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Addis Ababa University

College of Law and Governance

School of Law

**Illegally Obtained Confession in Criminal Investigations and the
Protections Afforded: Case Study**

A Thesis Submitted to the School of Law of Addis Ababa University in Partial Fulfillment of the
Requirements of Masters of Law in Constitutional and Public Law

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May 22, 2015

Declaration Statement

I hereby declare that, this paper prepared for the partial fulfillment of the requirements for LL.M Degree in Constitutional and Public Law entitled “Illegally Obtained Confession in Criminal Investigations and the Protections Afforded: Case Study” is my own work and that it has not previously been submitted for assessment to another University or another qualification.

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Signature.....

Date

Certification Statement of an Advisor

Here with I state Adi Dekebo has carried out this research work on the topic entitled “Illegally Obtained Confession in Criminal Investigations and the Protections Afforded: Case Study” under my supervision. This work is original in nature and has not been presented for a degree in any university and it is sufficient for submission for the partial fulfillment for the award of LL.M degree in Constitutional and Public Law.

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Certification Statement of Examiners

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Date.....

Abstract

Throughout history, the police institution have been authorized and mandated to protect citizens against crime. If the crime is already committed police are duty bound to investigate. During the interrogation of a suspect, however, the police may obtain incriminating statements from him with the utilization of improper methods. As such this thesis investigates illegally obtained confession in criminal investigations and the protections afforded. In doing so, it proves that the issues relating to confession are not comprehensively dealt with by law. Practically speaking, those who are involved in criminal justice administration are indisposed in affording protection against illegal confession. The study aspires to clarify the legal and practical issues involved with the response given. Moreover, the barriers for protection and the roles of those involved personnel are scrutinized with the aim of re-shaping confession rules in Ethiopia.

List of Abbreviations and Acronyms

ACHPR	African Commission on Human and Peoples' Rights
CIA	American Central Intelligence Agency
FDRE	Federal Democratic Republic of Ethiopia
ICCPR	International Convention on Civil and Political Rights
UDHR	Universal Declaration of Human Right
UN	United Nations
ICC	International Criminal Court

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Chapter One: General Framework of the Research

1.1. Background of the Study

It is the responsibility of governments in general and the police in particular to protect citizens against any crime.¹ Based on the allegation received police are duty bound to investigate the crime.² In the course of investigation, however, there are instances where traces are utterly absent or at least minimal and they resort to interrogation. In case the suspects are not willing to provide all sort of information, the investigating police officers may resort to illegal methods of obtaining confession. As the task of interrogating, eliciting confessions, and interviewing suspects carry on, police officers may inadvertently or purposefully influence the statements of suspects. Improper police tactics of obtaining illegal confession may result in wrongful convictions.³ On the issues relating to determining the practical protection against such abuse international⁴ and national laws have provided rules to be applied by criminal justice administrators.⁵ But it is yet to be identified in this research whether the laws have afforded sufficient and explicit protection and the practical enforcement of the rules provided.

Specifically, prior researches conducted in the areas of illegally obtained confession are rare or they are not accessible and they have touched upon the topic either only incidentally⁶ or are not comprehensive enough in dealing with the matter at hand.⁷ The rare studies on the matter have not shown the practical applications of rules relating to illegally obtained confession; they rather

¹ Constitution of the Federal Democratic Republic of Ethiopia, Proc. No 1, 1995. Art. 13 oblige government to enforce and protect the people from human right violation. Federal Democratic Republic of Ethiopia, Criminal Justice policy, (2011): 1; The Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, Proc. No. 414, Art. 1: Federal Police Commission Proclamation, 2011, Proc. No. 720, Art. 5 and 6

² Criminal Procedure Code of the Empire of Ethiopia, 1961, Proclamation no 185, Neg. Gaz., No 1. Art. 11 -17

³ Lawrence Wrightsman , Forensic psychology (Cengage Learning, 2008), p.252

⁴ UN General Assembly, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, Art. 14, 17, Non-binding instruments like; African Commission on Human and Peoples' Rights, Principles and Guidelines on the right to fair trial and legal assistance in Africa, (ACHPR), (2001) DOC/OS (xxx) 247., United Nations, Basic Principles on the Role of Lawyers, 7 September 1990.

⁵ See FDRE Constitution, 1995, cited above at note 1, Art. 19, 14, 16 and 18

⁶ Writers may refer to confession in discussing accused persons right in general or some specific right in particular For instance see Simeneh Kiros, "the Principle of the Presumption of Innocence and its Challenges in the Ethiopian Criminal Process," Mizan Law Review., Vol. 6 No.2 (2012), p.277

⁷ See Solomon Emiru, Inadmissibility of Involuntary Confession and the Problem of Deciding the Issue of Voluntariness: Case Oriented Analysis, (1998, Unpublished, Faculty of Law, Addis Ababa University)

limited themselves to the abstract concept of the rules of exclusion and the difficulties of determining voluntariness of confession. Even the case oriented analysis conducted has limited itself to showing the difficulty of showing voluntariness per se.⁸

This study is different from other studies in Ethiopia in that it seeks to indulge upon the matter in more detail by making a case study of not only showing the difficulty but also how criminal justice administrators are dealing with the issue at hand and more importantly what legal and practical protections are afforded to it. Unlike the previous studies, the topics covered under the thesis are comprehensive as they cover issues relating to the nature, purpose and evolution of confession in criminal investigation. Once the general theoretical and legal matters relating to confessions are dealt with the practical protection afforded against illegally obtained confession including the role of human right institutions will be dealt with. By scrutinizing the procedural and substantive protection afforded it is aimed at exploring the gaps in this regard. As such with my research thesis I propose to address the legal and practical protection afforded from such illegal interrogation and by scrutinizing federal courts case studies it is meant to see the present situations of how justice sector bodies are dealing with the issue at hand. The exposure that the writer of this thesis has as a federal public prosecutor will make the thesis inclusive of the internal and external views of the issues relating to confession. The issue at hand is important to the writer as there are number of claims by suspects that their human rights are violated. This lead one to exploring the legal and practical protection afforded against illegal confession.

1.2. Statement of the Research Problem

Society is the main source of authority for police. The people give the authority to uphold and enforce the law. The misuse of this authority results in police misconduct. In the process of interrogation the investigating police officers may obtain incriminating statement from the suspect. Those statements could be admissions, confessions or simply exculpating statements. If those statements are taken legally by respecting due process of the suspect, it serves justice. The problem comes to picture in case if the accused's due process right is not adhered to. The performance of police in Addis Ababa is measured based on whether they are able to finish the investigation before the last day of the month irrespective of when it began and also if public

⁸ Ibid.

prosecutor closes the investigation for insufficiency of evidence that will be regarded as a defect on them.⁹ As such the police officers want to see that suspects are eventually charged at any cost and in which case they can misuse their power and encroach upon the suspect's right. The interrogation happens in private and the suspect is left at their mercy. Safeguard can be provided based on certain requirements. The exclusionary rule is doctrines in criminal procedure and evidence law is one of the safeguards provided under the law. The difficulties are both in theory and practice. In theory, it is difficult to provide a compelling rationale for the rule and for instance what would we do if a serial killer bitten up by police shows the grave of whom he killed? Is it logical to extend the protection for terrorist who confessed the murder of Ethiopian citizens? In practice, the extent and methods of the protection is unclear. It is not clear if there is mechanism of determining exclusion of illegal confession, on whom the burden lies, when should it be determined and more importantly the evidentiary sufficiency of contested confession.

My intention here is to make principled discussion of the rule and current prevailing practice of how the prosecution department and courts deal with the issue at hand. First, limited number of research made on the area deal with the issue of deciding voluntariness¹⁰, presumption of innocence¹¹ and the right to remain silent. None of them however made an in-depth analysis of the subject matter and as there are still many profound, crucial and difficult questions unanswered, this thesis tries to deal with them. Many of these important issues have been simply ignored. The discourse of suspect's inability to understand the language in which confession is to be recorded is also forgotten.

1.3. Objective of the Research

The particular objective of this thesis is to review the criteria or prerequisites for the admissibility of confession as set out in Ethiopian law in relation to international human right

⁹ See reporting mechanism of Addis Ababa Police investigators monthly report. It is my personal observation that every criminal file not finished with investigation on the last day of Ethiopian calendar month is treated as a defect. All Police officers are expected to report on the last day of the month finishing all the investigation files in their irrespective when it began to be investigated.

¹⁰ See Solomon Emiru, cited above at note 7

¹¹ See Simeneh Kirros, cited above at note 6

standards and experience of other countries. With this in mind, the procedure developed by our courts for determining the admissibility of confessions will be reviewed.

The problem to be researched in this thesis is not only limited to the above. But also the questions of burden of proof, in particular, the shift of onus to the accused and if there are other options will be scrutinized. The de facto and de jure procedures adopted by courts to determine legality of confession will also be studied. Whether trial within a trial is possible will be explored. This procedure will be reviewed in order to ascertain whether it is satisfactory in terms of protecting human and constitutional rights of the suspect. The use of contested confession made on self and against co-offenders will be dealt with. There is no law governing the length of period of interrogation of a suspect by the police.

As such an issue of how long interrogation of a suspect for confession can be made and whether a law reform is a must in this area will be dealt with in relation to case study. More importantly this thesis is aimed at scrutinizing the current trends of having the contested confession *as sole* or at least as *major evidence* in criminal prosecution in relation to the evidentiary sufficiency of contested confessions. Taking into account those who are vulnerable to miscarriage of justice because of illegally obtained evidence an examination into barriers to the protection of defendants' rights will be conducted. In general an investigation and an answer into whether the criteria for admissibility of confession are adequate to ensure the protection of the right of the accused and at the same time an attempt as to necessity of retaining the current legal and practical situation in this regard will be made. In this regard the role of all justice sectors will be investigated. The reason for all of this is to scrutinize the existence of legal and practical gap and determine necessity of reform.

1.4. Research Question

The key research questions to be explored in this study are:

- What is the criterion for the admissibility of confession as set out in Ethiopian law? What kind of confession is excluded? What is the parameter of coercion?
- What is the current trend and effect of not following mandatory interrogation system? What are the procedures adopted to record confessions in police station and courts? Do these procedures

ensure fair trial and are they in compliance with the order of the law?

- What legal and practical protections are available to the suspects not able to understand the language in which the confessions are recorded?
- Do the de facto and de jure procedures of determining legality match? What is the procedure developed by our courts for determining the admissibility of confessions and determination as to voluntariness? Taking into account those who are vulnerable to miscarriage of justice because of illegally obtained evidence, what are the barriers to the protection of defendants' rights?
- Who has the burden of proving if the confession is voluntary? In terms of procedure, when is the motion to suppress confession conducted? Whether trial within a trial is possible? What are the current trends of having the contested confession as sole or at least as major evidence in criminal prosecution in relation to the evidentiary sufficiency of confessions?
- Can the confession made on self and against co-offenders be used as evidence against the other non-confessing co-offender? For how long can interrogation of a suspect for confession be made?
- What are the roles of human right institutions in relation to shaping the rules of confession in Ethiopia? What are the remedies for violation of rights in interrogation of suspects?

1.5. Research Methodology

This research thesis is carried out by utilizing doctrinal and non-doctrinal research techniques or methodologies. As such the key methodological approach will be to use literature review, internet sources, observations and real case studies. To this end, it consults, inter alia, books, journals, and other relevant publications. The key steps followed include first, analyzing and unpacking the issues in order to identify the issue or issues which need further research. Secondly, having established the issue requiring further investigation, the researcher determined the relevant rule or rules of law applicable to the identified issues.

1.6. Significance of the Study

This study seeks to contribute to the literatures concerning illegally obtained confession in criminal justice administration. The research will reveal the flaws and weaknesses of the current criminal justice system in dealing with the issue. In doing so, the feasibility of the current

practical mechanisms of dealing with the issue will be determined. This study attempts to clarify the key issues revolving around the confession rules. It will determine how coercion is to be understood and means of ascertaining the same. By suggesting solution as to how to deal with illegal confession it adds value to the mechanisms of protection of human right of the suspect. The findings of this thesis hopefully, will demonstrate the role and wrong doings of the human right institutions in the promotion, protection and enforcement of human rights of suspects. This way, a recommendation forwarded to these institutions helps the realization of human rights in Ethiopia. The finding will assist those who are involved in administration of criminal justice to take corrective measures in encouraging and strengthening the promotion of accused person's rights in Ethiopia. It may provide research based information for further action and it serves as reference to further research by contributing knowledge to the existing discourse on the issue.

1.7. Limitations of the Study

The national and international laws dealing with accused person's right are broad. Among such right is the protection afforded against the improper technique of obtaining confession to be used as evidence supporting criminal claim. The coverage of this study is limited to issues dealing with confession, and the cases scrutinized are from Ethiopian federal courts per se and any references to other jurisdictions are for comparative purposes. For the mere fact that the governments unwilling to be condemned, when it comes to human right protection, lack of cooperation on the part of those who are in a position of data which is used for analysis of issues in this paper is expected. Most decisions from courts are not published which creates limitation in terms of accessibility. Considering the ethical duty that the researcher owes to the schedule and program of the masters degree, finishing the thesis within a semester is a time constraint expected.

1.8. Organization of the Study

In this thesis, attempt will be made to show illegally obtained confessions and the protection afforded. To this end, the thesis is organized in five chapters.

The first chapter of the paper will introduce the background of the problem, objective of the study, research methodology, and scope of the study, significance of the study and limitation of the study.

In chapter two an extensive study of nature, rationale and evolution of confession in criminal investigation including the international and Ethiopian human right protection relating to confession which can be used as evidence in a court will be conducted. First, a discussion of meaning, evolution, types and rationales of confession will be scrutinized in order of their appearance. Then following, the international, regional, other selected countries from civil and common law, and Ethiopian human right protection afforded vis-à-vis the confession will be explored.

Chapter three of the thesis analyses the practical exploration of the protection afforded against illegal confession by making federal courts case studies. For this, the right to remain silent and its effect, bilingualism and confession, procedures of recording confession, coerced confession and exclusion followed by the status and methods of confession made to courts is studied. Issues relating to the use of co-defendants confession, methods of defending illegal confession, motion to suppress the confession, burden and standard of proof will be explored respectively. Finally, evidentiary sufficiency of contested confession, coerced confessions resulting in wrongful convictions including remedies of illegal confession and barriers to the protection of defendant's right is explored.

The fourth chapter explores the mechanisms of re-considering the exclusionary rule in Ethiopia by indicating the role of human right institutions. First reform in the law of confession will be considered in order to re-shape confession rules in Ethiopia. Then, the role of police institution, prosecution department, judiciary, legislative organ, defense counsels, the Ethiopian Human Right Commission and Media as a means of re-establishing and re-shaping fair confession rules in Ethiopia will be explored.

The Fifth Chapter will draw conclusions and recommendations.

Chapter Two: The Nature and Legal Discourse of Confession

"It may be true that the *law cannot make a man love me, but it can keep him from lynching me, and I think that's pretty important.*" - Martin Luther King¹²

2.1. Introduction

Human rights are inherent to all mankind.¹³ Such human rights have greatest interlink with criminal justice administration. Criminal investigation is conducted with the view of finding out the commission of a crime and the person who have committed the criminal act. The investigation reveals these facts and evidences supporting criminal claims will be presented to courts with the view of proving the crimes. One of the mechanisms of proving crimes is by adducing confessions made by the suspect that he committed or participated in the commission of crime. It should however be borne in mind that such evidence is subject to different rules for their admission or exclusion depending on the jurisdiction to which such evidence is brought to. As such this chapter is meant to discuss the nature, rationale and evolution of laws relating to confession in criminal investigations including the exclusionary rules debate. Furthermore, this chapter is aimed at exploring the national and international human right standards relating to the protection afforded for illegally obtained confession in criminal justice administration.

2.2. Nature, Evolution, Rationale of Laws Relating to Confessions

2.2.1. Meaning of Confession

The term confession refers to statement implicating oneself in a crime.¹⁴ It is a statement by a suspect in which he or she acknowledges that he or she committed or participated in the commission of a crime.¹⁵ It is an admission made at any time by the person charged with a crime making the inference that he committed the crime. It is also an acknowledgement of guilt. However, the meaning of confession in the context of criminal justice has been used differently

¹² Geisler, Norman, and Turek, Legislating Morality: Is it Wise? Is it Legal? Is it Possible?, (Wipf and Stock Publishers, 2003), p.286

¹³ See FDRE Constitution 1995, cited above at note 1, Art. 10; Universal Declaration of Human Rights, Art. 1 and 2,

¹⁴ Michael J. Palmiotto, Criminal Investigation, (4th ed., 2012), p.31

¹⁵ Jones, Evidence § 398 (5th ed. 1958). As cited in M. C. Slough, "Confessions and Admissions," 28 Fordham L. Rev., (1959), p. 96

from jurisdiction to jurisdiction. In some jurisdiction it means the admission of all elements of a crime entailing liability.¹⁶ Such statements could be made to police officers or it could also be made to a court but admission should be given without any reservation of all elements of a crime. At common law, an informal admission made by an accused person, prior to his trial, to a person in authority was known as a confession, an expression which included not only a full admission of guilt but also any incriminating statement.¹⁷ The Law Reform Commission of Hong Kong, in their Report on “Confession Statements and their Admissibility in Criminal Proceedings”, equally described confession in these clearer terms: “When, in the course of an investigation into a criminal offence, a suspect has made a statement to the police tending to show that he has committed the offence, the statement is known as a confession”.¹⁸ In Nigeria a confession is defined as “...an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime.”¹⁹

Though different countries have defined the term confession, it is not however, defined under Ethiopian law.²⁰ But directly or indirectly a reference is made to the use of confession as evidence in the FDRE Constitution,²¹ Criminal Procedure Code²² and Anti-Terrorism Proclamation.²³ As it is provided in these legal instruments, both confession and admission are used in the same provision.²⁴ According to Simeneh Kiros “confession appears to be a statement of admitting guilt and admission is used in the context of admitting relevant evidence, such as, a given item of evidence is what it purports to be or leading to its whereabouts.”²⁵ The Constitution for instance provides that “Persons arrested shall not be compelled to make confessions or admissions ...” Moreover Criminal Procedure Code also used the term

¹⁶ Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868 (1954). As cited in *ibid*, M. C. Slough, 96

¹⁷ Keane, Adrian, and Paul Mc Keown, The modern law of evidence (Oxford University Press, 2014), p.380

¹⁸ Law Reform Commission. "Confession statements and their admissibility in criminal proceedings: Topic 8." (1985), p.5

¹⁹ Section 28 of the Nigerian Evidence Act, as cited in Ibraheem, OjoTajudeen, “The Relevance of Confessions in Criminal Proceedings,” International Journal of Humanities and Social Science., Vol. 3 No. 21 (Special Issue – December 2013), p.291.

²⁰ SimenehKiros, Criminal Procedure Law : Principles, Rules and Procedures, (2010), p.176

²¹ See FDRE Constitution, Art. 19(5), cited above at note 1

²² See Cri.Pro.C., Art. 27(2), 35, 85(1) cited above at note 2

²³ Anti-Terrorism Proclamation, 2009, Proc. 652, Fed. Neg. Gaz., 15th year No. 57, Art. 23(5)

²⁴ It should however be borne in mind that admission is commonly used in civil cases while confession is used in criminal cases.

²⁵ See SimenehKiros, cited above at note 20 p.177

“admission.”²⁶ The Criminal Procedure Code also takes a stand of recognizing both confession in a sense of admitting guilt and also any statement implicating oneself to a crime in other provisions too. Here we can see that confessions or admissions are put in such a way that they are interchangeable.²⁷ The draft evidence rules provides for the definition of admission but not confession. Affording constitutional protection to both admission and confession without discrimination serves the objective of the law against untrustworthy evidence and protection from torture.²⁸ Practically, confession is understood broadly, so as to include admissions of criminal behavior to private parties, admissions to law-enforcement officials not of only guilt but also of other facts that may link a suspect to a crime, and exculpatory statements. For the purpose of this thesis, a reference to confession should be understood to follow the practical understanding of the term not only of admitting the guilt but also any statement from which guilt can be inferred.

2.2.2. Evolution of Laws Relating to Confession

Laws relating to confession have undergone different stages of development. It is fact of history that confessions as evidence in criminal cases have been used since ancient times. For instance old Roman and Greeks laws relied upon torture in order to obtain confessions.²⁹ There was judicially administered confession from “approximately 1250 to the late 1800s” in the western legal tradition.³⁰ The same holds true in Asia as confession was obtained through torture for the purpose of punishment in criminal cases.³¹ Laws relating to confession have developed through time and in the 16th century the privilege against self-incrimination derived from a Latin maxim, “nemo tenetur prodere se ipsum” which refers to “No one should be required to betray himself” is incorporated in English law³² and 17th century the English court is given the power to exclude

²⁶ See Cri.Pro.C., cited above at note 2, Art 134 (1)

²⁷ Id., Art. 27(3) and 35

²⁸ See Simeneh Kiros, cited above at note 20, p.177

²⁹ Freedman, Samuel, “Admissions and Confessions,” RE Salhany and RJ Carter, Studies in Canadian Criminal Evidence (1972), As cited on p.98; Evans, Malcolm, “The Prohibition of Torture in Exceptional Circumstances” International and Comparative Law Quarterly, vol.63, no. 02 (2014), p.133

³⁰ John H. Langbein (ed.), The legal History of Torture (Oxford University Press, 2004), p.93

³¹ Chandler, David Porter, Voices from S-21: Terror and history in Pol Pot's secret prison (Univ. of California Press, 1999), p.117

³² Fisher, Jonathan. The law of investor protection (Sweet & Maxwell, 2003), p.590

improperly obtained evidences.³³ The same development occurred in American law in the 17th and 18th centuries. In 1791, the Fifth Amendment's to United States Constitution provide that "no person...shall be compelled in any criminal case to be a witness against himself."³⁴ Through time an enforcement of privilege against self-incrimination and exclusion of improperly obtained evidence rules developed world wide and in 20th century major international, regional, and national human right instruments incorporate prohibition against torture, the right to remain silent, prohibition against self-incrimination and exclusion of evidences obtained through improper methods including torture and treats of any kind in interrogation.

In Ethiopia a formal constitutional rule dealing with confession in criminal matters developed recently. Though the 1931 Constitution is regarded as the first modern Constitution in Ethiopian history, it does not however incorporate protections against illegally obtained confessions. Even John H. Spencer in his book said "...I was unsuccessful in introducing the privilege against self-incrimination..." in giving personal account of his attempt in legal reform at the time of constitutional revision of 1955.³⁵ But an important development in this regard however is the fact that the Ethiopian Criminal Procedure Code adopted in 1961 incorporated protection against illegally obtained confessions.³⁶ New constitutional developments came with the adoption of the 1987 Constitution which prescribes protection against self-incrimination and exerting compulsion in the form of either violence or pressure.³⁷ Currently, there are rules enumerated in the FDRE Constitution and also subordinate legislations.

³³ Terry Johnson, "Legal Rights," Info base Publishing (2005), p.37

³⁴ Pallitto, Robert M., eds., Torture and state violence in the United States: a short documentary history (JHU Press, 2011), p.39

³⁵ Spencer, John H, Ethiopia at bay: A personal account of the Haile Selassie years. (Tsehai Publishers, 2006), 258

³⁶ See Cri.Pro.C., cited above at note 2, Art. 27 and Art 35(2)

³⁷ The People's Democratic Republic of Ethiopian Constitution, 1987, Proc. No. 1, Neg. Gaz. Vol. 47 No. 1, Art. 45(4)

2.2.3. Type of Confession: Formal and Informal Confessions.

Based on the place where the confession is made or to whom the confession is made, it can be divided into formal or judicial confessions and informal or extra-judicial confessions.³⁸ When we say judicial confession we are referring to a confession made before a court of law.³⁹ Any court may record any statement or confession in Ethiopia for the purpose that it be used latter in trial of the suspect.⁴⁰ Such confession is also regarded as judicial confession. Not only this but also an admission of guilt before a trial court is referred to as confession. The informal or extra judicial confessions are when the confession is made to any individual or organ other than court.⁴¹ It is to mean out of court admissions. For instance it can be made to a police or other law enforcement agent during investigations. Both judicial and extrajudicial admissions are subject to rules for their admission.⁴²

2.2.4. Rationales of Laws Relating to Confession and the Exclusionary Rule

Laws relating to confessions are aimed at protecting the accused or criminal suspects from unfair and possibly injustice creating instances of use of illegally obtained evidences. It should however be stressed here that such rules have been subject to much controversy and debate for long now.⁴³ Those who object to protection against self-incrimination, right to remain silent or the exclusion of illegally obtained confession contend that such rules only protect the guilty people rather than innocent ones and it should be abolished in order to protect the society in general.⁴⁴

³⁸ Roberts, Paul, and Zuckerman, Criminal Evidence (Oxford University Press, 2010), p.522; Monir, M., Textbook on the Law of Evidence (Universal Law Publishing, 2013), p.99; Sakhrani, Monica, Citizen's Guide to Criminal Law (Universal Law Publishing, 2008), p.98

³⁹ Ibid.

⁴⁰ See Criminal Procedural Code, cited above at note 2, Art 35

⁴¹ See Roberts, Paul, and Adrian Zuckerman, cited above at note 38

⁴² Extra judicial confessions, unlike the judicial confessions must pass the strict test of admissibility. A requirement of voluntariness applies to judicial admission and an additional requirement of reliability applies to extra judicial confessions. Depending on the jurisdiction, confession could be subjected to additional requirements.

⁴³ Hsieh, Kuo-hsing, The Exclusionary Rule of Evidence: Comparative Analysis and Proposals for Reform (Ashgate Publishing, Ltd., 2014), 49; Del Carmen, Rolando115, *Infra* note 42; Acker, James R., and David C. Brody. Criminal procedure: A contemporary perspective (Jones & Bartlett Learning, 2004), p.79.

⁴⁴ Cochran, Clarke, et al, American public policy: An introduction (Cengage Learning, 2011), p.154.

They say that society should not be punished for wrong doing of the police.⁴⁵ It is not even helpful for the search of truth in criminal proceedings.

The other group of people advocates for the existence of rules relating to confession and exclusionary rule taking into account the mere existence of the rationale of the rule itself. The reasons provided includes exclusionary rules are one mechanism of banning the police officers from resorting to the use of improper methods of interrogations. Such rules also protect the innocent as the person under torture tells not the truth but what the torturer wants him to tell and as such confessions obtained under improper mechanisms are believed to be untrustworthy.⁴⁶ The burden of proof in criminal case is on prosecution and the accused should not be forced to assist prosecution by betraying himself. Generally, the above basic rationales for the exclusionary rule can be categorized into i.e. 'reliability principle' protective principle' and the disciplinary principle'.⁴⁷

2.2.4.1. Reliability Principle

According to this principle confessions obtained through improper methods should be excluded from the determination of guilt of person for the fact that such evidences are untrustworthy.⁴⁸ It is to mean that evidence of such type should be excluded when its “reliability is impaired or the accused’s ability to test its reliability has been impaired”.⁴⁹ This principle was first reflected in the decision of Nares J. and Eyre B. in the case of R v Warickshall (1783):

Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or not entitled credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but confessions forced from the mind by the flattery of hope, or by torture of fear, comes in so questionable a

⁴⁵ Del Carmen, Rolando, Criminal procedure: Law and practice (Cengage Learning, 2013), p.113

⁴⁶ David Jr. Robinson, Massiah, and Escobedo, "Rationales for the Exclusion of Confessions," J. Crim. L. Criminology & Police Sci. 412 (1965), p.413

⁴⁷ Babalola, Afe, Law & practice of evidence in Nigeria (Sibon Books Limited, 2001), P.70

⁴⁸ See Hsieh, Asst Prof Kuo-hsing, cited above at note 43, p.37

⁴⁹ See Keane, Adrian, and Paul McKeown, cited above at note 17, p.56

*shape when it is to be considered as the evidence of guilt, that no credit to be given to it; and therefore it is rejected.*⁵⁰

As such confession obtained involuntarily may not be reliable⁵¹ and we cannot afford to convict fellow human beings for the evidences we could not rely on.

