

ADMISSIBILITY OF HEARSAY EVIDENCE IN CRIMINAL TRIALS: AN APPRAISAL OF THE ETHIOPIAN LEGAL FRAMEWORK

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Abstract

Despite Ethiopia following a common law approach regarding evidentiary principles, rules and procedural safeguards in criminal trials, the country does not have a codified and compiled evidence law. This problem might partly be attributable to the difficulty of concepts involved in evidences such as hearsay. Because of inadequacy in the legal framework and absence of explicit provision, there was no clear standing as to the status and admissibility of hearsay. Recently, the FDRE Supreme Court Cassation Bench rules hearsay is regulated in the law and makes it always admissible. However, the plausibility of the court's decision is questionable starting from the very existence of hearsay as a rule or an exception, and its constitutionality as well. In this article, an attempt is made to appraise admissibility of hearsay evidence in criminal trials in the Ethiopian legal framework. Accordingly, the following vexing issues will be addressed: Pertaining to the legal tradition it has been adopted, what would be the fate of admissibility of hearsay evidence in the country? Does the term "indirect knowledge" under Article 137(1) of the Criminal Procedure Code (CPC) have something to do with admissibility of hearsay evidence? In light of CPC provisions, what conditions former testimony, preliminary inquiry and confession must meet to escape the ban under the hearsay rule? What significance the confrontation clause of Ethiopian Constitution can offer to the admissibility of hearsay evidence and in solving the thorny issue of permissibility as a rule or as an exception? Finally, in contrast to ordinary crimes, hearsay is clearly admissible in crimes of terrorism in the Ethiopian law, why is this so? And the potential risks will be highlighted.

Keywords: Admissibility, confrontation clause, hearsay evidence, indirect knowledge, hearsay exceptions

I. INTRODUCTION

In the law of evidence, there is no jurisprudence that has given rise to a rule known mostly by its plethora of exceptions, which has nearly become *de facto* rule, as hearsay. Hearsay rule has a common law origin, and its admissibility is justified mainly with the exceptions as an exemption from the general prohibition. Though the rule is considered an indispensable condition of trial processes in determination of the truth, a recent restriction of the exclusionary effect opens broader admissibility. Admissibility whether it is broader or narrower is determined by exceptions, rationales for or against hearsay, and the predominant legal tradition practiced in a

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given country. Accordingly, section one of the article examine the domain and rationales in the admissibility of hearsay evidence, and compares its status in different legal traditions.

Ethiopia adopts the rule from common law jurisdictions without putting ways to make it compatible with part of the ingredients found in the country's continental character. In Ethiopia, the problem starts with the non-existence of a compiled evidence law. Attempts were made to draft evidentiary rules beginning from the Draft Evidence Rules to the recent FDRE Draft Law of Evidence. Partly, this problem arises due to the difficulty of concepts involved in evidences including hearsay. Whatever other virtues it may possess, any attempt to enact such law is still unsuccessful. The drafts were undermined for their failure of providing clear and precise definition of the basic concept of hearsay, and properly integrating the concept with existing concepts of the procedural code (e.g. confessions). The problem is also manifested in the writings of scholars where some say hearsay is not mentioned in any law while others argue that hearsay is dealt within the laws. The debate continues. For one or another reason if we agree on its existence, still the law in itself poses another challenge: whether hearsay is admissible as an exception or a rule.

Admissibility of hearsay evidence in form of its various dimensions and confrontation rights in particular has been provided in the Criminal Procedure Code (CPC) and the 1995 FDRE Constitution respectively. Despite the clear recognition of confrontation right under Art. 20(4) of the FDRE constitution, it is too hard to find explicitly regulated hearsay related provisions in Ethiopia. Owing to this, there are many debatable and unsettled issues relating to the admissibility of hearsay evidence. But still, it is possible to anticipate that, the hearsay rule with its many exceptions as enshrined in the FDRE Second Draft Evidence Law [hereafter Draft Evidence Law] will bring lasting solutions albeit it lacks a binding nature at this level.

The debatable issues include: is the Ethiopian legal system continental or common law type or is it a hybrid of the two major systems? Pertaining to this, what would be the fate of admissibility of hearsay evidence in the country? The other quandary is that the CPC does not explicitly provide for admissibility of hearsay evidence either as a rule or as an exception. In an attempt to determine such admissibility or inadmissibility, scholars rely only and exclusively on Article 137(1) of the CPC's phrase - "indirect knowledge". Does the term "indirect knowledge" have something to do with admissibility of hearsay evidence?

The dimension of hearsay evidence is too broad involving various conceptions ranging from the constitutional value of confrontation right, to former testimony and confession. In the Ethiopian context, does former testimony broadly include a statement given before the police, deposition taken in a preliminary inquiry, or any statement recorded at the same or different trial? And what criteria the law sets to make it admissible? Although unavailability is mentioned clearly under Article 144(1) of the CPC as one criterion, the scope of unavailability in the law is not free from obscurity. Hearsay is also highly attached to confession. Accused persons may give a confession voluntarily or involuntarily. What sorts of acts are considered coercion within the meaning of Article 19(5) of the Constitution so that individuals would be protected against such improper methods (of obtaining evidence) under the hearsay rule?

Normally, unrestricted admissibility of hearsay is prohibited both in ordinary and serious crimes. But in Ethiopia admission of hearsay is legalized in a serious crime of terrorism. This article tries to show how free admissibility of hearsay affects and poses potential risks to human rights, particularly in terrorism crimes proceedings.

The aim of this article is, therefore, to appraise the Ethiopian legal framework on these various conceptions and their relation to admissibility of hearsay evidence and intertwinements of dimensional factors with that of the hearsay rule.¹ Section two does this business. In order to shed light on issues to which the FDRE Constitution and CPC is not clear, an attempt has been made to cite the experiences of foreign jurisdictions that contribute to an understanding of admissibility of hearsay evidence in the Ethiopian criminal justice system.

The work basically uses a doctrinal research strategy with a view to clarify the laws on hearsay by analyzing authoritative sources such as FDRE Constitution, proclamations, and also cases decided by courts, particularly the cassation bench of Federal Supreme Court. Also, with the view to clarifying future developments and perspectives, the draft evidence laws are referred. On the other hand, secondary sources like articles, textbooks, and experiences of other countries have been consulted by comparison.

II. HEARSAY EVIDENCE IN CRIMINAL TRIALS

A. Definition and Scope of Hearsay

It is clear that in most of the legal doctrines definition of a certain concept necessarily determines the scope. Thus, definition and scope are inextricably linked. In the coming discussions, the definition of hearsay is analyzed together with its dimensions that fall within the concept.

Bronstein gives a precise definition and essential elements thereof. Accordingly, hearsay is defined in pertinent part as ‘a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.’ In turn, the term "statement" is defined to include "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.² At least two people are necessary for a hearsay evidence to exist. The person who made the out-of-court statement - the declarant -and the person on the witness stand telling the court what the declarant has said. Hearsay is oral, written, or nonverbal conduct of a person intended as a statement, and who has not seen, or known of the fact by himself/herself, but who has heard that statement and later testified what he/she has heard to the court.³

¹Here, since the problem is that confession, former testimony, and preliminary inquiry are not considered hearsay among the justice organs and domestic literature do not explicate them in the discourse or context of hearsay, this article will show how conceptually they fall in hearsay by interpreting the Ethiopian Criminal Procedure Code and suggests a thorough application of such provisions or evidences.

²BRONSTEIN DANIEL, *LAW FOR THE EXPERT WITNESS*, 2nd edition, CRC press, (1999), at 138.

³ Chang Ming-woei, *Adoption of the Common Law Hearsay Rule in a Civil Law Jurisdiction: a Comparative Study of the Hearsay Rule in Taiwan and the United States*, *ELECTRONIC JOURNAL OF COMPARATIVE LAW*, Vol. 10 No.2 October 2006),at 20.

There are two types of definitions of hearsay: assertion-centered and declarant-centered. Under an assertion-centered definition, an out-of-court statement is hearsay when it is offered in evidence to prove the truth of the matter asserted.⁴ Under a declarant-centered definition, an out-of-court statement is hearsay when it depends for value upon the credibility of the declarant.⁵ This implicates that statement is a fact that the declarant intended to communicate orally, in writing, or with nonverbal conduct. In order for an utterance to fall within the scope of hearsay, first it must be capable of constituting a statement and then it must be asserted as a truth. Many utterances do not amount to statement at all in that the words carry no descriptive content capable of being true or false.⁶ Utterances such as “Hello” or “what is your favorite color” or “Gosh!” do not fall within the scope of the hearsay rule as nothing capable of being considered true has been said.⁷ Chang gives an example that “If Fred did not tell Mary that Joe stabbed Bill, but instead Mary tells the court that she overheard Fred asking Joe why he stabbed Bill, is Mary's evidence hearsay? Fred's question is not a statement and so, logically, cannot be hearsay.”⁸

The crucial point is any non-descriptive utterance which is incapable of being either true or false cannot fall directly within the scope of the hearsay rule and may, if relevant, be admissible as original evidence. Raymond claims that “hearsay is any out-of-court proceedings statement tendered to prove the truth of the matter, and a statement is any representation of fact or opinion made by a person by whatever means (including any representation made in a sketch, photofit or other pictorial form).”⁹ Sometimes, a statement is offered into evidence for some reason other than to prove the truth of the matter asserted therein. In instances where a statement is significant merely because of the fact that it was made, it is not considered to be hearsay because it is not being offered to prove the truth of the assertion contained within the statement.¹⁰ Where there is no need to test its truth, it is not hearsay.¹¹ Thus, the concept or scope of hearsay is limited to those statements that are made to prove the truth of the matter asserted there in.

Generally, hearsay is any form of statement generated out of the court by a person who is not produced in court as a witness, and where it is presented as a testimony to prove the truth of

⁴*Id.*

⁵*Id.*

⁶REAY ROSAMUND, EVIDENCE, Old Bailey Press, 2001, 3rd edition, at 111.

⁷*Id.*

⁸Supra note 3. Hearsay is any out-of-court statement (oral or otherwise) made by a person and tendered into court to prove the truth of its contents. Emphasizing any out-of-court statement to be hearsay, in strict terms, hearsay statements may also be made in a certain court. Hence, a statement previously made in one court if it is considered as evidence before another court or in other trials, it shall be taken as hearsay. Here, credibility of the documentary evidence is not the determinant factor; in so far as it was offered to prove the truth of its contents, it is hearsay. Any out-of-court verbal statement made by a witness other than an accused is hearsay. Unless otherwise provided by law, any out-of-court verbal statement derivative from anyone other than the defendant himself shall be inadmissible, this clearly delimits inadmissible hearsay in principle. Under this concept, out-of-court statements made by co-defendants or victims are inadmissible hearsay. Only out-of-court statements made by the defendant himself are not hearsay.

