When the Expert Turns into a Witch: Use of Expert Opinion Evidence in the Ethiopian Justice System

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1. Introduction

Contentions before the judiciary are about issues of facts and of law. Matters of fact are matters of evidence. Those facts that may be proved by witnesses come in two forms - facts in respect of which the witness may have personal experience and facts that may be proved by opinion evidence. Opinion evidence further comes in two forms - opinion evidence of lay witnesses and of experts. The subject of this article is expert opinion evidence.

Judges are called upon to dispose factual contentions of every sort. Where the determination of a fact requires expertise the court needs the assistance of an expert on the subject. Expert opinion evidence has to be relevant to the fact in issue and must not be otherwise inadmissible.

In order for the court to effectively use expert opinion evidence for the proper determination of facts, there are three fundamental requirements. First, the subject matter must be suitable for expert opinion. A subject matter is suitable for expert opinion evidence because it is scientific or technical or it requires otherwise specialised knowledge. Whether a fact is a subject matter of expert opinion evidence is determined by the law or by a decision of the court. In few cases, the law expressly provides for whether the fact needs to be proved by expert opinion evidence as in the case of criminal responsibility. Where the law does not so provide for and the court believes the subject matter calls for expertise, it may require that assistance of an expert. In many other cases the parties produce expert opinion evidence.

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Second, as the expert opinion evidence is based on the personal professional competence of the expert, the said person must possess relevant expertise. Third, all the constitutional and procedural requirements, such as, the right to confrontation of the witness and test the reliability of the testimony, must be complied with. The rules regarding the use of expert opinion evidence are meant to help the court have control in the use of such expertise by properly examining the competence of the expert and ensure that the reasoning process and that the ultimate finding is an outcome of the specialised knowledge of the expert.

It is only stating the obvious that the practice of utilising expert opinion evidence in Ethiopia is extremely poor. Many of the expert opinion reports presented to the court are not relevant to the fact in issue; substantial numbers of the reports are otherwise inadmissible while still others are not reliable. Therefore, the discussion on the current state of affairs regarding expert opinion evidence is made with a view to improve the use of such evidence.

In order to help the courts establish a uniform practice of disposing facts based on relevant, admissible and reliable expert opinion evidence, the topics determination of whether the subject matter is suitable for expert opinion evidence, determination of expertise, appointment of experts, the nature and extent of the assistance of the expert, presentation of expert opinion evidence, attendance of the expert in court, and how the expert testimony may be impeached by the other party are separately discussed.In doing so, the provisions of the law regarding expert opinion evidence and the related biding decisions of the Federal Supreme Court Cassation Bench are reviewed.

2. Subject Matters Calling for Expertise

Courts are called upon to decide on all sorts of facts. Some facts that are involved in litigation are highly scientific, technical or require otherwise specialised knowledge.[1] Regarding those facts which are known to be scientific

[1] A fact is a subject matter of expert opinion need not necessarily require "theoretical knowledge of the field" or "application of scientific principles." If it requires "skill or expertise based on observation" it is a subject matter of expert opinion evidence. David M. Godden and Douglas Walton "Argument from Expert Opinion as Legal Evidence: Critical Questions and Admissibility Criteria of Expert Testimony in the American Legal System"

or technical, or require otherwise specialised knowledge, the law identifies such facts and requires the assistance of an expert in their determination by the court. Many such provisions are found in the criminal and the criminal procedure codes - the most commonly used ones being criminal responsibility,[2] and medical examination.[3] There are also few such provisions in the civil code, such as, valuation of property.[4]

Where the law does not so require the assistance of an expert but the court finds the facts are of scientific or technical nature, or require otherwise specialised knowledge, it has the discretion to make use of expert opinion evidence on the subject.[5] This is made evident in the Code of Civil Procedure that where it is stipulated that if "the court considers it necessary or expedient that the facts in dispute between the parties should be verified, [by an expert] it may of its own motion or on application ...[appoint] one or more experts or other persons skilled in the matter, directing them to verify such facts and to report thereon to the court within such time as it shall fix."[6]

Further, the Federal Supreme Court Cassation Bench gave binding decisions[7] that provide that "where the determination of facts and the nature of the

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in *Ratio Juris Vol. 19 No 3* September 2006, at 272. Further, it is difficult to make distinction between scientific or technical knowledge or skills that require otherwise specialised knowledge. Terrence F. Kailey (2006) *Forensic Evidence: Science and the Criminal Law, 2nd Ed.,* (New York: Taylor & Francis Group LLP) at 19.

2 Crim. C., Art 48

3 Crim. Pro. C., Art 34

4 Civ. C., Art 1006, 1084 and 2856

5 *Yessu PLC v. Dejene Bekele, et.al.,* (Federal Supreme Court Cassation Division, Cass. File No 65930, 21 June 2011) Vol 12, at 362; *Haji Abdulkadir Mohammed v. Desta Gebreyohannes and Sisay Gebreyohannes* (Federal Supreme Court Cassation Division, Cass. File No 31833, 22 May 2008) Vol. 6 at 122

6 Civ. Pro. C., Art 136 (1). For instance, the California Evidence Code, Section 801 provides that the subject matters in respect of which expert opinion may be sought must be one that is not the subject of common knowledge and that is helpful to the court.

7 Ethiopia is said to be a civil law tradition country principally because it follows a codified law and the decisions of courts are not binding precedents. By the Federal Courts Re-amendment Proclamation No 454/2005, Art 2(1) the concept of precedent is introduced. Therefore, where the Federal Supreme Court Cassation Bench made an interpretation by a panel of five judges, it becomes binding on all lower courts including the Federal Supreme Court regular bench provided it is published in the series the Court publishes. However, what is implicit is that the Cassation Bench is given the power to interpret the law where the provisions of the law are vague, contradictory or have gaps that may properly be addressed by such binding interpretations. Where there is law and it is clear, the Cassation

litigation require expertise the court should hear expert opinion testimony."[8] Certainly, matters that call for expertise are broader in scope.[9]

Examination of the practice of the judiciary indicates that the court frequently sought the assistance of experts in the subject matters discussed below.[10] There are also areas that are not discussed here but for which the courts have sought expert opinion evidence less frequently.