2.2.4.2. Disciplinary Principle

Disciplinary principle is based on the idea that those who enforce law should themselves be subjected to law and should respect the law.⁵² Under disciplinary principle the rationale for excluding evidences obtained improperly with the violation of suspect's due process right is for the purpose of discouraging police officers not to engage in torturing, threatening, false promising, etc. to the accused in order to obtain evidences.⁵³ Disciplinarians believe that evidence should be excluded as a "...means of deterring the police from future improprieties by depriving them of fruits of the transgression in question".⁵⁴

2.2.4.3. Protective Principle

The protective principle also called as right based approach is aimed at excluding evidence for the purpose of protecting the civil rights.⁵⁵ Courts should be in position to uphold the rights of individuals involved in criminal justice system.⁵⁶ Suspects or accused person should suffer no harm as a result of violation of his or her right.⁵⁷ This is provided by way of remedy to the violation of right of individuals.⁵⁸ Allowing suspects to sue police officer who have violated his right per se will not place individuals in a position they would have been if not for the violation.⁵⁹ Therefore, evidences obtained through improper means should be excluded.

⁵⁰ I Leach 263, 168 Eng. Rep. 234 (Q.B. 1783) As cited on Hsieh, Asst Prof Kuo-hsing, cited above at note 43, p.37

⁵¹ Ibid.

⁵² Gans, Jeremy, and Andrew Palmer, Australian Principles of Evidence (Psychology Press, 2005), p.9

⁵³ See Keane, Adrian, and Paul McKeown, cited above at note 17

⁵⁴ Andrew L.-T. Choo, Evidence (Oxford University Press, 2012), p.171

⁵⁵ See Keane, Adrian, and Paul McKeown, cited above at note 17

⁵⁶ See Gans, Jeremy, and Andrew Palmer, cited above at note 52, p.10

⁵⁷ Ibid.

⁵⁸ See Keane, Adrian, and Paul McKeown, cited above at note 17

⁵⁹ See Gans, Jeremy, and Andrew Palmer, cited above at note 52, p.10

2.2.4.4. Integrity Principle

Confessions obtained through illegal means should be excluded with the view of “maintaining the integrity of the criminal justice process”.⁶⁰ If courts give recognition to illegality then integrity of courts would be at jeopardy. Here the emphasis is given for the legitimacy or integrity of the court and perception that the people may have towards the court for not excluding such evidences.

2.3. International and National Human Right Standards vis-à-vis Confession

2.3.1. International Human Right Standards of Admissibility of Confession

Major international human right instruments incorporate rules relating to confession by way of affording protection to criminal suspects.⁶¹ Protection against illegal confession is afforded as part of free and fair trial rights.⁶² “The fair trial rights formed part of basic human right expressly since its inclusion in the 1948 Universal Declaration of Human right.”⁶³ Later, the ICCPR provided that anyone who is charged with a criminal liability has, in relation to the determination of the charge, the right not to be compelled to be a witness or confess guilt against himself.⁶⁴ Such protection against self-incrimination is aimed at protecting the defendant from being forced to give a confession. The protection against self-incrimination applies to absence of any direct or indirect pressure exerted by the investigating police officer with the view of obtaining confession.⁶⁵ A human right committee emphasized that laws at national level must ensure exclusion of illegally obtained evidence and for this to happen it is the duty of government to

⁶⁰ See Keane, Adrian, and Paul McKeown, cited above at note 17, p.56

⁶¹ The following instrument incorporates rules relating to confession. International convention of civil and political right, Universal declaration of human right, the UN convention against torture and other Cruel, Inhumane or Degrading Treatment or Punishment, UN Convention on the Rights of the Child, and regional instruments like the European convention on Human Right, African Charter on Human and Peoples' Rights and The Inter American Convention on human Rights.

⁶² Easton, Susan, Silence and Confessions: The Suspect as the Source of Evidence (Palgrave Macmillan, 2014), p.68

⁶³ Van der Walt, Tharien, and Stephen De la Harpe, "The right to pre-trial silence as part of the right to a free and fair trial: An overview," African Human Rights Law Journal Vol. 5, no. 1 (2005), p.70

⁶⁴ See ICCPR, cited above at note 4, Art. 14 (3) (g)

⁶⁵ Human Rights Committee, "General Comment No. 32; Article 14: Right to equality before courts and tribunals and to a fair trial," UN Doc. CCPR/C/GC/32, 23 August 2007, Para.41

bear the burden of proof.⁶⁶ They also said information about how the confession is obtained should be available in order to be able to refer it to a later stage of trial.⁶⁷

The Convention against Torture provides that governments should “ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings.”⁶⁸ The same protection holds true in relation to the protection to be afforded to children according to the UN Convention on the Rights of the Child.⁶⁹ According to UN General Assembly resolution, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides;

*It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment.*⁷⁰

Obligations of not invoking evidences obtained through torture have further been protected in accordance with the annual UN General Assembly and the Human Rights Council resolutions on torture.⁷¹

2.3.2. Regional Human Right Standards of Admissibility of Confession

Various regional human right standards affords protection against illegally obtained evidence. The African Charter on Human and Peoples' Rights indirectly recognizes the right to fair and

⁶⁶ Id., para.6 and para. 41

⁶⁷ Id., para. 33

⁶⁸ Assembly, UN General."Convention against torture and other cruel, inhuman or degrading treatment or punishment." Constitution 5, no. 7 (1984): 5. Art. 15

⁶⁹ Assembly, UN General."Convention on the Rights of the Child."United Nations, Treaty Series 1577, no. 3 (1989).Article 40 (2) (b) (iv)

⁷⁰ UN General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment : resolution / adopted by the General Assembly, 9 December 1988, A/RES/43/173, principle 21.

⁷¹ UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment : resolution / adopted by the General Assembly, 26 March 2010, A/RES/64/153 , Art. 15., UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 4 March 2014, A/HRC/25/60, Para, 20

free trial.⁷² This is because the protection is afforded to dignity of human being, his liberty and security, right to be heard including right to independent court but no express recognition privileges against self-incrimination and the right to remain silent.⁷³ It should however be borne in mind that the African Commission on Human and Peoples' Right (African Commission) is given the mandates of providing persuasive i.e. legally non-binding rules and principles of solving legal problems.⁷⁴ Accordingly the African Commission developed Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and recognized the necessity of regulating confession or incorporating privilege against self-incrimination.⁷⁵ The Principles and Guidelines provide that taking advantage of the situation of the suspect for the purpose of obtaining confession and subjecting such person to any coercion is prohibited.⁷⁶ The principle protects suspects from involuntary confession and goes further in delimiting what sort of confessions are regarded as illegal. For instance confessions given with coercion, confession obtained with a serious violation of internationally protected human rights and confession given incommunicado detention are not admissible as evidence except in the prosecution of the perpetrators of the violations.⁷⁷

Although there is no express provision regulating self-incrimination in the European Convention on Human Rights and Fundamental Freedoms, the European Court for the Protection of Human Rights and Fundamental Freedoms ruled that it is implicit in the right to fair trial provided.⁷⁸ The court noted that protection against self-incrimination is one aspect of fair trial rights and it is an internationally recognized standard in police interrogation of suspects.⁷⁹

⁷² See Van der Walt, Tharien, and Stephen De la Harpe, cited above at note 63, p.72

⁷³ Ibid.

⁷⁴ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art. 45(1)b.

⁷⁵ The African Commission on Human and Peoples' Rights, Principles and Guidelines on the right to fair trial and legal assistance in Africa, (ACHPR), (2001) DOC/OS (xxx) 247.

⁷⁶ Id., Section M(7)(d) and (e).

⁷⁷ Id., section N(6)g, e1, d2.

⁷⁸ K v. Austria, 16002/90, Judgment 2.6.1993.

⁷⁹ Ibid.

Inter-American human right convention also recognizes the right not to be compelled to be a witness against himself or to plead guilty.⁸⁰ It specifically provides that a confession of guilt by the accused shall be valid only if it is made without coercion of any kind.⁸¹ The Inter-American Convention to Prevent and Punish Torture provides the inadmissibility of confession evidence obtained through torture except against the person accused of committing the torture itself.⁸²

2.3.3. International Criminal Court's Human Right Standards of Admissibility of Confession

It is also interesting to see that rules of exclusion have been adopted in rules of procedure and evidence adopted for the various international criminal courts. Rome Statute of the International Criminal Court guarantees the inadmissibility of confession evidence in violation of human rights of suspects.⁸³ The International Criminal Tribunal for the Former Yugoslavia (ICTY) also adopted a rule on the exclusion of evidence obtained in violation of human rights law.⁸⁴ Likewise, the International Criminal Tribunal for Rwanda (ICTR) adopted an identical provision to that of the ICTY.⁸⁵

2.3.4. Burden of Proof

In relation to this burden of proof there are some international human right documents showing who bears the burden of proving the legality of confession made. One of such document is the Human Rights Committee's General Comment on fair trial rights. According to the general comment 32 "... the burden is on the State to prove that statements made by the accused have

⁸⁰ Organization of American States (OAS), American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), 22 January 1969, Art. 8 (2)g

⁸¹ Id., Art. 8(3)

⁸² Organization of American States (OAS), Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS Treaty Series, No. 67. Article 10

⁸³ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, article 69(7)

⁸⁴ International Criminal Tribunal Former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev.44 (1994 – as amended 1995 and 1997), rule 95

⁸⁵ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, ITR/3/Rev.1 (1995 – as amended 1998), rule 95

been given of their own free will.”⁸⁶ According to Torture Committee, states are duty bound to investigate any allegation of torture.”⁸⁷ This view is also recognized by the Special Rapporteur on Torture which said “where allegations of torture and or other forms of ill- treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill-treatment.”⁸⁸

2.3.5. Evidentiary Sufficiency of Confession and Concern for Human Right

Regarding the evidentiary sufficiency of confession the European committee for the Prevention of Torture Standards and Special Rapporteur on Torture have expressed their concern that if one is to be convicted based on the confession obtained it will create conducive environment for the occurrence of torture itself.⁸⁹ The Special Rapporteur on Torture and European Committee for the Prevention of Torture has noted that for the purpose of proving guilt of the suspect the states should be able to adduce other reliable evidence than confession per se as it is insufficient for conviction.⁹⁰ It is of vital importance to secure through other methods of investigation evidences which are in themselves sufficient for conviction of the alleged offender.

2.3.6. The Role of Other Fundamental Rights Determining Admissibility of Confession

2.3.6.1. Presumption of Innocence

The presumption of innocence dictates that one is presumed innocent until it is otherwise proved.⁹¹ It refers to the fact that burden of proof regarding the guilt of the person is on the one

⁸⁶ Communications No. 1033/2001, Singarasa v. Sri Lanka, para.7.4; No. 253/1987, Kelly v. Jamaica, para. 7.4. as cited on cited above at note 65 General Comment 32, para, 42

⁸⁷ PE v France, Communication 193/2001, Views of 21 November 2002. As cited on Newton, Michael A., Terrorism: International Case Law Reporter 2008 (Oxford University Press, 2010), Vol. 1.p.481

⁸⁸ UN General Assembly, Report of Special Rapporteur on the question of torture and other cruel, inhuman and degrading treatment or punishment,” U.N. Doc. A/56/156, (3 July 2001). Para 39(j)

⁸⁹ Id., Report of the Special Rapporteur on torture, A/HRC/25/60, para. 21

⁹⁰ European Committee for the Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CPT) (2002) Standards, CPT/Inf/E/(2002) 1—Rev 2009

⁹¹ See ICCPR, cited above at note 4, Art. 14(2)

who declares, not on the one who denies it.⁹² As such the prosecution bears the burden of proving the guilt of the accused by collecting and presenting to the court of law legally admissible evidence that can convince beyond reasonable doubt or clear and convincing evidences. This is right of an accused person in a criminal trial. Accordingly major international human right instruments have recognized this right to presumption of innocence.⁹³ Presumption of innocence is linked to illegally obtained confession in multiple ways. First due to the presumption of innocence, a person cannot be compelled to confess guilt or give evidence against him/herself. It is for the state to produce evidence of guilt, not for the defendant to prove innocence. It also helps to determine who the duty bearer is in proving the voluntariness of the confession itself.

2.3.6.2. The Right to a Fair Trial

Rules relating to confessions are also linked to fair trial rights.⁹⁴ One of the things that bring about fair trial is the exclusion of improperly obtained evidence.⁹⁵ In terms of the right to a fair trial for defendants, they have the right not to be compelled to testify against themselves or to confess guilt. This is protection against self-incrimination, which aims to protect the defendant from being forced to give a confession. If a person is forced to give a confession, this confession should not be used as evidence in trial. There is good reason to doubt the accuracy and veracity of a forced confession, and the use of a confession like this would entail a clear violation of the right to fair trial. Before a person is questioned by the police, he or she ought to be made aware of their right not to testify against themselves. Exclusion of testimony as to circumstances of a

⁹² Ryan, Andrea, Towards a System of European Criminal Justice: The Problem of Admissibility of Evidence (Routledge, 2014), p.114

⁹³ See UDHR article 11, ICCPR Art. 14(2), African Charter on Human and Peoples' Rights Art. 7(1), The Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe Art. 6.2, Convention on the Rights of the Child Art. 40 of the, ICC Statute Art. 66

⁹⁴ Choo, Andrew L-T., and Susan Nash, "Improperly obtained evidence in the Commonwealth: lessons for England and Wales?," International Journal of Evidence and Proof, Vol. 11, no. 2 (2007), p.79

⁹⁵ Duff, Peter. "Irregularly obtained real evidence: The Scottish solution?." International Journal of Evidence and Proof Vol. 8, no. 2 (2004), p.83., Clough, Jonathan, "The Exclusion of Voluntary Confessions: A Question of Fairness," University of New South Wales Law Journal (1997), p.28

confession can deprive a defendant of a fair trial when the circumstances bear on the credibility as well as the voluntariness of the confession.⁹⁶

2.3.6.3. Prohibition Against Torture and Inhuman Treatment

The Convention against Torture defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession...."⁹⁷ Such act may be inflicted by any official acting in an official capacity.⁹⁸ The Convention against Torture provides that confession secured out of torture cannot be invoked as evidence against the suspect.⁹⁹ Therefore, the strong protection against torture or inhumane treatment meant the protection against certain confession obtained through the same method. The rules of exclusion of evidence obtained through torture and inhumane treatment is a mechanism of minimizing the act of torture or inhuman treatment as it is also a mechanism of keeping the trial fair.

2.3.6.4. The Right to Counsel

The right to counsel refers to the right to get assistance from counselor.¹⁰⁰ This right is part of fair trial rights of individuals so that the counselor representing the accused advise him of his right, ensure that the right of suspect is not violated, represent the accused in presenting objection to admissibility of evidences presented, also cross examine the witnesses presented and many more.¹⁰¹ The government is represented by public prosecutor who is trained in law and it would be unfair and unequal to try suspects without such knowledge and representation. Therefore the international human right instruments provided for the right to counselor as part of a bundle of accused persons' rights. According to the ICCPR accused persons have a right to be

⁹⁶ Crane v. Kentucky, 476 U.S. 683 (1986) as cited on Finkelman, Paul (ed.) Encyclopedia of American Civil Liberties (Routledge, 2013), P.375

⁹⁷ The Convention against Torture and other cruel, Inhuman or Degrading Treatment or Punishment, cited above at note 68, Art. 1(1)

⁹⁸ Ibid.

⁹⁹ Id., Art. 15

¹⁰⁰ Siegel, Larry, and John Worrall, Introduction to Criminal Justice (Cengage Learning, 2011.), P.377; Acker, James R., and David C. Brody, Criminal Procedure: A contemporary Perspective. (Jones & Bartlett Learning, 2004), P.329

¹⁰¹ Powell v. Alabama, 287 U.S. 45 (1932), Betts v. Brady, 316 U.S. 455 (1942)

counseled by a lawyer including the right to be informed of the right to lawyer.¹⁰² The representation of accused by counsel ensures the observance of the right of the accused from involuntary confession. Therefore an access to counsel is a mechanism of enforcing constitutional right to protection against self-incrimination.

2.3.7. Comparative National Standards for the Admissibility of Confessions

A comparative study of admissibility rules in civil and common law countries are made in this part of the study in order to see how different selected countries have afforded the protection to criminal suspects from illegally obtained evidences. Both common law and civil law systems are scrutinized. As a representative of the two systems United States and England from common law, and French and Germany from civil law legal system are chosen in this study. Additionally, as a source to Ethiopian Criminal Procedure Code Indian and Malayan system is compared.

2.3.7.1. Admissibility of Confessions in Civil Law Countries

2.3.7.1.1. French Legal System

In France voluntarily obtained confession is treated as superior evidence of all evidences presented.¹⁰³ But the express recognition of right to silence and protection against self-incrimination is not provided in the Constitution and Criminal Code procedure. Like all other evidence it is up to the judge to assess the admission of the confession obtained as the law provides that "...offences may be proved by any mode of evidence and the judge decides according to his innermost conviction ... and ...confessions, as any other type of evidence, are left to the free appreciation of the judges."¹⁰⁴ Although it is a crime for police officers to engage in obtaining confession through the utilization of confession, there is no strict observation of rules of confession.¹⁰⁵

¹⁰² See ICCPR, cited above at note 4, Article 14, section 3

¹⁰³ Kusonsinwut, Siriphon, A comparative Study of Confession Law: The Lesson for Thailand Regarding the Exclusionary Rule and Confession Admissibility Standard, (ProQuest, 2008), P.201

¹⁰⁴ Criminal Procedure Code of Republic of France, Art. 427 and 428.

¹⁰⁵ Ma, Yue. "Comparative analysis of exclusionary rules in the United States, England, France, Germany, and Italy." Policing: An International Journal of Police Strategies & Management., vol.22, no. 3 (1999), p.289

Still however there are available safeguards including non-admission of evidences gathered through torture or overly oppressive methods¹⁰⁶ and the right to be interrogated or confronted in the presence of their advocates.¹⁰⁷ Regarding the methods prohibited interrogation even if there is no explicit provision in the Criminal Procedure Code decision as to the admissibility is taken on a case by case basis.¹⁰⁸ For instance extensive lengthy interrogation, hypnotism and the administration of drugs, the use of lie detector are prohibited.¹⁰⁹ If there is no harm occurring to the suspect however, the French Court of Cassation opposed nullifying such evidence.¹¹⁰

2.3.7.1.2. German Legal System

The Basic Law of Germany does not explicitly incorporate the right to remain silent and also the right to protection against self-incrimination. It should be borne in mind that the German Constitution does not incorporate rules dealing with exclusion of illegally obtained confessions. There are however, limited statutory legislation requiring or imposing exclusion of evidence by way of remedies. Section 136(a) of Criminal Procedure Code provides for Prohibited Methods of Examination.¹¹¹ Accordingly,

*“the accused's freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis.”*¹¹²

There is also a general protection provided which says any measure impacting one's ability or memory is not permitted.¹¹³ This applies irrespective of the accused's consent and any evidence

¹⁰⁶ Vogler, Richard, A world view of criminal justice (Burlington: Ashgate, 2005), p.17

¹⁰⁷ See France Criminal Procedure Code, cited above at note 104, Art. 114

¹⁰⁸ Id., Articles 171 and 802

¹⁰⁹ See Kusonsinwut, Siriphon. cited above at note 103, p.201

¹¹⁰ Thaman, Stephen C., Exclusionary Rules in Comparative Law (Springer Science & Business Media, 2012), Vol. 20, p145

¹¹¹ Code of Criminal Procedure in the version published on 7 April 1987 (Federal Law Gazette [Bundesgesetzblatt] Part I p. 1074, 1319), as most recently amended by Article 3 of the Act of 23 April 2014 (Federal Law Gazette Part I p. 410), Section 136(a).

¹¹² Id., Art. 136

¹¹³ Ibid.

obtained in violation of the above protection afforded to the accused will be excluded from consideration of guilt.¹¹⁴

German case law suggests that irregularities followed during investigation could be a reason for exclusion of illegally obtained confession. These are commonly referred to as non-standardized exclusionary rules.¹¹⁵ But such non-standardized exclusionary rule applies in grave situations. For instance if the accused is not warned of the right to respond to the accusation or the right to remain silent or if he is not told his right to counsel and made statement without knowing his right such statement made will be excluded.¹¹⁶ The jurisprudence of courts of Germany shows that if a suspect's free will is affected in any way that will result in exclusion of illegally obtained evidence.¹¹⁷ Possible examples are lack of sleep, giving medicine for waking up suspects for interrogation, to tell suspects that bone-crushing evidence of guilt is at hand (when in fact they don't have one), to threaten to arrest if not cooperating, and promise of exemption from punishment if a suspect incriminates an accomplice.¹¹⁸ As to the use of indirect evidence collected through illegal means there is no settled jurisprudence on the matter.¹¹⁹

2.3.7.2. Admissibility of Confessions in Common Law Countries

2.3.7.2.1. England

The laws giving protection against illegally obtained evidence in criminal prosecution in England are found on statute law, case law and the European Convention on Human Rights. Accordingly any evidence obtained by torture is inadmissible in court of law.¹²⁰ Not only confessions obtained through torture but also confessions obtained through any other improper methods of gathering evidence are excluded from the consideration of guilt of the accused.¹²¹ This includes

¹¹⁴ Ibid.

¹¹⁵ See Thaman, Stephen, cited above at note 110, p.118

¹¹⁶ BGHSt 39, 349, 352 (10.12.1993) as cited on ibid.

¹¹⁷ Id., p.132

¹¹⁸ Ibid.

¹¹⁹ Id., 133

¹²⁰ Paye, Jean-Claude, Global war on liberty (Telos Press Publishing, 2007), p.90

¹²¹ National Legislative Bodies / National Authorities, United Kingdom: The Police and Criminal Evidence Act 1984 (Application to immigration officers and designated customs officials in England and Wales) Order 2013, 25 June 2013, 2013 No. 1542, Article 78(1).

confessions obtained through use any kind action having negative implication on fair trial rights may be excluded.¹²² Article 78(1) of the Police and Criminal Evidence Act 1984 (PACE) gives judges wide discretionary power to exclude evidence adduced by prosecutor if the circumstance of interrogation or the circumstance in which the confession is obtained indicates that admission of such evidence jeopardizes the fair trial.”¹²³ The Human Rights Act 1998, makes the jurisprudence of ECHR part of the law of the land of England, as if it is “directly enforceable in domestic courts.”¹²⁴ *Oppression* and unreliability being the two major conditions for exclusion of confessions obtained, the meaning and instances of the two are worth discussing.¹²⁵ Accordingly there is an operation if confession is administered through torture, inhuman or degrading treatment, and the use or threat of violence.¹²⁶ Confession obtained after thirteen hours of interrogation shouting at the suspect that they wanted him to say something was regarded as operational.¹²⁷ While operation is the use torture and the like acts, unreliability is a circumstance which renders the confession unreliable. Confessions are regarded as unreliable if a suspect was not given proper rest,¹²⁸ if it was made as a result of an inducement¹²⁹, where a suspect was not cautioned at the start of an interview,¹³⁰ and where the police failed to make a proper record of an interview in breach of the Codes of Practice.¹³¹ The physical condition and emotional state at the time of giving the confession, the suspect’s mental condition, fitness (absence of administration of drug), etc. are taken into consideration in determining the voluntariness of confession.¹³²

¹²² Ibid.

¹²³ Ibid.

¹²⁴ United Kingdom: Human Rights Act 1998 [United Kingdom of Great Britain and Northern Ireland], 9 November 1998, Art. 3(2)b.

¹²⁵ PACE, cited above at note 121, Art. 76(2)

¹²⁶ Id., Art.76(8) of PACE.

¹²⁷ R v Paris (1993) 97 Cr. App. R. 99; [1994] Crim LR 361, CA.

¹²⁸ R v Trussler [1988] Crim LR 446.

¹²⁹ R v Matthias [1989] TLR, 24 August.

¹³⁰ R v Doolan [1988] Crim LR 447.

¹³¹ R v Delaney [1988] TLR 30 August, CA.

¹³² R. v. McGovern, (1991) 92 Crim. App. 228, also R. v. Sylvester, [2002] EWCA (Crim) 1327., R. v. Walker, [1998] Crim. LR 211.

2.3.7.2.2. United States of America

The Fifth Amendment to the U.S. Constitution provides that no persons shall be compelled to be witnesses against themselves in criminal proceedings. Confessions are legal if they are voluntarily made, in accordance with Miranda requirement, corroborated by other evidence and in compliance with respect for right to counsel.¹³³ The Miranda requirement came from this notorious case of *Miranda v. Arizona*, and in the courts holding it is provided that unless the suspect “voluntarily, knowingly and intelligently” waived his right, it is prohibited to use confessions obtained in the absence of procedural safeguards of protection against self incrimination.¹³⁴ The procedural safeguards includes the right to be warned of the right to remain silent, that any statement he does make may be used as evidence against him and right to attorney.¹³⁵ If one claims his attorney no questioning is allowed until the attorney is present.¹³⁶ Even he consented to answer, he may refuse to respond to questions of his choice.¹³⁷

Involuntarily obtained evidence is excluded from the determination of guilt of the accused and the exclusion of involuntary confessions was required by the privilege against compelled self-incrimination contained in the Fifth Amendment.¹³⁸ In *Brown v. Mississippi*, a United States Supreme Court ruled that a defendant's involuntary confession that is extracted by police violence cannot be entered as evidence and violates the Due Process Clause of the Fourteenth Amendment.¹³⁹ Confession is treated as voluntary if it was the outcome of free will the confessor.¹⁴⁰ But if it shown that confession is extracted through the threat or application of force, through a false promise not to prosecute, or through a promise of lenient treatment it will be regarded as involuntarily confession which is subject to exclusion.¹⁴¹ A confession obtained

¹³³ Bacigal, Ronald, and Mary Tate, *Criminal law and procedure: An overview* (Cengage Learning, 2014), p.229

¹³⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Hopt v. Utah*, 110 U.S. 574 (1884) , *Bram v. United States* .

¹³⁹ *Brown v. Mississippi*, 297 U.S. 278, (1936), please use more recent decisions since the dynamics of this partticular area of law makes your cite irrelevant and less revealing.

¹⁴⁰ *United States of America v. Rodolfo BETHANCOURT*, Appellant United States Court of Appeals, Third Circuit. No. 94-5670. Decided: September 6, 1995, *United States v. Patrick William Swint*, 15 F.3d 286, 289 (3d Cir. Pa. 1994)] No. 93-7316. Argued Dec. 17, 1993. Decided Jan. 14, 1994.,

¹⁴¹ *LaFave*, Wayne R., and H. Jerold."Criminal Procedure." (1992), 294, See, *Arizona v. Fulminante*, 499 U.S. 279 (1991); *Malinski v. New York*, 324 U.S. 401 (1944).

as a result of fear, hope and threat is not admissible.¹⁴² Not only physical torture, but other overtly coercive tactics as well have been condemned. *Chambers v. Florida* held that five days of prolonged questioning following arrests without warrants and incommunicado detention made the subsequent confessions involuntary.¹⁴³

In general confession is involuntary if it is not the product of a rational intellect and free will of the suspect.¹⁴⁴ The determination as to whether a confession is involuntary is based on the “totality of the circumstances surrounding a confession”.¹⁴⁵ In evaluating the totality of the circumstances, courts consider a number of factors including physical abuse and threats of abuse by the police or angry crowds, psychological abuse and manipulation, threats, rewards, or trickery inducing a suspect to confess; the length, time, and place of questioning and the number of police officers involved in interrogation, refusal to permit a suspect to consult with an attorney, friends, or family’ the age, education, and mental and emotional development of the defendant and a failure by the police to follow proper legal procedures, including the Miranda warning.¹⁴⁶

2.3.7.2.3. India

The Indian Constitution provides for protection against self-incrimination.¹⁴⁷ In the subordinate legislations distinction is made between admission and confession.¹⁴⁸ An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant

¹⁴² Child, Barbara, "Invuntary Confession and the Right to Due Process: Is a Criminal Defendant Better Protected in the Federal Courts Than in Ohio," The Akron L. Rev. Vol. 10 (1976), P.268, Marcus, Paul, "It's Not Just About 'Miranda': Determining the Voluntariness of Confessions in Criminal Prosecutions," Valparaiso University Law Review Vol. 40, no. 3 (2006), p.608 footnotes.

¹⁴³ *Chambers v. Florida*, 309 U.S. 227 (1940).

¹⁴⁴ Ferdico, John N., Henry Fradella, and Christopher Totten. *Criminal procedure for the criminal justice professional*. Cengage Learning, 2012, p.522.

¹⁴⁵ *Haynes v. Washington*, 373 U.S. 503, 533–534 [1963]. As cited on Matthew Lippman, “Criminal Procedure”, sage publication (2011), p. 301, Bloom, Robert M., and Mark S. Brodin, Criminal procedure: the Constitution and the police (Aspen Publishers Online, 2006), p.238; Zulawski, David E., et al, Practical aspects of interview and interrogation (CRC press, 2010), p.49

¹⁴⁶ *Spano v. New York*, 360 U.S. 315, 323 [1959] as cited on Matthew Lippman, “Criminal Procedure,” sage publication (2011), p.301-302.

