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ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE STUDIES

SCHOOL OF LAW

Graduate Program

The Fate of Illegally Obtained Evidence in Ethiopian Criminal Process

By Habtamu Getahun Abtaw (ID No-GSR/1439/15)

Advisor: Simeneh Kiros (PhD, Associate Professor of Law)

January 2025



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The Fate of Illegally Obtained Evidence in Ethiopian Criminal Process

A Thesis Submitted to the School of Law, at Addis Ababa University, in Partial Fulfillment of the Requirements for the Degree of Master of Laws (LLM) in Criminal Justice.

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January 2025

THESIS APPROVAL PAGE

The thesis titled “The Fate of Illegally Obtained Evidence in Ethiopian Criminal Process” by Habtamu Getahun Abtaw is approved for the degree of Master of Laws (LL.M.).

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I, Habtamu Getahun, hereby declare that this thesis is original and has not been presented at any other higher education. I further declare that all materials used in this thesis have been duly acknowledged.

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Abstract

Evidence has an enormous role in determining truth in criminal proceedings in the administration of justice. All types of evidence are not admitted unless they are relevant to the matter and not subjected to the exclusion rule. Except for coerced confessions, the FDRE Constitution doesn't have an express exclusionary rule on whether illegally obtained evidence is admissible or not. The researcher primarily investigated the effects of constitutional rights violations in criminal proceedings involving illegally obtained evidence. This thesis discussed the protection of defendants against illegally obtained evidence using court cases and practical knowledge of judges and prosecutors. Particular attention is given to confessions obtained in violation of the procedure rights of the defendants and evidence obtained in violation of the rights to privacy. One of the thesis's findings is that courts' practical decisions demonstrate that they are unable to adequately enforce defendants' constitutional rights in the context of illegally obtained evidence. Some practical cases show that the court failed to apply constitutional principles and rights such as the presumption of innocence, procedural rights, and the right to privacy. The researcher argues that the court should apply FDRE Constitution provisions when determining the admissibility of illegally obtained evidence. The presence of inconsistency between the law governing the disposition of illegally obtained evidence and practice would violate the rights of arrested and accused persons, as well as fundamental principles and rights. As a result, some rules governing the admissibility of illegally obtained evidence require revision. Moreover, courts should carry out their duty of enforcing constitutional provisions.

Key Words:

Evidence, Admissibility, Illegally Obtained Evidence, Confession, and Defendants' Rights

List of Acronyms

- FDRE.....The Federal Democratic Republic of Ethiopia
- CPC The 1961 Criminal Procedure Code of Ethiopia
- UDHR Universal Declaration of Human Rights
- ICCPR International Convention on Civil and Political Rights
- ECHR European Convention on Human Rights
- EtCHR European Court of Human Right
- HOF ----- House of Federation
- CCI ----- Council of Constitutional Inquiry

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Chapter One

INTRODUCTION

1.1 Background of the Study

Evidence in the criminal justice system represents the information presented by the prosecution and defense to support their respective assertions at the trial. Parties to any dispute are required to produce and present relevant evidence at the trial. All types of evidence are not admitted unless they are relevant to the matter and not subjected to the exclusion rule.¹ The admissibility of evidence is determined by law, particularly through evidence rules. Hence, any relevant evidence to the fact in issue should not be subject to the exclusionary rule to be admissible at the trial.

The admissibility and exclusion of illegally obtained evidence do not follow a consistent or uniform approach across jurisdictions. This stems from a variety of rationales, ideologies, and other different perspectives. Although some jurisdictions have been excluding evidence due to violations of defendants' rights for a long time in the criminal process, it is possible to argue that it was not until after Second World War that human rights became a prominent common standard for determining evidence admission and exclusion. Because the second World War served as a watershed moment in the establishment of the United Nations and the signing of conventions addressing human rights protection. Following that event, human rights began to gain widespread acceptance as a standard around the world.

Criminal investigations require the gathering of evidence; however, the processes of investigation pose a risk to human rights violations. The investigation is conducted at the cost of human rights enjoyed by individuals. If evidence is acquired in a manner that exceeds the legal limitations, the evidence gained becomes illegally obtained evidence. The use of this evidence is restricted in many jurisdictions, albeit the degree varies by nation. There is widespread concern over violations of fundamental human rights in criminal processes across the world.

¹ Andrew L-T Choo, *Evidence*, (4th Edn, Oxford University Press 2015) 2-4

As one can see from common law and civil law perspectives, there is controversy about the admissibility of illegally obtained evidence. Many legal systems, mainly common law and civil law countries, consider the exclusionary rule to be an international standard. This type of evidence rule originated primarily in common law countries.² Following the international recognition of human rights, different countries with different legal systems have begun to use exclusionary rules as tools to respect a defendant's human rights during criminal proceedings.

However, the scope of the exclusionary rule has discrepancies. Although this rule is becoming a standard for protection of human rights at the time of trial for excluding evidence, there is still a difference in the scope of application of this exclusionary rule in that the rule has a wider application in common law than in civil law countries.³ Furthermore, the common law legal system is known for having separate codified evidence laws, whereas civil law legal system adherents have no separate evidence law, even though they may have dispersed rules.⁴

The primary function of the rule of evidence in any legal system is to regulate the generation, collection, organization, presentation, and evaluation of evidence for the purpose of resolving disputes about past events in legal adjudication.⁵ As stated by Ho, “many rules of evidence, including rules of admissibility, exist to protect the legitimacy of trial deliberation; they regulate the evaluation of evidence and constrain the manner in which findings of fact are made.”⁶

In criminal proceedings, a defendant has the right to remain silent, to be provided with a competent interpreter, to consult with a lawyer, the right to privacy, and other rights. These rights are the components of a fair trial right. All relevant evidence obtained in violation of those rights may not be admitted in a court of trial. There is no consistent and common approach to the admissibility of illegally obtained evidence across different jurisdictions, in terms of rules and court's practice. The social need or interest on the one side and the protection of the defendants'

² Jefferson L. Ingram, *Criminal Evidence* (14th edn, Routledge 2021) P.11

³ Michele Panzavolta et al., ‘Streamlining the Exclusion of Illegally Obtained Evidence in Criminal Justice’, (2022), p. 9. Available at <<http://www.fairtrials.org/app/uploads/2022/Streamlining-exclusion-KUL.pdf>> Accessed 4 January 2024

⁴ Ibid.

⁵ Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (3rd edn, Oxford University Press 2022) 2

⁶ Ho Hock Lai, *A Philosophy of Evidence Law Justice in the Search for Truth* (Oxford University Press 2008)33

rights on the other side are the basis of divergence. ⁷ Damaska stated that “the rules of evidence under the common law adversary system of criminal procedure present much more formidable barriers to conviction than do corresponding rules in the non-adversary civil law system.” ⁸

In Ethiopia, the exclusion of illegally obtained evidence is a point of debate even in court. The FDRE Constitution expressly excludes evidence obtained through coercion. ⁹ Evidence obtained other than through coercion in violation of the defendant's constitutional rights is not expressly excluded as it was made to confession acquired through coercion. This raises a question of whether any evidence obtained in violation of rights incorporated in the Constitution is admissible or not. The reason behind the expression of Article 19(5) of the Constitution is not evident other than excluding evidence obtained by coercion. The FDRE Constitution grants and recognizes a number of rights, including those of arrested and accused persons. The evidence obtained in violation of the arrested, accused, and other human rights would jeopardize the constitutional rights.

The Constitution guarantees several rights, including the right to remain silent, ¹⁰ the right to be presumed innocent and the right not to be compelled to testify against themselves, ¹¹ the right to defend the accusation in a fair trial, ¹² the right to be represented by legal counsel of their choice, ¹³ the right to privacy, ¹⁴ and others. Admitting evidence obtained in violation of the rights of the arrested and accused would be considered as an unconstitutional act. The criminal administrative justice system would be tainted if evidence obtained in violation of fundamental human rights is admitted.

In practice, the exclusion of illegally obtained evidence is inconsistent in similar cases. Illegal evidence obtained other than through coercion is a much more problematic area in practice. Many decisions of court revealed that there is no uniform approach to determine the

⁷ Kuo-Hsing Hsieh, *The Exclusionary Rule of Evidence: Comparative Analysis and Proposals for Reform* (first published 2014, Routledge Publishing, Ltd. 2016) 18

⁸ Mirjan Damaska, ‘Evidentiary barriers to conviction and two models of criminal procedure: A comparative study’ [1973] No. 3 University of Pennsylvania Law Review 121, 506

⁹ The Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, Art. 19(5)

¹⁰ Id., Art. 19(2)

¹¹ Id., Art. 20(3/)

¹² Id., Art. 20

¹³ Id., Art. 20(5)

¹⁴ Id., Art. 27

admissibility of evidence obtained in violation of constitutionally guaranteed rights. However, the judicial organ has a responsibility and duty to respect and enforce human rights in the criminal process.¹⁵ The Constitution requires all rights to be respected and protected. In this regard, the lack of an express exclusionary rule for all illegally obtained evidence, including non-confessional evidence, has made it difficult to apply constitutional provisions consistently and correctly in practice.

The admissibility of certain types of evidence obtained in violation of the defendants' constitutionally guaranteed rights is not consistently applied in Ethiopia. Besides that, the admissibility of illegally obtained non-confessional and confessional evidence is a contentious and unsettled matter. This needs a thorough examination of the FDRE Constitutional provisions and other laws with the practice in order to identify the legal framework and practical obstacles. This thesis seeks to study the protection against illegally obtained evidence. As a result, it will have an impact on the improving the administration of the criminal justice system. Thus, the researcher focuses on the admissibility of illegally obtained evidence; particularly confession obtained in violation of procedural rights and non-confessional evidence obtained in violation right to privacy.

1.2 Statement of the Problem

The FDRE Constitution safeguards a wide range of defendants' rights, stressing the importance of fair trial and due process. This can lead to a variety of issues concerning fair trials, human rights, consistency, and law enforcement practices. While defendants are entitled to a number of protections against human rights violations, the possibility of admitting evidence obtained through violations of the defendant's fundamental rights undermines these protections and may encourage illegal investigative practices. These would have an impact on the criminal justice system's ability to deliver justice.

The FDRE Constitution does not have an express exclusionary rule that applies to all evidence obtained illegally, like the rule for confession obtained by coercion. In practice, the place of evidence obtained through illegal search and seizure, as well as confessions obtained in violation of constitutionally guaranteed rights, is not clearly delineated. This raises serious concerns about

¹⁵ Id., Art. 13(1), Federal Courts Proclamation No.1234/2021, preamble Para 3

the criminal justice system's integrity, as well as the effectiveness with which constitutional rights are enforced.

The judicial organ has a decisive role in the trial in protecting the rights of the defendant by rendering a proper decision. The Ethiopian courts have a duty to respect and enforce the fundamental rights and freedoms during criminal process.¹⁶ However, the court's decision involving illegally obtained evidence does not demonstrate a consistent approach in protecting the constitutionally guaranteed rights. The court's inability to act in accordance with the responsibility entrusted to it contributes a lot to violations of defendants' rights in criminal proceedings. This diminishes the fairness of trials, affects protection of individual rights, and undermines the public trust in the justice system. Lastly, these would bring an ineffectual criminal justice system.

The courts' inconsistent approaches jeopardize the defendants' Constitutional rights. This aims to examine the implications for defendants' rights, the potential impact on the integrity of the judiciary, and the overall quest for criminal justice with the practice. As a result, this research seeks to investigate the constitutional remedies available for practical problems. Therefore, the courts' failure to base their decisions on the provisions of the Constitution to admit and exclude evidence obtained illegally, as well as the gaps in written literature, motivates the researcher to conduct this research, which specifically and sufficiently addresses the fate of illegally obtained evidence in Ethiopia's current criminal process.

1.3 Research Objectives

General Objectives

The general objective of this study is to analyze the Ethiopian approach to evidence obtained in violation of constitutionally guaranteed rights with the intention of contributing to the ongoing discourse on legal reforms and the enhancement of the criminal justice system's conformity to Constitutional mandates and defendants' human rights.

¹⁶ The FDRE Constitution, (Supra note 9) art. 13(1)

Specific objectives

- To examine the issue of admissibility of a confession obtained in violation of the defendant's constitutional procedural rights under the Ethiopian criminal process
- To examine the issue of the admissibility of evidence obtained in violation of the constitutional right to privacy under the current Ethiopian criminal justice system
- Analyzing the existing Ethiopian rule of exclusion of evidence and practice
- Finally, to make an appropriate recommendation on how to remedy the inconsistent approach of courts towards the admissibility of illegally obtained evidence in the Ethiopian criminal process.

1.4 Research Question

This study attempts to answer the following one main and three specific research questions based on the aforesaid objective of the study.

The main research question:

- What is the fate of illegally obtained evidence in the Ethiopian criminal process?

The specific research questions:

- Is there a consistent approach to the exclusion of evidence obtained in violation of the Constitutional rights, excluding coerced confessions, in practice? If not, why?
- Is there a legal framework to regulate illegally obtained evidence in Ethiopia's criminal justice system?
- What are the possible recommendations to address inconsistencies in the legal system?

1.5 Literature review

In Ethiopia, the issue of illegally obtained evidence, including confessional and non-confessional evidence, presents a complex dilemma for the courts. The Ethiopian Criminal Justice Policy of 2011 prohibits the admission of illegally obtained evidence, including forced confessions, in court.¹⁷ While there are policies in place that prohibit the use of illegally obtained evidence in Ethiopia, the enforcement and consistent application of these policies appear to be absent. In

¹⁷ The Criminal Justice Policy of Ethiopia, (2011), Section 3.16.1

Ethiopia, there is a lack of literature that addresses the issue of the admissibility of illegally obtained evidence from the defendants' rights perspective in the criminal process. To the best of my knowledge, the old article written by Stanley ¹⁸ in relation to illegally obtained evidence is limited to involuntary confession, apart from that, it does not reflect the recent changes in the legal framework starting in 1995, including the FDRE Constitution.

Adi Dekebo, in his thesis titled "illegally obtained confessions in criminal investigations and the protection afforded", tried to see the issue of confessional evidence.¹⁹ He discussed confession obtained in violation of constitutional rights and demonstrated that there is no comprehensive law in relation to confession in the Ethiopian criminal justice system. However, his work does not cover non-confessional evidence. The admissibility of illegally obtained evidence can be seen in two ways with reference to the FDRE Constitution. These are the ones that are already made expressly inadmissible, and the other one is not. Confession obtained through coercion is made inadmissible by the Constitution. On the contrary, confession obtained illegally other than coercion and non-confessional evidence is not expressly excluded.

The above researcher tried to see confession, confession obtained through coercion and confession obtained in violation of procedural rights. The researcher in his conclusion indicated that the confession obtained in violation of procedural rights must be inadmissible with reference to the FDRE Constitution. Therefore, the above researcher's thesis did not fully address all evidence obtained illegally, but my research will address all evidences obtained illegally other than confession obtained by coercion.

There is no other research conducted specifically on the issue of admissibility of illegally obtained evidence, especially in relation to the admissibility of non-confessional evidence obtained unlawfully through search, seizure, interception, and surveillance. Therefore, the scope of this research is limited to the admissibility or exclusion of non-confessional evidence obtained in violation of the right to privacy as well as confessions obtained in violation of the Constitutional procedural rights of defendants.

