminary Inquiry* 29 (1969) (cited in ibid., at 130, note 1).
[922] Krug, "Pros. Discr.," at 645.
[923] Kamisar et al., *Adv. Crim. Pro.*, at 849.
[924] Kent W. Roach, "Canada," in Bradley, *Crim. Pro.*, at 72.
[925] Article 279 of the Japanese Code of Criminal Procedure of 1922 instructs prosecutors to decide whether or not to prosecute by taking into consideration "the character, age and the environment of the offender, the circumstances of the offence, or the circumstances following the offence." In an amendment made in 1948, Article 248 was added to the Code requiring the prosecutor to consider the "gravity of the offence." Moreover, there is a book of instruction and broad guidelines known as *Kensatsu K'ogian* (Prosecutor's Manual) that provides a list of factors that prosecutors may consider for their decision on whether to prosecute. All prosecutors study the book at the Legal Training and Research Institute. Moreover, local public prosecutor offices have their own standard policies regarding decision making. Mark D. West, "Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion," 92 *Columbia Law Review* 684, at 688 (1992) (hereafter West, "Pros. Rev. Comm.").
[926] Kamisar *et al.*, *Adv. Crim. Pro.*, at 844.

do.[927] This is said to be attributable to the fact that Japanese law, unlike U.S. law, explicitly authorizes release of suspects despite ample evidence of guilt.[928]

2.2. Compulsory Prosecution

Compulsory prosecution, as adopted in Germany,[929] requires the public prosecutor to prosecute a charge whenever there is sufficient evidence to obtain a conviction. In this system, a prosecutor may exercise discretion only in limited cases provided by law, and even in such cases the prosecutor's discretion is subject to judicial control. Where adequate evidence exists to warrant prosecution, the German prosecutor has discretion whether to charge only in cases involving less serious offences – i.e., offences with a statutory minimum punishment of less than one year imprisonment. According to the German Code of Criminal Procedure, the prosecutor has the power to refrain from prosecution upon ascertaining two conditions: that the suspect's guilt is insignificant and that there is no public interest in prosecution.[930]

Equal enforcement of the criminal law and protection against prosecutorial arbitrariness are the predominant values underlying Germany's compulsory prosecution system.[931] Mandatory prosecution is considered to be a requirement of the equal rights clause of the German constitution. Moreover, compulsory prosecution is justified by Germany's Constitutional concept of the rule of law, which does not allow broad discretionary power. Vesting broad discretion in the prosecutor can lead to a lack of uniformity in the administration of criminal laws, since the prosecutor may make decisions based in part on political and pragmatic considerations.[932]

2.3. Some Views on Prosecutorial Discretion to Charge

Kenneth Culp Davis: Discretionary Justice

In the following comparison of the German and American prosecutorial systems, Professor Kenneth Culp Davis summarizes the major differences between compulsory and discretionary prosecutorial systems.

> The most important difference between the German system and the American System is this: whenever the evidence that the defendant has committed a serious crime is reasonably clear and the law is not in doubt, the German prosecutor,

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927 Floyd Feeney, Comment, "Japanese Criminal Justice – Some Brief Comparisons," 31 *Crime & Delinq.* 627, 629 (1985) (cited in West, *Pros. Rev. Comm.*, at 690).

928 Ibid.

929 For the origin of the idea of compulsory prosecution in Germany, see Joachim Herrmann, "The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany," 41 *The University of Chicago Law Review* 468, at 469-71(1974) (hereafter Herrmann, "Rule of Comp.").

930 Paragraph 153 of the German Code of Penal Procedure (cited in ibid., at 484).

931 Herrmann, "Rule of Comp." at 468-69.

932 Ibid., at 470.

> unlike the American prosecutor is without discretionary power to withhold prosecution. This means that selective enforcement, a major feature of the American system, is almost wholly absent from the German system.
>
> The German and American systems also differ when the evidence or the law or both seem to the prosecutor to be doubtful. When a doubt seems to require a discretionary choice, the German prosecutor does not resolve the doubt; he almost always presents a doubtful case to a judge, who determines the sufficiency of the evidence and the proper interpretation of the law. Of course, in America the prosecutor makes a discretionary determination in every doubtful case, either to prosecute or not to prosecute.
>
> Even when the prosecutor finds prosecution of a suspect clearly inappropriate, the German system, unlike the American system, provides protection against abuse of power. When a crime is reported by the police or by a private party, a file is opened and registered; the file can be traced at any time. ...[T]he file cannot be closed without a statement of written reasons, which in important cases must be approved by the prosecutor's superior, and which must be reported to any victim of the crime and to any suspect who was interrogated. Every prosecutor is supervised by a superior in a hierarchical system headed by the Minster of Justice, who is himself responsible to the cabinet. The supervision is real, not merely a threat; files are in fact often reviewed. Availability to victims of crimes of procedure to compel prosecution constitutes still another check." [933]

Wayne R. LaFave: The Prosecutor's Discretion in the United States

In the following three paragraphs Wayne R. LaFave summarizes the three most common explanations for the wide discretion given to the prosecutor under United States law: legislative overcriminalization, scarcity of resources, and a need to individualize justice.

Legislative "Overcriminalization": "...[T]he criminal code of any jurisdiction tends to make a crime of everything that people are against, without regard to enforceability, changing social concepts, etc. The result is that the criminal code becomes society's trash bin. Examination of the typical state code of criminal law supports this judgment. Included therein are likely to be crimes which are over-defined for administrative convenience...; crimes which merely constitute 'state-declared ideals' (e.g. the crime of adultery, which is 'unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals'); and now outdated crimes which found their way into the law because of 'the mood that dominated a tribunal or legislature at strategic moments in the past, a flurry of public excitement on some single matter.'" [934]

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[933] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969), at 194-195 (cited in Kamisar et al., *Adv. Crim. Pro.*, at 857, note e (hereafter, Davis, *Discretionary Justice*).

[934] 18 *Am. J. Comp. L.* 532, at 533-39 (1970) (cited in Kamisar et al., *Adv. Crim. Pro.*, at 850).

Limitation of Resources: "No prosecutor has available sufficient resources to prosecute all of the offences which come to his attention. To deny the authority to exercise discretion under these circumstances, it is said, is 'like directing a general to attack the enemy on all fronts at once.'"[935]

A Need to Individualize Justice: "Individualized treatment of offenders, based upon the circumstances of the particular case, has long been recognized in sentencing, and it is argued that such individualized treatment is equally appropriate at the charging stage so as to relieve deserving defendants of even the stigma of prosecution. Were it otherwise, so that the prosecutor acted 'in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable.'"[936]

Kenneth Culp Davis: Discretionary Justice

In the following paragraphs, Kenneth Culp Davis questions the merit of discretionary justice and recommends prosecutors be given minimal discretion that is closely supervised.

> Even if we assume that a prosecutor must have a power of selective enforcement, why do we not require him to state publicly his general policies and require him to follow those policies in individual cases in order to protect evenhanded justice? Why not subject prosecutors' decisions to a simple and general requirement of open findings, open reasons, and open precedents, except when reason for confidentiality exists? Why not strive to protect prosecutors' decisions from political or other ulterior influence in the same way we strive to protect judges' decisions?
>
> The seeming unanimity of American prosecutors that their discretionary power must be completely uncontrolled is conclusively contradicted by the experience of Germany, where the discretionary power of the prosecutors is so slight as to be almost nonexistent, and where almost all they do is closely supervised.
>
> I think we...should learn...that the huge discretionary power of prosecutors need not be unconfined, unstructured, and unchecked. We should reexamine the assumptions to which our drifting has led us – that a prosecutor should have uncontrolled discretion to choose one out of six cases to prosecute, without any requirement that the one most deserving of prosecution be chosen.
>
> Prosecutors, in my opinion, should be required to make and announce rules that will guide their choices, stating as far as practicable what will and what will not be prosecuted, and they should be required otherwise to structure their discretion.[937]

Notes and Questions

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[935] Ibid.

[936] Ibid., at 850-51.

[937] Davis, *Discretionary Justice*, at 189-90, 224-25 (cited in Kamisar et al., *Adv. Crim. Pro.* at 857-58).

1. To which one of the prosecutorial systems does the Ethiopian prosecution system belong? Does the Criminal Justice Policy change Ethiopia's system of prosecution from a compulsory to a discretionary type?
2. Whether a jurisdiction should adopt discretionary or compulsory prosecution system partly depends on the nature of its criminal justice. Joachim Herrmann, having examined the German Penal Code in light of the U.S. criminal law, concluded that the problems that call for prosecutorial discretion in the United States do not exist in Germany, which is the reason the latter has a system of compulsory prosecution.[938] First, "German law relies on careful and elaborate *judicial* interpretation of the substantive law to solve problems that the United States often leaves to the discretion of the *prosecutor*."[939] Hermann's second point relates to sentencing. As noted by Hermann, the German Penal Code generally provides for more lenient sentences than American Penal Codes do. One of the reasons to give discretion to the U.S. prosecutor is to minimize the harsh effect of a penal law that provides for severe punishment. That is, the prosecutor, by exercising his discretion, may charge the accused with the less serious of two offences where he believes that charging the accused with the more serious offence would subject him to excessively harsh sanctions. Hence, Hermann concludes that the fact that "sentences in Germany are considerably less severe than in the United states"[940] removes one reason to grant broad discretion to the prosecutor. Do you agree with Herrmann that the two factors are relevant in deciding which type of prosecutorial system is to be adopted? As noted earlier, by adopting the Criminal Justice Policy Ethiopia has shifted from a mandatory to a discretionary prosecution system. On the basis of the factors raised by Hermann, did Ethiopia make the right decision?
3. Read Section 3.12 of the Criminal Justice Policy, which regulates refusal to institute a criminal charge for purposed of the public interest. To what extent does the Policy address the concerns raised by Kenneth Culp Davis in connection with discretionary justice?
4. Legislative overcriminalization does not seem a compelling argument for prosecutorial discretion because the substantive criminal law can be revised to do away with the overcriminalization. LaFave indicates that a significant part of the discretion exercised by American prosecutors is "unnecessary" because the legislative overcriminalization could be eliminated by penal law reform.[941] To what extent do concerns of legislative overcriminalization apply in Ethiopia?
5. In support of LaFave's resource concern, Roger P. Joseph underlines the difficulty of prosecuting all known legal violations. According to Joseph, though prosecution of all known violators has the advantage of ensuring equality in prosecution, there is a risk that the resulting prosecutions would be less effective.[942] To what extent do you agree with LaFave's second justification for prosecutorial discretion – scarcity of resources?

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[938] Herrmann, "Rule of Comp.," at 471-474.
[939] Ibid., at 472.
[940] Ibid., at 474.
[941] Kamisar et al., *Adv. Crim. Pro.*, at 851.
[942] Joseph, "Review Ability," at 144.

Although his concern about the resources required to prosecute all legal violations is understandable, isn't the way LaFave puts it – *to deny the authority to exercise discretion under these circumstances is "like directing a general to attack the enemy on all fronts at once"* a bit exaggerated? Even in the compulsory prosecution system the prosecutor has priorities in terms of what to prosecute first and what next. The system does not require the prosecutor to *immediately* prosecute all offences that come to his attention. The rule of compulsory prosecution requires the prosecutor to prosecute every offence whenever there is adequate evidence. The timing of prosecution is addressed by the statutes of limitations.

Section III. Checks on the Prosecutor's Power

General

The public prosecutor may abuse his power and prosecute a suspect where he should not or refuse to prosecute where he should. Both might have devastating effects on the criminal justice of the country. Hence, it is essential to have meaningful checks on the power of the prosecutor. The law contains various mechanisms for controlling the prosecutor's power over post-investigation decisions. Two of these are most important.

The first mechanism is right to petition a superior prosecutor asking for reversal of a subordinate prosecutor's decision. The Proclamation Relating to Attorneys[943] allows a party who is unsatisfied with the decision of a prosecutor to petition to the superior public prosecutor. Decisions of a lower prosecutor – whether prosecute or not to prosecute – can be challenged before the superior attorney. That is, any person who believes that the decision of the prosecutor not to institute a criminal proceeding is unlawful because it is not based on the grounds in Articles 42 or 39 of the Cr. Pro. Code has the right to challenge the decision before the superior prosecutor. Similarly, a person who is aggrieved by the prosecutor's decision to charge a suspect may petition to the superior prosecutor and challenge the decision. By virtue of Article 10 of the Proclamation, the superior public prosecutor has the power to amend, alter, revoke, or confirm decisions made by the subordinate public prosecutor.

Another check on the prosecutor's power is the threat of criminal prosecution and disciplinary measures. In some circumstances, the public prosecutor who unlawfully institutes, or refuses to institute a criminal proceeding may be subject to criminal sanctions or disciplinary measures. If the prosecutor institutes, or refuses to institute, a criminal charge to obtain undue advantage for himself or another or to injure the right or interest of another, he may be prosecuted under one of the subarticles of Article 407 of the Criminal Code. German law allows the prosecutor to be charged with favoritism when he fails to prosecute while he knows that he has adequate evidence warranting prosecution.[944]

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[943] Attorneys Proc., Art. 9.

[944] German Penal Code, para. 346 (cited in Herrmann, "Rule of Comp.," at 476).

The prosecutor may abuse his power in issuing any of the orders listed under Articles 38 and 39 of the Cr. Pro. Code, including the decision to prosecute and the decision not to prosecute. In view of the serious consequences that could result from a prosecutor's abuse of power in connection with these two types of orders, this section focuses on the mechanisms that control the prosecutor's power to issue the orders.

3.1. Controlling the Prosecutor's Decision Not to Charge

In light of limited resources, it would hardly make sense to contend that the prosecutor should have no discretion at all. Even if full enforcement were desirable, it would not be practically possible. Therefore, the issue should not be discretion versus no discretion, but rather how discretion should be confined and checked. As Davis noted, "half the problem is to cut back unnecessary discretionary power. The other half is to find effective ways to control necessary discretionary power."[945]

3.1.1. General Controlling Mechanism

When the prosecutor decides not to institute a criminal charge for any one of the reasons listed under Article 42 (1) of the Cr. Pro. Code, he is required by Article 43 of the Code to make the decision in writing, giving clear reasons for his refusal to institute the charge. A copy of the decision is to be sent to the victim of the crime or his representative and to the investigating police officer. Similarly, when the prosecutor closes a police investigation file in accordance with Article 39(1) of the Code, he must send copy of his decision to the private complainant, the investigating police officer, and the Advocate General.

Japanese law incorporates a similar check on the prosecutor's power to decide not to prosecute. A Japanese prosecutor "who decides not to prosecute a suspect is required to provide written notice of such action to victims who have initially lodged complaint."[946] Mark D. West describes this mechanism as "indirect legislative control."[947] George states that the law, by requiring such a formal accounting, promotes "an especially careful handling of the criminal investigation."[948]

Article 9 of the Proclamation Relating to Attorneys (Proclamation No.74/1993) allows a party not satisfied with the decision of the prosecutor to petition to the superior public prosecutor. That is, any person who is aggrieved by the decision of the prosecutor not to institute a criminal proceeding has the right to challenge the decision before the superior prosecutor. Article 10 of the Proclamation empowers the superior public prosecutor to amend, alter, revoke, or confirm decisions made by the subordinate public prosecutor. Germany has a similar controlling mechanism. The victim is authorized to file a formal complaint to the superior's prosecutor or to the attorney general where the prosecutor

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[945] Kamisar et al., *Adv. Crim. Pro.*, at 851.
[946] Articles 260-61, Japanese Code of Criminal Procedure (cited in West, "Pros. Rev. Comm.," at 693).
[947] Ibid.
[948] B.J. George, Jr., "Discretionary Authority of Public Prosecution in Japan," 17 *Law in Japan: An Annual* 64 (1984) (cited in ibid.).

decides "not to investigate, or not to investigate further because of insufficient evidence or because there was no violation of law."[949] Where the decision of the prosecutor is found to be incorrect, he will be directed to reopen the investigation and file a charge.[950] In Germany, unlike Ethiopia, where the victim's complaint is rejected by the attorney general, he can apply to the highest state court of appeals asking for an order that the prosecutor file a charge.[951]

3.1.2. Controlling the Decision Not to Charge for Lack of Evidence

Where the prosecutor decides not to charge a suspect for lack of evidence, mechanisms exist for checking the prosecutor's decision. If he refuses, on the ground of insufficient evidence, to charge a person who is suspected of an offence punishable upon formal complaint, he is required by Article 44(1) of the Code to authorize persons listed under Article 47 of the Code[952] to conduct a private prosecution. The authorized person has the right to institute a private prosecution in accordance with the Cr. Pro. Code.[953]

When the prosecutor refuses to charge a suspect for a crime which is not punishable upon complaint, the Code provided a way for persons with a special interest in the case to challenge the prosecutor's decision. Article 44(1) of the Code allowed persons listed under Article 47 of the Code to apply to the court for an order that the prosecutor institute proceedings. The court, after considering the application and the reasons the prosecutor chooses not to institute a proceeding, confirmed the prosecutor's decision or ordered him to institute proceedings in accordance with Article 45(2) of the Code. These provisions of the Code were repealed by the Proclamation that Established the Office of the Central Attorney General of the Transitional Government of Ethiopia.[954] Thus, currently the only available way to challenge the prosecutor's decision is by petition to the superior public prosecutor, as discussed in the preceding subsection.

Notes and Questions:

1. To what extent does the requirement that the decision not to prosecute be made in writing prevent the prosecutor from making erroneous decisions? What about the requirements that: 1) the decision be communicated to the persons who are affected by the alleged commission of the crime and the police investigator and 2) the prosecutor authorize private persons to conduct a private prosecution?

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[949] Herrmann, *Rule of Comp.* at 476.

[950] Ibid., at 477.

[951] Code of Criminal Procedure, paras. 172-75 (cited in ibid.).

[952] Article 47 provides: "No person other than:
(a) The injured party or his legal representative; or (b) the husband or wife on behalf of the spouse; or (c) the legal representative of an incapable person; or the attorney of a body corporate; may conduct a private prosecution."

[953] Cr. Pro. Code, Articles 150-153.

[954] Office of the Central Attorney Proc., Article 24(2).

2. In a case where the superior prosecutor believes that a criminal proceeding should be instituted, should he refer the case to the same prosecutor who decided not to prosecute, or to another prosecutor? Does it depend on the reason for the prosecutor's refusal to charge the suspect? If his reason was lack of adequate evidence it may be difficult for that prosecutor to proceed with the case wholeheartedly. If his reason was related to other grounds, however, he may be perfectly able to prosecute the case. A lesson can be taken from Article 195(2)(a) of the Code, under which the appellate court is required to remand the case to a court other than the trial court when it reverses a decision of trial court acquitting or discharging the accused.

3.2. Controlling the Prosecutor's Decision to Prosecute

Ethiopian law dealing with controlling the prosecutor's power emphasizes the possible abuse of power through refusing to institute a criminal proceeding. There is, in contrast, no clear and formal mechanism to challenge the decision of the prosecutor to prosecute the accused. Realistically, only the accused will object to the charge, and he will do that during his trial.[955] As stated earlier, if a charge is prepared and filed in the presence of any of the reasons under Article 42(1) or Article 39 of the Code, the accused may petition to the superior prosecutor to take measures in accordance with Articles 9 and 10 of the Proclamation Relating to Attorneys.

Section IV. Checks on the Prosecutor's Discretion in Other Jurisdictions

Two approaches exist for controlling the prosecutor's power. They differ based on which institution is assigned oversight role over the prosecutor's conduct. According to one approach, the decision of the prosecutor is to be challenged before a court of law – this is judicial review. Under the other approach, the challenge is to be brought before a superior public prosecutor – this is administrative review.

The two systems for controlling prosecutorial power are not incompatible. For example, Japan employs both internal (administrative) and external (judicial) controlling mechanisms to check prosecutorial discretion. Japanese prosecution offices are pyramidic in structure; decisions of individual prosecutors must be approved by superiors. Judicial review of a prosecutor's activities is also a recognized way of checking prosecutorial discretion. A party aggrieved by the decision of the prosecutor (whether a decision to prosecute or not to prosecute) can bring the matter to the attention of the court. If the court finds, for instance, that the prosecutor is prosecuting the suspect while not prosecuting similarly situated offenders, the court may dismiss the charge filed against the suspect. Similarly, if the court, upon application by the victim of the crime, finds that the public

[955] From a reading of Article 130 of the Cr. Pro. Code which provides for the grounds of objection to the charge, one can tell that not all the grounds listed under Article 42 of the Code as grounds not to institute a proceeding are included. Thus, where the public prosecutor institutes a proceeding despite the existence of some of the grounds listed under Article 42, the accused may not have the opportunity to raise this fact and challenge the prosecutor's decision before the trial court.

prosecutor should have instituted a proceeding against a suspect, it may order prosecution and appoint a special prosecutor to handle the case. This type of application by the injured party is described as "analogical inquest of prosecution."[956]

The Israeli prosecutor has discretion on whether to prosecute the accused. The decision is to be made by taking into account several factors, most importantly the public interest and equality before the law. The prosecutor's decision whether to prosecute can be challenged before the Israeli Supreme Court.[957] Moreover, a trial court is empowered to dismiss a charge "in the interest of justice" in instances of a gross abuse of prosecutorial power or grave police misconduct.[958]

Another commonly used tool for curbing prosecutorial discretion that is uniquely Japanese is prosecution review commissions. The commissions are comprised of eleven lay citizens appointed to fixed terms with the power to review, upon the request of a victim of crime, a prosecutor's decision not to prosecute a suspect. The commission's verdict is not binding on the prosecutor, however. This review mechanism applies only to challenge a prosecutor's decision not to prosecute; it does not apply to a decision to prosecute.[959]

Arguments Against Judicial Review of Prosecutorial Discretion

Two major arguments are advanced against review of the prosecutor's decision before a court of law.[960] First, the doctrine of separation of powers bars the court from reviewing the prosecutor's decisions whether to prosecute. Second, "the decision to prosecute is particularly ill-suited to judicial review."[961]

i. Separation of Powers

U.S. courts have refused to review the exercise of prosecutorial discretion because they believe that unfettered prosecutorial discretion is vested in the executive branch as an aspect of the doctrine of separation of powers. The doctrine is said to require broad discretion for prosecutors because they "act as the executive branch's delegate to help discharge a chief executive's constitutional responsibility to 'take care that the laws be faithfully executed.'"[962] Hence, in the U.S. prosecutorial discretion is immune from judicial review. In *Newman v. United States,*[963] the D.C. Circuit Court declared that "few subjects are less adapted to judicial review than the exercise by the executive of his

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[956] West, "Pros. Rev. Comm.," at 692-694.
[957] *Ganor v. Attorney General*, 44(2) P.D. 485 (1990) (cited in Eliahu Harnon and Alex Stein, "Israel," in Bradley, *Crim. Pro.*, at 237).
[958] *Yafet v. State of Israel*, 50 (2) P.D. 221 (1996) (cited in ibid.).
[959] West, "Pros. Rev. Comm." at 694-98.
[960] For additional barriers to judicial review of prosecutorial decision making see Joseph, "Review Ability," at 134-161.
[961] *Wayte v. United States*, 470 U.S. 598 (1985) (cited in Weaver et al., *Principles of Crim.*, at 271).
[962] *United States v. Armstrong*, 517 U.S. 456 (1996) (cited in Weaver et al., *Principles of Crim.*, at 271).
[963] 382 F. 2d 479 (D.C. Cir.1967) (cited in Joseph, "Review Ability," at137).

discretion in deciding when and whether to institute criminal proceedings." However, i *Nader v. Saxbe,*[964] by finding that prosecutorial discretion in the form of total refusal t prosecute cases arising from a particular law, as opposed to the prosecutor's decision nc to prosecute in specific instances, is judicially reviewable, the same court narrowed th scope of cases where prosecutorial discretion is immune from judicial review.

ii. Unsuitability of the Prosecutor's Decision to Judicial Review

Another closely related but slightly different argument against judicial review o prosecutorial discretion is articulated by the U.S. Supreme Court in the case of *Wayte v United States*: "the decision to prosecute is particularly ill-suited to judicial review."[96 The inappropriateness of judicial review of a prosecutor's decision is attributed to tw factors. First, because prosecutors have the discretion – but not the duty – to investigat and to prosecute, it is impossible to judicially order them to do so.[966] Second, the need fo professional secrecy constrains courts from inquiring into the reasons for the prosecutor' failure to prosecute.[967]

The *Wayte* decision does not preclude judicial review prosecutorial decisions made or unconstitutional grounds. Such cases include selective prosecution and vindictive prosecution. In selective prosecution, a prosecutor who has the requisite amount of probable cause purposefully decides to pursue a case because of the defendant's race o religion, or some other arbitrary criterion. Such a decision of the prosecutor can be challenged before court of law for it deprives the accused of the right to equal protection of the law. In vindictive prosecution cases, the prosecutor reindicts the defendant on more serious charges in revenge for the defendant having exercised his constitutional o statutory rights. Vindictive prosecution is said to exist where the prosecutor's charging decision was motivated by a desire to "punish" the defendant for exercising his rights.[968]

Notes and Questions

1. The review mechanism adopted under Ethiopian law gives more attention to the prosecutor's decision not to prosecute than his decision to prosecute. Is that because a prosecutor's decision to prosecute will eventually be challenged before a court of law during trial, whereas no judicial forum exists for challenging a decision not to prosecute?
2. Does the question whether the court should review the prosecutor's decision depend on the prosecutorial policy – mandatory or discretionary? Where the prosecutor has discretion, as in the U.S, the court should attempt to ensure that the prosecutor's discretion is not exercised "unconstitutionally," not that every criminal against whom there is sufficient evidence is prosecuted. In a compulsory prosecution system, the role

[964] 497 F. 2d 676 (D.C. cir. 1974) (cited in Joseph, "Review Ability," at 138).
[965] 470 U.S. 598 (1985), Weaver et al., *Principles of Crim.*, at 271.
[966] Ibid.
[967] Joseph, "Review Ability," at 140.
[968] *United States v. Goodwin*, 457 U.S. 368 (1982) (cited in Weaver et al., *Principles of Crim.*, at 273).

of the court is to ensure that every offender against whom there is adequate evidence is prosecuted.

Shouldn't a compulsory prosecution system include judicial review? As provided under the Code of Criminal Procedure of Germany,[969] mandatory prosecution jurisdictions, the victim of an offence can challenge a prosecutor's refusal to bring charges for lack of evidence. The victim first petitions to the superior prosecutor, asking for reversal of the decision made by the subordinate prosecutor. If unsuccessful in obtaining a reversal, the victim can then bring the matter to the State Court of Appeals, which has the power to order the prosecutor's office to file a charge. Thomas Weigend advocates such a system of judicial review to provide a check on arbitrary dismissals by the prosecutor, though in practice victims' efforts to compel prosecution rarely succeed. [970]

If, because of separation of powers, no judicial review is available for a prosecutor's decision not to prosecute, how can the system check that the law is being enforced against the executive? Shouldn't accountability of the executive be checked by judicial review? According to proponents of broad prosecutorial discretion, "the most appropriate mechanism for monitoring and curbing abuse of the charging function is the electoral process, not legal regulation."[971] If the review is to be made by an Executive body, how can one trust that the compulsory prosecution system is protecting the rule of law? If the Executive chooses not to prosecute its officials, what check exists on the Executive power in the absence of review by an independent institution?

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[9] Articles 172-175 of the Code (cited in Thomas Weigend, "Germany," in Bradley, *Crim. Pro.*, at 206).

[0] Thomas Weigend, "Germany," in Bradley, *Crim. Pro.*, at 206.

[1] Griffin, "The Prudent Prosecutor," 14 *Georgetown Journal of Legal Ethics* 281 (2000) (cited in Krug, Pros. Discr.," at 646; Pizza, "Understanding Prosecutorial Discretion in the United States: The Limits of omparative Criminal Procedure as an Instrument of Reform," *Ohio St. L. J.*, 1325, at 1336-39 (1993) (cited n Krug, "Pros. Discr.," at 646).

Chapter Eleven

Preliminary Inquiry and Preparatory Hearing

Section I. Preliminary Inquiry

Most jurisdictions[972] incorporate a preliminary inquiry in their criminal process in cases involving serious crimes. These inquiries are referred to as preliminary hearings,[973] examining trials,[974] or preparatory examinations.[975]

1.1. When is it to be conducted?

As provided under Article 38 (b) of the Code, ordering a preliminary inquiry is one of the options available to the public prosecutor when the investigation is completed. The details of preliminary inquiry are regulated under Articles 80-93 of the Code. Article 80 identifies the types of cases subject to a preliminary inquiry.

Art. 80. Principle.

1. *Where any person is accused of...homicide in the first degree or...aggravated robbery a preliminary inquiry shall be held under the provisions of this Book: provided that nothing in this Article shall prevent the High Court from dispensing with the holding of a preliminary inquiry where it is satisfied by the prosecutor that the trial can be held immediately.*

2. *Where any person is accused of any other offence triable only by the High Court no preliminary inquiry shall be held unless the public prosecutor under Art. 38 (b) so directs.*

In principle, preliminary inquiry is not a mandatory step in a criminal proceeding. In only two cases, aggravated homicide and aggravated robbery, is a preliminary inquiry required to be conducted before the case proceeds to trial. In these cases, the prosecutor can only frame and file a charge before the trial court without a preliminary inquiry if he is authorized to do so by the High Court.[976] In all other cases under the jurisdiction of the High Court, the prosecutor has discretion whether to order a preliminary inquiry. The law

[972] A hearing to review the strength of the prosecutor's case before trial is not part of Germany's criminal process. The judges of the trial court may simply review the prosecution's case before setting it for trial. This process seems similar to what is known as preparatory hearing under the Anti Corruption Proclamation. Thomas Weigend, "Germany," in Bradley, *Crim. Pro.*, at 206.

[973] Eliahu Harnon and Alex Stein, "Israel," in Bradley, *Crim Pro.*, at 237; Rachel Van Cleave, "Italy," in ibid.., at 270; Catherine Newcombe, "Russian Federation," in ibid., at 303.

[974] United States, in Weaver et al., *Principles of Crim.*, at 276.

[975] P.J. Schwikkard and S.E. van der Merwe, "South Africa," in Bradley, *Crim. Pro.*, at 347.

[976] The Criminal Justice Policy provides that a preliminary inquiry for any of the offences within the jurisdiction of the High Court, including aggravated homicide and aggravated robbery, is to be made only where the public prosecutor decides so. That is, no permission from a court of law is required to proceed to trial without preliminary inquiry. Criminal Justice Policy, Section 3.18.

does not provide any guidance as to an appropriate basis for the prosecutor's decision. Hence, his discretion is absolute: it is within the exclusive jurisdiction of the public prosecutor to order a preliminary inquiry or not. It is clear that cases triable by first instance courts should not be subject to a preliminary inquiry. According to the current allocation of jurisdiction, supreme courts, both at the federal and state level, have first instance jurisdiction over some cases. As the supreme court of Ethiopia had no first instance jurisdiction at the time when the Code was enacted, the Code is silent as to whether a preliminary inquiry can be ordered in such cases.

1.2. What is to Take Place During a Preliminary Inquiry?

Jurisdiction

As provided under Article 81 of the Code, a preliminary inquiry is to be conducted before the Woreda Court within whose area of jurisdiction the crime was committed. Currently, a preliminary inquiry is to be conducted before first instance courts which replaced the Woreda Courts.[977] As provided under Article 83(3) of the Code, the prosecutor acting at the court before which the inquiry is to be conducted presides over the preliminary inquiry.

If a public prosecutor at the High Court level decides to order a preliminary inquiry, he is required by Article 83(1) of the Code to send a copy of his decision to the lower court (committal court) where it is to be conducted. The same provision states that the prosecutor at the High Court level, where appropriate, must send a copy of his decision to the public prosecutor at the court where the inquiry is to be conducted. The provision is silent as to when the prosecutor should send the decision to the lower court prosecutor.

The provision could not be understood as suggesting possibilities where the prosecutor at the High Court level may himself, in stead of the public prosecutor at the lower court, appear during a preliminary inquiry as that possibility is ruled out by Article 83(3) of the Code. For it is the prosecutor who is responsible for calling and examining witnesses[978] during the preliminary inquiry, the provision could neither be interpreted as suggesting cases where preliminary inquiry may be held without a prosecutor. Since the preliminary inquiry cannot be conducted in the absence of the prosecutor acting before the committal court, it is hard to imagine circumstances in which it would be inappropriate for the High Court public prosecutor's decision to be communicated to the local court prosecutor.

Oral Evidence

On the day fixed for the preliminary inquiry the court, upon ascertaining that the accused is present, shall require the prosecutor to open his case and call his witnesses in accordance with Article 84 of the Code. There is no explicit provision requiring the prosecutor to call all of his witnesses at the preliminary inquiry stage, and it can be

[977] For a preliminary inquiry to be conducted in Addis Ababa or Dire Dawa, see Federal Courts Proclamation, Article 15.
[978] Cr. Pro. Code, Article 84.

ferred from Article 143(3) of the Code that the prosecutor is not obligated to call every ıe of his witnesses. By virtue of this provision, simply by informing the accused in riting of the name of the witness and the nature of the testimony he will give, the rosecutor is allowed to call and let a witness testify during trial though he did not testify ıring the preliminary inquiry stage. The law does not even require that a reason existed r the witness not to testify during the preliminary inquiry.

rticle 88 of the Code, dealing with how to record oral evidence, refers to Article 147 of ıe Code which states that the evidence shall be divided into evidence-in-chief, cross xamination, and re-examination. Hence, the accused is allowed to cross examine the rosecution's witnesses. Article 30 of the Code allows witnesses to give their testimony to n investigating police officer during the investigation stage. However, suspects are not llowed to cross examine witnesses at this stage. It is at the stage of preliminary inquiry hat accused persons have this opportunity for the first time.

Article 87 of the Code empowers the committal court to call any witness who is not called by the prosecutor if the court thinks that the witness's testimony is necessary in the nterest of justice. Since the court has no power to order the release of the accused, it is not clear how the calling of witnesses by the court can be justified by the interest of justice. One possibility is that though the committal court has no power to dismiss the prosecutor's case, it has to make sure that the preliminary inquiry helps the trial court reach an accurate judgment. Hence, if the committal court learns from the prosecutor's case and the testimony of the prosecution's witnesses the identity of additional potential witnesses, the committal court may call for their testimony. The witnesses to be called by the committal court need not testify in favor of the prosecution. As the interest of justice is served when truth is discovered, anyone who is likely to have knowledge about the case can be called by the court. This witness may testify in favor of the prosecutor or the accused.

The witnesses are expected to appear and testify during the trial stage. Hence, a precautionary measure must be taken to make sure that they do appear and testify at trial. Article 90 of the Code empowers the court to cause the witnesses to execute a bond that binds them to appear before the trial court when needed. The court may order a witness who refuses to execute the bond to be kept in custody until trial. The committal court may also order the accused to remain in custody if reasons exist to deny his right to be released on bail as provided under Article 93 of the Code.

Article 85 of the Code specifies how the court conducts the preliminary inquiry. First, once the prosecution's witnesses have testified, the court must give the accused the opportunity to answer the charge. Second, the court must inform the accused that he is not bound to make a statement and that if he makes a statement, it may be used during his trial. Third, the court has to inform the accused about the nature of the proceeding. That is, the accused must be informed that the proceeding taking place does not constitute a trial

and that the decision whether he has committed the crime or not is to be made by another court at a separate proceeding. Such information is crucial to the accused, as it will help him decide what to do and when. For example, the information may help the accused decide whether to cross examine witnesses and whether to make a statement in response to the charge. Hence, for information about the proceeding to serve its purpose, it should be provided at the beginning of the proceeding. If the accused wishes to make a statement, Article 86(2) requires that his statement be reduced to writing, read to and signed by him and kept in the file.

The court then requires the accused to provide a list of witnesses (with addresses) he wishes to call during his trial. When the preliminary inquiry is concluded, the committing court will automatically commit the accused for trial. In accordance with Article 91 of the Code, the committing court must send the original record containing the matters listed under Article 92(1) of the Code to the registrar of the trial court. In accordance with Articles 91(3) and 92(2) of the Code, the registrar of the trial court is responsible for sending a copy of the record to the accused and the public prosecutor at the High Court level. In addition to the record, the exhibits, if manageable, should also be forwarded to the registrar of the trial court. Exhibits that cannot be sent due to their size will remain in the custody of the police until trial.[979]

The Cr. Pro. Code does not provide for documentary evidence to be submitted to or examined by the committing court. In Italy, the court before which a preliminary hearing is conducted simply examines the documents submitted by the prosecutor and listens to the oral arguments of the prosecutor and the accused.[980]

1.3. Functions of Preliminary Inquiry

The preliminary inquiry serves a variety of purposes. The following discussion reviews its role in several legal systems.

i. Screening:

The principal function of a preliminary inquiry in other jurisdictions[981] is screening. The court before which a preliminary inquiry is conducted decides whether the prosecutor can charge the accused or not. At this stage, the court reviews whether the prosecutor has *probable cause*, otherwise known as a *prima facie* case, that an offence was committed and that the accused committed it. If the court is satisfied that the prosecutor has a probable cause, it will commit the accused for trial. If the court does not find probable cause, the accused will be released and the prosecution's case dismissed.[982]

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[979] Cr. Pro. Code, Article 91.
[980] Rachel Van Cleave, "Italy," in Bradley, *Crim. Pro.*, at 271.
[981] United States, in Weaver et al., *Principles of Crim.*, at 277; Russia, Catherine Newcombe, "Russian Federation," in Bradley, *Crim. Pro.*, at 303; Italy, Rachel Van Cleave, "Italy," in ibid., at 270-71.
[982] The Russian judge is allowed to remand the case for supplementary investigation instead of dismissal. Catherine Newcombe, "Russian Federation," in Bradley, *Crim. Pro.*, at 303.