¹⁴⁷ The Constitution of India, 26 January 1950, Article 20(3).

¹⁴⁸ Indian Evidence Act, Art.17-23 and 31 of Indian Evidence Act 1872 states about the admission and its relevancy and Art. 24 -30 of Indian Evidence Act 1872 describes the confession.

fact in issue¹⁴⁹ while confession is a direct admission or acknowledgement of guilt.¹⁵⁰ Even if admission to police is admitted as evidence in court of law, confessions to police officers are not admissible as evidence.¹⁵¹ This is because no person can ensure that confessions made to police are voluntary and the only evidence which is certain to be voluntary is those made to court. At the heart of this exclusion is unreliability. But other evidences found as a result of confession made to a police are not excluded.¹⁵² For instance if one confessed the murder of someone and the corpus is shown, the corpus found as a result of confession will be admitted. However, any magistrate can record the confessions made voluntarily by the accused person by explaining the right to remain silent to him.¹⁵³

It is interesting to see the Indian law requires the confession made to be collaborated by other evidences. The evidentiary sufficiency of confession is minimal.¹⁵⁴ If it *appeared* to the court that confessions are the outcome of inducement, threat or promise it will be subject to exclusion.¹⁵⁵ As the law requires the appearance of the fact per se, it seems there is a lesser degree of probability than proof. As an exception to this however, Terrorist and Disruptive Activities Act of 1987 allows admissibility of confession made to police officers.¹⁵⁶ The supreme court of India upheld it taking into account the type of crime which is terrorism.¹⁵⁷ The act which replaced the Terrorist and Disruptive Activities Act of 1987 is Prevention of Terrorism Act of 2002. This Act also allowed the admission of confession of terrorism suspects. Under the latter act, confession by co-accused could no longer be used as evidence against the accused.¹⁵⁸ It should however be borne in mind that the mere fact that confession terrorism suspect are admitted does not mean it is without safeguards. Section 32 of the Prevention of Terrorism Act of 2002 requires confession to be made to a police officer not lower in rank than a Superintendent of Police, they shall warn the suspect of his right to remain silent, if he chooses

¹⁴⁹ Azimaddy and others v. Emp. 44 C.I.J. 253.

¹⁵⁰ PakalaNarayanaswami A.I.R. 1939 P.C. 47.

¹⁵¹ Indian Evidence Act, cited above at note 148, Art.17 and Art. 25

¹⁵² Id., Art. 27

¹⁵³ Indian Criminal Procedure Code, Act No. XXV of 1861, Art. 164

¹⁵⁴ Emperor v. Biseswar 26 CWN 1010.

¹⁵⁵ See Indian Evidence Act, cited above at note 148, Art. 24

¹⁵⁶ India: Act No. 28 of 1987, Terrorist And Disruptive Activities (Prevention) Act, 1987, 3 September 1987, Art. 15

¹⁵⁷ Kartar Singh v. State of Punjab.

¹⁵⁸ National Legislative Bodies / National Authorities, India: The Prevention of Terrorism Ordinance, 2002, 21 September 2004,,Art. 32.

to remain silent not to compel or induce him to make any confession, confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it and finally be taken to magistrate within 48 hours.¹⁵⁹ Even in this stage if there is any complaint of torture, such person shall be directed to be produced for medical examination before a Medical Officer.¹⁶⁰ This is an interesting safeguard available to even terrorism suspects. In general Indian law on confession is detailed and affords protection to criminal suspects.

2.3.7.2.4. Malaysia

The Evidence Act and the Criminal Procedure Code incorporate rules relating to admissibility of confession. The Criminal Procedure Code states that a confession to police with the rank of Inspector is admissible as evidence.¹⁶¹ A confession obtained by inducement, threat or promise from a person in authority is inadmissible.¹⁶² But confession to police officer below the rank of Inspector in hierarchy and Confession by accused while in custody of police are not to be used as evidence in court of law.¹⁶³ But facts which are found as a result of statement taken in police station may be admissible i.e. confessions are not adduced as evidence but based on confession made if police found other evidence that will be admissible.¹⁶⁴ Statement taken from accused person should be in a language he understands.¹⁶⁵

The Malaysian has gone too far in even excluding the confession obtained by way of cross examination.¹⁶⁶ Confessions are inadmissible as involuntary if the court is of opinion that without inducement or promise made he would not have confessed. It suffices if the suspect felt he would get any temporal or permanent gain by confessing.¹⁶⁷ The burden of proving, beyond

¹⁵⁹ Ibid.

¹⁶⁰ Id., Art. 32(5).

¹⁶¹ Malaysian Criminal Procedure Code, Act No. 593 of 2012, 1 November 2012, Art. 113(1).

¹⁶² Id., Art. 113(1)(a)(1)„ Security Offences (Special Measures) Act 2012 (Act 747), Art. 27.

¹⁶³ Malaysia Evidence act, Art. 25 and 26.

¹⁶⁴ Id., Art. 27.

¹⁶⁵ Tan Too Kia v. Public Prosecutor [1980] 2 MLJ 189.

¹⁶⁶ Chang SengHeng and Ors. v. Public Prosecutor [1949] MLJ 175.

¹⁶⁷ Mohammed, MohdAkramShair, "Confessions under Malaysian and Islamic Law: A Comparative Evaluation," Australian Journal of Basic and Applied Sciences Vol.6, no. 11 (2012), p.30

reasonable doubt, that a confession is voluntary lies throughout upon the prosecution.¹⁶⁸ The admissibility of confession is dealt with at a trial within a trial. This should be considered as a separate proceeding from the trial proper.¹⁶⁹ If the accused does not object to the admissibility of a statement there is no need to hold a trial within a trial.¹⁷⁰ Lesser proof is needed for a defense to show the appearance of involuntariness to the court. As such the Malaysian criminal justice administration afforded an interesting protection to criminal suspects from illegal confession.

2.4. Ethiopian Human Right Standards: De jure

2.4.1. Constitutional Human Right Protection Afforded against Involuntary Confession

The FDRE Constitution affords protection to the right of persons arrested and the rights of accused persons.¹⁷¹ Among the protection afforded are the rights which are related to the protection of suspects against illegal confessions. First of all upon their arrest they have the right to be informed about the reason of their arrest and also any charge against them.¹⁷² Most importantly “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.”¹⁷³ From the nature and jurisprudence of this right we can therefore say that the accused persons in Ethiopia can refuse to answer to allegations brought against them. As to possibility of adverse inference from the silence of the accused, it is possible

¹⁶⁸ Dato’ Mokhtar Hashim bin Hashim & Anor v PP (1983); PP v Chong Boo See (1988), Tan Too Kia v. Public Prosecutor [1980] 2 MLJ 189.

¹⁶⁹ Lim Seng Chuan v. Public Prosecutor [1977] 1 MLJ 171 CCA.

¹⁷⁰ Public Prosecutor v. Mohamed Noor bin Jantan [1979] 2 MLJ 289.

¹⁷¹ Even if the right of arrested person and accused person are provided in an independent provision in the constitution there is however relevant rights which are enumerated under accused person’s right but should be availed to arrested persons too. For instance right to a lawyer is a right of an arrested person in accordance with ICCPR. If the constitutions are to be read in accordance with the international human right instruments there should not be a prohibition of availing rights enumerated for accused to be availed to arrested individuals. An example of such right is right to a lawyer, right to be presumed innocent, right to an interpreter. The other rights enumerated under this provision however may not be right of arrested person if no charge is brought against them. Example could be the right to public trial, right to be informed of the charge brought against him, full access to evidence and the right to confrontation. See Cited above at notes, 1 Art. 19 and 20 of FDRE Constitution

¹⁷² See FDRE Constitution, cited above at note 1, Art 19(1)

¹⁷³ Id., Art. 19(2)

to say that if we can make adverse inference from the silence of the accused that would make the right itself meaningless.

This right is further protected by express inclusion of the right against self-incrimination under Article 19(5) of the FDRE Constitution.¹⁷⁴ This provision provides that “Persons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them.”¹⁷⁵ It is even interesting to see in the Constitution that if evidence is obtained by methods of ‘coercion’, that evidence would be subject to exclusion in any case irrespective of the truth, the probative value attached to the evidence obtained or otherwise of the evidence.¹⁷⁶

It is of importance however to indicate the fact that even if the Constitution provided for the right to remain silent, protection against self-incrimination, the right to be informed of the charges against the suspect and the right to remain silent, it only dared to exclude evidence obtained under coercion explicitly.¹⁷⁷ This however does not mean the confessions obtained without following the constitutionally provided mechanisms are given legal effect. This is because the Constitution obliges “executive and judicial organs at all levels” to respect and enforce the rights enshrined under the Constitution. One of such right is enforcing the rights of suspects of the right to be informed of the right to remain silent.¹⁷⁸ An interrogation done by police officers contravening the Constitution is of no effect. If we ruled the interrogation failing to follow the legal mechanisms provided on the Constitution, we cannot give effect to the outcome of the illegally obtained confession as it is null and void from the beginning. Failing to notify that anything suspects say will be used against them in court will make the interrogation unconstitutional. An act which is unconstitutional is said to be non-existent from the beginning. We cannot give legal protection for illegal (non-existent) confession. Because the Constitution ruled it shall be of no effect i.e. void from the beginning.

¹⁷⁴ Id., Art 19(5).

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid .

¹⁷⁸ Id., Art. 19(2).

In addition to the above protection there are also other protections afforded in our Constitution which includes presumption of innocence¹⁷⁹, right to be represented by legal counsel of their choice and to be provided with legal representation at state expense if they do not have sufficient means to pay for it and miscarriage of justice would result,¹⁸⁰ protection against cruel, inhuman or degrading treatment or punishment,¹⁸¹ request for the assistance of an interpreter¹⁸² and the right to security of a person or protection against bodily harm.¹⁸³ Still there are however questions regarding the right to counsel of the accused at the investigation level.¹⁸⁴ This is because the Constitution provides for the right to counsel for an accused person and suspects without charge are not yet accused and as such there is a difficulty in showing the right of arrested person to counsel.¹⁸⁵ Even if suspects are given access to counsel at investigation level, that would create a problem still for those who do not afford counselor at their own expense. Though the Constitution gives the right to request for counselor at the expense of the State, that actually happens in trial court by the order of the presiding judges. Therefore in this regard there is a need to appoint counselors to suspects of at least grave criminal cases at the time they are brought to court within 48 hours. In relation to this ICCPR provides that the right to be informed of the right to lawyer. As such courts are duty bound to notify the right to lawyer as this law forms part of Ethiopian legal system based on the Constitution.

2.4.2. Statutory Human Right protection Afforded against Involuntary Confession

The Constitution provide general right of an arrested and accused person. As such it is for the other legislations to provide the details of the rights in particular way. There are two mechanisms of recording confession according to the Criminal Procedure Code. The first one is a confession obtained at police station by the investigating police officers according to Article 27 of the code.¹⁸⁶ The second type is when the confession is taken before the courts as provided on Article

¹⁷⁹ Id., Art. 20(3)

¹⁸⁰ Id., Art. 20(5)

¹⁸¹ Id., Art. 18

¹⁸² Id., Art. 20(7)

¹⁸³ Id., Art. 16

¹⁸⁴ Id., Art. 20(5)

¹⁸⁵ Ibid.

¹⁸⁶ See Cri.Pro.C., cited above at note 2, Art. 27(2)

35 of the Criminal Procedure Code.¹⁸⁷ There are safeguards available to accused person in the process of taking confessions both in police interrogation of the accused and also in court recording confession as provided below.

2.4.2.1. Right not to be Compelled to Confess

Article 27 of the Criminal Procedure Code provides that once the accused's identity is identified, he will be asked to answer regarding the allegation made against him.¹⁸⁸ But in this process such person may not be compelled to answer to the allegation made against him and even needs to be told that he has the right to remain silent and in case if he opt to make statement that will be used as evidence in court of law.¹⁸⁹ A protection is afforded to the accused under Article 27 not to be compelled to answer for the charges and the right to be informed of right to silence.¹⁹⁰ But the consequence of not following the right of accused is not provided in the Criminal Procedure Code. But it is indicated in this provision that statement that the accused voluntary make are only to be used in evidence against him.

Where the suspect gave his confession to the police, such person is taken to the nearest court around the station so that his confession is recorded in the court.¹⁹¹ In such case the court is given a power to record the confession to be made to it.¹⁹² Such statement or confession can only be taken by court once they make sure that it is being given voluntarily by the accused.¹⁹³ An ascertainment is made by asking the accused of this fact. Such statement are recorded in writing and signed and dated by the accused and also the president of the court.¹⁹⁴ It is a valid way of dealing with the matter that though those who are to bring the accused for confession are the police officers they will not be taking the recorded confession but it will either be sent to the court trying the matter or alternatively to prosecution office.¹⁹⁵ Such act protects the accused

¹⁸⁷ Id., Art. 35

¹⁸⁸ Id., Art. 27(1)

¹⁸⁹ Id., Art. 27(2)

¹⁹⁰ Ibid.

¹⁹¹ Id., Art. 35

¹⁹² Ibid.

¹⁹³ Id., Art. 35(3)

¹⁹⁴ Id., Art. 35(3)

¹⁹⁵ Id., Art. 35(4)

against the danger he may entail when he gets back to police station as a result of not confessing in court to certain extent.

We can observe that confessions in the Criminal Procedure Code are taken in writing but Anti-Terrorism proclamation no. 652/2009 under Article 23(5) provides that “confession of a suspect of terrorism in writing, voice recording, video cassette or recorded in any mechanical or electronic device” are admissible.¹⁹⁶ The proclamation however does not provide as to the protection afforded to the accused from illegally obtained confession. In the absence of rules as to exclusion of the accused confession it is possible to contend based on Article 36 of the proclamation that the provisions of the Criminal Code and Criminal Procedure Code are applicable.¹⁹⁷ Accordingly only voluntarily obtained confessions are admissible. But according to the Anti-Terrorism proclamation no. 652/2009, “intelligence report prepared in relation to terrorism [are admissible], even if the report does not disclose the source or the method it was gathered.”¹⁹⁸ If the intelligence report is prepared by methods that are prohibited under the Constitution and if the method as to how it is gathered is not going to be explained to the court that will jeopardize the right of the suspect. It will create a problem in determining the voluntariness of the confession from which the intelligence report is prepared.

2.4.2.2. Methods and Levels of Ascertaining Voluntariness of Confession

As to the proper procedure to be followed in deciding the issue of voluntariness the Ethiopian laws on the matter is not clear. None of the Ethiopian laws shows sufficient methods of ascertaining the voluntariness of the confession. Under Article 27 the duty is imposed on a police not to follow illegal methods of obtaining confession but it is not clear how laws can ascertain voluntariness if it is to be an issue later on a trial. What the laws says under Article 35 is to ask the accused himself as to whether he is giving his confession voluntarily for judicial confession. That being one mechanism it should not however be the only mechanism. The judges should have been given the power of not taking the confession of the accused from the mere fact that of the totality of the circumstance surrounding the interrogation. This includes for instance the length of the incommunicado detention, the length of the accused’s arrest before he is brought to

¹⁹⁶ See Anti-Terrorism proclamation, cited above at note 24, Art. 23(5)

¹⁹⁷ Id., Art. 36

¹⁹⁸ Id., Art. 23(1)

court for confession, the physical condition of the accused etc. Here what this meant is the judge should not be sticking to the statement of the accused as to voluntariness of his confession rather the judge should first study the total condition of the accused before taking his statement.

As to making objection to the admissibility of evidences the criminal procedure under Article 146 provides that “Where the prosecutor or the accused objects to the admission of any evidence or the putting of a question to a witness, the court shall decide forthwith on the admissibility of such evidence.”¹⁹⁹ Therefore if the admissibility of the confession became an issue the court needs to decide the admissibility of confession forthwith before taking the evidence.

2.4.2.3. Exclusion of Illegally Obtained Confession

As to the exclusion of illegally obtained confession, the Criminal Procedure Codes and other subordinate legislation to the Constitution did not provide express provision. But the FDRE Constitution comes to operation here and as such evidences which are ruled illegal under article 27 and 35 are to be excluded according to the Constitution Article 19(5).²⁰⁰ But even before the coming into effect of the Constitution itself, Stanley Z. Fishery for instance argues that as far as the methods of obtaining the confession is illegal it is the duty of courts to exclude it.²⁰¹ This is about not giving legal effect for illegal acts.

2.4.2.4. Burden of Proof

Still the burden as to showing the legality of confession is not expressly provided as in Criminal Procedure Code or any other proclamation of its kind. According to Simeneh Kiros there are three arguments to be made in as to the fact that prosecution bears burden of proof.²⁰² First, once the prosecution introduces the confession as evidence to the case he/she needs to show that it is legally obtained as an allegation is made by him/her. Second, as the interrogation is conducted in secret it is ‘unjust’ to burden the accused with the duty of showing the voluntariness. Third, specifically in relation to confession taken under Article 27 of the code, it is the duty of

¹⁹⁹ See Cri.Pro.C., cited above at note 2, Art. 146

²⁰⁰ Id., Art. 27 and 35; FDRE Constitution, cited above at note 1, Art. 19(5)

²⁰¹ Stanley Z. Fishery, "involuntary confession and Article 35, Criminal Procedure Code," Journal of Ethiopian Law, vol 3. no. 1 (1966), p.333

²⁰² See Simeneh Kiros, cited above at note 20, p.79

prosecution to show voluntariness as it is extra judicial admission which is “yet to be established before the court.” In addition to the above reasons provided by Simeneh Kiros, it is of importance to take due consideration of the messages of presumption of innocence under the Constitution and also the international human right standards adopted by Ethiopia. Human rights relating to confession in criminal investigation are “interpreted in a manner conforming to the principles.”²⁰³ Accordingly, it is herein above provided that the burden of showing the legality of confession is borne by prosecution him/her self-according to the international human right standards.²⁰⁴ More importantly one is to defend only if “a case against the accused has been made out.”²⁰⁵ A case against the accused is made out only if the prosecutor brings legal evidences and able to prove his case. The accused should not be ordered to defend if the evidence brought against him not shown to be legally obtained.

2.4.2.5. The Use of Co-Defendants Confession

As to the case of use of confession of co-defendants to the other defendant the law keeps silent. But from the rules of the accused persons right incorporated in the Constitution such evidences should not be admitted. This is because the accused person according to the Constitution has the right of confrontation of the evidence presented against him.²⁰⁶ He cannot cross examine his co-offender for that matter nor have any other means of confronting the evidence presented against him. As this act of admitting co-defendants confession jeopardizes the Constitutional right to confrontation of evidences,²⁰⁷ it should be of no effect. Even in addition to excluding from admission against the other defendant who did not make confession, extra effort must be made not adversely infer guilt from the other confession. For instance illuminations of defendants name from the confession made or an independent trial are one way of doing it.

²⁰³ See FDRE Constitution, cited above at note 1, Art. 13(2)

²⁰⁴ See Section 2.3.4. of this thesis.

²⁰⁵ See Cri.Pro.C., cited above at note 2, Art. 142

²⁰⁶ In *Bruton v. U.S.*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the Supreme Court held that the defendant is deprived of his rights under the Confrontation Clause of the Sixth Amendment when his co-defendant's incriminating statement is introduced at their joint trial.

²⁰⁷ See FDRE Constitution, Art 20(4), cited above at note 1.

2.4.2.6. Jurisdiction to Rule on Admissibility of Confession

As to which court decides on the non-admissibility of confession obtained illegally the criminal procedure or the anti-terrorism proclamation has not provided any independent court. As such, the court which tries the case decides on the admissibility of confession evidence. This is further supported by Article 146 which provides for mechanisms of deciding on question of admissibility.²⁰⁸ Therefore the objection for the use of illegal confession is presented to the court trying the case as any usual objection. But according to Revised Anti-Corruption Special Procedure and Rules of evidence Proclamation no. 434/2005 Article 36(2)(1) provides by way of an exception the question as to admissibility of evidence may be decided by preparatory hearing which is conducted optionally.²⁰⁹ Unanswered question is with regard to the question of whether the judge should read the confession before deciding the admissibility of confession. In relation to this there should have been an assurance of certain kind to make sure that the judge is not biased towards what he/she reads from the confessions made. But there is no inbuilt mechanism to that effect in our law.

Having scrutinized the legal protection afforded in matters relating to confession, it is of necessity therefore to determine the practical applicability of the available laws themselves in prosecution and trial of an accused person and of the practically adopted methods of dealing with the matter at hand. With this in mind a case based analysis of protection afforded against illegally obtained evidence are conducted below in the next chapter.

²⁰⁸ See Cri.Pro.C., cited above at note 2, Art. 146

²⁰⁹ Revised Anti-Corruption Special Procedure and Rules of evidence Proclamation, 2005, Fed. Neg. Gaz. no. 434, 11th Year No.1 9 2nd February, 2005, Article 36(2)(1).

Chapter Three: Illegal Confession in Ethiopia: A Practical Exploration

“I would have said anything to get out of that room”

Corey Beale²¹⁰

3.1. Introduction

In a country where an interrogation is the primary method of investigation and suspects claim their rights have been violated, it is of paramount importance to investigate the practical protection afforded against the illegally obtained confession. It is of necessity to discuss not only the laws and theoretical foundation of confession laws, but also the practical state of affairs surrounding criminal confession in order to examine whether the practice conforms to the law. Further, this chapter explores whether the practical cases relating to confession are all covered by the law regulating the matter. The methods adopted by criminal justice administrators to deal with the issues at hand are also scrutinized. In this part of the thesis, therefore, the practical exploration of issues relating to confession is dealt with.

3.2. The Notification of the Right to Remain Silent and its Effect

The FDRE Constitution, International Human Right documents and the Criminal Procedure Code created a series of procedures that must mandatorily be followed in conducting a suspect's interrogation.²¹¹ One of the procedural requirements provided in the Constitution relates to warning suspects of their right to remain silent.²¹² At the time of making an interrogation, warning suspects of their right to remain silent is not yet practiced in Ethiopian police stations. This is what is acknowledged according to the reports of Ethiopian Human Right Commission study.²¹³ From researcher's observation, in police stations suspects are not warned of their right. The practice shows that suspects are taken to the investigation room and once their identity is

²¹⁰ Corey Beale, Victim of coerced confession quoted in Leo, Richard A., Police interrogation and American justice, (Harvard University Press, 2008), p.195

²¹¹ See FDRE Constitution, cited above at note 1, Art. 19; Cri.Pro.C., cited above at note 2, Art. 27 and 35

²¹² See FDRE Constitution, cited above at note 1, Art. 19(2)

²¹³ Ethiopian Human Rights Commission. Supervisory Report on Arrested Persons Right in Ethiopian Police Stations. (Addis Ababa: Ethiopian Human Rights Commission, 2005 EC.), p.27-29.

identified they will be asked either how they do it or why they do it. This is taken as a method of investigation. Rather than other mechanisms of investigation the criminal justice administration relies in practice on interrogation of suspects or witnesses. The question of ascertaining whether the suspects committed the crime or not comes to be an issue only when the suspect responds to the question of the investigator as how he commit it or why he commit it. It is of relevance to Ethiopia specifically that most of the society members cannot be said to have known this right. In the absence of knowledge, those who are assigned to investigate need to operate in standard put in place in the Constitution. The police officers should not be exploiting the lack of knowledge on the part of the suspect as to their possible rights. It is also an indication of rule of law that the investigators should act according to the law. Upholding the Constitution is expected of the police officers as they are the guardian of it.²¹⁴

Failure to follow the Constitution shall make the interrogation and evidence obtained accordingly 'of no effect'.²¹⁵ No legality emanates from illegality. No constitutionality emanates from unconstitutionality. Therefore, the Constitution is clear on that the effect of not following mandatory interrogation procedures will make it unconstitutional. It should be borne in mind that failure to notify the right to remain silent does not in and of itself constitute coercion. It is an independent constitutional protection that citizens need to understand their right and make an informed decision. It is up to an individual to waive his right against self incrimination. The purpose of this rule is deterring the law enforcement officer's violation of the law and put the suspect in a position he could have been if not for the violation. FDRE Constitution provides that unconstitutional practice or decisions are of no effect. If they are of no effect, it means they are void from the very beginning. As such no legal recognition is afforded for something non-existent from the beginning.

The practice of courts in relation to effect of failure to notify right to remain silent shows that, they are not giving emphasis needed. For instance in *Public Prosecutor v. Sisay Dagne* the appellant contended to the court that he is not warned of his right to remain silent and that

²¹⁴ Ethiopian Federal Police Commission Establishment Proclamation, 2011, Proc. No. 720,,Fed. Neg. Gaz., year 18, no.2, Art. 5 and 6.

²¹⁵ See FDRE Constitution, cited above at note 1, Art. 9

evidence should not form part of admissible evidence as it violates the Constitution.²¹⁶ The court did not settle this issue rather relied on evidentiary sufficiency of confession evidence per se in deciding the case.

In all cases where the police use force or intimidation to secure confessions notifying right to remain silent is not expected. The occurrence of coercion means that the right to remain silent is also violated. For instance in case *Getnet Teferi* the accused police used improper methods of investigations by slapping the suspect on his face and wound his back with a police baton.²¹⁷ In the case of *Public Prosecutor v. Tamirat Kassa* the judge insisted into asking the witnesses who were the police officers themselves if they saw the investigator telling the suspect of his right.²¹⁸ Except for reprimanding violation of such right and making a remark that they be working according to the law, none of those questions were to the benefit of the accused as the judge finally told the accused to defend himself. In such case the integrity of the court will be questioned. Courts should be in a position to maintain the integrity of the criminal justice process. The reprimand that followed the police officers without exclusion of such evidence is a threat to integrity of courts as they are not in a position to retrospectively and prospectively protect civil rights of suspects.

From the comparative study made above, it is clear that failure to notify the right to remain silent will result in exclusion of the evidence in Germany²¹⁹ and USA.²²⁰ The Ethiopian law obliges interrogators to warn suspects that anything he says will be used against him in court of law.²²¹ Though this right is recognized it is not yet put into practice. It is not about the truth, value or otherwise of confession obtained. Rather it is about rule of law. The best available enforcement mechanism is to exclude such evidences. It should be excluded because the Constitution provides

²¹⁶ Public Prosecutor v. Sisay Dagne, (Criminal File No. 17739, Federal Supreme Court, 1997 EC) (Case Report of Federal Supreme Court) Vol. 2 no. 1 1999 EC.

²¹⁷ Public Prosecutor v. Getnet Teferi (Criminal File No. 43261, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished).

²¹⁸ Public Prosecutor v. Tamirat Kassa, (Criminal File No. 125950, Arada First Instance Court Criminal Bench, 2007 EC.) (Unpublished).

²¹⁹ See Thaman, Stephen C., cited above at note 110, p. 118

²²⁰ See *Miranda v. Arizona*, cited above at note 134.

²²¹ See FDRE Constitution, cited above at note 1, Art 19; Cri.Pro.C., cited above at note 2, Article 27(2)

that any law, practice or a decision which contravene the Constitution *shall be of no effect*.²²² The protection is broad enough that confession obtained without following mandatory Constitutional provisions are not going to be given legal effect as it is unconstitutional.

One may say an action can be taken against the police for violating the constitutional methods of investigation and there is no reason to exclude the confession for mere reason that the suspect was not warned. However, this rule is aimed at giving legal protection against unfair trial i.e. taking advantage of suspect's absence of knowledge about his right. It is true that society should not be punished for wrong doing of the police.²²³ But the suspect is also part of the society. Excluding confession without due process rights are one mechanism of banning the police officers from resorting to the use of improper methods of interrogations. The accused should not be forced to assist prosecution for the mere reason that his rights are concealed. According to the disciplinary principle, those who enforce law should themselves be subjected to law and should respect the law.²²⁴

For the purpose of discouraging police officers from resorting to unconstitutional methods of interrogation exclusion of evidence obtained without telling the right to remain silent is the solution. This is a means of deterring the police from future improprieties of the same kind. Not only is this, but also according to the protective principle exclusion of improperly obtained evidence is for the purpose of protecting the civil rights.²²⁵ Courts should be in a position to protect these civil rights. Taking action against the police officer per se will not place the suspect to the position he could have been if not for the violation of his right to remain silent.²²⁶ Integrity principle of exclusionary rule says this is also about protecting the “integrity of the criminal justice process.”²²⁷ Therefore, evidences obtained without notifying the suspect of his right to remain silent should be excluded.