¹⁸ Fishery Stanley Z, ' Involuntary Confession and Article 35, Criminal Procedure Code ' [1966], Vol. 3 Journal of Ethiopian Law 329

¹⁹ Adi Dekebo, "Illegally Obtained Confessions in Criminal Investigations and the Protection Afforded: A Case Study", (LLM Thesis, Addis Ababa University 2015)

The researcher intends fill the gaps in existing literature regarding illegally obtained evidences particularly confession obtained in violation constitutionally procedural rights and more importantly non-confessional evidences usually obtained at the expense of the right to privacy. Both types of evidences are not expressly excluded if they are obtained in violation of constitutional rights like that of confession through coercion. Therefore, the researcher will provide a clear examination of the legal frameworks and the practice to fill a gap exist in this research area. Thus, I intend to assess the legal framework regarding the admissibility of illegally obtained evidence and practical court decisions in the Ethiopian criminal justice system.

1.6 Scope of the Study

This study focuses on analyze the legal framework governing illegally obtained evidences in Ethiopia, specifically examining the admissibility of confession and non-confessional evidences obtained in violation of constitutionally guaranteed rights with the practical court decisions. It will examine the provisions of the FDRE Constitution and the decisions of courts to address the concerns of violation of defendants' rights in the process of determining the admission of illegally obtained evidence, assess the adequacy of the current legal framework in addressing these concerns, and identify potential gaps and inconsistencies in the existing criminal justice system.

1.7 Significance of the Study

This study will contribute to the knowledge of the area. Furthermore, there is no sufficient literature on the issue in the context of Ethiopia. Thus, this work will be significant as input for further research on the problem. Moreover, it will be significant to suggest a possible way of implementing the basic constitutional rights and criminal principles in the process of determining the admissibility of evidence obtained in violation of the defendant's rights. Finally, this work recommends to policymakers how to solve the flawed part of the Ethiopian rule of evidence illegally obtained in the process of investigation and court trial.

1.8 Limitations of the Research

This research may be constrained due to a lack of sufficient time, as the researcher does not believe that the time given for this work is enough as the researcher is a half-day worker. Additionally, the researcher faced limitations in finding the court's decision on the issue. This could have a negative impact on the qualities of this work. Thus, all these aforementioned problems may affect the qualities of this work.

1.9 Research methodologies

This study employed both doctrinal and non-doctrinal legal research methods for analyzing the legal framework, its limitations, and the practice. The reason for employing such methods is to be able to understand the subject matter and the legal and practical gaps and to give proper recommendations for reform. This thesis will use a qualitative research approach to analyze the rules governing the exclusion of illegally obtained evidence as well as the practical application of defendants' constitutional rights in criminal proceedings.

The research examines both primary and secondary sources. The primary sources used to refer to include Ethiopian laws and practical court decisions. Furthermore, other primary sources of data were collected using interviews and observation. The interviewees were selected from the relevant institutions, including the Ministry of Justice and Federal Courts. The sampling technique employed to select interviewees was purposive sampling, relying on the expertise and experience they had. The secondary sources of data include scholarly books, articles, journals, and unpublished materials.

1.10 Structure of the Research

This thesis is organized into four chapters. Chapter one consists of the background, statement of the problem, research questions, and a review of relevant literature. It also includes the scope, limitations, significance of the study, and research methodology. The second chapter deals with the conceptual and legal frameworks of illegally obtained evidence. Specifically, it deals with the meaning and concept of evidence, illegally obtained evidence, exclusionary rules, fundamental principles and rights, rationales, and the Ethiopian legal frameworks with respect to the

exclusion or admission of evidence obtained in violation of defendants' rights. The third chapter of the thesis addresses the practice of excluding or admitting evidence obtained in violation of defendants' rights. It evaluates the laws using some court decisions. In doing so, some legal system approaches' experiences are occasionally discussed. Furthermore, the findings are briefly discussed. The last chapter of this thesis presents the possible conclusions and recommendations.

Chapter Two

Conceptual and Legal Frameworks of Exclusion of Illegally Obtained Evidence

2.1 *Conceptual and Legal Frameworks*

2.1.1 Meaning and Concepts

Evidence has an enormous role in determining truth in criminal proceedings in the administration of justice. It is evidence that determines the outcome of any criminal litigation. Evidence refers to information that can be used to prove relevant facts in the issue of any assertion or allegation brought before the trial. Hence, any information used to prove a fact in issue of a case can be considered as evidence. As a result, evidence is information that can be used to prove or disprove the relevant facts in the case being tried.

Not all evidence presented to court is admissible; rather, it is only the evidence that is relevant to ascertaining facts in issue. Furthermore, it is a law that determines whether evidence is admissible or not. As Keane et al. stated, “[t]he laws of evidence is the body of law and discretion regulating the means by which facts may be proved.”²⁰ The admissibility of evidence is a matter of the rule of evidence of which the court decides based on law.

When we go back to the history of the evidence, as Jefferson indicated, “[t]he early methods of determining guilt or innocence in England were crude by our modern standard.”²¹ The rule of evidence has begun to develop following the introduction of the jury system in England. One of the decisions of the court that has a strong foundation for the subsequent consolidation of the rigid formulation of the common law rule against illegally obtained evidence was the decision in *R v. Leatham*, which is often cited as an authority for the general rule that all relevant evidence is admissible in English criminal proceedings.²² It says that “it matters not how you get it; if you

²⁰ Adrian Keane & Paul McKeown, *The Modern Law of Evidence*, (14th ed., Oxford University Press 2022) 2

²¹ Jefferson L. Ingram, (supra note 2) P. 11

²² *R v Leatham* 8 Cox C.C,498 (1861)

steal it even, it would be admissible in evidence.’’²³ However, there has been a shift in the courts towards recognizing and adopting certain exclusionary rules on the basis of the illegality of the means in which the evidence is obtained.²⁴

Besides that, exclusionary rules were also developed through court determination by applying various tests to keep certain evidence away from the juror.²⁵ In 1984, England enacted the Police and Criminal Evidence Act (PACE), which governs the exclusion and admission of evidence. Following this act, the court is given wider discretion to admit illegally obtained evidence, except for some evidence obtained through oppression. The USA inherited its legal system from England, but the rules concerning the admissibility of evidence have passed through separate developmental paths and are not the same in the two countries.²⁶ As Ho noted, the rules to exclude evidence relate to consideration of certain values that outweigh the interest in finding truth.²⁷

The values may involve upholding the rule of law, respecting human rights or dignity, and the rule of exclusion of evidence and subsequent remedial measures.²⁸ The rule of evidence will continue to change to meet the needs of an evolving society.²⁹ The rule of evidence developed partly to keep out untrustworthy evidence or unfairly prejudicial evidence even if it contained the truth.³⁰ Hsieh argues that the whole point of the rule is regulating the intrusions and thus constraining every species of arbitrary or oppressive government.³¹ Hence, mostly the admissibility of evidence obtained illegally is determined through rules of evidence.

Confession obtained through coercion is directly related to the right not to be compelled to give a statement. In many jurisdictions, the confession obtained in violation of the right not to be compelled is excluded from use. The other aspect of confession is evidence obtained in violation

²³ Ibid.

²⁴ R v Sang 1980 AC 402

²⁵ Jefferson L. Ingram, (supra note 2) P. 11

²⁶ Id., p. 12

²⁷ Hock Lai Ho, ‘ Evidence and truth ’ in Christian Dahl man Alex Stein and Giovanni Tuzet (eds), *Philosophical Foundations of Evidence Law* (Oxford University Press 2021) 21

²⁸ Id., p. 11

²⁹ Id., p.12

³⁰ Id., p.23

³¹ Kuo-Hsing Hsieh (Supra note 7) P. 5

of procedural rights, such as the accused person's right to be informed that the statement or confession he gives may be used against him, to consult a lawyer, and to be provided a competent interpreter. Similarly, evidence obtained in violation of these rights could result in exclusion.

The other type of evidence is non-confessional evidence that is acquired in violation of the right to privacy through search and seizure or wiretap by using a listening device or conducting surveillance. In order to conduct a search and seizure, primarily the presence of probable cause and, if circumstances oblige, a warrant order are necessary requirements. When warrantless searches are permitted by law, the existence of probable cause is detrimental. Hence, evidence obtained without a warrant and legally permitted situation through search, seizure, surveillance, and interception is a breach of the right to privacy. This type of evidence can be categorized as illegally obtained non-confessional evidence. This research will study confessional and non-confessional evidence obtained in violation of 'procedural rights'³² and the right to privacy, respectively.

2.1.2 Types of Evidence

There are different ways of collecting evidence in criminal investigations based on the nature of the investigation. The one is done through the interrogation of a suspect, and the other is through other means other than interrogation. The first type of evidence is taken from the suspect's through interrogation, which is called confession. The second way is collecting evidence through search, seizure, interception, surveillance, and other similar means, which can be categorized as non-confessional evidence. Based on this perspective, we have two types of evidence: confession and non-confessional evidence.

Confession is evidence obtained from the suspect through interrogation. The word confession can be defined in many ways from different perspectives. From a legal point of view, a confession is an acknowledgement or admission of a criminal act by confessing all necessary facts that establish guilt of the crime charged. From this, one can understand that confession is

³² The phrase 'Procedural Rights' in this study refers the right to remain silent, the right to consult a counsel, the right to be provided language translator and the right to be informed that any statement a suspect makes may be used against him in trial.

only associated with criminal acts, not civil matters. Confession can be categorized as judicial or extrajudicial confessions. Judicial confession is a confession that is given to the court, whereas extrajudicial confession is a word given to other persons outside the court.

Extrajudicial confession mainly concerns the confession given to a police officer before the trial. For a confession to be admissible, the investigator needs to respect the procedural rights of the defendant. Hence, the police officer should notify the suspect, as any word he gives may be used as evidence, as well as make sure of the suspect's voluntariness in the process of interrogation, because the absence of notification of the suspect's rights and voluntariness would make his confession unreliable and against the protection of individual rights.

The other major type of evidence is non-confessional evidence, mainly obtained through search, seizure, interception, and surveillance. Indeed, the phrase non-confessional evidence includes many other types of evidence, like documentary evidence, but for the purpose of this study, non-confessional evidence is evidence collected through search, seizure, interception, and surveillance. This way of gathering evidence is conducted through seizing an item that has a connection with the alleged crime, intercepting any means of communication of the suspect through electronic devices, and conducting surveillance. This way of gathering evidence has much to do with the right to privacy. The police officer needs to follow the legal requirements and get a court order to obtain such evidence.

2.1.3 Illegally Obtained Evidence

The police officer has a duty to notify a suspect of his right to remain silent, and any statement or confession he gives may be taken as evidence. The notification has to be made before the interrogation is conducted. In addition, the suspect has to be provided with a competent interpreter where he doesn't understand the working language, and he has to be informed as he has the right to consult a lawyer. Any statement or confession obtained in violation of such and other procedural rights is an illegal confession.

Different jurisdictions have different outlooks regarding the admission of confessions obtained in an unlawful manner. In England, it is only confession obtained in repression subject to exclusion.

³³ Whereas, in the case of the US, the Supreme Court, in *Miranda v. Arizona*, ruled that the statement or confession obtained in violation of the duty to notify an arrested person's constitutional rights to remain silent and the right to consult a lawyer are subject to exclusion. ³⁴

The other type of evidence is non-confessional evidence obtained in violation of the right to privacy. Evidence might be obtained in violation of the right to private and family life, their home, and correspondence through search, seizure, and wiretap and could be admitted in England. In this respect, the English courts have discretion to admit or exclude such evidence. The England PACE Act gives freedom to the court to admit or not admit illegally obtained non-confessional evidence. ³⁵

In 1914, in *Weeks v. United States* ³⁶, the court first held that the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. The rules of exclusion of US was more stringent, but gradually, this rule is being subjected to some exceptions so that its scopes and applications are getting limited. Currently, there are some exceptions, like where there is good faith on the law enforcement agent, ³⁷ in grand jury proceedings, ³⁸ civil case proceedings (silver-platter doctrine), ³⁹ for impeachment testimonial evidence and derivative evidence that are admissible under some conditions. ⁴⁰ The current practice, as Hsieh stated, “[t]he US Supreme Court backed away from a very strict application of the search and seizure exclusion rule.” ⁴¹ In sum, evidence obtained illegally may not have similar effects in different jurisdictions, but any evidence obtained in violation of defendants' rights is considered illegally obtained evidence.

³³ The Police and Criminal Evidence Act Of 1984 of England (PACE), Section 76(2)

³⁴ *Miranda v Arizona* 384 US 436 (1966)

³⁵ PACE, supra note 33, Section 78(1) and 82(3)

³⁶ *Weeks v United States* (1914), US/232/383/

³⁷ *US v Leon*, 203 F. 3d 162 (2000)

³⁸ *United States v. Calandra* 414 US 338 (1974)

³⁹ *US v. Janis*, 387 F. 3d 682 (2004)

⁴⁰ Kuo-Hsing Hsieh (supra note 7) p.16 (Illegally obtained evidence can be admissible where evidence possibility of inevitable discovery by legal means, harmless error and rule of sufficient attenuation of casual link.)

⁴¹ Kuo-Hsing Hsieh, (supra note 7) p. 16

2.1.4 Exclusionary Rule

Different legal systems rely on various grounds to determine the admissibility or exclusion of evidence. Some of the grounds may be associated with internal factors of fact-finding, like hearsay evidence, whereas the other grounds are in connection with values that are external to fact-finding activity, like illegally obtained evidence. Some legal systems develop rules of exclusion of evidence to prevent the use of certain evidence for criminal verdicts. In Damaska's observation, relevant evidence is excluded for two reasons: those pertaining to fact-finding rules and those unrelated to fact-finding.⁴² The latter one is concerning relevant evidence that is excluded for external factors, like where evidence is precluded to be admitted by law or human rights consideration.

Some jurisdictions try to regulate illegally obtained evidence through exclusionary rules, while others provide broader discretionary power to the court. There are still some other jurisdictions that don't have rules for exclusion and courts with no adequate discretionary power. However, there are some accepted principles of exclusionary rules. Among them, the principle of 'fruit of the poison tree' or 'derivative evidence' which prohibits the use of the evidence that is derived from other former illegally obtained evidence. Of course, in English, in accordance with the ruling given in *R v. Warickshall*, derivative evidence is admissible.⁴³ Panzavolta et al. indicated that "exclusionary rules are wide-ranging: they are 'as many and varied as the diverse range of values, objectives, and policies they embody to promote.'"⁴⁴ These are some of the reasons, as Hsieh noted, "the exclusionary rule is one of the most difficult, "controversial," and "complex" doctrines in criminal procedure and evidence law."⁴⁵

2.1.5 Rationales

The debate on the admissibility of illegally obtained evidence in criminal matters is not easily resolved for different reasons. The center of the divergence is linked to the value one legal

⁴² Mirjan Damaska, (supra note 8) p. 506

⁴³ *R v. Warickshall* 1 Leach 263 - 1783

⁴⁴ Michele Panzavolta, (supra note 3) p. 16

⁴⁵ Kuo-Hsing Hsieh, (supra note 7) p. 14

system gives priority over the other. As Ho states, “the qualifications recognize that while truth is a fundamental goal, there are legitimate side constraints in the pursuit of truth.” Considering this, the debate is to be continued unless there is a balance that ensures the recognition of certain values. As Hsieh noted, “the law in this area is complex and still developing.”⁴⁶

Rationales are important to determine the impact and scope of the admission and exclusion of evidence. Scholars on the subject matter have been debating by taking various policy reasoning and rationales. Among the pioneer scholars, Bentham has been prominent concerning the rule of procedure and evidence.⁴⁷ For Bentham, the role of the rule of evidence is truth discovery, and all relevant evidence should be admissible.⁴⁸ Thayer, unlike Bentham’s notion of free proof, believes that the rule of evidence should be based on two principles: evidence that is logically probative would be admitted unless it is excluded by a clear ground of policy or law.⁴⁹

As Patterson observed in Zuckerman’s argument, in addition to the need to discover the truth, there are rationales for protecting the innocent and maintaining high standards of propriety during the criminal process.⁵⁰ In such a time, the main question is how the balance between the competing values is determined.⁵¹ The answer depends on the rationale or normative justification for the exclusion of illegally obtained evidence one adopts.⁵² There are some major rationales used by various legal systems to justify the exclusion or admission of evidence, such as reliability, deterrence, protective /remedial/, and integrity principles.