2.1 Criminal Responsibility

In criminal matters, the law expressly provides for certain categories of facts be established by expert opinion testimony. For instance, the Crim. C., Art 48(1) provides that a person "who is responsible for his acts alone is liable to punishment under the provisions of the criminal law." Where the person claims insanity as a defence, the existence and extent of the defendant's irresponsibility that existed at the time the defendant committed the alleged

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Bench is not given the power to pass a different interpretation. Where it makes such interpretation the decision, arguably, is not binding.

8 *Yessu PLC*, *supra*, n 7; *Ethiopian Development Bank v. Hailu Ambo, et. al.,* (Federal Supreme Court Cassation Division, Cass. File No 61227, 21 July 2011) Vol 12, at 377; *Wogagen Bank S.C. v. Habitom Rezene* (Federal Supreme Court Cassation Division, Cass. File No 48608, 21 November 2010) Vol. 12, at 306; *Commercial Bank of Ethiopia v. Zenebech Alemayehu and Adugna Demissie* (Federal Supreme Court Cassation Division, Cass. File No 83771, 19 March 2013) Vol. 15, at 214.

Although expert opinion evidence has been used for several decades and it has always been marred by problems, the Cassation Division attempted to address the issue in greater depth only in Volume 12 of its publication where the Bench at least in 7 different cases (both recent and earlier decisions) addressed issues relating to the admissibility, impeachment and evaluation of expert opinion evidence.

9 Adrian Keane and Paul McKeown (2012) *The Modern Law of Evidence, 9th Ed.*, (Oxford: Oxford University Press) at 527, 528. In fact, all forensic science areas were classified into seven groups at the 2004 Interpol 14th Annual Forensic Science Symposium. They are: 1. Scenes of Crime Evidence; 2. Individual Identification Evidence; 3. Questioned Documents; 4. Forensic Acoustics and Imaging; 5. Chemical and Material Analysis Evidence; 6. Debris Analysis, Explosives, and Environmental Crime; and 7. Media Analysis. Kailey, *supra*, n 3, at 43

10 The material that is given to the expert for her examination must be admissible evidence. However, other materials which she uses in forming her opinion need not be admissible in evidence. Jonathan Grossman "Admissibility of Expert Opinion Testimony" available at <http://www.sdap.org/downloads/research/criminal/expert.pdf> last accessed on July 13, 2013

criminal act has to be established.[11] Certainly, the court is not competent to determine criminal responsibility unless such responsibility or irresponsibility is patent. Thus, where the responsibility of the accused is doubtful, or where the court is convinced defendant is irresponsible but the degree of irresponsibility is not clear, the court is required by law to "obtain expert evidence."[12]

The court is also required to seek expert opinion regarding "the character, antecedents and circumstance of the accused person."[13] Further, where "the accused person shows signs of a deranged mind or epilepsy, is deaf and dumb or is suffering from chronic intoxication due to alcohol or due to drugs" the law makes it imperative that such expert opinion evidence must be sought regarding the criminal responsibility of the accused.[14]

The purpose of such mental competence (psychiatrist) evaluation is for the determination of whether defendant was responsible for his actions by the time he committed the alleged criminal act. This is obviously because if defendant was irresponsible for his actions at the time of the commission of the alleged criminal act, he is not liable to punishment. On the other hand, if the defendant is partially responsible, he is liable to punishment to the extent of his responsibility. In this regard, we can review three separate cases decided by our courts at different periods. The first one is *Public Prosecutor v. Fitsum Eyasu*.[15]

In this case, the defendant was charged for first degree murder for killing his biological mother. The evidence presented includes confessions of the defendant made as per Crim. Pro. C., Arts 27(2) and 35, after-the-fact witnesses and autopsy.

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11 Crim. C., Art 49(1) is clear in providing "...at the time of his act..."

12 Crim C., Art 51(1)

13 *Id.*

14 *Id.* Where the court orders such psychiatric examination it should adjourn the matter expecting the results of examination of the "mental stability of the accused...by an expert." Crim. Pro. C., Art 94(2)(j).

15 *Public Prosecutor v. Fitsum Eyasu* (Federal High Court, Crim. File No. 60743, 10 July 2008)

In his defence, defendant made statements coherent (in form) but irrational (in content) regarding the circumstances of the incident as per Crim. Pro. C., Art 142(3). Further, defence witnesses testified that the defendant had a mental problem and his mother used to take him to different places for traditional treatment. The court rejected their testimony on the ground that the witnesses were not experts and that their testimony in this regard was "irrelevant." The court then convicted Fitsum of first degree murder and sentenced him to death.

Fitsum appealed to the Federal Supreme Court both against his conviction and the sentence.[16] In his appeal, Fitsum stated that he was convicted without his mental treatment records being evaluated. The Court asked Fitsum whether he had been to Amanuel Mental Hospital to which he had replied in the negative. The Court in the course of the conversation had opined that appellant was conversing with the judges intelligibly. Appellant replied he had been on medication.

Fitsum was then referred to Amanuel Specialised Mental Hospital. The "Medico-Legal Committee" unanimously found Fitsum to be not only a "mentally ill person [but also] dangerous." The report further suggests that, Fitsum needs internment for treatment where there were medication and amenities. He also needs psychiatric evaluation before he is discharged to the community.

The Federal Supreme Court, after receiving such psychiatric evaluation result, for reasons that are not clear from the records of the court, affirmed the conviction and the sentence. The Court of course, went beyond the call of duty and wrote to the Ministry of Justice asserting that "in case [Fitsum] is released on pardon, he should be evaluated by psychiatrist before he is integrated into the society." [Translation ours].

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[16] *Fitsum Eyasu v Public Prosecutor* (Federal Supreme Court, Crim. App. File No 40199, 9 March 2011). The grounds of his appeal are disregard of mitigating grounds by the court sentencing him to death and incompetent assistance of counsel, both of which were evident from the records of the court.

The second case is *Chala Qeneni v. Public Prosecutor*.[17] The established facts of the case were that appellant would approach herders far away from his residential area whom he never had prior acquaintance or contact with. He then said to them "Kill me! I want to die today!" and lied on the ground by his chest. The people around were terrified but one of the herders had stated his refusal. Appellant then took his walking stick and hit him on the head about three times. When prosecution first witness approached them to quell the fight, the defendant hit her over the head and she fell onto the ground. When another woman came to help, he also hit her several times and when he hit her over the forehead she died immediately.

While he was under detention, he also hit the police officer in charge and had killed him. He had then been charged for aggravated murder and for causing bodily injury.