²²² Id., FDRE Constitution, Art. 9.

²²³ See Del Carmen, Rolando, cited above at note 45, P.113

²²⁴ See Gans, Jeremy, and Andrew Palmer., cited above at note 52, P.9

²²⁵ See Keane, Adrian, and Paul McKeown, cited above at note 17

²²⁶ See Gans, Jeremy, and Andrew Palmer, cited above at note 52, p.9

²²⁷ See Keane, Adrian, and Paul McKeown, cited above at note 17, p. 56

3.3. Language Inability and Confession

Ethiopia is a country with more than 80 languages.²²⁸ Though the federal working language is Amharic and every state is free to choose its working language,²²⁹ every person is not expected to know these working languages. For instance, suspect caught in Addis Ababa brought to Federal Police or Addis Ababa Police Station or Federal Courts may not understand or may have certain problems of either hearing, speaking or reading Amharic. Therefore, what the courts will be doing in combination with how they handle the matter currently in such instances need to be clarified.

In such case the law dictates that arrested person “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.”²³⁰ Accordingly, the language used to notify right to remain silent should be in a language the suspect understands. But as to the language to be used to record confession the FDRE Constitution is silent. However, the Criminal Procedure Code governs this matter. It provides that if the suspect is unable to understand the language in which confessions are recorded he will be provided with competent interpreter.²³¹ The competent interpreter envisaged under this provision will be certifying the accuracy of questions and answers. According to Susan Berk-Seligson, language proficiency is one of the factors that promote the likelihood of false confessions.²³² But this discourse is overlooked for long now.

In most cases both for interpretation of statement made to police and to that of courts interpreters are not competent as envisaged under the Constitution. This is because unlike in other countries the interpreters are not trained translators.²³³ In United States court interpreters have a training equivalent to two years of university education while in Europe it is equivalent to four years of university education. But here in Ethiopia no certified interpreter is used. Even interpreting is not

²²⁸ Gish, Steven, Winnie Thay, and Zawiah Abdul Latif, Ethiopia (Marshall Cavendish, 2007), Vol. 12. p.87; Getahun, Solomon Addis, and Wudu Tafete Kassu, Culture and Customs of Ethiopia (ABC-CLIO, 2014.), p.3

²²⁹ See FDRE Constitution, cited above at note 1, Art. 5

²³⁰ Id., Art. 19(2)

²³¹ See Cri.Pro.C., cited above at note 2, Art. 27(4)

²³² Berk-Seligson, Susan, Coerced confessions: The discourse of bilingual police interrogations (Walter de Gruyter, 2009), Vol. 25, P.10

²³³ Id., 22

their career. Susan Berk-Seligson claims that an involvement of unskilled in “interpreting services means building a weak link into the legal process.”²³⁴

From observation made in police station and courts, they are selected for that specific work *on the spot* without having prior training for interpretation. First of all the records of confession are made in writing in narration forms. No indication of what is asked and what is answered is available in the police file. Even the communication between the one interpreting and the suspect in the language they understand does not form part of the record. Though the Criminal Procedure Code provides that the interpreter certifies correctness of all questions and answers, no trend of recording questions and answers are available. The confession is provided on the record by way of story narration. In such instance it is difficult to prove the interpretation is the accurate one. Even if the accused person claim that he did not confess like it is presented on the paper to the court, it is impossible to prove such allegation, especially if the interpreter is the police officers. The problem is worsened as there is no technological instrument like videotaping or audio taping being utilized currently. Because, had they had these instruments the issues of the language used, accuracy and existence of coercion or any abuse of confession resulting from bilingual confession can easily be recognized from the whole process that can be grasp from the instruments. In the absence of these instruments, the opportunity for the court to scrutiny the whole communication between the accused and police officers will be deficient. Accuracy and voluntariness could have been scrutinized through court appointed interpreters.

The need for video or tape recording police interrogations should be considered. In United States eight States passed regulations requiring recording and other States also in default uses such system mostly.²³⁵ In the United Kingdom suspects of serious felonies are recorded according to the Police and Criminal Evidence (PACE) Act of 1984.²³⁶ In Ethiopia however, the use of technological instrument is not legally required. The only law making reference to the use of audio or video recording is the anti terrorism law. Even this law talks about admissibility of “confession of a suspect of terrorism in writing, voice recording, video cassette or recorded in

²³⁴ Ibid.

²³⁵ Id., p.173

²³⁶ Ibid.

any mechanical or electronic device.”²³⁷ This provision does not provide mandatory use of these instruments for their admissibility. In terms of affording protection for constitutional right of accused person not to be compelled and to have an interpreter the use of such technology is of much help.

What is striking in this process is habitually police officers are used as interpreters during interrogations carried out in the police station and even in courts. Police involvement as interpreters during interrogation raises a question. More important in relation to affording protection to the accused is the question of impartiality probably emanating from conflict of interest. This is the case because most of the time those who are involved as an interpreter are police officers themselves. What exacerbates the problem in this regard is Ethiopian law do not require interpreter to be impartial when they are engaged as an interpreter. Had there been a provision in the law which requires them to withdraw/disqualify themselves from the assignment of interpretation whenever there is a conflict of interest including remedial provision for those who knowingly involve irrespective of existence of conflict, it could have afforded more protection to the accused.

In England though a police officer is not necessarily prohibited from interpreting, according to the Metropolitan Police Handbook, those who are personally involved in the case or having any contact with the suspect are excluded from acting as interpreter.²³⁸ In United States there is no guideline regulating “bias on the part of police officers, or associates of police officers, when acting as interpreter police” and currently defense lawyers are appealing for exclusion of such evidence.²³⁹ Reliability of confession could have been so strong if steps are taken to make sure to use qualified interpreter, avoid partiality and use audio or video tape recordings. The practice of making those interpreters testify in court room to show to the court the role they have played as interpreters is also a trend which is not available in courts in Ethiopia. Accuracy of an interpretation conducted in the court room is presumed at least for the reason that the interpreter gives his interpretation after being under oath. But such default procedure is available only in trial court. No interpreter is sworn and affirmed in involving as an interpreter in police station.

²³⁷ See Anti Terrorism Proclamation, cited above at note 23, Art. 23(5)

²³⁸ As cited in Berk-Seligson, Susan, cited above at note 232, p.29 and 46

²³⁹ Id., 21

Trusting the written confession by police and signed by suspect who does not even know what the paper says is a bit delicate. As such safeguards should have been available.

In one pending case the accused told the court that he doesn't understand the language in which confession is taken and no interpreter is available for him.²⁴⁰ The court provided him with interpreter for trial proceeding but keeps silent as to confession taken.²⁴¹ The court could have easily made sure from police file if interpreter was available on the case.²⁴² In another case the accused claimed that he speaks only Oromo language and as such the investigator communicated with him in the same language but recorded it in Amharic.²⁴³ It is difficult to trust accuracy of such confession later on a trial stage. Because as the suspect confessing will be signing in any case the investigator can record it as he wants it. A police officer may engage in interpreting the confession of the suspect.²⁴⁴ In another case of the same type, the suspect claimed that they did not know what the police acting as an interpreter said to the police recording the confession.²⁴⁵ Assuming the allegation is true, these cases prove that the necessity of providing guiding principles in relation to the safeguards that should be available for accused who is unable to understand the language in which confessions or any statement he/she makes is to be recorded.

Even for the confession recorded in any court the law keeps silent as to appointing interpreter, and the requirement of impartiality and avoiding conflict of interest in such case. Constitution however gives the right to request assistance of an interpreter at state expense.²⁴⁶ In practice the courts appoint interpreters to suspects who requested or are visible to the court that he does not understand the language. But the problem lies on appointing qualified interpreter and avoiding conflict of interest. Like in the case of police, most of the time interpreters are chosen on the spot. Any one even the police available around the court could be called on to interpret. A

²⁴⁰ Public Prosecutor v. Abdi Husen, (Criminal File No. 152768, Federal High Court Lideta Criminal Bench, 2007 EC) (Unpublished)

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Public Prosecutor v. Abdi Kemal et al (Criminal File No. 155211, Federal High Court Lideta Criminal Bench, 2007 EC) (Unpublished)

²⁴⁴ In most of the confessions recorded in police station, as far as there are police officers knowledgeable of the language the suspects speaks, the police officers from the same station is used as a translator.

²⁴⁵ Public Prosecutor v. Ziyad Shafi et al v., (Criminal File No.144159, Federal High Court Lideta Criminal Bench, 2007) (Unpublished)

²⁴⁶ See FDRE Constitution, cited above at note 1, Art 20(7)

mechanism of avoiding conflict of interest should be established in the court room recording confession whenever the suspects give their confession.

3.4. Recording Confessions: Reading, Signing and Dating

Any statement implicating self in a crime may be used as evidence in court of law. Such statement can be taken in police station or in any court before a charge is framed by the prosecutor. Confession will be read over to the accused who signs and dates it. In relation to this requirement it is provided that court recording confession should comply with it. But it is nowhere provided for a confession recorded by police officers in the Criminal Procedure Code requiring reading over the confession recorded before the suspect puts his signature and dates it.²⁴⁷ There is no law requiring the *confession to be read* to the accused. No *signature or dating* it is required. But the practice in a police stations resembles to that of requirement provided for a confession taken at courts.

3.4.1 Reading the Confession Over to the Suspect

In relation to reading the confession over to the accused, from the observation made in police station, there is a limitation in this regard. Some police officers read the confession to the accused. For others, they read out loud while writing, so that the confessor sees and hears what the police officer is recording at the same time. Other police officers still just write the confession in form of narration while the suspect talks. In some cases the police officers first asks the suspect as to the commission of crime and after taking notes in an independent paper writes back in an organized manner the way police officer wants. Then after writing in such manner he/she may or may not read over to the accused. Some of the suspects ask to read the confession themselves. In other cases the police officers may just tell the major elements of the confession to the accused before signing orally without a need to read.

In general, no uniform ways of recording is currently available. For the sake of transparency and safeguarding the rights of suspect the confessor should read the confession after it is recorded. For those who are not willing to read or unable to read the officers should feel obliged honestly

²⁴⁷ See Cri.Pro.C., cited above at note 2, Art. 35(3)

and responsibly to give them or read over to the suspect. In relation to this it is better to use audio visual instruments to record confessions. This minimizes the abuse that could be exerted on the suspect or otherwise may minimize the abuse by the suspect themselves making false allegation against the police for the sake of getting their freedom at the cost of truth. In any case, written confession should be *read* by or to him *before* it must be *signed and dated by the suspect*.

3.4.2. Signing the Recorded Confessions

Even if the law does not require it the practice requires signature of the accused. This indicates the owner of confession though it is not a proof of how it is gathered. Had there not been a requirement of signature, it could have been open for a more prevalent abuse. It also protects the accused, the police and prosecutor themselves who could have had hard time explaining to courts who confessed the confession evidence they presented to the court. If they deny their signature an order will be made to forensic investigation to verify it. In one case *Public Prosecutor v. Yordanos Befikadu* the confession presented to the court was not signed.²⁴⁸ The court entertaining the case ruled that the evidence of confession without signature is untrustworthy and as such excluded the confession and convicted the suspect with other sufficient evidences. The stand of the court is sound that in the absence of signature the confession cannot be said to have been given by the suspect.

If the suspect refuses to sign that indicates the suspect has a problem with recognizing as the owner. This will not however exclude it from the determination of guilt. Because if the prosecutor proves that the confession is made after the suspect is notified of her right to remain silent and anything she say will be used against her in a court of law irrespective of the existence of signature. The courts stand holds strong in that such confession is not trustworthy as the ownership cannot be established. Had her confession been on audio or video recording no signature could have been required. In this specific case as the confession adduced is in writing, it is unworthy as to whether she made it or not remains unsolved. In any case written confession should be *signed by the suspect*.

²⁴⁸ Public Prosecutor v. Yordanos Befikadu, (Criminal File No.152147, Federal High Court Arada Criminal Bench, 2006 EC.) (Unpublished)

3.4.3. Dating Recorded Confessions

The confession both in the police station and courts should be dated. The date manifests the date in which the confession is made. Providing the specific time in which the confession is made is beneficial to both the prosecutor and the accused as it enables to cross examine witnesses coming to elaborate how confession is made to the court including the time it was made. Probably, at that time those who claim to have seen confession being taken may not even be there. This enables the defense to present to the court defense of alibi. It also avoids the usual mechanism exploited by the police officers taking confession from the suspect and later on in some other time or day asking the suspect to elaborate it to witnesses. If the time of confession of suspect and the time the witnesses heard the confession are different the confession evidence is not trustworthy. An accused named *Tolosa Bedada* is acquitted as a result of disconformities between the day the suspect gave his confession and the day the witnesses claimed to have heard his confession.²⁴⁹

For the confession taken in the court, dating is required to be done by the suspect himself. But for the confession taken by the police the dating is not specifically required to be done by the suspect. The police is the one who dates the confession. A due care should be taken either to give an opportunity of dating to the suspect or read specifically the dates in combination with other facts written on the record. Complying with these avoids postdating or predating which becomes subject of debate in the courts.²⁵⁰ Disconformities between the date the suspect is said to have given his confession and the day witnesses said to have heard his confession in police station makes the confession untrustworthy. Therefore the police officers may illegally record confession in the absence of witness and ask the suspect to repeat what he confessed to the police. To make the confession look like as if it is recorded in the time the witnesses heard it may in advance be post dated or may be left open and later filled. This creates the difficulty for the suspect to prove illegality since the confession is said to have been recorded in the presence of witness who are going to testify legality since they didn't knew what the suspect faced before they come to observe confession.

For instance whenever some person makes an accusation or a criminal complaint the police

²⁴⁹ Public Prosecutor v. Teshale Bekishe et al, (Criminal File No. 105027, Federal High Court Lideta Criminal Bench, 2005) (Unpublished)

²⁵⁰ Ibid.

officers are mandated under Article 14(1) of Criminal Procedure Code to reduce that criminal accusation or complaint in writing and when completed it is required to be signed and dated by the person making the accusation or complaint.²⁵¹ Because following such accusation a criminal liability may emanate on the person making false allegation, if any. For the same reason, the person suspected of crime should be able to read, sign and date his confession himself as a criminal liability which is an immediate one is about to follow for the same reason.

3.5. Coerced Confession Vis-à-vis Exclusion

The due process rights enshrined under the FDRE Constitution takes in to consideration voluntariness of confession for the admissibility.²⁵² It bars the use of coerced confession against criminal suspects. Compelling and coercing are the two words that are used in the Constitution to afford protection from illegal confession.²⁵³ The question remains, however, as to the specific criterion developed by courts to determine whether confession is the product of free will. Our law does not describe what this words stands for or how courts should understand and implement it. Therefore, it is necessary to scrutinize the matter at hand and see how courts today are dealing with it. In general confession is said to be voluntary if it is a product of free will. That is determined by looking at the totality of circumstance surrounding the interrogation. In most of other countries today an interrogation conducted at police station are tape-recorded or videotaped and as such the circumstance surrounding the interrogation are undeniable.²⁵⁴ Though tape-recorded or videotaped confessions themselves are not exclusive in determining voluntariness, they are of much help. The factors which describe voluntariness of confession are discussed below.

²⁵¹ See Cri.Pro.C., cited above at note 2, Art. 14(1)

²⁵² See FDRE Constitution, cited above at note 1, Art. 19(5)

²⁵³ Ibid.

²⁵⁴ See Berk-Seligson, Susan, cited above at note 232, p.22

3.5.1. Police Use of Force and Exclusion

As it is indicated in the historic part of this thesis police uses force in order to extract confessions from the accused.²⁵⁵ With the development of protection against self incrimination in 16th century however the "nemo tenetur prodere se ipsum" which refers to "no one should be required to betray himself" comes to be the prevailing understanding in criminal justice administration.²⁵⁶ Though in today's world different human right instruments provide for protection against use of force still however, police investigators are using force to extract confessions.²⁵⁷ The Commissioner of the Ethiopian Human Right Commission (EHRC), responded to the parliament that "[t]hough there could be things that happen sometimes at emotional moments in the course of investigation, there is no torture by the police."²⁵⁸

From this statement, it can be said that there might not be a widespread, systemic or organized use of torture by the police. But he implied in his response that because of police misconduct not emanating from the will of government 'there could be things that happen at emotional moments in the course of investigation.' Therefore, it is expected that slap or some kind of blow may occur in certain cases under the alleged reason of emotionality. That is also the use of force being an issue in this thesis though there is no reason for police officer to be emotional unless he/she didn't like the accused pleading not guilty. Further, the police station study conducted by Ethiopian Human Right Commission shows that in most instances the accused persons are not coerced into making confession.²⁵⁹ But in limited instances, based on the claim of suspects, there are investigative police officers exerting coercion on the suspect so that they will be making confession without their free will.²⁶⁰ In most cases the coercion is exerted in the form of threatening and intimidation.²⁶¹ In other instances use of force is also exploited. Such acts are conducted in 29 % of the police station studied.²⁶² An indication of use of force seems to have

²⁵⁵ As cited on, Balfour, Danny L., cited above at note 30

²⁵⁶ As cited on, Fisher, Jonathan, cited above at note 32, p.590

²⁵⁷ An Audit of Police Oversight in Africa, African Policing Civilian Oversight Forum - (Country Reports on Human Rights Practices for 2007 By Államok. Egyesült, Congress), p.210

²⁵⁸ Horn Affairs - English,. 'Committee Against Torture ~ Horn Affairs - English'. N.p., 2015. Web. 13 May 2015.

²⁵⁹ See Ethiopian Human Right Commission Report, cited above at note 213, p.27

²⁶⁰ Id., 28

²⁶¹ Ibid.

²⁶² Ibid.

been acknowledged in National Human Right Action Plan which urges adopting legal provisions for the sake of banning the current use of force by the police.”²⁶³ The Committee against Torture expressed its concern in relation to the existing torture allegation conducted for the purpose of obtaining confession in Ethiopia.²⁶⁴ US Department of State reported on Ethiopia that existence of torture is widely alleged and reported in Ethiopia.²⁶⁵

From the above observations and reports by the Ethiopian government bodies, foreign government and NGO’s the existence of ongoing use of force on criminal suspects is obvious. The only difference lies on disagreement on the extent. Whether the coerced confession is widespread, systemic or organized or just small number of police misconduct, it is of vital importance to seek mechanisms of ascertaining how confessions are gathered and how courts can deal with the subject matter in real world, even for small number of cases.

In case of *Public Prosecutor v. Worku Yigzaw*²⁶⁶ the police used improper methods of investigations by slapping him on his face and wound his back with a police baton.²⁶⁷ But an occurrence of slap or beating on his back was proved not in the trial of *Worku Yigzaw* but in the trial of the police investigator himself for the use of Improper Methods.²⁶⁸ In the trial of another police officer, *Public Prosecutor v. Henok Ambello*, the force used was slap on the face of the suspect asking why he committed the crime.²⁶⁹ The interrogation was not even whether the suspect did the offence but why. The suspect in that case was beaten so that he responds to such interrogation without even confessing whether he committed the crime.

²⁶³The Federal Democratic Republic of Ethiopia National Human Rights Action Plan, (2013-2015), p.30

²⁶⁴ UN Committee Against Torture (CAT), Report of the Committee against Torture: Forty-fifth session (1–19 November 2010), Forty-sixth session (9 May–3 June 2011), 2011, A/66/44, Para. 31.

²⁶⁵ U.S. Department of State, 'Ethiopia 2013 Country Reports on Human Rights Practices'. N.p., 2015. Web. 13 May 2015. They reported that “Sources widely believed police investigators often used physical abuse to extract confessions in Central Police Investigation Headquarters in Addis Ababa. Human Right Watch reported an occurrence of beatings, stress positions, the hanging of detainees by their wrists from the ceiling, prolonged handcuffing, the pouring of water over detainees, verbal threats, and solitary confinement at the facility.”

²⁶⁶ *Public Prosecutor v. Worku Yigzaw* (Criminal File No. 40811, Federal First Instance Court Menagesha Criminal Bench, 2005 EC) (Unpublished).

²⁶⁷ See *Public Prosecutor v. Getnet Teferi*, cited above at note 217

²⁶⁸ *Ibid.*

²⁶⁹ *Public Prosecutor v. Henok Ambello* (Criminal File No.41896, Federal First Instance Court Menagesha Criminal Bench, 2005 EC) (Unpublished)

In a grave robbery case, *Public Prosecutor v. Ayalew Bogale*, the accused adduced evidence that he is tortured in making confession.²⁷⁰ The witnesses described to the court that they heard him screaming and they saw his face with simple bruises.²⁷¹ His teeth was also broken at the time of interrogation. In Federal *Public Prosecutor v. Zinash Wendimu* the prosecutor witnesses testified to the court that the accused was forced to confess as a result of the beating she suffered.²⁷² In one recent case the Federal High Court ruled that two of the accused gave their confession as a result of the force exerted on them and as such the accused defended themselves sufficiently.²⁷³ In *Public Prosecutor v. Mahmed Gizachew* the suspect adduced evidence showing that he was tortured every night.²⁷⁴ The court in these cases ruled that voluntariness of confession is the criteria for admissibility of confession.

In one interesting case the accused claimed he turned deaf as a result of the torture he faced.²⁷⁵ The prosecutor did not produce any evidence showing voluntariness of confession but by way of defense the accused brought to the court family members, custody cell roommate and medical certificate. The family members testified that at the time the accused is arrested he did not have any medical history of ear sickness and he suffered such injury in custody. Then accused custody cell roommate testified that the police officers took the suspect on one night and when he returns his ear was bleeding, though at the time the police took him he was normal. He told the court that the accused was bleeding and the victim also told him that the police tortured him. In the morning of that night the suspect was taken to hospital through emergency. The medical certificate is also adduced from police hospital which says the accused had head injury, bleeding on the ear and loss of consciousness. The court claimed that the ear bleeding was pre-existing according to the Amharic translation of the certificate adduced by police hospital. The court totally rejected the witness's testimony without any reason. The total circumstance in this case

²⁷⁰ *Public Prosecutor v. Ayalew Bogale*, (Criminal File No. 17891, Federal Supreme Court Criminal Bench, 1998 EC.) (Unpublished)

²⁷¹ *Ibid.*

²⁷² *Public Prosecutor v. Zinash Wendimu*, (Criminal File No.44805, Federal First Instance Court Menegasha Criminal Bench, 200) (Unpublished)

²⁷³ See *Public Prosecutor v. Teshale Bekishe et al*, cited above at note 249

²⁷⁴ *Public Prosecutor v. Mahmed Gizachew*, (Criminal File No. 141338, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished)

²⁷⁵ *Public Prosecutor v. Temesgen Abale*, (Criminal File No. 124062, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished)

shows that the court ignored the human rights of the suspect by failing to exclude confession. In this case for instance it is obvious that the police used force to get the confession.

Police use of force is one parameter used to exclude confession. The courts need to be alert in entertaining an allegation of use of force. The Police Commission should also make respecting human right part of measuring the performance of police officers. The public prosecutor should also be responsible in making sure that the confession is not the outcome of police misconduct against free will of the confessor before presenting it as an evidence to prove guilt of the accused.

3.5.2. Threatening or Intimidation

Threat or intimidations occurs through the use of verbal or physical signs.²⁷⁶ This is a psychological ploys used to obtain confession.²⁷⁷ In this case the interrogator puts the suspect or his family in the fear of injury or harm.²⁷⁸ The officer deceives the suspect under interrogation as to the physical or mental injury he or his family will be sustaining if he is not willing to admit to the commission of the crime or confess. Confession obtained at gun point is exerted on the suspect by pressing or pointing gun on the face or body of the suspect. The unlucky suspect will be asked whether he committed the alleged crime. In such instances the option for the suspect is to tell what the confessor wants to hear, so that the treat exerted on him is halted. The only performance required of the suspect is to tell the story or accept the story as he was being asked and retell the officers and finally put his signature on the paper which says the confession is made voluntarily. In case of denial it, the officers will respond that they are going to kill him. Here the confessor may have two options: to confess or die.

Another method of threatening or intimidating is to tell the suspect that if he is not going to confess he will face physical torture.²⁷⁹ Even if the police did not tell the suspect that he will beat

²⁷⁶ Hughes, Daniel J., Homicide: Investigative Techniques (Springfield: Thomas, 1974), p.94-96

²⁷⁷ Della Porta, Donatella, Abby Peterson, and Herbert Reiter (ed), The policing of transnational protest (Ashgate Publishing, Ltd., 2013), p.68

²⁷⁸ Cq Researcher (ed.), Issues in Terrorism and Homeland Security: Selections From CQ Researcher (SAGE, 2010), p.368

²⁷⁹ Clucas, Bev, Gerry Johnstone, and Tony Ward (ed.) Torture: moral absolutes and ambiguities. (Nomos Verlagsgesellschaft Mbh & Company, 2009), Vol. 2, p.51

him up, it suffices if he creates such perception in the minds of the suspect as a result of his conduct. In such case, threats or intimidation suspect under interrogation will accept whatever story he was being fed and sign a paper saying he had *not* been coerced and his statement was *voluntary*, simply to stop the abuse.

In one case between *Public Prosecutor v. Tamirat Layine* the accused claimed that after the police investigator wrote the confession he asked him to sign which he refused according to his version of fact.²⁸⁰ Then the officer responded do not make me enter into ‘something else’.²⁸¹ If the allegation is true, this type of practice erodes the constitutional protection afforded to arrested person not to be coerced into making confession.

3.5.3. Lengthy Incommunicado Interrogation

Lengthy interrogation results in unfair proceeding and false confession.²⁸² As said earlier, the totality of circumstance surrounding the confession is used as a parameter to determine existence or non existence of voluntariness of confession. One of the factors that the court should be considering in this regard is to look at the length of incommunicado interrogation. But the question as to how many hours are too many remained unanswered even in the jurisdiction considering the length of interrogation to rule on voluntariness of confession. According to Richard Leo, normal interrogation lasts for limited time while false induced confession takes more hours.²⁸³ This method may be utilized without breaks and appropriate opportunities to eat and sleep.²⁸⁴

The law keeps silent as regards the length of time interrogation can legally continue. This opens door for abuse. Even practically the accused, attorneys and courts are not raising length of interrogation. The period of arrest is visible from the police file. The time he agreed to confess is also described on the same document. The interrogation period should be limited. If the suspect

²⁸⁰ Federal Ethics and Anti-Corruption Commission Public Prosecutor v. Tamirat Layine, (Criminal File No. 1/89 Federal Supreme Court, 1992)

²⁸¹ Ibid.

²⁸² Leo, Richard A., Police interrogation and American justice (Harvard University Press, 2008), p.311

²⁸³ Ibid.

²⁸⁴ Id., 274.

is taken to court an additional period of remand may be granted for the purpose of collecting additional evidences. Even interrogation may continue after the maximum 14 days period of remand according to the Criminal Procedure Code or minimum 28 days of remand for crimes of terrorism.²⁸⁵ Even interrogation may continue in this time as part of investigation conducted on the alleged crime.

Courts do not ask the suspects as to the length of their arrest before recording their confession. They do not make sure whether the person is granted an access to family and lawyer. The Constitution specifically provides that an accused person has the right to attorney.²⁸⁶ Since an arrested person turns into accused person right to counsel provided for accused person should be available to arrested person. This is further supported by Criminal Procedure code, ICCPR and the Basic Principle on the Role of Lawyers. The Criminal Procedure Code also provides that arrested person have the right to consult his attorney.²⁸⁷ ICCPR and the Basic Principle on the Role of Lawyers provide that suspects have the right to be informed of their right to be assisted by counsel.²⁸⁸ According to Human Right Watch a Muslim protesters who was charged with Terrorism are denied access to lawyers though such claim is denied by Central Police Investigation Headquarters in Addis Ababa.²⁸⁹ The presence of lawyer at the place of interrogation is the standard safeguard against abuse.²⁹⁰

Defendant interrogated incommunicado for five days is ruled inadmissible in one case from United States.²⁹¹ Confession obtained after “police questioned an emotionally distraught and exhausted defendant for eight hours” is also ruled involuntary.²⁹² In *People v. Neal* incommunicado interrogation for more than 24 hours was ruled inadmissible.²⁹³ Though how long is too long remains unresolved, courts should consider the length of the incommunicado

²⁸⁵ See Cri.Pro.C., cited above at note 2, Art. 59(3); Anti-Terrorism proclamation, cited above at note 23, Art. 20(3)

²⁸⁶ See FDRE Constitution, cited above at note 1, Art. 20(5)

²⁸⁷ See Cri.Pro.C., cited above at note 2, Art. 61

²⁸⁸ United Nations, Basic Principles on the Role of Lawyers, 7 September 1990, Art. 5.