⁴⁶ Kuo-Hsing Hsieh, (supra note 7)

⁴⁷ Paul Roberts and Jill Hunter, *Normative evolution in evidentiary exclusion: coercion, deception, and the right to a fair trial. Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions*. (1st edn, Bloomsbury Publishing 2012) 163-193

⁴⁸ Alanah Josey, ‘Jeremy Bentham and Canadian Evidence Law: The Utilitarian Perspective on Mistrial Applications’[2019] *Man. LJ*, 42, 291.

⁴⁹ James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown, 1898) 530

⁵⁰ Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory* (Dennis Michael Patterson, First published 2010, Chichester: Wiley-Blackwell 2010) 181

⁵¹ Michele Panzavolta et al., (supra note 3) p. 79

⁵² *Ibid*

2.2 Fundamental Principles

2.2.1 Rule of Law

Rule of law is fundamental principle that guarantees all persons, either government officials or ordinary citizens, is accountable to laws; the enforceability of laws must be respected equally; and the laws must respect and be consistent with human rights protection. It serves as a standard for democratic societies, ensuring that no one is above the law. The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.⁵³ The right to equality before courts and tribunals also ensures equality of arms.⁵⁴ The principle of rule of law has importance for the protection of rights in the process of gathering evidence. The rule of law will be in trouble where human rights incorporated in the constitution and other statutes are violated to acquire evidence. One of the rationales mostly cited is the protection or remedial rationale, which postulates any right that is recognized in the law should be protected; otherwise, the recognition of a right by itself is not end. As long as there is a provision that prohibits unlawful search and seizure, the court should give protection by making the fruit of unlawful search and seizure inadmissible and guarantee the protection in the future by deterring the police officers.

2.2.2 Right to Fair Trial

The right to a fair trial is one of the fundamental rights recognized in different international and regional human rights instruments as well as national constitutions and statutes. The principle of a fair trial does not ensure that the outcome of the proceedings reflects what actually happened, but it attempts to safeguard the fairness of the procedure itself.⁵⁵ Other procedural rights, such as the right to consult a lawyer, the right to confront witnesses, the right to presume innocence, and other procedural rights, are some aspects of the fair trial right. The UDHR and ICCPR have

⁵³ UN Human Rights Committee General Comment No. 32 Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, UN.DOC. ICCPR/C/GC/32, 23 August 2007, para 25, para 2

⁵⁴ Id, para 13

⁵⁵ L Macula, 'The Potential to Secure a Fair Trial through Evidence Exclusion: A Swiss perspective. Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules,' [2019] 15-60

incorporated this right.⁵⁶ Likewise, regional human rights conventions such as the European Convention on Human Rights (ECHR) recognize this right under Article 6. Overall, the right to a fair trial in criminal proceedings is associated with the absence of any direct or indirect influence, pressure, intimidation, or intrusion from whatever side and for whatever motive.⁵⁷ In sum, the practice and international human rights documents show that the use of illegally obtained evidence undermines fair trial rights protection and compromises the protection of human rights and the integrity of the judiciary system.

2.2.3 Presumption of Innocence

One of the rules of a criminal trial and considered one aspect of a fair trial right is the presumption of innocence. Ho noted that “the common law uses the concepts of ‘burden of proof’ and ‘proof beyond reasonable doubt’ in its articulation of the presumption.”⁵⁸ This right is fundamental for the protection of human rights, as it imposes on the prosecution office the burden of proving the charge, considering that no guilt can be presumed until the charge has been proved beyond reasonable doubt, the accused takes the benefit of doubt, and requires the accused persons to be treated in accordance with this principle.⁵⁹ Moreover, this right is incorporated in the UDHR and ICCPR as a universal right, which is applicable both in common law and civil law countries that have different litigation systems and standards of proof. One of the things that are required by the presumption of innocence is that the state must prove the defendant’s guilt as a condition to get a person convicted of a crime and punished for the charge brought against him.⁶⁰ The trial is unfair, and due process is abandoned where the prosecution solely determines all evidence and the accused has no right to challenge witnesses or present exculpatory evidence.⁶¹

⁵⁶ Universal Declaration of Human Rights (UDHR), Article 10 says that ‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.’ and Article 14/1/ ICCPR ‘...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’

⁵⁷ UN Human Rights Committee General Comment No. 32, (Supra note 53) para 5

⁵⁸ Hock Lai Ho, ‘The Presumption of Innocence as a Human Right, Criminal Evidence and Human Rights,’ [2012] 259,

⁵⁹ UN Human Rights Committee General Comment No. 32, (Supra note 53) para 30

⁶⁰ Hock Lai Ho, (supra note 58) 259

⁶¹ Ibid

2.2.4 The Right to Privacy

The right to privacy is a fundamental human right that entitles individuals to keep certain aspects of their private lives free from intrusion or surveillance by others, including the government.⁶² This right is recognized in several international human rights instruments, including the UDHR⁶³ and the ICCPR⁶⁴, including regional human rights conventions such as the European Commission on Human Rights (ECHR).⁶⁵ This right is often seen as vital to the protection of individual autonomy, dignity, and personal freedom. This right includes protecting individuals from unwanted intrusion into their personal lives, such as their homes, personal correspondence, or private conversations.⁶⁶ It also relates to controlling the collection, use, and dissemination of personal information. However, the right to privacy is not an absolute right in accordance with many countries' Constitutions and other statutes. In accordance with the guideline of the Siracusa principle, restriction of any human rights must be necessary and prescribed by law.⁶⁷ The restrictions or limitations must be proportional, for social and legitimate goals, temporary, and subject to review.⁶⁸ Hence, in our case, the restriction of the right to privacy for criminal investigation purposes should be in accordance with internationally accepted guidelines of the Siracusa principle.

2.2.5 Burden of Proof

It is commonly accepted that once a criminal charge is brought up, the state bears the burden of proof. The burden of proof requirement is a prominent aspect of the presumption of innocence. The principle of presumption of innocence obliges the state to prove the commission of a crime up to the level of the standard proof required by law. This tells us the principle of presumption of

⁶² All international human rights instruments clearly indicate that the right to privacy is a fundamental human right as stipulated in Art. 12 of the UDHR, Art. 8 of the ECHR, and Art. 17 of the ICCPR.

⁶³ UDHR, (supra note 56), Art. 12

⁶⁴ Article 17 of ICCPR says, No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honor and reputation. And everyone has the right to the protection of the law against such interference or attacks.

⁶⁵ European Commission on Human Rights (ECHR), Art. 8

⁶⁶ Id., Art. 8

⁶⁷ UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4, 28 September 1984, <<https://www.refworld.org/legal/resolution/unchr/1984/en/57200>> [accessed 28 January 2025]

⁶⁸ Ibid.

innocence is a restriction on state power, as it is directly related to lawfulness and the notion of law.⁶⁹

The constraints on state power are for the purpose of making the trials fair and avoiding wrong convictions. In some countries, like the US and England and Wales, the issue of admissibility can be decided at a pre-trial hearing.⁷⁰ In the trial hearing, if a question of the illegality of evidence arises in the US, the burden of proof is on the prosecution.⁷¹ Unlike the US, the English and Welsh courts use discretion to determine which party bears the burden of proof in the trial.⁷² Additionally, a court can raise the issue of the admissibility of a confession of its own motion and require the prosecution to prove whether it is not obtained in the manner as stipulated in the law.⁷³

2.3 The Admissibility of Confession and Non-Confessional Evidence in Ethiopian Legal Frameworks

2.3.1 Constitutional Rights and Criminal Process

The FDRE Constitution grants a number of rights to an arrested and an accused person.⁷⁴ These rights do have enormous impact on the administration of criminal justice. They are also the means to protect a suspect or accused person from the intrusive exercise of government power by public officials. Some of the rights incorporated in the FDRE Constitution includes the right to remain silent, the right to be informed promptly that any statement they make may be used as evidence,⁷⁵ right to a public trial;⁷⁶ right to privacy;⁷⁷ right to be presumed innocent and not to be compelled to testify against themselves;⁷⁸ right to full access to any evidence presented

⁶⁹ Egidijus Kuris, 'On the Rule of Law and the Quality of the Law-Reflections of the Constitutional-turned International Judge. Teoría y realidad constitucional' [2018] 131

⁷⁰ William Van Caenegem, 'New Trends in Illegal Evidence in Criminal Procedure: General Report-common Law ' [2007] In XIII World Congress of Procedural law, 22

⁷¹ Ibid.

⁷² Id., p. 23

⁷³ PACE, (supra note 33) Section 76(2)

⁷⁴ The FDRE Constitution, (supra note 9) Article 19 and 20

⁷⁵ Id., Article 19(2)

⁷⁶ Id., Article 20(1)

⁷⁷ Id., Article 26

⁷⁸ Id., Art. 20(3)

against them, examine witnesses, and present evidence; ⁷⁹ the right to be represented by legal counsel; ⁸⁰ the right to request the assistance of an interpreter ; ⁸¹ the right to privacy, which includes the right not to be subjected to searches of his home, person, or property, or the seizure of any property under his personal possession, ⁸² and the right to the inviolability of his notes and correspondence, including postal letters and communications made by means of telephone, telecommunications, and electronic devices ⁸³. These rights have much to do with the process of investigation in protecting a suspect from an intrusive action of investigators. They also assist the discovery of truth in the process of investigation. Hence, investigators need to respect each right of arrested or accused persons while they are conducting interrogation or search and seizure.

The primary purpose of investigating is to obtain evidence to prove the commission of a crime in a court of trial. Criminal investigation involves the act of arresting a suspect, interrogating, and searching the person and premises to produce evidence. Once the police officer has summoned or arrested a suspect person, he may undertake an interrogation in accordance with article 27/2 of the Criminal Procedure Code. Additionally, the police officer may conduct searches of persons and premises that have a connection with the commission of the alleged crime. In the process of these activities, the police officer has a duty to observe and respect the suspect's rights.

All relevant evidence may not be admissible in trial unless the collection is conducted in accordance with the law. Here, the question is: what if a police officer infringes on a suspect's rights to get certain evidences? Is the evidence obtained in such situation admissible? In this section I will discuss the constitutional rights and their connection with the admission of evidence. Next, I will discuss fundamental constitutional rights and principles that are detrimental for the protection of defendants' rights in process of criminal proceedings.

⁷⁹ Id., Art. 20(4)

⁸⁰ Id., Art. 20(5)

⁸¹ Id., Art. 20(7)

⁸² Id., Art. 26(1)

⁸³ Id., Art. 26(2)

2.3.2 Constitutional Rights and Confession

2.3.2.1 The Right to Remain Silent and be Informed

The police officer has a duty to notify the suspect's right not to be compelled to answer and that he has the right not to respond and in case any statement he makes may be used as evidence against him.⁸⁴ Similarly, the FDRE Constitution also stated that upon the arrest suspect, the investigator should notify promptly that any statement the suspect makes may be produced as evidence against him in court.⁸⁵ Again, the right to remain silent is a fundamental right recognized in the FDRE Constitution.⁸⁶ The right to be informed about the use of his confession is an extension of the right to remain silent. It is highly connected with and a means to enforce the right to remain silent. This right requires the police officer to notify at the earliest time before the accused begins to answer a question.

2.3.2.2 The Right to Counsel

The right to consult a lawyer is helpful to put the accused person on an equal footing with a public prosecutor in criminal proceedings. The FDRE Constitution provides the right to be represented by legal counsel of his choice.⁸⁷ If the accused person has no sufficient means to hire a lawyer, a miscarriage of justice may result. The accused has the right to get state-hired legal counsel at state expense.⁸⁸ The Constitution expressly provides this right only to the accused, not to the arrested. I don't see any reason to deny this right to an arrested person while this right is provided to an accused person. Denying an arrested person, the right to consult a lawyer is also denying the right to presume innocent until proven guilty and the right to a fair trial. In this matter, the draft criminal procedure and evidence law has recognized the right to get legal assistance starting from the time of arrest.⁸⁹ Hence, the police officer should notify the suspect of the right to get legal assistance before he questions him.

⁸⁴ Ethiopian Criminal procedure Code, Proclamation No.161/1960, Art. 27(2)

⁸⁵ The FDRE Constitution, (supra note 9) Art. 19(2)

⁸⁶ The FDRE Constitution, (supra note 9) Art. 19 (2)

⁸⁷ Id., Art. 20(5)

⁸⁸ Ibid

⁸⁹ The Draft Criminal Procedure and Evidence Code of Ethiopia, Art. 10

2.3.2.3 The Right to Request the Assistance of an Interpreter

The other procedural right is the right to request an interpreter if the accused or arrested person does not understand the working language of the police station at the time of interrogation. The FDRE Constitution provided the accused person the right to request the assistance of an interpreter at state expense where the court proceedings are conducted in a language he does not understand.⁹⁰ This right is also the other aspect of the principles of fairness and equality of arms in criminal proceedings.⁹¹ Taking a confession without access to a competent neutral language interpreter, would be a violation of the defendant's right. As a result, a confession taken in the absence of an interpreter, while it was necessary, would make the evidence illegal.

2.3.3 Constitutional Rights and Non-Confessional Evidences

One of the other vital means of gathering evidence is searching, seizing, intercepting, conducting surveillance, and monitoring individual premises, properties, and other activities. If the search, seizure, interception, and surveillance are conducted without court or legal authorization, the constitutional right to privacy will be jeopardized. The use of non-confessional evidence obtained unlawfully in criminal trials implicates several constitutional rights, fundamentally the right to privacy. Again, the use of such evidence by itself will pave the way for wider violations of the right to privacy. As a result, the right to privacy protects individuals from unjustified intrusion into their personal affairs, including their premises, communications, and digital or electronic data.