In *Thies v. State*, Rosenbery, J., writes the following on the screening function of preliminary inquiry.

> The object or purpose of the preliminary [hearing] is 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.[983]

The Ethiopian Criminal Procedure Code does not empower the committal court to dismiss the case of the prosecutor, no matter how weak his case may be. After the prosecution's witnesses have been heard and the suspect is invited to make a statement in answer to the charge, the court will automatically commit the suspect for trial. However, no law obliges the prosecutor to prosecute an accused after a preliminary inquiry. Hence, the prosecutor at the High Court level may refuse to institute a criminal proceeding in accordance with Article 42(1) (a) of the Code when the prosecutor generally feels that hewill have difficulty establishing the guilt of the accused. That would be the case if witnesses crucial to his case fared badly during cross examination at the preliminary inquiry or if witnesses called by the court testified persuasively in favor of the accused.

The non-binding nature of the committal court's decision is clear from Article 109(2) of the Code, which allows the prosecutor, where he believes it to be appropriate on the basis of the record of preliminary inquiry, to file a charge in a lower court "notwithstanding the decision of the committing court."

ii. Pretrial Discovery:

In jurisdictions where the committal court has the power to dismiss the prosecutor's case for lack of probable cause, the prosecutor is obliged to introduce witness testimony sufficient to prevent dismissal. This allows the accused to know in advance of the prosecution's witnesses and the nature of their testimony. Its significance as a means to discover the prosecution's evidence depends, of course, on the number of witnesses who testify and how critical their testimony is to the prosecution's case.

As discussed above, the Ethiopian committal court does not have the power to dismiss the prosecutor's case no matter how weak a case he has. Because of this and because there is no requirement that all witnesses of the prosecutor testify, in Ethiopia preliminary inquiry has minimal significance as a means to pretrial discovery of the prosecutor's evidence. Because there is no risk of dismissal of the prosecutor's case for lack of probable cause and because Article 143 expressly allows the prosecutor to call witnesses during trial who did not testify at the preliminary inquiry, the prosecution has no incentive to call all, or as many witnesses as possible, during preliminary inquiry.

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[983] *Thies v. State*, 189 N.W. 539 (Wis. 1922) (cited in Kamisar et al., *Adv. Crim. Pro.*, at 898).

The accused has an opportunity for pretrial discovery of evidence even where there is no preliminary inquiry (by virtue of Article 20(4) of the FDRE Constitution), and the public prosecutor has ample opportunity not preview his evidence at the preliminary inquiry. Thus, the preliminary inquiry cannot be justified as a means for allowing the accused to discover the prosecution's evidence in advance.

For three reasons, preliminary inquiry in Ethiopia is designed to serve the interests of the public prosecutor (*i.e.*, the perpetuation of testimony of the prosecutor's witnesses), not those of the accused. First, except in cases of aggravated robbery and aggravated homicide, a preliminary inquiry is to be conducted only where the public prosecutor wishes it. Even in the case of the two specific crimes, he may apply to the trial court to dispense with the preliminary inquiry. Second, the prosecutor is not required to satisfy the court by any standard that he has a case against the accused. That is, there is no risk that his case may be dismissed by the committal court. Hence, the prosecutor may present the testimony only of those witnesses who are not likely to be available during the trial of the accused. Third, there is no requirement that the prosecutor call all of his witnesses during the preliminary inquiry. Article 143(3) of the Code expressly allows him to call at trial any witness who did not testify during the preliminary inquiry stage. He need not articulate any reason for not calling the witness to testify at the preliminary inquiry.

iii. Impeachment

Where a witness testifies twice, one during the preliminary inquiry and for the second time during trial, there is a possibility that he will make inconsistent statements, thereby impeaching himself. The more witnesses say during the preliminary inquiry, the more inconsistencies will arise between their testimony at the preliminary inquiry and at trial. Hence, it is good strategy for the defence to extensively cross examination prosecution witnesses at the preliminary hearing, so as to be able to impeach the prosecution's witnesses at trial. On the other hand, extensive cross examination could demonstrate to the prosecutor the weaknesses in his witnesses' testimony and could alert him to the need to shore up these weaknesses during trial. The defence lawyer should thus strike a balance in his cross-examination of the prosecution's witnesses.

iv. Perpetuation of Testimony:

The major function of preliminary inquiry in Ethiopia is perpetuation of testimony.[984] As provided under Article 90 of the Code, prosecution witnesses who testified at the preliminary inquiry are required to enter into a witness bond binding themselves to appear and testify during trial. Their testimony at the preliminary inquiry may not be used in lieu of their appearance and testimony at trial. That is, unless it is impossible for the witnesses to testify during trial, the prosecutor is to call them to testify at trial. If, on the other hand, witnesses who testified during the preliminary inquiry are not available to testify at trial

[984] The Criminal Justice Policy expressly indicates that perpetuation of testimony is the objective of preliminary inquiry. Criminal Justice Policy, Section 3.18.

for certain reasons, including death, physical or mental illness, being outside of the country, or because they cannot be found for any other reason, Article 144(1) of the Code allows the deposition of witnesses taken at a preliminary inquiry to be introduced as evidence at trial.

Article 80(1) of the Code allows the prosecutor to request the court to dispense with a preliminary inquiry and authorize him to frame a charge and institute a criminal proceeding in cases of aggravated robbery or homicide. If the court is convinced that the trial will be conducted immediately it may agree to dispense with the preliminary inquiry. The fact that the trial will be conducted immediately is relevant in two ways to the court's decision whether to dispense with the preliminary inquiry. An immediate trial serves two functions of the preliminary inquiry: screening and perpetuation of testimony. The preliminary inquiry's screening function is important to the accused because it restores his liberty in cases where evidence is lacking. If the trial is conducted without delay, the trial itself serves the screening function and therefore is not prejudicial to the accused's interests.

The preliminary inquiry's function of perpetuation of testimony can also be served by an immediate trial. Although it is unclear what "immediate" means under Article 80(1), it is logical to assume that if the trial is conducted shortly after the conclusion of the investigation, little risk exists that prosecution witnesses will be unavailable to testify at trial. Hence, there is no concern about perpetuation of testimony and the court may grant the prosecutor's request.

The screening function of preliminary inquiry cannot be considered under Article 80(1) of the Code, since this function of the preliminary inquiry is not recognized in the Code. Thus, any request by the prosecutor to proceed directly to charge and prosecution should emphasize that doing so would not jeopardize perpetuation of testimony function of the preliminary inquiry (its most important function under the Code).

Notes and Questions

1. To what extent is the perpetuation function of the preliminary inquiry (Article 143(3) of the Code) compatible with the accused's right of confrontation as recognized under Article 20(4) of the FDRE Constitution and Article 14(3) (e) of the ICCPR? In *Ohio v. Roberts*,[985] the U.S. Supreme Court held that recorded preliminary hearing testimony may be used against the defendant as substantive evidence at trial. In the U.S., preliminary hearing testimony has been admitted at trial as substantive evidence under the "prior testimony" exception to the hearsay rule where the witness is unavailable to testify, provided that three conditions exist: 1) the testimony was given under oath; 2) the declarant is unavailable to testify at trial; and 3) a reasonable opportunity, whether exercised or not, for cross examination on substantially the same issues was afforded

[985] *Ohio v. Roberts*, 448 U.S. 56 (1980) (cited in Weaver et al., *Principles of Crim.*, at 279).

the opposing party at the preliminary hearing. The proper application of Ethiopian law on preliminary inquiry ensures the fulfillment of the last two of the three conditions. By virtue of Article 88 and 147 of the Code the accused has the right to cross examine witnesses of the prosecutor. Article 143(3) conditions admissibility of testimony given during preliminary inquiry on the unavailability of the witness. Regarding the oath requirement, only under Article 136(2) of the Code contains a requirement that witnesses of the prosecutor be sworn or affirmed before they give their testimony. However, in practice witnesses testify under oath even during a preliminary inquiry.

2. Because the public prosecutor can call his witnesses to testify at the preliminary inquiry stage, he will take advantage of the perpetuation of testimony function of the preliminary inquiry in cases witnesses are unavailable for reasons envisaged under Article 144 of the Code. However, the accused is allowed to simply submit a list of names of witnesses that he is planning to call during his trial. Hence, if in case his witnesses are unavailable during his trial for one of the reasons listed under Article 144(1) of the Code, he has no testimony to rely on. In view of this, is it fair to let the witnesses of the public prosecutor but not those of the accused testify during the preliminary inquiry? How do you see this issue from the viewpoint of discovering the truth, one of the functions of the criminal procedure law?

3. Article 109(1) of the Code provides the time within which a charge is to be framed. When no preliminary inquiry is conducted, the provision requires the prosecutor to frame a charge within 15 days of his receipt of the police investigation report. When a preliminary inquiry is conducted, the 15-day time period starts as of the prosecutor's receipt of the record of the preliminary inquiry. In view of these time periods, what does the condition that "the trial can be held immediately" mean under Article 80(1) of the Code? Does it mean that the trial has to be conducted within less than 15 days?

   The prosecutor has no role to play in determining the date of trial. His role is simply to file a charge. As provided under Article 123 of the Code, once the charge is filed before the trial court, the court fixes the date of the trial according to its schedule and case load, and informs the parties of the date selected. Since the court determines the trial date, what is the prosecutor expected to do to convince the court that the "trial can be held immediately" so that the preliminary inquiry can be bypassed? Should the phrase be construed as requiring that the charge be filed immediately?

   The Amharic version of the Code does not invite such questions. The Amharic version of Article 80(1) simply requires that the prosecutor suggest that the trial be conducted immediately (without preliminary inquiry). If the court accepts the prosecutor's suggestion, it can dispense with the preliminary inquiry. Although the Amharic version does not expressly state that a prompt trial is not a ground for dispensing with the preliminary inquiry, it does not state any other grounds for dispensation. What possible reasons might the prosecutor come up with to convince the court to accept his suggestion so that he can go straight to filing a charge?

. Where a preliminary inquiry is not a mandatory procedure, what might motivate the public prosecutor to order it?
. Does the accused have the right to have an appointed lawyer during the preliminary inquiry? What are the implications of Article 20(5) of the FDRE Constitution, on the one hand, and Article 61 of the Code, on the other?
. Future impeachment and perpetuation of testimony are the two conflicting functions of preliminary inquiry. The first function is served only where a witness testifies both at the preliminary inquiry and trial stages. It is in such cases that there would be inconsistency between the testimoniesies given at the two stages of the criminal proceeding. The second function is served where a witness who testified during preliminary inquiry is not *available* during the trial stage of the case. When a witness who testified during the preliminary inquiry does not appear at trial, the accused is affected in two ways. First, he will have no opportunity to confront the witness. Second, he will have no opportunity to impeach the witness. In light of the constitutional right of the accused to confront witnesses testifying against him and to defend his case (not only through the testimony of his own witnesses but also by challenging the evidence of the prosecutor), should perpetuation of testimony of the prosecutor's evidence continue to be a recognized function of preliminary inquiry?

Section II. Preparatory Hearing

Introduction

The notion of a "preparatory hearing" was introduced to the Ethiopian criminal justice system in 2001 by the Anti-Corruption Special Procedure and Rules of Evidence Proclamation. The Revised Anti-Corruption Proclamation[986] has retained the process with some modifications.

Preparatory hearing refers to a "pre-trial" process where both the public prosecutor and the accused present their version of the criminal case to the trial court so that the court can identify issues on which the trial will focus on and rule on admissibility of evidence and any other questions of law that need to be addressed before trial begins.

This step in a criminal proceeding is applicable only to corruption cases, and even in corruption cases it is not mandatory. Unlike the preliminary inquiry, which the prosecutor decides should or should not take place, the trial court determines whether a preparatory hearing is to be held. The court considers two factors in deciding whether a preparatory hearing is to be held. The first is the complexity of the case. A preparatory hearing is justified if the corruption case filed before the court is so complicated that the trial is likely to take long time. The second factor relates to the likely purpose of the hearing. The preparatory hearing should be likely to serve the purposes listed under Article 36 of the

[986] This proclamation, by virtue of Article 58(1), repealed the Anti-Corruption Proclamation.

Art 36.

Proclamation. Where the two conditions exist, the court has authority to order that a preparatory hearing be held.

2.1. Purposes of Preparatory Hearing

Art. 36 of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation provides the following regarding the purposes of preparatory hearings.

1. *the purpose of the preparatory hearing are the following:*
   a. *To identify issues which are likely to be material to the case*
   b. *To assist the parties in comprehending the issues;*
   c. *To facilitate the proceedings;*
   d. *To assist the court in the management of the trial*
2. *in the proceeding of a preparatory hearing, the court shall make ruling with respect to:*
   a. *Any question as to the admissibility of evidence;*
   b. *Any question of law which is found necessary to give ruling before the trial starts.*

i. Making the Case Manageable

If a charge of a corruption offence is complicated, the court may order a preparatory hearing be conducted. The purpose for a preparatory hearing articulated in Article 36(1) of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation is to simplify the complexity of the case, thereby making the matter manageable both to the parties and the court.

When a preparatory hearing is ordered by the court, both parties – the prosecutor and the accused – submit their version of the case, as the parties do in a civil proceeding. First, the prosecutor provides a written statement to the court and the accused that, *inter alia*, includes the principal facts of the case and provisions of the law on which he proposes to rely. Then, the accused submits a written statement setting out in general terms the nature of his defence and indicating the principal matters on which he takes issue with the prosecution.

Then, the court frames the issues – that is, the points of disagreement between the parties – on the basis of the statements of the two parties. The "trial proper" is a forum where the prosecutor introduces evidence to establish the disputed part of the charge. In Israeli criminal procedure, one of the purposes of the preliminary hearing is to identify facts that are genuinely in dispute.[987]

ii. Ruling on Admissibility of Evidence and Preliminary Issues

The other purpose of the hearing, as provided under Article 36(2) of the Proclamation, is for the court to rule on preliminary issues that do not go to the merits of the case. Arguably, a related purpose of the hearing is articulated in Article 37(4) of the

[987] Eliahu Harnon and Alex Stein, "Israel," in Bradley, *Crim. Pro.*, at 237.

Proclamation.[988] This provision empowers the court to order the prosecutor to amend his written statement on the basis of the objections raised by the accused. Amendment can be considered as another purpose of the hearing though the Proclamation does not expressly state so.

2.2. Appeal and Institution of New Charge

Article 181 of the Code provides that an appeal may be lodged only from a judgment of conviction, acquittal, or discharge. By prohibiting appeal on interlocutory rulings, including rulings on the admissibility of evidence and objections to the charge, most of which are questions of law that need to be addressed before trial proper begins, Article 184 of the Code reinforces the prohibition of interlocutory appeal.

Article 40 of the Proclamation provides that a ruling made under Article 36(2) of the Proclamation is appealable. Either or both of the parties may appeal points they believe were wrongly decided by the trial court. Appeal is allowed even if the ruling does not have a dispositive effect on the case; hence, it is an exception from the rule of no interlocutory appeal. The statement "*the court may continue a preparatory hearing notwithstanding such appeal*" in Article 40 of the Proclamation indicates that an appeal can be taken during a preparatory hearing.

Note that it is possible the prosecutor's case may be terminated at the preparatory hearing stage, depending on the court's rulings on admissibility of evidence and other preliminary issues. First, all or crucial evidence of the prosecutor might be declared inadmissible by the court. Without such evidence the prosecutor's charge is not likely to be proved. In such cases, either upon court order or by the prosecutor's own motion, the trial will be discontinued. Second, a ruling on a question of law envisaged under Article 36(2)(b) might result in discontinuance of the trial. For instance, if the case is declared to be barred by the applicable statute of limitations, it could not continue, since neither conviction nor penalties can be imposed in a time-barred case under Article 216(1) of the Criminal Code.

Article 41 of the Proclamation specifically provides that closure of the prosecutor's file as a result of a ruling that certain evidence is inadmissible does not bar future prosecution under the same cause of action based on new evidence. The same should be true where the file is closed as a result of a court ruling on other preliminary matters. Assuming the ground for discontinuing the case is not an absolute bar (such as a statute of limitations), the prosecutor can cure the problem and bring his case back to trial. The prohibition against double jeopardy does not bar this result.

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[988] Art. 37. Obligation of the Prosecutor
The court may order the prosecutor;
4. To make any amendments of any written statement given pursuant to sub-article (1) of this article that appears to be appropriate, having regard to objections made by the accused.

Notes and Questions

1. The Proclamation simply authorizes the court to order a preparatory hearing where it appears to it that the two conditions stated under Article 35 of the Proclamation No. 434/2005 exist. In a complicated case, can the parties apply for the hearing to be conducted if the hearing will serve any of the purposes listed under Article 36 of the Proclamation? In England, where preparatory hearings in long or complex cases are allowed, the decision to hold a preparatory hearing is to be made by a crown court judge on the application of any of the parties or by the court on its own motion.[989]
2. The basic purpose of the preparatory hearing in England is to assist the jury to identify and understand material issues, thereby expediting proceedings before them. The hearing is not meant to assist the parties or the court as such. The court will benefit from the proceeding in managing the trial only indirectly – for the proceeding is helpful in guiding the jury. Since Ethiopian trials involve no jury, what is the practical significance of the preparatory hearing?
3. As under the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, British law allows interlocutory appeals from rulings given by the court during the preparatory hearing. The justification for recognizing interlocutory appeals in England is "to ensure that issues of admissibility and law are definitely resolved before the jury begins to deliberate, so as to ensure that a complex and potentially lengthy trial does not prove to be abortive."[990] Is there such a convincing justification for the Proclamation's recognition of interlocutory appeals (given the Criminal Procedure Code[991] requirement that appeals be made only from a judgment)?
4. The court is to ensure the fulfillment of two conditions before ordering a preparatory hearing. The existence of one of the factors – the complexity of the case – can easily be determined by the court from a reading of the charge. How does the court know whether the other factor exists – that the preliminary inquiry is likely to serve the purposes listed under Article 36 of the Proclamation?
5. What is the next step if the accused does not contest the admissibility of the prosecutor's evidence and admits each allegation of the prosecutor, including the allegation that he has committed the given crime? Can the court convict the accused summarily, *i.e.*, without conducting a "trial proper"? Should the court treat the response of the accused as a plea of guilty and apply Article 134 of the Code, which authorized the court to convict the accused forthwith? Or should the court require the prosecutor to call any evidence it deems necessary?
6. Once issues – points of disagreement between the prosecutor and the accused – are framed during the preparatory hearing stage, should the court, during the "trial proper," focus only on the disputed part of the charge? If so, the prosecutor would not be expected to produce evidence to prove the part of the charge that is admitted by the accused. However, under Article 133(2) of the Code, if the accused, when asked whether he pleads guilty, admits the charge with reservation the court is to record a

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[989] Sprack, *Practical Approach* , at 274.
[990] Ibid., at 275.
[991] For the arguments against interlocutory appeal, refer to Chapter 15.

plea of not guilty. In such a case the prosecutor is required to prove every element of the charge, including the one admitted by the accused. Which approach is consistent with the right of the accused to be presumed innocent and the burden of the prosecutor to prove the charge by a "beyond a reasonable doubt" standard? If, on the other hand, the prosecutor is required to prove both the admitted and contested parts of the charge, there would be no point in identifying issues in a separate proceeding (preparatory hearing).

What questions of law does Article 36(2) (b) of Proclamation No 434/2005 envision being addressed before the trial starts? Does it extend to objections to the charge listed under Article 130 of the Code and other matters that do not go to the merit of the case?

2.3. Responsibilities of the Parties During Preparatory Hearing

Both parties are required to submit their cases in writing. Based on the parties' submissions, the court frames the issues and makes rulings on preliminary matters. The obligations of the prosecutor and the accused are stated under Articles 37 and 39, respectively, of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation.

Art. 37. Obligation of the Prosecutor.
The court may order the prosecutor;

1. *To give the court and the accused a written statement of the matters falling under article 38 of this Proclamation;*
2. *To prepare the prosecution evidence and any explanatory material in such a form as appears to the court to be likely to assist the proceeding and submit same to the court and the accused;*
3. *To give to the court and the accused a written notice of documents the truth of the contents of which ought in the prosecutor's view to be admitted and of any other matters which in his view ought to be agreed;*

Article 38. Written Statement of the Prosecutor
The written statement to be submitted in accordance with Sub-Article 1 of Article 37 shall contain the following:

1. *The principal facts of the case for the prosecution;*
2. *Unless it is deemed necessary to keep secret the identity of the witnesses upon the application of the prosecutor and court authorization, the witnesses who will speak to those facts;*
3. *Any exhibits and documentary evidence relevant to those facts;*
4. *Any provision of law on which the prosecutor propose to rely;*
5. *Any matter falling within preceding sub-articles or that appears to the prosecutor to flow from the same.*

Article 39. Obligations of the Accused
Where the prosecutor has complied with the order of the court, the court may order the accused to give the court and the prosecutor:

1. *a written statement setting out in general terms the nature of his defense an indicating the principal matters on which he takes issues with prosecution.*
2. *a written notice of any objections that he has to the case statement;*
3. *a written notice of any point of law and the admissibility of evidence which h relies on;*
4. *a written notice stating the extent to which he agrees with the prosecutor relatin to documents and other matters referred to in sub-article 3 of Article 37.*

Chapter Twelve

Criminal Jurisdiction of Courts

Section I. Structure of Courts

1.1. Traditional Court System

he following three paragraphs from Fisher's *Traditional Criminal Procedure of Ethiopia* ımmarize the structure of courts in Ethiopia in earlier times.[992]

> As was the case in most African traditional societies, separation of judicial from administrative power was not a feature of Ethiopian governmental organization. At the base of the official Imperial structure we find the parish headman, or chief, called the *chika shum* ("appointed over the soil"). This personage, whose eligibility for the post is hereditary and tied to land ownership, is appointed by the governor-general of the province (*tekle guezat*). The parish headman acts as the lowest judge (*dagna*) in the court hierarchy. Some writers seem to distinguish between the parish headman's administrative office and that of the judge (*dagna*), but it appears that only in urban areas, where specialization of function was warranted by the increased volume of judicial business, were the two offices held by different persons.
>
> The administrative level between the village and the province is the district (*woreda*), administered by the district governor (*wore-da-gaj*). The district governor was appointed by the provincial governor, and reportedly sat to hear appeals in cases decided by the parish headman. From the district governor's court, appeals went to the provincial governor, who sat in court with an uncertain number of judges. Redress lay from the provincial governor's court to that of the Emperor, but not to him personally. An official known as the *Afe Negus* ("Mouth of the King") heard the great bulk of the Emperor's judicial business. To relieve the excessive burden of cases coming to the *Afe Negus*, and thereby to speed up the appeal process, in 1908 Emperor Menelik established a special tribunal to Addis Ababa composed of twelve "princely judges" (*wonder-rases*), two to deal with cases from each of the six parts of the Empire. From this court, apparently, cases could still go to the *Afe Negus*, and from him, in last resort, to the Emperor's court.
>
> Two additional points should be noted. First, it is probable that each level of "appeal court" mentioned above also had original jurisdiction, although the rules, if any, restricting the initiation of cases at any given level are not known to the present writer. Also, although only the major levels of administration/adjudication

[992] As the timeframe of his article was the period between the reign of Emperor Menelik (1889-1913) and 1935 – the year of the Italian occupation of Ethiopia, these paragraphs should be understood as referring to this period. Fisher, "Traditional Crim. Pro." at 713.

> have been presented, it may be that other levels existed. Surely, in addition, there were specialized judicial bodies such as church and market courts which functioned to some extent outside of the normal hierarchy.[993]

Assefa agrees with Fisher that there was a blend of judicial and executive functions i traditional Ethiopia.

> In historic Ethiopia, adjudication of cases formed part and parcel of public administration. One finds a merger of functions within the executive, the administration of justice and the executive function proper. Indeed, adjudication of cases was considered to be the principal function of the executive. For example, in Menelik's era of appointment of the Ministers in 1908, the Minister of Justice was also the Chief Justice.[994]

1.2. Modern Court Structure

Though Articles 9, 10, 11, and 16 of the 1931 Ethiopian Constitution envisioned formation of formal state courts, such courts were not established till 1942. It was then that the four-tier state court systems were formally established for the first time by Proclamation No. 2/1942.[995] For about half a century after that time, the court's structure could generally be described as unitary and hierarchical.[996]

The federal structure of government was introduced for the first time[997] by the Federal Transitional Charter[998] and was later adopted by the FDRE Constitution. Following the adoption of a federal form of government by the Transitional Charter, a law was proclaimed that provided for the establishment of National/Regional Self-Governments.[999] According to this law, every National/Regional Transitional Self-Government[1000] had a legal personality[1001] and its own several organs[1002] through which it exercised its

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[993] Ibid., at 713-16.

[994] Asefa Fisha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* at 390 (Netherlands: Wolf Legal Publishers, 2006).

[995] Administration of Justice Proclamation, 1*Consolidated Laws of Ethiopia*, at 87-90 (1972).

[996] Several laws on establishment of courts were passed from time to time. See Special Courts Martial Establishment Proclamation, Proc. No. 7/1974; Administration of Courts Proclamation, Proc. No. 52/1975; the Supreme Court Establishment Proclamation, Proc. No. 9/1987; High Courts and Awraja Courts Establishment Proclamation, Proc. No. 24/1988.

[997] By virtue of the Federal Act of 11 September 1952 Eritrea was federated with Ethiopia. That Act granted to the Eritrean Government legislative, executive, and judicial powers in the field of domestic affairs. Federal Act of 11 September 1952, 1 *Consolidated Laws of Ethiopia*, at 34-37 (1972). Thus, a federal form of government was in place until the federal status of Eritrea was terminated in 1962. Termination of the Federal Status of Eritrea and the Application to Eritrea of the System of Unitary Administration of the Empire of Ethiopia Order, 1962, 1*Consolidated Laws of Ethiopia*, at 45-46 (1972).

[998] The Transitional Period Charter of Ethiopia, 1991, *Fed. Neg. Gaz.*,year 50, no. 1.

[999] National/Regional Self-Governments Establishment Proclamation, Proc. No. 7/1992, *Neg. Gaz.*, year 51, no. 2. (hereafter National/Regional Self-Governments Establishment Proc.).

[1000] For the definitions of "National Transitional Self Government" and "Regional Transitional Self-Government," see National/ Regional Self-Governments Establishment Proc., Art. 2, subarticles 4 and 5.

[1001] Ibid., at Art. 6.

[1002] Ibid., at Art. 8.

egislative, executive, and judicial powers.[1003] The law, having established a National/Regional Superior Court, empowered each National/ Regional Transitional Self-Government to establish other lower courts as it deemed necessary.[1004]

n 1993, a law was proclaimed that abolished the pre-existing unitary court structure and established courts of the Central Transitional Government.[1005] This law established the Central Supreme Court, the Central High Court and the Central First Instance Court[1006] and allocated judicial jurisdiction among them.[1007] With the promulgation of this law came two parallel courts in Ethiopia – Central Courts and Courts of National/Regional Self-Government – each with its own hierarchical arrangement.

The FDRE Constitution, without affecting the federal structure of courts, introduced some modifications to the pre-existing court structure. The Constitution established the Federal Supreme Court and empowered the House of Peoples' Representatives to establish the federal high courts and the federal first instance courts nationwide, or only in certain parts of the country. Accordingly, the House passed laws establishing these federal courts.[1008] By virtue of the Federal Courts Proclamation, the House repealed the Central Courts[1009] and established the federal high court and federal first instance court to sit in the federal cities[1010] – Addis Ababa and Dire Dawa. The House exercised its constitutional power to establish federal courts in some parts of the country and passed a law[1011] that established a federal high court in five states – Afar, Benshangul, Gambella, Somali, and the Southern Nations, Nationalities, and Peoples Region.[1012]

[1003] Ibid., at Art. 9.

[1004] Ibid., at Art.24. Chapter Two, Part Five of the Proclamation deals with the judicial organs and powers of the National/ Regional Transitional Self-Government.

[1005] Article 47 of the Central Government Courts Establishment Proclamation, Proc. No. 40/1993, *Fed. Neg. Gaz.*, year 52, no. 25.

[1006] Ibid., at Art. 3.

[1007] Ibid., at Arts. 5, 6, and 10- 21.

[1008] FDRE Constitution, Article 78, subarticle 2. Article 78 of the FDRE Constitution has the same approach as that of Article III of the U.S. Constitution. Both provisions of the two constitutions establish one federal Supreme Court and empower the federal law-making bodies to establish inferior courts as necessary.

[1009] Article 37 of the Federal Courts Proclamation, Proc. No. 25/1996, *Fed. Neg. Gaz.*, year 2, no. 3 (hereafter Federal Courts Establishment Proc.) The Federal Supreme Court was already established by virtue of Article 78(2) of the FDRE Constitution.

[1010] Ibid., at Arts. 12(2) and 15(2).

[1011] Federal Courts Proclamation, Proc. No. 25/1996, *Fed. Neg. Gaz.*, year 2, no. 3, as amended; Federal High Court Establishment Proclamation, Proc. No. 322/2003, *Fed. Neg. Gaz.*, year 9, no. 42 (hereafter Federal High Court Establishment Proc.).

[1012] Ibid., at Art. 2

Section II. Division of Judicial Power between State and Federal Courts[1013]

2.1. Constitutional Division of Judicial Power

A Constitution in a federal system is a compact between the central and regional governments. Among other things, the constitution divides state power and assigns part of it to the central government and the other part to the regions. Judicial power is among the state powers to be divided. Chapter Five of the FDRE Constitution contains provisions dealing with division of power between the states and the federal government. Article 51 provides an exhaustive list of matters over which the federal government has exclusive power. Article 52 provides a list of some matters over which states have exclusive power and grants the residuary power to the states. These provisions simply allocate power to two governments without specifying legislative, executive, or judicial aspects of the powers. Hence, the relevance of these provisions in allocating judicial power between the federal and the state courts is minimal.

In a horizontal federalism,[1014] the powers of one organ of the central or regional government are defined in terms of the power of the other organ. That is, the federal judiciary interprets the laws passed by the federal law-making body and the executive at the center executes the laws passed by the federal law-making body. The same logic applies with regard to the power of the three organs of the regional governments. The regional law-making body legislates on matters assigned to the regions. Laws passed by the regional law-making body are interpreted by the regional judiciary and executed by the regional executive body.

There are federations in which the federal government assumes the power to pass laws and policies and the regional governments execute the laws passed by the center – this is executive federalism.[1015] As will be clear from subsequent discussion, the Ethiopian federation cannot be categorized under either system on the basis of the division of power provided under the Constitution and other relevant laws.

Article 50 of the Constitution, by establishing the three organs of government at both the state and federal level with their own respective powers, establishes a horizontal type of federation. Article 80(1) of the Constitution, by empowering the Federal Supreme Court to have the final and highest say over federal matters, implies that federal courts have

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[1013] For more on the Ethiopian court system and jurisdiction see Abebe Mulatu, 'The Court System and Questions of Jurisdiction under the FDRE Constitution and Proclamation 25/96," *1 Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution*, at 124-42 (2000).

[1014] Classical examples of such federal arrangement are the U.S., Canada, and Australia. Ronald L. Watts, *Comparing Federal Systems*, 2nd ed. (Montreal & Kingston, London: McGill-Queen's University Press, 1999), at 36.

[1015] Examples of this type of federal arrangement include Switzerland, Austria and Germany. Ibid. For more on this federal arrangement see Peter H. Merkl "Executive-Legislative Federalism in West Germany," 53 *The American Political Science Review*, at 732-741(1959).

dicial power over federal matters. Similarly, Article 80(2) of the Constitution, by npowering the State Supreme Court to have the final and highest say on state matters, nplies that state courts have judicial power over state matters.

he next logical question is: how can we characterize a matter as federal or state? Federal natters, in general terms, are listed under Article 51 of the Constitution.The Constitution rther specifies the law making, judicial and executive powers of the federal overnment. Because courts decide cases on the basis of laws, federal courts have the ower to adjudicate cases arising from federal laws – laws passed by the federal law-aking body on matters listed under Article 55 of the Constitution. Article 55(5) of the onstitution empowers the federal law-making body to enact a penal code. It follows that riminal cases arising from federal criminal laws would be within the jurisdiction of the ederal courts.

his leads us to the discussion on the relation between the Constitution's Articles 51 and 5 in general and Articles 51 and 55(5) in particular. While Article 51 provides for matters ver which the federal government, as opposed to the states, has power, Article 55 rovides for the law-making, as opposed to the executive and judicial, powers of the ederal government. While provisions of the Constitution under its chapter Five (the ederalism section of the Constitution), which is composed of Articles 50-52, divide ower between the federal government and the states, its Chapters six, eight, and nine ivide power of the federal government among its three organs. Thus, Article 55 of the onstitution, which deals with the law-making power of the federal government, does not ive new power to the federal government. The scope of Article 55 is, rather, limited by rticle 51 of the Constitution.

he federal law-making body can pass laws only on federal matters – matters that are xclusively listed under Article 51 of the Constitution. This interpretation is supported by he Commentary on the draft provisions of the FDRE Constitution. The Commentary tates that the law-making power provided under Article 55 is one aspect of the federal ower provided under Article 51 of the Constitution (the others being executive and udicial power provided elsewhere in the Constitution).[1016]

t follows that the scope of the power of the House of Peoples' Representatives to enact a enal Code under Article 55(5) is delimited by the power of the federal government rovided under Article 51. Hence, the Penal Code envisaged under Article 55(5) of the onstitution is supposed to include provisions which are meant to protect federal interests isted under Article 51. It cannot contain provisions which are not related to matters listed nder Article 51. All matters not related to those listed under Article 51 are state matters y virtue of Article 52, so the federal law-making has no power to legislate over them. his requires the federal law-making body to carefully identify areas over which it can

[1016] *Commentary*, at 114.

legislate and to be selective in passing federal penal laws. However, the 2004 Criminal Code, which is designed to be all-inclusive, shows that the federal legislature ignored Article 51 of the Constitution. Although the preface[1017] of the 2004 Criminal Code claims that the Code was passed on the basis of the authority vested in the federal law-making body by Article 55(5) of the Constitution, it is impossible to establish a link between most of the provisions of the 2004 Criminal Code (such as provisions criminalizing conducts that are punishable only upon formal complaint by the injured person) and matters listed under Article 51. To the extent that provisions of the Criminal Code do not relate to the federal matters listed under Article 51, the House of Peoples' Representatives has the power to legislate on matters listed or envisaged under Article 52 of the Constitution – matters on which the Federal House does not have power to legislate.

The Code's over-inclusiveness was not envisaged under Article 55(5) of the Constitution. It creates confusion as to the judicial power of the federal and state courts to try cases arising from, and calls for interpretation and application of, the 2004 Criminal Code. Had the federal law-making body been careful and selective in enacting the 2004 Criminal Code, the Code would have included provisions dealing only with matters listed under Article 51. In that case, only the federal courts would have judicial power to deal with cases arising from the Code, and state councils would have passed their own penal laws covering other matters, which would have resulted in state courts having judicial power to deal with cases arising from these penal laws.

2.2. Federal Courts Proclamation (As Amended)

The Federal Courts Proclamation came into force following the FDRE Constitution and is the only relatively comprehensive federal law that deals with the jurisdiction of federal courts. The Proclamation contains provisions dealing with criminal judicial jurisdiction of the federal courts. Article 3 of the Proclamation states, *inter alia*, that federal courts shall have jurisdiction over cases arising under federal laws. This provision is consistent with Articles 78(1) and 80(1) of the Constitution, which provide that the Federal Supreme Court has the highest and final judicial power over federal matters – that is, matters over which federal laws can be passed.