On first hearing, he had raised the defence of insanity and was sent to Amanuel Specialised Mental Hospital. The records show that the report of the Medico-Legal Committee of the Hospital states that the "defendant Chala Qeneni is not a person with mental disorder; as such he is responsible for his acts." [Translation ours]. Accordingly, the proceedings went on; prosecution evidence had been heard and defendant was convicted and sentenced to death by the High Court.

Chala appealed to the Supreme Court both against his conviction and the sentence. The Supreme Court after examining the appeal and the records of the High Court held that, appellant is proved to have had committed the crime and therefore, affirmed the conviction. However, having regard to the circumstances of the commission of the crime and the mental health of the appellant, the Supreme Court had reservations regarding the sanity of appellant. The court then had called three witnesses living in the vicinity of the appellant regarding his antecedents. Those witnesses mentioning specific instances and general circumstances had testified that appellant had been mentally ill and that is how he had been perceived in his community.

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[17] *Chala Qeneni v. Public Prosecutor* (Federal Supreme Court Panel Bench, Crim. App. File No 255/76, 5 May 1987)

The Court then held "even though their testimony cannot disprove the findings of Amanuel Mental Hospital, it is hard to disregard" and thus reduced the death sentence to life imprisonment.

The third case is *Public Prosecutor v. Woletemaryam Tigabu*.[18] Woletmaryam was charged for ordinary murder contrary to Crim. C., Art 540 for killing a person who attempted to rape her. At the hearing, because she had not been able to intelligibly communicate with the Court, the Court ordered her psychiatric evaluation on its own motion. The result of the evaluation states that "the accused Woletemaryam Tigabu is mentally ill and need [sic] treatment and follow up." Because there had not been objection on the part of the prosecutor, the court then dismissed the charge.

Several preliminary observations could be made from these three cases discussed here and other similar psychiatric evaluations results not discussed here. First, in a criminal case where there is psychiatric evaluation, at least for those cases decided by the courts seating in Addis Ababa, all of them are from Amanuel Specialised Mental Hospital. Second, the mental condition of the person is evaluated by the so-called Medico-Legal Committee of the Hospital, the body to which the psychiatrist who conducted the examination of the patient is a member. Third, the reports include only the findings of the Medico-Legal Committee in few words and signed by the Chairman of the Committee who may not have conducted the examination. For instance in *Fitsum*, the Committee stated that he is not only "mentally ill person [but also] dangerous." Likewise, in *Woletemaryam*, it stated that she is "mentally ill and need [sic] treatment and follow up." It does not state the reasons for its conclusions, the procedures employed in examination of the patient, etc.

Fourth, responsibility relates to the mental capacity of defendant to understand the nature and consequence of his actions and/or whether he is able to control himself according to such understanding. The capacity of defendant that is in issue is the one that existed at the time of commission of the alleged criminal act. However, the reports are all about the present condition of the accused

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[18] *Public Prosecutor v. Woletemaryam Tigabu* (Federal High Court, Crim. File No 66908, 4 November 2008)

which is not in issue before the court.[19] Further, where such irresponsibility exists, it may either be full or partial. The reports are always about full (ir)responsibility; never about a partial (ir)responsibility.

Fifth, coming to the courts, the findings are introduced as documentary evidence;[20] and the expert did not appear in person to testify before the court about his/her findings and were never cross-examined by the other party against whose interest the report finds.[21] There may be reasons for the expert's failure to appear before the court but none is on legal grounds. Therefore, if the report includes only the findings of the evaluation, the court should certainly, hear directly from the expert as to her competence, the procedures she followed and her reasoning. This is important not only to test the reliability of the report but also because the defendant has a constitutional right to confrontation should the report be adverse to his interest.[22]

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19 It is obvious that there is a significant time lapse between the time of the alleged crime and the time defendant is examined by a psychiatrist for insanity. At a workshop jointly organized by the AAU Medical School and the Law School to upgrade the skills of the psychiatrist (on September 18, 2014 at Churchill Hotel), the experts stated that when the person is sent to the respective institutions for examination, often it is his/her first time. There are no prior records. Therefore, the experts can only make a finding of the present mental health condition of the patient and they cannot, in the absence of any such prior records, state about the mental health conditions of the suspect that existed at the time of commission of the alleged crime.

20 It is all expert opinion report that is produced as "documentary" evidence. The practice is consistent in that they are always top in the list of documentary evidence the prosecutor presents as part of the charge sheet. However, the report is only a statement of the subject matter given to the expert for her examination, the findings of her examination based on the material given to her and her expertise, and that she would testify to those facts should she appear before the court unless the other party waives her right to cross-examination.

21 For instance, the reports indicate that Menelik II Hospital makes autopsy for several cases per week. Likewise, Amanuel Specialized Mental Hospital conducts examination of several patients per week for judicial purposes. The Federal Police Forensic Department examines several more documents for the same purpose. The authors have not encountered a case nor have we heard from our colleagues wherein any of those experts conducting the examination appeared before the court to explain their findings or for cross-examination by the party against whose interest the report operates. We cannot categorically assert there was none; there may be cases wherein such expert appeared which we might not have encountered but it would not be wrong to conclude that appearance of the expert before the court, if any, is a rare exception.

22 FDRE Const. Art 20(4)

Sixth, in *Fitsum*, while the High Court failed to send defendant for psychiatric evaluation, ironically, the Supreme Court completely disregarded the findings of the Medico-Legal Committee of the Amanuel Specialised Mental Hospital that *Fitsum* is criminally irresponsible. In *Chala*, while the ultimate decision on responsibility is that of the court, the Supreme Court in particular had difficulty believing that Appellant had mental illness. But it appeared to consol the appellant (and itself) by taking into consideration appellant's predicaments when changing the death sentence to a life imprisonment. In *Woletemaryam*, the High Court referred defendant to psychiatrist evaluation on its own motion, and it fully accepted the findings of the experts.

As illustrated in these three cases discussed above (and in all those cases discussed elsewhere in this article), the practice is that the court admits irrelevant and otherwise inadmissible expert opinion evidence. The expert reports are surprisingly divergent in all other aspects that there is no common thread we can draw from those decisions.

In addition to the determination of criminal responsibility, the law provides that in order to determine "what treatment and measures of an educational, corrective or protective kind would be most suitable" to the young convict, the court may seek the assistance of an expert regarding the physical and mental condition of such young person.[23] The authors did not have access to such examination reports of experts.