2.3.3.1 The Right to Privacy

The right to privacy is a constitutionally guaranteed right that includes the right not to be subjected to searches of his home, person, or property, or the seizure of any property under his personal possession.⁹² The Constitution guarantees this right against arbitrary search and seizure. This implies a wider protection of individual autonomy and freedom from unwarranted interference is recognized by the Constitution. It is a fundamental right that ensures the protection against arbitrary or unjustified searches of persons and homes and that any seizure of

⁹⁰ The FDRE Constitution, (supra note 9) Art. 20(7)

⁹¹ UN Human Rights Committee General Comment No. 32, (supra note 53) para 40

⁹² The FDRE Constitution, (supra note 9) Art. 26(1)

property is conducted within the limits of the law. Likewise, everybody has the right to the inviolability of his notes and correspondence, including postal letters, and communications made by means of telephone, telecommunications, and electronic devices.⁹³

The right to privacy encompasses protection not only of physical items but also of intangible interests, such as personal information and confidential communications. Hence, search and seizure should take into consideration these wide-ranging privacy concerns. The protection of this right includes the confidentiality of communications, telephone conversations, electronic emails, and other forms of electronic communication, from unauthorized interception or surveillance.

2.3.3.2 Restriction to the Right to Privacy

The Constitution obliges public officials to respect and protect the right to privacy of individuals.⁹⁴ It also states that no restriction may be put in place except the grounds stipulated in the Constitution. Three cumulative requirements can be identified from Article 26(3) of the FDRE Constitution, under which the right to privacy is limited. The first requirement is the presence of a compelling circumstance to limit the enjoyment of the right to privacy. The phrase ‘compelling circumstance’ is not defined, so it is difficult to determine whether there are compelling circumstances or not. However, the phrase ‘compelling circumstance’ indicates that there has to be no other option other than limiting such rights or having convincing and reasonable circumstances. In other words, I can argue that interference should be the last resort and has no other less intrusive ways, for instance, to use wiretaps and the like against the suspect to gather evidence.

Secondly, the restriction on the enjoyment of the right to privacy must be made by law. The right to privacy cannot be subject to limitation unless there is a law enacted by law-making organs. Hence, any organ or public official has no legal privilege to interfere in individual privacy unless there is a provision of a law that permits doing so. In this respect, there are a number of specific legislations that restrict the right for the purpose of crime prevention. To mention some of the majors, the Criminal Procedure Code, the Revised Anti-Corruption Special Procedure and Rules

⁹³ Id., Art. 26(2)

⁹⁴ Id., Art. 26(3)

of Evidence and its Amendment, the Prevention and Suppression of Terrorism Crimes, and the Computer Crime Proclamations are the major ones. The above legislations do have provisions that restrict the right to privacy. Hence, no government bodies can limit the enjoyment of the right to privacy unless specific legislation is enacted in the area.

The provisions of the CPC that deal with search and seizure involve the right to privacy for the sake of investigation. It states that no arrested person shall be searched unless it is reasonably suspected that he has about his person any articles.⁹⁵ The item should have a connection with the offense of which the suspect is accused or is suspected to have committed in order to use it as evidence.⁹⁶ The restriction of the right is not out of limit because there are requirements like probable cause and search warrants.⁹⁷ However, there are exceptions in which a police officer does not need a search warrant in hot pursuit, urgent circumstances, and the like.⁹⁸

Among the exceptions, the plain view doctrine is the one that allows a police officer to seize property that is outside the lists in the warrant. Plain view is “a recognized justification for warrantless seizures, not warrantless searches...”⁹⁹ In order to seize an object that has incriminating character in accordance with this doctrine, the police officer must enter the suspect’s premises or house with a warrant and he discovers it in plain view.¹⁰⁰ Ward stated that “if an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy.”¹⁰¹

The code specifies the competent body that can issue a search warrant. It is only the court that is empowered to issue a search warrant where it is satisfied.¹⁰² The court has to make sure that the police officer or member of the police has requested the issuance of a search warrant with a specified list of the property to be searched for and seized.¹⁰³ At the time of the search, the

⁹⁵ The 196 Criminal Procedure Code, (supra note 84) Art 32(1)

⁹⁶ Ibid.

⁹⁷ Id., Art. 32(2)

⁹⁸ Id., Art. 32(2) (a) and (b)

⁹⁹ Howard E. Wallin, ‘Plain View Revisited’, [2001] *Pace L. Rev.*, 22, 307

¹⁰⁰ Ibid

¹⁰¹ Kate Brueggemann Ward, ‘The Plain (Or not so Plain) View Doctrine: Applying the Plain View Doctrine to Digital Seizures ’ [2010], *U. Cin. L. Rev.*, 79,1163, 4 (foot note 17)

¹⁰² The 1961Criminal Procedure Code of Ethiopia, (supra note 84), Art. 32 and 33(1)

¹⁰³ Id., Art. 33(2)

police officer needs to take an independent person who can check and sign the list of property seized.¹⁰⁴ The Code also gives the time when the police officer can conduct a search that is only between 6 a.m. and 6 p.m. hours unless otherwise expressly ordered by the court.¹⁰⁵ All in all, the provisions of the CPC put certain limitations on the enjoyment of the right to privacy for the sake of crime prevention, which is in line with the FDRE Constitution.

The other specific law that is relevant to the issue at hand is the rules of evidence of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation and its Amendment.¹⁰⁶ The proclamation gives some government bodies the power to intercept correspondence and letters.¹⁰⁷ The head of the Ministry of Justice and Police Institutions can order an interception for the investigation of corruption offenses.¹⁰⁸ The institution that gives the order is responsible for citing the offense that gives rise to the interception and for fixing the duration of the interception at no more than four months.¹⁰⁹ In doing so, the information obtained through the interception can be produced in the form of a video camera, a sound recorder, or similar electronic devices as evidence.¹¹⁰

The other specific law that contains some provisions in relation to the collection of evidence through interference with the right to privacy is the Prevention and Suppression of Terrorism Crimes Proclamation.¹¹¹ The proclamation allows, upon permission by the Commissioner General of the Federal Police, a police officer to conduct a surprise search and seize property to prevent terrorism offenses.¹¹² The police officer may search and seize a property of a suspect without a court order in urgent circumstances. In such a situation, the police officer has to submit the case within seventy-two hours to the court for affirmation or rejection.

¹⁰⁴ Id., Art. 3(3)

¹⁰⁵ Id., Art. 33(5)

¹⁰⁶ Revised Anti-Corruption Special Procedure and Rules of Evidence proclamation no.434/2005, and Revised Anti-Corruption Special Procedure and Rules of Evidence /Amendment/ proclamation, (Amendment) Proclamation NO.882/2015,

¹⁰⁷ Ibid., Art. 46

¹⁰⁸ Id., Art. 46(1)

¹⁰⁹ Id., Art. 46(3)

¹¹⁰ Id., Art. 46(3)

¹¹¹ Prevention and Suppression of Terrorism Crimes Proclamation, Proclamation No. 1176/2020

¹¹² Id., Art. 31

Again, the above legislation allows a police officer to employ special investigation techniques where an act of terrorism has seriously damaged the country and the public, and the Criminal Procedure Code investigation techniques may not be effective. The special techniques include intercepting or conducting surveillance on postal, letter, telephone, fax, radio, and internet and other electronic devices to exchange or record communications of a person suspected; using surveillance or installing camera, audio, or video recording devices; infiltrating and collaborating with the suspect's group; and following up and creating simulated communication.¹¹³

The special techniques can be used only upon the authorization of the court, but the authorization of the court is not required in urgent conditions.¹¹⁴ When the investigation is conducted with a court order, the court order must contain the techniques, duration of the authorization, and the address of telephone, fax, radio, internet, electronics, postal, or other similar communication lines or identifications applied in the interception or surveillance.¹¹⁵ In such a case, the police should have the permission of the head of the nearest and appropriate public prosecutor institution, but he is obliged to submit the temporary permission and the good cause in writing to the court within 48 hours.¹¹⁶ The court has discretion to accept or reject the petition of the police officer based on the evidence's relevancy.

The other recent law is the Computer Crime Proclamation, which has some provisions about the collection of evidence.¹¹⁷ This proclamation stipulates that, in addition to evidence to be produced in accordance with the Criminal Procedure Code and other laws, any digital or electronic evidence may be produced through a search or access to a computer systems, network, or computer data physically or virtually upon the court order.¹¹⁸ It allows the investigator to extend the search to other computer system where the investigation organ reasonably believes so without asking for other separate warrants.¹¹⁹ Moreover, this proclamation has made clear that

¹¹³ Id., Art. 42(1)

¹¹⁴ Id., Art. 42(2)

¹¹⁵ Id., Art. 42(4)

¹¹⁶ Ibid., Art. 42(3)

¹¹⁷ Computer Crime Proclamation, Proclamation No. 958/2016

¹¹⁸ Id., Art. 32(1)

¹¹⁹ Id., Art. 32(2)

any document or other certified document related to computer data seized in accordance with the provision of the computer crime proclamation is admissible.¹²⁰

In general, the CPC and other specific legislations permit a search and seizure to be conducted through a court order where there is a reasonable cause to believe in the commission of a crime. The act of granting and refusing a warrant or permission is a way the court executes the supervision. However, in urgent situations, flagrant offenses, and other legally permitted grounds, the authorization of the court is not required to conduct a search, seizure, interception, and surveillance.

Some of the above specific legislation gives the police officer the power to collect evidence either with or without a court order. In cases of investigation without a court order, the police officer has to report or submit a petition to a court. The proclamation attempts to control the police act after he has already conducted what he wants to do. This makes the court power less meaningful because the right to privacy has already been put widely in danger.

The third requirement for restricting the right to privacy in a criminal process is the purpose of the limitation. The lawmaking organ is not free to enact a law that restricts the enjoyment of the right to privacy. The Constitution has provided a requirement for the law-making organ to consider the purposes. The purposes should be safeguarding national security or public peace, preventing crimes, or protecting health, public morality, or the rights and freedoms of others. As you can see, the lists are wide enough to cover many things. This may pave the way for wider interference in the private affairs of a person.

The above three requirements that are incorporated in the Constitution needs a careful act in the process of subjecting the right to privacy for restriction. In this respect, the Siracusa principle guideline should be taken into consideration. This principle provides how restrictions are interpreted and evaluated. The most fundamental standards are necessity, proportionality, social and legitimate goals, and reviewability.¹²¹ Therefore, any law that puts restrictions on the enjoyment of the right to privacy should be evaluated in the eyes of that principle and be in conformity with the requirements of the FDRE Constitution.

¹²⁰ Id., Art. 33(1)

¹²¹ UN Commission on Human Rights, the Siracusa Principles, (supra note 67)

2.4 The Consequence of Violations of Constitutional Rights

The Constitution recognizes and provides many rights for the arrested and accused persons. As I have discussed some of the rights of the suspect in the previous parts of this chapter, the police officer may violate those rights in the process of gathering evidence. Here, the question is what would be the effect of violation of the suspect's rights in the process of gathering evidence. The CPC, including other specific legislations discussed above, does not have a clear answer for the question. The Computer Crime Proclamation is the only law other than the Constitution that gives a rule for exclusion of certain types of illegally obtained evidence.¹²² This law says that any evidence obtained in accordance with this proclamation is admissible. Since this law can only be applied to digital property, the effect of violation of other laws is not clearly determined by similar-level laws.

The FDRE Constitution has expressly stated that any evidence is inadmissible if it is obtained under coercion.¹²³ Here, the question is what about evidence obtained other than through coercion. The FDRE Constitution states that any law, customary practice, or decision of an organ of state or a public official that contravenes the Constitution does not have effect.¹²⁴ These mean that the decision of a court, police, and prosecution institutions and its public official's decisions need to be in conformity with the provisions of the Constitution. Where the decision of the organ or public official violates the constitutional provisions, it would be void. Hence, evidence obtained in violation of the constitutional rights of the suspects will not have an effect; rather, it will be void.

The confession obtained without notification of the right to remain silent and to inform any statement he gives may be used as evidence violates the provisions of the Constitution. Similarly, any confession obtained in the absence of a competent interpreter when a suspect doesn't understand the working language will be against the Constitution. Likewise, any evidence collected through search, seizure, interception, or surveillance in violation of the constitutional provision will not be constitutional. Therefore, the effect of evidence collected in violation of the

¹²² The Computer Crimes Proclamation, (supra note 17) Art. 33(1)

¹²³ The FDRE Constitution, (supra note 9) art. 19(5)

¹²⁴ Id., Art. 9(1)

provisions of the Constitution will be null and void in accordance with Article 9(1) of the FDRE Constitution.

In this regard, the draft Criminal Procedure and Evidence Code attempts to regulate the matter in a detailed manner. The draft code shows that any relevant evidence is admissible unless the Constitution or other laws say otherwise. Furthermore, the draft code lists down inadmissible prosecution evidence. The lists include confessions or evidence obtained contrary to the special investigation techniques rules, evidence or statements obtained in the process of implementing procedures alternative to trial, evidence showing the accused helping the victim or taking any remedial or corrective measures, admissions or confessions of a co-accused against the accused who pled not guilty, and evidence not authenticated as ordered by the court.¹²⁵

The draft code has tried to put the effect of evidence obtained in violation of the suspect's rights. Because the draft code states that any relevant evidence is admissible except those mentioned in the code. Hence, in my view, the lawmaking organ disregards Article 9(1) of the FDRE Constitution. They consider the Constitution as it has not embodied the exclusionary rule for illegally obtained evidence other than coerced confession. This entails that there is not a clear view with regard to Article 9(1) of the Constitution. Of course, the draft code says that if the Constitution, code, or other law provides otherwise, it will prevail. However, this does not mean article 9(1) is taken into consideration. Rather, it seems that the admissibility of evidence other than coerced confession is determined by legislation enacted or that will be enacted. Hence, there is also an inconsistent approach on the part of law-making organ. Exclusion of evidence obtained through violation of constitutional rights is not a clearly settled issue yet.

2.5 Types of Evidence and its Exclusion

2.5.1 Confession and its Exclusion

Confession is a major type of evidence used to prove the commission of crime in Ethiopian criminal proceedings. In accordance with Article 27(2) and (3) of CPC, a statement taken from the suspect may be used as evidence. Again, Article 35 of the CPC also states that the suspect's

¹²⁵ The Draft Criminal Procedure and Evidence Code of Ethiopia, Art. 260

statement or confession made to court recorded and may be given to other courts, police, or prosecutors for evidence purposes. The code uses the words ‘statement’ and ‘confession’ sometimes separately and interchangeably. The FDRE Constitution is also using the word confession and admission interchangeably.¹²⁶ This may create confusion, but the senses of all provisions refer the word ‘confession’. From this, one can understand that whether the word used is statement, confession, or admission, if it contains the acknowledgment of all necessary facts and elements of crime, it can be considered a confession. Therefore, the above provisions of the laws indicate that confession is admissible evidence in Ethiopian criminal proceedings.

Confession is not always admissible in Ethiopia. The FDRE Constitution states that any evidence obtained under coercion will not be admissible. Confession may also be obtained in violation of the right to be informed that any statement the suspect gives may be used as evidence against him, or the right to get lawyer assistance and the right to be provided a competent interpreter, but it is still not admissible. In accordance with article 9(1) of the Constitution, any decision made by any organs or public officials of the government has no effect if it contravenes the provisions of the Constitution. Therefore, a confession obtained in violation of the constitutionally guaranteed procedural rights has no effect, meaning it must be excluded.

2.5.2 Non-Confessional Evidence and its Exclusion

Evidence can be obtained through search, seizure, interception, and surveillance upon the permission of appropriate organs. Evidence acquired in such a way has a great impact on the right to privacy. The right to privacy is a right against unlawful search, seizure, and any other interference with individual autonomy. There should be a probable cause or reasonable grounds to interfere in individual privacy.