²⁸⁹ Human Rights Watch telephone interview with lawyer, September 27, 2013. Human Rights Watch,. “They Want A Confession” Torture And Ill-Treatment In Ethiopia’s Maekelawi Police Station. (United States of America: Human Rights Watch, 2015 Web. 14 May 2015), p.34

²⁹⁰ Ibid.

²⁹¹ *Turner v. Pennsylvania* (1949) 338 U.S. 62

²⁹² *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1485

²⁹³ *People v. Neal* (2003) 31 Cal.4th 63, 84

detention as one circumstance surrounding the confession to determine existence of coercion case by case basis.

3.5.4. Promises

In this case confession is the outcome of promise made to the suspect as to the state of something. A confession obtained as a result of promise of benefit of certain kind or even leniency is ruled inadmissible.²⁹⁴ In one case the suspect claimed that he was promised that if he confessed he will be a witness on the case than an accused as a result of such a promise he allegedly confessed.²⁹⁵ But he could not produce to the court any evidence suggesting the same. In another interesting case the suspect was promised that if he confessed a family arrested with him for no reason will be released.²⁹⁶ Even his families are told that the key to go free from arrest is on the hand of their son. If he confessed they will be released. But in this case though the High Court convicted the accused irrespective of such evidence the Supreme Court reversed the decision as a promise to the family to get confession is illegal and improper methods of investigation.

In practice before the confessor puts his signature, the trend with most confessions is to put statement begging for excuse on the part of the government. These words are manipulative in getting the signature of the confessor. Though the police officer knew no excuse is going to be granted to the suspect, they keep on inserting the same words for the sake of creating a belief that in confessing a benefit of getting excuse on the part of governments goes to the accused. This has an element of promise in itself. Unless they emanate from the suspect the police officers should take due care not to bring that up to the suspects mind.

3.5.5. Deprivation

The other mechanism of illegal methods of obtaining confession is through deprivation methods. The suspects could be deprived of food, water, clothing and sleep. In some cases the accused claimed that they were harassed because of the deprivation of clothing for the purpose of

²⁹⁴ Cri.Pro.C., cited above at note 2, Art. 30; *People v. Carr* (1972) 8 Cal.3d 287, 296.

²⁹⁵ See *Public Prosecutor v. Abdi Kemal et al*, cited above at note 243

²⁹⁶ See *Public Prosecutor v. Ayalew Bogale*, cited above at note 270

obtaining confessions.²⁹⁷ Sleep deprivation could occur by exposing suspects to cold, lack of bed, and 24 hours of lack of light in the room.²⁹⁸ An act of deprivation which in the eyes of reasonable persons could result forfeiture of one's right to remain silent should be regarded as coercion. Courts should take due care in dealing with such claim because deprivation of any of these happens in private rooms. Where interrogation is conducted the suspect has no family, witness or friends around him. It is not clear as to what the persons subject to deprivation should present to the court.

In general, all of the above acts are involuntary confession which should be excluded from determination of guilt of the suspect. In many case the accused repudiates his confession at the trial court claiming that it was the result of coercion prohibited under FDRE Constitution. Even if most of these coercions in Ethiopian police stations are untrue, it is hard to believe that all are false. Therefore for the sake of protecting those with real claim, courts should request the prosecutor to execute not only the burden of producing the confession but also burden of persuading the court as to how it is gathered. The court should be ready and voluntary to protect accused person right relating to involuntary confession which should be excluded.

3.6. Fruits of Poisonous Tree

The evidence originally gathered as a result of the illegal interrogation becomes the "poisonous tree."²⁹⁹ Once this original confession is illegally recorded then such confession could lead the investigators to secondary evidence which is called the "fruit of the poisonous tree."³⁰⁰ It is important to understand in Ethiopia that the *exclusionary rule applies to the fruit of poisonous tree* i.e. any evidence consequential to the illegal confession obtained. The evidence which is directly derived from the illegal interrogation is excluded. The latter evidence discovered as a consequence of an illegal interrogation is also subject to exclusion. For example, confession obtained by torture may disclose the location of the murder blade. The constitution is clear in excluding not only the confession but also any evidence obtained under coercion is

²⁹⁷ This is a methods employed by putting the suspect into the feeling of shame. For the purpose of halting being necked the suspect will have an option of confessing or feel the shame while being visited by the officers.

²⁹⁸ See Human Rights Watch, cited above at note 289, p.27

²⁹⁹ Robert M. Pitler, "The Fruit of the Poisonous Tree Revisited and Shepardized", Cal. L. Rev. vol.579, no.56 (1968), p.581

³⁰⁰ Ibid.

inadmissible.³⁰¹ Any evidence is not limited to confession evidence but also any other evidence obtained as a result. Therefore, courts should equip themselves to exclude illegal confession and the fruits of the illegal confession itself.

3.7. Confession Made to Courts

Article 35 of Criminal Procedure Code regulates the power of court to record statements and confessions. First of all, recording confession is not only the power of trial court. Any court be it the trial court or any other subordinate court can record confession.³⁰² In practice, confession, currently, is recorded in nearest first instance court.³⁰³ In relation to this the trends of recording confession by the trial judge himself should be questioned. For instance in the case of Federal First Instance Court Menagesh Criminal Bench the judge recording the confession and the one trying the Real Time Dispatch (RTD) cases is the same judge. In Federal First Instance Court Arada Criminal Bench mostly one judge is assigned to record confessions. But sometimes even the trial judges are involved and the same case may be presented to them for a trial after the prosecutor framed the charge. For the sake of protecting the rights of the suspect and also the interest of justice this might be problematic. Two points must be emphasized. First, if the suspect already convinced the court he is tortured by the time he appeared for giving confession that would burden the prosecutor with extra effort of convincing the court that the suspect is lying about his alleged torture. Second, if the suspect already confessed to the same judge it is impossible for the same suspect to exclude it later. This is because the judge is the one who recorded the confession after asking the suspect as to his free will to confess. Even if he is coerced for confession he gave in the same court, it is difficult to persuade otherwise the same judge. For the purpose of both parties, it is better to avail trial of the crime later by a judge having no prior contact with the recording confession of the suspect. In that case bias towards the issue can easily be avoided. Therefore, there has to be a guideline requiring the trial of the case by a judge having no prior contact to the case.

Confession according to Criminal Procedure Code can be recorded anytime before the opening of a preliminary inquiry or trial. This is a danger to the individual human right protection against

³⁰¹ See FDRE Constitution, cited above at note 1, Art. 19(5)

³⁰² Cri.Pro.C., cited above at note 2, Art. 35(1)

³⁰³ Previously, Addis Ababa city courts used to record confessions of suspects.

torture and exclusion of evidence obtained through coercion. The treat emanates from the fact that if evidence is to be recorded any time before trial that will give police officers a sufficient time to use different illegal tactics to obtain confession. As far as the suspect is in custody the police officers can exert coercion and the suspect is left with an option of either stopping the ongoing torture or confess. As far as the confession can be recorded any time before the trial the police officers will have sufficient time and while the suspect will only have little patience without knowing when it will stop. More convincingly, if the suspect is willing without any coercion to confess why would he take number of weeks or months to confess?

According to the Constitution and Criminal Procedure Code, arrested person are brought to courts within forty eight hours.³⁰⁴ This is the best opportunity to record the confession. If the accused is willing to give his confession this is the best opportunity for obtaining voluntary confession compared to confession obtained after lengthy detention. For the sake of providing better protection to human rights of the accused the mandatory provision of law requiring the same is necessary. But the current law and the current practice are not concerned with this. Even if the suspect come after long time of detention the courts recording confession only asks if he is willing to make and they do not seem to be concerned with why and how did the confession could not come early but now. It is illogical to think that the person brought to court after a week time to confess to a court is coming voluntarily. But courts are not activists in this regard. In the absence of practical and legal protection against an open room for abuse, the protection against illegal confession in criminal investigation is eroded.

The Criminal Procedure Code requires courts to record voluntary confession per se. Voluntariness as it is envisaged under the Criminal Procedure Code is to be determined by ‘*questioning the person making it.*’³⁰⁵ The question to be presented to such person could be of any type which enables the courts to determine as to the voluntariness of the confession. Currently, the practice shows that once the suspects are presented to the court the judges ask them if they are voluntarily making the confession. Then, will be asked if they committed the criminal act.

³⁰⁴ Cri.Pro.C., cited above at note 2, Art. 29

³⁰⁵ Id., Art. 35(2)

Once the confession is recorded the police officers themselves are not going to take the confession from the court. Rather the law expects it to be sent to the trial court or to the prosecutor.³⁰⁶ This provides safeguards to suspects. The police officers tell them that if they deny in that court they will be getting back to police station. As such, if the police officers are not given the result of the record and if the suspects knew that the police officers do not know whether he admits or not, that will relieve them of coercion. From observation made, in most cases the confessions obtained in court are given to the police officers themselves which in default exposes the suspect to human right abuse and encourages false confession.

The issue of voluntariness is adjudicated at time remote from the interrogation. Evidence which might prove or disprove coercion is already disappeared. Often police assert that claim of torture is afterthought on advice from prison-mates and creates impossibility of determining voluntariness. If the law requires the confession to be recorded within forty eight hours time this issue could have been resolved. Fisher writing about involuntary confessions and Article 35 of Criminal Procedure Code suggests that if confessions are recorded in strict sense of the above provision, then reopening the issue of voluntariness should not be an issue in trial court.³⁰⁷ He says the trial court should see the confession as fact found out by lower court and presented to the appellate court. He keeps on arguing however, the court recording the confession should be provided with guideline as to how confessions are taken. For instance the courts should make sure that the right to remain silent is notified, once confession is made he should be sent to prison or given bail, make sure non existence of coercion, to record confession only within forty-eight hours limit and recording confession in a court where only a clerk is present.³⁰⁸ Even today no guideline of any sort exists. Most of the above safeguards are not available as shown below.

In the current practice of courts recording confession they do not ask as to the confession made in police station. For instance suspects are not asked whether they are notified of the right to remain silent in police station and whether they have made confession voluntarily. All they will be ascertaining is as to his willingness to make confession in that court irrespective of the prior history in the police station. Every one going through such procedure also returns to the police

³⁰⁶ Id., 35(4)

³⁰⁷ See Stanley Z., Fisher., cited above at note 201, P.336

³⁰⁸ Id.,p.336-337

station. At least those claiming their human right has been violated should be able to be put in prison than returning them to police officers. There is no reason for courts to expose suspects to human right violation if they claim its happening. It is the role of courts to enforce and also protect citizens against possible human right abuses.

As to its form, the practice shows that the confession is recorded in a very short statement in most cases.³⁰⁹ This also goes against the interest of the suspect as there is no way the stories stated on the courts confession record are to be disproved in the absence of detail. It is even difficult to rely on a confession recorded only accepting the commission of crime on some specified date without elaborating all elements of what happened.

The other issue relates to recording confession twice. This happens in two ways. At first the suspect may deny his involvement in commission of a crime. But after being taken to police station in some other day or hours he will be taken to court for another trial of obtaining confession. In the case of *Federal Public Prosecutor v. Mikiyas Girma* the lower court recoded the confession of the suspect twice.³¹⁰ In the first case the suspect already told th e court that he did not commit the offence but later as a result of the alleged coercion exerted on him he confessed in the same court and later convicted in a trial court. The second option is when the suspect first gave his confession to a court then later on some other day he wants his confession to be recorded for the sake of denunciation of the previous confession in the same court. The law however keeps silent as to possibility of both of the above two circumstance. Even existence of two confessions at a time is being used for a defense in a trial. It is unreliable to accept confession submitted after first denying it. It is beneficial to the suspect that one may confess under coercion and later when he gets an opportunity to tell the truth he may ask the court to record his denial again. This could however be abused by the suspect. What is ought to be done is to make sure the courts recording confession first time should take all necessary means to ascertain truth of the confession by adopting a guideline for this purpose. Otherwise recording confession twice creates procedural irregularity and it is open to abuse by both parties i.e. police

³⁰⁹ Four line of confession in case of Behayilu Legese, (Criminal File No. 110709, Arada First Instance Court, 2006 EC.) (unpublished); Three and half line of confession in case of Mesfin Moges, (Criminal File No. 117708, Arada First Instance Court, 20006 EC.) (unpublished)

³¹⁰ Public Prosecutor v. Mikiyas Girma, (Criminal File No. 44805, Federal High Court Criminal Bench, 2006 EC.) (Unpublished)

and the suspect.

What remains issue here however is as to possibility for attorneys to ask courts to record statement of suspect based on personal initiatives without police requiring the record of confession. The idea here is to halt future abuse of suspect in custody. In relation to this Article 35 of Criminal Procedure Code simply provides the power of court to record statement of suspect without providing any detail as to who requests the confession to be recorded. Since there is no provision in the said legislation which requires only admission to be recorded, it is also possible to record denial in the involvement of crimes. Not only this but also since the law is silent as who requests the confession to be recorded, one cannot claim prohibition on the attorneys to request the statement of the suspect. More important in this regard is the fact that such entitlement of the suspect or his attorney to request his statement to be recorded affords protection of the accused against human right abuse. Under the UDHR, Ethiopia is obliged to adopt proactive measures to promote the realization of human rights.³¹¹ As such allowing suspects to ask courts to record their confession is a proactive measure to protect the suspects against possible abuse.

As to the status of such confession in a trial there is a discrepancy in practice. In the case of *Public Prosecutor v. Zinash Wendimu* the prosecutor witnesses testified to the court that the accused was forced to confess to the police as a result of the beating she suffered.³¹² The court in these case ruled that voluntariness of confession is the criteria for admissibility of confession and as such confession in the police station is excluded. What is left is the question as to the fate of confession given to the court according to Article 35 of the Criminal Procedure Code. The court rightly ruled that if the confession in the police station is a result of coercion, it naturally follows that confession to the court after that is untrustworthy. The accused after giving his/her version of fact to the court, he/she will be returning to the police station. In the case of *Public Prosecutor v. Abebe Isubalew*, the Supreme Court ruled in 1978 that once distrust is created on confession made to police, the confession given to court is also untrustworthy.³¹³ This is because the confession in police station is obtained through coercion and even if he later confessed in the

³¹¹ See UDHR Preamble, cited above at note 13

³¹² See *Public Prosecutor v. Zinash Wendimu*, cited above at note 272

³¹³ *Public Prosecutor v. Abebe Isubalew*, (Criminal Appeal File No. 173/78, Ethiopian Supreme Court, 1978 EC)

court according to Article 35 of the Criminal Procedure Code, he is still under the custody of police and even returns to them after confessing. Suspects knew what they will face when they return to police station and as such they will be left with the option of repeating the confession made in police station. Therefore exclusion of such evidence is correct.

In a case from 1979 E.C. the Supreme Court afforded strong protection against the abuse of the suspect at the time of giving confession to the court.³¹⁴ In this *High Court Public Prosecutor v. Diriba Meta (et al)* the court ruled that presence of the police investigator in the court room at the time the accused is asked whether he committed the crime or not avails the circumstance of coercion on the suspect.³¹⁵ The analysis made in 1979 is of relevance to us today that at the time of recording confession no person should attend court except clerk. This affords protection to the suspect by not exposing him to intimidation.

3.8. The Use of Co-Defendants Confession

The admissibility of an accomplice's confession against a non-confessing defendant is illegal. Its illegality emanates from the fact that the use of such evidence violates accused person constitutional right to confronting the evidences presented against him.³¹⁶ A co-defendant cannot be cross examined by the other defendant. The rules of evidence in England³¹⁷ and United States³¹⁸ dictates that confession of one of several defendants cannot be used as evidence against the other defendant. It was held that a co- defendant's confession on joint trial is evidence only against the person who made it. It will not be admitted against the other defendant who did not admit it. Confession recorded in writing may be introduced in a trial of the co-offender and that confession may implicate the other offender who exercised his right to remain silent or pleaded not guilty. That obviously creates prejudice in a trial of the other offender. The means to preclude such a prejudice is to grant separate trial of the two and not introducing the confession of the co-offender into the trial of the other. Though two individuals may be charged together, they will be granted a separate trial as the interest of justice requires it as envisaged under

³¹⁴ High Court Public Prosecutor v. Diriba Meta et al, (Criminal Appeal File No. 709/79, Ethiopian Supreme Court, 1979 EC)

³¹⁵ Ibid.

³¹⁶ See FDRE Constitution, cited above at note 1, Art. 20

³¹⁷ Tong's Case, Kelyng 18 (1664)

³¹⁸ Bruton v. United States 391 U.S. 123 (1968)

Criminal Procedure Code.³¹⁹ Not only this but also change of venue should also be ordered for the purpose of avoiding bias of the judge who have heard the confession of the other. Whenever a fair and impartial trial cannot be held for any reason a change of venue can be requested.³²⁰

In the case of *South Nation Nationalities People Regional State Anti Corruption Commission Prosecutor v. Gudina Lemma*, the accused was charged with five other co-defendants.³²¹ Among the five accused the second accused contended that he committed the crime of appropriation and misappropriation in the discharge of duties³²² as a result of the alleged incitement of the *Mr. Gudina Lemma*. The court trying the case in its first instance and appellate jurisdiction convicted the person with the evidence of the confession taken from the other co-accused. The trial is conducted together and the evidence of co-accused confession does not give the other suspect the chance to defend himself and violates constitutional right to confront the evidence produced. The Federal Supreme Court Cassation Bench interestingly overruled the decision of the regional court's decision.³²³ The reason provided is the fact that a person when giving his confession he admits his own fault and mentioning any other person as co-criminal is useful only for further criminal investigation. If not for such purpose, it will not be relevant for the determination of guilt of the other person. The Cassation Bench ruled that such evidence will not have both positive and negative effect on the trial of the other person. Accordingly, the confession of co-accused cannot be used against the other person who denied involvement in the crime.

The same stand was taken in the case of *Gambella Regional State Justice Office Prosecutor v. Naja Zhingeta*.³²⁴ In this case the accused was charged with another man suspected of murdering the victim. According to the confession of the other co-accused *Mr. Naja Zhingeta* was having an affair with the victim and he wanted to get rid of such an affair and paid the house servant

³¹⁹ See Cri.Pro.C., cited above at note 2, Art. 117

³²⁰ Id., Art. 106

³²¹ South Nation Nationalities People Regional State Anti Corruption commission Prosecutor v. Gudina Lemma, (Criminal File No. 96310, Federal Supreme Court Cassation Bench, 2007) (Unpublished)

³²² See The Criminal Code of the Federal Democratic Republic of Ethiopia, , cited above at note 1, Art. 413

³²³ See South Nation Nationalities People Regional State Anti Corruption commission Prosecutor v. Gudina Lemma cited above at note 321

³²⁴ Gambella Regional State Justice Office Prosecutor v. Naja Zhingeta, (Criminal File No. 94450, Federal Supreme Court Cassation Bench, 2006 EC) (Unpublished)

living with the victim to kill her.³²⁵ The house servant was promised to be paid 10,000 birr for which he agreed and killed the victim. The other co-defendant who allegedly paid 10,000 birr for the murder of the victim denied involvement in the commission of such a crime. The High Court acquitted the suspect claiming that a successful defense of alibi is brought to the court. But the supreme court of the regional state overruled the decision asserting that the co-accused confession given to a police and court in accordance with Article 27(2) and 35 of Criminal Procedure Code respectively shows the involvement of *Mr. Naja Zhingeta*. The Federal Supreme Court ruled the regional Supreme Court erred in admitting accomplice's confession against a non-confessing defendant. The reason given by the Cassation Bench is the fact that both Article 27(2) and 35 provides a mechanism of recording confession incriminating self. They said, the law does not indicate any use of such confession as evidence against the non confessing accused.

The outcome and holding of the Federal Supreme Court Cassation Bench is historical as some accused might be affected by decision of courts accepting such confession, if not for this decisions. Though the outcome and the stand taken by the Supreme Court is interesting, the reason provided for the holding is poor. It is poor because all the matters dealing with admissibility and inadmissibility are not provided in Criminal Procedure Code. In allowing prosecutor to use co-suspect as a witness against the other suspect, in the case of *Federal Public Prosecutor v. Yordanos Abay*, the cassation court said there is no law prohibiting the prosecution.³²⁶ For the same reason there is no provision in the criminal procedure prohibiting the admissibility of an accomplice's confession against a non-confessing defendant. Rather than relying on absence of permissive provision in the Criminal Procedure Code, the court could have relied for strong reason on absence of opportunity for confronting the evidence presented. In countries where such evidence is excluded from trial, the rationale provided is the absence of cross examining the co-accused. The FDRE Constitution provides for the same right.³²⁷ The one who confessed is not subject to oath, not present as witness and not cross examined. Therefore, the Cassation Court should have contended the absence of right to confrontation in the admission of accomplice's confession against a non-confessing defendant.

³²⁵ Ibid.

³²⁶ Public Prosecutor v. Yordanos Abay, (Criminal File No. 57988, Federal Supreme Court Cassation Bench, 2003 EC, Cassation Decision Vol. 12)

³²⁷ See FDRE Constitution, cited above at note 1, Art. 20(4)

It is of relevance however to touch upon the current trend of flipping co-offender to being witness against the trial of the other. In relation to this the cases of *Federal public Prosecutor v. Sadik Lemu* and *Public Prosecutor v. Mehadi Muche* is pertinent.³²⁸ In both cases the accused claimed that since the prosecutor witness is a co-defendant arrested together for the same crime, their testimony is inadmissible. But the court could not accept such argument. In another case, *Federal public Prosecutor v. Yordanos Abay*, the Federal Supreme Court Cassation Bench decided that there is no law which prohibits the prosecutor to decide to flip suspect to being a witness.³²⁹ From the decision of cassation bench it can be said that once two persons are accused together in the same trial the confession of one person cannot be used against the other not willing to confess but if the prosecutor decides to make the suspect a witness on the trial of the other, it is possible. Allowing the prosecutor to use one suspect as a witness against the trial of the other is logical. Because, the use of confession against the other cannot be adduced as evidence as it violates the constitutional right to confrontation. But if the one who confessed is to be made a witness the right to confrontation is protected. That witness will be subject to rigorous cross examination by the accused. It should however be emphasized that the person who is converted to being a witness buys his freedom by testifying on the other. Therefore such evidence is not reliable.

The Revised Anti-Corruption Special Procedure and Rules of Evidence proclamation provides however that “the testimony of the person who has been given immunity from prosecution shall have equal weight as the testimony of ordinary witness.”³³⁰ But those who are given immunity are buying their freedom at the cost of testifying against others. Consequently it is illogical for the law to provide as such. The court need to give lesser weight to such testimony in determining whether the prosecution made his case or not. In addition to this a guideline should be adopted for prosecutor to determine and make a plea bargaining with cooperating witness. Nowadays however, the police officers themselves are choosing whom to prosecute and whom to make witness. This is because at the time the investigation report is given to prosecutor, one co-suspect is already recorded as defendant while the other’s statement is recorded as a witness. But it

³²⁸ Public Prosecutor v. Sadik Lemu (Criminal File No.6844, Federal Supreme Court, 1995 EC.); Public Prosecutor v. Mehadi Muche (Criminal File No.8902, Federal Supreme Court, 1995 EC.)

³²⁹ See Public Prosecutor v. Yordanos Abay, cited above at note 326

³³⁰ See Revised Anti-Corruption Special Procedure and Rules of Evidence proclamation, cited above at note 209, Art. 43(5)

should be for the prosecutor to make plea bargaining with cooperating witness for the purpose of avoiding any promise and coercion into granting such status.

3.9. Methods of Defending Confession Evidence

From the cases scrutinized in this thesis and experience of other countries there are possible mechanisms of proving illegality of confession. The first, by showing the fact that it is not the outcome of free will or it is not made voluntarily. In order to prove the involuntariness of confession the totality of Circumstance surrounding the confession should be the parameter. Simple question whether one is forced into making confession is not the solution. Even for suspects who could not or did not contend his right is violated, those who are assigned as a public prosecutor should see the circumstance of the accused at the time of confession. The totality of circumstance surrounding the confession is taken as parameter in deciding voluntariness of confession in different countries. In one case the federal public prosecutor took in to consideration this parameter in deciding not to institute proceeding.³³¹ In this case six persons were suspected of committing grave theft of property estimated with values of 7,450 birr. The police investigators reported the case to the federal prosecutor incorporating confession of the suspects given to police and court. According to the decision of public prosecutor the voluntary confession per se are admitted as evidence in court of law. Any evidence obtained under coercion is not admissible. Though the meaning of coercion is not provided in the Constitution, the prosecutor said it is obvious that it includes any sort of physical and psychological impact exerted on the suspect. In this case suspects gave their confession in an interrogation held in police statics bureau and not in the investigation or interrogation office. The police statics bureau is located at the back side of the police compound where no individual or even prosecutor has access to it. Conducting interrogation in secret place without informing the prosecutor about it meant exerting physical and psychological impact. The total circumstance leads the prosecutor to say the suspects were coerced. This is an interesting case that the prosecutor took the circumstance surrounding the confession to measure voluntariness of the

³³¹ Sintayehu Amare (et al) (Criminal File No. 3048/05, FDRE Ministry of Justice Yeka Justice Office, 2005 EC.) (Unpublished)

confession. This decision is of paramount importance as it considers the totality of circumstance in proving illegality of confession before even putting it as evidence in court of law.

The courts need to take lesson from this decision that to rule confession as inadmissible one should see generally the total environment the suspects are put in at the time of giving confession. For instance, in the case of *Federal public Prosecutor v. Mikiyas Girma* the lower court recorded the confession of the suspect twice. In the first one the suspect denied his involvement and later admitting his involvement in a crime. Further the prosecutor witness replied to the court that the investigator was reading confession from the paper and ordered the suspect to repeat it to the witnesses so that they can appear to court and testify that he confessed. Even the confessions in police station and in the court are not compatible. The circumstance of surrounding the confession implies that the confession is unreliable. Because the confession is the story of the suspect not something to be read to suspects by the police. Who knows who wrote it? Why is the suspect repeating what the investigator is reading, why did he deny first and then later admitted in the same court? All of these questions put a reasonable man in suspicion of the confession. When all these facts put together, circumstance surrounding the confession in this case implies unreliability of the confession. But in this case except for the dissenting opinion written on the case by one judge the accused is convicted. As such the decision rendered by the public prosecutor could be a lesson to courts not considering circumstances surrounding the confession and just wanting direct proof of existence of use of force or threat.

Confession evidence obtained from the accused multiple times and if those confessions have difference the court disregards them. In the case of *Public Prosecutor v. Tessema Bizachew*, the Supreme Court rejected the confession claiming that the police interrogating the suspect multiple of times do not comply with the rules provided under Article 27(2) of Criminal Procedure Code.³³² This is a sound decision that once the suspect gives his version of fact there is no reason for the court to trust one among various confessions made. Even in the extreme case of *Public Prosecutor v. Sisay Dagne* which indicates that the accused defended himself as he already adduced the confession he gave at lower court in accordance with Article 35 of Criminal Procedure Code.³³³ Any person who gave his confession in accordance with Article 27(2) but

³³² Public Prosecutor v. Tessema Bizachew (Criminal File No. 28308, Federal Supreme Court, 1999)

³³³ See Public Prosecutor v. Sisay Dagne, cited above at note 216

denied of committing a crime based on Article 35 of the Criminal Procedure Code is said to have put the confession already made in police station in doubt. This is because if confession made to police and court should be compared the latter one is more trustworthy. In all of the above case the circumstance of torture or otherwise of the environment and procedural irregularities are indication of problem which courts should be suspicious about.

In *Public Prosecutor v. Ayenew Minwiyelet (et al)*, the prosecutor witness claimed in the court that he did not see the accused committing crime.³³⁴ He testified to the court that he was coerced into being witness on the case. From this logically and persuasively, the court, come to the conclusion that if the witnesses are coerced to act as a witness, there is no reason for the police to not to expose suspects with the same treat. As such the confession of the accused itself is unreliable. From this case we can say that even if deciding voluntariness is difficult job, the court can take circumstances surrounding the confession. The circumstance surrounding the confession in this case is that even the witnesses did not voluntarily become witness on the case.