⁹EMSON RAYMOND, EVIDENCE, Palgrave Macmillan, 4th Edition Replika Press Pvt Ltd, 2006 and reprinted 2008., at 105.

¹⁰*Id.*

¹¹ROSAMUND, *supra* note 6, at 130-131.

the facts which have been asserted.¹²In spite of this, it is not always easy to draw a distinction between statements that fall within the ambit of the rule and those that fall outside it. This is especially so in the context of the distinction between original evidence and hearsay. Byrne makes a distinction between original evidence and hearsay evidence as follows:

It is a long-established rule in the law of evidence that original evidence of a statement is admissible not to prove that the statement is true but to prove that it was made. A statement may be admissible as original evidence because it is *itself a fact in issue or the statement is relevant to a fact in issue (emphasis added)* in the proceedings. If the evidence is adduced for either purpose, the fact that a statement is made out of court does not render it hearsay. The hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely as assertions to evidence the truth of the matter asserted.¹³

It is well-established that the essence of hearsay encompasses not merely oral statements but also written and documentary statements depending on the purpose for which they are adduced in evidence. Conduct also amounts to hearsay in so far as those gestures amount to 'verbal' assertions, that is, statements equivalent to words.¹⁴It is generally accepted that conduct falls within the scope of hearsay where it is intended to be communicative or to the extent that it asserts some fact.¹⁵The exclusionary hearsay rule is also applicable to signs, drawings, charts and photographs as they're identifiable as being hearsay in nature.¹⁶The reason why most documents fall within the ambit of hearsay is not only because the persons who had originally created the documents were not available to be cross-examined in court but also due to the fact that documentary records, almost all the time, are introduced to prove their contents.¹⁷ Thus, the essence of hearsay extends to statements purposively communicated in writing or in any other manner.

A statement purposively communicated by way of a physical gesture is similarly defined to be hearsay.¹⁸

¹²Law Reform Commission, *Consultation Paper: hearsay in civil and criminal cases*, March 2010, at 31. Available at www.lawreform.ie. A witness will, therefore, not be prevented from giving evidence about an out-of-court statement if it is being introduced into proceedings merely to confirm that the statement was made or if its making is relevant to an issue in the proceedings.

¹³*Id.*, at 28-29.

¹⁴Donnelly Roy, *The Hearsay Rule and the Uniform Evidence Act*, UNIVERSITY OF TASMANIA LAW REVIEW, Vol. 25, No. 1 (2006), at 85.

¹⁵*Id.*

¹⁶*Id.* A representation is defined to include those made orally, in writing or by conduct; it also includes express or implied representations, but excludes those made by incompetent witnesses other than certain contemporaneous representations. Representations once admitted for another relevant purpose, do not come within the concept of hearsay and they can be used as evidence of the truth of the assertion they contain because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation. If the assertion was intended, then the risk of intentional deception exists and therefore it should be excluded under the rule as it comes in the concept of hearsay. Unintended assertions on the other hand do not carry the same risk of intentional deception and are therefore not caught by the rule. Assertions are hearsay only if they are intended to be asserted by the declarant; See also Donnelly Roy, *supra note 14*.

¹⁷RAYMOND, *supra note 9*.

¹⁸*Id.*, at 117-118.

A woman who had had her throat cut could respond to questions by nodding her head or making other signs; and the privy council held that the deceased's nod of assent to a question put to her amounted to a hearsay statement and it was reasoned that the woman was incapable of speaking, she was in the same position as someone who was dumb to whom sign language would be verbal communication.¹⁹

Reay Rosamund correctly argues that in principle there is no reason why evidence of conduct which implies something is not also hearsay.²⁰ A person stating those facts mentioned above to someone either orally or by writing them down on a piece of paper have no distinction with the person nodding his/her head if someone asks him/her whether they have occurred.

B. Hearsay Evidence in Common Law and Continental Law Jurisdictions

Formerly, it was generally accepted that hearsay was inadmissible except in corroboration of other evidence, a doctrine which emphasizes comparative value rather than admissibility.²¹ When the Anglo-Norman inquisitorial system of litigation transformed into the adversarial system, the rule rejecting hearsay was also adopted. What makes inquisitorial system quite distinct from adversarial is that witness's answer to the court's question is allowed to be free-flowing and lengthy, uninterrupted by evidentiary objections from opposing counsel, and hence much evidence that otherwise might be prohibited is aired in open court.²² In essence, the inquisitorial type is a generalized description of criminal proceedings which prevailed in continental European countries where judicial investigation of cases is the hallmark.²³ When inquisitorial system is compared with adversarial, the role of the parties to a criminal proceeding such as the prosecutor, witnesses and the defendant is very minimal. The following is a summary of a typical inquisitorial system:

The investigator determines whether the crime had in fact been committed and the identity of the primary suspect, the defendant was incarcerated, both he/she and the witnesses were examined *ex parte* and required to answer questions under oath; responses to all questions were put in writing; until the investigation reached its final stages, the defendant was rather vaguely informed about the precise nature of the crime being investigated and the incriminating evidence.²⁴

This system emphasizes on the screening stage with the view to protect the innocent as early as possible when compared with the adversarial system. Soon after the completion of all investigatory activities, the investigator would send the file (dossier) of the case to a court for decision. A judge looks for the truth at his own exertions and proceeds on the basis of documents

¹⁹ RASAMUND, *supra note* 6, at 128.

²⁰ *Id.*

²¹ Morgan Edmund, *Hearsay Dangers and the Application of the Hearsay Concept*, HARVARD LAW REVIEW Vol. 62 No. 2 (December, 1948), at 181.

²² GLENDON, CAROZZA, AND PICKER, *COMPARATIVE LEGAL TRADITIONS*, (West Publishing Co., 3rd ed., 1982), at 252-253 [hereafter GLENDON et al]

²³ Damaska Mirjan, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, Vol. 121, No. 3 (Jan., 1973), at 556.

²⁴ *Id.*, at 555-557.

contained in the dossier, and in many countries would never see the defendant.²⁵ It seems that the investigator works representing the interest of both the defendant and the state (victims). Public prosecutors, even where they existed, were not necessary for the proceedings to commence, develop, or terminate. Furthermore, in many instances the defendant had no right to assistance of counsel.²⁶

Common law jury trial presents the prosecutor with more evidentiary obstacles than does the continental criminal trial. Put in other words, in common law there is no freedom of evidence and parties must produce as regulated in the law unlike in the continental where there is freedom to introduce any evidence. Continental law is similar to common law in a sense that witnesses are required to give testimony under oath and its accompanying sanctions; it sometimes requires confrontation. It has, however, retained the essential features of an inquisitorial system and has not adopted the adversarial theory of litigation.²⁷ And it does not reject hearsay evidence. Continental judges' active role include examination of witnesses that in effect substitute the task of adverse parties in the cross-examination of witnesses of the other party, that is why even the accused could call no witnesses on his own behalf.²⁸

The hearsay rule has long been understood as a distinguishing mark of common-law trials, one of the key features setting those trials apart from their counterparts in civil-law jurisdictions. Often the hearsay rule has also been tied to another distinguishing feature of common-law trials, the jury system. It is that lay jurors [in contrast to professional judges] are ill-equipped to evaluate second-hand testimony, the common-law jury trial has thus served both to explain the hearsay rule and to justify it.²⁹ In so far as it is relevant evidence, most continental law jurisdictions freely admit hearsay, unlike the common-law. However, recently, differences in the treatment of hearsay in common-law and civil-law jurisdictions are in practice not that great.

As cited by Sklansky, Richard Lempert mentioned the following grounds for increasingly coming to commonality:

This "convergence" is partially due to the many exceptions to the hearsay ban in Anglo-American law, and to the fact that "even where exceptions do not neatly fit statements offered," Anglo-American trial judges will often find some way to admit hearsay that they think is reliable. There is convergence from the other side as well: Continental systems . . . often treat hearsay with suspicion, discounting it when it is not corroborated with other evidence, and in one Continental system, Italy, theoretical barriers to admitting hearsay appear similar to what they are in the United States and England.³⁰

²⁵ *Id.*, at 557. See also McEwan JENNY, EVIDENCE AND THE ADVERSARIAL PROCESS: THE MODERN LAW, 2nd edition, Hart Publishing, 1998, Oxford, UK.

²⁶ Carpzov B., *Practica Nova Imperialis Saxonica Rerum Criminalum*, Pars III, questio 115 nos. 74-75 lipsiae (Leipzig) 1739 cited in Damaska Mirjan, at 556-557.

²⁷ GLENDON *et al*, *supra* note 22.

²⁸ *Id.*

²⁹ Richard Lempert, cited in Sklansky David, *Hearsay's Last Hurrah*, THE SUPREME COURT REVIEW, The University of Chicago Press, Vol. 2009, No. 1 (2009), at 31.

³⁰ *Id.*, at 32.

A characteristic feature of court proceedings in Ireland, as a common law state, is that much evidence is delivered orally by witnesses with relevant firsthand knowledge of the matters in issue.³¹ A common justification for the system of giving evidence by oral testimony, including the hearsay rule, is that seeing the demeanor and hearing the evidence of a witness in the witness box is the best means of getting at the truth.³² Likewise, in the UK, the Privy Council stated that without the witness being present in court to give an account of his evidence, the light which his demeanor would throw on his testimony is lost.³³

It is axiomatic that the Anglo-American (common law) and Continental (civil law) legal systems have different general approaches to trial procedure. More specifically, their perspectives on evidentiary rules, and especially the hearsay principle, differ substantially on the eyes of their respective laws but with a compromise of extremist practical sides. It should be noted, however, that both systems are coming closer and closer to each other. In the common law, hearsay is ostensibly disallowed. Practically, however, with proliferating exceptions, the rule is administered flexibly and not in the strictest manner. The "rule" excluding hearsay testimony is often characterized as an overgrown, "unintelligible thicket," intricate to navigate, replete with at least arguably logical exceptions, difficult to understand and equally difficult to expound.³⁴ Hearsay is freely admissible in civil law. In reality, however, reliability matters. So, magnitude of either divergence or convergence of the two systems depends on interpretations of the laws into the practical reality by the courts.

Although some sort of similarity as regards hearsay rule emerges to develop between the two systems particularly in modern days, owing to their historical differences and the tendency to remain intact with their long-existing cultures, there is still divergences regarding admissibility of hearsay evidences. This in turn influences the practical situation of the present day courts of the two systems. Thus, the exclusion of hearsay remains a typical feature or staple of Anglo-American evidentiary procedure.³⁵

C. Arguments for and against hearsay evidence

There are tough arguments among scholars to the admissibility or otherwise of hearsay evidence. Hearsay is both academic and practical issue because courts often encountered with the necessity

³¹ Law Reform Commission, *supra note* 12, at 18.