A police officer needs to get a warrant in order to search, seize, intercept, and conduct surveillance on the suspect’s premises or home. The police officer should have shown a reasonable cause to get a warrant or permission from the court. There are exceptional situations where a police officer does not require showing a warrant to search. Some of the exceptions are the existence of exigent circumstances or imminent risk of evidence destruction or loss, or

¹²⁶ The FDRE Constitution, (supra note 9) art. 19(5)

searches happening to lawful arrests. The Criminal Procedure Code of Ethiopia allows a search and seizure without a warrant in exceptional situations in urgent circumstances and other lawful grounds.¹²⁷

As I have previously discussed above, different legislations have brought special investigation techniques for collecting evidence, such as interception and surveillance. A police officer or any investigator needs to have court authorization to intercept or conduct surveillance on a suspected person. However, there are still some exceptional circumstances where a police officer exercises the interception or surveillance without a court order. In urgent circumstances, the police officer conducts the investigation through interception upon the permission of the head of police or prosecution institution. However, a police officer has a duty to report to the court for approval after the interception or surveillance is made.

Again, in a case where a police officer has gathered evidence without having court authorization or legal grounds, there will be a question of the legality of the means used to get the evidence. The question of the admissibility of illegally obtained evidence is a matter of the exclusionary rule. The special legislation deals with corruption, terrorism, money laundering, and other serious offenses that do not have a provision that specifies the effect of evidence obtained in violation of the right to privacy and other procedural requirements.

The Computer Crime Proclamation is the only statute that specifically prohibits the use of computer-related evidence collected in violation of the proclamation's provisions.¹²⁸ However, this does not mean that there is no law that governs all illegally obtained evidences. The FDRE Constitution states that every decision made by any government organ or official is null and void if it violates constitutional provisions.¹²⁹ Hence, any evidence obtained illegally is the result of government organ or its public official decision. As a result, any evidence obtained in violation of constitutional provisions is not admissible in Ethiopian criminal justice system.

¹²⁷ The 1961 Criminal Procedure Code of Ethiopia, (supra note 84), Art. 32

¹²⁸ The Computer Crimes Proclamation, (supra note 117) Art. 33

¹²⁹ The FDRE Constitution, (supra note 9) Art. 9(1)

2.5.3 Derivative Evidence

Derivative evidence is also another type of evidence that is obtained on the basis of other evidence secured formerly. Any evidence obtained using the information found on formerly collected evidence is admissible. The question here is what will be the effect of the derivative evidence if it is acquired on the basis of illegally obtained confession or other evidence. There is no provision that directly addresses such a kind of issue in Ethiopia. However, the admissibility of such evidence has been assessed in accordance with Article 9(1) of the Constitution because the provision states that any decisions of organ and public officials that contravene the provisions of the Constitution do not have effect. The word decision refers to any decisions, whether they directly or indirectly use the illegally obtained evidence. On the other hand, the prosecution should not benefit from its unlawful act against the defendant.

2.6 Fundamental Constitutional Rights

The FDRE Constitution has incorporated a number of human rights in relation to the criminal process, such as the right to a fair trial, the right to presume innocence until proven guilty, and equality before the law. The protection of human rights will increase the fairness of the whole criminal process. Hence, these fundamental human rights are used as an instrument to assist the discovery of truth in the criminal justice system. Because the right to equality before the law, the right to a fair trial, and other rights will keep the fairness of the criminal proceedings as well as the integrity of the system by upholding the rule of law. Additionally, the accused is entitled to the right to be presumed innocent until proved guilty.¹³⁰

One of the fundamental rights recognized in Ethiopia is the right to a fair trial. This right is recognized in the FDRE Constitution even if it is not expressly provided. The right to a fair trial is related to the whole procedural rights that should be protected throughout the criminal proceedings. The arrested and accused person's rights provided in the FDRE Constitution are the components of the right to a fair trial. The procedural rights, like the right to remain silent, the right to be assisted by a legal representative, the right to be presumed innocent, and the right to be assisted by an interpreter, are some aspects of fair trial rights. The violation of these

¹³⁰ Id., Art. 20(3)

procedural rights in the process of searching for evidence will jeopardize the fairness of the criminal proceedings.

Equality before the law is another fundamental human right incorporated in the FDRE Constitution. Everyone is equal before the law and entitled not to be subject to any discrimination on the protection of the law.¹³¹ The Constitution says that the law must be a guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, color, sex, language, religion, political or other opinion, property, birth or other status.¹³²

All persons are equal before the law, which means the law treats all persons equally so that the procedural rights of all accused persons should be protected without discrimination. Hence, the law enforcement agents should not exercise the interrogation, searches, seizures, and other means of evidence gathering against individuals' rights except in accordance with the laws. Furthermore, the prosecutor and the defendant are equal before the court. This tells us that the court should treat the prosecutor and accused persons equally. The court is in duty to enforce those procedural rights in the criminal proceedings. When judges put the procedural fairness standards into operation, the importance of equality within the rule of law comes to the forefront.¹³³ This can be expressed through the principle of equal arms. Hence, any evidence obtained in an illegal manner will directly jeopardize the defendant's right to equality before the law.

2.7 Burden of Proof

The principle of burden of proof is an aspect of the principle of presumption of innocence. The state bears the burden to prove the commission of a crime because the suspect is presumed innocent. As a result, the burden to prove the commission of a crime resides on the state, and it has a constitutional base. Hence, the prosecutor needs to produce evidence and persuade the court as to what crime was committed and who was the perpetrator. In this regard, in addition to

¹³¹ Id, Art. 25

¹³² Ibid

¹³³ JD Jackson, 'Truth, Proof, Rights and the Rule of Law in Criminal Adjudication: A Comment on Sarah Summers "Epistemic Ambitions of the Criminal Trial: Truth, Proof and Rights"' [2023] 183

CPC, the Computer Crime Proclamation clearly states that the prosecutor has the burden to prove the material facts of the case to the level of the standard of proof, but the court is given discretionary power to shift the onus to the accused where the prosecutor has proved the basic facts of the case.¹³⁴

The prosecutor's obligation is not only limited to producing evidence but also ascertaining the legality of how the evidence was collected. The prosecutor has a constitutional duty to respect and enforce the defendants' rights and ascertain whether the evidence was collected in accordance with the provisions of the FDRE Constitution and other laws.¹³⁵ Therefore, the prosecutor is asserting the affirmative, so he has to prove that the evidence was obtained in accordance with the provisions of the Constitution and other laws.

2.8 The Trial of Admission or Exclusion Evidence

The trial of the admissibility or exclusion of evidence is determined by the trial court. It is the trial court that will decide on the issue of admissibility of evidence along with the main trial. The Criminal Procedure Code states that the moment to decide on the exclusion or admission of evidence is at the time when the objection is raised.¹³⁶ It shows that the Ethiopian criminal justice system has incorporated the concept of 'the trial within trial'. However, in relation to corruption offenses, there is an exception to some extent because, in accordance with the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, it indicates the possibility of other courts, other than the main trial court, to decide on the question as to the admissibility of evidence during the preparatory hearing.¹³⁷

¹³⁴ Computer Crime Proclamation (Supra note 117), Art 37

¹³⁵ The FDRE Constitution, (supra note 9) Art. 13(1)

¹³⁶ The 1961 Criminal Procedure Code of Ethiopia, (supra note 84) Art. 146

¹³⁷ Anti-Corruption Special Procedure and Rules of Evidence /Amendment/ proclamation, (Supra note 106) Art. 36

Chapter Three

Analysis of Cases with the Legal Frameworks: Illegally Obtained Evidence

3.1 Introduction

The protection of human rights and fairness of all activities in the investigation and trial process is detrimental to the criminal justice system. The FDRE Constitution grants a number of rights, including the right to remain silent and the right to be informed promptly that any statement arrested person makes would be used as evidence against him in the trial. The accused person also has the right to be assisted by an interpreter when he does not understand the working language. Furthermore, he has a right to be assisted by a lawyer before he responds to the police officer's questions. Additionally, an arrested or accused person has a right to privacy. These constitutionally guaranteed rights are required to be respected and protected in the criminal process. The problem is not a question of recognition but rather a question of the application of rights in the criminal process and the remedying when these rights are violated.

In this chapter, discussion on the admissibility of evidence, particularly illegally acquired evidence, with reference to some court decisions, interviewee's views, and my observations. In doing so, I attempted to analyze the legal frameworks with practical cases to identify the existing gaps in deciding the admission or exclusion of unlawfully obtained evidence in the criminal process. Hence, next I will discuss firstly illegally obtained confessions and then non-confessional evidence and lastly other related points.

3.2 Illegally Obtained Confession

3.2.1 The Right to Remain Silent

The FDRE Constitution entitled arrested persons to enjoy the right to remain silent during police interrogation.¹³⁸ It is a right to be informed promptly that he has the right to remain silent and

¹³⁸ The FDRE Constitution, (supra note 9) Art. 19(2)

that any statement he makes may be used as evidence against him.¹³⁹ When a police officer makes an arrest, he has a duty to inform the suspect in a language he understands, as any statement he makes may be used as evidence against him. Furthermore, the police officer who conducts the interrogation has a constitutional duty to act in accordance with the law.

The suspect may not aware the effect of his words at the moment he gives them, or he may not know whether his action was a crime or not or whether he has the right to keep silent, or he may put himself under a state of obligation to respond. In such cases, he may incriminate himself in order to avoid the police officer's incessant interrogation or to obtain an early release by saying what the officer wants and resolving the issue in question. This may have resulted in unintended criminal liability for the suspect or accused individual. The rationalization for the right to remain quiet and be informed of the use of his words is to prevent against unintended self-incrimination and to allow the suspect to offer his confession with knowledge. This right also allows the investigator to collect trustworthy evidence. Hence, in any situation, a police officer is required to notify a suspect of his or her rights.

In practice, the police officer conducts the interrogation in a different manner after he has made the arrest. In most of the cases, the confession given by the suspect shows that the police officer informs the suspect that the confession he is going to give may be used as evidence. However, in my observation, the police officer did not inform the suspect about his rights and the use of the confession; rather, what they mostly do, after the identity of the suspect is confirmed, is directly go to the questions about the subject matter. Then, lastly, the police officers ask the suspect to put his signature, or sometimes they read the confession that is written and ask the suspect whether the word is his; sometimes the police officer even tells him orally what he has confessed without reading.

In the case heard by the federal high court, *Public Prosecutor v. Abdi Tahir et al.*¹⁴⁰, the defendants objected to the confessions, claiming that they were not informed of their right to remain silent and that the confessions they delivered should not be admitted as evidence. The

¹³⁹ Ibid.

¹⁴⁰ Federal Public Prosecutor v Abdi Tahir Kolia et. al., (2024, Crim File No 20825, Dire Dawa Federal High Court)

court overruled the accused's objections, noting that the defendants had already made similar words to the court in accordance with Article 35 of the CPC.

The reason for the court to reject the defendant's objection was that it is believed that the courts always record the suspect's confession in a proper manner as required by the law. The judgment of the court clearly shows that the confession and the witnesses' testimony (Yederja Misikir) were used to convict the defendants.¹⁴¹ Here, the court used the evidence without examining the defendant's right to be notified. This kind of decision not only violates the defendant's right to remain silent but also other rights, like the right to a fair trial and presumption of innocence. These shows that the court failed to ensure the observance of the constitutional provisions and, more importantly, it failed to enforce the constitutional rights.

Similar to the preceding cases, several court decisions or rulings demonstrate that some judges strictly implement the rules of the Constitution and other laws, declaring unlawfully obtained confessions inadmissible, while others accept the confession as admissible evidence.¹⁴² A high court judge remarked that most courts do not explore the accused's objection to the admissibility of a confession taken in violation of his rights during an investigation for a variety of reasons.¹⁴³ The judges attribute the court's inactivity to the defendant's incapacity to produce evidence, dread of a lengthy hearing, and the judge's assumption of an ineffective outcome.¹⁴⁴

In this matter, Ato Haileamlak, who is a public prosecutor in the Ministry of Justice, said that the confession obtained in violation of the right to remain silent is not subject to exclusion in the

¹⁴¹ Ibid.

¹⁴² Public Prosecutor v Tewodros Gizawu, (2024, Crim. File No. 292081, Lideta High Court); Public Prosecutor v Teshome Tamiru et al., (2024, Crim File No. 292726, Lideta High Court); Public Prosecutor v Dessie Gezia, (2024, Crim. File No. 304939, Lideta High Court); Public Prosecutor v Beyene Feyisa et al., (2023, Crim. File No. 298019, Lideta High Court) and Public Prosecutor v Yishwas Wubit, (2024, Crim. File No. 266041, Lideta High Court)

¹⁴³ Interview with Getahun G/Meskel, High Court Judge, Lideta Federal High Court, (Addis Ababa, 10 July 2024)

¹⁴⁴ Ibid

Ethiopian legal frameworks.¹⁴⁵ He further stated that the violation of those rights has a minor or insignificant impact on the accused as long as the defendant was not compelled to confess.¹⁴⁶

The other Federal First Instance Court judge, Ato Behayilu, stated that any evidence obtained in violation of the constitutional rights of the suspect is illegal evidence, but there is no provision that excludes such evidence in Ethiopia.¹⁴⁷ The judge also said that the need to protect social interest and weak investigation technique capacity should be considered in assessing the admissibility of evidence.¹⁴⁸ He further divulged that most of the time the court does not try to investigate; rather, the court takes notice that the police officer has no culture of informing the suspect of his right to remain silent, and the court passes it silently without examining the suspect's objection. The FDRE Constitution clearly puts that any decision of government organs and their officials considered as void if it contravenes the provisions of the Constitution. Again, the judge's action of passing silently by considering the police officers weakens as a reason would it be against the constitutional duty and responsibility. Therefore, judge's arguments do not go in line with the Constitutional stands and requirements.

In a similar way, Ato Zelalem stated that a confession obtained in violation of the right to be informed about the use of the confession is illegal evidence, but it should not be excluded for that reason.¹⁴⁹ Because there is no provision that precludes the admissibility of illegally obtained evidence.¹⁵⁰ Again, Ato Zelalem arguments failed to observe the constitutional provisions that makes void any decision of public officials in conflict with the provision of the Constitution in accordance with Article 9(1) of the Constitution.

In contrast to the above interviewees' point of argument, Ato Getahun stated that any evidence obtained in violation of constitutional rights has to be excluded because the constitutional rights have to be respected and enforced as the Constitution puts the judges in duty to act accordingly.

¹⁴⁵ Interview with Haileamlak Bawoke, Public Prosecutor, Ministry of Justice, (Addis Ababa, 20 June 2024)

¹⁴⁶ Ibid.

¹⁴⁷ Interview with Behayilu Kiflu, Federal First Judge, Federal First Instance Court, (Addis Ababa, 14 June 2024)

¹⁴⁸ Ibid.

¹⁴⁹ Interview with Zelalem Fikadu, Director General of Corruption Crimes Directorate General, Ministry of Justice, (Addis Ababa, 17 July 2024)

¹⁵⁰ Ibid.