2.2 Medical Examination

Where the dispute relates to physical injury to a person, a medical examination is done with a view to determine whether there exists an injury and the nature and extent of such injury. Medical reports come from different institutions: it could be dentist reports or reports from clinics and health centres. For sex related offences, medical examination results often come from Ghandi Memorial Hospital, etc.

In criminal matters where, at the investigation stage, the investigating police officer believes medical examination is necessary for the investigation he may

[23] Crim. C., Art 54(2).

order a registered practitioner to conduct such medical examinations, including blood test.[24] Such medical examination may be ordered both for investigation as well as for treatment purposes. Where such examination is to be conducted on the victim, the police needs to get the consent of victim, her guardian or parent.[25]

One such medical report which usually comes from Menelik II Hospital Pathology Department is autopsy. As the purpose of examination is related to the determination of the cause of death, it is dealt with under causation.

2.3 Causation

Causation is a fundamental issue to be determined by the court, principally in criminal matters and tort claims cases. Often the determination of whether a certain fact is a result of another fact, or whether there is an intervening cause and whether such intervening cause is in itself sufficient to bring about the result, etc. is usually a subject of expert opinion evidence.

One such determination of causation by an expert commonly used in our courts is autopsy. There is a consistent practice, at least in Addis Ababa, that as soon as the investigating police officer learnt the death of a person, she sends the corpse to Menelik II Hospital for examination in order to determine the cause of death. A review of the cases where autopsy result is presented reveals that, the autopsy report is not turning evidence. Often, the facts are sufficiently proved by other evidence, such as, witnesses and exhibits. The autopsy report is meant to affirm the already established cause of death.

In *Public Prosecutor v. Mohammed Aman*[26] defendant was charged for ordinary murder contrary to Crim. C., Art 540. As indicated in the prosecution charge, defendant hit victim at the back of his head three times with his bare fist, and the evidence includes lay witnesses' testimony and autopsy report from Menelik II Hospital, the only documentary evidence. The autopsy report has four parts: (a) brief history - which is a tip the Hospital gets from the police

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[24] Crim. Pro. C., Art 34.

[25] Crim. Pro. C., Art 34(2)

[26] *Public Prosecutor v. Mohammed Aman* (Federal High Court, Crim. File No 112738, 12 February 2013)

by the time the corps is delivered; (b) external examination - in this case, the report states that there is "no external sign of trauma;" (c) internal examination - which states "subarachnoid haemorrhage and bleeding into ventriere and hematoma in cerebral region;" and (d) the main cause of death - a finding. In this case the main cause of death is "head injury." Based on those evidence defendant was found guilty of ordinary murder.

One cannot help raising the fundamental question whether being hit three times with bare fist at the back of one's head would cause death in the normal course of things. As the expert did not appear before the court, this question was not raised and was not addressed. Neither extraneous causes were mentioned as possibilities nor were they ruled out.

Likewise, in *Public Prosecutor v. Constable Metew Akele, et. al.*[27] defendants were charged for murder contrary to Crim. C., Art 540. The autopsy report, presented as documentary evidence, finds that "the main cause of death" is "severe head trauma [of] unknown circumstances."

The expert opinion report presented as accepted by the court in these two cases and others not discussed here,[28] share the same shortcomings that other expert opinion evidences have which is the fact thatthey are statement of findings often using only phrases. But the autopsy results have two more shortcomings. First, they exclusively focus on internal and external physical examination. The reports do not include results of toxic substance and similar biochemical examinations and underlying factors, such as, prior illness that caused victim's physical frailty or compromised immunity.[29] Second, the report states only "the main cause of death" which is not recognized by the law. The autopsy examination is, therefore, incomplete in terms of scope regarding causation which makes the current methods of examination less helpful to the justice

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[27] *Public Prosecutor v. Constable Metew Akele, et. al.,* (Federal High Court, Crim. File No 102904, 23 December 2011)

[28] Also see *Public Prosecutor v. Commander Girma Moges* (Federal High Court, Crim. File No 106053, 21 March 2013). All murder cases discussed in this article have autopsy reports.

[29] In examination of cause of death all known natural causes of death must be excluded; until all such known natural causes of death are excluded, the cause of death remains unknown. Keane and McKeown, *supra*, n 11, at 252.

system, and the finding is not relevant to the determination of the fact in issue - causation.

2.4 Police Technical Evidence

However, wrongly stated in the law, the police, by the very nature of the institution, host personnel that are experts with specific qualifications and able to conducts examinations of physical items because of the availability of certain observational devises.[30] Some of these examinations, frequently used by the court, are discussed below.

i. Examination of documents for genuineness of handwriting, signatures, stamps etc. -

In *Public Prosecutor v. Getahun Assefa*[31] defendant was charged for fraudulent misrepresentation in violation of Crim. C., Arts 27(1) cum. 692(1) and material forgery in violation of Art 375(c) for allegedly creating a CPO (Cashier's Payment Order) payable to him without authority.

The construction company the defendan owns submitted a bid for a construction work run by Addis Ketema Sub-City Education Department. Along with the bid document a bid-bond CPO for Birr 19,000 was also submitted. The company did not win the bid. Therefore the back of the CPO was marked, signed and stamped on by the Addis Ketema Sub-City Education Department for return of the said amount to the company which submitted the

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[30] Ethiopian Federal Police Commission Establishment Proclamation No. 720/2011, Art 6(15) provides that the Federal Police Commission "conduct[s] forensic investigation and submit its findings and provide expert witness [sic] to court or the requesting organ." This gives the impression that the Federal Police has monopoly of forensic examinations, and it is the only institution that provides expert "testimony."

[31] *Public Prosecutor v. Getahun Assefa* (Federal High Court, Crim. File No 94179, 10 May 2012)

bid. Defendant then presented the CPO to Awash International Bank for a refund. The Bank refused payment on the ground that the CPO was not issued by the Bank.

At the hearing the prosecutor presented three witnesses and only two of them were heard. The key evidence in this matter was the CPO which is said to be illegally created by the defendant and the police report on the result of the forensic examination.

The police forensic examination result report has five parts. The first part of the report states who requestd/ordered the examination; usually it is either the court hearing the matter or the police conducting the investigation that orders or requests such forensic examination. In the present case it is the Arada Sub-City Police Department which requested the forensic examination.

The practice shows that such request for forensic examination states what is to be examined, and usually other documents are also submitted for comparison. The second part of the report, therefore, states the document to be examined and the accompanying documents sent for comparison.