The Proclamation, in its Article 2(3), defines "laws of the federal government." They include all previous laws in force that are not inconsistent with the Constitution and that relate to matters within the competence of the federal government as specified in the Constitution. Laws promulgated before the Constitution came into effect, including the 1957 Penal Code, are treated as federal laws where two conditions are satisfied. First, the matter addressed by the law falls within the competence of the federal government. Second, these laws should be consistent with the provisions of the Constitution. As not all provisions of the 1957 Penal Code are related to matters listed under Article 51 of the Constitution, it follows that only the parts of the 1957 Penal Code that are related to matters listed under Article 51 of the Constitution are to be treated as federal laws,

[1017] Criminal Code, Preface at V.

rovided that these parts are consistent with the provisions of the Constitution. The emaining parts of the 1957 Penal Code are related to matters listed or envisaged under rticle 52 of the Constitution, and hence may not be treated as federal laws.

rticle 3 of the Proclamation empowers federal courts to hear cases arising from the ederal law. This jurisdiction includes criminal cases arising from parts of the 1957 Penal ode as well as other penal legislation relating to the matters identified in Article 51 of the onstitution. Article 4 of the Proclamation expressly deals with criminal jurisdiction of ne federal courts.[1018] All the cases referred to under Article 4 of the Proclamation are elated to federal interests.

here is a difference between the Proclamation's Articles 3 and 2(3) on the one hand and rticle 4 on the other relating to the scope of criminal cases within the jurisdiction of ederal courts. Although all the matters listed under Article 4 of the Proclamation are ederal matters, not all criminal cases relating to federal matters/interests are included in ne list. A cumulative reading of this provision with Articles 12(2) and 15(2) of the roclamation implies that all matters not included in the list provided under Article 4 are vithin the jurisdiction of state courts except where these cases arise in Addis Ababa or Dire Dawa. The provision's compatibility with the FDRE Constitution is questionable to he extent the provision excludes federal criminal matters from the jurisdiction of federal ourts. Article 4, by implication, deprives federal courts of their constitutionally given riminal jurisdiction and awards that power to state courts.

For example, although matters related with copyright and possession and bearing of arms re clear federal cases as provided under Articles 51(19) and 51(21) of the Constitution, Article 4 of the Proclamation does not refer to crimes relating to copyright and possession nd bearing of arms.

As discussed earlier, the Federal Supreme Court has the highest and final say on federal matters. For the Federal Supreme Court to have the opportunity to exercise such power, federal matters should be entertained by federal courts. Empowering state courts over federal matters has the effect of depriving the Federal Supreme Court of its constitutionally given power to give a final decision over federal matters. If the matter is decided by state courts it is treated as a state matter, in which case the State Supreme Court has the final and highest say over it – that is, that matter is not brought to the Federal Supreme Court.

[1018] Articles 2(1) and (2) of the Federal Courts (Amendment) Proclamation modified subarticles 1 and 9 of Article 4, respectively, of the Federal Courts Establishment Proclamation. Moreover, Article 2(3) of the Amendment Proclamation added two more cases to the list provided under article 4 of the Federal Courts Proclamation. Federal Courts Proclamation, Proc. No. 25/1996, *Fed. Neg. Gaz.*, year 2, no. 13, as amended, Federal Courts (Amendment) Proclamation, Proc. No. 321/2003, *Fed. Neg. Gaz.*, year 9, no. 41 (hereafter Federal Courts Amendment Proc.)

Another reason for the confusion is that the 2004 Criminal Code incorporates provisions which are not related to federal matters as defined under Article 51 of the Constitution. Because the Code includes both state and federal matters and does not distinguish between the two, it creates confusion about the division of criminal jurisdiction between state and federal courts.

As stated above, the legislative power of the Federal House of Peoples' Representatives over criminal cases, as provided in Article 55(5) of the Constitution, is to be understood in light of the powers of the federal government listed under Article 51 of the Constitution. Had the House been guided by this idea, the 2004 Criminal Code would have been composed solely of provisions intended to protect the federal interests listed under Article 51 of the Constitution. Given that the Code is all-inclusive, it is difficult to characterize the Criminal Code as a federal or non-federal law. From the viewpoint of the body that legislates the provisions of the Code, it is a federal law. However, the Code is composed of provisions protecting federal as well as state interests, which logically leads to the conclusion that the Code is both a federal and state law.

The other alternative, a harsh one, is to treat the provisions of the Criminal Code related to matters listed in Article 51 as valid federal laws, and to disregard the other provisions because they were not passed by a competent organ. This approach assumes that any of the provisions of the Criminal Code not related to matters listed in Article 51 refer to state matters addressed in Article 52. Hence, under this approach, the House legislated on matters over which it has no legislative jurisdiction. It follows that parts of the Code relating to matters over which the House has no jurisdiction to legislate are not valid laws, because the Constitution does not grant the House the power to legislate over those matters. Hence, each state council, pursuant to Articles 52 and 55(5) of the Constitution, shall legislate over such matters. This approach would settle the issue of jurisdiction, which has been unsettled and confusing. The suggestion would have the following consequences on the division of criminal jurisdiction between the state and federal courts. First, the Criminal Code enacted by the House, being composed of criminal provisions related only to matters listed under Article 51, would be rightly considered a federal law, whether on the basis of the matter it deals with or the organ that passed it. It follows that cases arising under the Code would be federal matters to be entertained by federal courts. This would allow the Federal Supreme Court to have the final and highest say on federal criminal cases. Second, each State Council would legislate on matters not related to those listed in Article 51, which are state matters by virtue of Articles 52 and 55(5) of the Constitution. Such laws will be rightly considered state laws, whether because of the matters they address or the body that passes the law. It follows that criminal cases arising from such state penal laws would be within the exclusive jurisdiction of state courts, and thus the state supreme court would have the final and highest say on matters arising under these laws, as provided under Article 80(2) of the Constitution.

2.3. The Practice

The practice reflects a cumulative reading of Articles 4, 8, 12 and 15 of the Federal Courts Proclamation (as amended). Federal courts exercise inherent and exclusive criminal jurisdiction on those matters listed in Article 4 of the Proclamation. With regard to other criminal cases, federal courts assume jurisdiction only where the crimes are committed in Addis Ababa or Dire Dawa. If a crime not included in the list under Article 4 of the Proclamation is committed within the territory of Ethiopia other than in Addis Ababa and Dire Dawa, the state courts in the territory where the crime is committed will assume jurisdiction.

Federal courts have inherent criminal jurisdiction over the commission of any of the crimes listed under Article 4 of the Proclamation in any of the regions of Ethiopia. The state supreme or high court assumes jurisdiction over the case by delegation where the case is within the jurisdiction of Federal High Court or Federal First Instance Court, respectively. In 2003, federal high courts were established by law in five States, namely Afar, Benishangul, Gambella, Somalia, and the Southern Nations, Nationalities and Peoples Region.[1019] Hence, where a crime listed under Article 4 of the Proclamation is committed in any of these five regions, it will be tried by federal courts – not by the state supreme court, because delegation to the state courts was revoked by establishment of the federal high courts.

Section III. Allocation of Criminal Jurisdiction among Federal and State Courts

Jurisdiction has three components – judicial, material and local. The judicial aspect of jurisdiction is related to sovereignty.[1020] The question with regard to this element of jurisdiction is whether Ethiopian courts have the power to try a given case, as opposed to, for example, the Kenyan courts or courts of other states.[1021] The issue of division of jurisdiction between state and federal courts – the subject matter of this subsection – enters the picture once it is settled that Ethiopian courts have judicial jurisdiction. Thus, only the other two elements of jurisdiction are at issue here.

[1019] Federal High Court Establishment Proc.

[1020] For more on judicial criminal jurisdiction see Robert Allen Sedler, "Criminal Jurisdiction in Ethiopia," 2 *J. Eth. L.*, at 467-80 (1965).

[1021] Robert Allen Sedler, *Ethiopian Civil Procedure* (Addis Ababa: Haile Sellasie I University Law Faculty, 1968), at 19. Some authors indicate that the question of the "judicial" element of jurisdiction is relevant to the division of jurisdiction between federal and state courts. See, for example, ibid., at 19, note 1.

3.1. Material Jurisdiction

3.1.1. Federal Courts

Jurisdiction among federal courts is allocated by Federal Courts Proclamation, as amended. The Proclamation, through its Articles 8, 12 and 15, distributes jurisdiction over the crimes listed in its Article 4 to the Federal Supreme, High and First Instance Courts.

A. Federal Supreme Court

The jurisdiction of the Federal Supreme Court is defined in terms of the identity of the accused persons. As stated under Article 8 of the Proclamation, the Court has first instance jurisdiction in two categories of cases. The first is criminal cases in which federal officials are suspected in connection with their official responsibilities. The sole fact that the accused is a federal official does not bring his case within the jurisdiction of the Federal Supreme Court. If the alleged offence is not related to his official responsibilities, the case will be tried by the court that would have jurisdiction over the offence had the offence been committed by an ordinary citizen. The second type of case over which the Federal Supreme Court has first instance jurisdiction is offences alleged to have been committed by foreign ambassadors, consuls, and representatives of international organizations and foreign states.

Notes and Questions

1. For an Ethiopian court to have material jurisdiction over a case it should first have judicial jurisdiction. As provided under Article 12 of the Criminal Code, Ethiopian criminal law is not applicable to those who enjoy immunity under international law. Also, Article 8(2) of the Proclamation recognizes the immunity of the persons it refers to. Under what conditions may the Federal Supreme Court exercise jurisdiction over foreign ambassadors in view of the Vienna Convention,[1022] which provides for their immunity? Does the law envisage instances where the sending state waives the immunity[1023] from jurisdiction of diplomatic agents?
2. As defined under Article 2(1) of the Federal Courts Proclamation, "federal officials" include members of the House of Peoples' Representatives and of the House of the Federation, officials of the federal government above ministerial rank, ministers, judges of the Federal Supreme Court, and other officials of the federal government of equivalent rank. This definition is open ended. Which officials are to be considered officials of the federal government "of equivalent rank" for jurisdiction purpose?

[1022] "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state." "Vienna Convention on Diplomatic Relations 1961," *United Nations Treaty Series*, vol. 500, Art. 31 (1).

[1023] "The immunity from jurisdiction of diplomatic agents...may be waived by the sending state." Ibid., at Art. 32(1).

3. Federal High Court

Article 12[1024] of the Federal Courts Establishment Proclamation identifies criminal cases over which the Federal High Court has first instance jurisdiction.[1025] The provision empowers the Federal High Court to assume jurisdiction over two categories of cases. The first category refers to some of the criminal cases listed under Article 4 of the Proclamation. These include offences against the constitutional order or against the internal security of the state, offences against foreign states, offences against the law of nations, offences against the safety of aviation, and offences regarding illicit trafficking of dangerous drugs. For the Federal High Court to have first instance jurisdiction over other categories of offences, two conditions need to exist. First, the crime must have been committed in Addis Ababa or Dire Dawa. Second, the crime must fall within the jurisdiction of the High Court pursuant to the law in place at the time the Proclamation was enacted.[1026] The major reference regarding criminal jurisdiction of the courts is the First Schedule annexed to the Cr. Pro. Code. Article 12(2) of the Proclamation refers to these laws. It follows that offences allocated to the High Court by these laws, if committed in Addis Ababa or Dire Dawa, would fall within the jurisdiction of the Federal High Court.

C. Federal First Instance Court

The criminal jurisdiction of the Federal First Instance Court is provided under Article 15 of the Proclamation.[1027] The first subarticle refers to crimes listed under Article 4 of the Proclamation. Irrespective of where within the territory of Ethiopia these crimes are committed, the Federal First Instance Court has jurisdiction over them. These crimes include offences against the fiscal and economic interest 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 services operating within more than one egion or at the international level, and offences regarding foreign nationals. The second subarticle empowers the Court to exercise jurisdiction over all criminal cases not listed in Article 4 of the Proclamation that are committed in Addis Ababa or Dire Dawa and that were assigned to Woreda and Awraja courts at the time when the Proclamation came into force.

3.1.2. State Courts

As indicated above, all criminal cases other than those listed under Article 4 of the Proclamation are considered to bewithin the jurisdiction of state courts if not committed in Addis Ababa or Dire Dawa. The material jurisdiction of regional courts over those cases

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[1024] This provision is amended by the Federal Courts (Amendment) Proc., Art.4.

[1025] The Court has appellate jurisdiction over decisions of the Federal First Instance Court. Federal Courts Proc., Article 13.

[1026] By virtue of the Proclamation's Article 38, it came into force on February 15, 1996.

[1027] This provision is amended by the Federal Courts Amendment Proc., Art. 5

not listed in Article 4 of the Federal Courts Proclamation (as amended) is partitioned among the state courts by each state court's establishment Proclamation.[1028]

3.2. Local Jurisdiction

The location of the crime determines which local unit of the federal courts has jurisdiction over a case. Article 101 of the Code and Articles 12 and 15 of the Proclamation employ the "crime committed" formula as the basis for allocation of local jurisdiction. The court within the local limits of whose jurisdiction the crime was committed has local jurisdiction provided that it has material jurisdiction. Where the offence involves different places – multi-venue offences – this formula fails to serve as a basis for allocating local jurisdiction. In such cases, which are envisaged under Articles 100-105 of the Cr. Pro. Code, the concerned prosecutor will decide which court has local jurisdiction.[1029] Technically speaking, all the courts within the local limits of which one aspect of the crime was committed could have local jurisdiction. The prosecutor, by filing a criminal charge before one of these courts, determines which one of the several courts will have local jurisdiction.

3.2.1. Federal Courts

Since there is only one Federal Supreme Court, it has local jurisdiction over all the cases it has material jurisdiction. The Federal Supreme Court automatically has local jurisdiction over crimes by federal officials in connection with their official responsibility, and crimes by foreign ambassadors, consuls or representatives of international organizations.

Unlike the Federal Supreme Court, there is more than one Federal High Court – one in Addis Ababa, another in Dire Dawa, and one in each of the five regions.[1030] Each of them has local jurisdiction over cases that fall within the material jurisdiction of the Federal High Court and arise in the region or city over which it has jurisdiction.

Before the establishment of the Federal High Courts in the five regions, if a crime within the material jurisdiction of the Federal High Court, as provided under Article 12 of the Proclamation, was committed in any of the regions, the State Supreme Court of the region where the crime was committed had the material jurisdiction.[1031] Because there is one state supreme court in each state, it follows that each state supreme court automatically had local jurisdiction over cases within its material jurisdiction. Currently, a Federal High Court is established in five of the nine regions. Hence, the state supreme courts of the five regions no longer exercise the jurisdiction of the Federal High Court over cases arising in

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[1028] See, *e.g.*, the Oromia National Regional State Courts Establishment Proclamation, Proc. No. 6/1995, as amended. On the constitutionality of allocation of criminal jurisdiction over cases arising from the federal penal code to the state first instance courts, see Wondwossen Demissie, "Legitimacy of Criminal Jurisdiction of State First Instance Courts," 2 *The Law Student Bulletin, A Biannual Publication of Society of Law Students for Quality Education*, at 33-35(2001).

[1029] Cr. Pro. Code, Article 107.

[1030] Afar, Beneshangul, Gambella, Somali and Southern Nations and Nationalities.

[1031] FDRE Constitution, Art.78 (2).

ne regions. Rather, the Federal High Court has material jurisdiction over matters listed nder Article 12(1) of the Proclamation and, as there is only one Federal High Court in ach of these five regions, the Federal High Court automatically has local jurisdiction in ases over which it has material jurisdiction. In the four regions where a Federal High Court is not established, the state supreme courts continue to have both material and local urisdiction over the cases identified in Article 12 (1) that are committed in their espective region.

So far there are only two Federal First Instance Courts – one in Addis Ababa and the other n Dire Dawa. No such court is yet established in any of the regional states. Crimes, over vhich the Federal First Instance Court has jurisdiction, if committed in the regions, are ried by the state high courts.[1032] Since each state (other than Harari) has more than one igh court, local jurisdiction over federal cases arising outside of Addis Ababa and Dire Dawa depends on the specific area where the crime is committed. By applying the "offence committed" formula,[1033] the state high court within the limits of which the crime s committed has local jurisdiction over the matter.

3.2.2. State Courts

Local jurisdiction of state courts over state matters is regulated by Articles 100-107 of the Code. As discussed above, among the courts that have material jurisdiction, the court within the local limits of which the crime is committed has local jurisdiction over the matter. If the matter is within the material jurisdiction of a State Supreme Court, no issue of local jurisdiction arises because there is only one such court in each region. Only if the crime is within the jurisdiction of the state high court or state first instance court that the issue of local jurisdiction would be relevant. In such cases, the Code provides for the court within the local limits of which the crime is committed to exercise local jurisdiction. Where the offence is a multi-venue offence, the prosecutor decides before which court to bring the case thereby vesting that court with local jurisdiction over the case.

[1032] Ibid.
[1033] Cr. Pro. Code, Art. 107.

Chapter Thirteen

Criminal Charge

ntroduction

Criminal charge refers to the pleading of the prosecutor. It is a statement of accusation that ne accused has committed a crime. It is known by different names in different urisdictions. As stated under Article 109(1) of the Code, when the public prosecutor ecides to prosecute the accused, he must decide what charge to frame on the basis of nformation from the police investigation file or the preliminary inquiry. He has to file the harge before the court having jurisdiction within 15 days of the time he received the olice investigation file or, if a preliminary inquiry is conducted, within 15 days of the me he received the inquiry record.

The charge is so important that it must be made in writing. Article 20(2) of the FDRE Constitution recognizes the right of the accused to be given the charge in writing. Moreover, subarticles 1 and 2 of Article 108 of the Code expressly prohibit conduct of a rial without a charge. Article 108 makes an exception only for petty offences, for which ne court simply issues a summons to the accused. Even in such cases, Article 167(2) of ne Code requires the summons to recite the name of the accused, the circumstances of the etty offence committed, and the relevant law (including article number).

Section I. Content, Form, and Functions of Charge

1.1 Content of Charge

rticle 111(1) of the Code lists the elements that a charge must include.

rticle 111. Contents and form of the charge

) Every charge shall be dated and signed and shall contain:

a. *The name of the accused; and*
b. *The offence with which the accused is charged and its legal and material ingredients; and*
c. *The time and place of the offence and, where appropriate, the person against whom the property in respect of which the offence was committed; and*
d. *The law and article of the law against which the offence is said to have been committed.*

egal Citation: The charge must cite the provision of law the accused is charged with olating. Subarticle (1) (d) of Article 111 requires the charge to show the law and articles f the law against which the offence is said to have been committed. This refers to the gal element of an offence.

ame of the Accused, Date and Signature: Article 111(1) of the Code requires the harge to contain the date the charge is framed and that the charge be signed by the

concerned prosecutor. Article 111(1) (a) specifies that the name of the accused must b stated on the charge.

Facts of the Case: Subarticles 1(b) and (c) of Article 111 of the Code specify the facts t be included in a charge. The charge must indicate the legal and material elements of th crime with which the accused is charged, the time and place of the alleged offence, and where possible – the identity of the person against whom the offence was committed o against whose property the offence was committed.

Evidence of the Prosecutor: The logical way to enforce the right of the accused t pretrial disclosure of evidence is to require the prosecutor to include a list of his evidenc (oral or otherwise) as an annex to the charge. However, there is no such requirement in th Code. Articles 123 and 124 of the Code indicate that a list of the prosecutor's evidence i not included with the charge, but instead is submitted after the date of the trial is fixed b the court following the filing of the charge by the prosecutor. However, in practice th prosecutor attaches a list of his evidence to the charge.

Article 112 provides how clearly the elements of the charge should be written. Thi provision of the Code, together with Article 20(2) of the FDRE Constitution, requires th prosecutor to describe the offence and the circumstances in such a way that the accuse knows exactly what charge he is required to answer.

Although Article 109 of the Code provides that the charge must be filed before a cou having jurisdiction, Article 111 does not list "name of the court" as an element of th charge. Nor is it included in the model charges in the Second schedule to the Code.

Notes and Questions: Specificity of a Charge

1. Article 112 of the Code and Article 20(2) of the FDRE Constitution require the charg to contain information sufficient to enable the accused to know what he has to answe to. How specific should the accusation be as to the time and place of the alleged crime What would be the consequence if the time or place specified on the charge is late proved by the evidence to be inaccurate? In England,[1034] the place where the crime i committed need not be alleged, unless the definition of the offence requires that it b committed in or with reference to a specific place or places. Moreover, where the dat of the crime as noted in the charge differs from that proved by the prosecutor' evidence at trial, the accused will still be convicted. If the change in date will prejudic the accused in his defence (*e.g.* where he has an alibi for the date identified in th charge) he should be granted an adjournment and perhaps an amendment.

   In *Public Prosecutor v. Gosaye Benti*,[1035] the Federal Supreme Court did not attach an significance to the variation between the times of the crime as indicated in the charg

[1034] Sprack, *Practical Approach*, at 248.
[1035] *Public Prosecutor v. Gosaye Benti* (Fed. Sup. Ct., Cr. App. No. 13992, Ginbot 6, 1996 E.C.).

and as established by the prosecution's evidence. The prosecutor's charge indicated that the accused caused the death of Hiruye G/Tsadik, in violation of Article 523 of the Penal Code, on Ginbot 9, 1993. Three prosecution witnesses testified that the accused caused the death of the victim on Ginbot 27, 1993. The trial court acquitted the accused in accordance with Article 141 of the Code because the prosecutor's evidence failed to prove the crime alleged to have been committed on Ginbot 9.

The prosecutor appealed the trial court's ruling. The prosecutor objected that, because his evidence consistently established that the accused had caused the death of the victim, the mere variance between the dates specified in the charge and in the witnesses' testimony did not constitute a ground to acquit the accused. Such a variation, the prosecutor observed, could be the result of a simple typing error. The respondent argued that if the variance was due to a typing error the prosecutor should have amended the charge before the trial court gave its ruling. In light of the consistency in the testimony of the prosecutor's witnesses, the appeals court found that the variation indicated a typing error, not an indication that the accused did not commit the crime. The appellate court reversed the ruling of the trial court and ordered the accused to present his defence.

Obviously, the time a crime was committed is not an element of a crime. The law requires the time to be specified in the charge in order to maximize the accused's right to defend himself. If the Supreme Court's position is correct, what is the significance of specifying the time of the crime? If the accused is to be required to present his defence even where there are such variations, should he be required to defend himself against the crime as alleged in the charge or as described by the witnesses?
How far should the charge go, for instance in a serious bodily injury case, in describing the means of committing the crime, such as the weapon used and the injury caused? Generally, the more detailed and specific the charge, the more likely there will be variance between the charge and the proof. Variance increases the possibility of acquittal. In considering how much specificity and accuracy fairness requires in a criminal accusation, one must bear in mind the basic function of the charge: it should give the defendant enough information to enable him to prepare his defence. The requirement of specificity should not make it impossible for the prosecutor to prove the guilt of the accused. Its purpose is to make sure that the charge is prepared in such a manner that the accused understands what needs to answer to.
Article 20(2) of the Constitution entitles every accused person to be informed in sufficient detail of the charge brought against him and to be given the charge in writing. How consistent with this constitutional provision is Article 108 of the Code, which allows prosecution without a charge for petty offences? For petty offences, Article 167 of the Cr. Pro. Code requires the court to issue the accused a summons (the content of which is similar to that of a charge. Does it, then, make a difference whether the document is named a "charge" or "summons," so long as the document serves the function of notice?

4. The Constitution rightly recognizes the right of the accused to be informed of t accusation of the prosecutor, because one should not be condemned unheard. To wh extent are Articles 113(2) and 115 of the Code compatible with this legitimate intere of the accused?

1.2. Form of a Charge

Article 111(2) of the Code requires the prosecutor's charge to follow the sample form provided in the Second Schedule to the Code. The Schedule provides a variety of forms depending on whether the prosecutor prepares a simple, alternative, or concurrent charge The *type of the offence* alleged to have been committed is to be stated at the top of th charge. Next comes the *statement of the offence*, indicating both the offence and th criminal law provision at issue. The third part of the charge is *particulars of the offence* i which, essentially, the facts of the case shall be precisely stated.

Where alternative or concurrent charges are prepared, the charge sheet shall contain two o more counts. In an alternative charge, as the name suggests the prosecutor pleads tha either one or the other offence was committed. Where a concurrent charge is prepared, the allegation is that both or all of the offences listed on the charge were committed. Since in both cases more than one allegation is made by the prosecutor, it must be made clear whether the prosecutor pleads alternatively or concurrently.

Despite Article 111(1) of the Code, which requires every charge to be dated and signed, the official forms given as examples do not contain the date of the charge or the signature of the prosecutor. Moreover, they do not include the name of the court where the charge is filed. In practice, the charge contains a caption setting forth the date charge is filed, the name of the court and the name of the parties (the date is written on the top right side of the charge; the name of the court on the top left side of the charge; and that of the parties beneath the name of the court). The prosecutor is named as the accuser and the accused is designated by name, usually with the details of his address. The prosecutor's signature goes at the bottom of the charge.

1.3 Functions of a Charge

The major function of the charge, as can be inferred from Articles 20(2) of the FDRE Constitution and Article 112 of the Code, is to inform the accused of the nature of the crime alleged against him so that he can prepare his defence.

Article 20 FDRE Constitution. Rights of the accused

1. Accused persons have the right to be informed with sufficient particulars of the charge brought against them and....

Art. 112 of the Cr. Pro. Code. Description of circumstances

Each charge shall describe the offence and its circumstances so as to enable the accused to know exactly what charge he has to answer.

In addition to its primary function of giving notice to the accused, the charge serves certain secondary functions. It serves as a reference document for the court to use in deciding whether given evidence is relevant and whether the prosecutor proves each element of his allegation to the required standard. Also, the charge serves as evidence for the accused to prove that he is being subjected to double jeopardy in case he is prosecuted a second time for the same offence.

Section II. Alternative and Joinder of Charges

The above discussion shows in general terms what the elements of a charge are. What exactly is to be included in the charge depends on several factors. If the prosecutor, due to the nature of the facts to be established, is not certain what offence was committed by the accused, he must prepare alternative charges. If the accused is suspected of more than one offence, a concurrent charge must be prepared. Where more than one person is involved in the commission of a crime, the prosecutor must accuse all of them in one charge, instead of preparing a separate charge for each suspect.

2.1. Alternative Charges

Art. 113 of the Cr. Pro. Code. *Where it is doubtful what offence has been committed*

(1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed the offence which appears the more probable to have been committed and he may be charged in the alternative with having committed all other offences which the facts can be proved might constitute.

As the caption indicates, alternative charges are to be prepared where it is doubtful what offence has been committed. The public prosecutor might have different kinds of doubts. Some doubts can be cleared by taking time to sort things out, in which case the prosecutor would order further investigation per Article 38(c) of the Code. Some doubts, however, may not be resolved even after further investigation is conducted. There are two such types of doubts. The first is doubt as to whether proceedings should be instituted. The public prosecutor may not be in a position to decide with confidence whether to file a charge and proceed with the case. In this circumstance, the prosecutor is allowed or required to refer the matter or instruction to the superior public prosecutor (Advocate General) under Article 42 of the Code. The superior public prosecutor will then decide whether to proceed with the prosecution. The other type of doubt concerns how a given set of facts is interpreted. A given set of facts, depending on how it is perceived, might give rise to two or more types of offences; let us say offence "A" and offence "B." Such a scenario is envisaged under Article 113 of the Code. The public prosecutor might believe that the facts at hand show that the crime committed was probably crime "A," though he feels the facts could also be construed to suggest the crime committed was crime "B."

When the prosecutor faces such a dilemma, Article 113(1) of the Code allows him to prepare alternative charges. To apply Article 113(1) of the Code, the public prosecutor should not have doubt as to what facts are to be proved during trial. He knows that his evidence will prove, for example, facts "X," "Y," and "Z." But these facts can be understood to constitute crime "A" or "B." Because the prosecutor is not certain how the trial court will interpret facts "X," "Y," and "Z," the prosecutor is advised to plead that either crime "A" or crime "B" has been committed. In terms of form, Article 113 of the Cr. Pro. Code provides for the prosecutor to plead first the crime that he believes to be constituted by the facts (crime "A"), and to plead the other crime/s alternatively.

If the prosecutor charges the accused with the crime he believes to have been committed (crime "A") without charging him alternatively with the other offence (crime "B"), a risk arises that the trial court may construe the facts proved by the prosecutor's evidence to constitute crime "B," rather than crime "A." In principle, where the prosecutor fails to prove his allegation the accused must be acquitted. However, in this case Article 113(2) of the Cr. Pro. Code authorizes the court to convict the accused for crime "B" though he was charged with crime "A," provided two conditions exist. First, the proved offence must be within the jurisdiction of the trial court. Second, the proved offence must be of a lesser gravity than the charged offence.

Criminal Procedure Code Art. 113. Where it is doubtful what offence has been committed

(2) Where the evidence shows that the accused committed an offence with which he might have been charged in the alternative and the offence is within the jurisdiction of the court, he may be convicted of such offence notwithstanding that he was not charged with it, where such offence is of lesser gravity than the offence charged.

Notes and Questions: Doubt as to What Offence is to be proved

1. One fundamental requirement for changing the charged offence to the proved offence under Article 113(2) of the Cr. Pro. Code is that the proved offence is of such a nature that it could have been charged in the alternative with the charged offence. That is so where "a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute." That is, two or more offences are so similar that it is difficult to know in advance which one of them can be inferred from a single act or series of acts. In *Public Prosecutor v. Birhanu Kassa et al*,[1036] the trial court ordered the accused persons to present their defence under Article 13 of the Special Penal Code Proclamation No. 214/1981 (the proved offence) instead of Article 656 of the 1957 Penal Code (the charged offence). Do the offences under the two provisions fulfill these requirements?
2. In the case of *Tesema Bizachew v. Public Prosecutor*,[1037] Tesema was charged and convicted of two offences. The second charge was trading in illegal arms in violation of

[1036] *Public Prosecutor v. Birhanu Kassa*, (Fed. Sup. Ct., Cr. App. No. 15343, Tikemet 30, 1997E.C.)
[1037] *Tesema Bizachew v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 28303, Miazia 29, 1999 E.C.).

Article 41 of the Revised Special Penal Code. He appealed the trial court's judgment to the Supreme Court. With regard to the second charge, the Federal Supreme Court noted, the prosecutor's evidence proved that the appellant was in possession of illegal arms. The evidence did not, however, show that he was engaged in trade of these arms. Hence, the Supreme Court, by invoking Article 113(2) of the Code, reversed the trial court's finding and convicted the appellant under Article 764 of the 1957 Penal Code for carrying and using illegal arms. Do offences under Article 41 of the Revised Special Penal Code and Article 764 of the 1957 Penal Code fulfill the "similarity" requirement?

In *Elias Tesfaye v. Public Prosecutor*,[1038] the Federal Supreme Court reversed the trial court judgment convicting the appellant of aggravated homicide under Article 522(1)(a) of the 1957 Penal Code. The Supreme Court noted that the prosecution's evidence established that the appellant had committed homicide but not that the homicide was committed with such premeditation, motives, or means as to show that the appellant was exceptionally cruel or dangerous. Hence the court, by virtue of Article 113(2) of the Cr. Pro. Code, convicted the appellant under Article 523 of the Penal Code. Are aggravated homicide (Article 522 of the Penal Code) and homicide in the second degree (Article 523 of the Penal Code) offences that could have been charged in the alternative? In *Tsegaye Korcho v. Public Prosecutor*,[1039] the Federal Supreme Court reversed the judgment of the lower court convicting the appellant under Article 252(1)(a) of the 1957 Penal Code. The appellate court found that the confession of the accused, *the only evidence of the prosecution*, showed only that the appellant was involved in a movement of armed uprising but not that he organized and led the movement. The court stated the proved act of the appellant fell under Article 252(2) of the 1957 Penal Code and convicted him under that provision in accordance with Article 113(2) of the Cr. Pro. Code. Are the two offences so similar that they can be charged in the alternative?

3. The cases discussed suggest that the Federal Supreme Court does not give weight to the requirement that the proved offence "*might have been charged in the alternative.*" Does the approach of the Court compromise the right of the accused to defend himself? If not, should the requirement under Article 113(2) be reconsidered, as it might unjustifiably restrict the court's power and cause acquittal of guilty persons?

Notes and Questions: Gravity of the Proved Offence

1. Only where the proved offence is of a lesser gravity than the charged offence can the court convict or require the accused to defend against the proved charge. The provision does not establish criteria for comparing the gravity of the two offences. Normally, the major indicator of the gravity of the offence is the punishment attached to it. If the punishment prescribed for the proved offence is heavier than that for the charged offence, the court is not to convict the accused for the proved offence. What else

[1038] *Elias Tesfaye v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 26884, Tahisas 10, 1999 E.C.).
[1039] *Tsegaye Korcho v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 27720, Miazia 29, 1999 E.C.).

indicates the gravity of an offence? If punishment is the sole criterion for determining the gravity of the offence, should the court look at the minimum or maximum possible punishment? Should mitigating and aggravating circumstances be considered for purposes of the comparison?

2. In *Public Prosecutor v. Birhanu Kassa et al*,[1040] the public prosecutor charged three persons before the Federal High Court, two of them for committing a fraudulent misrepresentation in violation of Articles 27, 32(1)(a) and 656(a) of the 1957 Penal Code and the third for breach of official duties under Article 412(1) of the 1957 Penal Code.

After hearing the prosecutor's evidence, the Court ordered: 1) the two persons charged with fraudulent misrepresentation to defend themselves under Article 13(1). of the Special Penal Code Proclamation No. 214/81 (this means that the Court changed the charge in accordance with Article 113(2) of the Code); 2) the accused persons to produce their defense before the Federal First Instance Court with jurisdiction to try a case arising under Article 13(1). The prosecutor appealed this ruling of the Federal High Court.

The Federal Supreme Court assessed the ruling of the Federal High Court in light of the elements of Article 113 of the Cr. Pro. Code as follows.

> Article 113(2) of the Code gives discretion to the court to convict accused persons by a provision that they were not charged with only where the offence is of a lesser gravity than the offence that they are initially charged. In the case at hand, the offence that they were charged with is punishable with simple imprisonment or according to the gravity of the case up to five years rigorous imprisonment. The punishment under the provision of the Special Penal Code that the High Court ordered them to defend is rigorous imprisonment from five to ten years and fine up to Ethiopian Birr 10,000. Therefore, the change made by the High Court which would subject accused persons to a graver punishment is found to be prejudicial to the interest of accused persons and a clear violation of the requirement of Article 113(2) of the Code. The appellate court reversed the ruling given by the Federal High Court and ordered that the accused persons defend themselves for the charge brought by the public prosecutor and produce their defense before the Federal High Court.[1041]

According to the Federal High Court, the prosecutor's evidence proved an offence not indicated on the charge, rather than the offence with which the accused was charged. The appellate court did not indicate that the prosecutor's evidence proved the charged offence. The appellate court based its decision simply on the gravity of the charged offence as compared to the proved offence, without considering whether the charged offence was proved by the prosecution's evidence.

[1040] *Public Prosecutor v. Birhanu Kassa et al.* (Fed. Sup. Ct., Cr. App. No. 15343, Tikemet 30, 1997).

[1041] *Public Prosecutor v. Birhanu Kassa et al. (Fed. Sup. Ct.,* Cr. App. No. 15343, Tikemet 30, 1997 E.C.) (translation by the Author).

2.1. Do you think the appellate court's position would be different if it had noted that the prosecutor had established a violation of Article 13 of Proclamation No. 214/81 but not Article 656 of the 1957 Penal Code?
2.2. If accused persons are not required to defend against the proved charge because it is of a higher gravity than the charged offence, should they be acquitted altogether or should the charge be amended?
2.3. If the defendants are acquitted under the scenario above, can the prosecutor file a new charge against them for violating the Special Penal Code? Would such an action be barred by the prohibition against double jeopardy? Could an objection be raised under Article 130(2) (b) of the Cr. Pro. Code?

otes and Questions: the Jurisdiction Requirement

Where the proved offence differs from the charged offence one of the requirements for convicting the accused of the proved offence is that the proved offence be within the jurisdiction of the trial court. When is the trial court considered to lack jurisdiction over the proved offence? If the proved offence is within the jurisdiction of a superior court, obviously the trial court lacks competence. But where the proved offence is within the jurisdiction of a lower court does the trial court lack competence to try the case for the purpose of Article 113(2) of the Cr. Pro. Code ?

. Isn't it a waste of time and resources if the trial court, for lack of jurisdiction, refers the case to a lower court where doing so serves no legitimate purpose? Does it matter whether the difference between the proved and alleged offences is discovered when the prosecutor concludes his case or after both parties introduced their evidence? That is, should the trial court refer the case to the lower court if it discovers the variance at the conclusion of the prosecution's case (before the accused enters into his defence), but proceed and decide the case if the difference is discovered only after both parties have introduced their respective evidence? Obviously sending the case to another court in the latter case is more costly than in the first case.

. As the following cases show, the Federal High Court consistently disclaims jurisdiction when the proved offence is within the jurisdiction of the Federal First Instance Court. In *Public Prosecutor v. Alemayehu Mesele,*[1042] the prosecutor charged the accused under Articles 526(1) and 783 of the 1957 Penal Code for negligent homicide and endangering the safety of communications, respectively. *After the prosecution presented* its case, the Federal High Court concluded that the prosecution's evidence proved that the accused was guilty of driving an unsafe vehicle in contravention of Article 543(2) (but not Article 526(1)) of the 1957 Penal Code. Stating that the proved offence was not within its jurisdiction, the court stated that it could not proceed with the case per Article 113(2) of the Code. Hence, the court let the accused go free. The prosecutor appealed the ruling of the trial court. The appellate court,[1043] without

[1042] *Public Prosecutor v. Alemayehu Mesele* (Fed. H. Ct., Cr. F. No. 10624, Tahisas 1, 1995 E.C.).
[1043] *Public Prosecutor v. Alemayehu Mesele* (Fed. Sup. Ct., Cr. App. No. 10720, Hidar 23, 1996 E.C.).

commenting on the lower court's interpretation of Article 113, found that th prosecutor's evidence established a case against the accused for the charged offenc and ordered the respondent to defend against the charged offence.