³²*Id.*

³³*Id.*

³⁴Blumenthal Jeremy, *Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective*, PACE INTERNATIONAL LAW REVIEW, Volume 13 Issue 1, (Spring, 2001), at 93-94.

³⁵*Id.*, at 94. In a characteristically hyperbolic statement, Wigmore called the hearsay rule "next to jury-trial, the greatest contribution of the common law system to the world's jurisprudence of procedure"; See John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV.437, 458 (1904). In the Continental system, however, hearsay evidence is, again broadly speaking, admissible. Because of the crucial importance of the dossier the public hearing is often much more a verification of its contents, the results of the pre-trial investigation, than the culmination of a contest. Hearsay evidence, being not regarded as fundamentally unreliable, is generally accepted Second, because witnesses are called and, for the most part, questioned only by the court, they do not have the patina of partiality that is possible if they were called by a particular party. Accordingly, their testimony is likely seen as "less contrived as well as less partisan," and thus, even when they do report hearsay testimony, it may appear more reliable. See also Blumenthal, *supra note* 34, at 98.

of determining hearsay admissibility. Generally, in inquisitorial system, the approach to hearsay is undisputed that it is more or less admissible in all circumstances but in common law unless it is justified by grounds, it is not admissible; and this is the point where an argument in favor or against hearsay evidence comes into the picture.

1. Argument in Favor of Hearsay Evidence

Scholars arguing in favor of hearsay raise points of reliability, relevancy, necessity and easier availability of the evidence for its admissibility.

A. Reliability: Here, argument in favor of admissibility is justified only in the existence of clear reliability. The following are instances with such nature of highest reliability even better than any other evidence. Because unplanned statements of a person are naturally uttered out of sincerity, statements deemed as spontaneous would be admitted in the absence of oath and cross-examination if the declaration is closely associated with the present mental or physical condition.³⁶ Bernard further notes that “The theory of admitting spontaneous utterances and declarations of mental or physical condition of an unavailable declarant is that the assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources.”³⁷

Any relevant evidence, including hearsay, has at least some absolute reliability because the existence of infirmities and uncertainties of a piece of evidence only justifies discounting the weight given to the evidence rather than ignoring the evidence through exclusion.³⁸

B. Necessity: The principle of necessity addresses the need for the specific evidence in a given case. This includes both consideration of other means of proving the issue on which the evidence is probative and determination of the importance of that issue to the case as a whole.³⁹ Necessity circumstances obliged courts to refrain from excluding not just material evidence to the criminal proceeding but also the reliable one. In contrast to antagonist approach of admissibility, “the argument of free admission has its greatest force when the hearsay declarant is unavailable, and the choice is between admitting the hearsay declaration and having nothing at all.”⁴⁰ In such circumstances, the proponents of free admission argue that doubts about the reliability of hearsay should go to its weight, not to its admissibility, and the trier of fact should be trusted to give the evidence its proper value.⁴¹

³⁶Jefferson Bernard, *Declarations against Interest: An Exception to the Hearsay Rule*, HARVARD LAW REVIEW, Vol. 58, No. 1 (Nov., 1944), at 6.

³⁷*Id.*

³⁸_____ *The Theoretical Foundation of the Hearsay Rules*, HARVARD LAW REVIEW, Vol. 93, No. 8 (Jun., 1980), at 1788. With respect to hearsay, the existence of bias may be uncertain because there is no opportunity to cross-examine the declarant; yet, exclusion of such evidence would be inappropriate since the effect is to discount the evidence even more than if we were certain that the witness was biased.

³⁹*Id.*, at 1800.

⁴⁰ *Id.*

⁴¹ *Id.* Even when the declarant is available, however, use of hearsay may be the most convenient method of producing testimony, and the opportunity of the opponent to call the declarant for cross-examination gives the opponent a means of ensuring that the facts are adequately explored.

C. Availability: Hearsay's easier accessibility in the ordinary course of life makes it less difficult for the criminal parties to dispose, explain, and remember what was happened. In terms of its probative value, sometimes, hearsay may be the best evidence than any other evidence; or even if it is not the best evidence, it would be the only and best available evidence.⁴² For instance, the judge might encounter a difficulty of choosing hearsay evidence or none at all, such as may be the case where the victim made statements explaining how he or she sustained harms before his/her death or the original source of the information cannot be located.

D. Relevancy: The exclusionary rule imposes upon court to pronounce hearsay evidence inadmissible unless there is reason to suppose that the interests of justice require admission.⁴³ The interests of justice should be considered by weighing the disadvantages of excluding relevant evidence against the benefits of exclusion.⁴⁴

For those who advocate abolishing the hearsay rule, relevancy is sufficient. Recently, US courts have shown leniency toward the hearsay doctrine and have admitted such evidence through much flexibility. With the promotion of judicial discretion that enables hearsay evidence of probative value to be admitted, stringent conditions put to some traditional exceptions are relaxed, new exceptions recognized, and open-ended residual exceptions created. American evidence scholars are now discussing seriously the question of whether there has been a *de facto* abolition of the hearsay rule.⁴⁵

2. Argument against hearsay evidence

A. Lesser credibility:⁴⁶ Hock Lai claims that exclusion of hearsay evidence is founded "on two assumptions: that the members of the jury are not competent at evaluating hearsay evidence, and the statement of a person who has not been cross-examined is not reliable."⁴⁷ Generally, the hearsay rule is usually considered from an external point of view: that is, the effect the rule has

⁴² Law Reform Commission, *supra note 12*, at 32. An obvious example is a statement made by a person now dead that we aren't going to get better evidence than hearsay. There will also be circumstances where the only evidence available on some point at issue is the statement of a three-year-old child. Where the original is lost or has been destroyed, hearsay may be the best evidence – in the sense of the best that is available.

⁴³ Zwick Crittendon, *Exceptions to the Hearsay Rule Expanding the Limits of Admissibility*, LOUISIANA LAW REVIEW, Vol. 36, (1975-1976), at 447.

⁴⁴ *Ibid.* The principal benefit of excluding hearsay is to avoid the risk that the trier of fact will make an error in assessing the value of the evidence in the absence of cross-examination. Especially in criminal cases, where we require a high degree of accuracy to prevent the conviction of the innocent, the court should carefully assess this risk. Where, however, it is better to have some evidence than none at all, even though its weight is not great, or where cross-examination would have made little difference, or where the risk of error is negligible, it would be disadvantageous to exclude a relevant evidence.

⁴⁵ Edward J.Imwinkelried, A Comparativist Critique of the Interface between Hearsay and Expert Opinion in American Evidence Law, BOSTON COLLEGE LAW REVIEW, VOL. XXXIII, No. 1 (December, 1991), at 31.

⁴⁶ [Different] group of hearsay exceptions are justified by specific attributes of the out-of-court act or utterance which are thought to reduce the [infirmity] weaknesses so substantially that the balance of untrustworthiness and likelihood of probative value favors admissibility of the evidence." However, this may not be applicable to all types of hearsay evidence; See Laurence Tribe, *Triangulating Hearsay*, HARVARD LAW REVIEW, Vol. 87, No. 5 (Mar., 1974), at 964-965.

⁴⁷HO HOCK LAI, A PHILOSOPHY OF EVIDENCE LAW: JUSTICE IN THE SEARCH FOR TRUTH,(Oxford University Press, Oxford, 2008) in Mason Stephen, Book Reviews, International and Comparative Law Quarterly, available at <http://journals.cambridge.org>, retrieved on 18 May 2012.

on the capacity to reach a correct verdict.⁴⁸The common risks associated with hearsay evidence include: faulty perception (the risk that the declarant may have inaccurately perceived the events at issue in his/her statement); and faulty memory (the risk that the declarant does not accurately recall the details of the events at issue in his/her statement).⁴⁹

B. Social acceptance excluding hearsay: From the perspective of securing legitimacy, stronger argument for the rejection of hearsay is portrayed as follows:

First, the hearsay rules shield the system from possible embarrassment. Admitting hearsay generally creates the possibility that the declarant might later come forward to reveal that injustice resulted from the trier of fact's reliance on such evidence, second, hearsay is distinctive in that its deficiencies can be observed readily by anyone outside the system. These two considerations indicate how a rule against hearsay enhances social acceptance by excluding evidence.⁵⁰

Yet, extensive exclusion of hearsay may itself diminish acceptance since we like to believe that the trier considers all relevant information in reaching its decision. Therefore, maximizing social acceptance implies that hearsay exceptions are appropriate where the danger of exposing error is less.⁵¹

C. Possibility of deception: The argument against hearsay even goes to public records or professional statements in situations where there is no guarantee to check whether the statement was made due to an influence of fabrication. An expert report, for instance, prepared with the intention to use it at trial apparently lacks impartial objectivity [which renders the statement hearsay], and any person(s) other than on whose behalf the records are kept and the acts are done is going to be disadvantaged by the inability to cross-examine the expert in a witnesses' box unless confrontation right is safeguarded.⁵² So, the judge should be permitted to view the demeanor of the maker being subjected to confrontation under the constitution in order to measure the credibility or assessing whether the maker has entered in a calculated deceptive conducts. Otherwise it remained to be hearsay.

D. Constitutional Confrontation: The exclusionary rule is justified because any one or more of three guarantees of trustworthiness may be lacking: 1) the administration of an oath; 2) the opportunity to cross-examine; and 3) the opportunity for the trier of fact to observe the

⁴⁸ *Id.*

⁴⁹ Nicolas Peter, *But What if the Court Reporter Is Lying? The Right to Confront Hidden Declarants Found in Transcripts of Former Testimony*, BRIGHAM YOUNG UNIVERSITY LAW REVIEW, 2010 at 1153.

⁵⁰ _____ *The Theoretical Foundation of the Hearsay Rules*, HARVARD LAW REVIEW, Vol. 93, No. 8 (Jun., 1980), at 1808.

⁵¹ Tushnet Mark and Tribe Laurence, *the Supreme Court, 1998 Term: the New Constitutional Order and Chastening of Constitutional Aspiration*, HARVARD LAW REVIEW, Vol. 113, No. 1 (Nov., 1999), at 240-241. Again, evidence simply that it falls within the firmly rooted exceptions doesn't have the effect of immediate admissibility. Even though evidence satisfies one of the enumerated hearsay exceptions, it is not automatically admissible, because it may be rejected if its probative value is outweighed by the risk of prejudice. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the judges, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

⁵² Bronstein, *supra note 2*, at 147.

demeanor of the declarant if hearsay evidence is used.⁵³ A person who gives testimonial hearsay is not required to enter into any lengthy and detailed questioning so as to solve difficulties, reconcile contradictions, remove ambiguities and explain obscurities: he/she retreats by a simple assertion that he was told so.⁵⁴ Here, the court is forced to hold back the ambit of cross-examination.