One cannot give his confession for crimes which no victim come to contend crime is committed on him. Sometimes in murder cases that could happen as a result of moral guilt felt by the suspect himself. But recidivist house burglar cannot voluntarily go on knocking doors in some village and tell to witnesses and police what he took from that house and build a case against himself without even the owner knowing him and complaining to police for investigation like in the case of *Public Prosecutor v. Kibre Meaza*.³³⁵ In most cases of “*Leba Tinat*”³³⁶ as it is locally called the evidences adduced are confession evidence per se. The courts seems not willing to know how confession is obtained in such cases and even how did the suspect end up being suspect from nowhere. Adducing direct evidence of torture through the use of medical certificates and witnesses could also be employed to show the circumstance of torture exerted on

³³⁴ Public Prosecutor v. Ayenew Minwiyelet et al, (Criminal File No. 44874, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished)

³³⁵ Public Prosecutor v. Kibre Meaza (Criminal File No. 22518, Federal Supreme Court, 1998 EC)

³³⁶ Leba Tinat as it is locally called is investigation conducted by the police officers on house burglars or robbers. An investigation is conducted without no trace of any sort. Mostly those usual suspects are brought to police stations and confess the crimes they have committed for the last couple of years or months.

the suspect at the time of confessing. In *Public Prosecutor v. Ayalew Bogale* the accused produced evidence of torture to prove illegality of confession.³³⁷

The second mechanism of showing involuntariness of confession is to prove the impossibility of commission of crime by the accused. For instance in *Public Prosecutor v. Zimbelachew Desalegn* the accused adduced evidence of alibi.³³⁸ The high court however convicted the accused claiming that even though the accused produced alibi he did not defend the confession he gave at the police station. The Supreme Court ruled that if a person shows trustworthy alibi the confession evidence is said to have been defended. Even if the suspect did not produce evidence defending the confession made at police station or court, it suffices to exert reasonable suspicion on the evidence of prosecution using other evidences showing no involvement of the suspect into the commission of the crime. Therefore, two of the above methods are mechanisms of defending cases with evidence of confession.

3.10. A Motion to Suppress the Confession: Trial Within a Trial

Although the issue of the admissibility of improperly obtained evidence may involve mixed question of law and fact, it should be determined through trial within a trial. It is required to hold a trial within trial to determine the admissibility of confessions challenged on one of the grounds of illegality of methods as to how it is gathered. The ultimate issue on the *trial within a trial* is voluntariness which is contested by the accused himself. The purpose of a trial within a trial is to give an opportunity to both the prosecution and the accused to give evidence to enable the court to decide whether to admit or to reject the confession.³³⁹

A trial within a trial is a procedure followed by the court to decide on the admissibility of a confession or admission by an accused. It may create heavy onus of proof which is placed upon the prosecution and to the excessive burdens on the courts of trial within trials. The idea of holding trial within a trial, however, is to determine voluntariness of confession, which is relevant for admissibility or inadmissibility of the confession. Asking the accused on the *trial*

³³⁷See *Public Prosecutor v. Ayalew Bogale*, cited above at note 270

³³⁸ *Public Prosecutor v. Zimbelachew Desalegn* (Criminal File No. 26686, Federal Supreme Court, 1999 EC.)

³³⁹See Keane, Adrian, and Paul McKeown, cited above at note 18, p.38

within a trial if he is guilty effectively violates the function of the trial within the trial as it is a separate inquiry into voluntariness. During the trial within a trial, the contents of a confession are not in issue.³⁴⁰ Rather it is only an objection raised to the admission of the involuntary confession. This is a protection afforded to the accused because once the evidence is presented to the court and already heard, it will jeopardize the interest of the accused. This is true even if the confession is excluded later on a trial. Once the judge is aware of the contents of the confession made he/she will be biased towards what he/she come to learn as a result of the presentation of the same to the court.

In accordance with the Ethiopian Criminal Procedure Code “*Where the prosecutor or the accused objects to the admission of any evidence ..., the court shall decide forthwith on the admissibility of such evidence.*”³⁴¹ Therefore if the admissibility of the confession became an issue the court needs to decide the admissibility of confession forthwith before taking the evidence. In any case the issue of voluntariness or involuntariness of a confession is the issue of admissibility or inadmissibility of the confession. Based on Criminal Procedure Code, contending admissibility of evidence should be raised by way of objection before it is heard.³⁴² Otherwise it is self defeating and does not comply with the aim of protecting the accused against involuntary confession. In corruption cases the question of admissibility could be entertained in preparatory hearing stage.³⁴³ Malayan system, which is used as a source for our Criminal Procedure Code, suggested that the admissibility of statement or confession is dealt with at a trial within a trial.³⁴⁴ This should be considered as a separate proceeding from the trial proper.³⁴⁵ If the accused does not object to the admissibility of a statement there is no need to hold a trial within a trial.³⁴⁶

But practically the objections to admission of involuntary confessions are not made in accordance with the order of the law. Rather it is to be ascertained after a full trial of the case.

³⁴⁰ As cited on Mbuli, Reuben Johnson, "Admissibility of Confessions in Criminal Trials" (PhD diss.1993), p.225

³⁴¹ See Cri.Pro.C., cited above at note 2, Art. 146

³⁴² Ibid.

³⁴³ See The Revised Anti-Corruption Special Procedure and Rules of Evidence proclamation, cited above at note 209, Art. 36(2)

³⁴⁴ Landa, Jay, and Mohamed Ramjohn, Unlocking Evidence 2nd Edition (Routledge, 2013) ,p.15

³⁴⁵ Public Prosecutor v. Lim SengChuan [1977]1 MLJ 171 CCA

³⁴⁶ Public Prosecutor v. Mohamed Noor bin Jantan [1979] 2 MLJ 289

Mostly involuntariness of confession is raised as a defense once the prosecutor made his/her case. This can be observed from the cases involving issues of confession. It is not inconformity with the law that it should not be the case that the defense should conflict the confession evidence presented rather object to its admission before it is actually heard.

But in some instances it is not unusual, however, to see the accused making an allegation that he is forced to make statement against his interest at the time he is asked to plead guilty or innocent. The way it is done is that they will not only be pleading innocence but also tell the court that they were beaten up in making confession. As to the allegation however the court should ask before hearing the evidence if the accused is willing to substantiate his claim with certain evidence to go for trial within a trial. This should be the case only if there is a claim on the part of the accused that the confession is involuntary at the time of introduction of the confession evidence but before hearing it.

The practice however is that the courts give deaf ear to the claim made by the accused at that stage and go on with considering the evidence without previously making sure that it is voluntary. In case of *Public Prosecutor v. Worku Yigzaw* the suspect was charged with theft of gold jewelry.³⁴⁷ The evidence in this case shows that no witness has seen this person committing the crime or no circumstantial evidence indicating the person in the commission of the crime exists. Though the suspect claimed he gave his confession as a result of physical force applied on him by the investigator the court did not ask him to support his claim with evidence nor did the court ask the prosecutor if the confession is voluntary. Rather the court settled the case through determination of evidentiary sufficiency of confession evidence per se. After this case is solved, however, the suspect opened a criminal claim against the police officer *Getnet Teferi*. In the case of *Public Prosecutor v. Getnet Teferi*³⁴⁸ the prosecutor successfully proved to the court that the police used improper methods of investigations by slapping him on his face and wound his back with a police baton. As a result the police were sentenced. The issue here is that in the case between *Worku Yigzaw*, a wrong method of settlement mechanism is used. A trial within a trial should be conducted so that the truth would come out without the necessity of measuring whether confession per se meets the standards of proof.

³⁴⁷ See *Public Prosecutor v. Worku Yigzaw*, cited above at note 266

³⁴⁸ See *Public Prosecutor v. Getnet Teferi*, cited above at note 217

It is against the constitutional protection afforded to the accused that such evidence should not be made part of the evidence and heard in court without making sure that it is made voluntarily. Even if the court wants to determine voluntariness at this stage they will be doing that at the time of hearing the case. They will not be determining voluntariness independently before seeing the content of the confession presented. Mostly, later on the stage of presenting defense the accused will be given a chance to present his version of fact alleging involuntariness of confession. In *Public Prosecutor v. Masresha Astatike*, the Federal First Instance Court Menagesha Criminal Bench read the charge brought to the court and asked the accused if he pleads guilty or not.³⁴⁹ The accused told the court that he is tortured in police station and on the day the crime is alleged to have been committed, he claimed to have been in prison. The judge automatically referred to his previous record and proved that he was in prison on the day of commission. The prosecution did not adduce any other evidence except for the confession. Therefore the court acquitted the suspect without further full trial proceedings. Such cases are rare but show the need to have a trial within a trial without further entering into the full trial. Trial within a trial is not enough. The confession which is ruled admissible can still be challenged on the ground of the weight the confession must be given.

3.11. Burden and Standard of Proof

The burden of proof in criminal adjudication rests in general on prosecution.³⁵⁰ The burden of production and burden of persuasion are the two components of burden of proof.³⁵¹ The burden

³⁴⁹ *Masresha Astatike v. Public Prosecutor*, (Criminal File No. 43353, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished)

³⁵⁰ The principle that the burden of proof rests upon the prosecutor is one of the corollaries of the presumption of innocence, a basic human right. See. Thienel, Tobias, "The admissibility of evidence obtained by torture under international law," *European Journal of International Law* Vol.17, no. 2, 2006), p.353-355; Raimondo, Fabián, *General principles of law in the decisions of international criminal courts and tribunals* (Brill, 2008), p.111; Roberts, Paul, and Adrian Zuckerman, *Criminal evidence* (Oxford University Press, 2010), p.244; Shahabuddeen, Mohamed, *International criminal justice at the Yugoslav tribunal: a judge's recollection* (Oxford University Press, 2012), P.155; Kälin, Walter, and Jörg Künzli, *The law of international human rights protection* (Oxford University Press, 2009), p.454; Emmerson, Ben, Andrew Ashworth, and Alison Macdonald, (ed.), *Human rights and criminal justice* (Sweet & Maxwell, 2007), p.669

³⁵¹ Simeneh Kiros, "The Principle of the Presumption of Innocence and its Challenges in the Ethiopian Criminal Process" *Mizan Law Review*, vol.6, no. 2 (2013), p.254-255; Christopher, Kathryn, Russell Christopher, and Russell L. Christopher, *Criminal Law: Model Problems and Outstanding Answers* (Oxford University Press, 2011)

of production is the obligation imposed on the party to present evidence to the court while the burden of persuasion however is the obligation expected of the parties to convince the court with certain standard.³⁵² Meeting the burden of proof means that a party has introduced enough compelling evidence to reach the standard defined in the burden of persuasion. The prosecutor has the burden of prove i.e. both burden of persuasion and burden of production. The accused will have burden of proving his defense once the prosecution made his case and the proceeding is open for a defense.

The prosecution bears the burden of proving voluntariness of confession. Prosecution is said to have made his case if he/she is able to prove his/her case. If confession is part of the evidence used to persuade the court about guilt of the suspect, the burden of proving the accuracy, truth, and the voluntariness of confession rests upon prosecution. This is because the Constitution obliges courts to consider confession as evidence only if it is voluntarily made. *In Jackson v. Denno* US Supreme Court case the judge said “*I repeat to you again, the burden of proving the accuracy, truth, and the voluntariness of confession always rests upon prosecution.*”³⁵³

From observation made, the practice currently available however shifts the onus to an accused in most cases. In this cases the prosecution just produces the confession signed by the accused and not asked how it is gathered. Instead the accused bears the burden of showing how confession was made. In default, the courts have given the prosecution a kick-start by not imposing them with duty of showing voluntariness. These also operate like presumption which is rebuttable by the accused. Only in rare cases the accused is acquitted before he is required to present his defense. For instance in the case between *Public Prosecutor v. Zinash Wendimu* the only available evidence was the confession made by the accused and witnesses who have seen the accused making confession in police station.³⁵⁴ In this case the witnesses repeated what the accused has confessed in police station but when the judge asked them how the suspect confessed the prosecutor witness testified that when the investigation police officer slapped her on her face she confessed to what she did. In this case however, it is visible to see that the

³⁵² Ibid.

³⁵³ *Jackson v. Denno*, 378 U.S. 368 (1964)

³⁵⁴ See *Public Prosecutor v. Zinash Wendimu* , cited above at note 272

acquittal of the suspect followed the examination conducted by the judge of the witnesses already presented as a witness to the prosecution's case.

No clear burden is imposed on the prosecution following the claim of the accused. But the truth of involuntariness of confession come to be realized from the active role of the judges in cross examining the witnesses present at the time of interrogation. In other cases the suspect are able to bear the burden of showing involuntariness of confession as a result of the force exerted on them in public places or even in police station were third parties to the case are seeing the act.³⁵⁵ In other instance the suspects are lucky enough to show to the court how they gave their confession through other suspects who were present in police station at the same time with the suspect or subjected to the same treatment with the suspect or remanded together in the same cell.³⁵⁶

In *Melkam Zena et al v. Federal Public Prosecutor*, the prosecutor witness testified that they saw police reading the confession to the police so that he repeats to them.³⁵⁷ Not only this but also they testified that they did not know whether the suspect was tortured or not. In this case the investigator told the suspect to tell the witnesses what the suspects and the investigator talked about last night and even the court saw the injury sustained by the suspects. Even though the prosecutor witnesses' testimony proves existence of doubt on the voluntariness of confession the court unfairly presumed voluntariness and shockingly ordered them to defend themselves.³⁵⁸ This shows that there is a de facto presumption of voluntariness and the burden of proof is on the accused to prove otherwise of the confession.

The State however should not be granted any of such assistance by way of relieving them of proving the voluntariness of confession. This is also a constitutional duty on the state. One is presumed innocent. There is also a protection of self-incrimination and requirement of voluntariness for the admission of confession evidence. The reading of these rights indicates that the state can refute presumption of innocence by producing legal documents. The state can call witnesses of all sorts to show the court that the confession was the outcome of free will.

³⁵⁵ Ibid.

³⁵⁶ See *Public Prosecutor v. Ayalew Bogale*, cited above at note 270

³⁵⁷ *Melkam Zena et al v. Federal Public Prosecutor*, (Criminal File no. 41143, Federal First Instance Court Akaki Criminal Bench, 2007) (Unpublished)

³⁵⁸ Ibid.

The State have all the resource and mans power, including police officers, who may have interrogated or participated in the course of investigation to be called upon for elaborating the free will of the accused at the time of interrogation. Once they are in the court they will be subjected to different kinds of cross examination by being sworn to tell the truth. It is obvious from this that the prosecution is in a position to carry out the burden of proving how confession is gathered without the courts presumption of legality of confession. The prosecution should bear the burden of proving not only because the law burdens state with such duty or even state is in position to carry out this duty but also in consideration of unfairness of imposing this burden on the accused. Placing an onus of proof on the accused is wrong because any human right violation exerted on the suspect happens mostly in private room where evidence of any sort is unavailable. It is unfair to burden the suspect with the duty of producing evidence which they don't have. Even whenever they try to show the court the injury on their body the police will claim that has nothing to do with interrogation. It is in the interest of criminal justice, therefore, to comply with the law burdening the state with the duty of persuading the court as to legality of confession. Even if we have to place the onus of proof on the accused, if he/she simply provided some evidence which laid some doubt, then whatever onus there was on that accused should be discharged and that the initial and overall onus should remain on the state.

The visible error made commonly by the courts currently relates to the fact that they say the accused did not defend himself as there is no evidence produced supporting illegality of confession. It is wrong in that there is no indication of prosecution producing evidence supporting legality of confession. Rather it is just presumed, even if the accused contended that it is illegal. For instance in *Public Prosecutor v. Ahmed Abdi Mussa* the court said though the accused claimed he is tortured he did not produce any sort of evidence to show illegality of confession obtained in police station. At the same time however, the court did not put any indication of whether the prosecution produced evidence to prove accuracy, truth, and the voluntariness of confession.

The pattern of the Supreme Court decisions shows that the prosecution bears the burden of proof of commission of a crime and illegal confession will be excluded none of the cases so far suggest however, the burden is on the prosecution to show legality of confession. Rather it is expected of the accused as incidentally provided in the judgment given on *Public Prosecutor v. Ayalew*

Bogale.³⁵⁹ In this case the court said the evidence of confession will be excluded if the accused proves its illegality. *Ayalew Bogale* was lucky enough to get evidence that he is tortured in making confession. In *Public Prosecutor v. Tamirat Layine* the court claimed that the accused did not produce evidence supporting his claim that the confession is illegal.³⁶⁰ Therefore, the stand taken by the Supreme Court is to expect the accused to show illegality of confession without otherwise expectation of prosecution proving legality of confession. This erodes the constitutional and other human rights standards providing protection for the accused against illegally obtained evidence.

In grave robbery case, *Public Prosecutor v. Ayalew Bogale*, the victim was found dead.³⁶¹ The accused was convicted of confession and the Kalashnikov rifle found with him. The accused adduced evidence that he is tortured in making confession. The witnesses described to the court that they heard him screaming and they saw his face with simple bruises. His teeth were broken. Accused persons family were arrested with the suspect and told that their release is up to the accused. The police officers told his family to beg him so that they will be released up on his confession. The accused was able to get the freedom he deserved because he was able to bear the burden of proving that the confession was illegal. The High Court convicted the accused, though the accused carried the burden which should have been for the prosecution to bear. The Supreme Court emphasized the unreliability of illegally obtained evidence and ruled inadmissible in accordance with the Constitution.

One can prove guilt with admissible evidence. As such, it is on the state to prove guilt with admissible evidence. The aim of including witnesses who heard confession of the suspect in police station, locally called “*Yedereja Misikir*”, in to the system is to carry out the burden of prosecution in showing the confession is voluntary. That was the case in *Public Prosecutor v. Zinash Wendimu* as the prosecutor witnesses testified that the accused was coerced to making confession.³⁶² The use of such witnesses to prove voluntariness of confession is not effective. It

³⁵⁹ See *Public Prosecutor v. Ayalew Bogale*, cited above at note 270

³⁶⁰ See Federal Ethics and Anti-Corruption Commission *Public Prosecutor v. Tamirat Layine*, cited above at note 280

³⁶¹ See *Public Prosecutor v. Ayalew Bogale*, cited above at note 270

³⁶² See *Public Prosecutor v. Zinash Wendimu*, cited above at note 272

is not effective in that the prosecutor witnesses most of the time are those persons who were found at police station for their own business or the police officers themselves.

Using other ordinary person to show voluntariness is insufficient as the witnesses are not aware of the circumstance surrounding the confession. They do not know when he is arrested, how he agreed to confess, how accused spends his time in custody, what they do with him in night, etc. The use of police officers themselves as the witnesses who heard confession of the suspect in police station, locally called “*Yedereja Misikir*” is even manipulative to the right of the suspect. The police officers coming to court will not be testifying against their co-workers as to the methods employed to obtain confession. As such, it does not serve the aim it is meant to serve. They are found to be valuable in the case of *Federal Public Prosecutor v. Zinash Wendimu* because the police officer were reluctant in avoiding evidence of use of force against the suspect. The police officer slapped the suspect in the presence of the witnesses. The witnesses will not serve any benefit if the coercion occurred in the absence of witnesses.

As to the standard of proof the state is required to prove legality of confession the Special Rapporteur on Torture which said;

*“where allegations of torture and/or other forms of ill- treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill-treatment.”*³⁶³

This complies with the presumption of innocence provided in the Constitution. It is difficult to determine the standard of proof available practically in the place where the prosecution is not even burdened with the duty to show legality of confession. Where the onus rests upon the accused to rebut the Prosecution’s evidence however it has to be discharged on a balance of probabilities. Legal provision specifically regulating standard of proof of voluntariness of confession in this regard is necessary.

³⁶³UN General Assembly, Report of Special Rapporteur on the question of torture and other cruel, inhuman and degrading treatment or punishment,” U.N. Doc. A/56/156, (3 July 2001). Para 39(j).

3.12. The Evidentiary Sufficiency of Contested Confessions

According to Report of UN General Assembly Special Rapporteur, convicting suspects with confession evidence per se will create conducive environment for the occurrence of torture itself.³⁶⁴ Supporting criminal charge with other evidences than confession is necessary in order to convict suspects. Therefore, adducing other reliable evidence than confession is expected as confession per se is insufficient for conviction.³⁶⁵ Presumption of innocence is rebutted only by adducing evidence beyond reasonable doubt or at least clear and convincing evidence.³⁶⁶ Convicting suspects without meeting this standard however infringes this constitutional protection.

For instance, in the case between *Public Prosecutor v. Sisay Dagne* the accused was convicted of the crime with the confession evidence obtained at police station.³⁶⁷ The Federal Supreme Court in reversing the decision of high court ruled that in the absence of other collaborating evidence against the accused confession evidence per se is not sufficient evidence to secure conviction. But in this case the lower court ordered the accused to adduce defense based on the confession of the suspect. The Supreme Court ruled that evidence of confession without other supporting evidence cannot be said to prove a case beyond reasonable doubt. Therefore the accused should have been acquitted without the necessity of defending himself. This decision of the court ensures the importance of securing through other methods of investigation evidences which are in themselves sufficient for conviction of the alleged offender.

In other case of *Public Prosecutor v. Kibre Meaza* the Supreme Court framed the issue as to evidentiary sufficiency of confession.³⁶⁸ In this case, the prosecutor adduced confession evidence with witnesses who heard confession of the suspect in police station, locally called “*Yedereja Misikir*”. The witnesses saw the accused describing to police how they have committed the

³⁶⁴ Ibid Report of the Special Rapporteur on torture, A/HRC/25/60, para. 21.

³⁶⁵ European Committee for the Prevention of Torture and cruel, inhuman or degrading Treatment or Punishment (CPT) (2002) Standards, CPT/Inf/E/(2002) 1—Rev 2009.

³⁶⁶ The presumption of innocence requires evidence beyond reasonable doubt. An attempt was made to include these standards in to ICCPR but failed. It is no were set in our law too. The Human Right Committees General Comment 13, para 7 provides that ‘no guilt can be presumed until the charge has been proved beyond doubt.’ Art. 66(3) of Rome Statute of ICC sets beyond reasonable doubt standard.

³⁶⁷ See *Public Prosecutor v. Sisay Dagne*, cited above at note 231

³⁶⁸ See *Public Prosecutor vs. Kibre Meaza*, cited above at note 335

crime. The court said this witness's testimony is not relevant in that they have not seen the commission of the crime nor they have knowledge of commission of the crime. What is striking in this case is that they were charged with the crime of robbery without any victim claiming its existence. So the court said that neither the confession of the accused claiming the commission of a crime on some unknown person nor the witness's confession seeing all the description of the accused as to the commission of the crime is sufficient to obtain conviction. The same holds true in relation to pictures taken at the time of description of the event.

In the case of *Public Prosecutor v. Daniel Birhane* both the police and the accused did not know on whom the crime was committed.³⁶⁹ But accused just confessed that he committed a crime on somebody. The Supreme Court emphasized that confession per se is not sufficient in such cases even if the witnesses who heard confession of the suspect in police station, locally called “*Yedereja Misikir*”, saw the accused confessing or elaborating how he committed a crime. The mere fact that these witnesses have seen the demonstration of the accused to the police of how the crime is committed does not make them knowledgeable about the crime. They are just repeating what is already confessed by the accused and as such evidence of confession per se are not sufficient to secure conviction. In the previous case of *Public Prosecutor v. Ayalew Bogale* the Supreme Court once again emphasized insufficiency of confession evidence in settling the issue of exclusion of illegally obtained evidence.

In the case of *Public Prosecutor v. Worku Yigzaw*³⁷⁰ the court ruled that confession and witnesses who heard confession of the suspect in police station, locally called “*Yedereja Misikir*” per se is not sufficient for criminal conviction.³⁷¹ The same decision is reached by the Federal High Court in acquitting five accused of corruption case.³⁷² This holds true specially, as the practice of warning suspects of their right to remain silent and the practice of police in resorting to proper methods of investigation is yet to develop. Once the court found out that the confession obtained in police station is the outcome of coercion that in effect results in insufficiency of confession obtained in the court in accordance with Article 35 of the Criminal Procedure Code. This was the

³⁶⁹ Daniel Birhane v. Public Prosecutor (Criminal File No. 27537, Supreme Court, 1999 EC.).

³⁷⁰ See Public Prosecutor v. Worku Yigzaw, cited above at note 266

³⁷¹ Ibid.

³⁷² Bedada Tolosa (et al) v. Anti Corruption Commission prosecutor, (Criminal File No. 143969, Federal High Court Criminal Bench, 2007) (Unpublished)

courts holding in the case of *Public Prosecutor v. Zinash Wondemu*.³⁷³ In the two cases of *Remedan Hussen v. Public Prosecutor*, the court ruled that the mere presence of confession evidence with the witnesses who heard the suspects confessing to police do not prove the guilt of the person.³⁷⁴ The witnesses neither new or saw the occurrence of the crime and evidence of confession is insufficient.

According to the current prevalent practice however, the trends of courts shows that confession of the suspect in combination with witness who saw the suspect confessing suffices for conviction. For instance in *Public Prosecutor v. Ketema Kenito*, *Public Prosecutor v. Kasahun Girma*, *Public Prosecutor v. Addise Bedasa* and many more the only evidence adduced was confession and witnesses who heard confession of the suspect in police station, locally called “*Yedereja Misikir*”.³⁷⁵ In the case of *Federal Public Prosecutor v. Melkam Zena*³⁷⁶ the only

³⁷³ See *Public Prosecutor v. Zinash Wondemu*, cited above at note 272

³⁷⁴ *Public Prosecutor v. Remedan Hussen*, (Criminal File No. 41125, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished), *Public Prosecutor v. Remedan Hussen*, (Criminal File No. 41168, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished)

³⁷⁵ *Public Prosecutor v. Ketema Kenito*, (Criminal File No. 45587, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); *Public Prosecutor v. Kasahun Girma*, (Criminal File No. 44892, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); *Public Prosecutor v. Addise Bedasa*, (Criminal File No. 44327, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); *Public Prosecutor v. Dereje Haile*, (Criminal File No. 44357, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); *Public Prosecutor v. Biniyam Desalegn*, (Criminal File No. 44443, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); *Public Prosecutor v. Fikirte Mokonene*, (Criminal File No. 41707, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished), *Public Prosecutor V. Gebrehiwot Hagaze et al v.*, (Criminal File No. 44729 (Unpublished). .Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); *Public Prosecutor v. Maki Lemma*, (Criminal File No. 44763, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); *Public Prosecutor v. Workneh Degefa*, (Criminal File No. 44874, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); *Public Prosecutor v. Defaru Demse*, Federal First Instance Court Menagesha Criminal Bench, File No. 45116 (Unpublished), *Public Prosecutor v. Getachew Demisie*, (Criminal File No. 45216 Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); *Public Prosecutor v. Biruk Manyazewal*, (Criminal File No. 43942 Federal First Instance Court Menagesha Criminal Bench 2006 EC.), (Unpublished); *Public Prosecutor v. Akililu Abay*, (Criminal File No. 43789, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); *Public Prosecutor v. Workineh Mekonen*, (Criminal File No. 43844, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); *Public Prosecutor v. Gezahagn Mekonen*, (Criminal File No. 48756 Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); *Public Prosecutor v. Abriham Ayalew*, (Criminal File No. 43912, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); *Public Prosecutor v. Yeabkal Addisu*, (Criminal File No. 43613, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); *Public Prosecutor v. Degisew Yilma*, (Criminal File No. 43614, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); *Public Prosecutor v. Sara Million*,

evidence adduced was confession and testimony of the witnesses who saw suspects confessing. The court in this case ordered the accused to defend themselves claiming prosecutor made his case. Though they have successfully defended themselves later, what happens if evidence of torture were not accessible to the suspects?