In *Public Prosecutor v. Assefa Degefa,* [1044] the prosecutor charged the accused unde Article 636 of the 1957 Penal Code for robbing a certain Zeyneba Siraj. Once th prosecution's case was concluded the court found the prosecution's evidence to hav established a case against the accused under Article 630 – but not Article 636 – of th 1957 Penal Code. The court referred the case to the Federal First Instance Court an ordered the accused to be released. The prosecutor appealed, stating that the tria court's referral of the case to the First Instance Court was inappropriate. The appellat court cited Article 110 of the Code, which provides in part, "the court may not refuse t accept a charge filed by the public prosecutor under Art. 630 Penal Code by reaso only that a court subordinate thereto has jurisdiction to try such charge."

4. In *Public Prosecutor v. Birhanu Kassa* et al., [1045] the appellate court reversed the ruling of the Federal High Court because the trial court had changed the offence to the grave offence. As a result of the change, the Federal High Court had transferred the case t the Federal First Instance Court because the proved offence was within the jurisdictio of the latter court. Was the Federal High Court right in sending the case to the Federa First Instance Court? Where the proved offence is normally within the jurisdiction of a lower court, shouldn't the trial court continue to hear the trial? Does the court's ruling suggest that the Federal High Court is incompetent to try cases that are within the jurisdiction of Federal First Instance Court? Did the change in courts – from the Federal High Court to Federal First Instance Court – make the ruling of the court erroneous? Note that Article 113(2) of the Code requires that the offence against which the accused is required to defend (in this case, the proved offence) be within the jurisdiction of the trial court.
5. In *Yared Tilahun v. Public Prosecutor,* [1046] the accused was charged and convicted of robbery under Article 636 of the 1957 Penal Code. The convicted person appealed to the Federal Supreme Court, which found that the prosecution's evidence did not establish that the appellant used force while stealing. Hence, the court convicted the appellant under Article 630 of the 1957 Penal Code. The Federal Supreme Court stated that although the accused was not charged under Article 630 of the 1957 Penal Code, the Federal High Court could have exercised jurisdiction in accordance with Article 110 of the Criminal Procedure Code (which states that no court may refuse to try a charge filed by the prosecutor under Article 630 of the 1957 Penal Code). Does this statement of the Federal Supreme Court suggest that if not for Article 110 of the Code, the Federal High Court (trial court) would not have jurisdiction (in accordance with Article 113(2) of the Code) when the trial court has jurisdiction only over the charged offence – but not the proved offence?

[1044] *Public Prosecutor v. Assefa Degefa* (Fed. Sup. Ct., Cr. App. No. 1102, Hamle 21, 1995 E.C.).
[1045] *Public Prosecutor v. Birhanu Kassa et al.* (Fed. Sup. Ct., Cr. App. No. 15343, Tikemet 30, 1997 E.C.).
[1046] *Yared Tilahun v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 27906, Tir 30, 1999 E.C).

Article 110 of the Code envisions instances where the prosecutor initially "files a charge in a court having no jurisdiction" not as such in cases where the charge initially filed by the prosecutor is within the jurisdiction of the court but later in the proceeding (due to the variance between the proved and charged offence) the prosecution's evidence proves an offence that does not fall within the jurisdiction of the trial court. Then, the logic of the ruling of the Supreme Court's ruling was that, let alone where a violation of Article 630 is proved during the trial, the superior court could not disclaim jurisdiction even where the public prosecutor initially filed a charge under Article 630 of the Penal Code. By specifically prohibiting superior courts from disclaiming jurisdiction relating to theft on the ground that lower courts have jurisdiction over it, does Article 110 suggest that they may disclaim jurisdiction in other cases? That does not seem to be the case. Article 109(3) of the Cr. Pro. Code[1047] clearly shows that superior courts have jurisdiction to try offences that are normally allocated to lower/subordinate courts.

lotes and Questions: Article 113

. What is the trial court supposed to do if any one of the requirements for convicting the accused for the proved offence under Article 113(2) is missing? As it cannot convict the accused, how should the court terminate the proceeding without prejudice to the prosecutor's right to institute a new charge before the competent court? Should it refer the case to the appropriate court or should it simply acquit the accused for the charged offence? In *Public Prosecutor v. Elias Petros*,[1048] the accused was charged before the Federal High Court under Article 636 of the 1957 Penal Code for robbing Eseye Zewude. At the conclusion of the prosecutor's case, the Court found that the prosecution's evidence established a case against the accused under Article 668 (but not Article 636) which, according to the Court, does not fall within its jurisdiction. The court released the accused without prejudice to the right of the public prosecutor to proceed with the case before the court having jurisdiction to try the proved offence. In an appeal, the Federal Supreme Court noted that the proved offence is within the jurisdiction of the Federal High Court and remanded the case to the trial court to continue to hear the case.

2. If, following the termination of his case by the court on the ground that one of the requirements under Article 113(2) is not fulfilled, the prosecutor files a new charge in the court having jurisdiction over the proved offence, should the trial court continue from where the former court stopped – or start the trial anew? Can the accused object to the charge as subjecting him to double jeopardy? In other jurisdictions, if the prosecutor moves to relitigate facts that were proved or disproved in the previous

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[1047] Art. 109.—Framing, filing and service of the charge.
"3. Where the preliminary inquiry discloses offences some of which are to be tried by the High Court and some by a subordinate court, the prosecutor shall... file them in the High Court which shall have jurisdiction to try all offences thus charged."

[1048] *Public Prosecutor v. Elias Petros* (Fed. H. Ct., Cr. F. No. 1886, Tikemet 18, 1996 E.C.).

proceeding (in favour of the defendant), the case may be barred by collater estoppel.[1049]

3. If the public prosecutor frames alternative charges under Article 113(1) and bo charges are proved, can the court convict the accused for both offences? Since th prosecutor asked the court to convict the accused either for crime "A" or for crime "B would it be appropriate for the court to convict the accused of both offenses? Wouldn that amount to convicting an accused for an offence not charged, since the accused wa not charged with concurrent offences?

In *Public Prosecutor v. Getachew Biru,*[1050] the Federal Supreme Court convicted th accused under both charges despite the fact that the prosecutor framed alternativ charges. Before the Federal First Instance Court, the public prosecutor prepare alternative charges in accordance with Article 113(1) of the Code. The first count state that the accused in violation of Article 589(2)(a) of the 1957 Penal Code compelled hi 14-year-old daughter to submit to sexual intercourse after having rendered he incapable of resistance by use of force. The second count contained two allegations First, the accused, in violation of Article 598(a) of the 1957 Penal Code, had bee committing sexual outrage against his daughter by use of force from 1988 to Megabi 1991. Second, the accused, in violation of Article 622 of the 1957 Penal Code, ha committed a sexual act with his daughter, thereby causing public scandal.

The Federal First Instance Court convicted the accused under the first count (fo violation of Article 589(2)(a)) and under Article 621(2) of the 1957 Penal Code changing the article cited by the public prosecutor in the second count. The Federa High Court reversed the conviction, *inter alia,* by stating that since the conviction under the changed provision subjected the accused to a heavier penalty, it was barred by Article 113 of the Code. The Federal Supreme Court reversed the High Court's judgment, upholding the finding of the Federal First Instance Court with regard to the first count. With regard to the second count, the Supreme Court accepted the High Court's comment, set aside the finding of the Federal First Instance Court, and convicted the accused under the charged offence (Article 622 of the 1957 Penal Code).

Where the public prosecutor applied to the court to convict the accused either under the first or the second count, is it appropriate for the Supreme Court to convict the accused under both counts? Preparation of alternative charges indicates that the accused has committed either of the alleged offences, but not both. If the accused is charged with two or more offences, the charge must be prepared in accordance with Article 116 of the Code. If the accused is charged in the alternative under Article 113 with a possibility of conviction under both counts, it is doubtful if the charge satisfies the requirement of Article 112 of the Code. In effect, he is being convicted without an opportunity to be heard. Moreover, where the charge is prepared in accordance with

[1049] For more on collateral estoppels refer principles of crim pro., pp. 309-11

[1050] *Public Prosecutor v. Getachew Biru* (Fed. Sup. Ct., Cr. App. No. 10965, Tir 26, 1996 E.C.).

Article 113, there is no chance for severance of charge as envisaged under Article 116(2) of the Code. In view of all these concerns, wouldn't it be unfair to convict an accused under both counts if the prosecutor's charge is prepared in accordance with Article 113?

. If the prosecutor's evidence proves that the accused committed both the crimes charged in the alternative, but the court convicts the accused of only one of the alternative counts, can the public prosecutor institute a new charge against the accused for the crime for which he was acquitted? Would such an action subject the accused to double jeopardy and hence be prohibited under Article 23 of the FDRE Constitution?

. If the public prosecutor files a single charge in circumstances where he could have filed alternative charges in accordance with Article 113(1), can he appeal an acquittal on the ground that the court should have convicted the accused of the proved offence under Article 113(2)? The answer seems to depend on two factors. First, does Article 113(2) of the Code impose a duty on, or give discretion to, the court to convict the accused for the proved offence? Second, can the public prosecutor institute a new action against the accused based on the proved offence? Would doing so go be a violation of the prohibition against double jeopardy?

2.2. Joinder and Severance

2.2.1. Joinder and Severance of Offences

f a person is suspected of more than one offence, to save time and resources it is dvisable that he be tried for all the offences at one time. Such an approach is particularly ppropriate in cases where the prosecutor's allegations are to be proved by the same vitnesses, as as in where the accused is suspected for crimes committed at same time (*e.g.*, he killing of several people with successive shots). Trying the accused for all the offences n a single trial will save the time of the witnesses, the accused, the prosecutor, and the court. Concurrent charges are also preferred to separate charges for reasons of collateral estoppels.[1051] According to this principle, if the prosecutor charges an accused for an offence and the accused is acquitted, the prosecutor cannot institute a new charge against the accused which would require relitigating questions of fact that were decided in favor of the accused in the previous proceeding.[1052] Moreover, concurrent charging facilitates concurrent sentencing.[1053] The Cr. Pro. Code contains s a general provision on joinder of charges.

Art. 116 of Cr Pro. Code. More than one charge

(1) A charge may contain several different counts relating to the same accused and each offence so charged shall be described separately.

[1051] The concept of collateral estoppel is not recognized in the Criminal Procedure Code.

[1052] Weaver *et al.*, *Principles of Crim.* , at 309-311.

[1053] For more on the advantages of joinder of criminal charges see K.P. Hein, "Joinder and Severance," 30 *Am. Crim. L. Rev.* 1139, at 1143-45 (1992-93) (hereafter Hein, "Joinder and Severance").

(2) All charges may be tried together but where the accused is likely to be embarrassed in his defense, the court shall order the charges to be tried separately.

The first subarticle allows the prosecutor to charge an accused with several counts in a single charge. This provision conveys two points in connection with joinder of charges. First, joinder is permissive: the prosecutor does not have an obligation to prepare concurrent charges. It follows that an accused has no right to have all alleged offences tried together. There is no provision that allows the court to order consolidation of separate cases against the accused. Hence, consolidation is solely within the discretion of the prosecutor. In other jurisdictions, the court has power to order consolidation. For example, the Federal Rules of Criminal Procedure of the United States allow the court to "order that separate cases be tried together as though brought in a single indictment if all offences...could have been joined in a single indictment."[1054] Because the court has such power under the American system, the accused may request the court to order consolidation of cases against him.

Second, the provision does not limit the prosecutor's power to charge, and cause the accused to be tried, for different offences in a single charge. Other jurisdictions allow joinder of charges only under certain conditions. For instance, in the U.S., Federal Rules of Criminal Procedure, under its Rule 8(a), allows two or more offences to be charged together against an accused where the offences are based upon: (1) the same act or transaction (*e.g.*, a rape and assault), or (2) a series of acts or transactions constituting a common scheme (*e.g.*, armed robbery, auto theft, and possession of weapon), or (3) the offences being of similar character (*e.g.*, bank robberies in the same neighborhood two months apart).[1055] Joinder under British law is allowed only where "those charges are founded on the same facts or form or are a part of a series of offences of the same or a similar character."[1056] Similar provisions exist in Australian law.[1057]

Where the prosecutor charges an accused for several offences, Article 116(2) of the Cr. Pro. Code allows the court to order that the charges be tried separately. The court will do so where it believes that trial of the accused under concurrent charges would have a prejudicial effect on his defence. The law does not provide guidance regarding the circumstances under which trial of the accused on several counts would be prejudicial to him.

[1054] Rule 13 of the Federal Rules of Criminal Procedure for the United States District Courts (cited in Yale Kamisar et al., *2003 Supplement to Tenth Editions of Modern Criminal Procedure, Basic Criminal Procedure, Advanced Criminal Procedure,* (St. Paul, Minessota: West Publishing Co., 1996), at 253 (hereafter Kamisar et al., *2003 Supplement to Tenth Ed.*).

[1055] Weaver et al., *Principles of Crim.*, at 305.

[1056] Indictments Act, 1915, Schedule I, Rule 3. The provision is now in Indictment Rules, Rule 9. David Ross, QC, "Joinder of Counts Against one Accused," 9 *Deakin L. Rev.* 197, at 200, note 13 (2004) (hereafter Ross, "Joinder of Counts").

[1057] Crimes Act 1914 (Cth) s 4K(3); Criminal Code (Qld) s 567 (2); Criminal Code (WA) s 585; Criminal Code (Tas) s 311(2); Criminal Code (NT) s 309 (1); Criminal Procedure Act 1986 (NSW) s 29 (cited in Ross, "Joinder of Counts," at 200, note 14.

Misjoinder is not recognized as a ground to object to a charge under Article 130 of the Code; hence, the accused does not appear to have a legal right to challenge a charge on the ground that trying him for several offences will be prejudicial to his defence. The law vests the court with discretion to consider the propriety of joinder or severance of charges. The accused facing multiple charges may, however, request the court to order severance based on the ground that the joinder is prejudicial to his defence. U.S. Federal Rules of Criminal Procedure, in its Rule 14(a), like Article 116(2) of the Cr. Pro. Code, simply empowers the court (with no indication that the accused can apply for the severance) to order separate trials where joinder appears to prejudice the accused. However, this rule has been commonly applied by the U.S. courts upon application by the accused.[1058] Article 116(2) of the Code can be construed in such a way that it can be applied by the court's own motion or upon application by the accused. In England, application of the accused for severance is a necessary condition for the judge to consider ordering severance. The court cannot order severance of charges on its own initiative. In *R v Collins,* the court said "it was not proper for the trial judge to act on his own initiative" in ordering severance.[1059]

2.2.2. Prejudicial Effects of Joinder of Offences[1060]

This issue of prejudice resulting from joinder of offences has been discussed in many U.S. cases. Unlike Ethiopian law, U.S. law allows accused persons to object to joinder of offences where it is prejudicial to their defence.[1061] Excerpts from decisions by U.S courts that discuss the impacts of joinder on the defence of the accused are presented below. These cases might inform the decisions of Ethiopian courts as to what factors to take into consideration in rulings under Article 116(2) of the Code.

1. Effect on the Decision to Plead or to Remain Silent

In *Cross v. United States,*[1062] the D.C. Circuit Court of Appeals made the following statement about how joinder can prejudice the accused's decision to plead.

[1058] See, *e.g.*, *United States v Foutz*, 540 F.2d 733(4th Cir. 1976); *Drew v United States*, 331 F.2D 85 (D.C. Cir. 1964) (both cited in Kamisar et al., *Adv. Crim. Pro.*, at 1030-32;*Cross v. United States*, 335 F.2d 987 (D.C. Cir. 1964) (cited in ibid., at 1028-30).

[1059] *R v. Collins ex parte Attorney-General* [1996] 1 Qd R 631, 637 in Ross, "Joinder of Counts," at 201. S 596 of the Queensland Criminal Code allows "the accused to move the court for the indictment to be quashed on the ground of formal defect." Ibid. at 201.

[1060] For more on the result of an empirical study on the prejudicial effect of joinder on the accused see James Earrin, Note, "Rethinking Criminal Joinder: An Analysis of the Empirical Research and its Implications for Justice," 52 *Law and Contemporary Problems,* at 325-40 (1989) (hereafter Farrin, "Rethinking Crim. Joinder").

[1061] Rule 14(b) of the Federal Rules of Criminal Procedure for the United States District Courts (cited in Kamisar et al., *2003 Supplement to Tenth Ed.*, at 253-54).

[1062] 335 F. 2d 987 (D.C. Cir. 1964) (reported in Kamisar et al., *Adv. Crim. Pro.*, at 1028-1030. The argument advanced in *Cross* that the defendant may become embarrassed or confounded in presenting separate defences has been confined to be applicable "where the defendant can show both important testimony to offer on one count and a strong need to refrain from testifying on another count." *Baker v. United States*, 401 F.2d 958, 976-78 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970) (cited in Farrin, "Rethinking Crim. Joinder," *at* 325, note 16.

> Prejudice may develop when an accused wishes to testify on one but not the other of two joined offences which are clearly distinct in time, place, and evidence. His decision whether to testify will reflect a balancing of several factors with respect to each count: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk on both counts, although he may benefit on only one. Moreover, the defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent.

Scholars argue that charging an accused for more than one offence subjects him to a situation that would be deemed intolerable by the U.S. Supreme Court. The Court has said, "when evidence is before a jury that threatens conviction, it does not seem unfair to require him (the accused) to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes."[1063] "However," the scholars argue, "a defendant tried for two offences faces a much more difficult situation: (1) his silence on one count does not prevent impeachment; (2) an inference from his silence on one count is encouraged by his lack of silence on the other."[1064]

2. Effect in Causing Bias and Unwarranted Inference Against the Accused

The D.C. Circuit Court of Appeals has found that prosecution for several offences in a single charge may cause the jury to develop a bias or make unwarranted inferences against the accused.[1065]

> It is a principle of long standing in our law that evidence of one crime is inadmissible to prove *disposition* to commit crime, from which the jury may infer that the defendant committed the crime charged. Since the likelihood that juries will make such an improper inference is high, courts presume prejudice and exclude evidence of other crimes unless that evidence can be admitted for some substantial, legitimate purpose. The same dangers appear to exist when two crimes are joined for trial, and the same principles of prophylaxis are applicable.
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> Evidence of other crimes is admissible when relevant to (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the

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[1063] *Adamson v. California*, 332 U.S. 46 (1947).

[1064] Kamisar et al., *Adv, Crim. Pro.*, at 1029.

[1065] Drew v. United States, 331 F. 2d 85 (D.C. Cir. 1964). See also United States v. Foutz, 540 F. 2d 733 (4th Cir. 1976). For more on the disadvantages of joinder for the accused, see Hein, "Joinder and Severance," at 1145-50.

commission of two or more crimes so related to each other that proof of the one tends to establish the other, and (5) the identity of the person charged with the commission of the crime on trial. When the evidence is relevant and important to one of these five issues, it is generally conceded that the prejudicial effect may be outweighed by the probative value.

If, then, under the rules relating to other crimes, the evidence of each of the crimes on trial would be admissible in a separate trial for the other, the possibility of "criminal propensity" prejudice would be in no way enlarged by the fact of joinder.... In such cases the prejudice that might result from the jury's hearing the evidence of the other crime in a joint trial would be no different from that possible in separate trials.

The federal courts have however found no prejudicial effect from joinder when the evidence of each crime is simple and distinct, even though such evidence might not have been admissible in separate trials under the rules just discussed. This rests upon the assumption that, with a proper charge, the jury can easily keep such evidence separate in their deliberation and, therefore, the danger of the jury's cumulating the evidence is substantially reduced.

he Relationship Between Articles 116(2) and 138 of the Code

he scope of Article 116 (2) of the Cr. Pro. Code depends, *inter alia*, on how Article 138 f the Code is to be interpreted. If the latter is to be construed as consistent with the "*other ffence rule*" of evidence discussed in *Cross* and *Drew*, it would be applicable not only in ases of successive prosecution (as its wording seems to suggest) but also in a single rosecution where the accused is charged for two or more offences.

rticle 138 recognizes exceptional cases, as does the *other offence rule,* where prior onvictions of the accused may be introduced as evidence in his trial for the current harge. There is no rule of evidence that expressly authorizes this practice. Several rovisions of the 1957 Penal Code (Articles 635(3)(a), 648(b), and 658(a)) allow the rosecutor to disclose prior convictions of the accused. Article 138 of the Code allows ich disclosure when "expressly provided by law." Thus, before the 1957 Penal Code was pealed, Article 116(2) could have been interpreted in light of Article 138 of the Code. ecause Article 138 of the Code allows the disclosure of prior convictions of the accused cases under Articles 635(3)(a), 648(b) and 658(a) of the 1957 Penal Code even in cases successive trials, charging the accused for two or more related offences under these enal Code provisions would not have been construed as prejudicial or a ground for verance under Article 116(2) of the Code.

he 2004 Criminal Code omits Articles 635(3)(a), 648(b), and 658(a) of the 1957 Penal ode. This change might be construed as indicating that the legislature strongly opposes sclosure of prior convictions of the accused. Currently, despite the phrase "unless herwise expressly provided by law" in Article 138 of the Cr. Pro. Code, there is no

single provision that authorizes disclosure of prior convictions of the accused. Thus, und no condition may the prior convictions of the accused be disclosed during his tria Broadly read, this rule may be analogized to the "*other evidence rule*" and construed t prohibit disclosure of conviction of one offence while the accused is tried for anothe offence in the same single trial, which practically forecloses the possibility of concurre charges.

The other alternative approach is to construe Article 138 positively as referring to som instances where prior convictions of an accused might be introduced as evidence of th charge for which he is being tried. In the absence of a clear provision of law, factors liste in *Drew v. United States* can be used as guidance in determining whether to allo introduction into evidence of the prior convictions of the accused. Applying *Drew*, on can conclude the following about the relationship between Articles 116 and 138 of the Cr Pro. Code.

Insofar as the exceptions are concerned, there is no difference for the accused whether th prosecutor files a concurrent charge or separate charges. In both cases, the prosecutor i allowed to disclose the prior conviction of the accused as evidence. Hence, in thos exceptional cases where prior convictions can be disclosed, Article 116(2) of the Cr. Pro Code cannot be invoked to order severance. However, where none of the exceptions to th *other offence rule* exists, there would be a significant difference between a separate an single trial. Where separate trials are ordered, Article 138 of the Cr. Pro. Code wil automatically bar the prosecution from disclosing the conviction of the accused on on charge in the trial on the second charge. However, if both charges are tried together in single trial, the prior conviction of the accused on the first charge will be disclosed before judgment is rendered for the second offence. This is prejudicial to the accused and can b a ground to sever a charge under Article 116(2) of the Code.

2. Risk of Double Jeopardy

The above discussion on the two prejudicial effects of joinder presupposes that th prosecutor prepares the charge properly. A third possible disadvantage of joinder is tha charging the accused for several counts may have the unintended effect of charging hi for two or more offences when essentially he has committed a single crime. In such case the accused is being subjected to double jeopardy.

In *Eshetu Ute Duba v. Public Prosecutor*,[1066] the appellant was charged with three count before the Federal High Court. Two of the counts were aggravated theft in violation o Article 635(2)(a) for stealing a gun with 30 bullets and one was engaging in illegal trad (by selling the stolen gun) in violation of Article 41(1) of the Revised Special Penal Cod Proclamation No. 214/81. Convicted under all three counts, Eshetu lodged an appea before the Federal Supreme Court. The appellate court found the judgment of the lowe court erroneous to the extent that the appellant was convicted for both aggravated thef

[1066] *Eshetu Ute Duba v. Pulic Prosecutor* (Fed. Sup. Ct., Cr. App. No. 26631, Tir 2, 1999 E.C.).

or stealing the gun) and engaging in an illegal trading of arms (for selling the same gun). he Court modified the lower court's judgment, finding that the appellant should not have een charged and convicted separately for stealing and selling the same gun, since the eries of acts constitutes a single offence under Article 60 of the 1957 Penal Code.

Unlike the first two types of harms arising from joinder of charges, which involve no error n the part of the prosecutor, this type of harm is attributable to prosecutorial error in etermining whether the facts and the law demonstrate a single crime or more than one rime. When the charge contains such a defect, the accused has the right to bring the efect to the attention of the court by objecting to the charge in accordance with Cr. Pro. ode Article 130(1). In such cases, the solution is not severance and separate trial. nstead, the prosecutor must amend his charge and prosecute the accused for a single ffence. As such a defect in the charge can have an impact on the constitutional right of ie accused not to be subject to double jeopardy,[1067] the court has a responsibility to raise ie matter *sua sponte* as part of its constitutional duty under Article 13 to protect and nforce the rights recognized in Chapter Three of the constitution. Those rights include the ght of the accused not to be subjected to double jeopardy.

otes and Questions

Does the fact that there is no jury in Ethiopia make the concerns discussed by the D.C. Circuit Court of Appeals in *Cross* and *Drew* irrelevant, or less relevant, to Ethiopia? In other words, would the factors identified by the Court in the two cases as likely to influence the jury also influence the judgment of professional judges? Although its efficacy is subject to critique,[1068] in *United States v. Cafaro*[1069] and *Bluementhal v. United States,*[1070] the U.S. Courts stated that the prejudicial effects of joinder can be prevented by a judge's clear instruction to the jury. The instruction could, for example, direct the jury to confine certain evidence to only one of the offences. Statements by the U.S. courts imply that joinder of offences would not have a prejudicial effect in cases decided by professional judges. However, the concept of the "*other crimes*" evidentiary rule discussed by the D.C. Court in *Drew v. United States* is recognized

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[7] Article 23 of the FDRE Constitution states: "No person shall be liable to be tried or punished again for offence for which has already been finally convicted or acquitted in accordance with the criminal law and ocedure."

[8] Despite its frequent use, the efficacy of this device is doubtful. Critics of the doctrine have questioned ether it is realistic to expect jurors to ignore relevant data once they have heard it, and the little empirical terial available suggests that limiting instructions do more harm by emphasizing the challenged evidence n good by erasing it. "Notes and Comments. Joint and Single Trials under Rules 8 and 14 of the Federal les of Criminal Procedure," 74 *Yale L.J.* 553, at 554-55(1964-1965) (hereafter Notes and Comments, oint and Single Trials").

[9] *United States v. Cafaro*, 26 F.R.D. 170 (S.D.N.Y. 1960) (cited in ibid., at 554, note 5).

[10] *Bluementhal v. United States*, 332 U.S. 539 (1947) (cited in Notes and Comments, "Joint and Single als," at 554, note 5).

under Article 138 of the Cr. Pro. Code,[1071] even though criminal cases in Ethiopia a tried by professional judges.

2. Where, as discussed in *Cross v. United States*, the defendant's decision to plead to o count has such serious adverse impacts on the accused in relation to the second cou can he not prevent those impacts by not pleading to both counts? If so, does he lo anything by not pleading to the first count? Article 82(1) (e) of the Criminal Co states that the court shall reduce the penalty when the accused, on being charge admits every ingredient of the crime stated on the criminal charge.
3. Normally, both the *other offence* rule and Article 138 of the Code are applicable whe the accused is successively charged. Both prohibit the previous conviction of th accused for the first offence from being disclosed to the court or jury before his guilt decided in relation to the second offence. The D.C. Circuit Court of Appeals extending the application of the *other offence* rule to cases where the accused charged for concurrent charges at one time, instead of successively. Can we appl Article 138 of the Code where a defendant is charged with concurrent offences?
4. A clear understanding of the relation between Articles 60-63 of the Criminal Code, o the one hand, and Article 116 of the Code, on the other, prevents the risk of subjectin an accused to double jeopardy through concurrent charges. What is the relationshi between the two?
5. Article 116(2) of the Code prohibits the court from considering as a ground fo severance the prejudicial effect of joinder on the interest of the government. Can yo think of cases where joinder might end up being disadvantageous to the publi prosecutor?

2.2.3. Joinder and Severance of Accused Persons

Article 117 of the Code provides for joinder of accused persons under some conditions The policy behind this rule is the same as that of joinder of offences – judicial econom and efficiency. It is more likely than not that the evidence to be produced with respect t one defendant would be relevant to establish the guilt of all of those involved in the crime Moreover, it gives a clear picture to the court as to how the crime was committed.

Art. 117. Joinder of charges

(1) All persons accused of having participated in whatever capacity in the offence or offences even at different times shall be charged and tried together.

(2) Nothing in this article shall prevent the court from ordering separate trials where separation is required in the interests of justice.

(3) *Where several persons have committed different offences connected with the same criminal activity they may where necessary be charged and tried together.*

[1071] Art. 138. Antecedents of the accused.

(1) Unless otherwise expressly provided by law, the previous convictions of an accused person shall not be disclosed to the court until after he has been convicted

(2) The previous convictions of an accused shall not be included in the record of any preliminary inquiry

e first subarticle is applicable where two or more persons are involved in the mmission of a given crime, either as a principal (as identified in Article 32 of the iminal Code) or secondary participant (such as an instigator or accomplice). The third barticle allows joinder even where the accused persons do not participate in a single me, so long as the crimes are interrelated. Such is the case where, for example, a person luces another to prepare a forged document and the other prepares the false document. this case, the first has committed a crime under Article 386 of the Criminal Code. The cond commits a crime under Article 385 of the Criminal Code. Although their joinder ay not be justified under the first subarticle, it is allowed under the third subarticle. In neral, joinder of accused persons looks to the factual connecting link.

common joinder situation is where the several accused persons have committed a crime a conspiracy relationship. In such cases, even where only some of the conspirators rsue the conspiracy and perpetrate the crime and the others do not participate in the rpetration of the crime, all of the persons will be charged together, but under different ovisions. The former group will be charged for the substantive offence and their volvement in the conspiracy will be treated as an aggravating circumstance. The latter oup will be charged only for conspiracy punishable under Article 478 of the Criminal de. As being a co-offender does not necessarily presuppose conspiracy, several persons y commit a crime together even in the absence of conspiracy. Joinder of these persons still proper either under the first or the third subarticle.

in the case of concurrent charges, the prosecutor has authority to join or not to join co-enders. An accused does not have a right to be tried with those who have committed a me with him. However, unlike cases of concurrent charges, where the accused does not ve the right to apply for severance, Article 130(2)(d) of the Code allows the accused to ect to a charge on the ground that his joinder with other accused persons would have a judicial effect on his defence. The court may then order separate trials to be conducted accordance with Article 117(2) of the Code.

2.2.4. Prejudicial Effects of Joinder of Accused Persons

order for the court to order severance, it should be convinced that joinder of trial is judicial to the accused. The court can consider whether joinder is prejudicial to the used's defence upon application by the accused in accordance with Article 130(2)(d) or its own motion in accordance with Article 117(2) of the Code As stated by the U.S. preme Court, "defendants are not entitled to a severance merely because they may have etter chance of acquittal in separate trials."[1072]

tes and Questions

In Ethiopia, since trials are decided by professional judges – not juries – to what extent are the features of joinder of accused persons discussed in the preceding paragraph

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Zafiro v United States, 506 U.S. 534 (1993) (cited in Weaver et al., *Principles of Crim.*, at 313).

prejudicial to the defence of the accused? Some of the factors identified as prejudicir the defence of the accused relate to the jury being unfamiliar with the technicalities the law. Others are inherently related to the joinder of accused persons in a single tri Is it valid to assert that only those factors inherently related to joinder are relevant relation to objections raised under Article 130(2) (d) and rulings made under Artic 117(2) of the Code?

2. In jurisdictions which have a jury system, one of the major issues relating to joind and severance of accused persons arises when one of the accused persons makes confession that implicates on his co-defendant.[1073] The risk in such a case is t possibility that the jury might wrongly use the confession as evidence against the c defendant. In view of the fact that trials in Ethiopia are conducted by profession judges, is such a risk a ground for severance under Article 117(2) of the Code? I *Federal Ethics and Anti Corruption Public Prosecutor v. Misgana Mitiku and Capta Elias Ketema*,[1074] the prosecutor charged Misgana Mitiku (first count) for allowir Captain Elias to import a video camera in exchange for Birr 800. In the second cou the prosecutor charged Captain Elias with importing the video camera illegally witho paying the necessary duty and for paying the Birr 800 as a bribe to Misgana Mitiku.

   In his confession under Articles 27 and 35 of the Code, Misgana Mitiku admitted th he and Captain Elias engaged in the actions alleged in the charge. The trial court, citir Articles 27(2) and 35(4) of the Code, expressly stated that Misgana's confession wa irrelevant to prove the guilt of Captain Elias. The Federal High Court acquitted Capta Elias for lack of evidence, while convicting Misgana Mitiku. The Federal Supren Court confirmed the decision of the Federal High Court and rejected the prosecutor appeal. Do the positions of the two courts in this case indicate that confession of defendant implicating a codefendant is not likely to prejudice the codefendant becau the judge is capable of confining the relevance of the confession to the confessor only?

3. How should the effect of joinder of accused persons on the jurisdiction of the court b considered in view of its impact on the right of appeal? Assume a crime that normally within the jurisdiction of Federal High Court is committed by several person one of whom is a federal official. According to Article 8(1) of the Federal Cou Proclamation No. 25/1996, when a federal official is charged for an offence that he alleged to have committed in connection with his official capacity, his case is to b tried by the Federal Supreme Court. If the prosecutor files a charge before the Feder Supreme Court against all the suspects, can the ordinary persons apply for severance the ground that the joinder resulting in their case being tried by the Federal Supren Court impacts their right to appeal and thereby defeats the interests of justice? F

[1073] *Bruton v. United States*, 391 U.S. 123 (1998) (cited in Kamisar et al., *Adv. Crim. Pro.*, at 1061). There another alternative for preventing such a confession from influencing the jury to develop a bias against t other defendant. In *Richardson v. Marsh*, the U.S. Supreme Court recognized a redacted confession with instruction not prejudicial to the accused; redaction and instruction can prevent the jury from forming a bia

[1074] *Federal Ethics and Anti-Corruption Public Prosecutor v. Misgana Mitiku and Captain Elias Ketema* (Fed. H. Ct., Cr. F. No. 34354).

example, in *Public Prosecutor v. Ato Tamirat Layne et al.*,[1075] only one of the nine accused persons was a federal official. However, the prosecutor brought the charge before the Federal Supreme Court. The issue raised in the case was the constitutionality of Article 8 of the Federal Courts Proclamation, which empowers the Federal Supreme Court to exercise first instance jurisdiction. This challenge concerned the court's jurisdiction to try all the accused persons. The eight accused persons who were not federal officials did not request a severance. Had they done so, would their application have been accepted?

4. The crime of "accessory after the fact," which occurs after the principal offence is perpetrated, is disconnected in some way from the principal crime. Does Article 117 of the Code allow an accessory after the fact to be charged together with the principals? If so, will the joinder be justified under the first or the third subarticle? Note that by allowing the court to convict an accused charged with a principal offence to be convicted as an accessory (before, during, or after the fact), Article 115(2) of the Code considers the two offences interrelated.

5. Can three persons be charged together where all the three are involved in the commission of one crime, two of them are involved in another crime, and the third is involved in yet a third crime? Note none of the three persons are involved in all three crimes. There is one crime that each of the three is not involved in. Article 117 of the Code envisages two scenarios where joinder of accused persons is allowed. The first scenario, as envisaged under Article 117(1), is where all the accused persons are involved in the offence or all the offences alleged to have committed. The second scenario, envisaged under Article 117(3) of the Code, is where the accused persons might be charged with different offences but the offences are connected with the same criminal activity.

Does the answer to the question depend on the relationship between the three offences alleged to have been committed? Is joinder justified under Article 117(3) only if there is a link between them? The prosecutor should rely on either subarticle 1 or 3 of Article 117 of the Code to join accused persons in a single charge. Where neither applies, there is a misjoinder and there is no need to show prejudice for the court to order separate trial. Article 117(2) of the Code presupposes proper joinder in accordance with either subarticle 1 or 3. And rightly so, because where the accused persons are joined in the presence of neither subarticle 1 nor subarticle 3, the purpose of joinder – judicial economy – would not be served since different evidence is to be produced for the different counts. In such cases, there is no reason for one of the accused persons to be required to attend the trial of another. In the U.S., the three persons can be charged together; Rule 8(b) of the Federal Rules of Evidence expressly states that "the defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count."

[1075] *Public Prosecutor v. Tamirat Layne et al.* (Fed. Sup. Ct., Cr. F. No. 1/1989)

Section III. Amendment of Charge

3.1 Grounds of Amendment

What is to be included in a charge, what form it should have, and how elements of the charge should be described are specifically addressed by the relevant provisions of the Code. The charge framed by the prosecutor might not comply with the law. Something might have been omitted from the charge or another type of error might have been committed. A discrepancy may arise between the charge and the proof. These and other factors may call for some sort of amendment to the charge. Articles 118-121 of the Code regulate the amendment procedure.

Art. 118. *Effect of errors*
No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded as material and no charge containing such errors or omissions shall be regarded as invalid unless they relate to essential points or the accused was in fact misled by such error or omission or justice is likely to be thereby defeated.