E. Demeanor: Another persuasive key reason in the argument against hearsay is attached with the personal appearance of the declarant. The judge or the jury doesn't see the speaker or declarant in person, and can't weigh qualities like demeanor. Other drawbacks of hearsay may be remedied easily but demeanor cannot be solved. The judge is denied an opportunity to assess that person's demeanor in the witness box. In conclusion, the free admissibility approach (that is the complete abolition of the hearsay rule) was rejected for the traditional reasons of confrontation rights and because of the likelihood that much superfluous evidence would be rendered admissible.⁵⁵

III. ADMISSIBILITY OF HEARSAY EVIDENCE IN ETHIOPIAN CRIMINAL TRIALS

A. The Ethiopian Approach to Hearsay Evidence: General Overview

We have seen that evidence rules particularly in common law jurisdictions are exhaustively regulated under a separate and independent law. However, the Evidence Law in Ethiopia is scattered and is found both in substantive and procedural laws. Since the substantive law is taken from continental countries particularly French, evidence related provisions are incorporated. On the other hand, the procedural laws are adopted from the common law countries, and production of evidence is regulated as per this system. And hence, for more than forty years, the practice of Ethiopian courts in deciding relevancy, admissibility, and exclusion of evidences is highly influenced by the common law rules.⁵⁶

Despite Ethiopia doesn't have a well-articulated set of rules which govern the production of evidence in a trial, there are evidence related provisions being scattered in different codes, when taken collectively, meant to cover some areas of evidence. Even with some ingredients or a number of inputs from the common law legal tradition, the entire legal system is more of civil law legal tradition. Within this general feature of our legal system, the Ethiopian law of evidence is highly influenced by both the continental and common law evidence rules.

⁵³ Norman Garland & Donald Snow, *The Co-conspirators Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements*, THE JOURNAL OF CRIMINAL AND CRIMINOLOGY, Vol.63, No.1, (Mar, 1972), at 3.

⁵⁴ *Coleman v. Southwick*, 9 Johns. 45, 50 (N.Y. Sup. Ct. 1812) cited in Park Roger, *A subject Matter Approach to Hearsay Reform*, MICHIGAN LAW REVIEW, Vol. 86, No. 1 (Oct., 1987), at 58. The danger that the trier of fact will give too much weight to the evidence is not the only reason for excluding hearsay. Bar groups and others have advanced a variety of additional concerns and they have repeatedly expressed the fear that if hearsay were freely admitted, trial preparation would become more difficult, and the danger of unfair surprise at trial would increase. A party couldn't have the means to know what evidence the other may bring.

⁵⁵ RASAMUND, *supra note* 6, at 128.

⁵⁶ Elaboration for FDRE Law of Evidence (second draft), Justice and Legal Systems Research Institute (JLSRI), Addis Ababa (August, 1996), at 3 [translation mine]. JLSRI is established by Council of Ministers Regulations No. 22/1997, an autonomous institution having its own legal personality and is accountable to the Prime Minister.

For instance, the highest value attached to administering of an oath and cross-examination makes the process adversarial in its nature. Impeachment of witnesses by the adversary party, objection to and admissibility of evidence are also common law features. Traditionally and practically the mode of litigation in Ethiopia is adversarial in its nature and was dependent up on the party presentation of case. On the other hand, like that of inquisitorial system, Ethiopian judges are permitted to raise repetitious of questions and actively lead the whole criminal proceeding. This gives the Ethiopian system a hybrid flavor. The writer opined that, in view of high illiteracy rate in the country and inadequate counsel assistance, active involvement of judges is justifiable, indeed, particularly for the sake of balancing justice to the indigent.

There are different out looks regarding the admissibility of hearsay evidences in Ethiopia. Both Article 137(1) of CPC and Article 263(1) of Civil Procedure Code in the same wording provide that “[q]uestions put in examination in chief shall only relate to facts which are relevant to the issue to be decided and to such facts only of which the witness has direct or indirect knowledge”.⁵⁷ Here, some argued that the phrase “*indirect knowledge*” in the above provisions include ‘hearsay evidence’. Thus, they asserted that, in Ethiopia hearsay evidence is admissible as a rule, not as an exception.⁵⁸ While, others argue that the phrase ‘*indirect knowledge*’ implies the circumstantial evidences rather than hearsay evidence. They provide that since admitting hearsay evidence as a rule is against the constitutional rights of the accused to confront his accusers as provided under Article 20(4) of the FDRE Constitution, we have to admit hearsay evidence only in exceptional circumstances as that of common law countries.⁵⁹ When we see the practice of our courts, the confusion on admissibility of hearsay evidence is apparent. There is no uniform application of the rule; some judges admit it while others do not. The practice has been that some courts regard hearsay evidence inadmissible, while others either accept it fully, or consider it as collaborative evidence.

Federal Supreme Court, in a crime of rape, ruled that in so far as hearsay evidence validates assertion of the truth, it should be made admissible. As per the ruling, the victim who appeared before the court and gave a testimony of her sufferings by the crime ensures reliability of the evidence given by other witnesses who claimed that the victim told them about the situation; likewise, in crime of homicide case between Public Prosecutor v. Mihret Teshome, Addis Ababa High Court renders decision unambiguously approving admissibility of hearsay evidence. In sharp contrast to this, courts have been seen passing a verdict with the effect that hearsay is inadmissible in all circumstances let alone in criminal

⁵⁷ Criminal Procedure Code of Ethiopia, 1961, Art.137 (1), Proc. No.185/1961, NEGARIT GAZETA, Year 32 [Hereinafter Criminal Procedure Code of Ethiopia].

⁵⁸ Menbere Tsehay Tadesse, *The law and Aspects of justice in Ethiopia*, (Addis Ababa, 1999), at 111 -112 [translation mine]; see also Evidence Law Training Module, Federal Justice Organs Professionals’ Training Center, at 11. Retrieved from <https://chilot.files.wordpress.com/2011/07/module-on-the-law-of-evidence.pdf> Evidence is said to be indirect into two situations. The first when evidence is produced to prove the fact in issue when the evidence in question has make use of another source of evidence or it comes to know from another. Hearsay evidence is indirect as it explains a given issue not in a source of direct knowledge or reading content. The second type of indirect knowledge is circumstantial evidence.

⁵⁹ Kahsay Debesu and Andualem Eshetu, *Law of Evidence: Teaching Material, Justice and Legal System Research Institute*, 2009, [unpublished], at 146.

cases but even in civil cases where standard of evidence is less stringent when compared with criminal cases.⁶⁰

The cassation bench unambiguously confirmed its stand in a very recent case between Enat Hunachew v. Prosecutor, and interpreted Article 137(1) of CPC as having the effect of including hearsay.⁶¹ It holds that the spirit and purpose of the law under Article 137(1) is to make admissible statements where the witness has given about general circumstances of what he/she has observed or heard of someone saying. The practice of courts making hearsay inadmissible, according to Menbere Tsehay, is a contravention of clear provision of the law. He moves on to say that in the continental systems it is permissible for a witness to testify not only facts he came to know in his direct experience but also facts known indirectly.⁶² He raised the following argument in upholding the view that hearsay must be admissible automatically in the Ethiopian criminal justice system:

There is no law out rightly preclude evidence on the ground of its directness or indirectness and what is advisable is to focus on its probative value. By admissibility of hearsay evidence, however, it doesn't mean equal weight has to be given for each sorts of evidence. Admissibility of evidence is completely different from weighing of evidence and caution must be taken not to mix the two concepts because failure to identify them would cause a problem of exclusion against a valuable fact inherently existed in hearsay. Even in other jurisdictions directness goes to weighing of evidence not to admissibility.⁶³

Here, the question worth considering is that “does *indirect knowledge* of Article 137 (1) mean hearsay evidence? What is direct knowledge and how is it distinct from indirect one?” A witness may have direct knowledge in a sense that he/she perceived the fact by any of his/her sense organ at the occurrence of the fact. Such may be perceived by a person who directly saw the happening of the fact, who directly heard it. On the other hand, what if an offender already had successfully committed the crime and no one observed him. In such case unless we opt to look for circumstantial evidence, we failed to identify who has acted against the law, and we could not reach at what happened. Thus, the main events will have to be reconstructed with the help of circumstances before and after the commission of the crime. The happening of such facts should be perceived by sense organ. But the problem is that there is no direct evidence to prove the fact in issue. In this case there is indirect evidence as to the facts of the case.

Admissible testimony is limited to matters of which the witness has acquired personal knowledge through any of his/her own senses. The requirement of personal knowledge is closely related to the inadmissibility of hearsay. If a witness testifying to an event acknowledges that the

⁶⁰ See Public Prosecutor v. Mihret Teshome, Addis Ababa High Court, Crime Record No.306/81 [unpublished]. See also, ኩልማኒት አድረጊኖ v. ገብረመድህን በኩረ፣ የጠቅላይ ፍ/ቤት የፍ/ብ/ይ/መ/ቁጥር 201/77፤ የፍርዶች መጽሐፍ፣ (1986 ዓ.ም.) ይህም አስተያየትን የልዩአዋቂ የሙያ ውጤት ሳይሆን ወደ ይመስላል ያዘነበለ የሰሚሰሚ (hearsay) ማስረጃ ውጤት ያደርገዋል በማለት ማስረጃውን ውድቅ አድርጎታል። ከዚህ ውሳኔ የምንገነዘበው ቁምነገር የሰሚሰሚ ማስረጃ ቅቡልነት የሌለው መሆኑን ነው። በሌላ በኩል የፌዴራል ሰበር ችሎቱ በአስገድዶ መድፈር በቀረበው ጉዳይ ላይ የዚህ ዓይነቱ ማስረጃ ሲል የሰሚሰሚ ማስረጃንም የሚያጠቃልል በመሆኑ ተቀብሎታል. See Tesfaye Abate, የሰሚሰሚ ማስረጃ (Hearsay Evidence), MIZAN LAW REVIEW, Vol. 6 No.1, (June 2012), at 142-143 [translation mine].

⁶¹ Amhara National Regional State Prosecutor v. Enat Hunachew et al., FEDERAL SUPREME COURT CASSATION BENCH, Cassation Record No. 113464, Vol. 19, [August, 2016], Addis Ababa [translation mine].

⁶² Menbere Tsehay Tadesse, *supra note* 58, at 111 -112 [translation mine].