¹⁵¹ He also stated that the Constitution has to make void any decision made by public officials if it contravenes the constitutionally guaranteed rights.¹⁵² He further stressed that the judge should exclude evidence if it was acquired in violation of the constitutional rights because any organ of the state should respect and enforce the constitutional rights to give remedy for them: otherwise, the recognition of rights by itself does not have any effect.¹⁵³

In this case the issue of admissibility of confession obtained without notifying the right to remain silent seems debatable. However, the researcher agrees with the later argument. The constitutional rights of the defendant are jeopardized if we let the police officer obtain evidence in violation of those fundamental constitutionally guaranteed rights. The Constitution itself put an obligation on all law enforcement organs and officials to respect and enforce constitutionally guaranteed rights. The arguments raised by Ato Haileamlak as the right to remain silent and to be informed the use the words he gives as minor right does not have any rational because the violation of this right would bring wrong conviction. The constitutional rights are not minor and insignificant; rather, they are the most fundamental rights embodied in the supreme law of the country. Furthermore, Article 9(1) of the Constitution has made it clear that any decisions of government officials given contrary to it have no effect. However, the court decisions and the responses of the interviewees revealed that there are different stances among the judges and inconsistency between the law and practice.

3.2.2 The Right to be assisted by Interpreter

The other procedural right in the criminal process is the right to request the assistance of an interpreter where the arrested person does not understand the language at the time of interrogation. This is an important right to maintain the principles of fairness and equality of arms in criminal proceedings.¹⁵⁴ In case the police officer has conducted an interrogation in

¹⁵¹ Getahun G/Meskel, (supra note 143)

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ UN Human Rights Committee General Comment No. 32, (supra note 53) Para 40

violation of the suspect's rights, the statement or confession obtained would be illegal if the arrested person is unable to properly understand the language.¹⁵⁵

In one case, the suspect did not speak and hear Somali language, but the police officer was questioning the defendant at the police station in Somali language and recorded it in Amharic by himself.¹⁵⁶ The defendants in this case have raised an objection on the admissibility of that confession because he was not provided an interpreter at the time of interrogation. Then the court accepted the objection and made the confession inadmissible in accordance with Article 27(2) of the CPC and the FDRE Constitution provision.

In another case between the Public Prosecutor and Shasho Anbesa¹⁵⁷ the defendant objected to the admissibility of his confession for the reason that he was not provided a competent interpreter during the interrogation, but the court rejected the objection for lack of evidence and convicted him.¹⁵⁸

In an interview with Judge Behayilu and Prosecutor Haileamlak, they contend that mere violation of this right should not render evidence inadmissible. Judge Behayilu's reasoning was based on the principle of protecting the public interest over individual rights. Whereas Ato Haileamlak backed his position based on the impact it has on the defendant, which he considers minimal. However, some contend that constitutional rights should be safeguarded without distinction because they are fundamental rights.¹⁵⁹ In my view, it has no constitutional foundation and, rather than being unconstitutional, violates the notion of legality or rule of law, as well as the right to a fair trial and other rights, by admitting such unlawfully gained confessions.

3.2.3 The Right to be assisted by Lawyer

Another right that assists in putting the accused individual on an equal footing with the government prosecutor is the right to be represented by a lawyer in criminal proceedings. In my

¹⁵⁵ The 1961 Criminal Procedure Code of Ethiopia, (supra note 84) Art. 27(4)

¹⁵⁶ Public Prosecutor v Abdi Tahir et al., (Crim File No 20825, Dire Dawa High Court)

¹⁵⁷ Public Prosecutor v Shasho Anbesa et al., (2024, Crim File No 197188, Lideta High Court)

¹⁵⁸ Ibid.

¹⁵⁹ Getahun G/Meskel, (supra note 143)

observation, police officers do not inform suspects of their right to consult a lawyer, and suspects cannot obtain counsel, especially if the alleged offense is serious or involves an issue of politics. In such a case, some judges stated that evidence should be admissible if the public interest protection outweighs the individual right and the violation of the right to seek legal counsel has a minuscule impact on the individual when compared to the public interest in relation to the crime.¹⁶⁰ In contrast, some argue that any right should have gotten protection to give effect to the constitutionally guaranteed right.¹⁶¹

The researcher agrees with the last point of view that the defendant's rights must be respected for a variety of reasons. The first reason is that the mere entitlement to certain rights necessitates their protection; otherwise, the acknowledgment of the rights in the Constitution is meaningless. Furthermore, the prosecution should not be in an advantageous position as a result of the unlawful conduct committed against the suspect whose rights have been infringed. The second is that law enforcement agencies are responsible for respecting and enforcing constitutional rights. The last and most important reason is connected to Article 9(1) of the Constitution, which states that any decision made by public officials or state organs is null and void if it violates constitutional provisions.

3.2.4 Formality Requirements of the Confession

The formality needed for confession is not well defined or well regulated; however, there are some requirements such as recording. According to my observations, the police officer conducts an interrogation by questioning the suspect about the entire incident and recording the statement in his own words. This method has the potential for misleading the suspect's actual words. Even once the recording is complete, the police officer does not read the confession to the subject before signing. In other cases, police officers ask the suspect to sign after providing a synopsis of the suspect's confession. In Muktar Abdi et al. and other cases, the defendants' confession lacked a date and the signature of a police officer.¹⁶² However, the confessions were admitted and used

¹⁶⁰ Behayilu Kiflu, (supra note 147)

¹⁶¹ Getahun G/Meskel, (supra note 143)

¹⁶² Public Prosecutor v Muktar Abdi et al., (2024, Crim File No 20232, Dire Dawa High Court) (Unpublished); Public Prosecutor v Getaneh Abuhay, (2018, Crim File No 197377, Lideta High Court) and Public Prosecutor v Shasho Anbesa et al., (2020, Crim File No 197188, Lideta High Court)

to render a decision. Such admission of a confession may violate the procedural rights of the suspect. Thus, this will be against the defendant's right to a fair trial and presumption of innocence.

3.3 Evidence Obtained in Violation the Right to Privacy

One of the fundamental rights recognized in the FDRE Constitution is the right to privacy. This right includes the right not to be subjected to searches of one's home, person, or property, or the seizure of any property under his personal control.¹⁶³ Everyone has the right to be protected from unwarranted search and seizure. Additionally, the individual has the right to the inviolability of his notes and correspondence, including postal letters and communications made by means of telephone, telecommunications, and electronic devices.¹⁶⁴ The Constitution put a duty on the public officials to respect and protect the right to privacy and related rights. However, there are certain grounds that these rights are put under restrictions. These exceptions can only be exercised in accordance with the provisions of the Constitution and other laws. I have consulted some court decisions that divulge the problems.

In Public Prosecutor v. Tekalign Merdasaa et al.,¹⁶⁵ the defendants were accused of the crime of terrorist acts as per Article 4 of the Anti-Terrorism Proclamation 652/2001, and evidence collected through intercepting and surveillance in accordance with Article 14/1 and intelligence reports in accordance with Article 23/1 of the same proclamation was produced against them. In the above case, the defendants raised an objection on the admissibility of the above evidence. The defendants, in their objection, stated that evidence collected through intercepting and conducting surveillance on the telephone of a person suspected of terrorism should be made upon the permission of a court order.¹⁶⁶

Furthermore, the defendants stated that the former Anti-Terrorism Proclamation No. 652/2001, repealed by Proclamation No. 1176/2012, and the later proclamation have different provisions

¹⁶³ The FDRE Constitution, (supra note 9) Art. 26(1)

¹⁶⁴ Id., Art. 26/2/

¹⁶⁵ Public Prosecutor v Tekalign Merdasaa et al., (2022, Crim. File No 249292, Federal High Court)

¹⁶⁶ Ibid.

that favor the accused in relation to the collection of evidence.¹⁶⁷ The new proclamation needs court authorization to use special investigation techniques. The defendants requested the court to exclude the evidence collected without court authorization.¹⁶⁸ The court refused to exclude the evidence on the basis of the reason that the principle of application of the more favorable law works only for penalty at the time of sentencing, not concerning the rules of collection of evidence and its admission.¹⁶⁹

There are similar decisions given in the same manner. For instance, in *Public Prosecutor v. Abdureman Mehamed*,¹⁷⁰ the defendants have raised the same objection on the evidence collected through interception and surveillance without court authorization. Again, the court used the same reason and rejected the defendant's objection. Here, the court decisions indicated that evidence obtained through special investigation techniques was admitted even though the repealed proclamation under article 14/1 and the new proclamation under article 42 required court authorizations to intercept and conduct surveillance. In the above, both cases divulge that evidence obtained without court authorization was made admissible.

The search warrant should also include a list of the property to be looked for and seized. In this case, the prosecutor in *Public Prosecutor v. G/Meskel W/ Mihiret*¹⁷¹ presented the lists of seized items but not the search warrant. If the order is not supplied as evidence, it will be impossible to determine if the seized item is on any of those lists.

In an interview conducted with Ato Zelalem, he stated that most of the time accused persons did not raise an objection to articles seized that were not found in the lists in the warrant.¹⁷² Indeed, it is mainly the defendant who should challenge the matter, but the court itself has a responsibility to enforce constitutional rights. In an interview made with Ato Getahun, he stated that any search and seizure made beyond the list under the search warrant should be

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ *Public Prosecutor v Abdureman Mehamed and Ferhan Ibrahim*, (2024, Crim. File No 245566, Lideta Federal High Court)

¹⁷¹ *Public Prosecutor v G/Meskel W/Mihiret*, (2023, Crim. File No 266305, Lideta High Court)

¹⁷² Zelalem Fikadu, (supra note 149)

inadmissible.¹⁷³ The researcher strongly argues that admitting any evidence that was obtained outside the lists of the warrant would amount to allowing a search without a warrant in a legally permitted situation.

The important issue involves the place of evidence obtained in seizing incriminating objects in plain view. The provisions of the Criminal Procedure Code and other legislations oblige the properties to be searched to be listed in the warrant. This means the legal frameworks of Ethiopia prohibit the granting of a general search warrant. Some of the cases decided by the Federal High Court did not show whether the seized object that has an incriminating nature was admitted in what condition. It did not deal with whether the firearms or poisonous narcotic substances or any other incriminating object was found in plain view or through a search warrant. In the Dagne Tessma¹⁷⁴ and Natinayel Sisay¹⁷⁵ cases, the courts did not investigate whether the seized incriminating objects were searched because they were found in the warrant or they were seized under plain view. Similar cases were decided in a similar way without revealing the reason for admitting those incriminating objects.¹⁷⁶

In the above case, one judge noted that it is difficult to exclude evidence that is an object that has incriminating character and free the accused as long as the object is an illegal one.¹⁷⁷ On the contrary, the other judge pointed out that any evidence not collected with a warrant or in plain view should have been excluded, even if the items had an incriminating character. The court's failure to probe the matter would have a considerably more serious explanation. In my view, the court failed to address the issue because it believes that the nature of the item makes no difference or because it is unaware of the subject matter. However, evidence gathered from outside the lists in the warrant must not be admitted unless the object was seized in plain view.

In all cases, where the search, seizure, interception and surveillance conducted in violation of the constitutional rights and provisions of other laws, the evidence would be illegal. In such

¹⁷³ Getahun G/Meskel, (supra note 143)

¹⁷⁴ Public Prosecutor v Dagne Tessma, (2024, Crim. File No 313198, Lideta High Court)

¹⁷⁵ Public Prosecutor v Natinayel Sisay, (2024, Crim. File No 292915, Lideta High Court);

¹⁷⁶ Public Prosecutor v Beyene Feyisa et al, (2023, Crim File No 298019, Lideta High Court); Public Prosecutor v G/Meskel W/Mihiret, (2024, Crim. File No.266305, Lideta High Court) and Public Prosecutor v Dessie Gezia, (2024, Crim. File No 304939, Lideta High Court)

¹⁷⁷ Getahun G/Meskel, (Supra note 143)

circumstances, the prosecution should not benefit from the evidence obtained in violation of accused rights. The court has a responsibility as per to Article 9(1) and 13(1) of the Constitution. However, all the above discussions of some court decisions demonstrate that there are inconsistencies between the law and the practice.

The Supreme Court cassation bench in *Public Prosecutor v. Getachew Walelign et al.* has given a binding decision in relation to the issue of admissibility of evidence.¹⁷⁸ In this case, the court stated that in a situation where there is no clear provision of the law that precludes the admission of certain evidence, it would be a fundamental legal error to reject that evidence from the beginning without considering the probative value of the evidence from different perspectives.¹⁷⁹ The court decision demonstrates that evidence other than confession obtained by coercion is admissible, and it is the court that determines, in trial in accordance with the law, the weight, credibility, and legality of the evidence. The court decision reveals that there is no rule of automatic exclusion of evidence except for coerced confession.

Some judges consider evidence obtained in violation of the right to privacy as valid, but some others do not. Ato Behayilu, in this case, stated that the constitution does not clearly provide a provision as to the exclusion of the evidence obtained with unlawful search and seizure.¹⁸⁰ And, he argues that the exclusion of evidence obtained illegally will affect the public interest, especially in serious offenses. Illegally obtained evidence should be used on a case-by-case basis to take into consideration public interest and not be helpful for the offenders to go free for the reason of police incapacity and misconduct in the process of investigation.¹⁸¹ In this regard, Ato Getahun stated that the incapacity of police organs should not be considered as a justification to violate the constitutional rights of the accused person because this will increase the misconduct of the police officer rather than support the investigation.¹⁸²

In another interview made with Ato Zelalem, he said that the Constitution does not have a clear provision that makes evidence obtained through unlawful search, seizure, and interception

¹⁷⁸ *Public Prosecutor v. Getachew Walelign et al.*, (2019, Cassation File No. 163947)

¹⁷⁹ *Ibid*

¹⁸⁰ Behayilu Kiflu, (supra note 147)

¹⁸¹ *Ibid*.

¹⁸² Getahun G/Meskel, (supra note 143)

inadmissible. He further states that the way article 9(1) is constructed is not clear to mean evidence obtained illegally is inadmissible.¹⁸³ He also believes that excluding evidence is not the only remedy to protect and enforce constitutional rights; rather, there are other mechanisms, such as criminal, civil, and administrative accountability of the police officer.¹⁸⁴ Some others argue on the contrary, relying on the provisions of the FDRE Constitution. In this issue, Ato Haileamlak argues that any non-confessional evidence obtained through unlawful search, seizure, and interception must be excluded because its intrusion into constitutionally protected right to privacy is devastating.¹⁸⁵ Similarly, Ato Getahun stated that any evidence obtained in violation of constitutional rights has to be excluded because the constitutional rights have to be protected, and the Constitution puts a duty on the government organs and public officials so that a judge should exclude unlawfully obtained evidence.¹⁸⁶

Indeed, there is a concern or debate regarding the power of the courts involving invoking constitutional provisions in the criminal proceedings to exclude illegally obtained evidences. The FDRE Constitution grants the power to interpret the Constitution to the House of Federation /including Council of Constitutional Inquiry/.¹⁸⁷ The Constitution states that all constitutional disputes will be decided by the House of Federation.¹⁸⁸ The constitution further goes to mention the powers and functions of the Council of Constitutional Inquiry, which is to investigate constitutional disputes and upon the investigation the inquiry may interpret the constitution if it needs that.¹⁸⁹ In this respect, the Constitution has mentioned that where there is a contest regarding any laws of the federal or state lawmaking organ disputes with the Constitution for making the law unconstitutional, such area of disputes could be matters that needs interpretation when the courts or parties of the case submitted to the Inquiry.¹⁹⁰

As the recognition of the principle of separation of power has created three organs of government to separate each organs function and check and balance each other powers. The judiciary as one

¹⁸³ Zelalem Fikadu, (supra note 149)

¹⁸⁴ Ibid.