The provision divides defects of a charge into two types: material and non-material. The first category of defect includes those related to essential points, those that in fact misled the accused (evenif unrelated to essential points), and defects which are likely to result in justice being defeated. All other types of defects – those are not related to the substance of the charge and hence are not likely to have an impact on the functions of the charge – are non-material defects.

The provision also suggests what effect each type of defects has on the validity of the charge. The effect depends on the type of error or omission. Where the charge's defect is material the charge is to be regarded as invalid. Where the charge's defect is non-material, it does not affect the validity of the charge. As provided under Article 119 of the Code, where the charge is invalid (for being materially defective) it must be amended.

Art. 119. *Alteration or addition to charge*
(1) Where the accused is brought to trial on a charge containing essential errors or omissions or such errors or omissions that the accused has been or is likely to be misled, the court may at any time before judgment of its own motion or on application order the charge to be altered or added to or a new charge to be framed, as the case may be.

Errors or Omissions: Omission refers to the fact that a charge fails to include something. As it is supposed to include those matters listed under Article 111(1) of the Code, the charge is said to have omitted something that it is supposed to include only where any one of the listed matters is missing that. Error, on the other hand, indicates that the charge contains erroneous information with regard to those matters mentioned under Article 111(1) of the Code.

otes and Questions

1. Not all errors or omissions affect the validity of the charge, thereby calling for its amendment. It is only where the error or omission is "essential" that it would have such an effect. What type of errors or omissions is considered essential? Since the charge is supposed to include those matters listed under Article 111(1) of the Code, isn't any error or omission related to any one of them essential? Or can it be argued that only where the error or omission has impact on the notice function of the charge is it essential?
2. Whether or not something important/essential is *omitted* from the charge can be known by comparing the charge framed by the prosecutor with the language of Article 111(1) of the Code. How can one determine whether there is an *error* in preparing the charge? What is the reference point for gauging whether the charge deviates enough from the facts that it is erroneous? Does the word "*error*" under Articles 118 and 119(1) of the Code encompass cases where, for example, the facts in the police investigation file are not correctly transferred to the charging instrument – for example, the charge gives the date of the crime as September 10, 2007, but it is later determined to be September 10, 2008? In this type of case, the mistake may be discovered because there is a variance between the charge and proof.
3. Does it follow that only omissions, but not errors, can be discovered by the accused and the court since they do not normally have access to the reference material – the police investigation file – that would show that the charge is erroneous? In such cases it is only the prosecutor who can discover that the charge contains essential errors and move for amendment.
4. Article 119(1) envisages cases where that charge may be amended even where the omission or error is not essential. That is so where the accused is likely to be misled, or actually is misled, by the omission or error. It is one thing if the accused fails to understand the charge due to his own mistake; it is another thing entirely if the accused fails to understand the charge because it is erroneous or does not include required information. In the latter case, even if the defect of the charge is not that fundamental, it must be amended because it in fact has misled, or has the potential to mislead, the accused.
5. Only two of the three grounds mentioned under Article 118 would make a given omission or error "material" under Article 119, thereby necessitating amendment of the charge. Since any one of the three grounds would make the charge invalid, and since Article 108 of the Code prohibits conduct of a trial without a valid charge, what would be the appropriate thing to do where justice is likely to be defeated as a consequence of an omission or error? Should the prosecution's case be dismissed and the accused released? Is the effect of the Articles, taken together, so harsh as to themselves defeat justice, by letting a real criminal go free due to omissions or errors that could have been rectified through amendment? Or is this interpretation due simply to poor drafting, in which case one has to read the ground not included/mentioned into Article 119?

Variance Between the Charged and the Proved Offence: Where the public prosecutor charges an accused for crime "A" and his evidence proves that the accused has committed crime "B," it is said that there is a variance between the charged and the proved offence.

Notes and Questions

1. What should the court do when there is a variance between the charged offence and the proved offence? Should the accused be acquitted because the prosecutor's evidence does not establish the allegations in the charge or should he be convicted for the proved offence? On the one hand, the accused is not proved to have committed the charged offence – a fact that militates against his conviction. On the other hand, the prosecutor's evidence established that the accused has committed a crime – a fact that militates against his acquittal.
2. Article 113(2) of the Code empowers the court to convict an accused for the proved offence even where he was charged for another offence, provided that three conditions are cumulatively fulfilled. Similarly, Article 115 of the Code allows the court to convict a person charged with a complete offence for a related offence, such as an attempt, or acting as an accessory or instigator. Do these provisions suggest that in all other cases the court must order amendment or acquit the accused? What makes the variances envisaged under these provisions different from other types of variances?
3. Unlike the variances envisaged under Articles 113 and 115 of the Code, other types of variances may suggest a major problem with the charge which calls for amendment (because convicting the accused for the proved offence would amount to condemning him unheard). In these circumstances, amendment will be ordered. This results in the accused having an opportunity to defend (he will not be condemned unheard), while on the other hand preventing him from escaping criminal responsibility (simply because a wrong charge was filed) if in fact he committed a crime. What possible arguments may be advanced in support of acquittal instead of amendment?

3.2 Effects of Amendment

Whether upon application by the accused or the prosecutor or by the court's own motion a defective charge, as envisaged under Articles 118 and 119 of the Code, must be amended, upon court order, as soon as its defect is discovered. Once amendment is ordered, if the prosecutor fails to amend the charge the accused will be discharged in accordance with Article 122(3) of the Code If the charge is amended, whatever form the amendment may assume, the accused must be informed of the modification. As provided under Article 119(2), every alteration, addition or new charge shall be read and explained to the accused. The effects of amendment are provided under Articles 120 and 121 of the Code.

Art. 120. Effects of alteration or addition

(1) Where a charge is altered or added to or a new charge is framed, the court shall ask the accused to state whether he is ready to be tried on such altered, added or new charge.

(2) Where the accused declares that he is not ready, the court shall consider the reasons he gives. If proceeding immediately with the trial is not likely, in the opinion of the court, to prejudice the accused in his defense the court may proceed with the trial as if the altered, added or new charge had been the original charge.
(3) If proceeding immediately with the trial is likely in the opinion of the court to prejudice the accused in his defense or the prosecutor in the conduct of the case, an adjournment shall be ordered (Art. 94).

Once the amended charge is brought by the prosecutor and explained to the accused, the court has to ask whether the accused is ready to be tried on the amended charge. If the accused confirms that he is ready, the court shall proceed with the trial. Where the accused states otherwise and requests additional time to understand the charge, the court will assess the reasons of the accused. If the court finds his reasons convincing, it will accept the application of the accused and adjourn the trial to another date. If the court finds the accused's justifications for adjournment not convincing, it will disregard the application of the accused and continue with the trial.

Art. 121. Recall of witnesses
Whenever a charge is altered or added to or a new charge is framed after the beginning of the trial, the prosecutor and the accused shall be allowed to recall and examine, with reference to such alteration, addition or new charge, any witness who may have been examined and may also call any further evidence which may be material.

Depending on the effect of the amendment on the testimony already provided, the amendment may necessitate recalling witnesses to testify to the "amended" part of the charge. If the charge is amended because an important fact was omitted from the charge, the witnesses of both parties are likely not to have testified in connection with that fact. Hence, it may be necessary for them to be recalled to see what they have to testify in connection with the new added fact. If the newly added fact is to be established by new evidence (oral or documentary), Article 121 of the Code allows the new evidence to be introduced by the concerned parties. This is one example of circumstances in which parties may be allowed to call additional witnesses in accordance with Article 143(2) of the Code.

Section IV. Withdrawal of Charge

The procedure through which a charge may be withdrawn by the public prosecutor is addressed in Article 122 of the Code. According to its first subarticle, any charge, other than that relating to aggravated homicide or aggravated robbery, can be withdrawn with permission of the court. The second subarticle provides that the court shall allow the prosecutor to withdraw the charge upon ascertaining that the prosecutor is instructed by the government to do so. When the withdrawal is requested on other grounds, the fourth subarticle empowers the court decide whether to allow the withdrawal. The court is required to give reasons for allowing or prohibiting withdrawal of the charge.

These three subarticles of Article 122 were repealed by the Proclamation that provided for the Establishment of the Office of the Central Attorney General of the Transitional Government of Ethiopia.[1076] Having repealed these provisions of the Code, the Proclamation[1077] empowered the Office of the Central Attorney General to withdraw criminal charges in accordance with the law.

This Proclamation was repealed by the Proclamation Relating to Attorneys.[1078] The new Proclamation, in its Article 13, provided for the transfer of rights and obligations of the Central Attorney General of the Transitional Government of Ethiopia Proclamation to the Ministry of Justice. It followed that the new Proclamation empowered the Ministry of Justice to withdraw a criminal charge in accordance with the law.

The recently promulgated Proclamation on the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia provides that the Ministry of Justice has the power to withdraw a charge for good cause and in accordance with the law.[1079] The Criminal Justice Policy empowers the public prosecutor, by informing the trial court, to withdraw a charge where he is convinced that continuation of the criminal proceeding is not in the interest of the public.[1080] The policy requires the prosecutor who decides to withdraw a charge to report his decision to the superior public prosecutor and the Attorney General.[1081]

It is not clear what effect withdrawal will have on the right of the prosecutor to institute a new action. This issue is addressed by Article 122(5) of the Code. This provision indicates that withdrawal does not mean acquittal, and hence does not bar the prosecutor from restarting his case against the accused. Technically speaking, Article 122(5) refers to withdrawal of a charge made in accordance with the provisions which have been repealed (subarticles 1 and 2 of Article 122 of the Code). It states, "the withdrawal of a charge *under the provisions of this Article* is no bar to subsequent proceedings." However, its significance is debatable in view of the fact that subarticles 1 and 2 of Article 122 have been repealed. The Criminal Justice Policy allows the prosecutor to resume the case that he has withdrawn where doing so is found to be in the interest of the public.[1082]

Notes and Questions

1. After the repeal of subarticles 1, 2 and 4 of Article 122 of the Code, grounds for withdrawing a charge have never been addressed by a provision of law. The law that

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[1076] Office of the Central Attorney Proc., Art.24 (2).
[1077] Ibid., at Art. 9(7).
[1078] Attorneys Proc., Art. 12.
[1079] Article 16(6) of the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, Proc. No. 691/2010, *Fed. Neg. Gaz.*, year 17, no. 1.
[1080] Criminal Justice Policy, Section 4.5.5.
[1081] Ibid.
[1082] Ibid.

repealed these provisions of the Code and other subsequent laws as well simply provide that the Ministry of Justice has the power to withdraw a charge "in accordance with the law." Where there is no law dealing with grounds and procedures for withdrawal, how should the Ministry of Justice exercise its power to withdraw a charge? Can one argue that withdrawal is not allowed, because no law that deals with the grounds and procedures for withdrawal exists?

2. What is the role of the court when the Ministry decides to withdraw a charge? Can it refuse the withdrawal? In other words, must the Ministry satisfy the court that it has a reason to withdraw the charge?
3. If the Ministry of Justice is allowed to withdraw a charge without being required to have a justification, wouldn't it defeat the purposes that the compulsory prosecution policy is supposed to serve?
4. The issue of its practical significance aside, doesn't Article 122(5) of the Code subject the accused to double jeopardy by allowing the prosecutor to proceed with the case after the charge against him was once withdrawn? Double jeopardy attaches to the accused when he pleads or when the prosecutor's witness testifies. Thus, whether double jeopardy attaches to the accused depends at what stage during the trial the charge was withdrawn. If the withdrawal was made before the accused pleaded or the prosecutor's witness testified, the withdrawal was made before jeopardy attaches. Hence, the prosecutor's motion for new trial would not amount to subjecting the accused to double jeopardy. However, if the withdrawal was made after the accused pleaded guilty or a witness of the prosecutor testified, it was made after jeopardy attached, which means the subsequent proceeding subjects the accused to jeopardy for the second time.[1083]

In Israel, the prosecutor is allowed to drop a charge at any stage during trial. If the prosecutor withdraws a charge after the accused pleads not guilty, the withdrawal results in acquittal of the accused. Where the charge is dropped prior to pleading, the charge will simply be quashed by the court without affecting the prosecutor's right to file a new charge.[1084]

. What should be the relationship between the mandatory prosecution policy and the law on withdrawal of charge? Where the prosecutor may withdraw a charge without explanation wouldn't the purpose of mandatory prosecution be defeated? Subarticles (2) and (4) of Article 122 of the Cr. Pro. Code were repealed together with Article 44(2), which allowed appeal from a decision of the prosecutor not to institute a criminal proceeding. Whether the decision of the prosecutor to charge or not should be subject to judicial review is controversial. However, the role of the court before and after a criminal charge is filed is both factually and jurisprudentially different. On this issue, the U.S. Supreme Court stated the following:

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[83] Weaver et al., *Principles of Crim.*, at 387.

[84] Israeli Criminal Procedure Law (Consolidated Version), Sections 93 and 94(a) (cited in Eliahu Harnon nd Alex Stein, "Israel," in Bradley, *Crim. Pro.*, at 237).

> The right of a court to refuse to accept prosecutorial discretion as the final word where a case has commenced is vastly different from a situation where no crime has been charged. It is obviously factually different. In addition, it is jurisprudentially different. A prosecutor who dismisses an already initiated claim is free to re-prosecute it later. To allow on-again, off-again prosecutions that cease before a defendant has been subjected to jeopardy would be to permit the court system to be used for harassment and would expose a defendant to some of the hazards of attachment of jeopardy, i.e. damage to reputation, expense, and threat of criminal sanctions, without the protection that the constitutional prohibition against double jeopardy affords. In addition, a "public interest" and that of third parties is implicated by a pending prosecution – a situation not present where a prosecution has not been commenced.[1085]

In France, once the prosecutor requested a judicial investigation or has sent the case directly to Correctional or Police Court, the prosecution lacks any formal power (akin to the common law *nolle prosequi*) to dismiss or reduce charges; at least in theory, such charges may only be dismissed or reduced by the court (although in practice, courts often defer to the wishes of the prosecutor).

6. Where court approval is required for withdrawal of a charge, what standard should the court apply to decide on the prosecutor's application? In one case, the U.S. Supreme Court held, "a court may deny an uncontested request only 'in extremely limited circumstances' in extraordinary cases when the prosecutor's actions clearly indicate a 'betrayal of the public interest.'"[1086]

[1085] *State ex rel. Unnamed Petitioners v. Connors*, 401 N.W. 2d 782 (Wis. 1987) (cited in Kamisar *et al.*, *Adv. Crim. Pro.*, at 866).

[1086] *United States v. Welborn*, 849 F. 2d 980 (5th Cir. 1988) (cited in ibid.).

PART FOUR

TRIAL and APPEAL

Chapter Fourteen

Trial

ıtroduction

ial refers to the stage in a criminal proceeding where the validity or otherwise of the egations of the prosecutor is to be tested. This stage includes an adversarial process here both parties have the chance to present their evidence to an impartial court. There e different activities to be performed during trial. On the first day of the trial, the court to ensure that the accused understands the charge. The accused is given an opportunity express his objection, if any, to the charge. Once the concerns of the accused regarding e charge are addressed, he will be asked whether he pleads guilty or not guilty to the arge. The court next hears the evidence of the parties. The trial concludes with the dgment of the trial court.

Section I. Attendance of the Accused, Objections to the Charge and Plea

1.1. Attendance of the Accused

ticle 127 of the Code requires the accused to appear in person even if he has an vocate. In principle a criminal case, unlike a civil case, cannot be defended by the vyer of the accused alone. Where the accused does not show up, the action the court es depends on why the accused failed to appear. As provided under Article 160(2) of e Code, if a representative appears before the court and explains that the accused failed appear for good cause, then the case is adjourned per Article 94 (2) (a) of the Code. If, the other hand, no representative appears, or even where a representative appears and plains the reason for the accused's failure to appear but the court does not accept the son as good cause, Articles 125 and 160(2) of the Code authorize the court to order the cused to be arrested and brought before it.

provided under Article 160(3) of the Code, where the accused is not likely to appear by nself or by the efforts of the police, the court shall consider whether trial in his absence ossible. If the case can be tried in the absence of the accused, the court shall proceed in ordance with Articles 162 and 163 of the Code in public proceedings, and in ordance with Article 166 in private proceedings.

estions

What is the rationale for requiring the accused to appear in person even if he has a defence lawyer?

Where the accused, charged with offences envisaged under Article 161 of the Code, does not appear before the trial court on the day fixed for trial, the court, after verifying that there is no good cause for his absence that may justify adjournment, shall proceed

with the trial in absentia. What is the court to do where the case cannot be tried in t absence of the accused? Should it dismiss the case or order closure of the file? Wh procedures shall the prosecutor follow if he wishes to proceed with the case up finding the accused?

1.2. Objections to the Charge

Article 129 of the Code requires the trial court to read the charge aloud to the accused a the public and to ask the accused if he has any objection to the charge. The major purpo of the charge is to inform the accused of the allegations of the prosecutor. Once understands the prosecutor's allegation (as stated on the charge sheet), the accused m raise any one of the objections listed under Article 130 of the Code.

1.2.1. Grounds

The objections relate to preliminary matters having nothing to do with the merit of t case – *i.e.*, whether the accused is guilty or not. If successful, the objections would make legally impossible, difficult, or unnecessary to proceed with the trial. Some of t objections make clear that the continuation of the trial is unnecessary.

Article130. Objection to the charge

(1) If the accused has anything to say....

(2) The provisions of Article 131 shall apply where the accused states:

a. That the case is pending before another court; or

b. That he has previously been acquitted or convicted on the same charge; or

c. That the charge against him has been barred by limitation[1087] *or the offen with which he has charged has been made the subject of pardon*[1088] *amnesty: or*

d. That he will be embarrassed in his defence if he is not granted a separa trial...;or

e. That no permission to prosecute as required by law has been obtained; or

f. That the decision in the criminal case against him cannot be given unless oth proceedings have been completed; or

g. That he is not responsible for his acts[1089]

(3) Where no objection is raised under this article immediately after the accused h been required by the court to state his objections, the accused shall be barred fro

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[1087] The period referred under this subarticle is likely to be the "absolute period of limitation.'" Had it been the ordinary period of limitation, it would have been considered by the prosecutor under Article 42(1)(a) o the Code.

[1088] As pardon necessarily presupposes conviction, if the accused was pardoned that means he w previously tried and convicted. Hence the objection can also be based on Article 130(2)(b) of the Code.

[1089] The English version seems to suggest that the accused, at the time of trial, is not in a position to sta trial. But the Amharic version refers to the state of mind of the accused at the time of the commission of t crime.

raising any such objection at any later stage in the trial, unless the objection be such as to prevent a valid judgment being given.

rticle 130(2) of the Code provides seven grounds for objecting to the continuation of the al. Technically, the grounds listed under Article 130(2), unlike those in Article 130(1), e objections of the continuation of the trial for reasons not related to the content and rm of the charge. Hence, it is a misnomer to refer to these grounds as "objections to the arge."

1.2.2. Ruling on Objections

ie ruling of the court depends on the type of the objection raised. The court's response to me of the objections may be dismissal of the charge. The court could respond to other jections by ordering amendment of the charge. In response to the remaining objections, e court shall simply adjourn or suspend the trial pending the fulfillment of certain nditions.

ie first group of objections includes pendency, previous acquittal or conviction, the fence being barred by a period of limitation, the offence being the subject of amnesty or rdon, and that the accused is not responsible for his acts. These objections result in smissal of the criminal case. The prosecutor is maynot continue the trial, and cannot file other case against the accused based on the same facts alleged in the charge.

ie second group includes defect in content and form of the charge, and that the accused ll be embarrassed in his defence if separate trial is not ordered. These objections can be dressed by amendment of the charge. The prosecutor can take corrective measures and t the trial continue.

ie third category of objections simply results in suspension of the trial until a certain ndition is satisfied. This group includes "no permission to prosecute is obtained" and ie decision in the criminal case against the accused cannot be made until other oceedings have been completed." In these cases, the court may simply adjourn the trial another date or suspend the trial until the permission is obtained or the other proceeding completed.

ie court's ruling depends on whether or not the point raised by the accused goes to the art of the charge. If the accused establishes that the charge contains essential errors or issions, the court will order the prosecutor to amend the charge. The errors or issions would be considered essential[1090] where the charge is so defective in content or rm that it has actually misled, or is likely to mislead, the accused. If the defect does not ve such effect the court will not accept the objection raised by the accused. Once the jection is accepted by the court and the prosecutor is ordered to amend the charge, the

[1090] For the details on the errors or omissions that call for amendment, refer to Chapter 13.

prosecutor has to comply with the court's order. If the prosecutor fails to comply with t court's order, Article 122(3) of the Code authorizes the court to discharge the accused.

Notes and Questions

1. What is the effect of an accused being discharged under Article 122(3) of the Cod Can the prosecutor at some later time revive the case by amending the charge ordered by the court? Does it depend on his reason not to amend earlier? If his failu was not for reasons beyond his control, isn't the prosecutor's refusal a contempt court? Shouldn't the court be empowered to compel the prosecutor to amend t charge?
2. With regard to timing, Article 130(3) of the Code, as a matter of principle, requir objections to the charge or to the continuation of the trial to be raised immediately aft an opportunity by the court is given to the accused. The defendant's failure to raise th objection is considered a waiver, so he will not be allowed to raise it later in th proceeding. However, certain objections may be raised at any time during the tri process. The criterion adopted by the law is that the objection must be so fundament that refusal to accept it would have the effect of making the judgment to be rendere invalid. Which of the objections would prevent a valid judgment and hence can b raised at any time during the trial?
3. Article 130(3) seems to suggest that even the objections which may prevent a vali judgment from being given should be raised before a judgment. If these objection prevent valid judgment from being given, shouldn't the accused be allowed to rais them even after judgment? Does the failure of the accused to raise the objection befor judgment make the judgment valid? If, for instance, the accused had already been trie and acquitted for the crime that he is charged with for the second time, will hi conviction be valid and enforceable because he failed to raise the objection before th second judgment was given? If the objection can be raised after judgment, should it b brought to the attention of the trial court or the appellate court?
4. Does Article 130 of the Cr. Pro. Code exhaustively provide for possible objections t the charge? For instance, does the provision allow the accused to raise lack o jurisdiction of the court as an objection to the charge? What about the prosecutor' failure to file the charge within 15 days as required under Article 109 of the Code?[1091]

1.3. Plea of the Accused

Once the objections raised by the accused, if any, have been settled in a way that does no prevent continuation of the trial, and once the court ensures that the accused understand the allegations of the prosecutor, the court then asks the accused whether or not he plead guilty to the charge. As provided under Article 134 of the Code, if the accused admit every ingredient of the charge without reservation, the court enters a plea of guilty. I

[1091] Article 109 (1) of the Code states: "the public prosecutor shall within fifteen days of the receipt of th police report (Art.37) or the record of preliminary inquiry (Art. 91) frame such charge as he thinks fi having regard to the police investigation or preliminary inquiry, and shall file it in the court havin jurisdiction."

cases where the accused does not respond when asked whether he pleads guilty or not guilty, or where he admits the charge with reservation, the court enters a plea of not guilty per Article 133 of the Code.

When the accused pleads not guilty, the court always asks the prosecutor to present his case, explaining succinctly the charges he proposes to prove and the nature of the evidence he will produce. When the accused pleads guilty, Article 134(2) of the Cr. Pro. Code gives discretion to the court to convict the accused exclusively based on the plea or to order the prosecutor to produce his evidence. Where the court orders the prosecutor to call evidence despite the plea of guilty, it may ask the prosecutor to present evidence the court deems necessary instead of all the evidence in the prosecutor's possession. If, for instance, the court doubts the fulfillment of the mental element of the crime the accused is charged with, it may order the prosecutor to produce only his evidence relating to the mental element of the crime. So, where the accused pleads guilty, the court has discretion to convict the accused without asking the prosecutor to produce any of his evidence, or to ask the prosecutor to produce part or all of his evidence.

Notes and Questions

1. Where the accused pleads guilty, the law gives discretion to the court to convict the accused on the basis of his own plea or to require the prosecutor to introduce his evidence. What factors should the court take into consideration in deciding which option to choose? To what extent is the gravity of the offence the accused is charged with relevant? In *Public Prosecutor v. Habtamu Seifu Woldekidan*,[1092] the accused was charged under two counts, namely, causing the death of his girlfriend in violation of Article 539(1)(a) of the Cr. Code and having engaged in indecent behavior with a relative in violation of Article 655 of the Cr. Code. The accused pleaded guilty on both counts and the trial court convicted him forthwith and sentenced him to life imprisonment.
2. Article 135(1) of the Code allows the court to change the plea of guilty it has already recorded into a plea of not guilty, through amendment. The court would make such an amendment where it learns, in the course of the trial, that a plea of not guilty should have been entered. Does the phrase "a plea of not guilty should have entered" contemplate a case in which the court, despite the silence or admission with reservation of the accused, wrongly entered a plea of guilty when it should have entered a plea of not guilty? Or does it refer to a case where the accused, without intending to admit guilt, admits the charge without reservation, causing the court to record a plea of guilty, but later it becomes clear from the accused's argument that he did not mean to admit guilt? If the latter, the phrase "a plea of not guilty should have been made" should have been used instead of the phrase "a plea of not guilty should have been entered." The term "entered" attributes the error to the court.

[1092] *Public Prosecutor v. Habtamu Seifu Woldekidan* (Fed. H. Ct., Cr. F. No. 95755).

3. Where a guilty plea is changed to a plea of not guilty, Article 135(2) of the Cod requires the court to set aside the conviction, if any, made based on the guilty plea. Th court may have an opportunity to learn that a plea of not guilty should have bee entered when, instead of convicting the accused based on his own plea, the cou requires the prosecutor to produce his evidence and allows the accused to present h defence. Once the court convicts the accused based on his guilty plea, at what stag during the trial might the court have an opportunity to learn that a plea of not guilt should have been made?
4. The effect of a guilty plea on the right of the accused to appeal is provided unde Article 185(1) of the Code, which states in relevant part, "provided that no appeal ma be lodged by a convicted person who has pleaded guilty and has been convicted o such plea except as to the legality of the sentence." The provision indicates that person who pleads guilty may challenge the legality of the sentence but not hi conviction (the finding).
   4.1. Is the prohibition of appeal applicable whenever the accused pleads guilty o only to an accused who is convicted exclusively based on his own plea a envisaged under Article 134(1) of the Code? What does the phrase "and ha been convicted *on such plea*" suggest? For the purpose of allowing o prohibiting appeal, do you see any justification for making a distinction betwee the two cases – conviction made exclusively based on the plea of the accuse and conviction made based on the plea of the accused plus other evidence of th prosecutor?
   4.2. By prohibiting appeal of the finding of the court, does Article 185(1) of th Code narrow the right of the accused to appeal, as provided under Articles 20(6 of the FDRE Constitution and 14 of the ICCPR? If so, does it mean that th Code's provision, to that extent, is unconstitutional?
5. Article 82(1)(e) of the Criminal Code recognizes a plea of guilty as a mitigating factor Would this provision have the effect of influencing the accused to plead guilty? If so doesn't that make it constitutionally suspect for compelling the accused to testif against himself?

Section II. Production of Evidence

2.1. Prosecution's Evidence

Unless the accused pleads guilty and the court convicts him forthwith, the step following the plea of the accused is normally production of evidence by the prosecutor. Because there is no codified law of evidence, production of evidence by the prosecutor is regulated by the relevant provisions of the FDRE Constitution and the Code.[1093]

As provided under Article 136(1) of the Code, following the plea of the accused the public prosecutor opens his case, explaining succinctly the charges he proposes to prove and the

[1093] The Code provisions deal with oral testimony (lay witnesses and experts) but not with documentary evidence. See Articles 124, 136-140, 142, 143, and 147.

ature of the evidence he will present. That is, the prosecutor briefly advises the court hich part of the charge is to be proved by which evidence. The prosecutor is to act npartiality and objectively in presenting his case.

he prosecutor may call his witnesses in any order he wishes. Questions asked by a party f his own witnesses are known as "examination-in-chief." As stated under Article 137(1) f the Code, during examination-in-chief, the prosecutor is to raise questions which are elated to facts relevant to the issues to be decided and about which he has direct or ndirect knowledge. The Code's Article 137(2) prohibits the prosecutor from leading his itnesses, except with the permission of the court or the accused. Raising irrelevant or eading questions is a ground for objection by the accused or his lawyer.

ollowing the examination-in-chief, the accused or his lawyer may cross-examine the rosecution's witness. The type of questions posed in cross-examination is determined by estimony of the witness. As the purpose of cross-examination, as provided under Article 37(3) of the Code, is to show to the court what is erroneous, doubtful, or untrue in the nswers given in the examination-in-chief, questions posed at this stage should relate to ne facts raised during the examination-in-chief. The accused is allowed to ask leading uestions when cross-examining the prosecution's witness.

he prosecutor has a second chance to question his witness (re-examination) to clarify natters raised in cross-examination. By the conclusion of cross-examination, fact testified by the witness during the examination-in-chief may have become blurred by questions ised during cross-examination. Article 139 of the Code limits the prosecutor to questions nat would have the effect of clarifying matters raised in cross-examination.

2.2. Ruling by the Court

ollowing the conclusion of the prosecution's case, the court will evaluate the rosecution's evidence and decide whether the prosecutor has established a case. Based on ne evaluation, the court rules whether to acquit the defendant or order him to present his efence. If the court is convinced that the prosecution has established a case, it will order ne accused to enter into his defence. Where the court believes that the prosecution has not stablished a case, it shall give an order of acquittal.

he criterion for whether the accused should be acquitted or ordered to present his defence an be inferred from Articles 141 and 142 of the Code.

Art. 141. Acquittal of accused when no case for prosecution.
Where the case for the prosecution is concluded, the court, if it finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, shall record an order of acquittal.

Art. 142. Opening of case for defense

(1) Where the court finds that a case against the accused has been made out...it shall call on the accused to enter upon his defense....

If, on the basis of the prosecution's evidence, the court finds that the guilt of the accused has been established beyond a reasonable doubt, a case against the accused is said to have been made out and the accused is to be ordered to enter into his defence. This is confirmed by the Federal Supreme Court which, in *Sisay Dagne Yirdaw v. Public Prosecutor*,[1094] stated that an accused is to be ordered to enter into his defence under Article 142 of the Code only where the prosecutor proves his case beyond a reasonable doubt. Criticizing the holding of the trial court, the Federal Supreme Court stated that the witnesses called by the prosecution did not testify to relevant facts supporting the prosecutor's charge, so the only evidence the trial court considered was the defendant's confession. According to the Federal Supreme Court, confession is not adequate evidence to prove the prosecutor's case beyond a reasonable doubt and, therefore, a case against the accused was not made out, so the accused should not have been ordered to present his defence.

In short, an order of the court for the accused to enter into his defence is a provisional holding that the accused has committed the crime. It is provisional, because the accused has the opportunity to rebut the case of the prosecutor with his own evidence. The court may change its initial holding after hearing the evidence of the accused. Unless the accused produces a defence or evidence to rebut the case of the prosecutor, the accused will be convicted.

On the other hand, where the evidence of the prosecutor does not establish the guilt of the accused beyond a reasonable doubt, no case against the accused is said to be made out. In such a case, the court will automatically acquit the accused. The prosecution did not establish a case which needs to be rebutted, so there is no need for the accused to enter into his defence.

Notes and Questions

1. What error is committed by the court where an accused who was ordered to enter into his defence is finally acquitted, despite the fact that he could not produce any evidence?
2. In *Public Prosecutor v. Mulu Hailemariam et al.*,[1095] three persons were charged before the Federal High Court for committing fraudulent representation contrary to Article 692(1) of the Criminal Code. Under Article 142 of the Code, the court ordered all three defendants to enter into their defence. All three called their witnesses. Although the court did not accept Bahiru's defence of *alibi*, it acquitted him on the ground that what was proved by the prosecutor did not constitute fraudulent misrepresentation. The court did not find any of the statements by Bahiru's witnesses to have rebutted the

[1094] *Sisay Dagne Yirdaw v. Public Prosecutor* (Fed. Sup. Ct., Cr. App. No. 17739, Tahisas 28, 1997 E.C.).
[1095] *Public Prosecutor v. Mulu Hailemariam et al.*, (Fed. H. Ct., Cr. F. No. 97626).

prosecution's case. Should Bahiru have been ordered to enter into his defence under Article 142? Once ordered to present his defence, should he have been acquitted despite the fact that the court was not convinced that his evidence did not rebut the prosecutor's case?

2.3. Evidence of the Accused

he court is convinced that the prosecution has provisionally established the guilt of the used beyond a reasonable doubt – a standard that warrants conviction – it will order the used to introduce his evidence. The accused, like the prosecutor, opens his case by king a brief statement about his defence and evidence. Article 142 of the Code allows accused to make a statement in answer to the charge. When he wishes to do so, the law uires him to do it before his witnesses testify. The accused is not to be subjected to ss-examination by the prosecutor. Witnesses called by the accused shall be direct-mined by the accused, cross-examined by the prosecutor and re-examined by the used.

es and Questions

What justifies the law prohibiting the prosecutor from cross-examining the accused? Is he rationale related to the privilege against compulsory self-incrimination? Once the ccused decides to testify in his favor, doesn't that constitute a waiver of his privilege? n Israel, if the accused testifies in his own favor, he is subject to full cross-xamination.[1096]

Article 136(4) of the Code, which deals with the prosecution's witnesses, authorizes the ourt to question a witness where necessary in the interest of justice. Similarly, Article 42 of the Code, which deals with witnesses of the accused, allows the court to uestion to the accused if he decides to testify in his favor. The provision does not llow the court to question the witnesses of the accused. Does that mean the court may ot ask witnesses of the accused?

What type of questions may the court ask witnesses of the accused or the prosecutor? What questions can the court ask the accused if he decides to testify? Can the court ask ross-examination type questions?

he law allows the court to call witnesses where it believes it is in the interest of stice. In practice, courts do not allow the parties to cross-examine court witnesses. Where a witness testifies against one of the parties is it fair to prevent that party from ross-examining the witness? What may be the possible justification for the courts not allow cross-examination of court witnesses? Does it arise from the assumption that uch witnesses are not likely to make false statements against the parties because they ere not called by either party?

rticle 44 of the Revised Anti-Corruption Special Procedure and Rules of Evidence roclamation allows the party who called the witness to ask leading questions during e examination-in-chief where the witness, in a manner showing he is unwilling to tell

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iahu Harnon and Alex Stein, "Israel," in Bradley, *Crim. Pro.*, at 242.

the truth, gives contradictory statements. It is clear from the three subarticles of Articl 44 that the critical element in the determination whether to allow leading questions i that the witness gives contradictory statements with a view not to tell the truth.

5.1. What does "*previous statement*" refer to? Statements given at trial during th examination-in-chief or statements given during the police investigation o preliminary inquiry? Shouldn't giving contradictory statements be a ground t discredit the witness instead of a ground to lead him to testify in favor of th party who called him?

5.2. Making contradictory statements is not adequate for the court to authorize th party to lead his witness. It must also be ascertained that the witness is making the contradictions with a view not to tell the truth. How is the state of mind o the witness to be known? Is it simply to be presumed from his contradictor statements?

Section III. Constitutional Rights Associated with Production of Evidence

Rights of persons accused are listed under Article 20 of the FDRE Constitution and Article 14 of the ICCPR. The following sections analyze to what extent the Code and other subsidiary laws are suitable to enforce these rights.

3.1. Right to Pretrial Disclosure of Evidence

Knowing the evidence of the prosecutor has several advantages to the accused. First, by evaluating the strength of the prosecution's evidence, the accused will be able to decide whether to plead guilty or not. Where the prosecution's evidence is so strong that it proves the guilt of the accused, there is no point in pleading not guilty. Additionally, if the accused pleads guilty he may benefit from mitigation of punishment. Second, knowing the evidence of the prosecutor enables the accused to identify evidence that may help challenge the admissibility or credibility of the prosecutor's evidence, thereby casting doubt on facts established by the prosecution's evidence. Furthermore, knowing the identity of the prosecution's witnesses allows the accused to collect information about the background of the witnesses, and their association with the case. The accused can make use of such information in cross-examining those witnesses.