⁶³ *Id.*

time was getting dark and is somehow difficult to identify who has caused it, the proper objection could be lack of knowledge. But if he/she testifies that some other person has told him/her of the events, he/she is considered not having personal and direct knowledge, making the proper objection to be hearsay. In many situations where it is clear that the witness is relying upon the statements of others although not specifically so stating the objection of hearsay generally suffices. A witness testifying to an extrajudicial statement which is defined as not hearsay or is admissible under an exception to the hearsay rule, is not, however, required to have direct personal knowledge of the matter related in the matter.⁶⁴

Well, still circumstantial evidence covers any admissible evidence from which it would be possible to draw an inference going some way towards proving or disproving the fact in issue.⁶⁵ An item of circumstantial evidence is an evidentiary fact from which an inference may be drawn rendering the existence or non-existence of a fact in issue more probable. The fact in issue is not proved directly by a witness relating what he himself/ she herself perceived, so circumstantial evidence is used to prove facts in issue indirectly.⁶⁶ Hence, Article 137 seem to refer to circumstantial evidence because it is indirect knowledge of the witness himself/herself that may prove the fact in issue indirectly. Let's assume W observed D bought a gun, planned to go to a distant area, and performed other preparatory acts; and D shot X. Here at the time when the alleged crime was committed W knows D was not in his home and he knows D's preparatory act. W has no direct knowledge as to the actual commission of the crime but he has indirect knowledge from the circumstances he heard and observed, and therefore, in the opinion of the author, indirect knowledge is about circumstantial evidence.

But other writers have a different interpretation.⁶⁷ The point made by these writers is a confusion of indirect knowledge mistaken for hearsay evidence. Generally, there is an argument representing the majority of opinions that the term indirect knowledge refers to hearsay evidence. Based on this line of interpretation, Article 137(1) of the CPC and Article 263 (1) of the Civil Procedure Code can be interpreted to permit admissibility of hearsay as a matter of evidence. In the Ethiopian approach, the predominant thinking is, therefore, hearsay is permissible as a rule and not as an exception and courts can freely admit such evidences.

By way of invoking as one important rationale in clarifying the dilemma, type of system, adversarial or inquisitorial, that Ethiopia follows and its relation to the admissibility of hearsay evidence needs to be considered. In the absence of a clear provision of law regulating admissibility in Ethiopia, it is quite logical to resort to what is the predominant legal tradition the country has been adopting in an attempt to determine whether hearsay is admissible as a matter

⁶⁴ GRAHAM MICHAEL, *FEDERAL RULES OF EVIDENCE IN A NUTSHELL*, (5th ed., West publishing Co.) 2001, at 192.

⁶⁵ RAYMOND, *supra note 9*, at 10.

⁶⁶ *Id.*, at 9-10.

⁶⁷ It is argued the rule in examination-in-chief is that questions to be asked should relate to facts of which the witness has direct or indirect knowledge; direct knowledge is acquired by that witness through personal observation; and depending on the nature of the fact, the witness should observe the fact in any of or combination of the five sense organs. See, for instance, Aderajew Teklu and Kedir Mohammed, *the Ethiopian Criminal Procedure: Teaching Material*, Justice and Legal System Research Institute, (March 2009), Addis Ababa, at 268 [unpublished]. But it also relate to facts of which the witness has indirect knowledge, a witness is said to have indirect knowledge where he has heard about the fact from another person who has observed the fact and does not personally observe it.

of rule or exception. As Robert Allen Sedler pointed it out, no matter how the substantive codes in Ethiopia are based on the continental model, the country follows the common-law approach to procedure.⁶⁸ Accordingly, the 1961 CPC is primarily “a common-law type code.”⁶⁹ Under the CPC, the “prosecution is adversary rather than inquisitorial, and the traditional safeguards and guarantees of the criminal accused which form an integral part of common-law criminal procedure exist in Ethiopia.”⁷⁰ That is, the CPC manifests the features of common-law procedure. Strict approaches to hearsay evidence, as has been discussed earlier, are rooted in common law countries which adopt adversarial system that require an exploration of much evidence from the oral testimony of witnesses with relevant firsthand knowledge of the matters in issue, unlike inquisitorial system. Thus, by way of conclusion, Ethiopia’s adversarial nature of law seems to require admitting hearsay exceptionally.⁷¹

Even though, the provisions of our procedural laws are not clear as to whether hearsay evidences are admitted as a rule or as an exception, the draft law of evidence considered hearsay evidences as an exception. Article 14 of FDRE Draft Evidence Law has made the controversy clear by providing that unless expressly provided under the law as an exception, hearsay evidence is inadmissible.⁷² Thus, in principle hearsay evidence is inadmissible though it is relevant; but when the statutory provision allows, hearsay evidence is admissible. This provision of the draft evidence law interestingly acknowledged Ethiopia’s affiliation to common law origin where hearsay is admissible under strict requirements. Again, the draft law didn’t distinguish civil proceeding from that of a criminal proceeding as in the former there is often no restriction of admissibility merely on the ground that it is hearsay (the author is not interested to scrutiny this issue further for it can go beyond the scope or of avoiding astray).

This draft law has enumerated a number of exceptions, and since the lists are exhaustive that do not leave room to courts, the rule is that all hearsay is inadmissible. Moreover, the Ethiopian approach does not allow judicial creation of hearsay exceptions for the interest of justice or high credit of reliability. Declarations against interest including the penal interest, dying declaration,

⁶⁸ Robert Sedler, *The Development of Legal Systems: The Ethiopian Experience*, IOWA LAW REVIEW, Vol. 53, 562-635(1967), at 576, retrieved from <www.abbyssinialaw.com> [Accessed on 23 June, 2015]. See also the reasons why Ethiopia has adopted the common-law approach towards procedures despite the fact the substantive laws are anchored in the continental model.

⁶⁹ See Stanley Fisher, *Some Aspects of Ethiopian Arrest Law*, 3 J. ETH. L.463, 464 n.6, 1966 cited in Sedler, *supra* note 65, at 624.

⁷⁰ Sedler, *supra* note 68, at 622.

⁷¹ Since Ethiopia follows the adversarial system of criminal proceedings and hearsay rule is a notably traditional safeguard of common law, arguably it can be stated that hearsay evidence is admissible only in exceptional circumstances and not as a principle. Due to acute shortage of technologically assisted evidences, there is and has been a traditional and excessive dependency on eyewitness testimony; in fact, it is the sole source of evidence in the Ethiopian courts in most of the occasions. And there is a difficulty in counterbalancing abused testimonies. If that is the case admitting hearsay in exceptional situations is also justifiable from social policy perspective in the sense that it would discourage bias and abuse of witnesses by producing a hearsay evidence in jeopardy of an opponent party.

⁷² Evidence Law of the Federal Democratic Republic of Ethiopia (Second Draft), Art. 14 of Chapter Two, August, 2004, Justice and Legal Systems Research Institute (JLSRI), [translation mine]., Addis Ababa [hereafter FDRE Draft Evidence Law]. JLSRI is established by Council of Ministers Regulations No. 22/1997, an autonomous institution having its own legal personality and is accountable to the Prime Minister.

public documents, former testimony, family history and a number of other exceptions are dealt in the law exactly in the same way as the common law approach.

B. Admissibility of Hearsay Evidence vis-à-vis the Right to Confrontation

The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the judge to weigh the demeanor of the witness. The confrontation right operates to restrict the range of admissible hearsay and face-to-face accusation to ensure the defendant with an effective means to test adverse evidence.⁷³

The confrontation clause of the Ethiopian constitution under Article 20(4) stipulates that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. Nevertheless, the language of the constitution does not provide clear guidance about hearsay issues. It is susceptible to a variety of plausible interpretations. In the experience of US with the same constitutional issue, there are mainly two interpretations. In the first interpretation, all hearsay declarants whose statements are offered by the prosecution would be considered "witnesses against" the defendant, and therefore the Constitution would require that the defendant be confronted with them at trial by producing in person the witnesses whose statements is to be used against him.⁷⁴ This interpretation would lead to the exclusion of all hearsay. Alternatively, one could interpret the amendment to require merely that the defendant be confronted with whatever witnesses the prosecution chose to produce at trial:

[Under this interpretation], trial witnesses could testify about hearsay declarations, and the confrontation clause would impose no limits upon the creation of new hearsay exceptions. It would merely require the presence of the defendant when evidence was presented to the trier of fact. The amendment could also be construed so that "witnesses against" the defendant referred only to persons who were available to testify. Under this interpretation, the prosecution would be required to produce declarants for cross-examination when possible, but the statements of unavailable declarants could be freely admitted.⁷⁵

In our constitution the defendant is entitled to confront witnesses in the same wording as the US constitution. The FDRE constitution under Article 20(4) provides "[a]ccused persons have the right to full access to any evidence presented against them, to examine witnesses testifying

⁷³“Courtroom witnesses testify under oath, in the presence of the trier, and subject to cross-examination. Hearsay declarants avoid these courtroom safeguards, which both encourage witnesses to be accurate and expose defects in their credibility. In particular, cross-examination is valuable for testing reliability because it explores weaknesses in a declarant's memory, perception, narrative ability, and sincerity. Thus, hearsay's fundamental evidentiary flaw is the absence of an opportunity to reveal an out-of-court declarant's weaknesses through cross-examination. The exclusion of hearsay evidence is not grounded upon its lack of probative value ... rather hearsay is excluded because of potential infirmities with respect to the observation, memory, narration and veracity of him who utters the offered words when not under oath and subject to cross-examination.” See Westen Peter, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, HARVARD LAW REVIEW, Vol. 91, No. 3 (Jan., 1978), at 569-570.

⁷⁴ *Id.* at 582.

⁷⁵ *Id.*

against them, to adduce or to have evidence produced in their own defence, and to obtain the attendance and examination of witnesses on their behalf before the court.”⁷⁶

This constitutional right of the accused is a great challenge to the blind admissibility of hearsay evidence. The constitution renders the accused with an opportunity of cross-examination to challenge the veracity of the witness who may testify against the accused. If the accused has used this opportunity of constitutional confrontation right, it would inevitably require the witness to have a direct or personal knowledge of the facts asserted. At this point, therefore, there might be a clash between the constitution and hearsay evidence because of the difficulty to cross-examine. But we should not focus on the letters of the law by neglecting the real sense of the provisions. Instead, the most important point is to look for the spirit of the law of Article 20(4) that put the various requirements enabling to acquire and test the quality of truth. The availability of cross-examination as in the form indicated in the procedure code has primarily focused on the discovery of truth, or reliable evidence.