Here, the report states that (a) the document to be examined is the CPO (with specific number and date of issue) said to have been issued by Awash International Bank S.C., in the name "HAMER NOIHE CONSTRUCTON" in particular (1) the handwriting and signature, and (2) the circle stamp put at the back of the CPO. The report further states that (b) for comparison (1) a sample written and signed by Getahun Assefa (defendant) in the presence of the party requesting the forensic examination; and (b) the correct *Addis Ababa City Administration Education Bureau Addis Ketema Sub-City Education Department* circle stamp was also sent.

Part three of the report states that the objective of the forensic examination is whether those writing, signature and stamp stated under (a)(1) and (2) are similar or identical with those sent for comparison as stated under (b).

The fourth part of the report states the process of the forensic examination and the findings. The report thus states that "with the help of magnifying technical devises, those writing, signature and circle stamp that are stated under (a)(1)

and (2) were individually compared with those stated under (b)(1) and (2)." [Translation ours].

The finding is that "those stated under (a) are similar with those under (b) in style, character, in movement of word creation, in the creation of the alphabet, in size, shape and unique customary signs. Therefore, according to the results of the examination (1) the writing and signature stated under (a)(1) is written and signed by Ato Getahun Assefa; (2) the circle stamp stated under (a)(2) is also stamped by the correct *Addis Ababa City Administration Education Bureau Addis Ketema Sub-City Education Department* circle stamp." [Translation ours].

The last and fifth part of the report is name, title and signature of two individuals who conducted the forensic examination.[32]

The court, after evaluation of the evidence, found the defendant guilty and his appeal to the Supreme Court was also dismissed because the Supreme Court held it found no ground for intervention.[33]

ii. Matters relating to identity, such as, fingerprints and other traces left behind at the scene -

Often in criminal cases where identity of the offender is not established, the police conduct examination of traces, such as, fingerprints, footprints, tyre impressions, blood spatters, hairs, etc.[34]

In *Public Prosecutor v. Constable Atlabachew Lakew and Srgt. Andinet Kebede*[35] defendants were assigned to guard the then Ministry of Capacity

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[32] The same process is used in *Public Prosecutor v. Tigist Tadios* (Federal First Instance Court, Crim. File No 171433, 14 July 2010) who is charged and convicted for correcting her age in her student report card without legal authority contrary to Crim. C., Art 378. Also in *Public Prosecutor v. G/Egziabiher Tewolde and Tadesse Berihun* (Federal High Court, Crim. File No. 10419, 27 October 2006) defendants were charged and convicted for violating the Special Penal Code (Proclamation No 214/1982) Art 17(1) for changing the vehicle sale value assessment figures.

[33] *Getahun Assefa v. Public Prosecutor* (Federal Supreme Court, Crim. App. File No 80801, 19 July 2012)

[34] For many more criminal forensics, generally see Kailey, *supra*, n 3; Keane and McKeown, *supra*, n 11, at 527-529

Building. They were charged for aggravated theft contrary to Crim. C., Art 669(2)(b) for allegedly stealing office items from Office No 2. The first defendant pled guilty while the second defendant pled not guilty. Because identity had to be established, one of the evidence the Public Prosecutor presented was fingerprint examination report drawn by the Federal Police Forensic Department.

The content of the report is similar in form and content with the document examination report presented in *Getahun* (*supra*). Fingerprint trace was found on the door knob of Office No 2. The fingerprint samples of 10 individuals were taken for comparison including that of the two defendants. The objective of the examination is stated to be determination of whether the fingerprint trace left at the door knob of Office No 2 match with any of the fingerprint samples of the ten individuals. .

The examination process involves the use of special lighting and magnifying glass. The finding of the examination was that the fingerprint trace found on the door knob of Office No 2 is similar to that of the second defendant's fingerprint.

Ironically, something is not clear from the readings of the records of the court. The Federal Police Forensic Department Report indicates that the examination is conducted regarding the identity of the person whose fingerprint traces were found on the door knob of Office No 2. However, the second prosecution witness Srgt. Tariku Tsegaye states that the second defendant's fingerprint traces are found on 6 of those items stolen from the office. This difference between the testimony and the expert opinion evidence then begs the question which one is correct, admissible and reliable.

The court, however, convicted the second defendant based on the evidence presented including the police forensic examination report.

iii. Ballistic test and other demonstrative examinations -

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[35] *Public Prosecutor v. Constable Atlabachew Lakew and Srgt. Andinet Kebede* (Federal First Instance Court, Crim. File No 41392, 15 October 2012)

This test is conducted in order to determine whether, for example, a gun seized from a suspect has been shot with, or whether a specific bullet had been discharged from a specific gun, etc. Although it is closer to demonstrative examination, the matching of the marks on the barrel and the bullet are the 'fingerprints' of the gun without the need for other comparison. This examination is also conducted by the Federal Police Forensics Department.

In *Public Prosecutor v. Tilahun Eshete*[36] defendant was charged for aggravated murder for shooting and killing his wife and her sister. The Federal Police Forensic Department conducted technical examination on the bullets collected both at the scene of the crime and from one of the victims' body and the report concluded that those bullets were discharged from the gun that was seized from the defendant.[37] Based on such and several other evidence presented by the Prosecutor the defendant was convicted and sentenced to life imprisonment.

As discussed in these few cases, the police technical examination expert report are better than the other expert reports in two aspects. First, the reports directly address the issues pending before the court for resolution. Second, the reports state the process of examining the material given to that department.

2.5 Auditing of Financial Accounts

In many cases the dispute may involve auditing of financial accounts in order to help the court reach a reasonable conclusion regarding the respective rights and liabilities of the parties. The court in such cases requires the assistance of auditors, i.e., certified accountants. They examine documents and transactions in order to determine assets and liabilities.

At this juncture the authors would like to note that although the foregoing discussion has focused on criminal cases., this is mainly as a matter of convenience since the facts in criminal matters are straightforward and more

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[36] *Public Prosecutor v. Tilahun Eshete* (Federal High Court, Crim. File No 68115, 26 August 2009)

[37] As defendant raised the defence of insanity, he was examined by Amanuel Specialized Mental Hospital and found to be responsible for his actions. Likewise, autopsy was conducted on the victims in Menelik II Hospital and the report shows both died of bullet wounds.

susceptible for intelligible discussion. Otherwise, expert opinion evidence is also used in civil matters much more frequently than it is used in criminal matters. For instance, valuation of property is one additional subject the law indicates calls for expertise (Civil Code, Art 1006, 1084 and 2856). Further, experts are appointed in liquidation of bodies corporate, determination of damage both in tort and contractual matters, etc.