An act of conviction based on insufficient evidence violates the presumption of innocence. One is presumed innocent until the state proves otherwise beyond reasonable doubt or at least by producing clear and convincing evidence.³⁷⁷ The current trend however is not uniform in all courts. In limited cases courts ruled insufficiency of evidence of confession per se. But in most cases the accused persons are being convicted with the evidence of confession per se. This evidence is insufficient in that confession evidence is meant to corroborate other evidences. If confession obtained in police station is sufficient the law could not have required confessions to be registered in courts in accordance with Article 35 of Criminal Procedure Code. According to the Indian system let alone considering confession obtained in police station as sufficient for conviction, it is not even admissible as evidence in court of law. In Malaysia confession to police officer below the rank of Inspector and confession by accused while in custody of police are not to be used as evidence in court of law. According to the European committee for the Prevention of Torture Standards and Special Rapporteur on Torture conviction based on confession per se creates conducive environment for the occurrence of torture itself.³⁷⁸ Production of other reliable evidences for the purpose of conviction is emphasized by UN Special Rapporteur on Torture and European Committee for the Prevention of Torture.³⁷⁹ They said confession per se is insufficient

(Criminal File No. 43638, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); Public Prosecutor v. Yosef Tarekegn, (Criminal File No. 43647, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); Public Prosecutor v. Birhan Fikre, (Criminal File No. 43656, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); Public Prosecutor v. Medina Ibrahim, (Criminal File No. 43657 Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); Public Prosecutor v. Kibrom Mesfin, (Criminal File No. No.43665, Federal First Instance Court Menagesha Criminal Bench, 2006) (Unpublished); Public Prosecutor v. Biruk Habtamu, (Criminal File No. 43749, Federal First Instance Court Menagesha Criminal Bench, 2006 EC.) (Unpublished); Federal Public Prosecutor v. Negasi Gebre Giyorgis et al, (Criminal File No. 143425, Federal High Court Criminal Bench,). (Unpublished)

³⁷⁶ See Public Prosecutor v. Melkam Zena, cited above at note 347

³⁷⁷ See cited above at note 356

³⁷⁸ See Report of the Special Rapporteur on torture, A/HRC/25/60, cited above at note 88, para. 21

³⁷⁹ European Committee for the Prevention of Torture and cruel, inhuman or degrading Treatment or Punishment (CPT) (2002) Standards, CPT/Inf/E/(2002) 1—Rev 2009

for conviction.³⁸⁰ The other evidences produced should secure conviction irrespective of the existence of confession evidence. Therefore, a current trend of convicting accused with evidence of confession per se is wrong which needs to be rectified.

3.13. Coerced Confessions and Wrongful Convictions

Those who are wrongfully convicted are guilty but innocent. There are lots of reasons for the occurrence of wrongful conviction. One of which is conviction based on coerced confession. Coerced confession can lead and have led to false confessions and wrongful convictions of innocents.³⁸¹ The person under torture tells the story the torturer wants to hear and not the truth of what occurred. The aim of requirement of voluntariness rule for the admissibility of confession is to minimize the wrongful conviction.³⁸²

In one case in Ethiopia, *Federal Public Prosecutor v. Shumi Regassa*, the suspect is found guilty of murder based on the evidence adduced.³⁸³ He was sentenced for life imprisonment. Then the real murderers confessed to their crime after the *Shumi Regassa* served more than three years of sentence.³⁸⁴ What is striking in this case is that one of the evidence produced against *Shumi Regassa* was confession obtained in police station. Even if the suspect contended to the court that he was coerced into making a confession he could not get sufficient attention. Once his innocence is proved now, it became visible that the confession was the coerced one. In other case of *Federal Public Prosecutor v. Masresha Astatike* the accused was convicted for stealing car wheels.³⁸⁵ The evidence adduced against the person was confession given to police and to courts in accordance with Article 27(2) and 35 of Criminal Procedure Code respectively. When the accused appeared to the trial court he told the court that he is coerced into making confession and on the day of the occurrence of the crime as stated on the charge he was in prison. The court

³⁸⁰ Ibid.

³⁸¹ Gudjonsson, Gisli H., The psychology of interrogations and confessions: A handbook (John Wiley & Sons, 2003), p.178

³⁸² Skinnider, Eileen, "The art of confessions: A comparative look at the law of confessions–Canada, England, the United States, and Australia," International Centre for Criminal Law Reform and Criminal Justice Policy (2005), p.2009

³⁸³ Public Prosecutor v. Shumi Regassa (Criminal File No. 65177, Federal High Court, 2003) (Unpublished)

³⁸⁴ Ibid.

³⁸⁵ Public Prosecutor v. Masresha Astatike (Criminal File No. 43353, Federal First Instance Court Menagesha Criminal Bench, 2005 EC.) (Unpublished)

verified the truth of his claim and acquitted him. If not for the evidence of alibi in prison he could have faced wrongful conviction if his presence were somewhere else for which he cannot present evidence. Therefore, the danger of coerced confession in exposing accused to wrongful confession is higher which calls for the careful consideration of collaboration of evidence of confession with other evidence and non sufficiency of confession evidence per se. The other evidence produced and the evidence of confession should also comply with each other in terms of their content.

3.14. Barriers to the Protection of Defendants' Rights

3.14.1. Lacking Enforcement Mechanisms

From the scrutiny made so far, it is clear that the procedural laws regulating interrogation of suspects are not explicit and they do not cover all the issues raised here. For instance the issues relating to effects of not following the procedure provided in the law are not specifically and clearly provided. Coercion has the effect of exclusion but whether failure to notify right to remain silent, prohibiting access to lawyer etc. entails the same consequence is not clearly provided like in the case of coercion.

The issues relating to who is to be appointed as interpreter and rules relating to conflict of interest requirement lacks force of mandatory legal provisions. Not only this but also the status of confession made to police and court remains controversial with some considering it sufficient for conviction while other claim such evidence to be collaborative to other evidence. Other issues relating to the use of co-defendants confession, methods of proving illegality of confession and burden and standard of proof are still unresolved. The absence or lacks of clarity on the above issues are the reasons to the barrier to the protection of defendant's right. The judges could have excluded confession obtained without notification of the right to remain silent if there is a clear provision on the matter requiring exclusion. But in the case of *Federal Public Prosecutor v.*

Tamirat Kassa, the judge opted to reprimand than exclude.³⁸⁶ Therefore, lack of enforcement mechanism is one reason for barrier to the protection of defendant's right.

3.14.2. Lack of Administrative Supervision

The laws regulating police in Ethiopia provides for a mechanisms of performance evaluation.³⁸⁷ The evaluation envisaged by legislative organ is the observance and being faithful to the Constitution and law.³⁸⁸ The requirement of the law as to the evaluation however remains to be implemented on the ground. The evaluation conducted however is not centered on the observance of human right in conducting interrogations. Rather they are more of administrative in nature. Whether the investigation is completed in timely manner, corruption etc. are the major once at the center of evaluation of the officers. Had there been continues supervisory works of officers as observance or otherwise of accused persons right, the barrier could have been minimized. But in the absence of such system however it can be said that one of the barrier to the protection of right of citizens is lack of supervision.

3.14.3. Limited Judicial Supervision

The law requires any arrested person to be brought to courts with forty eight hours. That is one mechanism of involving judiciary so that they could have an oversight as to the total circumstance surrounding the rights of the suspect in custody of police. But from the observation made courts argue about period of remand and necessity. They are not concerned about how the suspect is being kept in custody. Even in recording confessions in court the judges simply forward whether the suspect is willing to give his confession. Rather, when it comes to human right enforcement it is expected that the judges go through all the situations of the suspect. They do not make cross examination to understand whether the confession is voluntary or not. That is why in some cases even if the confessors are coerced to make confession they do not trust the judges recording confession as they will be letting them be exposed to further abuse by letting

³⁸⁶ Public Prosecutor v. *Tamirat Kassa*, (Criminal File No. 125950, Arada First instance court criminal Bench, 2007 EC.) (Unpublished)

³⁸⁷ Federal Police Commission Administration Council of Ministers Regulations, 2003, Reg. No. 86, Fed. Neg. Gaz. 91hYear No. 39, Art. 28, 31 and 32.

³⁸⁸ *Ibid.*

them return to police station with the same officer. Therefore, the other barrier for protection of accused person's right is existence of limited judicial supervision.

3.14.4. Heavy Burden on Defendants and Limited Burden on the Prosecution

The Constitution provides mandatory provision requiring exclusion of coerced confession. As said before the prosecution bears the burden of proving the confession is the product of free will of the accused. Prosecution is said to have made his case if he/she is able to prove his case. The practice currently available however shifts the onus to an accused in most cases. In this cases the prosecution just produces the confession signed by the accused and not asked how it is gathered. Instead the accused bears the burden of showing how confession was made. In default, the courts have given the prosecution a kick-start by not imposing them with duty of showing voluntariness. In practice, the defendant's signature on a confession establishes a strong presumption in favor of its validity. By doing so court are burdening the defendant with duty of producing and convincing the court of existence of coercion which most of the time occurs in secret. Relatively, the courts in practice are not burdening the prosecutor to show legality of confession which otherwise could have forced the prosecution department to be more interested in involving in interrogation of criminal with the police and clarify it to the court. Burdening the prosecution with such duty could have relieved the suspect of extra burden imposed on him/her. Therefore, the heavy burden on defendant compared to the prosecutor is another reason for barrier to the protection of accused person's rights relating to confession.

3.14.5. The Lack of Electronic Recording of Custodial Interrogations

The confessions are hand written in most cases. The use of audio or video tapping is yet to take place in Ethiopia. If every interrogation office is required to have an inbuilt system of audio taping or videotaping many of issues involved in interrogation could have easily been avoided. For instance if one claimed that he/she did not understand the language in which the confession is recorded and she/he is not provided with interpreter the video or audio recorded could have displayed everything including the identity of the one interpreting.³⁸⁹ Even the court could have

³⁸⁹ See Rolando del Carmen, cited above at note 45, p.549; Richard A Leo, cited above at note 282, p.296; Cooper, Ms Sarah Lucy (ed.) Controversies in Innocence Cases in America (Ashgate Publishing, Ltd., 2014), p.15,

made an inference of voluntariness from what took place in the audio or video submitted to the court. Absence of such instrument also contributes for the barriers to the protection of accused person's right.

3.15. Remedies Against Illegal Confession

3.15.1. Exclusion

Any confession obtained through any improper methods which are illegal are excluded from the determination of guilt. The Constitution is clear on the coerced confession which is subject to exclusion. The exclusion applies to the confession adduced and any other fruits of the illegal confession. This is because the Constitution excludes confession or any other evidence gathered by coercion. For other types of illegal confession like failure to put the suspects in warnings of right to remain silent and other procedural safeguards specific exclusionary rule is not provided on the same provision guarantying this right. But if police officers used unconstitutional methods of interrogation that will result in exclusion of such evidence as it is void from the beginning. This is the protection afforded against illegal confession.

The courts in practice also exclude confessions obtained through coercion. Their difficulty remains with the methods of ascertaining existence of coercion. Once the accused proved he gave his confession through the utilization of coercion they are excluding it. In *Public Prosecutor v. Ayalew Bogale* for instance the accused was able to prove to the court that he gave his confession to the police officers because of the physical and psychological force exerted on him.³⁹⁰ The Supreme Court in trying the appeal lodged against conviction said this confession evidence is unreliable and untrustworthy which is inadmissible. Inadmissibility of such cases meant exclusion irrespective of the details of the information provided in that confession.

In *Public Prosecutor v. Kibre Meaza* case the court explained in its decision distrusts of voluntariness because of the fact that the confession is given in the absence victims' complaint

Gould, Jon B., The Innocence Commission: Preventing wrongful convictions and restoring the criminal justice system (NYU Press, 2007), p.153

³⁹⁰ See *Public Prosecutor v. Ayalew Bogale*, cited above at note 270

and the crime is said to have been committed on unknown person.³⁹¹ But what is striking is that rather than excluding such evidence the court went on determining evidentiary sufficiency of such confession. What is wrong is that once the confession is said to have been obtained illegally its fate is exclusion. Such evidence no longer exists in the trial of the suspect. The court should not have engaged in determination of sufficiency of such evidence. Rather, the court should have ruled it none existent. In *Federal public Prosecutor v. Zinash Wondimu* case the court excluded confession obtained from the suspect because the prosecutor witness testified that the suspect confessed after being beaten by the investigator so that she confesses.³⁹²

Most of the exclusion measures are taken after hearing the accused that he is coerced into making his confession and the confession is not the outcome of free will of suspect. But this operates in relation to coercion either physical or psychological. As to other illegal confession obtained without following mandatory constitutional procedure like failure to notify right to remain silent or confession made without understanding the language of confession the practice of courts as to the effect of procedural irregularities is yet to be identified.

3.15.2. Criminal Trial

One of the sanctions for obtaining illegal confession is to open a criminal prosecution against the police officers who have employed improper methods of investigation. In relation to this the criminal code provides that it is a crime of use of improper method for any police officer charged with duty of interrogation to

*“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 mental torture, be it to obtain a statement or a confession, ...”*³⁹³

³⁹¹ See Public Prosecutor v. Kibre Meaza, cited above at note 335

³⁹² See Public Prosecutor v. Zinash Wendimu, cited above at note 271

³⁹³ See Criminal Code of Ethiopia Art. 424, cited above at note 1

In relation to this, in the case of *Public Prosecutor v. Worku Yigzaw*³⁹⁴ the police used improper methods of investigations by slapping him on his face and wound his back with a Police Baton.³⁹⁵ But an occurrence of slap or beating on his back was proved not in the trial of *Worku Yigzaw* but in the trial of the police investigator himself for the use of Improper Methods.³⁹⁶ In the trial of another police officer, *Public Prosecutor v. Henok Ambello*, the force used was slap on the face of the suspect asking why he committed the crime.³⁹⁷ The interrogation was not even whether the suspect did the offence but why and the suspect in that case was beaten so that he responds to such interrogation without even confessing whether he committed the crime. In grave robbery case, *Public Prosecutor v. Ayalew Bogale*, the accused adduced evidence that he is tortured in making confession.³⁹⁸ The witnesses described to the court that they heard him screaming and they saw his face with simple bruises.³⁹⁹ In one recent case the federal high court ruled that two of the accused gave their confession as result of the force exerted on them and as such the accused defended themselves sufficiently.⁴⁰⁰ In *Public Prosecutor v. Mahmed Gizachew* the suspect adduced evidence showing that he was tortured every night.⁴⁰¹

In *Federal Public Prosecutor v. Zinash Wondimu* the prosecutor witnesses testified to the court that the accused was forced to confess as a result of the beating she suffered.⁴⁰² In this case the prosecution department took wrong decision. Trial court judges may put to the witnesses questions which are relevant for the just decision of the case.⁴⁰³ Consistent with this the presiding judge insisted in clarifying how the confession is obtained. The first witness already gave some clue as to the fact that the accused denied her involvement in the crime first. Then the question the court wants to solve is how she did agree to confess later. Though the witnesses tried to conceal the judge's cross examination exposed that she was coerced. Now, the right approach to serving justice should have been to take remedial action against the police officer who followed

³⁹⁴ See *Public Prosecutor v. Worku Yigzaw*, cited above at note 266

³⁹⁵ See *Public Prosecutor v. Getnet Teferi*, cited above at note 217

³⁹⁶ *Ibid.*

³⁹⁷ See *Public Prosecutor v. Henok Ambello*, cited above at note 269.

³⁹⁸ See *Public Prosecutor v. Ayalew Bogale*, cited above at note 270.

³⁹⁹ *Ibid.*

⁴⁰⁰ See *Bedada Tolosa et al v. Anti Corruption Commission prosecutor*, cited above at note 262.

⁴⁰¹ *Mahmed Gizachew v. Public Prosecutor*, (Criminal File No. 141338, Federal High Court Criminal Bench, 2006 EC.) (Unpublished)

⁴⁰² See *Public Prosecutor v. Mikiyas Girma*, cited above at note 303

⁴⁰³ See Criminal Procedure Code Art. 136(4), cited above at note 2

improper methods of investigation. Rather the wrong decision taken in this regard is to try the prosecution for false testimony. That followed because in the police file the witnesses testimony says the accused gave her confession voluntarily. This is the standard format police uses when they take testimonies of witnesses who heard confession of the suspect in police station, locally called “*Yedereja Misikir.*” Instead of investigating as to the truth or otherwise of the police misconduct the wrong option opted was to prosecute the witnesses. The witnesses have no motive to lying before the court. Even the victim herself testified in the same way after trying to conceal. They were convicted for telling the truth.

This is discouraging mechanisms and does not afford protection to suspects. The police can use this case as a precedent and may tell the witnesses to confess according to the wishes of the investigators or otherwise face prosecution. In any case rather than running after witnesses, it is better to make investigation of what happened and if there is police misconduct that should be rectified by bringing about criminal charge against the police officer.

3.15.3. Civil and Administrative Measures

In addition to the criminal measures that are taken against the police officer for the use of improper methods of interrogation, the civil and administrative measures can be taken. Any person including police who infringed any law will be liable for extra contractual liability.⁴⁰⁴ Therefore, the suspect who is coerced into making confession can claim the infringements of the criminal procedure and constitutional provision which entails a liability towards the victim in accordance with extra-contractual liability law. Such person will be obliged to pay compensations for the material and moral injury suffered. Even for the moral injury a payment of one thousand birr will have a hindrance effect compared to the salary of police officers. If the coercive method employed is the use of physical assault like in the case of *Public Prosecutor v.*

⁴⁰⁴ Civil Code of the Empire of Ethiopia, 1960, Proclamation No. 165, Neg. Gaz., Extraordinary Issue, 19th No 2. Art. 2035

*Worku Yigzaw*⁴⁰⁵ and *Public Prosecutor v. Zinash Wondemu*⁴⁰⁶ who faced an assault tort liability arises for use of physical assault.⁴⁰⁷

In addition to the civil action against the officer an administrative decision can be taken against the police in accordance with Addis Ababa and Federal Police Commission Enabling Proclamation and Police Commission Administration Regulation.⁴⁰⁸ Accordingly, these laws impose extra duties on the police officers to be faithful to the Constitution and conduct their interrogation in accordance with the law.⁴⁰⁹ There is an administrative inbuilt system in which performance evaluation is conducted and failure to observe such duty entails dismissal from police duty.⁴¹⁰ Accordingly, if awareness is created on this subject matter the suspects can exercise their rights by bringing administrative and civil action against the police exploiting improper methods of interrogation.

⁴⁰⁵ See *Public Prosecutor v. Worku Yigzaw*, cited above at note 266

⁴⁰⁶ See, *Public Prosecutor v. Zinash Wondimu*, cited above at note 272

⁴⁰⁷ See Civil Code Art. 2038, cited above at note 404

⁴⁰⁸ See Federal Police Commission Administration, cited above at note, 387, Art. 24

⁴⁰⁹ See Federal Police Commission Establishment Proclamation Art. 24, cited above at note 209.

⁴¹⁰ See Council of Ministers Regulations No. 86/2003. Art. 28, 31, 32, cited above at note 387

Chapter Four: Re-shaping the Confession Rule in Ethiopia

“To deny people their human rights is to challenge their very humanity.”

Nelson Mandela⁴¹¹

4.1. Introduction

In a country where confession of suspect is the sole evidence or at least the major evidence adduced against the suspects in criminal trial, it is of paramount importance to have a complete and persuasive law governing the subject matter at issue. In addition to this, those who are involved in criminal justice administration are expected to get involved in respecting and enforcing accused person's right. As such this chapter is meant to explore the mechanisms of correcting the improper methods practically employed in dealing with confession of suspects. The necessary reform in the law compiled with the pre-existing duty and role of criminal justice administrators or national human right institutions will be explored.⁴¹²

As it is indicated in the chapter three of this thesis laws relating to confession are not comprehensive enough in enforcing accused persons right. Practically, identical issues are being handled differently from courts to courts and from judges to the other judges. Some of this difference emanates from different understanding of the law which lacks clarity and detail. This calls for the need to have a reform in the law in order to include provisions which are missing from Criminal Procedure Code or otherwise needs clarifications. Taking into account the fact that the Criminal Procedure Code is under revision, it is of paramount importance in this paper to indicate how to re-shape the exclusionary rules in Ethiopia.

⁴¹¹ Reddy, E. S., "Nelson Mandela: Symbol of Resistance and Hope for a Free South Africa." (1990), p.85

⁴¹² The term “national human rights institution” has acquired a specific meaning. While the number and range of “institutions” concerned with human rights is large, and includes religious institutions, trade unions, the mass media, NGOs, government departments, the courts and the legislature, the term “national human rights institution” refers to a body whose specific functions are to promote and protect human rights.

4.2. Re-establishing and Re-shaping Law of Confessions: Reform in the Law of Confessions

Only voluntary confessions are admissible as evidence in court of law.⁴¹³ This is already what is provided in the law. What remains unresolved however are the issues relating to what amounts to coercions or definition of voluntariness. As to what sort of influence are regarded as coercion the laws are not comprehensive enough. Providing explicit definition which is an open ended provides guiding principle to courts in dealing with the subject matter. Such reform is of importance to Ethiopia as our legal system relies on the law proclaimed by parliament than court adopted rules. The elaboration as to what amounts to involuntariness can be regulated in the evidence law. But in the absence of criminal evidence law and any initiation to come up with evidence law, it is of paramount importance to incorporate it in the coming Criminal Procedure Code.

Therefore, the definition to be provided for voluntariness of confession should take into consideration the fact that any force, threat and intimidation, deprivation, confession obtained after lengthy incommunicado detention, confession obtained in the hope of advantage or oppression exerted by a police officers involved in the investigation. For this to take effect the law should explicitly demand the prosecutor not to frame a charge or courts not to convict a person without scrutinizing the total circumstance surrounding the confession.

The laws regulating confession should incorporate clear provisions as to procedure to be followed in recording confessions, presenting to the court, burden and standard of proof.⁴¹⁴ In recording confessions in the police department at least for grave crimes there has to be a requirement of audio taping or videotaping. There is already requirement of warning the suspect as to the right to remain silent and the right to have an interpreter. But in advancing this right, the effect of not following this requirement should be provided in the Criminal Procedure Code. Moreover for the purpose of avoiding conflict of interest the laws should clearly provide who

⁴¹³ See FDRE Constitution, Art. 19(5), cited above at note 1

⁴¹⁴ In Hong Kong for instance a committee is established for the purpose of considering legal reform relating to confessions rules. This committee made comparative study of common law and civil law rules and suggested a legal reform which is comprehensive and modern one.

can act as an interpreter whenever the confession is recorded. The requirement of impartiality in order to act as an interpreter should be incorporated.

Federal Public Prosecutors under federal jurisdiction works with the police in all police stations. Prosecutors should act like a watchdog institution of the police officers by way of check and balance. By way of revolution, confessions recorded in the absence of prosecution should not be admissible except with other strong reason. For confessions recorded on the holiday, nights etc. whenever the prosecutors are not around the police stations there should be requirement of sufficiency of reason provided to record such confession in the absence of prosecutors.

Based on requirements of trial within a trial if the admissibility of confession evidence is objected by the accused the prosecution should bear the burden of production and persuasion as to the fact that the confession is the free will of the suspect. Not only as to the requirement of burden of proof but also the standard of proof should be regulated in the context of exclusionary rule for which the current law is silent.⁴¹⁵

The Criminal Procedure Code gives the judges discretionary power to enter not guilty even if the accused pleads guilty if in the eyes of the judge a plea of not guilty should have been entered.⁴¹⁶ This protects the suspects from involuntary false confession. The same protection should be afforded to the suspect in that courts recording confession based on Article 35 of Criminal Procedure Code should be given discretionary power of not recording confession.⁴¹⁷ Not only this but also the court trying the case should be given broad discretionary power to exclude confession if the judge is not persuaded that the confession is the outcome of free will as the prosecution tries to convince. Finally, the law should specifically prohibit the admissibility of an accomplice's confession against a non-confessing defendant as it violates the right to confrontation provided in the Constitution. All of the above and other problems indicated in this thesis need proper law addressing them. This is about freedom of citizens and life threatening event. One could be vulnerable to wrongful confession and could even be sentenced to capital

⁴¹⁵ See note 366

⁴¹⁶ See Criminal Procedure Code Art. 135, cited above at note 2

⁴¹⁷ As it is provided on Article 35 of Criminal Procedure Code currently, once the accused says he is willing to confess the judges are not given the power to refuse to record taking into account the unusual circumstance of the suspect.

punishment. Furthermore, the issues in this paper are not story of number of cases available. But taking into account the relevance of confession and its current use as major evidence, the necessity of legal reform in this regard is of relevance.

4.3. Re-establishing and Re-shaping Law of Confessions: Role and Function of Police Institution

There is a constitutional mandate imposed on all organs of the government.⁴¹⁸ One of such institution is the police commission. This institution is obliged under Article 9 of FDRE Constitution to obey and enforce human rights of suspects.⁴¹⁹ Among the right they are supposed to respect is to notify the right to remain silent, to provide an interpreter and also not to coerce suspects in making confessions.⁴²⁰ In addition to this the enabling acts of the institution itself mandates members of police force to be faithful to the Constitution and other subordinate laws.⁴²¹ It is part of public knowledge that police uses force on criminal suspects. It should not be the case that everyone talks about police misconduct but nobody does anything. Therefore, for the purpose of protection of an accused person's right, the police should follow the mandatory provisions of the law. Among them is the duty to give notify the right to remain silent, the duty to provide interpreter and to respect the rights of suspects against self-incrimination.⁴²²

They should also give unlimited access to lawyers and families at the time the suspects are under custody of police. They should actually refrain from using force to get confessions and also appear in the eyes of the public and criminal justice administrators that they primarily observe the law, though individual cases of police misconduct still is inevitable. Rather than defending existence of police use of force in the institution, they should be committed in looking at themselves to avoid the occurrence of human right violations.⁴²³ In order to appear faithful to the Constitution the police organ needs to evolve into performance evaluation of all police officer at the heart of which is the issue of respect for human right than other administrative matters. For

⁴¹⁸ See FDRE Constitution, Art 9 of const, cited above at note 1

⁴¹⁹ Ibid.

⁴²⁰ Id., Art. 19 and 20

⁴²¹ See Federal Police Commission Establishment Proclamation 720/2011, cited above at note 214

⁴²² See FDRE Constitution, cited above at note 1, Art 19 and 20

⁴²³ See Ethiopian Human Rights Commission Report, cited above at note 213

this to happen there is already law entitling them.⁴²⁴ In addition to this they should be open to the public so that the suspect's condition can easily be visited by interested groups like civil societies. More important in this regard is the necessity of giving sufficient legal education on the subject matter to those who are involved in the interrogation of suspects. As it is the experience of some police stations, an accused persons rights are posted on the wall of the interrogation. This practice should extend to other police stations and notification and awareness creation should be conducted by posting custody cells and interrogation rooms of the possible rights of the suspects.

Furthermore the investment in the modern day technological instrument like audio and videotaping is necessary. If these instruments are used in recording confessions the chances of suspect changing their stories when they appear to court becomes minimal. It also allows courts to infer any coercion exerted on the suspect and beneficial in terms of determining total circumstances surrounding the confession.⁴²⁵ In doing so, the police can be regarded as faithful to the Constitution and playing their legal role in terms of enforcing accused persons rights at the time of interrogation.

4.4. Re-establishing and Re-shaping Law of Confessions: The Role and Function of Prosecutors

The prosecution department is supposed to stand for the society in general. A violation of the law is what the prosecution is meant to object and stand against. As such the role of prosecutor in relation to enforcing right of citizens is of paramount importance. Like all other government institution the Constitution mandates this institution to respect and enforce the right of arrested and accused person.⁴²⁶ In addition to this the enabling act of Ministry of Justice obliges this institution to conduct investigation, prosecution and creation of legal awareness.⁴²⁷ All of these powers are relevant to the present considerations.

⁴²⁴ See Council of Ministers Regulations, 2003, Reg. No. 86, cited above at note 387, Art. 28, 31, 32,

⁴²⁵ As quoted in Suzan, cited above at note 232, p. 174

⁴²⁶ See FDRE Constitution, cited above at note 1, Art. 9,

⁴²⁷ Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, 2010, Proc. 691, Fed. Neg. Gaz. 17th Year No. 1, Article 16 (5),(6) and (15).

The Business Process Re-engineering (BPR) document signed between police, prosecution and judicial organ of the government mandates the prosecutors to get involved into the investigation of suspects.⁴²⁸ As such the prosecutors should have to engage in investigation of criminal suspects together with police officers which in a way is a protection of the right of the suspect. They should be engaging in the investigation and prosecution of an alleged improper use of investigation techniques. If suspects are acquitted, the prosecution should automatically open an investigation or cause to be investigated against the police officer abusing his/her power.⁴²⁹ Such active role of prosecutor helps in enforcing an accused persons right relating to confession. The best example in this regard is the criminal prosecution of *Getnet Teferi* who participated in investigation of *Worku Yigezaw*.⁴³⁰ After *Worku Yigezaw* is acquitted as a result of force exerted on him for the confession, the prosecutor successfully prosecuted *Getnet Teferi* who is a police officer for using improper methods of investigations.⁴³¹ As a result, the police were sentenced and lost his job. But in another case the prosecution rather than investigating the truth or otherwise of witness testimony in the court and prosecuting the police, they prosecuted the witnesses who told existence of coercion on the accused in the *Federal public Prosecutor v. Mikiyas Girma*.⁴³²

In other case the police slapped the suspect in police station at the place where public prosecutor is present and the prosecution successfully prosecuted *Henok Ambello* for improper use of investigation technique.⁴³³ The cases of *Getnet Teferi* and *Henok Ambello* are paramount importance in deterring them from committing another improper investigation and make them a lesson to other police officers who are willing to coerce suspects to obtain confessions.