These purposes would be served if the accused is given access to the list of witnesses and information on the nature of the evidence of the prosecutor before trial begins. Recognizing the significance of disclosure of the prosecution's evidence to the accused, Article 20(4) of the Constitution provides the accused person the right to full access to any evidence presented against him. This being a constitutional provision, it simply recognizes the right in a general fashion. The details are provided in subsidiary laws.

he Code does not expressly state at what stage in a criminal proceeding (during trial) the vidence of the prosecutor to be made accessible to the accused.[1097] Articles 123 and 124 f the Code make clear that the list of evidence of the prosecutor need not be attached to ıe charge. These provisions make clear that the date of trial is to be fixed after the rosecutor files a charge. The list of evidence of both parties is to be submitted after the ate of the trial is fixed, which clearly shows that the list need not be attached to the harge. Since there is no clear provision that requires the prosecutor to give a copy of the harge filed in accordance with Article 123 of the Code to the accused before trial begins, ven if the list of evidence were to be attached to the charge, there is no guarantee that the ccused will have pretrial access to the evidence of the prosecutor.

lowever, Article 94(2) (g) of the Code, by recognizing that that failure to serve the ccused with a copy of the charge constitutes a ground to adjourn a trial, implies that the ccused must be provided a copy of the charge before trial begins. In fact, he should be erved with the charge in time to properly prepare his defence before trial begins. The ractice follows the law. If the accused does not receive the charge with enough time to repare his defence (say, just before trial or on the first day of trial), it qualifies as a round to adjourn the trial. Since the trial cannot begin until the accused has had the pportunity to prepare his defence, it makes no practical difference whether he gets the harge before or on the first day of the trial. Had a list of the prosecution's evidence been equired to be annexed with the charge, the accused would have had an opportunity to now the prosecution's evidence before trial begins.

ven if Articles 123 and 124 of the Code allow the prosecutor not to attach a list of its vidence with the charge, the Code's Article 94(2) (e) requires that the accused not to be ıken by surprise by the prosecution's evidence. This provision orders the trial to be djourned if "evidence is produced either by the prosecution or the defence which takes ıe other side by surprise and the production of which could not have been foreseen." For ıe accused not to be taken by surprise by the prosecution's evidence and trial not to be djourned, the accused should be informed of the prosecution's evidence before it is ıtroduced at trial.

rticle 143 of the Code: Additional Witnesses

he court is empowered, by virtue of Article 143(1) of the Code, to call any witness efore judgment if the court believes his testimony is necessary in the interest of justice. he court may call such a witness at any time before judgment. Testimony is considered ecessary in the interest of justice where, at any time during the trial, the court faces an sue that can be decided only with the aid of testimony. In such cases, the court has the

[1097] The Criminal Justice Policy calls for laws that require the public prosecutor to give a list of his evidence the accused together with the charge. The Policy provides for instances where a list of evidence may not given to the accused with the charge. Criminal Justice Policy, Section 4.5.2.

power, perhaps even the responsibility, to call and hear the witness. Even in such a ca the accused will be informed in advance of the identity of the witness.

Normally, both the prosecutor and the accused are supposed to submit a list of th witnesses before trial begins. But instances may exist where either or both parties mi discover someone whose name was not included in the list of witnesses who knowledgeable about the facts at issue. In such cases, the concerned party may apply the court to allow the person to testify. Article 143(2) of the Code empowers the court decide whether such witnesses are to be called upon ascertaining two conditions. First, t court must be satisfied that the person to be called is a material witness – that is, a witn whose testimony relates to any of the core elements of the charge. Second, the court m be satisfied that the application is not made as a way to delay the case. It is unlikely for t second element not to be satisfied where the first condition exists. Summoning a witn upon the application of the prosecutor does not necessarily affect the right of the accus to know in advance the identity of the witness testifying against him.

Article 143(3) of the Code deals with possibility of calling additional witnesses whe after a preliminary inquiry, a case is committed for trial to the High Court. A witness w did not testify during the preliminary inquiry may only be called during trial if t prosecutor informs the accused in writing of the name of the witness and of the testimon he will give. It is not clear whether the two requirements of Article 143(2) apply in the circumstances. Article 143(3) seems to foreclose any role by the court in deciding wheth additional witnesses can be called. That is, so long as the prosecutor informs the accus of the name of the witness and the nature of testimony he will make, he has the right call additional witnesses in cases envisaged by Article 143(3). So long as as the prosecut complies with the preconditions, the right of the accused to know the prosecution' evidence will not be affected.

Notes and Questions

1. The accused whose case is tried in accordance with the Code is entitled to know th evidence of the prosecutor so that he can prepare to challenge the relevanc admissibility, and weight of the evidence. Laws exist, however, that authorize th prosecutor not to disclose certain evidence to the accused. Article 32(1) of the Anti Terrorism Proclamation authorizes the court, on its own motion or on an applicatio made by the prosecution or by the witness, to order the withholding of the name an identity of the witness, if it is satisfied that the life of the witness is in danger. Is thi provision compatible with the right of the accused to have full access to the evidenc presented against him, as recognized under Article 20 (4) of the Constitution? Articl 4(h) of the Protection of Witnesses and Whistleblowers of Criminal Offence Proclamation No. 699/2010 authorizes the Ministry of Justice, even without the court' permission, to withhold the identity and names of witnesses with a view to protect thei interest. Is it fair to give this power to the Ministry? If withholding of names an identity of witnesses is necessary and justifiable at all, shouldn'ot the decision be mad by the court?

2. Article 23 of the Anti-Terrorism Proclamation allows an intelligence report prepared in relation to terrorism to be used in evidence, even if the report does not disclose the source or the method of its gathering. This provision apparently aims to preserve the secrecy of the government's intelligence service. How is the interest in preserving that secrecy to be balanced against the right of the accused to defend himself? To what extent is such a law valid under Article 20(4) of the Constitution?
3. Is there an obligation on the part of the accused to disclose his evidence to the prosecutor? Article 20(4) of the Constitution establishes the right of the accused to pretrial disclosure of the prosecution's evidence, but not vice versa. Articles 124 and 94(2)(e) of the Code are framed in such a manner that both parties have the right to know the evidence of the other before the evidence is introduced at trial. What is the implication and effect of the right of the accused being recognized by both the Constitution and the Code, while the right of the prosecutor is recognized only by the Code? Do you see any sort of unfairness in the law that imposes an obligation on the accused to disclose his evidence to the prosecution?

3.2. Right to Cross-Examine Witnesses

The right of the accused to cross-examine witnesses testifying against him is recognized both under Article 20(4) of the FDRE Constitution and Article 14(3) (e) of the ICCPR. On the meaning, purposes and exceptions of the right to confrontation, Wondwossen writes the following.[1098]

> The right to confrontation, where put in normal operation, requires all the witnesses testifying against an accused to do so in the presence of the accused at a public hearing with a view to adversarial argument. Then the defense should be allowed to question such witnesses in open court. The right serves three aims: "the facilitation of cross-examination, which is claimed to be the best legal engine for uncovering the truth; [1099] the presence in the court room of witnesses which would give the court a chance to assess credibility through observation of demeanor; and the provision of testimony on oath, guarding against falsehood."[1100]

3.2.1. Hearsay Evidence

There are instances where persons who have knowledge about the commission of a crime are not available to testify at trial but have made out-of-court statements to third persons about what they know relating to the crime. Such a situation may require third persons to appear before court and testify to what they were told – this is hearsay evidence. Hearsay evidence is among the evidence that Article 23 of the Anti-Terrorism Proclamation lists as admissible in terrorism cases. McCormick defines hearsay as "testimony in court or

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[1098] Wondwossen, "Reflective Analysis," at 84-85.
[1099] *California v. Green*, 399 U.S. 149, 179 (1970) (cited in Ruth Costigan and Philip A. Thomas, Anonymous Witness," 51 *N. Ir. Legal Q.*, at 328-329 (2000) (hereafter Costigan and Thomas, "Anonymous Witness").
[1100] Costigan and Thomas, "Anonymous Witness," at 329.

written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out of court asserter."[1101]

To understand the right of cross-examination and its relation to hearsay evidence, one has to define the phrase "*witness testifying against*."[1102] Although the phrase is used in several provisions of Ethiopian law, no specific provision defines the concept. Before looking into the possible meaning of the phrase as used in these provisions, let us briefly see how the term is understood in Europe and the United States in the context of legal instruments[1103] which recognize a right to confrontation similar to that in Article 20(4) of the FDRE Constitution.

The following paragraph summarizes how the European Court of Human Rights understands the term "witness."

> The European Court of Human Rights, as can be inferred from a series of its decisions, construes the term "*witness*" to refer to beyond its usual meaning of someone who attends the trial to give oral testimony. According to the Court, it is not necessary, in order to be treated as a witness, for the person concerned to testify in court. What is important, for the Court, is whether he or she made a statement which has been taken into account by the court in the evaluation of the evidence. One can think of different possibilities where a person might have made out of trial court statements relating to a fact in issue before the court. First, he might have made formal statements to an investigating police officer during investigation. Second, he might have given his testimony before a court of law during preliminary inquiry – a pre-trial but post investigation step in a criminal proceeding. Third, he might have made statements not in a formal setting, as opposed to the other two, but just as a casual remark.[1104]

The U.S. law on the relation between hearsay and confrontation has changed over time. It took some time for its position on the issue to become similar to that of the European Court of Human Rights. There was time in the U.S. when one's out-of-court statement was not considered testimony, because the declarant (one who makes a statement out of

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[1101] McCormick, *Evidence*, para. 225.

[1102] In the continental law system, where witnesses are supposed to be neutral and to be examined by the judge, it is difficult to say whether the witness is that of the prosecution and hence testifies against the accused or that of the accused and hence testifies in his favor. Often it is only after the result of the interrogation made by the judge is known that one can say whether the witness is for the accused or for the prosecution. In the common law system parties present their own evidence, while in the continental law system the court has the primary responsibility for the administration of evidence. The question whether a witness is for the prosecution or for the defence makes more sense in the common law system.

[1103] The relevant part of the Sixth Amendment to the U.S. Constitution provides, "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witness against him." Similarly, Article 6(3) (d) of the European Court of Human Rights, in relevant part, states that everyone charged with a criminal offence has the right "to examine or have examined witnesses against him."

[1104] Wondwossen, "Reflective Analysis," at 88-89 (footnotes omitted).

court) was not considered a witness for purposes of the Sixth Amendment to the U.S. Constitution. At the time, the phrase "*witness testifying against*," for purposes of the Sixth Amendment of the U.S. Constitution, which recognizes the right to confrontation of the accused, was defined as "a person who is available to give his incriminating evidence in the form of live testimony in open court, under oath, and subject to cross examination."[1105] It follows that a declarant who was not available to be produced in person for a reason not attributable to the state did not qualify to be treated as a "*witness testifying against*" the defendant per the meaning of the confrontation clause, even if his statement (as reported by someone else) was to be used as evidence.[1106]

In *Ohio v. Roberts*,[1107] the U.S. Supreme Court recognized that the right of the accused to confrontation is relevant even where the statement that the prosecution presents as evidence is made out of court. The court stated, "when a hearsay declarant is not present for cross examination at trial, the confrontation clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate indicia of reliability."[1108] Finally, in *Crawford v. Washington*, the U.S. Supreme Court held that "the prosecution cannot admit a testimonial out-of-court statement unless it shows that the declarant is unavailable and that the defendant had an adequate opportunity to cross examine the declarant."[1109]

The Federal Supreme Court of Ethiopia focused on the meaning of the term "witness" in *Public Prosecutor v. Tamirat Layne*.[1110]

> In this case the public prosecutor moved to introduce a document which contained a written statement made by certain Abdurahman Bore who, as indicated by the prosecutor, was not willing to appear before the trial court.[1111] Defense lawyers objected to the admissibility of the document on several grounds. One of their reasons was that the document, if admitted, would have the effect of depriving accused persons of their right to confront witnesses testifying against them. The

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[1105] *California .v Green*, 399 U.S. 149, 179-183 (1970) (Harlan, J., concurring) (quoted in Peter Westen, "The Future of Confrontation," 77 *Michigan Law Review*, at 1188-89 (1979) (hereafter Westen, "Future of Confrontation").

[1106] Ibid.

[1107] *Ohio v. Roberts*, 448 U.S. 56 (1980) (cited in Marc H. Robert, "The Right To Confrontation after Crawford v Washington," at 1, available at: www.fd.org/pdf_lib/ws07_CrawfordHearsay.pdf (accessed on October 7, 2011) (hereafter Robert, "Right to Confrontation").

[1108] Ibid.

[1109] *Crowford v Washington*, 541. U.S. 36 (2004) (cited in ibid., at 1). On what constitutes "testimonial" and unavailability," see ibid., at 3-9.

[1110] *Public Prosecutor v. Tamirat Layne et al.*, (Fed. Sup. Ct., Cr. F. No. 001/1989). Since the Federal Supreme Court defines the term after the coming into force of the FDRE Constitution, the Court might also have had Article 20(4) of the Constitution in mind while defining the term. This is the more likely since the defence lawyers raised the issue of confrontation at the time.

[1111] The public prosecutor informed the court that it could not compel Abdurahman to appear before the court to testify because he was in Djibouti at that time. Ibid.

> court rejected the objection raised by the lawyers stating that the term "*witness*" refers to one who appears before court of law, take oath and testify in the presence of the judges of the trial court and the parties. The court went further and emphatically indicated that statements made by persons outside of the trial court including that given to the investigating police officer is not to be treated as being made by witness. For the Court, the statement given to a police officer and reduced into writing is to be treated as documentary evidence. Hence, the court concluded that admitting the above referred evidence, not being treated as an oral testimony made by a witness against the accused persons, does not constitute a violation of the right of the accused to cross examine witnesses testifying against them.[1112]

Relation Between Hearsay and Right to Confrontation in Other Jurisdictions[1113]

In the United States, in connection with hearsay, the confrontation clause is treated as a "*preferential rule.*"[1114] This means that the clause "imposes a preference for a (person's) live testimony in open court, under oath, and subject to cross examination"[1115] to his out-of-court statement – that is, hearsay evidence. One can imagine a preference for live testimony over hearsay where the person who has made the out-of-court statement is accessible during trial to present live testimony. If the person is not available to testify at trial,[1116] however, the only accessible evidence is his out-of-court statement. In this case, the out-of-court statement is the best available evidence and can be used as evidence provided that the accused had an adequate prior opportunity to cross-examine the declarant. Hence, the U.S. Supreme Court stated in *Crawford* that an out-of-court statement is admissible "only if the witness is demonstrably unable to testify in person."[1117]

In the U.S., the Sixth Amendment's confrontation clause would apply when the prosecution seeks to introduce at trial a prior statement of a person (hearsay evidence) without showing that the person is unavailable for a reason not attributable to the state and that the accused had an adequate prior opportunity to cross-examine the declarant. Absent a showing of the fulfillment of the two conditions, the confrontation clause does not allow the prosecution to introduce the out-of-court statement. The prosecution is obliged to present its evidence in the preferred form of live testimony under oath and subject to cross examination.

[1112] Wondwossen, "Reflective Analysis," at 90-91. On his opinion about how the term should be understood under Ethiopian law, see ibid. at 91.

[1113] This text is taken, with minor modifications, from ibid., at 92-96.

[1114] *Dutton v. Evans*, 400 U.S. 74, 95 (1970) (Harlan, J. concurring) (cited in Weston, "Future of Confrontation," at 1189.

[1115] Ibid.

[1116] Unavailability is defined under Federal Rule of Evidence 804 (a) in Robert, "Right to Confrontation," at 9.

[1117] *Crawford v. Washington*, 541 U.S. 59 (2004) (cited in Robert, *right to confrontation*, at 9.

the United Kingdom, the Confrontation Clause recognized under Article 6(3)(d) of the ıropean Convention on Human Rights is treated as a preferential rule applicable where th live testimony and an out-of-court statement are available. As stated by the U.K. ɔurt of Appeal in *R v. Cole* and *R v. Keet*, "where the source of the evidence is ıavailable to be cross-examined and where the evidence of the missing witness is the ly, and potentially decisive, evidence Article 6(3) (d) does not lay down an absolute rule at evidence of a statement cannot be admitted."[1118]

s shown above, both the European Court of Justice and the U.S. Supreme Court treat a rson who made an out-of-court statement as a witness for purposes of the Confrontation ıause even if the person is not available to testify during trial, providing his statement is troduced as evidence to prove what is asserted by the statement.[1119] Where the maker of e out-of-court statement that the prosecution intends to rely on is treated as a witness or e statement is considered testimonial, the statement "may not be used in evidence unless e defense had a chance to put its questions, however inconvenient that may be for the osecution."[1120]

ɔr the European Court of Human Rights, the right to fair administration of justice holds prominent a place in a democratic society that it cannot be sacrificed. The right of the ccused to confront witnesses testifying against him being one of the guarantees of a fair iminal justice system, the difficulty – perhaps impossibility – of arranging a ɔnfrontation between the witnesses and the defence cannot be used as a justification to low an out-of-court statement to be introduced as evidence against the accused. That is, ılike in the United States and the United Kingdom, the unavailability of the person ıring trial, even if for a reason not attributable to the state, does not make the ɔnfrontation clause inapplicable.[1121]

he European Court of Human Rights does not take the position that the right to ɔnfrontation under Article 6(3) (d) is absolute. In some cases, the court has accepted erogations from a strict interpretation of Article 6(3)(d) on grounds of sufficiency of ther evidence, and has declared criminal proceedings fair despite the use of statements by itnesses the defence was unable to question.[1122]

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[18] 1 Cr. App. R. 5, CA.

[19] The U.S. Supreme Court focuses on the 'testimonial' nature of the statement than on whether or not the eclarant is to be treated as a witness. *Crawford v. Washington*, 541 U.S. 51 (cited in Robert, "Right to onfrontation," at 3-7).

[20] The Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Topics*, at 60, available : http://www.lawcom.gov.uk/docs/lC245.pdf (accessed on October 15, 2011).

[21] Ibid.

[22] *Bricoment v. Belgium* (1990) 12 EHRR 217; *Asch v. Austria* (1993) 15 EHRR 597; *Artner v. Austria* 992) Series A No 242.

The Court weighs the value attached to the hearsay evidence by domestic courts to deci whether the use of hearsay affects the fairness of the trial in a particular case.[1123] T Court opined that convicting an accused exclusively or mainly on the basis of hears evidence is unfair under Article 6 of the European Convention on Human Rights. In *A Khawaja and Tahery v. The United Kingdom,* the Court found that the judgment of t domestic court[1124] was contrary to the relevant Convention provisions on the ground th the hearsay evidence was the *sole or, at least decisive basis* for each applicant conviction by the domestic court.[1125]

A scholar suggested that the European Court could have approved the hearsay evidence " there had been other significant and tangible evidence in the case."[1126] On the other han in *Liefveld v. The Netherlands,*[1127] the Court hold that the trial by the domestic court wa fair despite the fact that hearsay was used in evidence. In that case, the court accepted th trial as fair because the hearsay evidence did not constitute *the only or the main item evidence* on which the applicant's conviction was based.

Both the European Court of Human Rights and the Supreme Court of the United State recognize the tension between hearsay evidence and the confrontation clause. The court do not take a position that hearsay is at all times contrary to the confrontation clause. Bot courts recognize that the right to confrontation, not being absolute, may sometimes yiel to hearsay. Both in the United States and Europe, hearsay is allowed to be used a evidence though only exceptionally. What constitutes these exceptions differs between th two systems.

Notes and Questions

1. How do you compare and contrast the definition given to the phrase "*witness testifyin against*" as used by the three courts?
2. Do you agree with the Federal Supreme Court's interpretation of the word "witness" Citing Articles 30, 83(2), 84, 85(1), 87, 88, 90, and 145 of the Code, which refer to th person who gives oral testimony in a criminal case, whether during the investigation o the preliminary inquiry stage of a criminal proceeding, as a "witness," Wondwosse

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[1123] To the extent the court assesses the value of the out-of-court statements it seems to refer to weight of t evidence rather than its admissibility. It is one thing to prohibit hearsay evidence because it does not allow t accused to exercise his right to cross-examine. It is another thing to say that the hearsay is not adequate in a of itself to warrant conviction. To say that hearsay evidence should not be admitted where it is the only decisive evidence for the prosecution does not seem to make sense, as it confuses the issue of admissibili with weight of the evidence.

[1124] The Confrontation clause of the Convention does not prohibit the domestic court from admitting hears into evidence where the source of the evidence is unavailable for cross-examination. See *R v. Cole*; *R v. Ke* (2008) 1 Cr. App.R. 5, CA.

[1125] *Al-Khawaja and Tahery v. the United Kingdom* (2009) 49 E.H.R.R 1.

[1126] Gregory Durston, *Evidence: Text and Materials* (2008), at Ch. Six.

[1127] *Liefveld v. The Netherlands* (1995) 18 EHRR CD 103.

disagrees with the court's limitation of the term to a person who testifies before the trial court.[1128]

Article 143(1) of the Cr. Pro. Code allows the court to call any witness whose testimony it thinks is necessary in the interests of justice. In practice, where courts call witnesses, parties (both the accused and the public prosecutor) are prohibited from cross-examining these witnesses. Parties may be allowed to raise questions (via the court), if at all, solely for the purpose of clarifying any part of the statements made by the witnesses. Article 20(4) of the Constitution and Article 14(3) (e) of the ICCPR do not seem to distinguish based on who calls the witness, rather on whether the witness testifies against the accused. In view of these legal authorities, how is the practice justified?

Are Articles 144 and 145 of the Code compatible? These provisions allow statements given during preliminary inquiry and investigation, respectively, into evidence subject to the right of the accused to cross-examine witnesses who testify against him. Regarding the issue of compatibility, does it depend whether the accused had cross-examined the witness during the preliminary inquiry stage, or is it the fact that he had an opportunity to cross-examine that really matters?

Does the phrase "indirect knowledge," under Article 137 of the Code, refer to hearsay evidence? Apparently, Article 23 of the Anti-Terrorism Proclamation sees "hearsay" and "indirect evidence" as different concepts.

On the basis of your reading of the extract, how do you assess the compatibility of Article 23 of the Anti-Terrorism Proclamation, which allows "hearsay or indirect evidences" to be admissible in court as evidence for terrorism cases, with Article 20(4) of the FDRE Constitution? Note that the Proclamation does not provide for guidelines (detailed rules) as to when hearsay is to be allowed as is done in the United States and Europe. What lesson can Ethiopian courts take from the cases decided by the foreign courts?

The U.S. Supreme Court observed that the right to cross-examination is based on the need to "constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses."[1129] Doesn't a law that allows hearsay as evidence defeat this purpose?

3.2.2. Witness Anonymity

Witness safety is another important interest justifying restriction of the right to confrontation. Cases may exist where the life or privacy of those who testify against an accused will be threatened, if the identity of the witnesses is known to the accused or his relatives and friends. Witness intimidation is a major concern in the criminal justice process. In such cases, maintaining anonymity of the witnesses can be seen as a means to guarantee their safety.

[1128] Wondwossen, "Reflective Analysis," at 91.

[1129] *California v. Green*, 399 U.S. 149, 179 (1970) (quoted in Costigan and Thomas, "Anonymous Witness," at 328).

Article 32 of the Anti-Terrorism Proclamation and Article 4(1)(h) of the Proclamation Witnesses and Whistleblowers of Criminal Offences Proclamation provide for witne anonymity. There is a tension between witness anonymity and the right to cros examination.

3.2.2.1 Justification for Anonymity[1130]

The following excerpt is on the justification for anonymity and its impact on the right the accused to cross-examine prosecution's witnesses.

> In *Doorson v. Netherlands*, the European Court of Human Rights succinctly explained how the substantive rights of witnesses justify mechanisms designed to provide their protection.
>
> It is true that Article 6 (of the European Convention on Human rights) does not explicitly require the interest of witnesses in general, and those of victims, called upon to testify in particular, to be taken into consideration. However their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other substantive provisions of the Convention, which imply that Contracting States should organize their criminal proceedings in such a way that those interests are not unjustifiably imperiled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defense are balanced against those of witnesses or victims called upon to testify.[1131]
>
> Theoretically, there can be three possible ways to protect witnesses from intimidation and any other sorts of attacks. First, let those who have the knowledge about the crime not to testify. This may simply mean to tolerate criminals to escape justice. The public's interest in prosecution and conviction of criminals is too obvious to be stated. As this option disregards this strong public interest it cannot be a practical option. Second, to guarantee their safety through special witness protection program, such as those applied in the United States.[1132] In this system, the government, following trial, will have to give new identity and facilitate the building up of a new existence to the witness in another part of the country. Such option is said to be "extremely expensive and onerous workable only in a large country where everyone speaks the same language"[1133] unless the witness is made to settle abroad.
>
> The difficulty of applying the second option made jurisdictions to resort to the third alternative, which is use of anonymous witness – not to disclose names and

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[1130] Wondwossen, "Reflective Analysis," at 97-99.
[1131] *Doorson v. Netherlands* and *Van Mechelen v. Netherlands* (quoted in Trechsel, *Human Rights*, at 316).
[1132] *Cf., e.g.*, Fyfe (2001), at 15 (cited in Trechsel, *Human Rights*, at 316).
[1133] Treschsel, *Human Rights*, at 316.

identities of witnesses. Netherlands, faced with the problem of witness intimidation, declared in 1984 that "hearing witnesses with full anonymity was an unavoidable solution to the problem of the intimidated witness."[1134]

he Anti-Terrorism Proclamation recognizes this third way of protecting witnesses. It llows the court to order the names and identities of witnesses not to be disclosed where oing so is necessary for their safety.[1135] Like Article 6 of the European Convention on uman Rights, which is said not to incorporate witness protection,[1136] Article 20(4) of the DRE Constitution provides for the right of the accused persons to confront witnesses stifying against them and does not refer to witness protection. Nor is there any phrase in rticle 20(4) that envisages restriction of the right in the interest of witness protection. So, e justifications for witness anonymity come from Articles 14 and 26 of the FDRE onstitution, which recognize the right to life and privacy, respectively, of everyone, cluding witnesses.

3.2.2.2. Impact of Anonymity on the Right of the Accused[1137]

ondwossen offers the following analysis of the impact of witness anonymity on the right f the accused to cross-examine witnesses against him.

> Though the use of anonymous witness is a useful mechanism to guarantee witness safety, it is criticized for endangering the fair administration of justice in two ways. At a general level it challenges open justice which makes the purposes[1138] to be served by public testimony to be in danger. And specifically it deprives the accused of his right to confrontation by which he would examine the credibility and reliability of prosecution witnesses.
>
> Three impacts of using an anonymous witness on the accused are identified in one South African case.[1139] First, it deprives the defence of its capacity to discover the background of the witness which would affect the defence in several ways. Being unaware of the name and identity of the witness, the accused would not be able to collect general information

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Report on Anonymous Witnesses in the Netherlands, at 526, available at w.library.uu.nl/publarchief/jb/congress.

Anti-Terror Proc., Art. 32.

Doorson v. Netherlands and *Van Mechelen v. Netherlands* (cited in Trechsel, *Human Rights*, at 316).

The following excerpt is taken from Wondwossen, "Reflective Analysis," at 99-100.

Public testimony, with the right of the accused to cross-examine, is an important tool to uncover the truth. is is so because presenting the testimony in public creates pressure on the witness to tell the truth. On the nificance of public testimony, Wigmore indicates that it produces "[i]n the witness' mind a disinclination falsify; first, by stimulating the instinctive responsibility to public opinion, symbolized in the audience, and dy to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through closure by informed persons who may chance to be present or to hear of the testimony from others sent." (J.H.Wigmore, 6 *Evidence* (Chadbourn rev., 1976) at 435-36 (quoted in Costigan and Thomas, nonymous Witness," at 326).

S v. Leepile and Others (5) (1986) 4 SA 187 (quoted in Costigan and Thomas, "Anonymous Witness," at).

regarding reputation for untruthfulness or making inconsistent statements that would be use to impeach the witness. Ignorance of the background of the witness would also have oth specific harmful consequences. For instance, it would be impossible for the defence ascertain whether there exist elements justifying a suspicion of bias, animosity, hatred, other motives for lying; it is not possible to establish whether any links to the victim exis moreover, where eyewitness testimony is at issue, it may not be possible to assess wheth the victim could actually see what he claims to have seen. Second impact of anonymity witness as identified by the court is that it would not be possible for the accused to enqui and contest the presence of the witness at places on occasions mentioned by him. Third, gives confidence to or tempts the witness to falsify or exaggerate.

The European Court of Human Rights, recognizing the dangers associated with anonymou testimony, interpreted Article 6(3)(d) of the Convention[1140] as prohibiting a state fro basing a conviction "*solely or to a decisive extent on anonymous evidence.*"[1141] Howeve the court does not interpret the Convention provision as it rules out the possibility of usin anonymous witness. For the court, in so far as the difficulties anonymity of the witnes causes to the defense is adequately counterbalanced, "the use of anonymous statements i not in all circumstances incompatible with the Convention."[1142]

3.2.2.3. Counterbalancing Measures[1143]

According to the interpretation by the European Court of Human Rights, as indicate above, the prosecutor may rely on an anonymous witness only to strengthen his cas established by other evidence (documentary or testimony given in open court by othe witnesses) but not as sole or a decisive evidence. According to the European Court o Human Rights, if anonymous witness testimony is used to strengthen the prosecution' case, the court that receives the testimony of the anonymous witness should ensure that th proceeding includes mechanisms to neutralize the handicap caused by anonymity. The European Court has not formulated a hard and fast rule as to what constitutes a counterbalancing measure that would justify employing an anonymous witness in a give case. According to the court, this is to be decided on a case-by-case basis.

In one case,[1144] the Court recognized the following measures as appropriate and adequat to counterbalance the disadvantage faced by the accused. First, the identity of the witnes was disclosed to the investigating judge, who was obligated to file a report on hi observations regarding the reliability of the witnesses (as inferred from the demeanor an

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[1140] Its relevant part states as follows. "3) Everyone charged with a criminal offence has the followi minimum rights: (d) to examine or have examined witnesses against him...." European Convention for t Protection of Human Rights and Fundamental Freedoms (1950), as amended by Protocol 11 (cited in Lou Henkin, *Human Rights: Documentary Supplement* (New York: Foundation Press, 2001), at 429).

[1141] *Kostovski v. Netherlands*, para.44; *Doorson v. Netherlands*, para. 76; *Van Mechelen v. Netherlands*, pa 55; *Viser v. Netherlands*, para.43; *Biruits and others v. Lithuania*, para. 29 (quoted in Trechsel, *Hum Rights*, at 317) (emphasis added).

[1142] *Doorson v. Netherlands*, para.72; *Van Mechelen v. Netherlands*, para.54 (quoted inTrechsel, *Hum Rights*, at 317).

[1143] With minor modifications, taken from Wondwossen, "Reflective Analysis," at 101-02.

[1144] *Dorson v. Netherlands*, para. 73 (cited in Trechsel, *Human Rights*, at 316).

ody language of the witness). Second, the defendant's counsel was present at the hearing nd was given an opportunity to ask any questions not intended to identify the witness. Moreover, the anonymous witness had identified the accused when shown his photograph.

n another case,[1145] the court found the following measures insufficient to neutralize the mpact on the accused of the anonymity of the witness. The accused and counsel were laced in a room adjacent to the room in which the witness was testifying. They could ear the witness's testimony being taken and they had the right to ask questions. The Court found these measures inadequate because they did not allow the defendant to bserve the demeanor of witness under direct questioning, which prevents him from esting the witness's reliability.[1146] This ruling of the court indicates that face-to-face ontact between the witness and the defence is necessary unless, as in the first case, the udge himself actively examines the witness so as to evaluate his body language and demeanor.

Notes and Questions

. Does the right to cross-examination require that the name and identity or background of the witness be disclosed to the accused?

. How do you assess the compatibility of the Anti-Terrorism Proclamation and the Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation with the right of the accused to cross-examine the prosecution's witnesses? In the absence of clear counterbalancing measures provided by law, what should the court to do to ensure that provisions of such Proclamations do not "unfairly impact on the right of the accused"?

Section IV. Trial within a Reasonable Time (Speedy Trial)[1147]

Once a person is suspected of the commission of a certain crime, there is a public interest n ascertaining the validity of the suspicion without unnecessary delay. This is commonly eferred to as the right to a speedy trial.

The interest on the speedy completion of a criminal proceeding is justified both by ubstantive and procedural grounds. Completion of the criminal proceeding without nnecessary delay allows the convicted defendant to be punished promptly, thereby atisfying the victims implementing the punishment timely so that it will serve its purpose.. On the other hand, if the suspect is found not guilty, he will be acquitted without delay,

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[1145] *Van Mechelen v. Netrherlands*, para. 59 (cited in Trechsel, *Human Rights*, at 316).

[1146] Trechsel does not agree with the court's approach in the second case. Trechsel believes that, though it is elpful for the defence to be able to see the witness because it allows his counsel to point out specific bservations to the court, visual contact is not the definitive criterion to apply. In his opinion, it is "finally for e judges to assess the reliability of the testimony. Anyway, the voice itself carries a wealth of information n the speaker's information." See Trechsel, *Human Rights*, at 320.

[1147] This right is recognized under Article 14(3)(c) of the ICCPR and Article 7(1)(d) of the African Charter n Human and Peoples' Rights.

thereby shortening the time of his deprivation of liberty. From a procedural an evidentiary point of view, speedy completion of a criminal proceeding prevents problen that would have occurred as a result of delay. That is, as time goes on witnesses ma become inaccessible due to death, health problems, or a change of residence. Even whe they are available, memories may fade as time goes by. For these and other relate reasons, the law, in general terms, provides that criminal cases be disposed of witho unnecessary delay.

Contrary to what its name (right to speedy trial) suggests, the right is relevant not only a the stage of trial but during the whole criminal proceeding, beginning from investigatio Detailed legal provisions exist to ensure disposition of a criminal case within a reasonabl time.

4.1. At the Pre-Trial Stage

There are two ways of regulating the duration of an investigation. First, the FDR Constitution provides a general guideline, the enforcement of which is left to the court an the police or the prosecutor. Second, the legislature specifies a maximum duration of th investigation; law-enforcement officials are obligated to comply with this time limit.

Art. 19(4) of the FDRE Constitution shows the link between the duration of an investigation and the right to a speedy trial, thereby establishing that the interest in speed completion of a criminal proceeding is applicable not only to the trial stage of th proceeding. In relevant part, the provision states, "---or, when requested, remand him (th arrestee) for a time strictly required to carry out the necessary investigation. I determining the additional time necessary for investigation, the court shall ensure that th responsible law enforcement authorities to carry out the investigation respecting th arrested person's right to a speedy trial."

The Cr. Pro. Code incorporates provisions that deal with the duration of the investigation Article 37(1) of the Code requires police investigation to be completed withou unnecessary delay. Article 59 provides that additional time for investigation, where th arrestee is not released on bail, is to be given only upon ascertaining that there is a nee for it. Even then, the duration may not exceed 14 days on each occasion.

The other approach, as mentioned above, is to specifically determine the duration of th investigation by law. This approach was introduced for the first time by the Vagrancy Control Proclamation. Its Article 7(1) limits the duration of the investigation to 28 days The other law providing a maximum period of investigation is the Anti-Terrorism Proclamation, which specifies a four-month period in its Article 20(3).

Once the investigation is completed, the Code, in its Article 108(1), requires th prosecutor to file a charge within 15 days, while Article 8(1) of the Vagrancy Contro Proclamation orders the prosecutor to file a charge within ten days.

4.2. During Trial

rticle 20(1) of the FDRE Constitution refers to the right of the accused to be tried *within reasonable time* after being charged. Several provisions of the Code dealing with trial e meant to ensure that the trial be completed without delay. Its Article 123 requires the ourt to fix the date of trial forthwith once a criminal charge is filed by the prosecutor. nce trial begins, Article 94 of the Cr. Pro. Code regulates its adjournment, both its rounds and duration. Article 94(2) of the Code provides a list of grounds for djournment. Where none of the eleven listed grounds exists, the trial is to be completed one day – or if one day trial is practically impossible, for instance due to the number of itnesses, the trial must be adjourned to the following working day.[1148]

he duration of adjournment depends on the ground of adjournment. Where the trial is djourned for the reasons listed under Articles 94(2)(a), (f), (g) or (h), Article 94(3) of the r. Pro. Code requires that the trial not be adjourned for more than one week. As provided nder Article 95(1) of the Code, if the hearing is adjourned for other reasons the djournment is to be such *time only as is sufficient* to enable the purpose for which the djournment was granted to be carried out. A further adjournment of less or same uration, on the same ground, is allowed only if the purpose for which adjournment was ranted was not carried out for a reason not attributable to the fault of the parties.[1149] hese provisions of the Cr. Pro. Code indicate that the trial may take several months or ears, as long convincing reasons exist for the grant of additional time.[1150]

otes and Questions

Provisions on speedy disposition of cases are framed in such a manner that they suggest the speedy disposition is in the interest of the suspect only. Isn't timely disposition of a criminal case in the interest of the prosecution as well?

When is the right to speedy trial said to be violated? To what extent do complications of the case, the role of the accused in the delay, and the time spent on the proceeding affect the decision whether the right is violated or not? Does this reinforce the notion that speedy disposition of the criminal case is in the interest of the accused? How should the court weigh these factors in deciding whether the right is infringed or not?

What is the remedy where the court finds that the right is affected? Some argue that the only remedy is dismissal of the case. Where the case is dismissed without a decision on the merits of the case, will the prosecutor be barred from instituting a new action against the accused based on the same facts? Is prohibition of double jeopardy relevant?

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[48] Cr. Pro. Code, Article 94(2)(l).

[49] Ibid., Article 95 (2).

[50] The court that tries a vagrancy case is required by law to give its judgment within a four-month period of me from the institution of the proceedings. *Vagrancy Control Proc.*, Article 9(1).

Section V. The Right to Defence Counsel

One's right to counsel is recognized under the FDRE Constitution[1151] and human right instruments[1152] to which Ethiopia is a party. The ICCPR deals only with state-appointe counsel but not with self-appointed (retained) lawyers; the Constitution deals with bot The ACHPR says nothing about state-appointed counsel, perhaps because it is cognizar of the difficulty for African states to appoint a lawyer for accused persons.