Those subjects that call for expertise are either scientific, technical or requires otherwise specialised knowledge whether such assistance is sought by law or the decision of the court. Conspicuously absent from the practice are products liability and professional malpractice cases, including, medical malpractice and construction defect disputes. In products liability litigation, whether an injury is a result of defective product, experts may be heard to test whether such injury is caused by such product and the defect relates to production or design.

3. The Nature and Extent of the Assistance of the Expert

In order to properly determine the nature and extent of the assistance of the expert, courts may have regard to the nature of the facts, i.e., whether the subject calls for expertise,[38] responsiveness of the expert opinion to the issue framed by the court, and whether the report is a definite scientific finding or legal conclusion.

First, the nature of facts in respect of which the court requires the assistance of the expert must be scientific, technical or require specialized knowledge and skill. It is based on the unique nature of those facts that the law or the court determines whether such expert assistance is necessary. Therefore, where the facts do not possess such nature or a fact is a matter of common knowledge, the court may not require the assistance of an expert and it should reject such request by the parties as the evidence is inadmissible.[39]

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[38] As indicated earlier, a fact calls for expertise if the court lacks expertise in the field. Following this, there is an argument that if the court lacks expertise, it also lacks the competence to assess the cogency of the argument the expert proposes. Therefore, the court blindly defers to the conclusions of the expert. Keane and McKeown, *supra*, n 11, at 526

[39] Keane and McKeown, *supra*, n 11, at 529; J. Grossman, *supra*, n 12, at 4

For instance, the interpretation and application of the laws of the country are the basic duty of the court; therefore, the courts have the final decision on the subject. In such cases the court does not need the assistance of an expert.[40]

In *Public Prosecutor v. Temesgen Desalegn and Mastewal Publishing and Advertising Enterprise*[41] the second defendant was the publisher of a newspaper called "*Fitih*" and the first defendant is the Editor-In-Chief. News articles (or commentaries) allegedly written by first defendant were published in the said newspaper. Based on such publication, defendants were charged for four different counts: provocation and preparation contrary to Crim. C., Arts 43(1)(a) and 257(a); defamation against the state contrary to Crim. C., Arts 43(1)(a) and 244; inciting the public through false rumours contrary to Crim. C., Arts 43(1)(a) and 486; and against the second defendant only, for participating in principal capacity by publishing and circulating newspapers with such unlawful content contrary to Crim. C., Arts 34(1), 44(1) and 257(a).

The defendants' defence was that the contents of articles published in the newspaper are covered by the provisions of Art 29 of FDRE Constitution which provides for the freedom of expression and some of the provisions of the Criminal Code are unconstitutional. Accordingly, three witnesses were heard and two of them were experts on the content and scope of the right to freedom of expression. They testified that what defendants wrote in the newspaper falls within the meaning of freedom of expression enshrined in the Constitution and few provisions of the Criminal Code are unconstitutional.

In the opinion of the authors, to begin with, what the witnesses did in their testimony is interpreting the law which is the essential duty of the court and the court should not have heard such testimony in the first place.

Second, when the court seeks the assistance of the expert, it may give the necessary instructions regarding the nature and scope of the examination such expert is required to conduct so that the finding of the expert is responsive to the issue at hand. For instance, regarding criminal responsibility, the issue is

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40 J. Grossman, *supra*, n 12, at 4; Keane and McKeown, *supra*, n 11, at 544.

41 *Public Prosecutor v. Temesgen Desalegn and Mastewal Publishing and Advertising Enterprise* (High Court Crim. File No 123875, 17 October 2014)

whether defendant was able to understand the nature and consequences of his actions or he was able to control his actions in accordance with such understanding by the time he committed the alleged criminal act.[42] The expert opinion should be able to help the court resolve this issue. As such the report must contain the mental conditions of defendant and a condition that existed by the time the defendant committed the alleged criminal act.

Likewise, in medical examination the issue may be the cause of such injury, or the nature and extent of such injury sustained by victim. The medical report must address the issue to be determined by the court. It is only where the expert addresses such issues that the expert can properly assist the court in the determination of the facts.

Finally, only the court can decide on the fate of the report, i.e., if it accepts the report partly or rejects it entirely as it deems appropriate and logical. The law is abundantly clear that the final determination of legal issues is left exclusively to the court. As such, the court can use the factual findings of the expert as an input in its legal findings or it may disregard it. However, the court is bound only by the "definite scientific findings" of the expert.[43] This provision gives the impression that the expert is the final arbiter of the facts that are the subject matters of expertise. However, as discussed below, the court must be convinced that the data given to the expert are complete; the expert used a reliable methods or procedures in conducting her examination of the facts;[44] and the conclusion is the result of the information given to her and her expertise. If the court is not convinced that such standard procedural matters

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42 Crim. C., Art 51(2) provides that the "expert evidence shall describe the present condition of the accused person and its effect upon his faculties of judgment and free determination...."

43 Crim. C., Art 51(3) and 54(3).

44 The standard procedure is not to maintain the status quo but to guarantee the validity of the reasoning. If a new method is developed, as long as it is scientific and a breakthrough from the already established practice, that may be accepted. The American Supreme Court added a new rule to the 70 years old "generally accepted procedure" in *Frye v. United States* to "relevant and reliable standard" in *Daubert v Merrell Dow Pharmaceuticals* which is later affirmed in *General Electric v. Joiner*. See Kailey, *supra*, n 3, at 11-19. How the standards for admissibility of expert opinion changed over the years, please see Godden and Walton, *supra*, n 3, at 264-271. Also see U.S. Federal Rules of Evidence, Rule 702 setting the criteria for admissibility of expert opinion evidence.

are met, it can reject even the so-called the "definite scientific findings" of the expert.

The expert cannot in anyway determine that somebody was negligent, or that he is guilty, or is in breach of his duty, etc.[45] For all that they are worth, he can only state the facts as they were. In many of the reports discussed here, that is exactly what the experts did except the cases involving psychiatrist examinations.

4. Appointment of Experts

Experts are liberally appointed at different stages of the proceedings by the parties or courts. In criminal matters, the investigating police officer selects the expert who conducts medical examination regarding the nature and extent of injury to a victim including an autopsy.[46] The police frequently send fingerprints identification, and signature and document genuineness examination to the Federal Police Forensics Department. The results of such examination are presented to the court by the prosecutor later at the hearing.