Upon receiving a police report the prosecution is obliged to decide on the case submitted to him/her.⁴³⁴ In determining the sufficiency of evidence presented the prosecution should first determine admissibility or inadmissibility of confession evidence. The prosecutor in this regard

⁴²⁸ Though this document does not have the force of the law as memorandum of understanding between this three government institutions, it should be respected. This document is being implemented from the year on.

⁴²⁹ For this proc. 691 gives power of investigation and prosecution.

⁴³⁰ See Public Prosecutor v. *Getnet Teferi*, cited above at note 217

⁴³¹ Ibid.

⁴³² See Public Prosecutor v. *Mikiyas Girma*, cited above at note 272

⁴³³ See Public Prosecutor v. *Henok Ambello*, cited above at note 269

⁴³⁴ See Criminal Procedure Code Art. 38-44, cited above at note 2

has quasi judicial power. In doing so, the prosecution is carrying out its constitutional duty of enforcing and respecting criminal suspect's right. Article 16 of United Nation Guidelines on Role of Prosecutor provides that if the prosecutor has a reasonable ground that the evidence is gathered through unlawful methods;

*“they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.”*⁴³⁵

If the prosecutors engage in excluding improperly obtained evidence they are in effect living up to their oath which they have assumed to be loyal to the Constitution and other laws, to work for the supremacy of the law, and to respect and enforce human rights with honesty.⁴³⁶

It is of paramount importance to show an example of prosecutor living up to his promise in this regard. Though most prosecutor take voluntariness of confession for granted, in the case of Sintayehu Amare (et al) the prosecutor considered the total circumstance surrounding the confession and refused to institute proceedings according to Article 42(1)a of Criminal Procedure Code.⁴³⁷ The reason provided was the fact that the interrogation of the suspect is conducted in other places out of investigation room in a place where suspects cannot get any evidence of coercion. Conducting interrogation in concealed place takes away the free will of making confession from suspects. Ensuring fair trial is not only the responsibility of judicial organ of the government but also the prosecutors. This case should be an initiation to other prosecutors in terms of giving lesson to be alert about suspect's right. Therefore the prosecutors should exercise exclusionary rule before presenting the evidence to the court. By doing so the prosecution department and individual prosecutors can carry out their duties in avoiding improper evidence adduced to courts.

⁴³⁵ United Nation, Guidelines on Role of Prosecutor, 27 August to September 1990, Article 16

⁴³⁶ Federal prosecutor Administration Council of Ministers Regulations, 1998, Reg. 44, Fed. Neg. Gaz. 5th Year No.8, Art. 11(1)

⁴³⁷ See Sintayehu Amare (et al) (Criminal File No. 3048/05, FDRE Ministry of Justice Yeka Justice Office, 2005 EC.) (Unpublished). Art. 42(1)a of Criminal Procedure Code of Ethiopia orders the prosecutor to close the file in case of insufficiency of evidence, cited above at note 331

4.5. Re-establishing and Re-shaping Law of Confessions: The Role and Function of Judiciary

The authority granted to the judiciary by the Constitution is critical in determining the role of the judiciary. The roles of the judges are for practical purposes, determined by the model within which they operate.⁴³⁸ According to our model of procedural law judges do not remain aloof and take control of proceedings.⁴³⁹ As such judiciaries play an important role in protecting human rights of citizens and promote rule of law. By way of check and balance the judicial organ of the government should make sure that government is acting according to the law. Suspects may not be willing to tell the courts how confession is obtained if the courts are not willing and in a position to protect them.

The judiciary like all of the above institutions is obliged to respect and enforce the criminal suspects human right provided in the Constitution and other human right documents.⁴⁴⁰ The judicial power is in the hand of judiciary.⁴⁴¹ The Constitution guarantees independence of the courts and mandates them to be free from any interference.⁴⁴² They are expected to function in accordance with solely of law.⁴⁴³ According to the UN Basic Principles on the Independence of the Judiciary judges are duty bound to perform based on facts presented to them and according to the orders of the law by being free from other interferences.⁴⁴⁴ The judges duty in such case is to apply the law in “fair and even-handed manner with no regard to contingent social or political pressures...”⁴⁴⁵ Whenever they try cases and decide to exclude or even burden prosecutor to show legality of confession they are engaging in judicial work. It is the duty of judges to be accountable to the law. Failure to exercise office in the standard provided in the law put at risks the integrity of the court. The judicial organ of the government, separated from other organ of the

⁴³⁸ Haralambous, Nicola, and Nicola Monaghan. *Law of Evidence*. (Cambridge University Press, 2015), p.15

⁴³⁹ This model is the one followed in inquisitorial model of procedural system.

⁴⁴⁰ See FDRE Constitution, Art. 9, cited above at note 1.

⁴⁴¹ *Id.*, Art. 79

⁴⁴² *Id.*, Art. 79(2)(3).

⁴⁴³ *Ibid.*

⁴⁴⁴ Article 2 of Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁴⁴⁵ Bangalore principle of Judicial conduct, September 2007, Art. 20

government, should take due commitment to check upon the police and prosecution department as to voluntariness of confession obtained. It is the major duty of the court to determine voluntariness and exclude the evidence in case if the confession is the outcome of coercions exerted on the suspect. The judicial organ is the one responsible to abide by the presumption of innocence.⁴⁴⁶ They can convict only if the prosecution produces enough compelling evidence rather than presuming guilt in the absence of such evidence.⁴⁴⁷ The judicial organ of the government should not burden the suspect unfairly by providing a kick-start to the prosecution in presuming voluntariness of confession. They should require the prosecution to provide other relevant evidences which in themselves can secure the conviction of the suspect. They should burden the prosecution with the duty of producing evidence indicating voluntariness of confession and at the same time expect from the prosecutors themselves to persuade them with the evidence adduced.

From the observation made whenever police, judges and prosecutors meet for a training the judges speaks out loud that the police should stop coercing the suspects for the purpose of obtaining confession. Their concern emanates from the cases they entertained in the court. Though they knew that from the claim presented to them in the court, they however did not in most cases take the initiation to exclude the evidence. It is like giving legal effect for illegal acts, though deep inside the judge they knew the confession is obtained by exploiting coercion. The case of Temesgen Abale who lost his hearing as a result of force exerted on him minimizes the integrity of the court and rather than the court playing its part for rule of law, the court gave legal effect for illegality.⁴⁴⁸ The accused presented evidence of ear injury, the family testifying the fact that he was healthy when he get arrested and co-prison roommate testifying the fact that the suspect was fine when taken away by the police and when he return in the middle of the night he lost his hearing skill. What should the accused do to convince the court more than the evidence already produced? When should the court be excluding confession obtained in such a way?

⁴⁴⁶ Haveman, Roelof, Olga Kavran, and Julian Nicholls (ed.), Supranational criminal law: A system sui generis (Intersentia nv, 2003), Vol. 1. p.212

⁴⁴⁷ Ibid.

⁴⁴⁸ See Public Prosecutor v. Temesgen Abale , cited above at note 270

In another case from Federal First Instance Court Akaki Criminal Bench⁴⁴⁹, the suspects claimed that they were tortured and the prosecutor witnesses testified to the court that they did not see the investigator reading the confession over to the accused, but they saw the suspects signing, whether force is exerted on them or not the witnesses did not know, the fact that the investigator told the suspect to tell the witnesses what the suspects and the investigator talked about last night and even the court saw the injury sustained by the suspects. But it is shocking to see that the suspects were ordered to defend themselves.

In another case the Federal High Court, in the case of *Federal public Prosecutor v. Mikiyas Girma*, convicted the suspect while the dissenting opinion provided is sounder than the reason provided for conviction.⁴⁵⁰ In this murder case the prosecutor witness replied to the court that the investigator was reading confession from the paper and ordered the suspect to repeat it to the witnesses so that they can appear to court and testify that he killed the victim. This confession was the major evidence adduced in this case. Without this confession the prosecutor does not have any other evidence which in themselves can secure conviction. Even in this case confession adduced from police station and from courts in accordance with Article 27(2) and 35 do not comply as to the participation of the suspect. What is surprising is still in this case the court ordered the suspect to defend himself. Even in defense presented by the suspect he adduced confession made to the court recording confession in accordance with Article 35 of Criminal Procedure Code. What is surprising is that, the lower court recoded the confession of the suspect twice. In the first case the suspect already told the court that he did not commit the offence but later as a result of coercion exerted on him he confessed in the same court. Still two judges outvoted the other judge and convicted him. It can be said this suspect is victim of justice. Injustice exerted on him by the police is legalized by the court.

Taking into account these sample cases the courts should play their part faithfully in accordance with the law. If courts are active enough to live up to the expectation of the law and shows ordinary commitment expected of them they can re-shape and re-establish the confession and exclusionary rule in Ethiopia which is being cracked.

⁴⁴⁹ Melkam Zena et al v. Federal Public Prosecutor, cited above at note 357

⁴⁵⁰ See Public Prosecutor v. Mikiyas Girma, cited above at note 30

4.6. Re-establishing and Re-shaping Law of Confessions: Role of Legislatures

The legislative organ of the government is the highest organ of the government in the country.⁴⁵¹ They can exert controlling mechanism on police for the improper methods of interrogation. The parliament can control the police at the time of empowering them with power of interrogation. If a clear rules are included in the legal document and the consequence for violation is provided that helps in enforcing human rights of suspects. As such the parliament should have to make reform in the law on the issues identified in this paper and provide comprehensive law.

On top of the above, the house of people representative should exercise the mandates of supervision on the criminal justice administrators in order to make sure that the interrogation and prosecution currently conducted complies with the law. By conducting oversight hearings the parliament should investigate the action of the police to verify police use of force and take decision if necessary. The supervisory power of the parliament is already recognized under the Constitution.⁴⁵² Among the action they can carry out in order to halt the ongoing police improper use of coercion to extract confession is *to call and to question* federal police officials and officials of Ministry of justice.⁴⁵³ In doing so, they can make sure if these executive organs are carrying out their duties properly. Furthermore, they can take any decision they deem necessary in order to enforce the human right of the suspects.⁴⁵⁴ The standing committees of the parliament can visit the suspects while in custody and observe how interrogation is conducted.⁴⁵⁵

For instance some reports indicate that Central Police Investigation Headquarters in Addis Ababa is known for alleged improper use of interrogation system involving coercion.⁴⁵⁶ This forms part of public perception. In relation to this the supervisory investigation conducted by Unites States Senate Intelligence Committee on the interrogation system of CIA (Central Bureau of Investigation) revealed inhuman treatment of suspects.⁴⁵⁷ This forms good experience and gives

⁴⁵¹ See FDRE Constitution, Art. 50(3), cited above at note 1

⁴⁵² Id., Art. 55(17) and 55(18)

⁴⁵³ Ibid.

⁴⁵⁴ Ibid.

⁴⁵⁵ Id., Art. 55(19)

⁴⁵⁶ See Human Rights Watch, cited above at note 260; US Department of State, cited above at note 285.

⁴⁵⁷ McCarthy, Tom. 2014. 'CIA Torture Program: Senate Report Details Abuse Of Detainees – As It Happened'. The Guardian.<http://www.theguardian.com/us-news/live/2014/dec/09/cia-torture-report-released-senate>., Ackerman,

us a lesson. Police engaging in torture or police miss conduct of any sort cannot be peculiar to Ethiopia or United States. The parliament to this date should have established committee or enquiry team to verify whether this perception of Central Police Investigation Headquarters in Addis Ababa is wrong or not. Therefore the parliament can re-establish and re-shape the rules relating to confession in Ethiopia by making a legal reform and making in-depth supervisory and investigative works on those involved in criminal justice administration.

4.7. Re-establishing and Re-shaping Law of Confessions: Role of Defense Counsel

Defense counsels are essential component in the administration of criminal justice system.⁴⁵⁸ As citizen of the country they are duty bound to respect and enforce constitutional rights of citizens.⁴⁵⁹ Their basic duty is to give quality representation to their client.⁴⁶⁰ They are said to have given the best available representation to their client if they are able to protect the legal interest of their client with courage and devotion.⁴⁶¹ Specific to the current issue, they are expected to defend the admissibility of illegally obtained evidence by scrutinizing how interrogations are carried out to determine if there is any violation of constitutional right of the accused. They should also be making sure that the prosecution department complies with the legal requirement in terms of instituting charges against the suspect with legal evidence. As a professional they are expected to render best service to their client and at the same time remind the court of an accused person right specific to their client.⁴⁶² They should be the first hand information giver to the court as to how investigation is conduct and asking the exclusion of such evidence. Even if the confession is not excluded they should be in a position to argue insufficiency of confession evidence per se.

As already explored in this thesis, the trends of Supreme Court in relation to evidence of confession they ruled in number of cases as insufficient for conviction. As such it is the duty of

Spencer, Dominic Rushe, and Julian Borger. 2014. 'Senate Report On CIA Torture Claims Spy Agency Lied About 'Ineffective' Program'. The Guardian. <http://www.theguardian.com/us-news/2014/dec/09/cia-torture-report-released>.

⁴⁵⁸ See United Nations, Basic Principles on the Role of Lawyers, cited above at note 288, Art. 12

⁴⁵⁹ See FDRE Constitution Art. 9(2), cited above at note 1

⁴⁶⁰ Federal Court Advocates' Code of Conduct Regulations, 1999, Regulations No. 57, Council of Ministers, 6th Year No. I, Art 27(1)

⁴⁶¹ Ibid.

⁴⁶² See United Nations, Basic Principles on the Role of Lawyers, cited above at note 288, Art. 14

the defense council to be alert about these decisions and make available these decisions to lower courts by way of persuasion. In doing so, defense councils are improving the administration of criminal justice.⁴⁶³ The defense once he proved illegality of confession should institute administrative and civil action against those perpetrators on behalf of his/her client or at least advice his client of this fact. If defense counsel strongly get engaged in doing the above tasks they can re-shape and re-establish the current crack of practice in relation to confession.

4.8. Re-establishing and Re-shaping Law of Confessions: Role of NGO's and Ethiopian Human Right Commission

The Ethiopian Human Right Commission is granted with broad powers of ensuring respect, Promotion and protection of Human Rights.⁴⁶⁴ They are given the power of investigation, to make recommendations, provide consultancy services on matters of human rights and forward its opinion on human rights reports.⁴⁶⁵ Though the opinion and recommendations of the commission are not mandatory, the reports it may issue manifesting human rights violations have far reaching moral and political overtone. As such taking into account the power the commission poses they can act as watchman for violations of right of criminal suspects. Whenever there is an allegation of human right abuse by the police officers they should engage in investigating and making recommendation. For instance this institution makes report of human right within certain time interval. The report from 2005 EC. shows claim of police coercion in 29 % of police stations studied.⁴⁶⁶ The report mentions specific police station where such allegation is prevalent. In addition to this the report divulged the absence of warning the right to remain silent in practice. Therefore, such naming by shaming and report on executive government as to the human right violation is a mechanism of enforcing human right of suspects relating to confession. The use of Ethiopian Human Right Commission for the purpose correcting the faulty mechanisms adopted in dealing with the illegally obtained evidence is vital.

⁴⁶³ Id., Art. 12. Provides that “Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.”

⁴⁶⁴ Ethiopian Human Rights Commission Establishment Proclamation, Proc. 210/2000, Fed. Neg. Gaz. 16th Year No. 40, Art.6

⁴⁶⁵ Ibid.

⁴⁶⁶ See Ethiopian Human Rights Commission Report, cited above at note 213

One of the reasons charities and societies are formed are to work on enhancement of human right.⁴⁶⁷ It should be borne in mind that the primary duty bearer to respect, protect and fulfill human right is state.⁴⁶⁸ The role of charities and societies pertaining to this is that they assist the state in fulfilling its human rights obligations by advocating the respect for human right.⁴⁶⁹ CSOs have the role of acting as channels of communication and act as a watchman of the violation of human right for the sake of obtaining confession.⁴⁷⁰

The role of charities and societies in attaining accountability for human right violation and mainstreaming of human right cannot be overstated. They criticize police officers for violation of human right. “Naming and shaming” is a popular strategy to enforce international human rights norms and laws.⁴⁷¹ Non-governmental organizations publicize police violation of human right and urge reform and this will strengthen the government’s commitment in sticking to the constitutional promise.⁴⁷² Even more so, they provide the citizens with an opportunity of convincing the government to observe and live up to the human right standards. In the existence of violation of this, CSO’s provide access to justice to citizens by representation. CSO’s have involved in making lobbying, advocating and training on human rights. In relation to this it is of vital importance to mention the current development in law of human right which has accepted the role and responsibilities of CSO’s in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic

⁴⁶⁷ Charities are established for charitable purposes. One of the charitable purposes according to charities and societies proclamation is the advancement of human and democratic rights. Charities and Societies Proclamation, 2009, Proc. No. 621/ Fed. Neg. Gaz. 15th Year No.25, Art. 14

⁴⁶⁸ State as major duty bearer is prescribed on major international human right instruments including: UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, (United Nations, Treaty Series, vol. 999) 171,, UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3

⁴⁶⁹ Zeleza, Paul Tiyaambe, and Philip J. McConnaughay (ed.), Human rights, the rule of law, and development in Africa (University of Pennsylvania Press, 2011), p.248

⁴⁷⁰ Doebbler, Curtis FJ., Introduction to International Human rights law (Lulu. com, 2006), P.38, Robinson, Mary, A voice for human rights (University of Pennsylvania Press, 2006), p.108

⁴⁷¹ Hafner-Burton, Emilie M., "Sticks and stones: Naming and shaming the human rights enforcement problem," International Organization Vol. 62, no. 04. (2008), p.689

⁴⁷² See Doebbler, Curtis FJ, cited above at note 470

societies, institutions and processes.⁴⁷³ Both of these human right institutions can play pivotal role in re-establishing and re-shaping rules dealing with confession by communicating improper methods of investigation and advocating the need for correction.

4.9. Re-establishing and Re-shaping Law of Confessions: Role of Media

The role of mass media in halting the ongoing coercion exerted on criminal suspect cannot be undermined. Existence of strong media promotes rule of law and respect for human right.⁴⁷⁴ They carry out the works of lobbying and investigative journalism and put the improper police behaviors to the attention of the public and to those empowered to take action against the offenders.⁴⁷⁵ In doing so, the Medias can exert moral and political pressure on the interrogation techniques used in police stations.⁴⁷⁶ The Medias can be exploited as one of the most effective halting mechanism of coercion techniques to obtain coercion provided that freedom of the press is well guaranteed. In that way Medias are a means of re-establishing and re-shaping fair confession rules in Ethiopia.

⁴⁷³ The charities and societies are said to have an important role in promotion of human right worldwide and this has been recognized on different UN Declarations on the Right and Responsibility of individuals, Groups and Organs of Society to promote and protect Universally Recognized Human Rights and Fundamental Freedoms. UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms : resolution / adopted by the General Assembly , 8 March 1999, A/RES/53/144, Article 18(2).

⁴⁷⁴ Seble Teweldebirhan, “The Role of Media in the Promotion of Human Rights in Ethiopia,” (Master’s Thesis, March, 2011), p.29

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

Chapter Five: Conclusion and Recommendations

5.1. Conclusion

The use of improper methods of interrogations could occur in the course of investigation for the purpose of obtaining confession or admissions. Illegally obtained statement implicating oneself in a crime is inadmissible. Protections are afforded in accordance with the FDRE Constitution, Regional and International binding and non-binding human right instruments. The theoretical underpinnings for inclusion of exclusionary rule into this system emanates from the will of the people of the world to discourage coercions and unreliability of confession obtained in violations of the rules and principles set. Protection against illegal confession is afforded as part of free and fair trial rights.

The Ethiopian laws relating to confession are not comprehensive enough in dealing with the issues relating to confessions. From the comparative study made other countries have incorporated comprehensive rules relating to confession through judicial decisions and legal instruments adopted by the legislative organ. In Ethiopia the Criminal Procedure Code is not elaborative enough how the criminal justice administrators should be dealing with this subject matter. The number of provisions available coupled with absence of codified comprehensive Evidence Law and absence of judicial activism, complicated the solution to the issues relating to confession.

The practical problems observed include absence of notifying the right to remain silent. Interrogations conducted without such notification will be condemned as unconstitutional. The unconstitutionality of the act done will cart off the legal recognition it could have otherwise obtained had there been a notification of right. But currently the judicial understandings do not comply with this fact. Courts are giving legal effect to confessions obtained without due consideration of due process right, like the absence of notification of right to remain silent. Right to notification of the right to remain silent without meaningful remedy will make the right unavailable.

If the suspect understands the language in which the confession is being recorded, that will not be a problem. But if the suspect is unable to properly understand the language in which his answers are to be recorded the law obliges to be provided with a competent interpreter. This protection is available not only for recording confession but also for the purpose of notifying the right to remain silent. Improper and reluctant handling of this however results in wrongful conviction. There are number of claims in relation to language that they accused argues they did not confess like it is provided on the paper. The confessors are signing without being aware what is written on the paper. It s difficult for them to deny later on a trial as those involved interpreting are the police officers involved in the investigation of the crimes itself. This raises two difficulties i.e. partiality and incompetence. But in Ethiopia no practical and legal safeguards are available. In relation to this, though the use of audio and videotaping are of much importance they yet to be introduced mandatorily in Ethiopia.

Confession should be read over to the accused who signs and dates it. In relation to reading the confession over to the accused, from the observation made in police station, there is a limitation in this regard. Dating is also conducted by the one recording confession and may result in post dating and/or predating. Such confessions could be the result of coercion. An act constituting coercion is not defined in Ethiopian law. There is no judicial guideline adopted defining coercion yet. From comparative analysis made total circumstance surrounding the confession should be considered to determine existence of coercion. So far, intimidation or threatening and use of force are persistent in the cases studied in this thesis. But, lengthy incommunicado detention, Promises and deprivation of food, cloth, water and sleep could be methods exerted to coerce for the purpose of obtaining confession.

There are trends of recording confession in the same court the trial is later to be conducted. Trends of trial judge recording confession according to Article 35 of Criminal Procedure Code exposes the judge to be biased in advance. Recording confession any time before the trial exposes the suspect to human right abuses. Police can take prolonged period of remand and after all that time my claim the suspect confessed.

A mechanism of sending the one who confessed to prison is not available. Even if the suspect claims his right is being violated by police officers, he returns back to police station with them

and may even be coming back to the same court to give his confession which he previously denied his involvement in a crime in the same court. The lower courts are making error by recording confession twice and there is a discrepancy as how courts treat such occurrences i.e. accept or reject. In any case if suspect are able to prove coercion at police station it follows that the confession obtained in the court is also rejected.

Some courts argue that even if the suspect produced an evidence of alibi, in the failure to defend the confession given in police station they held accused liable. Illegality of confession can however, be ascertained by producing coercion evidence or proving non-participation of the suspect in the commission of the crime. The use of co-defendants confession at lower court is still available. But it should be rejected as it violates the constitutional right to confront the evidences adduced against the suspect.

The most problematic area in relation to confession in Ethiopia relates to a motion to suppress the confession. Though the criminal procedure law provides a procedure of trial within a trial, this however is not the case in practice. Illegality of confession is being ascertained after full trial which exposes suspects to bias on the part of the judge as to what is recorded. Though the burden of proving legality of confession is on the prosecution the courts are however burdening the suspect with unfair burden of proving illegality without otherwise requiring evidence of legality of confession. The presumption of legality of confession is what is observed practically. It is ascertained in this thesis that even those who are wrongfully convicted are coerced into making confession. Therefore, prosecution should bear the burden of proving legality of confession without first presuming legality.

Among the barrier for the realization of arrested and accused persons rights are lack of enforcement mechanism, lack of supervision on the interrogation system, limited judicial supervision, heavy burden on the defendant and lack of electronic recording mechanism are the reason. The remedial provisions in relation to illegal confessions are also yet to take effect in Ethiopia. This calls for re-establishing rules relating to confession. In order to that reform in the law and active role of human right institutions is required.

5.2. Recommendation

Taking into account the problems identified in this thesis and potential of abuse of the current practical system, the following recommendation are given.

➤ **General recommendations**

In general, those who are involved as human right institution and administration of justice should be abiding by the rule of law. The police institution empowered to conduct interrogation should follow the mandatory procedures of the law provided in the Constitution and other subordinate legislations. In addition to this rather than relying on the confession of the suspect they should provide prosecution with other collaborative evidence. The prosecution in turn needs to make sure that the evidence presented is legal or otherwise be excluded. The courts should be in a position to protect the rights of the accused as they are provided in human right instruments and other laws. All other stake holder human right institutions should carry out their responsibility in order to re-shape laws relating to confessions. More important in this regard is the need to legal reform of subordinate legislations incorporating all the legal protection afforded against illegal confessions.

➤ **Specific Recommendations**

The writer of this thesis is of the view that the present procedures of dealing with issues relating to confession in Ethiopia should not be retained. More specifically, the following recommendations are given for reform in the system.

❖ **Coerced confession and exclusion**

- ✓ An acts constituting coercion should be expressly provided in the coming Criminal Procedure Code. It should include intimidation, threatening, use of force, lengthy incommunicado detention, promises and deprivation of food, cloth, water and sleep.
- ✓ The test for voluntariness of confession needs to be redefined.

❖ **The notification of the right to remain Silent and right to lawyer**

- ✓ The notification of the right to remain silent should have to be made by the police officers.
- ✓ In the absence of such notification however, the courts should be in a position to exclude such evidence.
- ✓ A clear law manifesting the exclusion of confession obtained without following the duty to notify the right to remain silent should be proclaimed to clarify the disagreement on the consequence of such act.

❖ **Bilingualism and confession**

- ✓ If the suspect is unable to properly understand the language in which his answers are to be recorded it should be obligatory to be provided with a competent interpreter.
- ✓ A legal reform providing safeguard of confession of the suspect incorporating who can act as an interpreter, protection against conflict of interest, impartiality and competence should be specifically provided for recording confessions.
- ✓ Avoiding the use of police officers as interpreters at interrogations, replacing them with professional interpreters should be required in serious grave crimes and for other crimes those police officers involving in the investigation should not act as an interpreter.
- ✓ Audio or videotaping (recording) should be required for solving allegation as to existence of interpreter and accuracy of interpretation including existence of coercion.

❖ **Recording confessions in police stations**

- ✓ A requirement in the Criminal Procedure Code of reading by or to him *before* it must mandatorily be *signed and dated by the suspect* should be provided for recording confession in police stations.
- ✓ Right to consult attorney should be warned before interrogation
- ✓ Recording minutes of a confession with the question and answer than in the form of narration should be required.
- ✓ Confession should always be recorded in presence of prosecutor. An exception to this principle may be provided to deal with stringent conditions
- ✓ Recording confession twice at police stations should be prohibited.

❖ **Confession made to courts**

- ✓ It should be prohibited for a judge to record confession and at the same time entertaining the case a trial level.
- ✓ Recording confession any time before the trial should be prohibited. Courts and legislatures should limit times for interrogation of the suspect. Confession should only be required to be recorded within forty eight hours in the first appearance to the court.
- ✓ Judge should be given discretionary power of not recording confession whenever he is suspicious that the suspect is not voluntarily making confession. For this cross examining the suspect as to his willingness to confess should be conducted.
- ✓ Recording confession twice at courts should be prohibited.

❖ **The use of co-defendants confession**

- ✓ The use of co-defendants confession should be rejected as it violates the constitutional right to confront the evidences adduced against the suspect.

❖ **A motion to suppress the confession: trial within a trial**

- ✓ A procedure of trial within a trial should be adopted to suppress confessions without undergoing full trial.

❖ **Burden and standard of proof**

- ✓ The burden of proving legality of confession should be on the prosecution. Accused should not be required to prove illegality without first prosecution proving legality.
- ✓ A clear law should incorporate mandatory provision requiring prosecution to bear burden of proof including the current solution to current silence of standard of proof.

❖ **Evidentiary sufficiency of confession**

- ✓ If an accused has been charged on the basis of a confession, and where there is no other evidence outside the confession incriminating him, it is desirable to exclude.

❖ **Remedy**

- ✓ For those who violate the law an administrative, civil and criminal remedy compiled with exclusion of evidence should be taken.

❖ **Role of human right institutions**

- ✓ Human right institutions should carry on re-shaping and enforcing human rights of suspects.
- ✓ Strict performance evaluation of police officers as to their human right protection should be conducted in some time interval.

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