¹⁸⁵ Haileamlak Bawoke, (supra note 145)

¹⁸⁶ Getahun G/Meskel, (supra note 143)

¹⁸⁷ The FDRE Constitution, (supra note 9) art. 62(1)

¹⁸⁸ The FDRE Constitution, (supra note 9) art. 83(1)

¹⁸⁹ The FDRE Constitution, (supra note 9) art. 84(1)

¹⁹⁰ The FDRE Constitution, (supra note 9) art. 84(2)

of organs of the government has its own role which it to interpret law. Traditionally, the judiciary is known to interpret laws and it has inherent power to interpret the laws including the Constitution. In such sense, interpretation involves the process of determining or ascertaining the meaning, scope and the contents of the provisions of the Constitution in the process criminal proceedings. However, the FDRE Constitution allows the interpretation of the Constitution where there is constitutional dispute. Therefore, interpretation is made when the provisions of the Constitution is vague, ambiguous and unclear.

There are different Scholar views regarding the power of the court to interpret the Constitution. Some argues that the courts have no power to interpret the Constitution because the Constitution gives all power to interpret the Constitution to the House of Federation by relying Article 83 and 84 as well as other sub-constitutional legislations¹⁹¹ enacted to govern the businesses of House of Federation and Council of Constitutional Inquiry.¹⁹² In such kind of argument, the courts must submit for interpretation to HOF/CCI/ when they encounter cases with constitutional disputes.¹⁹³ some others argue that the court has a power to interpret the Constitution because it does not exclude the courts from interpreting the Constitution and what the Constitution has done is granting power, which is not exclusive, to the HOF/CCI/. In such case, other organs other than HOF/CCI/ can interpret the Constitution. There are also many other different arguments by different scholars. Dr Getachew argues that the better way to understand the issue is referring the intention of the makers of the Constitution and find that the power to interpret the Constitution resides on the HOF/CCI without exceptions.¹⁹⁴

In my view, the Constitution requires all constitutional dispute to decide by the HOF, but the reading of Article 9(2), 13(1), 62(1), 83(1) and 84 of the FDRE Constitution and absence of an indication of the exclusive power of the HOF force me to say the FDRE Constitution does not exclude the courts from applying and determining the meaning and contents of the provisions of the Constitution in the process Criminal trial that involves constitutional rights. Rather, the

¹⁹¹ Council of Constitutional Inquiry Proclamation, Proclamation No. 798/2013 and Consolidation of the House of the Federation and Definition of Its Powers and Responsibilities Proclamation, Proclamation No. 251/2001

¹⁹² Getachew Assefa, All About Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation. [2010] J., Ethiopian L., 24, 139

¹⁹³ The FDRE Constitution, (supra note 9) art. 84(2)

¹⁹⁴ Getachew Assefa, (supra note 192)

Constitution obliges courts to respect and enforce constitutional rights granted in chapter three of the Constitution. Hence, the duty and responsibility of the courts indicates the courts are not totally excluded from interpreting the Constitution.

The new Federal Courts proclamation no. 1234/2021 supports my argument involving the power of the court to interpret the Constitution. The proclamation states that the supreme court cassation bench can see a case that has basic or fundamental error of law when the final judgment, ruling, order or decree is given in violation of the Constitution.¹⁹⁵ Additionally, the federal courts have jurisdiction over cases arising under the Constitution.¹⁹⁶ Moreover, the proclamation has incorporated new things in respect to the Constitutional rights, in which the federal high court has jurisdiction to see case and give decisions, judgement or order to protect the human rights guaranteed in the Constitution.¹⁹⁷ All the aforementioned jurisdictions of the courts reveal that the courts have power to interpret the Constitution because in the process of determination of the cases, the courts will be engaged in determining the scope, meaning and contents of the constitutional rights as well as ensuring the constitutionality laws and decisions of public officials. Moreover, the reading of Article 84(2) of the Constitution reveals that when there is a contests or debates on the dispute between the laws of federal and state law making organs on the one hand and the Constitution in the other hand upon the court submission, the Inquiry will consider and provide recommendation for the HOF for final decision. In this regard, the Council of Constitutional Inquiry proclamation states that where the courts think that the interpretation of Constitution is necessary to decide the case it needs to submit to the Inquiry.¹⁹⁸ This indicates some constitutional disputes that does not need constitutional interpretation could be decided by the courts. Those abovementioned powers of courts are indicators of the courts power to interpret the Constitution.

The Constitution required the court to respect and enforce constitutional rights, in my view, as a result the courts needs apply and ascertain the constitutionality of any decisions of government organs or their officials even by engaging in the work of interpretation of the constitution in the process of criminal proceedings. In our case, the constitutional provisions divulge that

¹⁹⁵ Federal Courts Proclamation, Proclamation No. 1234/2021, Art. 2(4) (a)

¹⁹⁶ *Ibid.*, Art. 3(1)

¹⁹⁷ *Ibid.*, Art. 11(3 and 4)

¹⁹⁸ Council of Constitutional Inquiry Proclamation, Proclamation No. 798/2013, Art. 4(3)

interpretation may only be made where there is a constitutional dispute, hence, if the constitutional provisions are not vague, ambiguous and unclear the courts will not have a reason not to observe and enforce the provisions of the Constitution. However, the Constitution does not totally exclude the courts from engaging in constitutional interpretation. The court cannot enforce the constitutional rights at least without engaging in some level of interpretation. Therefore, although there are different arguments regarding the power to interpret the Constitution and other legislation that limit the courts' powers, the Constitution itself puts an obligation on the courts to respect and enforce human rights including the rights of arrested and accused persons guaranteed in the Constitution. Furthermore, the power to interpret, apply and guarantee the adherence of the Constitution stems from the inherent power of the Judiciary. Therefore, the courts' failure to apply and ascertain the adherence of the Constitution in the process of determining the admissibility of illegally obtained evidence will jeopardize the protection of constitutionally guaranteed rights of the defendants and lastly affect the criminal justice system.

3.4 Derivative Evidence

Police officers sometimes may use a confession or other evidence formerly obtained to get other evidence. The Federal High Court in *Teshome Tamiru*¹⁹⁹ rendered a decision on the objection raised by the defendant for the admissibility of evidence that was obtained illegally and the derivative evidence obtained on the basis of former illegally obtained evidence.²⁰⁰ The court overruled the objection and stated that even if the defendant has proved that the confession was obtained under coercion, the existence of real evidence obtained under the direction of the defendant ascertains the correctness of the confession.²⁰¹ This case divulges that the court did not examine the defendant's objection using the existing legal framework and evidence principles.

3.5 Burden of Proof

The prominent widely recognized procedural right of an accused person is the right to presume innocent until proven guilty. This right principally deals with that the burden of proof in criminal proceedings resides on the state, which means the prosecutor has the burden to produce adequate

¹⁹⁹ *Public Prosecutor v Teshome Tamiru et al.*, (2024, Crim. File No 292726, Lideta Federal High Court)

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

evidences and persuade the judges. In practice the prosecutors produce and presents the evidences to prove the commission of the alleged crime and persuade the court and if the court finds that a case against the accused has been made out, the court gives order for the defendant to present his defense if he wishes. Then the defendant may rise objection on the admissibility of the evidence for exclusion. Here, the defendant is expected to produce convincing evidence to prove the existence of violation of his rights during the investigation.

In case of voluntary confession, if the defendant object the confession for the reason of violation procedural rights like the right to be informed that the confession may be used as evidence and other rights. It is difficult for the defendant, who is probably under arrest, to prove through witness or any other evidence as the interrogation mostly conducted in the police station probable without video recording and other neutral observers. Hence, any confession obtained in accordance with Article 27 of CPC could be difficult for the defendant to challenge. In *Sisay Berihia et al.*,²⁰² the defendant was accused of the crime of aggravated robbery as per to Article 671/2/ of the FDRE Criminal Code of Ethiopia, and he has objected the admission of confession by claiming that he was tortured to give that confession. The court ruled against the defendant for the reason of unable to prove his assertion. The court completely put the burden of proof on the defendant.

Similarly, in many other cases, the court decided similar cases in the same manner.²⁰³ In case of non-confessional evidence, the way the police officer seized objects may violate the right to privacy and if there is no video recording or neutral third-party observers how could the defendant will defend the exclusion of illegally obtained non-confessional evidences. Indeed, there are provisions of the CPC and other legislation that require neutral third-party observer during search and seizure. If the police officer didn't invite neutral observer or invite non-neutral observers, the defendant would be unable to prove the violation of his rights. In such circumstances, the court should not completely put the burden of the proof on the defendant because it is evident that the defendant will not have evidence to show the violation of his rights during the investigation. If the defendant has questioned the legality the means the evidence

²⁰² Public Prosecutor v Sisay Berihia et al., (2021, Crim. File No 221788, Lideta High Court)

²⁰³Public Prosecutor v Tewodros Gizawu, (2023, Crim File No 292081, Lideta High Court); Public Prosecutor v Teshome Tamiru et al., (2024, Crim. File No 292726, Lideta High Court and Public Prosecutor v Kinfe Tadesse et al. (2020, Crim. File No 22926, Lideta High Court)

obtained and if the objection of the defendant has some weight by considering the circumstances surrounds the way the investigation conducted, the court should have a chance to shift the burden to the prosecutor regarding the legality of the way the evidence obtained once the defendant has questioned the legality. Hence, the practice divulges the judge's stand regarding upon whom the burden of proof resides.

In normal course of criminal proceedings, it is the prosecutor who has the burden of proof as to what crime is committed and who is the culprit. In doing so, the prosecutor needs to ascertain the evidence produced to the court is collected legally. In accordance with the Constitution, all Federal and State legislative, executive and judicial organs at all levels have a responsibility and duty to respect and enforce the provisions of the chapter three of the Constitution.²⁰⁴ Again, the Constitution says that any decision of an organ of state or public officials which contravenes the constitutional provisions shall be void.²⁰⁵ Thus, the investigation should be made in conformity with constitutional rights. However, the decision of the courts divulges that the defendant is the one who always bear the burden to proof the illegality of the evidence in any case. Indeed, the legal frameworks does not clearly give the discretionary power for court to shift the burden of proof in case of the trial of the admissibility of illegally obtained evidences.

3.6 The Trial of Illegally Obtained Evidence

The matter of admissibility or exclusion of evidence obtained illegally can be decided at the pre-trial or trial stage. As I have discussed in the previous chapter, there are countries that allow the issue of admissibility of confession in violation of the procedural rights and other evidence obtained through unlawful search and seizure to be decided at the pre-trial stage in addition to the trial stage. In Ethiopia, the trial court will decide on the objections related to the issue of admissibility of evidence obtained illegally along with the main trial.

In the Getaneh Abuhay ²⁰⁶ case, the prosecutor's evidence was 'Yederja Miskir' ²⁰⁷. The defendant, in his defense, produced witnesses, and they testified that the accused was tortured to

²⁰⁴ The FDRE Constitution, (supra note 9) Art. 13/1/

²⁰⁵ Id., Art. 9/1/

²⁰⁶ Public Prosecutor v. Getaneh Abuhay, (2019, Crim File No 197377, Lideta High Court)

²⁰⁷ 'Yederja Miskir' is the Amharic term for the witness who was present at the accused's police station interview and

give a confession. The court sustained the defendant's objection on the admission of confession, but the defendant was convicted of the crime he was charged with using Yederja Miskir. A similar decision was given in the Shasho Anbesa et al.²⁰⁸ case. This kind of treating illegally obtained evidence does not preclude the use of it for a decision. Because the court already used the illegally obtained confession and what the Yederja Misikir testified to, both pieces of evidence are derived from the defendant's confession. In such circumstances, the judges could have been indirectly or inadvertently prejudiced, because how could the judges who have made the original evidence inadmissible convict using secondary evidence derived from the confession that was not admitted? The absence of a separate trial of admissibility of evidence at the pretrial stage is another contributing factor, next to the courts failure to apply the CPC provision for the problem associated with the trial of admissibility of evidence.

3.7 Findings

In the modern world, all the activities of the investigation, the collection of evidence, the trial process, and other stages of the criminal process consider human rights as fundamental values that facilitate the process of truth discovery in the criminal justice system. The existing Ethiopian criminal justice system is a result of various values interplay. The FDRE Constitution provides recognition for individual rights and puts certain limitations on those rights to protect the public interest. In this regard, Dr. Simeneh stated that the constitution is “clear in its value choice, and it balances the interests of the public and of the individual in the administration of the criminal justice.”²⁰⁹

The major role of evidence in the administration of the criminal justice system is to discover the truth. The discovery of truth is not an easy task; rather, it is difficult because getting evidence demands huge effort and it has to be done within the legal limitation. The limitations of the discovery of truth are the rules of investigation, the collection of evidence, the trial process, and how evidence is presented and admitted. Hence, all evidence is not relevant, and all relevant

was counted as a witness.

²⁰⁸ Shasho Anbesa et al., (supra note 157)

²⁰⁹ Simeneh Kiros Assefa, ‘The Principle of the Presumption of Innocence and its Challenge in the Ethiopian Criminal Process’, [2012] Mizan Law Review 6(2), 273

evidence is not admissible in court or trial. Some relevant evidence may be excluded or not admitted because of the prohibition of law. The law prohibits certain types of evidence for the purpose of protecting certain values. One of the values that are recognized all over the world is human rights. Human rights are the values or standards that are recognized as one of the prominent values of criminal justice administration.

The protection of human rights is important to facilitate the discovery of truth in all stages of criminal proceedings. Hence, the rule of evidence governs the production, presentation, and admission and exclusion of evidence. In practice, there is an inconsistent approach toward the admission and exclusion of illegally obtained evidence. This inconsistency between the law and practice emanates from different reasons. One of the reasons, as I have discussed above, relates to the Constitution's approach towards illegally obtained evidence. The FDRE Constitution has only expressly characterized confession obtained by coercion as inadmissible. This is a basis for argument among lawyers. However, the FDRE Constitution has made clear that any organ's and public official's decision will not have effect if it conflicts with the provisions of the Constitution. As I have discussed in the previous parts of this chapter, the decisions of the courts divulge that the provisions of the Constitution are not getting attention pertaining to illegally obtained evidence.

The issue of admission of confession is one area of the finding. In practice, some decisions of the court reveal that a confession obtained unlawfully was taken as admissible evidence. The admission of confession obtained in violation of the defendant's constitutionally guaranteed rights, like the right to be informed, the right to consult a lawyer, and the right to be provided an interpreter, clearly conflicts with the provision of the Constitution. In such circumstances, the defendant's constitutional procedural rights will be violated, and the confession used may lead to wrongful conviction. Additionally, apart from the failure to protect individual rights, it raises the question of the reliability of the confession. Therefore, the court's failure to exclude evidence obtained unlawfully negatively affect the whole criminal justice system.