A defendant has a constitutional right to present evidence in his defence.[47] One such evidence may be expert opinion evidence.[48] However, the court may also require the assistance of experts as the case progresses. The practice indicates that whether or not insanity is invoked by the defendant, psychiatrist evaluation for criminal responsibility almost always is ordered by the court trying certain types of cases.[49]

The procedure in civil matters is more or less identical with the process in criminal matters. If the parties deem certain facts call for expertise, they may

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45 J. Grossman, *supra*, n 12, at 8. In fact, we have extensive use of traffic police incident report in car accident tort claims and criminal responsibility for causing death or bodily injury. The officer appears in court and gives testimony. Usually, it is the police officer who decides which party is at fault and the court appears to be there only to assess damage. The conclusion of the officer is based on the traffic regulations and his is not as such expert in such matters.

46 Crim. Pro. C., Art 34.

47 FDRE Const. Art 20(4), second statement

48 Crim. Pro. C., Arts 124(1), 136(2), 142(3). See also *Fitsum, supra*, n 17; *Chala, supra*, n 19; *Woletemaryam, supra*, n 20; *Tilahun, supra*, n 38.

49 Crim. Pro. C., Art 94(2)(j), 95(3), 96(2); Crim. C., Art 51(2).

hire such experts. This may be read from the provisions of Civ. Pro. C., Art 112(2) which provides for expenses and remunerations when such experts are summoned by the parties.

We can therefore abstract from the discussions on the provisions of the law that experts may be appointed by the parties earlier in the proceeding and later by the court.

However, there is always one particular provision frequently referenced to by the decisions of the Cassation Bench - Civ. Pro. C., Art 136 - which provides that "where the court considers it necessary or expedient that the facts in dispute between the parties should be verified" by an expert, the court may appoint "one or more experts or persons skilled in the matter."[50] The Federal Supreme Court Cassation Bench in *Chilalo Contractors PLC v. Africa Engineers Construction*[51] gives a wrong impression that this provision is the only avenue for appointment of experts in civil matters.

The dispute was regarding construction machinery rent. On appeal the Federal Supreme Court ordered both parties to appoint one accountant each to work together and produce a joint report to the Court. Each auditor submitted his own separate report with different results. The Court accepted only one of the reports on the ground that it is "detailed and convincing" and rejected the other.

In reviewing this judgment, the Cassation Bench indulged itself in a shallow discussion about appointment of experts in other legal systems. It stated that in the common law system, it is the parties that appoint the experts while in the civil law system, it is the court that appoints experts. The Cassation bench also noted that we follow the civil law tradition and as a result , Art 136 of the Civil Procedure Code states that it is the court that appoints experts.

It therefore held that the Supreme Court should have appointed the expert itself. Because both experts violated the order of the Court appointing them,

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50 Civ. Pro. C., Art 136(1).

51 *Chilalo Contractors PLC v. Africa Engineers Construction* (Federal Supreme Court Cassation Bench, Cass. File No 44522, 24 December 2010) Vol 12, at 404.

accepting one of the reports is contrary to the provisions of Art 136. It then overturned the decision of the Supreme Court.

The interpretation of Civ. C., Art 136(1) and the reasons provided are fundamentally flawed for at least two obvious reasons. First the Civil Procedure Code which provides for Art 136(1) is borrowed from the Indian Civil Procedure Code which is a common law system which is something that the Cassation Bench appears to have missed. Second, this interpretation disregards the provisions of Art 112 by which parties may also appoint their own experts.

However, the same Cassation Bench in *Yessu PLC* gave a biding interpretation of Art 136(1) that parties may also call their own expert witnesses.[52]

5. Determination of Expertise

Before the court admits the testimony of an expert, it must be affirmatively proved to the court that the person has the required and relevant expertise on the subject for her examination.[53] There is no well-established procedure provided for in the law or developed by the practice of the courts by which expertise of an expert would be established or tested.

The Federal Supreme Court Cassation Bench held that experts are those who, because of education, training or experience have special knowledge and that when courts call on them for their expertise, it must first establish they have the relevant expertise. If the expert opinion evidence is required in the area of engineering, then it must be established the person has knowledge in the field of engineering. Similarly, in the field of architecture, technology and similar fields, when the court believes such expert opinion is necessary, it may hear such expert testimony on its own motion or at the request of the parties.[54]

In the determination of expertise, the court may evaluate the relevance and sufficiency of the education and/or training the expert had in the field her expertise is sought where such fields are scientific or technical.[55] However,

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52 *Yessu PLC*, *supra*, n 7.
53 Keane and McKeown, *supra*, n 11, at 533, 534.
54 *Yessu PLC*, *supra*, n 7.
55 Keane and McKeown, *supra,* n 11, at 534.

education is not given in all trades. In such cases, if the subject matter requires specialized knowledge and such person is engaged in this activity for a living and she has been doing it for a substantial period of time, certainly, she must be an expert because the market assessed her so.[56]

Where a person claims to be an expert in a certain field it does not mean that he is the only knowledgeable person in the subject matter, nor should he be the best. It only means he has the required knowledge, and skills, he has taken training or he has acquired a good experience, and he understands the procedures and the normal practice of the profession. If a certain amount of information is given to him, he will come up with a certain result using his knowledge, skills, and reliable methods or procedures in making such analysis.

The current state of affairs of expert opinion evidence creates a serious confusion regarding determination of expertise. As alluded earlier, autopsy is always conducted by Menelik II Hospital; technical examinations are conducted by the Federal Police Forensics Department; and psychiatric evaluations are conducted by Amanuel Specialised Mental Hospital, etc., each of which is a government institution. This is not because those institutions have monopoly of knowledge or expertise.

In practice, this created at least two fundamental problems seen in the determination of expertise of the person giving opinion evidence. First, there is this institutional bias that associates the competence of the experts with the institution hosting those professionals.