Similarly, the constitution practically requires admissibility of evidence that carries only the indicia of reliability and trustworthiness. This is because the aim of the law is to enable the accused to defend his case successfully by the help of cross-examination, an instrument to extract the truth. Successful defense as indicated in the constitution presupposes the right to confrontation with witnesses. Hence, the main objective of cross-examination as per Article 20(4) of the constitution is to find trustworthy and reliable evidence. If this is the case, the exceptions which are statutorily recognized contain exactly the same objective, and justification given to them is clearly on the basis of necessity and circumstantial probability of trustworthiness which render them reliable evidences. In other words, in so far as the evidence to be adduced is reliable in itself, there is no any confrontation right to be negatively affected. At this juncture, the exceptions to hearsay rule would meet the same road and they can go together same journeys with what the constitution has previously pursued. This has a clear implication that the confrontation right of the accused and the firmly rooted exceptions recognized on the basis of necessity, particularized probability of trustworthiness stem from the same core value. Hence, what the constitution practically requires as an end outcome is truthfulness.

The procedural code provides the defendant with an opportunity to challenge the accuracy of the witness testimony by cross-examining his understanding, memory, and narration. In stipulating “[q]uestions put in cross-examination shall tend to show to the court what is erroneous, doubtful or untrue in the answers given in examination-in-chief” under Article 137(3), we understand that the main objective of cross-examination is to find trustworthy and reliable evidence. If this is the point, the message to be conveyed under Articles 20(4) of the constitution and 137(3) of the CPC in light with the constitutional purpose seems to allow admissibility with respect only to exceptions to the hearsay rule. Reading the two laws together signifies that if certain evidence is found to be erroneous or doubtful because of insincerity, ambiguity, and lack of memory that may risk reliability, then it is inadmissible because it is untrue and hence all

⁷⁶ Constitution of Federal Democratic Republic of Ethiopia, 1995, Art.20 (4), FEDERAL NEGARIT GAZETA, Proc. No.1/1995, 1st year, No.1.

hearsay evidence cannot freely be admitted. Since questions posed in cross-examination are basically meant to test erroneous, doubtful facts pursuant to Article 137(3), the main objective of the right to confrontation is to find trustworthy and reliable evidence by the help of a device called cross-examination. Therefore, the argument is persuasive that there are firmly rooted exceptions that are capable of achieving the same purpose of reliability even without cross-examination.

Azuibuike argues that confrontation does not ensure that evidence is reliable, but merely exposes the sources of unreliability and provides a basis for evaluating testimony and determining how reliable it is, and cross-examination in itself does not justify exclusion of hearsay.⁷⁷ From this one may reach to a valid conclusion that unless other justifications are added, cross-examination alone is not a ground for the exclusion of hearsay.

Nonetheless, there is no doubt that cross examination is an important safeguard. But the point, the author would like to raise is, if we apply hearsay properly, reliability of evidence will be an effective substitute for cross-examination. As such statements of the unavailable person who declares an assertive truth would not be altered whether we employ confrontation to the present witness or not. This implies that confrontation may not necessarily be the sole safeguard. The purpose of furnishing the safeguard of cross-examination, therefore, is not to aid the parties to suppress the truth, but to enable them to avoid the risk that the trier will be misled into mistaking the false for the true. Reliability, therefore, is the primary factor in determining whether hearsay is admissible under our law.

C. Admissibility of Hearsay Evidence in Ordinary Crimes

1. Admissibility of previous disposition of witnesses

Former testimony is a common hearsay exception that satisfies the demands of the confrontation clause and thus provides a means of admitting testimonial hearsay statements. The right to confront the witness who gave testimony in a preliminary inquiry may be met by proving his/her unavailability and the accused's prior opportunity to cross-examine him/her.

A testimony recorded in another court and statements kept in a police report are hearsay if it is produced as evidence to prove the asserted truth. But in the practice of our courts it is made admissible without any limitation. This is a serious problem that deserves closer attention so as to save a person from incriminating himself/herself through perjury crimes. In the Ethiopian courts there are abundant cases that a witness has changed testimonial words given in the police record, and evidence presented to this effect is usually what the police officer has recorded and is compared with what has been said in the court. But the problem is that courts have not considered perjury cases in the context of hearsay and the issue of admissibility is totally

⁷⁷Azuibuike Lawrence, *Prohibition against Hearsay Evidence in the USA and Nigeria*, JOURNAL OF AFRICAN LAW (2011), at 250-251.

ignored. When it comes to the experience of other countries, however, police report involving witnesses' statement is rejected unless read and signed by the witness himself/herself.⁷⁸

The CPC Articles 144 and 145 require the prosecution to provide notice to the defendant of its intent to use preliminary inquiry or police reports as evidence at trial. The defendant is then given a period of time in which he may be allowed to object to the admission of the evidence where the live appearance of the statement maker at trial is absent.

Article 144 provides that “[t]he deposition of a witness taken at a preliminary inquiry may be read and put in evidence before the High Court where the witness is dead or insane, cannot be found, is so ill as not to be able to attend the trial or is absent from the Empire.” Thus, deposition given by the witness at the preliminary inquiry may be offered by the prosecutor against the same criminal defendant if the witness becomes unavailable. The strictest requirement of unavailability, as per the above provision, represents a strong preference for the personal appearance of the witness as an aid in assessing his depositions though the demeanor of the witness that was not and normally will not be observed by the judge in the High Court. Apart from unavailability, there are still some conditions that need to be fulfilled. The exception for such deposition is admissible only where it was administered by or taken under oath and subject to cross-examination. Such an interpretation is obtained from reading Article 88 in cross reference to Article 147(1) and (3) of the Criminal Procedure Code which talks about recording evidences given in a preliminary inquiry. In other words, if the defendant had been afforded a full and fair opportunity to conduct a meaningful cross-examination of the witness, the preliminary inquiry is admissible.

Article 88 prescribes that “[e]vidence shall be recorded in accordance with Article 147 and the evidence of each witness shall be recorded on separate sheets of paper.” Article 147(1) states that “[t]he evidence of every witness shall start with his name, address, occupation and age and *an indication that he has been sworn or affirmed.*” Moreover, Article 147(3) stipulates that “[t]he evidence shall be divided into evidence-in-chief, *cross-examination* and re-examination with a note as to where the cross-examination and re-examination begin and end.” Here, we can see that depositions were recorded subject to cross-examination and on taking of oath. Since testimony is given with safeguards of oath and cross-examination in the previous court, there is no any violation of a confrontation right and is admissible legally as an exception to hearsay because of unavailability.

Despite the fact that such testimony is typically given under oath and the witness is subject to cross-examination, it is treated as hearsay because one of the three advantages of live testimony the opportunity for the judge in the current proceeding to observe the witness's demeanor is absent. Although one of the qualities of live testimony, i.e. demeanor is lacking, what makes Article 145 admissible as an exception to the hearsay rule is because unavailability

⁷⁸ Nicolas Peter, *But What if the Court Reporter Is Lying? The Right to Confront Hidden Declarants Found in Transcripts of Former Testimony*, BRIGHAM YOUNG UNIVERSITY LAW REVIEW (2010), at 1158. Since Ethiopian courts consider police reports are automatically admissible, witnesses are forced to face prosecution for altering their words in a trial court. Ethiopian courts pass verdicts without checking whether the police has read to the witness and obtain his/her signature in which case the police report might be admissible as exception to hearsay.

of the declarant constitutes a situation of necessity that enables the court to refer to the asserted truth therein. What constitutes unavailability is expressed in the procedure code exactly in the same way as the FDRE Draft Evidence Law. Rule No. 15(4) of the same says where attendance of a witness is not feasible due to death or physical or mental incapacity, it is deemed the witness lacks competency to testify. Rule No. 16(b)(1) states that absence of a declarant as a witness could not make it hearsay if the statement was made at the same or different trial process or a legally consistent written statement given at the same or different trial where the opportunity to cross-examine had given.

In both laws we see that various conditions of unavailability are enumerated. Among these 'death' is mentioned as one of the compelling reasons. Death, of course, is the clearest case of unavailability necessitating the admissibility of hearsay evidence. On principle, it would seem equally clear that other forms of unavailability should satisfy the necessity principle. The court may admit the hearsay declarations of a living declarant who was old and had lost his power of speech or memory, due to the assumption that the person would not be better than a dead man, in so far as the production of his testimony is concerned.⁷⁹Hence, the words of the Draft Evidence Law "mental incapacity" in rule 15(4) can be interpreted broadly to include circumstances of senility which can meet both requirements of unavailability and principle of necessity.

As per Article 144(1) of the CPC, insanity may make a person incompetent as a witness, and hence unavailable. Insanity can be considered as intellectual death particularly in situations where the person will not recover; and this would seem to satisfy the reason of the rule of necessity since the witness is incapable of testifying and being produced as a competent witness as per Article 16(a)(4). Incompetency to testify is defined as inability to recollect, recall as a result of death, physical and mental distortion including illness. Thus, a person's statement could be referred by the court if it is proved that the person is sick, physically or mentally incapable.

Under Article 144(1) persons who left Ethiopia and went abroad or live in foreign jurisdictions are considered unavailable for the purpose of the present law. Upon the request of the prosecutor or the defendant, the High Court may consider the evidence if it is satisfied that the witness no longer exists in Ethiopia. In this Article, what conditions constitute "cannot be found" is open to interpretations. Is it an addition to the lists or is it simply elaborating them? It can be argued that the government or a party must show reasonable steps or efforts to secure the attendance of the witness in which it cannot be made possible in any way. When compared with individual persons, the government is structurally, professionally and financially powerful for which reason the government must shoulder the burden of looking for and finding witnesses. A witness is deemed unavailable by constitutional standards only when physical, jurisdictional, or testimonial impediments prevent him from giving evidence in person.

⁷⁹If a witness cannot be produced in court, his declarations must be admitted, if at all, without the usual safeguards of the oath and cross-examination, no matter what the cause of the nonproduction of the witness may be. However, A defendant wrongfully caused the absence of a prosecution witness to prevent that witness from testifying at his trial, cannot object to the admission of that witness's extrajudicial statements because inherently his confrontation objection to that evidence has been extinguished as a result of his wrongful conduct.

To sum up, the admissibility of testimonial hearsay evidence under the confrontation right is determined by whether the witness is unavailable and the accused had a prior opportunity for cross-examination. Reading Article 144 in the spirit of Article 20(4) of the FDRE constitution prohibits the admission of testimonial hearsay statements of an absent declarant unless he/she is unavailable - defined as being dead, insane, left Ethiopia, sick, unable to travel - and the defendant had a prior opportunity to cross-examine him/her.