All three texts recognize the right of the accused to defence counsel, with minor differenc in scope. The FDRE Constitution deals with both self- and state-appointed counsel. recognizes the right of every accused person, irrespective of the type or gravity of th offence with which he is charged, to be represented by a lawyer in so far as he can affor it. With respect to state-appointed counsel, two conditions should be met for an accused t be eligible for such counsel: the accused cannot afford to pay the lawyer's fee and there i a risk that miscarriage of justice will result if the accused is not represented by a lawyer The ICCPR does not recognize a right to a self-appointed lawyer, perhaps because it take the right for granted; it does, however, recognize a right to a state-assigned lawyer. Th provision seems to deal separately with assigning a lawyer and covering the lawyer's fee.

Where the interest of justice requires, the accused has the right to assigned lega assistance. If he finds a lawyer himself and covers the expense, he is always free to do so But where the accused is not in a position even to find a lawyer, the state has a duty to find one for him where the interest of justice requires. The inability of the accused to find a lawyer, in and of itself, does not oblige the state to obtain one for him. Only where the interest of justice requires the accused to be represented by a lawyer does the state have such an obligation.

The other issue that arises with respect to the right to counsel is the responsibility for covering the lawyer's fee. Who has to pay the fee is exclusively dependent on the financia ability of the accused. If he has sufficient means, he shall alone be responsible for covering the fee. If he does not have the means, the state will be required to pay for him.

[1151] Art. 20(5) of the FDRE Constitution

> 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.

[1152] Art.14 (3) (d) of the ICCPR

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
> (d)... to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

Art.7 (1) (c) of the ACHPR

> Every individual shall have the right to have his cause heard. This comprises:
> (c) the right to defense, including the right to be defended by counsel of his choice.

he two sides of the right to counsel – whether the accused is to be represented by a awyer and the burden of covering the expense – are to be treated separately. The first uestion is decided on the basis of whether the "interests of justice" require the accused to e represented by a lawyer. Once the first question is addressed in the positive, the second uestion is to be addressed based on the financial capacity of the particular accused.

he ACHPR, apart from recognizing the right of an accused to be represented by a lawyer f his choice, does not say anything about the conditions that must be met for the right to e due. The ACHPR, thus, falls far short of requiring the state to find a lawyer for an ccused (as the ICCPR does) and to cover the expense for the lawyer (as both the ICCPR nd the Constitution do). Muradu explained this generality of the ACHPR's provision by tating that "the drafters did not want to burden the parties with the costs of defending the ndigents."[1153]

he FDRE Constitution expressly recognizes the absolute right of the accused to have a awyer of his own choice so long as he covers the expense. The ICCPR is silent or vague n this point. The ACHPR simply recognizes the right of the accused to have a lawyer of is own choice. For the state to be obliged to appoint a lawyer for an accused at its xpense, both the Constitution and the ICCPR require that it be in the interest of justice nd that the accused not have sufficient means. The ACHPR is silent on this issue, too.

Muradu writes the following about the significance and relevance of the accused's right to e represented by a lawyer.[1154]

> The essentiality of making a defense counsel available to a person charged with an offense invites little debate. A defense counsel is critical in seeing that procedural rules are followed and that the discovery of truth is pursued in any fair criminal trial. In addition to her task of establishing the truth, a defense counsel is significant for the protection of the rights of accused. The need for the right to counsel or the consequences of not making this right available to a person charged with an offense are put in not so many words as:
>
> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he is not guilty, he faces the danger of conviction...."

[1153] Muradu, "Indigent's Right," at 145, note 14.
[1154] Ibid., at 140 (footnotes omitted).

Notes and Questions

1. When does lack of legal representation result in a "*miscarriage of justice,*" a envisaged under Article 20(5) of the Constitution? When does the "*interest of justice* require that a lawyer be appointed for an accused as envisaged by Article 14(3)(d) o the ICCPR? What factors should the court take into account when assessing thes issues? Are educational background and life experience of the accused, gravity of th offence, and complication of the case among the factors?

   In practice, federal courts emphasize the gravity of the offence. They appoint a defenc lawyer at the expense of the government to persons accused of aggravated or ordinar homicide, terrorism, corruption, or robbery. Two pieces of legislation dealing with thi matter use the punishment attached to the charged offence as a criterion for decidin whether to appoint a lawyer.

   The Defense Forces Proclamation provides: "the state shall provide a defense counse to a person charged with an offence punishable with imprisonment of not less than fiv years and is unable to retain a counsel."[1155] The Proclamation to Provide for the Re establishment of Oromia National Regional State Courts Proclamation provides: "th court shall appoint a defense counsel to an individual who is accused of a crim punishable with a rigorous imprisonment not less than five years."[1156]
2. In what circumstances is the accused considered not to have sufficient means to pay fo legal representation under Articles 20(5) of the Constitution and 14(3) (d) of the ICCPR? If, for instance, the regular income of the accused is not adequate to cover the lawyer's fee, but he has a house, does he satisfy the requirement of having no sufficien means? On the question of ascertaining the financial status of the accused, Muradu quoted Nuru Seid as describing the practice as follows.

   > The judge, after reading out the charge to the accused, asks her as to how she would like to defend her case only in charges which would entail serious punishment. If the accused claims that she is unable to appoint a defense lawyer at her own cost, the judge asks her to undertake an oath as to her financial conditions or to bring a certificate to that effect from the Prison Administration. Upon oath taking or the production of such evidence, the judge appoints a defense counsel at the expense of the state. If these types of defendants are many, the judge goes for grouping them (if they are charged in a single file) and then assigning a defense lawyer to a group of defendants. Judges instruct the Public Defender's Office to assign a defense council for the accused. In case, a defendant expresses her decision to waive her right to have a defense lawyer, the judges advises the seriousness of the charge leveled against her and the appropriateness of defending her case through the service of a lawyer.[1157]

[1155] Article 34(2) of the Defense Forces Proclamation, Proc. No. 27/1996, *Fed. Neg. Gaz.*, year 2, no. 15.
[1156] Article 17(2) of the Re-establishment of Oromia National Regional State Courts Proclamation, Proc. No. 141/2008, *Megeleta Oromia*, year 16, no. 10.
[1157] Muradu, "Indigent's Right," at 146, note 19.

If an accused, who has appointed a lawyer at his expense, is acquitted at the end of the criminal proceeding, shouldn't he be entitled to claim reimbursement from the government?

At what stage in a criminal proceeding is the accused entitled to be represented by a lawyer? Does it depend on whether the accused himself covers the lawyer's fee? What does the wording of the relevant provisions of the FDRE Constitution, ICCPR AND ACHPR imply? Does Article 20(5) of the Constitution, which recognizes the right for an "*accused*" as opposed to an "*arrestee*," in any way suggest that the right is due only at the trial stage but not before? Does Article 20(3)(d) of the ICCPR imply the same, since it recognizes the right to have legal assistance assigned to a person "*in the determination*," as opposed to "*investigation*," of any criminal charge against him? Muradu recognizes that even where the accused is entitled to have a lawyer hired by the state, it is unlikely for the state to maintain the counsel in all stages of a criminal proceeding, from arrest through cassation petition.[1158] Citing the practice of the federal courts of appointing defence counsel at trial the stage, Muradu suggests the title of Article 20 of the Constitution – "rights of persons accused" – as a possible basis for the practice.[1159]

Two provisions of the Cr. Pro. Code deal with the right to counsel. Neither of them imposes an obligation on the state to hire a lawyer for a suspect at a pretrial stage of a criminal proceeding. Article 61, which deals with the right of detained persons to consult a lawyer, requires the concerned government official to allow a person detained on arrest or remand to consult his advocate, but neither expressly nor implicitly requires the government to hire a lawyer for the person at this stage of a criminal proceeding. Similarly, Article 127, which envisages cases where an accused might appear before the trial court with a lawyer on the first day of trial, does not imply that the lawyer is hired by the state.

As indicated by the language of Article 20(5) of the Constitution and as confirmed by the practice, the requirement for the state to appoint a lawyer for an accused who does not have sufficient means to hire a lawyer himself does not extend to all criminal cases. Should the degree of the judge's involvement during the trial depend on whether the accused is represented by a lawyer? Muradu suggests that "to have effective, protective and truth guided criminal proceedings" in the administration of criminal justice, the judge has a constitutional and statutory duty to be more active in a trial where the accused is not assisted by a lawyer.[1160]

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[158] Ibid., at 141.
[159] Ibid., at 146.
[160] Ibid., at 156.

Section VI. The Right to Public Trial by Impartial, Independent and Competent Court

6.1. Right to a Public Trial[1161]

Both the FDRE Constitution[1162] and the ICCPR[1163] recognize the right to a public crimina trial as a matter of principle, without excluding the possibility of trial *in camera* Compared to the Constitution, the ICCPR recognizes a wider exception. The grounds fo the court to hear cases in a closed session are expressly and exhaustively listed in th Constitution. These are the privacy of the parties, public morals, and national security. I the ICCPR, in contrast, the court is given discretion to order the trial conducted *in camer* on a case-by-case basis where publicity, in the opinion of the court, may prejudice th interest of justice. Hence, under the ICCPR, the court may base its decision to conduct trial in a closed session on factors other than those authorized in the Constitution. Th ICCPR thus gives wide discretion to the court.

The ICCPR includes two guarantees relating to the public nature of a criminal proceeding the public hearing requirement and the requirement that the judgment be pronounce publicly. Unlike the ICCPR, the FDRE Constitution deals only with the only the hearing aspect of trial and does not separately address accessibility of the criminal trial to th press. Only under the third subarticle of Article 29 does the Constitution in general terms recognize freedom of the press to have access to information of public interest, one type o which might be information relating to criminal trials.

The following paragraph[1164] succinctly describes the significance of publicity of trial.

> It is needless to quote authority on this topic from legal or historical writers. It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place

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[1161] For the Guidelines and principles developed by the African Commission on Human Rights relating to Publicity, see *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, African Commission on Human and Peoples' Rights, http://www.achpr.org , Section A(3) (hereafter *Principles and Guidelines*).

[1162] Art. 20(1). Accused persons have the right to a public trial by an ordinary court of law.... The court may hear cases in a closed session only with a view to protecting the right to privacy of the parties concerned, public morals and national security.

[1163] Art. 14 (1).

> ... In the determination of any criminal charge against him...everyone shall be entitled to a... public hearing by a competent, independent and impartial tribunal established by law. ... The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice; but any judgment rendered in a criminal case...shall be made public except when the interests of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

[1164] Lord Shaw of Dunfermline, in the House of Lords, in *Scott v. Scott* (4), (1913) A.C. 417, at 477 (cited in Fisher, *Eth. Crim. Pro.*, at 295).

> can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity."

'ublicity gives an opportunity to the public to check whether the court is staffed with ompetent judges and functions impartially and independently. It makes the judges onduct their business carefully. As noted by the Human Rights Committee,[1165] publicity f hearings ensures the transparency of proceedings and thus provides an important afeguard for the interest of the individual and of society at large.

'he European Court of Human Rights stated the following in relation to the purpose of ublicity of trial:

> [I]t (publicity) is...one of the means whereby confidence in the courts can be maintained. ...[T]he opportunity to observe the working of the courts will instill in the population the conviction that the judiciary continues to function in the way they expect it to, and characterizes the old adage that justice must not only be done but must also be seen to be done."[1166]

Notes and Questions

. Do the texts on publicity of trial suggest that the guarantee of a public criminal hearing serves exclusively the interest of the accused? If so, does that mean the accused can waive this right? Note that Article 8(5) of American Convention on Human Rights, dealing with publicity of trial, is drafted in a broader fashion than Article 20(1) of the FDRE Constitution and Article 14(1) of the ICCPR, in that the former enunciates a general principle rather than an individual right. It states: "criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice."

The American Convention does not invite the question whether the right is that of the accused or that of all interested persons. Article 26 of the Federal Courts Establishment Proclamation is drafted in a neutral and broad manner, simply providing for all cases to be heard in open court.[1167] The Federal High Court, in the case of *Federal Ethics and Anti Corruption Commission v. Yohannes Woldegebriel and Workenhe Bereded*,[1168] relied on this provision of the Proclamation to rule that publicity of criminal

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[65] *General Comment No. 32*, para. 28.

[66] Trechsel, *Human Rights*, at 120.

[67] Article 26. Open Hearing.

) All cases shall be heared in open court.

) Notwithstanding the provisions of sub-article (1) hereof and without prejudice to procedural laws elevant to adjudication, cases may be heard in camera in consideration of the following:

a) public and state safety and security; or

b) public morality and decency

[68] *Federal Ethics and Anti Corruption Commission v. Yohannes Woldegebriel and Workenhe Bereded* Fed. H. Ct., Cr. F. No. 42486).

proceedings is in the interest of both the accused and the society at large. The Huma Rights Committee, in its General Comment No. 13 paragraph 6, indicated that publicit of trial "is an important safeguard in the interest of society at large."[1169]

2. A close reading of the exceptions to publicity of trial in the ICCPR and the FDR Constitution suggests that the accused person is not the only beneficiary of the righ but that the public gains from it as well. The existence of any one of the grounds liste under Articles 20(1) of the FDRE Constitution and 14(1) of ICCPR justifies conductin the trial in camera. Where public morals and public security are the grounds cited, th trial is being conducted in camera in the interest of the public, perhaps at the expense o the individual's interest in the publicity of the trial.

   This indicates that the accused is the beneficiary of the right to public trial. Conductin the trial *in camera* in the interest of privacy of the parties (only that of the accused in criminal proceeding) it restricts the interest of the public in the publicity of the trial This suggests recognition that the public has an interest in the publicity of the trial. I the case of *Federal Public Prosecutor v. David Allen Christi*,[1170] the accused wa charged with unnatural carnal offence with 15 underage boys in violation of Article 601(2) (a), (c), and (d) of the 1957 Penal Code. Stating that publicity of the trial ma cause harm both to the public and the victims, the prosecutor requested the court t order the trial conducted in a closed session. Moreover, the prosecutor applied for the media to be ordered not to report the proceeding. The court, without analyzing how prejudicial the publicity of the trial might be, simply ruled that publicity of the trial would affect the morals of the victims and the public. It accepted the prosecution's application, ordered the trial to be conducted *in camera*, and gave instruction to the media not to report about the case.
3. There are times where the safety of a witness might be at risk if his identity were known by the public. Do the ICCPR or/and the FDRE Constitution recognize safety of witnesses as a ground to conduct trial *in camera*? In *Public Prosecutor v. Yohannes Hailegebriel and Workenhe Bereded*, the Federal Ethics and Anti Corruption prosecutor requested the Federal High Court to allow one of its witnesses to testify in a closed session on the ground that his safety would be at risk if he testified in public. The defence lawyer had no objection to the prosecutor's application. However, the court rejected the prosecutor's application. In its ruling, the court emphasized that safety of witnesses is not among the grounds recognized under Article 20(4) of the Constitution for conducting trial in a closed session. Moreover, the court noted that the defence lawyer's lack of objection to the prosecutor's application did not oblige the court to accept the prosecutor's application. According to the court, because publicity of the trial is in the interest not only of the accused but also of the public, it cannot be waived by the accused. In support of this later statement, the court cited Article 26 of the Federal Courts Establishment Proclamation. However, the court ordered the witness to testify under cover so that he would not be identified by the public. Would the court

[1169] Trechsel, *Human Rights*, at 119-120.

[1170] *Public Prosecutor v. David Allen Christi* (Fed. H. Ct., Cr. F. No. 1/1994, Meskerem 30, 1994 E.C.).

reach the same conclusion had it referred to Article 14(1) of the ICCPR, which empowers a court to order a trial to be conducted in camera "to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice"?

- How should the court deal with the issue of declaration of judgment where the hearing of evidence of the parties, for one of the reasons listed under Article 20(1) of the FDRE Constitution, is conducted *in camera*? According to the ICCPR, judgment shall always be public except when the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. That is, having a justification to conduct a hearing in a closed session does not necessarily mean that there is a justification to declare the judgment *in camera*. How can pronouncement of the judgment in public while the hearing was conducted in a closed session be explained? The legislative history [1171] shows that the Egyptian delegate, Mr. Loutfi, was the first to suggest that even where the hearing is conducted in camera, "the judgment must be made public" and this was later taken up by the Belgian delegate.
- How is the scope of grounds for trial in a closed session to be determined where the ICCPR and the FDRE Constitution take differing positions?
- Publicity of the trial is meaningful where the proceeding is conducted orally. Oral hearing is described, by the European Court of Human Rights,[1172] as the most obvious manifestation of the right to a public hearing. The substance of public hearing, according to the court, is that "all the evidence should, in principle, be produced in the presence of the accused at a public hearing with adversarial argument."[1173] Also, the Human Rights Committee, in its General Comment No. 32, linked publicity of the trial with its being conducted orally. To what extent does the part of the Code dealing with trial guarantee that it be conducted orally?

6.2. Right to be Tried by an Independent and Impartial Court

The concept of the right to be tried by an independent and impartial court established by law is incorporated under a single subarticle of the ICCPR.[1174] The same concept is scattered through different provisions in the FDRE Constitution.[1175]

[1171] Trechsel, *Human Rights*, at 119.

[1172] *Lundevall v. Sweden*, para. 34 (cited in ibid., at 126).

[1173] *Imbrioscia v. Switzerland* (cited in Trechsel, *Human Rights*, at 129).

[1174] Its Article 14(1) states in pertinent part: "In the determination of any criminal charge against im...everyone shall be entitled to a...hearing by a competent, independent and impartial tribunal stablished by law."

[1175] Article 20(1) provides, "accused persons have the right to a public trial by an ordinary court of law..."; rticle 78(1) states: "An independent judiciary is established by this constitution"; Article 78(4) provides: Special or ad hoc courts which take judicial powers away from regular courts or institutions legally mpowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be stablished"; Article 79(1) states: "Judicial powers, both at Federal and State levels, are vested in the ourts"; Article 79 (2) provides: "Courts of any level shall be free from any interference of influence of any

Trechsel writes the following regarding the vital importance of the right to an independent and impartial tribunal.[1176]

> While the right to free elections protects the foundations of democracy, the guarantee to an independent and impartial tribunal lays the foundation for the rule of law. It does not seem necessary to enter into a long argument in order to establish that without independent courts there can be no rule of law. Proceedings before a tribunal which does not satisfy the criteria of independence and impartiality can never be fair and there is thus no reason either to examine whether a hearing before such a tribunal was held in public or within a reasonable time.

6.2.1. Independence[1177]

"Independence" means essentially the lack of subordination to any other organ of the state, in particular the executive organ. Independence of the court from the legislature may be equally important. Although the legislature provides the raw materials with which the courts work (the law) and promulgates regulations organizing the judiciary, it cannot itself assume judicial functions. Thus, independence could be said to reflect the constitutional position of the judiciary.[1178]

Concerning the factors that should be taken into consideration in assessing whether a court is truly "independent," the European Court of Human Rights has suggested, on several occasions,[1179] that regard be given to, *inter alia,* the manner of appointment of members of the court, their term of office, appearance of independence, and the existence of safeguards against outside pressures.

The Human Rights Committee[1180] provides a broader list of factors that help in assessing the independence of a court. In addition to the factors identified by the European Court of Human Rights, the Committee identifies: the conditions governing promotion, transfer, suspension and cessation of functions of judges, and the actual independence of the judiciary from political interference by the executive and legislature.

Notes and Questions

1. Article 78(1) of the Constitution affirms the establishment of an independent judiciary. However, having such a provision does not necessarily guarantee independence of the courts. Taking into account the factors identified by the European Court of Human

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government body, government official or from any other source"; and Article 79 (3) provides: "Judges shall exercise their functions in full independence and shall be directed solely by the law."

[1176] Trechsel, *Human Rights*, at 46-47.

[1177] *Principles and Guidelines*, Section A(4).

[1178] Trechsel, *Human Rights*, at 53.

[1179] See, *e.g.*, *Incal v. Turkey*, para. 65, *McGonnell v. United Kingdom*, para. 48; *Lauko v. Slovakia*, para 63. For more on these factors, see Trechsel, *Human Rights*, at 54-57.

[1180] *General Comment No. 32.*

Rights and the Human Rights Committee for assessing the independence of a court of law, what is your assessment of the adequacy of Ethiopian law to guarantee independence of the courts?

The authority of the judgment given by a court is also considered relevant in assessing independence of the court. As noted by the European Court of Human Rights,[1181] the independence of the court which was vivid during the trial stage of a criminal proceeding would become partly illusory if the state administrative authorities could refuse or fail to comply with a judgment acquitting a defendant. How can one reconcile the institution of pardon, which empowers the president to spare the convicted person part or all of the execution of the sentence, with the independence of the court as measured by the binding nature of the court's judgments? Trechsel[1182] stressed that the authority of the court will be affected if the right to grant pardon is practiced arbitrarily or discriminatorily. In his view, to avoid undermining the independence of the court, pardon should never be motivated by doubts about the merits of the judgment; that is, it should not be regarded as an alternative to appeal. Moreover, in Trechsel's view, pardon negatively affects the independence of a court in the most dangerous way where those convicted of politically motivated crimes are pardoned because their deeds correspond to the aims of the ruler or the ruling party.

The Federal Courts Re-amendment Proclamation requires lower courts to follow the interpretation of law given by the Cassation Division of the Federal Supreme Court in which not less than five judges sat.[1183] Does that have an impact on the independence of the lower courts? Trechsel indicates that the notion of independence is relevant in the relation between lower and higher courts. However, in his view, there is no problem inherent in lower courts being expected to respect precedents of higher courts. Only if a higher court gives orders to a lower court as to the handling of a specific case does the relationship become incompatible with the notion of independence.[1184]

Independence of the court is said to imply that the court has full control over its decision and does not depend upon the binding opinions of any other state organ. The Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation empowers the Ministry of Justice to decide whether any protective measures should be taken to guarantee the safety of a witness.[1185] Does that have an impact on the independence of the court?

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[81] *Assanidze v. Georgia*, para 182-184 (cited in Trechsel, *Human Rights*, at 57).
[82] Trechsel, *Human Rights*, at 57-58.
[83] Article 2 of the Federal Courts Re amendment Proclamation, Proc. No. 454/2005, *Fed. Neg. Gaz.*, year 1, no. 42 (hereafter Federal Courts Re amendment Proc.).
[84] Trechsel, *Human Rights*, at 49-50
[85] Protection of Witness Proc., Article 7.

6.2.2. Impartiality[1186]

"Impartiality" is described as referring to "a state of mind in which the subject is balanced in a perfect equilibrium between parties – it is synonymous with "non-partisan" or "neutral."[1187] It is also defined as "absence of prejudice or bias."[1188]

Impartiality of the court gives the parties confidence that "the members of the court will decide the case exclusively on the basis of their reasonable assessment of the evidence and the application of the law."[1189] As noted by Trechsel, "it would not be realistic to expect that judges make no mistakes, but such mistakes must be *bona fide* rather than the result of preferences or prejudice, be it towards the parties or in relation to the subject matter with which the proceedings are concerned."[1190]

The Human Rights Committee identified two aspects of the requirement of impartiality. First, "judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbor preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial."[1191]

In very similar language the European Court of Human Rights acknowledged the two aspects of impartiality, which are described as "subjective" and "objective" test. In *Incal v. Turkey*,[1192] the Court wrote, "as to the conditions of impartiality...there are two tests to be applied: the first consists in trying to determine the personal conviction of a particular judge in a given case" – the subjective test – "and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect" – the objective test.[1193]

Notes and Questions

1. Is there any constitutional provision dealing with impartiality of courts or judges?
2. Articles 27-30 of the Federal Courts Establishment Proclamation provide for grounds and procedures for withdrawal and removal of judges. How adequate are these provisions for ensuring impartiality of a judge? Note that both Article 27(2) of the Proclamation and Article 24 of the Federal Judges' Code of Conduct require a federal judge to withdraw as soon as he knows that there are good reasons for him not to see the case – even if an application for his removal has not been made by any of the parties.

[1186] *Principles and Guidelines*, Section A(5).
[1187] Trechsel, *Human Rights*, at 61.
[1188] Ibid.
[1189] Eberhard Schmidt (1967) (cited in ibid.).
[1190] Trechsel, *Human Rights*, at 61.
[1191] *General Comment No. 32*.
[1192] *Incal v. Turkey*, para 65 (cited in Trechsel, *Human Rights*, at 62).
[1193] Trechsel, *Human Rights*, at 61-62.

. Article 27(1) of the Proclamation, after listing four clear cases where a judge of a federal court shall not sit and try a case, in its subarticle "e" provides for a "catch-all" clause. According to this subarticle, no judge of a Federal Court is allowed to sit in any case where "*there are sufficient reasons, other than those listed under sub-articles (1)(a)-(d) hereof, to conclude that injustice may be done.*" On the other hand, Article 24(2) of the Federal Judges Code of Conduct prohibits a judge from withdrawal without good cause. In reality, facts which might influence one judge might not have the same effect on another. In view of this, should the judge concerned base his decision on whether sufficient reasons exist to conclude that injustice may be done, whether the facts would actually influence his impartiality, or whether the facts, in the opinion of a reasonable person, would be perceived as causing partiality of the judge? Should the judge consider both of the aspects of impartiality identified by the Human Rights Committee and the European Court of Human Rights? For example, in criminal cases arising from religious disputes should a judge who has the same faith as an accused withdraw from the case? What if the judge is follower of the religion practiced by the victims? On what factors should the judge's decisions depend? In such cases, may the court reject an application by the public prosecutor or the accused for his removal?
. Article 28 of The Federal Courts Establishment Proclamation allows a party who doubts the impartiality of the judge to request that the judge remove himself from the case. If the party's application is rejected, wouldn't the fact that the party questioned the impartiality of the judge affect the judge's continued impartiality? Is it likely for the court to regain the trust of the party in the subsequent proceeding? According to Stefan, the applicant's apprehension that the judge is not impartial is insufficient to conclude that the court lacks impartiality. There would be a considerable danger of abuse if individuals could decide whether they want their case decided by a particular judge. The applicant must give reasons for his concerns and the court will decide whether the concerns are well founded.
. Article 11 of the Amended Federal Judicial Administration Council Establishment Proclamation[1194] lists criteria for an individual to be a federal judge. To what extent does the provision help in ensuring the competence and independence of the federal courts?

The institutional quality of the court, which is critical in ensuring the fairness and accuracy of outcome of a criminal proceeding, is directly related to the competence and impartiality of the judges. Having a competent judiciary guarantees that the fairness and accuracy of judgment will not be undermined by a lack of skill and ability on the part of the judge. Competent judges have confidence in their abilities, which makes them less susceptible to influence from any quarter. Impartiality of the judiciary

[1194] Amended Federal Judicial Administration Council Establishment Proclamation, Proc. No. 684/2010, *Fed. Neg. Gaz.*, year 16, no. 41.

guarantees that the fairness and accuracy of judgment will not be affected by a individual judge's affiliation with the government.

Even if a judge is competent, if he is not impartial he may misuse his knowledge and skill in a way that undermines the fairness and accuracy of a criminal proceeding. A related concept is independence of the court. Independence means that other organs o the government do not exert influence over the court. A lack of independence may compromise the court's impartiality: a court that is not independent is unlikely to adjudicate a case impartially.

Section VII. The Right to be Presumed Innocent

The right of the accused to be presumed innocent is recognized under the FDRE Constitution[1195] and in various human rights instruments.[1196]

7.1 Meaning of "Presumption of Innocence"

The phrase "presumption of innocence" is a compound term that encompasses two words *presumption* and *innocence*. A variety of presumptions exist in the law.[1197] The typ relevant here is *the legal burden of proving an issue to the satisfaction of a court.*[1198] Th term "innocence" refers both to *factual innocence* and *legal innocence*. In crimina proceedings, "factual innocence implies that an individual did not in fact commit the crim charged; legal innocence implies that an accused has not been found guilty of the crim charged in a court of law."[1199]

The following three paragraphs on the meaning of "presumption of innocence" are taken from Worku's "Presumption of Innocence and the Requirement of Proof beyond

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[1195] Article 20(3) states: "During proceedings accused persons have the right to be presumed innocent until proved guilty according to law...."

[1196] Article 14(2) of the ICCPR states: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law"; Article 11(2) of the UDHR provides, "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense"; and Article 7(1)(b) of the ACHPR states: "Every individual shall have the right to have his cause heard. This comprises: ...the right to be presumed innocent until proved guilty by a competent court or tribunal."

[1197] Raymond Emson, *Evidence*, 2nd ed. (Basingstoke: Palgrave MacMillan, 2004), at 456 (cited by Worku Yaze Wodag, "Presumption of Innocence and the Requirement of Proof beyond Reasonable Doubt Reflections on Meaning, Scope and their Place under Ethiopian Law," in Wondwossen Demissie (ed.), *Ethiopian Human Rights Law Series* (Addis Ababa: Addis Ababa University, 2010), at 115 (hereafter Worku "Presumption of Innocence").

[1198] In this sense, the presumption has nothing to do with an inference or conclusion that emanates from a basic fact. It is a presumption that exists without any basic or preliminary fact. Some writers thus prefer to employ another term – "assumption"; others refer to it as a *sui generis* presumption. Charles Goredma, "The Presumption of Innocence in Criminal Justice in Zimbabwe: Reflections on the Essence of a Besieged Rampant," *Stellenbosch L. Rev.*, at 70 (1999).

[1199] Mark Heerema, "Uncovering the Presumption of Factual Innocence in Canadian Law: A Theoretica Model for the Pre-Charge Presumption of Innocence," *28 Dalhousie L.J.*, at 447 (2005).

easonable Doubt: Reflections on Meaning, Scope and their Place under Ethiopian aw.'"[1200]

> According to the current understanding "presumption of innocence" can have two meanings; narrow and wider meanings. In its narrow sense, it is to mean that "where a person is charged with a criminal offence, the prosecution bears the burden of proving guilt of that offence, and that proof must be beyond reasonable doubt." This simply refers to that the prosecution bears the burden of convincing judges about the guilt of an accused. It is a rule applying merely at trial in order to ensure that a conviction will not be reached unless the accused's guilt has been proved beyond a reasonable doubt. This trial-centered interpretation contains two components that shape the content of the concept and determine its essence. These are: i) a rule, which requires the prosecution to bear the legal burden of proof; and ii) a directive that the burden will only be discharged when guilt has been proved by a high standard of proof.
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> The first element compels the prosecution to shoulder the duty of adducing sufficient evidence that convinces the minds of triers of facts with high degree of certainty. An accused would not be required to prove that he/she was not guilty of the offence charged. It is the prosecution who must prove that it is the accused who did the criminal act *(actus reus)* with the necessary mental ingredient *(mens rea)*. From the second ingredient of the narrow definition, one understands that (a) the prosecution bears a high degree of standard of proof, and (b) the burden of persuasion never shifts from the prosecution to the accused. Until the prosecution has met the onerous burden of proving the individual and personal guilt of the accused of every element of the offence charged the latter stands innocent. Generally, in its narrow sense, the presumption of innocence is an evidentiary rule. It is applicable only during trial; hence it does not have relevance during pre-trial criminal proceedings including issues of summons, arrest, bail, etc.
>
> In its broader meaning, one still finds that the narrower conception forms its core element. But it goes beyond that to include all the pre-trial phases of the criminal process. According to this interpretation, the concept of the presumption of innocence includes "not only a rule that the prosecution prove guilt beyond a reasonable doubt but also that criminal prosecutions be carried out in accordance with lawful procedures and fairness." In its comprehensive sense, the concept is, composed of three constituent parts. These are: a) prosecutions should be carried out in accordance with lawful procedures and fairness; b) the prosecution bears the burden of persuasion; and c) the prosecution must prove the guilt of an accused with evidence that convinces judges beyond a reasonable doubt.

Worku, "Presumption of Innocence," at 116-17 (footnotes omitted).

7.2. Functions of the Right to Presumption of Innocence

Worku writes the following about the purposes of the "presumption of innocence."[1201]

> First and foremost, the presumption of innocence serves to minimize the possibility of mistaken conviction of innocent individuals. We know that not everyone suspected of committing crime and subjected to a criminal proceeding is a criminal. For different reasons ...factually innocent individuals may be brought to the rigorous criminal process. The presumption of innocence is a device that helps reduce the likelihood of such factually innocent individuals incurring the evils of the criminal process and punishment. The presumption, both in its narrow and wider meaning, serves this purpose.
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> Secondly, the presumption of innocence protects suspects from being treated as criminals before conviction As such, it calibrates the acceptable level of state power used by law enforcement agencies in the course of the criminal process. That is, it serves as a restraint on the various compulsory measures that are likely to be taken before conviction, such as in arrest, detention, interrogation, search and seizure, determination of bail and so forth.
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> Third, the presumption of innocence is believed to be one of the mechanisms that counterbalance the inherent inequality of the prosecution and the accused.
>
> In a nutshell, the presumption of innocence, broadly understood, is taken as both a procedural and substantive normative principle that directs state authorities including the police, the prosecution and the courts as to the proper way of treating a person who has not yet been convicted. As such, the presumption is treated as a guarantee not only of against mistaken conviction but also of violations of so many fundamental human rights at all stages of the criminal process.
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> Of course, adherence to this principle has its own social costs. It creates loopholes for factually guilty persons to obtain acquittal in which case it may cause injury to victims of crimes. Its adverse effects could extend to the extent of weakening law enforcement measures and lessening the deterrence aspect of the criminal law. These in turn may erode the confidence of the public in its justice institutions to apprehend and punish criminal doers. But as has been stated by the U.S. Supreme Court in *In re Winship* (1970), "*It is far worse to convict an innocent man than to let a guilty man go free.*"[1202]

Notes and Questions

1. Does the right of the accused to be presumed innocent impose an obligation on the prosecutor to "*presume the accused to be innocent*" or the obligation to "*convince the court*" that the accused has committed the crime, or both? The Human Rights Committee has expressly indicated that the presumption of innocence "imposes on the

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[1201] Ibid, at 118-19 (footnotes omitted).

[1202] *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan J. concurring) (cited in Dressler, *Understanding Crim. Pro.*, at 30).

prosecution the burden of proving the charge."[1203] Would it be logical to require the prosecutor to persuade the court that the accused is guilty of the alleged crime while at the same time "presuming the accused to be innocent"? Though in its General Comment No. 32 the Committee states that "no guilt can be presumed until the charge has been proved beyond reasonable doubt," and that "it is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused," it seems illogical to impose both obligations on the prosecution.

It seems impracticable to impose on the prosecutor both the obligation to presume that an accused is innocent and the burden of proving the accused's guilt. To convince the court of the guilt of the accused, the prosecutor should first himself be convinced that the accused is guilty of the alleged crime. This is supported by the cumulative reading of Articles 40(1) and 42(1) (a) of the Cr. Pro. Code. Article 40(1) requires the prosecutor to "institute proceedings...whenever he is *of the opinion* that there are sufficient grounds for prosecuting the accused." Article 42(1) (a) prohibits proceedings from being instituted "where the public prosecutor is *of the opinion* that there is no sufficient evidence *to justify a conviction.*" As argued before,[1204] sufficient grounds to prosecute exist where there is sufficient evidence to justify conviction. Conviction is justified where the evidence proves the guilt of the accused beyond a reasonable doubt. Referring to the excerpt, which of the two approaches to the scope of the presumption of innocence has been adopted in Ethiopia? The broader or the narrower one? Although the caption of Article 20 of the FDRE Constitution suggests that the rights recognized thereunder apply to the trial (unlike the rights provided under its Article 19), the specific subarticle dealing with the presumption of innocence (Article 20(3)) seems to suggest that the right apply to the entire criminal proceeding. The regional human rights institutions, namely the African Commission on Human and Peoples' Rights,[1205] the Inter-American Commission on Human Rights,[1206] and the European Commission on Human Rights,[1207] have interpreted the presumption of innocence to apply both to trial and the pre-trial stages of a criminal proceeding.

Articles 89(3) and 92(1) (m) of the Cr. Pro. Code, respectively, instruct the court to require the accused to submit a list of defence witnesses and to include the list in its record. Article 124 of the Code requires the accused to submit a list of his witnesses before trial begins. Since the accused, by virtue of Article 142 of the Code, enters into

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[1203] *General Comment No. 32.*

[1204] See Chapter Ten.

[1205] Robert P. Barnidge Jr., "The African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights: Addressing the Right to an Impartial Hearing on Detention and Trial Within A Reasonable Time and the Presumption Of Innocence," 4 *Afr. Hum. Rts. L. J.*, at 117-18 (2004).

[1206] Ibid.

[1207] Andrew Ashworth, "Four Threats to the Presumption of Innocence," *Int'l J. Evidence & Proof.* at 243 (2006).

his defence only after a case against him is established by the prosecutor, is it logical t require the accused to submit a list of his witnesses long before such a ruling is give by the court? Are such laws compatible with the right of the accused to be presume innocent until proven guilty?