Regarding the formality of how a statement or confession of a defendant is received, it is not adequately regulated. One of the formality requirements in the Criminal Procedure Code of Ethiopia is that the statements of the suspect have to be recorded. Any statement or confession

should be written down in which it will be easier to identify what the words of the suspect are and identify the identity of the person who gives it. However, the Code does not specify how the statement is recorded, whether it is in the form of narration or another mode. Furthermore, it doesn't say anything about reading the recorded statements to the suspect, dating the record, and signatures of the suspect, police officer, and interpreter.

All the above formalities are necessary to ascertain the correctness of the word given by the suspect and who is the author of that confession. In practice, the recorded confessions of the suspect presented to courts display that they did not fully address those issues.

The Criminal Procedure Code does not regulate how an investigator should record the words of the suspect. The procedural rights of the defendant would be paralyzed if he was unable to check what statement was recorded. The Criminal Procedure Code only obliges the suspect's statement to be recorded but no other formalities. However, reading, dating, and signing the confession is vital to enable the suspect to ascertain whether the words recorded belong to the person who confessed.

The absence of reading, dating, and signing of confession would make it easy to change the suspect's word or the whole confession. A confession obtained in such a way is susceptible to being unreliable. Therefore, the absence of legal requirements for reading, dating, and signing may enable a claim of exclusion confession that does not embody the defendant's word, which is against the procedural rights of the defendants.

The other area of this research is non-confessional evidence acquired through search and seizure, interception, and surveillance. In this case, the FDRE Constitution under Article 26 stated that the right to privacy includes the right not to be subjected to searches of his home, person, or property, or the seizure of any property under his personal possession.²¹⁰ This provision also recognized that the right to the inviolability of person's notes and correspondence including postal letters, and communications made by means of telephone, telecommunications and electronic devices.²¹¹ However, these rights have limitations where there is compelling circumstances and in accordance with specific laws for the purpose of national security or public

²¹⁰ The FDRE Constitution, (supra note 9) Art. 26(1)

²¹¹ Id., Art. 26(2)

peace, the prevention of crimes, or the protection of health, public morality or the rights and freedoms of others.²¹²

Evidence obtained using unlawful searches and seizures, wiretaps, and surveillance will violate the right to privacy, and this will undermine the protection of rights and the integrity of the criminal justice system. Non-confessional evidence obtained illegally interrelates with unauthorized intrusion into personal affairs, including his homes and communications, or personal data.

In practice, there are decisions that revealed the admission of non-confessional evidence obtained through unlawful search, seizure, interception, and surveillance. In Ethiopia, the Criminal Procedure Code and other special legislation that embody the rule of evidence do not provide the effect of the unlawful search, seizure, interception, and surveillance on the evidence. It is only the Computer Crimes Proclamation that clearly indicated the effect of unlawfully obtained computer crimes-related evidence.

The lawmaking organ has a perspective like those who complain about the FDRE Constitution's failure to have a rule of exclusion for all unlawfully obtained evidence. Such a kind of perception seems that all evidence is considered admissible unless it is provided otherwise by law. In my view, this kind of perception has been propounded by the lawmaking and judicial organs. This observation is further strengthened by the draft Criminal Procedure and Evidence Code provisions. However, this does not mean the Constitution has no provision of a general rule of exclusion for illegally obtained evidence. Indeed, the Constitution clearly states that any decision of any government organ and official has no effect if it contravenes the constitutional provisions.

²¹³

Courts have a responsibility to respect and enforce constitutional rights. There are inconsistent decisions made in practice with respect to illegally obtained evidence. Some decisions of the court demonstrate exclusion of unlawfully searched and seized items in accordance with the constitutional rights. On the contrary, there are decisions of the court that show the admission of evidence obtained illegally against the provisions of the constitutional rights. Therefore, the

²¹² Id., Art. 26(3)

²¹³ Id., Art. 9(1)

inconsistencies that exist between the decisions of the courts and again between the law and practice make it difficult to protect defendants' rights in the criminal process. This is a clear dilemma in the protection of defendants' constitutional rights and the integrity of the criminal justice system in a broader way.

The courts failure to apply the constitutional provisions in the process of criminal proceedings is a significant additional reason for violation of defendants' rights. The Constitution puts a responsibility and duty on the courts to enforce human rights. Hence, the court has a huge responsibility and duty to respect and enforce the constitutional rights in the criminal proceedings. The failure of police officer to inform that any statement he makes may be produced as evidence in trial has to be evaluated with the defendant's constitutional rights.

The court is a responsible body to evaluate the process of gathering evidence in line with the Constitutional provisions in the criminal trial. There is no other powerful and neutral organ for the enforcement of defendants' rights other than court. The court's failure to detect police misdeeds and deter them for their misconduct will contribute a lot for further violation of defendants' rights in the future. Therefore, the court's approach in handling the trial of criminal proceeding is not in a position to fully enforce the constitutional rights of the defendants.

In addition to the court's failure to uphold constitutional rights during the process of decision-making on the admission of evidence, the time they render a ruling on the admission of evidence is against the provision of the CPC. The Criminal Procedure Code under Article 146 states that any objection to the admission of evidence should be decided immediately as soon as it arises. However, there are decisions that divulge the ruling on the admissibility of evidence is rendered when they dispose of the whole case. In such a case, in addition to the failure to follow the provisions of CPC, the judges who were aware of the facts contained in the excluded evidence would have been influenced because the facts that the judges became aware of could not be easily excluded from their minds. Hence, in addition to the court's failure to apply the law properly, the procedural rule as to time and court of the trial of admissibility of evidence is problematic.

The other problem that is observed with regard to the trial of illegally obtained evidence is who bears the burden of proof. Many decisions of the courts revealed that the court usually put the

burden of proof of illegality of evidence on the defendant. However, once the legality of the evidence is questioned by the defendant, the prosecution should bear the onus to show the legality of the evidence he brought. The one who claims the legality, correctness, and reliability of the evidence should prove if the defendant has objected the admission of certain evidence for the violation of his rights during the collection because the defendant probably gives his confession or other evidences collected during when he was arrested in the police station. However, in practice, the court completely put the onus on the defendant in the absence of any rule of presumption of legality of the prosecution evidence and considering the circumstances the defendant was during the investigation. This violates the constitutional principle and right of the defendant.

The other practical problem observed in relation to search and seizure. A police officer who conducts a search after getting a warrant may discover an object that has an incriminating character but is not one of the listed items in the warrant. In practice, as I have discussed in the previous part, the court did not attempt to investigate evidence related to items that have an incriminating character seized that are out of the lists in the warrant, whether it was viewed in plain view or not. As a result, the law and the practice divulge inconsistency. However, in the case of digital property, it is different. This is because the Computer Crime Proclamation allowed a police officer to seize digital property without a restriction once he secured a warrant. Indeed, the Computer Crime Proclamation exacerbates the problem that comes already from the amorphous nature of digital property by allowing a police officer or any investigator to search or access any digital data even from the computer network that was not subjected to a warrant. Hence, the Computer Crime legislation laid the constitutional rights of the defendant in peril.

The other point discussed in this thesis is in connection with evidence acquired by taking information from the original confession obtained in violation of procedural rights. In practice, court decisions in some cases revealed that the issue of admissibility of derivative evidence obtained using formerly illegally gained confessions was not subject to the argument as it should have been. The researcher believes that the admission of such evidence will influence a police officer to choose informal ways to collect evidence without concerning its illegality. Again, this may encourage police officers to violate the rights of the defendant in the future. Moreover,

admission of derivative evidence violates the constitutional rights of the defendant. Therefore, the admission of derivative evidence contravenes the provisions of the FDRE Constitution.

In general, the Constitution under article 9(1) makes any decision of public officials and organs of the government void if it contravenes its provisions. However, there are various arguments for and against the exclusion of illegally obtained evidence. And this has paved the way for inconsistent ruling on the matter and infringement of the defendant's constitutional rights. And, finally, this may further lead to wrongful conviction and an unpredictable criminal justice system.

Chapter Four

Conclusions and Recommendations

4.1 Introduction

Evidence obtained illegally can be admissible in one jurisdiction but not in other. The admissibility of evidence is determined by law. There are jurisdictions that adopt automatic or categorical exclusion. Some other jurisdictions give discretionary power to admit or exclude evidence to the court with guidelines or without it. Again, there are also some jurisdictions where all relevant evidence is admissible. The illegality of evidence comes from the way the evidence is gathered or obtained. Evidence gathering may be conducted through either conducting interrogation, going to the crime scene or related places, or using technological devices. If the way of interrogation or search is conducted contrary to the rights of the suspect, the evidence obtained out of such an unlawful act is considered illegal.

Currently, the recognition of human rights plays a crucial role in the development of exclusionary rules. These human rights are incorporated at the international and national levels. Hence, they serve as standards in this modern world. As a result, the criminal proceedings need to be in conformity with fundamental human rights. In fact, human rights are there to protect the defendant from unlawful acts of law enforcement agents.

In Ethiopia, the admissibility of all types of evidence obtained in violation of defendants' rights is not expressly and adequately provided in the Constitution and other laws. The Constitution has only explicitly excluded confession obtained by coercion. However, this does not mean there is no constitutional provision that regulates the admission and exclusion of all evidence obtained in violation of constitutionally guaranteed rights. Apart from that, there are practical gaps observed, as I have discussed in the previous chapter.

The aim of this thesis was to discuss the gap that exists and remedies to it in connection with the admissibility or exclusion of illegally obtained evidence. In doing so, this thesis attempted to answer questions related to the inconsistencies between legal frameworks and practices regarding the admissibility of illegally obtained evidence, the constitutional remedies available for existing problems, and the recommendations suggested.

4.2 Conclusion

One of the ways for the police officer to gather evidence is by conducting searches, seizures, surveillance, and interceptions. This has a direct link to the right to privacy of a defendant. The right to privacy is one of the fundamental constitutional rights that should be protected. However, the right is not an absolute right; it has exceptional grounds that limit the enjoyment of this right. The limitations can only be constitutional where compelling circumstances exist and a specific law is enacted for the purpose of crime prevention, national security, and other related matters. Additionally, the procedural rights and requirements provided in the CPC and other specific laws should be respected; otherwise, the right to privacy would be violated.

The Constitution and other laws give specified circumstances of interference in a restricted way. That is why, in principle, all laws, including the CPC, require a warrant or court authorization to conduct searches, seizures, interceptions, and surveillance. Thus, any evidence obtained in violation of the right to privacy and related provisions of other laws would make the means the evidence obtained illegal. The FDRE Constitution gives no effect to the decision of any government organ and public officials if it contravenes its provisions. For that reason, evidence obtained through unlawful search, seizure, interception, and surveillance should have had no effect. However, in practice, some decisions of the court reveal that evidence obtained without a warrant or court authorization or legally permitted situations was admitted. Most of the court's decision can be a testimony to the court's failure in applying the provisions of the FDRE Constitution in the process of determining the admissibility of evidence.

During interrogation, a police officer has a constitutional duty to inform that any word he gives may be used as evidence against him. Additionally, he also has a duty to provide a competent, neutral interpreter if a suspect doesn't understand the working language. Any evidence obtained without the notification and provided with a competent interpreter would be a violation of the provisions of the Constitution. In practice, some decisions of the court reveal that a confession obtained unlawfully was taken as admissible evidence. Thus, the admission of the illegally obtained confession violates the defendant's constitutional right to be informed, the right to consult a lawyer, and the right to be provided an interpreter. Therefore, the court's failure to exclude evidence obtained unlawfully will negatively affect the whole criminal justice system.

The other area of problem relates to the way confession is recorded and authenticated. The Criminal Procedure Code and other laws do not provide how the word of the suspect is recorded, whether in narration or other format, and whether reading, dating, and signing a confession should be a ground of inadmissibility or not. In practice, the issues related to the formality of confession recording were not the subject of argument in the trial. Even in some cases where the issues arose, the court didn't try to examine the matter. Hence, there is a legal and practical gap in connection to the formality of confession recording.

The trial of objection of admission of evidence in terms of time and who bears the burden of proof has legal and practical gaps. The decisions of the courts revealed that the ruling on the objections of the defendant on the admission of evidence was rendered with the final decision, which is against the procedural rule. Again, the court put the burden of proof of illegal evidence on the defendant without any consideration the circumstances surrounds. The one who brings the charge should prove the legality, correctness, and reliability of the evidence, but the court completely put the onus on the defendant in the absence of any rule of presumption of legality of the prosecution evidence and other considerations. Hence, in both cases, the way the court entertains the matter of admissibility is contrary to the law and rendering criminal justice respectively.

The other practical problem related to illegally obtained evidence is the admissibility of evidence that has an incriminating character. In this regard, the code only says that a police officer can search only the items listed in the warrant. Unless the object has incriminating character and was observed inadvertently in plain view, the police officer has the power to seize even an object that has incriminating character. In practice, the court did not try to check whether the illegal object was obtained in the permitted situations or in contravention of the law. Hence, there is inconsistency between the law and practice in relation to the above evidence.

The last but not the least thing is the role of the judiciary organ. Among the organs of the government, the judiciary organ has a prominent role in the process of criminal proceedings. Courts have a responsibility to respect and enforce constitutional rights. However, there are inconsistent decisions with regard to the admission of illegally obtained evidence. The Ethiopian courts need to apply the provisions of the FDRE Constitution in the process of criminal process in a consistent manner. The court must not give effect to illegally obtained evidence, as the

provisions of the Constitution preclude it. Furthermore, the courts are obliged to respect and enforce constitutional rights.

4.3 Recommendation

The criminal process, beginning from the investigation up to the final decision of conviction or acquittal, involves individual human rights. This means the rights of arrested and accused persons and other fundamental rights of a suspect or accused or defendant person are decisive for the outcome of a criminal process. The process of gathering, producing, presenting, and admitting evidence involves the constitutional provisions and other sub-constitutional rights and procedural requirements. In Ethiopia, as I have discussed in the previous parts, the finding of this thesis has identified certain legal and practical gaps in relation to confessions and non-confessional evidence obtained in violation of constitutionally guaranteed procedural rights and other rights like the right to privacy, respectively. Thus, the legal and practical gaps require corrective measures. Based on the findings of this thesis the researcher forwarded one major general and other specific recommendations.

- The major problem in relation to illegally obtained evidence is linked to the courts failure to apply the provisions of the FDRE Constitution. The court's decisions witnessed that some defendants were convicted based on illegally obtained evidence in contravention of the Constitution. The Constitution has generally stated that any decision of any organ and public official that contravenes the provisions of the Constitution has no effect. Hence, any evidence obtained in contradiction with the constitutional rights, including derivative evidence, has no effect in accordance with Article 9(1) of the Constitution. Thus, the court must apply the provisions of the FDRE Constitution in the process of determining the admissibility of illegally obtained evidence.

Next, I have suggested major specific recommendations on the basis of each identified area.

- The Criminal Procedure Code and other laws do not clearly regulate the formalities of confession recording and whether the effects of the absence of reading, dating, and signing of confession make the confession inadmissible or not. Hence, the provisions

related to the form of recording, dating, reading, and signing of a confession should be amended to cover such matters.

- The trial of admission or exclusion of evidence when the defendant raise objections should be decided at the time it arose. Thus, the court should decide on objections against the admissibility of evidence immediately at the time it arises in accordance with the law.
- Lastly, the draft Criminal Procedure and Evidence Code should be revised in accordance with the above recommendations and the general fundamental rule as provided under Article 9(1) and 13(1) of the FDRE Constitution.

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