2. Admissibility of Confession and the Hearsay Rule

A confession is an admission made by a defendant in criminal proceedings.⁸⁰ In the Ethiopian constitution confession is evidence proving ones guilty.⁸¹ It must be noted that a statement made by the accused is considered to be a ‘confession’ only if it was adverse to him/her at the time he/she made it. Straightforwardly, a statement made adverse to one’s personal interest is admissible. However, what if another person enters a confession in respect of the suspect who pleads not guilty? A better comparative explanation, therefore, is that a confession made by the accused is admissible against him/her, for a combination of two reasons:

First, the principal objection to the admissibility of hearsay evidence – that the declarant is unavailable for the cross-examination – doesn’t apply if an out-of-court proceedings statement has been made by a party to the proceedings; after all, a party who has volunteered admission can hardly complain that he/she is unavailable for cross-examination. Secondly, a strong justification is the statement which is inculpatory (self-incriminating) is far more likely to be truthful than one which is exculpatory (self-serving).⁸²

This rationale is reflected in the Ethiopian CPC and a defendant may not enter confession against his co-defendant. Besides, our courts practically ruled that defendant’s confession would not be considered if the defendant had made damaging remarks against his/her co-defendant.⁸³ The FDRE Draft Evidence Law No. 16(b)(3) rejects admissibility when an out of court statement made by the accused which is wholly exculpatory in relation to the offence charged is offered at the trial for that offence. Moreover, according to the FDRE Draft Evidence Law No. 16(b)(3), a statement made with a view to expose criminal liability upon another and having the implication that the defendant is innocent would not be admissible unless such statement is corroborated with another evidence.

⁸⁰ Negatu Tesfaye, *Materials for the Study of Ethiopian Criminal Procedure* (in Amharic), Addis Ababa University, 1991.

⁸¹ FDRE CONSTITUTION, Art. 19(2) stated that “any statement they make may be used as evidence against them in court”.

⁸² RASAMUND, *supra note 6*, at 164.

⁸³ Admissibility of confession may also be determined taking into account different circumstances of the case. Take for instance: “If the accused made a neutral or wholly exculpatory statement before the trial (for example, I was elsewhere, playing golf) which subsequently became adverse to him because it was shown to be false, his statement is not hearsay because it is not tendered to prove the truth of what was stated (even though it may be possible to infer from the accused’s lie that he was conscious of his guilt, which could be regarded as an implied admission of guilt).” As it has been argued “not every exculpatory comment will be admissible hearsay just because the accused also made a trivial admission; the admission must be significant in the sense that it is capable of adding some degree of weight to the prosecution case on an issue which is relevant to guilt taking into consideration the extent of reliance on it as compared to other evidence.” See RASAMUND, *supra note 6*.

What if the accused has made a statement which is partly inculpatory and partly exculpatory? This is what the Ethiopian courts commonly encounter. Assume defendant D1 admits committing homicide but claim that he was acting in self-defense. Clearly the whole of any such mixed statement may be given in evidence by virtue of Article 27(3) of the CPC stating that “[a]ny statement which may be made shall be recorded”. This is because the content of confession should be taken in the wording of the accused and what should be focused is the content as a whole and nothing else. There are limits to the admissibility of mixed statements as an exception to hearsay rule. One instance is where there is no other evidence in support of the exculpatory part of a mixed statement, its weight is likely to be minimal. Here, the draft evidence law requires corroboration as to the exculpatory statements.

With respect to test of reliability, a truthful confession may be the best evidence for the prosecution, and in some cases the only evidence against the accused. Confession is more likely be true because the confessor who falls under reasonable suspicion of the police seeks to get rid of the stress developed as a result of guilty conscience. The constitution, as will be seen herein below, requires that confessions should not be made in circumstances which might cast doubt on their reliability as truthful assertions of fact. In line with this the rules of preclusion to all forms inducement indicated under Article 31 of the CPC intended to impose duties and govern the conduct of the police not to extract both truthful and falsified assertions alike. Statements acquired in repugnant to this law are excluded as the risk of unreliability is apparent.

The primary reason why involuntary confessions are excluded from evidence is that they are unreliable indices of truth: people have been known to admit crimes of which they are innocent, simply to escape the pain of torture or to obtain an irresistible benefit.⁸⁴ Failure to fulfill the requirements mentioned under the above article means confession is not qualified to be one of the exceptions to the hearsay rule: and without a justification still confession is inadmissible as hearsay evidence.

Under Article 31(1) of CPC inducement, threat, promise or any other improper methods cause loss of indicia of reliability and particularized trustworthiness which make it remain hearsay and hence inadmissible. Article 19(5) of the FDRE constitution stipulates that “[p]ersons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible.” Confession obtained in comport with the constitution is free and voluntary and is admissible. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it

⁸⁴ McInvale Anne, *Evidence- Can Admissibility of Co-Defendants Confessions under the Hearsay Rules Serve as a Minimum Standard for Admissibility under the Confrontation clause?* MISSISSIPPI COLLEGE LAW REVIEW, Vol.8:33, (1987-1988), at 40-41. However, it should be borne in mind that reliability is not the only consideration because confession may still be held inadmissible if it is obtained without giving due attention to the accused’s privilege against self-incrimination or Miranda rights. A person should not be compelled to testify against himself/herself. He/she must be warned prior to any questioning that he/she has the right to remain silent, that anything he/she says can be used as evidence against him/her in a court of law. Besides, the suspect must be told that he/she has the right to be with his/her lawyer starting from the pre- detention stage.

refers. The general rule is that a confession is admissible evidence against the person who made it, despite the confession being technically hearsay.

The issue of hearsay pertaining to confession arises when it is particularly received by the police officer without the lawful limits. Interrogation by the police is conducted with a view to use the statement as evidence before the court and any document presented in such a way to prove or disprove the contents asserted there in becomes hearsay. This problem of police interrogation blessed with the nature of hearsay cannot easily be remedied unless we subscribe to the strategies suggested by scholars. Yoseph argued that amendment must be made to Article 27 of the CPC that prevents the police from undertaking interrogation and making Article 35 of the CPC remain and workable as it is.⁸⁵ Pursuant to Article 35 of the CPC, even if a statement of confession is recorded by a certain court, the rules that the court shall record the statement in full, read over to the person making the confession and allowing him/her to sign it rectifies characters of hearsay as the statements are now considered his/her own, and hence it can be used by any other court. Even with confession given in the courts, additional rules are required that regulate covert influences and threats used by the police against the suspect before his appearance in the court. Unlike Article 35, therefore, confessions obtained under conditions of Article 27 are hearsay.

Obviously, as it has been stated elsewhere, one of the challenges to the admissibility of hearsay is absence of cross-examination. Confession or police witness reports are hearsay for they are susceptible to fabrication readily by the misconduct practices of the police, involves even layered evidence, and constitutional confrontation is absent. Yet, it must be noted that there are two alternatives to address the problem of absence of cross-examination in a confession. One is that the investigating police officer shall read and obtain the signature of the confessor, and the other is the police officer himself can be cross-examined. Obtaining signature would let the witness adopt police records as his testimony, and then it has become by adoption witness's own statement and can be made admissible in the court.

D. Admissibility of Hearsay Evidence in Crimes of Terrorism

Free admissibility of hearsay is prohibited in ordinary crimes; it is admitted only in definite strict conditions. For a stronger reason in more serious crimes, admissibility should be subjected even to more stringent requirements. The following is a discussion of how hearsay evidence is treated in a serious crime of terrorism by the Ethiopian law.

1. Tool to Stifling Dissent or Bringing Unfair Surprise

Azuibuike says litigation is a gamble.⁸⁶ The role of rules in hearsay is to reduce arbitrariness, uncertainty and unpredictability associated with it. If hearsay were freely admissible, it would become difficult to prepare cases. A party would not know what evidences the other had. It is possible, through discovery and deposition, to have notice of the evidence an

⁸⁵ Yoseph G/Egziabher, *Involuntary Confession: Comments on Criminal Appeal R/No. 4/71*, Addis Ababa University, Faculty of Law in collaboration with Ministry of Justice, *JOURNAL OF ETHIOPIAN LAW*, Vol. 12 (1982), Addis Ababa, at 93.

⁸⁶ Azuibuike, *supra note 77*, at 254-255.

opponent plans to use, however, where hearsay may be admissible, uncertainty remains and one party may thereby spring a surprise on the other.⁸⁷ The hearsay rule operates to avoid such unfair surprise.

But Article 23 of Ethiopian Anti-terrorism Proclamation,⁸⁸ under its heading of “Admissible Evidences”, enumerates category of indirect evidences which would expose the suspect at a great difficulty of impeaching their credibility. Article 23(1) makes intelligence reports prepared in relation to terrorism admissible even if the report does not disclose the source or how it was gathered. If the law admits intelligence reports without further scrutiny into the method of collection thereof, how would the court come to a conclusion that the evidence was obtained legally and fulfilling the criteria of reliability, for instance, absence of coercion—a base for an admissible hearsay exception. In fact, unnoticed intelligence reports in a felony crime of terrorism would make the offender helpless and hopeless in exercising his constitutional right to defense. Similarly, Article 23(2) allows the prosecutor to adduce hearsay or indirect evidences freely and this would create unfair surprise particularly to the accused who had no pre information and notice of evidence, such as, in an unnoticed intelligence reports, previous disposition, and anonymous statements. Thus, the potential risk of unrestricted admission characterizes full of uncertain and unpredictable criminal proceeding.

All over the world, anti-terrorism laws sustained strong criticisms due to the fact that they might inappropriately be used to punish political dissent.⁸⁹ Likewise, the Ethiopian Anti-Terrorism proclamation has been criticized by international human right activists and the domestic opposition and private media for its susceptibility to be used for the purpose of stifling political dissent.⁹⁰

2. Does Admissibility of Hearsay Impact Human Rights and the Criminal Justice System?

In the opinion of the author, free admission of hearsay destabilizes the criminal justice process. This is because one of the rationales to the exclusion of hearsay is the need for stability of verdicts and avoiding repudiation by witnesses. Lawyers who need to spend much time and resources for serving justice may discriminate and neglect suspects in a terrorism crime and focus on other ordinary crimes so as to retain their competitive advantage in the trial process. Meanwhile, terrorism suspects would remain without any help of legal counsel.

Ethiopian Anti-terrorism Proclamation allows detention for long periods, and authorities are explicitly permitted to use force to obtain evidence from the accused.⁹¹ Anything said within this long detention might be produced as evidence before the court and still production of such

⁸⁷ Ibid

⁸⁸ Ethiopian Anti- Terrorism Proclamation No. 652/2009, FEDERAL NEGARIT GAZETA, 15th Year No. 57, Addis Ababa, (28th August, 2009), Art. 23(1).

⁸⁹ See for example Ben Saul, *Defending ‘terrorism’: Justifications and Excuses for Terrorism in International Criminal Law*, AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW, Vol. 25, (2006), at 20.

⁹⁰ See for example, Human Rights Watch, *Analysis of Ethiopia’s Draft Anti-Terrorism proclamation*, (March 9, 2009), at 3.