4. At exactly what stage of the criminal proceeding does the right of presumption c innocence cease to exist? Is it when the accused is ordered to enter into his defence i accordance with Article 142 of the Cr. Pro. Code, or when he is convicted under Articl 149 of the Code? Does the right subsist when the convicted person lodges an appeal c the finding of the trial court?
5. Article 33 of the Revised Anti-Corruption Special Procedure and Rules of Evidenc Proclamation provides that the standard of proof applicable in civil cases is to be use to decide any question relating to whether a person has benefited from criminal conduc or to the amount to be recovered. Does this conflict with the principle of presumptio of innocence, as incorporated in the Constitution and ICCPR?
6. The obligation imposed on the prosecutor by the presumption of innocence is to prov every element of the offence beyond a reasonable doubt. However, certain provision relieve the prosecutor of this obligation. They do this either by providing that on element of the offence can be presumed from another element (which was proved b the prosecution's evidence), or by shifting the burden of persuasion as to one of th elements of the offence to the accused (once the prosecutor establishes other element of the crime). The first category includes such provisions such as Articles 403 and 36 of the Criminal Code. Article 403, captioned as "*presumption of intent* to obtai advantage or to injure," states the following: "Unless evidence is produced to th contrary, where it is proved that the material element (the act) has been committed as defined in a particular article proving for a crime of corruption perpetrated to obtain o procure undue advantage or to cause injury, such act shall be presumed to have bee committed with intent to obtain for oneself or to procure for another an undu advantage or to injure the right or interest of a third person."

In crimes of making counterfeit currency (Article 356), forgery of currencies (Articl 357), debasing legal currencies (Article 358), and importation, exportation and acquisition and acceptance of counterfeit or debased currencies (Article 359) of the Criminal Code, an "intent to utter" is an element of each crime. By virtue of Article 360 of the Criminal Code, once the act (the material element of these crimes) is established, the court is supposed to *presume that the act* has been committed with *intent to utter*.

The second category includes Article 419 of the Criminal Code (possession of unexplained property). In an action under this Article, if a public servant maintains a standard of living above that commensurate with his official income, or controls pecuniary resources or property disproportionate to his official income, then the accused must explain the discrepancy. If the accused's explanation fails to persuade the court, he will be declared guilty of possession of unexplained property. The Criminal Justice Policy provides that in cases of terrorism, corruption, or crimes against the

Constitution, once the prosecutor establishes fundamental facts the burden shifts to the accused to show his innocence.[1208]

To what extent are these provisions compatible with the right of the accused to be presumed innocent? May the accused charged under these provisions argue that the provisions conflict with his constitutional right to be presumed innocent? If you were a judge, would you accept this argument?

[8] Criminal Justice Policy, Section 4.4.

Chapter Fifteen

Appeal

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ce the trial is concluded, a range of steps may be taken. These steps include appeal, sation, enforcement of the court's decree, and pardon. This part deals with one of these ps: appeal. An appeal is an application by a party to a higher or appellate court asking t court to set aside or revise the decision of a subordinate court. It is a review, as posed to a retrial,[1209] of the case by the appellate court. There are a wide variety of es of appeal. In some countries, such as Argentina,[1210] appeal is limited to questions of v; in other jurisdictions, such as China,[1211] Italy,[1212] and South Africa,[1213] there is a right appeal against both findings of fact and questions of law. Still in other countries, a rson wishing to appeal to a higher court is required to apply for leave to appeal.[1214] In United States,[1215] the prosecutor is not allowed to appeal the lower court's decision quitting the accused, because doing so is deemed to subject the accused to double pardy.[1216] This disparity in the laws of different countries is said to be the reason why rticle 14(5) of the ICCPR leaves exercise of the right to appeal to the applicable laws.[1217]

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[9] In Germany there is what is known as "general appeal," in which a three-judge panel, upon application the convict, retries a case which was tried and finally decided by one professional judge. In this type of iew, the case will literally be tried for the second time, making it difficult to describe as an appeal. Where convict appeals against a judgment rendered by a single professional judge, the three judge panel is bliged to hold a *new trial* on the issue of guilt and sentence." (emphasis added.) German Code of Criminal ocedure, paras. 314, 322, section 3 (quoted in Thomas Weigend, "Germany," in Bradley, *Crim. Pro.*, at 2). At the level of appeal, "the trial process begins again at the starting point. The appeals court is obliged collect and present all the evidence necessary to arrive at the judgment, and it *cannot limit itself to a view* of the first instance judgment but must take new evidence if necessary."(emphasis added), Para. 323, ction 3, of the German Code of Criminal Procedure (cited in *ibid.*).

[10] Argentine Code of Criminal Procedure, Art. 456 (cited in Alejandro D. Carrio and Alejandro M. Garro, Argentina," in Bradley, *Crim. Pro.*, at 47).

[11] Liling Yue, "China," in Bradley, *Crim. Pro.*, at 89.

[12] Italian Code of Penal Procedure, Art. 581(1c) (cited in Rachel Van Cleave, "Italy," in Bradley, *Crim. ro.*, at 280-81).

[13] An accused person has the right to appeal a lower court's decision, on an issue of law or fact, to the High ourt. However, where the High Court is the first instance court, an appeal to the Supreme Court is possible nly upon permission from the High Court. P.J. Schwikkard and S.E. van der Merwe, "South Africa," in radley, *Crim Pro.*, at 356.

[14] In Canada, both the accused and the prosecutor are allowed to "appeal matters of law as of right and the tness of sentence with leave to the court of appeal." Kent W. Roach, "Canada," in Bradley, *Crim. Pro.*, at 7.

[15] Weaver et al., *Principles of Crim. Pro.*, at 390-91.

[16] On the other hand, the Argentine Supreme Court held that "to permit the appeal of an acquittal by the rosecution does not violate due process nor constitutes a double jeopardy violation." Gomez, CSJN, 299 allos 19 (1977) (cited in Alejandro D. Carrio and Alejandro M. Garro, "Argentina," in Bradley, *Crim. Pro.*, t 48).

[17] Trechsel, *Human Rights*, at 365-66.

Both the Constitution[1218] and the ICCPR[1219] recognize a right to appeal for accu persons but not for the government. Under the ICCPR, the right to appeal is available o after the accused is convicted. The accused may appeal the conviction or the sentence. T wording of the Constitution, on the other hand, does not require that the accused be fi convicted for the right to appeal to be exercisable. This might mean that accused pers can appeal from a ruling on an interlocutory matter. Furthermore, it is arguable t Constitution, by allowing the accused to appeal against *an order* (which might be given the course of trial before conviction and sentence) or a judgment, contemplates t possibility of the accused filing an appeal before the case is decided. The fact th conviction isnot required as a prerequisite for appeal under the constitutional provisi strengthens the interpretation that appeal on interlocutory matters is allowed.

Section I. Purposes of Appeal

The following two paragraphs on the purpose of appeal are adopted from Trechsel.[1220]

> Appeal, a review by a higher tribunal, provides several purposes. First, though not necessarily, it serves as a mechanism whereby the accused may obtain a more favorable outcome to the proceedings. In many countries, statutes allow public prosecutors to appeal against an acquittal or against a judgment which he or she seems to be too lenient in which case the appeal may reverse/change the lower courts judgment to the prejudice of the interest of the accused. In the United States, for example, appeal by the public prosecutor is not allowed for it is considered to subject the accused to double jeopardy. On the other hand, where there is no prohibition of *reformation in peius*, there is no protection of the appellant from a more severe judgment on appeal. These two possibilities make it difficult to simply conclude that the right to appeal benefits the defense.
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> Second, it promotes ideals such as consistency and fairness and regulates uniform interpretation of the law. This would be the case where the lower court's judgment is challenged on question of law as opposed to question of fact. Third, it has an indirect advantage of ensuring the fairness of the proceeding before the trial court. The fact that their judgment is subject to further examination has a preventive effect in that it constitutes a strong motivation for trial court judges to work conscientiously and to avoid errors or arbitrariness to the maximum possible. It makes trial court judges to give a reasoned judgment. The right to appeal can also be seen as a means of guaranteeing the right to an effective remedy as provided under Article 2(3) (a) of the ICCPR.

[1218] Article 20(6) provides: "All persons have the right of appeal to the competent court against an order or a judgment of the court which first heard the case."

[1219] Article 14(5) provides: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

[1220] Trechsel, *Human Rights*, at 362-363.

te on Cassation

iopian law[1221] recognizes another review mechanism known as cassation – a review by highest court of a case finally decided by a lower court that contains a fundamental or of law. As provided under the FDRE Constitution, the Federal Supreme Court has a wer of cassation over any final court decision containing a basic error of law.[1222] nilarly, the state supreme courts are empowered to exercise power of cassation over any al court decision on state matters which contains a basic error of law.[1223] The nstitution leaves the particulars of the matter to be governed by subsidiary laws. [1224]

some jurisdictions, such as France, this review mechanism is used not only to review ors of law committed by lower courts. It is also used as a form of collateral attack, sed on newly discovered evidence, on a finally rendered conviction.[1225] Russian law corporates a procedure known as "supervisory review" – a procedure used to reopen a minal case after conviction based on newly discovered evidence.[1226] In slightly different cumstances – where the judge who convicted and sentenced an accused doubts the rrectness of his decision – South African law empowers the judge to send the case cord of the convict to the High Court for what is known as "special review."[1227]

scussion Question

Some jurisdictions mentioned above use the system of cassation to ensure that a convict who is actually innocent is released. Unlike these jurisdictions, the cassation scheme recognized under Ethiopian law is not applicable where new evidence is discovered following a final disposition of a case, even when the newly discovered evidence suggests that the convicted person is factually innocent. Under Ethiopian law, parties are allowed to petition for cassation only on the ground that a fundamental/basic error

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[1] Under the 1961 Criminal Procedure Code, once appeal rights were exhausted, parties dissatisfied by the al decision could petition His Imperial Majesty's *Chilot* for a review of the case. The Imperial Chilot's isdiction was not confined to issues of law. Cr. Pro Code, Article 183. For more on the jurisdiction and gal status of the Imperial Majesty's Chilot, see Robert Allen Sedler, "The Chilot Jurisdiction of the mperor of Ethiopia: A Legal Analysis in Historical and Comparative Perspective," 8 *Journal of African w*, at 59-76 (1964).

[2] FDRE Constitution, Article 80(3)' (a). On the controversies surrounding the Federal Supreme Court's ssation power over final decisions rendered by state courts on state matters, see: Muradu Abdo, "Review Decisions of State Courts Over State Matters by the Federal Supreme Court," in 1 *Mizan Law Review*, at -74 (2007); Mehari Redae, 24 *J. Eth. Law.* No. 2, at 201-213 (December, 2010).

[3] FDRE Constitution, Article 80 (3) (b).

[4] FDRE Constitution, Articles 80 (3) (a) and (b). At the federal level, the details are governed by the deral Courts Proclamation. By virtue of Article 2(1) of the Federal Courts Re-amendment Proclamation, erpretation of law rendered by the Federal Supreme Court's Cassation Division is binding on federal as ll as regional courts.

[5] Arts. 622-626, Criminal Procedure Code of the French Republic (cited in Richard S. Frase "France," in adley, *Crim. Pro.*, at 184).

[6] Articles 384-390, Criminal Procedure Code of the Russian Federation (cited in Catherine Newcombe, ussian Federation," in Bradley, *Crim. Pro.*, at 316).

[7] P.J. Schwikkard and S.E. van der Merwe, "South Africa," in Bradley, *Crim. Pro.*, at 357.

of law[1228] was committed by the lower courts. Nor does any other mechanism[1229] e for the innocent convict to challenge the final decision of the court. In view of the n to accommodate a claim of innocence in a criminal justice system "no matter how l it is brought forward and no matter how much the failure to bring it forward at proper time is the defendant's own fault,"[1230] should the procedure of cassation be u to address situations where new evidence suggests that the convicted person innocent?

Section II. Prerequisites for Appeal

2.1. Finality

Parties may disagree with rulings of the court made during the course of the trial. T Code does not seem to allow appeal of rulings on interlocutory matters – matters on whi the court has rendered a decision, but which decision does not finally dispose of the case

There are two major reasons for prohibiting appeals from interlocutory orders. Fir allowing such appeals may delay the trial, for there can be as many appeals as the numb of rulings given during the course of the trial. The delay might conflict with the right the accused to a speedy trial. Moreover, a rule allowing interlocutory appeal might cau unnecessary appeals to be lodged. An accused who was unsuccessful in raising interlocutory matter might be acquitted at the end of the trial, and it is generally assume that the interest in an appeal disappears following acquittal. Also, it can be argued that accused who is not yet convicted cannot be seen as a victim of the ruling, even though was made against him.

As provided under Article 181 of the Code, an appeal lies from a judgment convictin discharging, or acquitting the accused. In fact, when the court discharges an accused accordance with Article 122(3) of the Code on the ground that the prosecutor failed amend the charge, the court is not passing a judgment *per se*. The trial court has n decided the merits of the case. However, as such an order terminates the crimin proceeding, it has a dispositive effect, since the accused will, for all practical purposes, b free from criminal prosecution.This fact justifies providing a right of appeal to th prosecutor.

Article 184 of the Code provides for list of interlocutory rulings from which appeal is n allowed. Appeal is prohibited from a decision of the court granting or refusin adjournment under Article 94, regarding an objection under Article 131, and regarding th admissibility or non-admissibility of evidence under Article 146. Any one of these ruling

[1228]FDRE Constitution, Article 80 (3); Federal Courts Proc., Article 10.

[1229] The Criminal Justice Policy envisages a law that would allow the public prosecutor and a person who convicted, upon discovery of new evidence showing the convict's innocence, to request the court th convicted the person to reconsider its judgment and release the person because he was wrongly convicte Criminal Justice Policy, Section 4.8.1.3.

[1230] *Bousely v. United States*, 523 U.S. 614 (1998) in Weaver et al., *Principles of Crim. Proc.*, at 409.

ay be used as a ground of appeal only after a final judgment is given. However, if the ourt accepts the objection raised by the accused in accordance with Article 131 of the ode and dismisses the prosecution's case, the prosecutor is allowed to file an appeal hallenging the ruling of the court, as the ruling has a dispositive effect on the case.

he wording of Articles 181 and 184 of the Code creates confusion as to whether appeal is llowed from a decision of the court on interlocutory matters other than those listed in rticle 184 (such as where the court orders the accused to enter into his defence under rticle 142 of the Code). On one hand, Article 181 simply states that appeal from a dgment is allowed; it does not prohibit appeals from rulings given in the course of trial. n the other hand, Article 184 contains an exhaustive list of interlocutory matters which re not appealable. However, reference to other provisions of the Code leads to the onclusion that the Code does not allow appeal from orders on interlocutory matters. rticles 185(1) and (2) of the Code envisage appeal being lodged from a judgment of onviction, acquittal, discharge, or sentence. Similarly, a close reading of the different cenarios envisaged under Article 195(2) of the Code (dealing with the power of the ppellate court) plainly shows that appeals are to be lodged only after a judgment is given y a lower court. Moreover, Article 149(7) of the Code requires the trial court, after elivery of the judgment, to inform both parties that they have a right to appeal.

he Revised Proclamation to Provide for Special Procedure and Rules of Evidence on nti-Corruption takes a different approach to appeal from interlocutory rulings. When a reparatory hearing is conducted in corruption cases, Article 40 of the Revised roclamation allows an appeal to be lodged against rulings of the court on admissibility of vidence and other preliminary matters.

By recognizing the right of accused persons to appeal against *an order* or a judgment of he court that first heard the case, Article 20(6) of the Constitution seems to suggest the ossibility of appeal from interlocutory rulings. However, it does not expressly authorize ppeal from rulings on interlocutory matters. It would be logical, then, to argue that to erve the purpose of requirement of finality, the word "order" under the Constitution hould be construed to refer to orders that make the continuation of the trial unnecessary – hat is, orders having a dispositive effect on the case. Such orders can only be made gainst the prosecutor, not the accused, in which case the accused would have no reason to ppeal. Hence, where the Constitution allows the accused to appeal both judgments and rders of the trial court, the appeal right should be read to include any interlocutory natters. Because of Article 20(6) of the Constitution, despite Articles 181 and 184 of the Code, it is hardly possible to argue that appeal from a ruling of the court given under the Code's Article 142, though interlocutory, is prohibited.

Public Prosecutor v. Birhanu Darimo[1231]

In *Public Prosecutor v. Birhanu Darimo*, the public prosecutor charged the accused und three counts, citing Article 522(1)(a) , Articles 27(1) and 522(1)(a), and Article 653 of t 1957 Penal Code. The accused's lawyer objected to the charge on the basis of Artic 130(1) of the Code on the following grounds. The accused did not set fire to and cause t death and bodily injury of the victims deliberately; his actions could only be described negligent. Hence, the lawyer argued, the legal provisions cited by the prosecutor did n apply to the accused's actions. The trial court accepted the objection and, citing Articl 112 and 119 of the Code, ordered the prosecutor to amend the charge. The prosecut appealed from the ruling of the court. The appellate court, invoking Article 195(2) (a) the Code, reversed the ruling of the trial court and remanded the case to the trial court.

Notes and Questions

1. Was the prosecutor right to appeal from the ruling of the trial court in the case of *Publ Prosecutor v. Birhanu Darimo*? Was the appeal supported by Articles 184 and 185 the Cr. Pro. Code? When the prosecutor does not agree with the ruling of the court an does not want to amend the charge, shouldn't he wait, by virtue of Article 119(3) of th Code, until the trial court discharges the accused?
2. Is the Supreme Court justified in citing Article 195(2) (a) of the Code, which refers t appeals from an order of acquittal or discharge, as a basis for its decision reversing th ruling of the lower court made under Article 130 of the code?

2.2. No Plea of Guilty

Another requirement for an accused to appeal, as can be inferred from Article 185(1) o the Code, is that he does not plead guilty.

Article 185(1). Appeal against conviction and sentence

> *(1) A convicted person may appeal against his conviction and sentence; provided tha no appeal may be lodged by a convicted person who has pleaded guilty and ha been convicted on such plea except as to the extent or the legality of the sentence.*

An accused's guilty plea prevents him from challenging the finding of the trial court bu not the court's decision on sentence. As indicated by Article 185(1) of the Code, the guilt plea *per se* does not prevent the accused from appealing the court's finding. It is where th court convicted the accused exclusively on the basis of his own plea that the accuse cannot challenge his conviction in an appeal. If the court ordered the prosecutor t introduce his evidence despite the plea of the accused, that means the plea, in and of itself did not convince the court beyond a reasonable doubt that the accused is guilty. In such a case, if for whatever reason the prosecutor could not produce his evidence, or the cour declared the prosecutor's evidence inadmissible, the accused would automatically b acquitted under Article 141 of the Code. On the other hand, if the accused is convicte

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[1231] *Public Prosecutor v. Birhanu Darimo* (F.H.Ct., Cr. F. No. 19313, 19th of Ginbot and 5th of Sene, 1995 E.C.).

llowing the prosecutor's evidence that means the court's finding is not based exclusively
the plea of the accused. Since the accused can be acquitted despite his guilty plea if he
ccessfully challenges the prosecution's evidence, it is logical to allow him to appeal his
nviction if, after the accused made his plea, the court required the prosecution to
troduce its evidence. The accused can challenge his conviction on the ground, for
stance, that the prosecutor's evidence was wrongly admitted or that exaggerated weight
as attached to it.

Fekade Degefa v. Public Prosecutor,[1232] the Federal Supreme Court accepted a
nvicted person's appeal of his conviction on a given charge, even though the person
ed guilty to the charge during his trial.

Public Prosecutor v. Fekade Degefa[1233]

Public Prosecutor v. Fekade Degefa, the accused was charged before the Federal High
ourt for being found in possession of a bomb without a license for an illegal purpose in
olation of Article 41 (1) of the Revised Special Penal Code. Although the accused pled
ilty, the trial court ordered the prosecutor to introduce his evidence. Two witnesses were
lled and testified. When the court ordered the accused to enter into his defence, he told
e court that he had no defence. The court convicted the accused and sentenced him to
ve years rigorous imprisonment.

he accused appealed from the judgment of the trial court, challenging both its finding
d the sentence. In his memorandum of appeal, the appellant stated that the lower court's
ecision was erroneous since the testimony of the prosecution's witnesses did not
tablish the facts alleged on the charge. The prosecutor argued that the lower court's
ecision was valid because the accused himself had pled guilty and the witnesses'
stimony supported the charge.

he appellate court analyzed the testimony of the two witnesses and concluded that it
oved simply that the accused was found in possession of the bomb without license. The
ourt found that the testimony did not establish that the accused was in possession of the
omb for an illegal purpose. Hence, in accordance with Articles 195(2)(b)(ii) and 113(2)
f the Code. The court altered the finding of the court, convicted the accused under Article
53(a) of the Penal Code for possessing a weapon without license, and sentenced him to
ree months simple imprisonment.

otes and Questions

In cases like *Public Prosecutor v. Fekade Degefa*, where the trial court ordered the prosecutor to introduce his evidence despite the accused's plea of guilty, is it possible for the appellate court to convict the accused by virtue of Article 134(1) of the Code, on

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[1232] *Fekade Degefa v. Public Prosecutor* (F.S.Ct., Cr. App. No. 14845, Hamle 12, 1996).
[1233] *Public Prosecutor v. Fekade Degefa*, (F. H. Ct., Cr. F. No. 16751, Tir 6, 1996 E.C.).

the ground that it was not even necessary for the trial court to call for additiona evidence from the prosecutor? Or is conviction on plea an exclusive discretion of th trial court? In *Public Prosecutor v. Fekade Degefa*, because the Federal High Court ha taken the position that the plea of the accused is not adequate evidence, the appellat court simply considered whether the testimony of the two witnesses proved th prosecution's case. The court gave no weight to the plea of the accused. Instead, i convicted the accused of the crime that the testimony of the witnesses proved, withou attaching any value to the plea of the accused.

In *Public Prosecutor v. Fekade Degefa*, the Federal High Court ordered the prosecuto to introduce his evidence despite the guilty plea of the accused for because the Cour was not convinced that the plea proved the prosecution's charge beyond a reasonable doubt. After hearing the testimony of the two prosecution witnesses, the court convicted the accused based on their testimony coupled with the plea of the accused.

The Federal Supreme Court did not amend the plea of the accused. Rather, it viewed it as one piece of evidence. The accused had pled guilty, meaning he admitted each ingredient of the charge. That is, he admitted that he was found in possession of an illegal weapon and that he possessed it not to protect himself but for other illegal purposes. In so far as the court accepted the plea of the accused as valid, it is unclear why it did not consider the plea of the accused adequate to establish his purpose for possessing the weapon.

Section III. Right to Appeal and the Highest Court Sitting at First Instance

Article 8 of the Federal Courts Establishment Proclamation No. 25/1996 empowers the Federal Supreme Court to assume first instance jurisdiction in two categories of cases. The first category includes criminal cases in which officials of the federal government are charged in connection with their official responsibilities. The second includes offences for which foreign ambassadors, consuls, and representatives of international organizations and foreign states are charged. In such cases, because the senior members of the judiciary decided the first instance proceeding, it is clear that there is no chance of appeal. There is no higher forum available than the Federal Supreme Court. It is thus questionable whether Article 8 is compatible with the right to appeal recognized in the ICCPR and FDRE Constitution.

Public Prosecutor v. Tamirat Layne et al.[1234]

The public Prosecutor instituted a criminal charge before the Federal Supreme Court against nine persons. The charge was filed before the Federal Supreme Court because one of the accused persons, namely Tamirat Layne, the former prime minister, was a federal official.[1235] Defence lawyers challenged the Court's jurisdiction on the ground that Article

[1234] *Public Prosecutor v. Tamirat Layne, et al.*,(Fed. Sup. Ct., Cr. F. No. 1/1989).
[1235] The term "Federal official" is defined under the Federal Courts Proc., Article 2(3).

of the Federal Courts Establishment Proclamation, which empowers the Federal upreme Court to try the case as a first instance court, violates the right to appeal ecognized under Article 20(6) of the FDRE Constitution. The court ruled as follows.

> Article 20(6) of the FDRE Constitution provides that all persons have the right of appeal to the competent court against an order or a judgment of the court which first heard the case. Article 14(5) of the ICCPR provides that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Both provisions guarantee the right of persons convicted and sentenced to appeal. The phrase "according to law" in the ICCPR indicates that the conditions and manner of exercising the right to appeal is to be regulated by law. Similarly the phrase "to the competent court" under the FDRE Constitution suggests that the right to appeal is to be exercised in so far as there is a competent court to hear appeals. This is an approach which is consistent with the jurisprudence of appeal as accepted worldwide.
>
> The point to be emphasized in relation to enforcing the right to appeal is ensuring that trials are not delayed in the pretext of appeal impacting the right to speedy trial. While establishing appeal systems adequate attention should be given in striking a balance between the right to appeal and the right to speedy trial. In other words, equal attention should be given to the enforcement of the rights of the accused recognized under sub articles 1 and 6 of Article 20 of the FDRE Constitution.
>
> In several democratic countries, with a view to give efficient and quality justice to higher government officials, criminal cases relating to them are tried by the highest judicial organ. Though this practice seems to narrow the right to appeal, the speedy disposition of the case by the most competent judges (in our case by not less than five judges) puts persons tried by the highest court in advantageous position. In other words, as the restriction of the right to appeal to some extent is compensated by the wider enjoyment of the right to speedy trial, being tried by the highest court would be advantageous rather than being prejudicial to the accused.
>
> Therefore, Article 8 of the Federal Courts Proclamation No. 25/1996 does not contradict with Article 20(6) of the FDRE Constitution.[1236]

Notes and Que

1. In a case decided in 1989 Ethiopian Calendar, the Federal Supreme Court interpreted the terms "*according to law*" in the ICCPR and "*to the competent court*" in the FDRE Constitution as recognizing the possibility that the right can be restricted by law. In 2007, the Human Rights Committee, in its General Comment No. 32, indicated that the expression "according to law" under Article 14(5) of the ICCPR is not intended to leave the very existence of the right of review to the discretion of the States Parties,

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[1236] *Public Prosecutor v. Tamirat Layne, et al.* (Fed. Sup. Ct., Cr. F. No. 001/1989).

since this right is recognized by the Covenant, and not merely by domestic la
According to the Committee, the term relates to the determination of the modalities
which the review by a higher tribunal is to be carried out, as well as which court
responsible for carrying out a review in accordance with the covenant. In view
Article 13(2) of the FDRE Constitution, which provides for provisions of Chapt
Three of the FDRE Constitution to be interpreted in light of, *inter alia*, the ICCPR, ho
valid is the Supreme Court's argument after the adoption of General Comment No. 32

2. Another point the Federal Supreme Court raised in support of Article 8 of Proclamatic
No. 25/1996 is that being tried by senior judges at the highest level is a privilege for t
accused. However, the Human Rights Committee, in its General Comment No. 3
emphasized that "where the highest court of a country acts as first and only instanc
the absence of any right to review by a higher court is not offset by the fact of bein
tried by the supreme tribunal of the State Party concerned; rather such a system
incompatible with the Covenant, unless the State party concerned has made
reservation to this effect."[1237]
3. Assume an accused tried by the Federal High Court is acquitted. The prosecutc
appeals to the Federal Supreme Court against the finding of the trial court. Assum
further that the appellate court – the Federal Supreme Court – reverses the finding o
the Federal High Court and convicts the respondent. There is no court to hear an appea
from the decision of the Supreme Court. Does that violate the right to appeal? Th
Human Rights Committee says yes. According to its General Comment No. 32,[123
Article 14(5) of the ICCPR is violated where a conviction imposed by an appeal cour
(or a court of final instance following acquittal by a lower court), cannot be reviewe
by a higher court according to domestic law. How should criminal jurisdiction b
allocated to avoid such a risk?
4. Does the possibility of review by the Cassation Division of the Federal Supreme Cour
help address the concerns raised in the preceding questions? In connection with Frenc
law, Charrier notes that "in France there is, even from the 'highest tribunal,' an appea
to the *Cour de Cassation*."[1239] Charrier considers the cassation procedure as a substitut
for appeal. According to Trechsel, Charrier's view is based on a misunderstanding o
the difference between appeal and cassation.[1240] Appeal differs from cassation in tw
ways. First, appeal allows the appellant to challenge the decision of the lower cour
both on findings of fact and questions of law. Cassation, instead, entertains onl
fundamental errors of law. Second, bringing an appeal is a right, while bringing a cas
before a Cassation Division is not a right.

[1237] *General Comment No. 32.*
[1238] Ibid.
[1239] Jean-Loup Charrier, Art. 2 Protocol No. 7 N 3 (2002), in Trechsel, *Human Rights*, at 370.
[1240] Trechsel, *Human Rights*, at 370.

Section IV. Powers of the Appellate Court

rt. 195 of the Cr. Pro. Code provides the following regarding powers of the appellate ourt.

') At the hearing of an appeal the court of appeal shall dismiss the appeal where there is no sufficient ground for interference.

2) Where it considers that there is sufficient ground for interference, the court of appeal may:

a. On an appeal from an order of acquittal or discharge reverse such order and direct that the accused be retried by a court of competent jurisdiction or find him guilty and sentence him according to law; or

b. On an appeal from conviction and sentence:

(i) Reverse the finding and sentence and acquit the accused; or

(ii) With or without altering the finding, maintain, increase or reduce the sentence;

c. On an appeal from conviction only reverse the finding and sentence and acquit the accused.

d. On an appeal from sentence only maintain, increase or reduce the sentence;

(3) Where the court of appeal confirms the conviction but alters the sentence or vice versa a second appeal shall lie only in respect of the conviction or sentence which has been altered.

'otes and Questions

. If the convicted person files an appeal requesting that the conviction and sentence be set aside, or the sentence be reduced, Article 195(2) (b) (ii) of the Cr. Pro. Code allows the appellate court instead to increase the sentence. Similarly, Article 195(2) (d) of the Code empowers the appellate court to increase a sentence when the convict has appealed, seeking reduction of sentence. This provision also authorizes the appellate court to reduce the sentence when the prosecutor appeals asking for an increased sentence. Article 196(2) of the Code prohibits an order made to the prejudice of the appellant from being applied to other persons who were convicted with the appellant but did not appeal, confirming the possibility that the appellate court may increase the sentence with or without changing the finding of the trial court. Is it fair to authorize the appellate court to give an order to the prejudice of the appellant? How is the court's decision increasing or reducing the sentence to be explained in circumstances where no one has applied for it? Don't these provisions discourage persons from exercising their right to appeal? Consider in particular their relationship to Article 196 of the Code, which guarantees that those who do not exercise their right to appeal will not be affected by a prejudicial decision of the appellate court. Trechsel indicated that appellants in most European countries are not protected from such prejudicial consequence of appeal because the European Convention on Human Rights does not contain any prohibition against *reformatio in peius*.[1241] The Chinese Criminal

[41] Ibid. at 362.

Procedure Law expressly prohibits the appellate court from increasing the sentenc where the case is appealed by the accused.[1242] The Russian Code Criminal Procedur contains a similar prohibition.[1243]

2. Article 195(2) (a) of the Code provides for different options to the appellate court whe the public prosecutor lodges an appeal from an order of acquittal or discharge. Th appellate court is empowered to reverse the order given by the trial court and direct tha the accused be retried, or find him guilty and sentence him. On what factors does thi appellate court's order depend? On what occasions should the appellate court orde retrial of the accused? When should the court convict and sentence the accused? I Germany, when a convict appeals against a judgment rendered by a single professiona judge, a three judge panel is obliged to hold a new trial on the issues of guilt an sentence. The panel remands the case for retrial only if the earlier trial was conducte by a court that had erroneously assumed jurisdiction.[1244]
3. According to the Amharic version of Article 195(2)(a) of the Cr. Pro. Code, if a appellate court orders the accused to be retried it shall, instead of remanding the case t the court which tried the case before, refer it to another court that has jurisdiction. Wha justifies such a requirement?

Section V. Status of Trial Court's Judgment Pending Appeal

Art. 188. Stay of execution.

(1) Where a convicted person has given notice of appeal no sentence of flogging shall be carried out until the appeal has been heard or abandoned by the appellant.

(2) Where an accused person is released on bail pending the hearing of his appeal the sentence of imprisonment shall not commence until the court of appeal delivers its judgment.

(3) Any measures which have been ordered by the court against whose judgment an appeal has been filed shall be carried out notwithstanding an appeal.

(4) There shall be no stay of execution in respect of the payment of compensation or costs

(5) An application for stay of execution may be made to the court of appeal at any time before the appeal is heard or at the hearing of the appeal.

A question exists as to the status of the judgment of the lower court during the appeal process. This provision does not provide a satisfactory answer. The first two subarticles are clear in their meaning but do not provide practical help, and the other three are confusing.

[1242] Article 190, Chinese Criminal Procedure Law (cited in Liling Yue, "China," in Bradley, *Crim. Pro.*, at 89).

[1243] Article 340, Russian Code Criminal Procedure (cited in Catherine Newcombe, "Russian Federation," in Bradley, *Crim. Pro.*, at 316).

[1244] Paragraph 328 of the German Code of Criminal Procedure (cited inThomas Weigend, "Germany," in Bradley, *Crim Pro.*, at 212).

e first subarticle, which prohibits a sentence of flogging from being carried out where a nvicted person has given notice of appeal, is no longer relevant, as this type of sentence no longer recognized under the Ethiopian criminal justice system. The second subarticle nply states the obvious. Once the appellate court releases the accused on bail (pending e appeal proceeding) there is no risk that the sentence of imprisonment passed by the al court would be carried out; therefore, the prohibition in this subarticle is unnecessary.

e third subarticle provides that measures ordered by the trial court shall be carried out spite the fact that the accused has appealed the decision of the court. "Measures," as is earer in the Amharic version, refer to those identified in Book II, Title I, Chapter III of e Criminal Code (Articles 129-156). It is unclear whether the provision means that such easures, unlike a sentence of flogging, are not suspended by law, or that these measures ould not be suspended by the appellate court even in response to an application under e fifth subarticle. However, since the measures are intended to guarantee public safety, ther than to punish the accused, suspending them might be dangerous to the public. ence, a more logical interpretation of this provision may be that it prohibits the appellate urt from ordering a stay of execution.

ne same confusion arises in relation to subarticle 4, which prohibits a stay of execution lating to the payment of compensation or costs. It is not clear whether the prohibition is gainst the automatic stay of execution (as in the case of a sentence of flogging) or against stay of execution being ordered by the appellate court. This subarticle applies where an jured party is allowed to apply for compensation in accordance with Article 156 of the ode. Hence, the issues relating to stay of execution arising in connection with the civil ase in a criminal proceeding can be treated in accordance with the relevant provisions of ne Civil Procedure Code.

n the absence of clear statutory language, the effect of an appeal on the judgment and entence passed by the lower court can be inferred from a cumulative reading of the five ubarticles of Article 188. Beginning with the clear case of the death penalty, the measure" will not be executed pending appeal; it will be executed only if confirmed by ne president of the Federal Democratic Republic of Ethiopia[1245] after the judicial process, ncluding appeal, is finalized. Therefore, when a convict sentenced with the death penalty ives notice of an appeal, he will remain in custody pending execution of the death enalty.[1246]

The presumption of innocence no longer applies once the person is convicted. The resumption ceases to exist once an accused is found guilty of an offence. Hence, stay of

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[1245] The death sentence shall not be carried out unless confirmed by the Head of State. Criminal Code, Art. 117(2).

[1246] In light of Article 63 of the Cr. Pro. Code, it is unlikely for a person who is charged with an offence punishable with death to have been released on bail during the trial process.

execution of the lower court's judgment against the accused cannot be explained by th presumption of innocence. Similarly, an accused who enjoys the presumption o innocence during trial should be treated as innocent for more compelling reasons after th trial court acquits him. If an accused should be presumed innocent and is thus released o bail during his trial, it would be illogical to require the accused to remain in custody afte his acquittal by the trial court simply because the prosecutor has given notice of an appea To stay execution of the lower court's judgment pending appeal would wrongly imply tha there is a presumption of error on the part of the trial court. There is thus no possibl justification to stay the execution of judgment of the lower court on the ground that a part has appealed the judgment.

It follows that the judgment of the lower court should, in principle, be executed irrespective of whether an appeal is lodged. If the accused was not released on bail during his trial but was ultimately acquitted, he should be released immediately, even if the prosecution has given notice of an appeal. Conversely, if the accused was released on bai during his trial but is ultimately convicted and sentenced to serve imprisonment, the sentence should be carried out without waiting for the decision of the appellate court.

Practical problems may certainly arise when the lower court's decision is carried out pending appeal. It may sometimes be too late to reverse the consequences of enforcing the lower court's decision by the time that decision is reversed by the appellate court. This is particularly true if the appellant is jailed following the lower court's decision, and that decision is later reversed by the appellate court. Similarly, an accused that is acquitted by the trial court and released following his acquittal may disappear during the appeal process, so that if and when the appellate court reverses the lower court's decision it will be unable to enforce any "measures" against the accused.

Hence, the different subarticles of Article 188 of the Code, taken together, imply that the decision of the lower court is to be carried out irrespective of whether an appeal is lodged. Appeal in and of itself does not operate to prevent execution of the lower court's decision. The lower court's decision is suspended only after a party applies for the stay and the appellate court grants party's request. When an application for a stay of execution is made, the appellate court considers the possible consequences of granting or denying the application, and decides the application on a case-by-case basis. The appellate court may look to Article 335(1) of the Civil Procedure Code (requiring a showing of a substantial loss if the stay is not granted) as a guideline when deciding applications for a stay of execution.

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