⁹¹ Ethiopian Anti- Terrorism Proclamation No. 652/2009, Arts 20(3) and Art 21.

evidence is against hearsay rule. Plentiful causes of abuse exist for the state and there will be punishment for hearsay evidence in general and coercive confessions in particular as the law fails to take into account the necessity of trustworthiness. Without qualifying test of trustworthiness, anonymous intelligence reports containing anonymous statements are admissible just like all confessions (both voluntary and involuntary) and hearsay evidences.

Indeed, an effective response to terrorism requires a review of existing procedural law and evidentiary requirements, in order to empower the criminal justice system to fulfil its security and social protection duties.⁹² For instance, admissibility of unnoticed intelligence reports may be justified because of sensitive security issues. Besides, witnesses may be granted anonymity in order to prevent risk to the witness.⁹³ Nevertheless, the European Court of Human Rights has set some limits on the use of anonymous testimony as it affects human rights of defendants, for instance, access to a fair trial:

The judge must know the identity of the witness and have heard the witness's testimony under oath and determined that it is credible and must have considered the reasons for the request of anonymity; the interests of the defence must be weighed against those of the witnesses, and the defendants and their counsel must have an opportunity to ask the witness questions through an audio link with a voice transformer; conviction should not be exclusively or substantially based on anonymous testimony.⁹⁴

That is why some states came up with the law requiring corroboration of the testimony of an anonymous witness in order for it to be considered valid. It is necessary to be cautious that substantial modification of criminal procedure is likely to affect protection of individual rights, the safeguarding of the rule of law and the integrity and the fairness of the criminal justice process. Even under compelling circumstances, it is important to design safeguards to prevent any potential abuses.

The reason why the FDRE constitution put evidence related rights under the heading of fundamental human rights and freedoms arises out of the basic need to lead the criminal litigation process fairly in a way to ensure justice. To this effect, the purpose of any law which is subordinate to the constitution should be framed to further the constitutional cause and this can be done by effectively screening the guilty from the innocent. Thus, cross examination, exercising the right to defense, and the right to have witnesses to testify on accused's behalf would help any person to prove his innocence. However, the new proclamation does not have methods for better achievement of confrontation rights. Rather, it entirely neglects the interest of innocent people by exacerbating the likelihood of wrongful convictions. Innocent people who might have been subjected to pass in the criminal process would have no other safeguards to defend themselves if hearsay is made to be admissible without any restriction.

Constitutional principles of exclusion of evidence obtained by torture could be violated with admissibility of evidences that do not disclose their sources or methods. Also, an issue of

⁹² UN, HANDBOOK ON CRIMINAL JUSTICE: RESPONSES TO TERRORISM, UNs Office on Drugs and Crime, Criminal Justice Handbook Series, New York (2009), at 41.

⁹³ *Id.*, at 45-46.

⁹⁴ *Id.*

legitimacy may arise if the executive is allowed to produce any kind of evidence; and if admissibility is decided somewhere out of the court-room, the government is losing legitimacy by polluting its good-will.

By making hearsay and indirect evidences, or intelligence reports admissible in court, the law effectively allows production of evidences obtained under torture.⁹⁵ Confession admissible without a restriction on the use of statements made under torture is clearly hearsay evidence due to the fact that pain is inflicted on a person with a view to obtain statements. It deprives defendant's constitutional right to be presumed innocent, and of protections against use of evidence obtained through threat, inducement or torture.

In addition, the admissibility of hearsay and indirect evidence and confessions of suspects of terrorism (Article23), use of anonymous witnesses (Article32) and other procedural provisions under the Anti-terrorism Proclamation will undermine defense rights of the accused. Anonymous accusations as per Article12 of the CPC can be disclosed for the purpose of further police investigation and not for automatic admission. But, in the Anti-Terrorism Proclamation, anonymous testimony which is made to be admissible in court can constitute charge independently of other evidences.

Article 14 of the ICCPR expressly entitles everyone with a fair trial and the right to examine witnesses produced against him/her. Ethiopia being a signatory to this instrument and, in fact, has become integral law of the land, it is mandatory to consider whether the production of hearsay evidence in terrorism crimes is compatible with the convention. In line with this any measure taken by the government must be directed towards a legitimate objective (one of those may be convicting those who have actually committed crimes), and is a proportionate way of achieving that objective. The Anti-terrorism Proclamation, however, is not compatible with the provisions of the ICCPR due to its insufficient safeguard to the accused if not it is a total ignorance.⁹⁶ It seems for the author that admitting hearsay evidence under all circumstances without supporting it by justifiable grounds would be a violation of human rights because it tampered with the enjoyment of most rights.

Hearsay is another best instrument for the government to abuse its power and to discriminate those who are believed to hold opposite political views. “[For political purposes, therefore, t]he maker could have fabricated the evidence or been mistaken and, ‘yet he/she is unavailable for cross-examination on his/her statements. This will prevent the accused to defend himself/herself and it is a violation a fundamental tenet of natural justice.’”⁹⁷In general, in criminal cases there are compelling conventional reasons for excluding hearsay and to apply them thoroughly, and

⁹⁵ Salisbury Abigail, *Human Rights and the War on Terror in Ethiopia*, Jurist-Forum, (August 2, 2011), available at <http://jurist.org/forum/2011/08/abigail-salisbury-ethiopia-terror.php>, last visited on August 10, 2015.

⁹⁶ Denying terrorism suspects' the right to fair trial is a violation of international human right instruments. Fair trial is the one that lets the suspect exercise guaranteed rights those indicated by Ethiopian constitution under Art. 20(4) which stipulate accused persons have the right to full access to any evidence presented against them, to examine witnesses testifying against them. Due to confrontation rights it can be argued admitting hearsay evidence violates constitutional rights.

⁹⁷ RASAMUND, *supra* note 6, at 108.

the hearsay rules serve the additional function of shielding the accused against misuse of governmental power.

The government says existing laws don't ban hearsay evidence and the proclamation complies with the existing laws and admissibility of hearsay was done taking the very complicated nature of terrorism acts and operations in to consideration.⁹⁸ The justification on part of the government seems that admitting hearsay is not a new phenomenon by invoking Article 137 of the CPC. But the laws stipulation that says witnesses can testify their direct and indirect knowledge rather opens door for argument; in fact, the law doesn't allow hearsay evidence since indirect evidences are naturally related with the alleged commission of the crime and is that knowledge which is allowed by law not hearsay.

In conclusion, in the Ethiopian criminal justice system, hearsay admission is legalized in a serious crime of terrorism while it is prohibited in ordinary crimes. It can be said admissibility of hearsay to the crime of terrorism is violation of human rights because it enables the government to bring charges against any person who is suspected of committing an offence.

III. CONCLUDING REMARKS

Laws on hearsay are inadequate in Ethiopia. In an attempt to determine admissibility or inadmissibility, scholars and practitioners rely exclusively on Article 137(1) of the CPC's phrase: "indirect knowledge". Generally, there is an argument representing the majority of opinions that the term indirect knowledge refers to hearsay evidence. Based on this line of interpretation, Article 137(1) of CPC can be interpreted to permit admissibility of hearsay as a matter of evidence. In the Ethiopian approach, therefore, the predominant thinking is hearsay is permissible as a rule and not as an exception and courts can freely admit such evidences. Until the Cassation had settled the issue recently, the problem with the absence of explicit legal provision seems to have caused a disparity of court practices on the admissibility of hearsay evidences. Yet, the court came up with wrong decision that equalizes the natures of circumstantial evidence with that of hearsay evidence, albeit the ruling might bring consistency of practices.

Indeed, concluding that hearsay is always admissible is completely inconsistent with the constitution, in particular, to confrontational rights, and overlooks Ethiopia's adversarial type approach, in particular, to procedural codes. Although at the draft stage, the forthcoming Draft Evidence Law of Ethiopia has come up with impressive ideas and legal philosophies anticipating to ending the debate once and for all. Accordingly, Article 14 of the Draft Evidence Law solved the controversy by stipulating that hearsay evidence is admissible only where the law expressly provides so. Hence, only those exceptions which are reconcilable with the confrontation clause in passing through the litmus test of reliability are admissible.

In the Ethiopian context, former testimony includes a statement given before the police, deposition taken in a preliminary inquiry, or any statement recorded at the same or different trial.

⁹⁸ *Salisbury, supra note 95, see also* new Ethiopian bill violates international human rights treaties available at www.ethiopianreview.com visited on June 27, 2017.

Admissibility of former testimony is conditional upon two criteria: unavailability and the opportunity of cross-examination. Since the law is illustrative in invoking grounds of unavailability, its scope is not limited only to jurisdictional and personal unavailability. For instance, under the Ethiopian CPC and in practice hearsay may be made admissible against one party when the other party wrongfully causes the declarant's unavailability. Hence, discounting its weight is believed to rectify incongruities of an otherwise inadmissible evidence.

Ethiopia's anti-terrorism law that was enacted in 2009 provides unprecedented enormous powers and permit to adduce anonymous and hearsay evidences. If the prosecutor's terrorism case depends wholly or substantially on the hearsay statement of a witness whose credibility is in real doubt, the accused would inevitably be handicapped by the inability to cross-examine. And punishing the accused with evidence below the acceptable criminal standard for an offence entailing a rigorous imprisonment for life and death penalty is a breach of constitutional right.

The effect the rule has on the capacity to reach a correct verdict is compromised under the Anti-terrorism Proclamation. Thus, admissibility of hearsay evidence exacerbates wrongful convictions, and may be used as a tool to stifle dissent opposition voices. Finally, this would violate a number of human rights including freedom of opinion, and due process, defense and fair trial rights.

Confrontational right should be interpreted to make a distinction between testimonial capacities for which there are circumstantial guarantees of trustworthiness and those capacities for which there are not such guarantees. Since all exceptions do not have the same character of sincerity, it demands a careful analysis in weighing them so differently. In jurisdictions like US, the limit to the admissibility of hearsay is expanding. In the Ethiopian approach, admissibility is limited to categorical exceptions. However, it doesn't suffice to put enumerated list of exceptions. Whenever a need arises, it is advisable to admit numerous extrajudicial assertions by allowing them to escape the general ban against hearsay evidence such as under residual exceptions. Or some form of judicial discretion has to be retained, for instance, by the forthcoming law, that enables inclusion of hearsay evidence which go beyond the recognized exceptions, when it is deemed necessary to the interests of justice, and, when the circumstances generally assure reliability.

Despite confession or police witness reports being hearsay for they are susceptible to fabrication by police misconduct, the Ethiopian courts automatically admit it. The author's proposal involves that in order to eliminate these layered hearsay and constitutional confrontation problems, the police must develop protections by having let the witness adopt the records as his/her testimony by reading it over and signing it. Then it has become by adoption his/her own statement and can be made admissible in the court.

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