It is a reminiscent of this unstated belief implicit in the Ethiopian Federal Police Commission Establishment Proclamation No. 720/2011 Art 6(15) which

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[56] *Id.* Such is the case relating to artistic, cultural and similar 'practices'.
Unrelated to this, there are no administrative regulations in this country. Almost all corruption cases are related to administrative procedure. Because there are no administrative regulations or guidelines, the court always requires a written explanation about the administrative practice in that particular office. Such administrative practice has to be written by a person who has ample experience in the office and it is preferable if he is senior in his position. The practice of the court is that, it does not look into the competence of the person who wrote the letter; simply because it came from that office with a header and a stamp, it admits the letter into evidence and gives it effect disregarding any challenge by defendant. See for instance, *Public Prosecutor v. Wondewossen Alemu, et. al.*, (Federal High Court, Crim. File No 87233).

provides that the Federal Police Commission will "conduct forensic investigation and submit its findings and provide expert witness to court or the requesting organ." This is an otherwise expression that the institution of the Federal Police is competent to deliver such testimony on forensic matters. We believe this is a serious mistake on the part of the drafters of this Proclamation.

Because such bias is pervasive that the courts, at times, donot appear to understand how competence is established. In *Tilahun,* for instance, because defendant invoked insanity the court reasoned "Amanuel Hospital, which has the ***authority*** to conduct psychiatric examination found no illness"[57] therefore his defence is not acceptable. [Emphasis added].

Second, a major problem seen regarding expertise is either the result is produced by a body that has not conducted the examination and/or the person who is said to have undertaken the examination does not state his competence other than his title, e.g., Inspector Thomas, Dr. Dereje (Pathologist), etc. For instance, the psychiatrist evaluation conducted by Amanuel Specialised Mental Hospital is signed by the chairman of the Medico-Legal Committee who is also a psychiatrist but who may not have examined the patient.

This has a negative impact on the credibility of the report and the admissibility of the expert opinion evidence.

6. Presentation of Expert Opinion Evidence

Unlike lay witnesses, experts do not necessarily have personal knowledge of the subject matter they are required to testify about.[58] Therefore, the expert is given the relevant information at her place of work and she is expected to deliver a reasonable conclusion on the subject given to her for examination that is helpful for the disposition of the issue before the court. She may also be asked to answer hypothetical questions.[59]

The manner of giving opinion is not clearly provided for in the law. A review of the best practices in our legal system and in other jurisdictions (which makes

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[57] *Tilahun*, *supra*, n 38
[58] Keane and McKeown, *supra*, n 11, at 541
[59] Ibid.

sense under the circumstances) is that, before the expert is required to appear before the court, she is required to prepare a report of her examination.[60] In order to meet the constitutional and procedural requirements of relevancy, admissibility and reliability of the testimony, the expert report is expected to have the following items.[61]

1. Competence of the Witness as Expert - the expert at the beginning of his report should state his competence as an expert on the subject under consideration. For instance, he may have to discuss his education, his experience on the subject (with specialisation and sub-specialisation), i.e., how long he has been engaged in this business, whether he has testified as an expert in similar cases, etc. The witness need not be the best in the profession but he must possess sufficient knowledge of the profession, of the preferred methods or procedures for the said investigation and so forth.

2. Content of the Information given to His Analysis and their Completeness/Sufficiency for the said Investigation - the expert witness is different from the lay witnesses in that he may never had personal experience of the facts given to him for examination. He is given the material, the subject matter of the examination and he is required to give his opinion on the subject based on his expertise. Therefore, he has to state the material that is given to him for examination and whether such material is complete for such purpose. Where the material is not complete to conduct the required examination he must proceed with the examination and turn in his report to the court.[62]

3. The Various Accepted Standards of Procedure in Conducting the Said Examination - the expert is expected to use preferred methods in his analysis of the material given to him. Such has to be stated in the report. However, where there are two or more procedures, he must state the widely employed standards of procedure in the profession and state which procedure he used and why. He must always use the preferred procedure under the circumstances. If he used a

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60 Civ. Pro. C., Arts 136 and 176(3); *Id.*, at 548-551

61 Keane and McKeown, *supra*, n 11, at 552, 554-555

62 The U.S. Federal Rules of Evidence, Rule 702; Godden and Walton, *supra*, n 3, at 274.

new method, he should state so and why the procedure he used is the preferred procedure for the said examination.[63]

4. The Findings of the Expert - using the information given to him and based on his expertises, the expert needs to state the findings of his examination and the degree of his certainty.

5. Possible Alternative Findings - as indicated above, the information or the material given to the expert for his examination may not be complete for the examination; or there could be different procedures for conducting the examination. Such and other similar reasons may make one firm conclusion impossible. In such cases, the expert needs to state other possible conclusions of the examination. In such cases, he must also state the degree of likelihood of each possible conclusion. If he rules out any of those possible conclusions, he must also state so and explain why.

6. The Report must be Prepared under Penalty of Perjury - as indicated below the appearance of the expert before the court is not certain, particularly in civil matters. It is possible the court would act on the report without the need to call the witness to appear before the court for cross-examination. Therefore, the report must be prepared under penalty of perjury. This may be stated either at the beginning or the end of the report.

7. Personal Attendance of the Expert in Court

The expert report is not documentary evidence in the strict sense of the term; it is a statement of facts and findings the expert would testify should she appear in court. The procedural laws provide that where the parties call experts in their favour, such expert must appear in court, enter an oath or make an affirmation to testify the truth and be open for cross-examination by the other party.[64]

However, if the expert is appointed by the court under Civ. Pro. C., Art 136 it is the discretion of the court to require attendance of the expert after the court has received the report. Should the court decide to call for the personal

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63 See n 46, *supra*.

64 Civ. Pro. C., Art 263(3); Crim. Pro. C., Art 137(3).

attendance of the expert, he shall be examined under oath.[65] The law is not clear, however, whether she could be subjected to cross-examination by the parties. The practice indicates that sometimes the courts allow the parties to cross-examine the expert, sometimes the parties' questions are put to the expert via the court.

In criminal matters, however, the accused has the constitutional right to cross-examine witnesses that testify against him whether they are prosecution or court appointed witnesses.[66] Therefore, if the expert is a prosecution witness (or the testimony is in anyway adverse to the interest of the defendant) the defendant has the right to confront the witness and the decision on the attendance of the witness should not be left to the discretion of the court.

8. Impeaching Expert Opinion Evidence or Testing Credibility

Always, when a proponent presents evidence, certainly the opponent wants to have that evidence excluded. Such impeachment may be done by discrediting the evidence either on relevancy, admissibility or reliability grounds. This may be done either intrinsically by using the evidence itself or extrinsically by producing counter evidence. Likewise expert opinion evidence may be impeached either intrinsically based on the facts in the evidence itself or extrinsically by presenting countering evidence.

7.1 Impeaching the Expert Opinion Evidence Intrinsically

Cross-Examination of the Expert- When the court appoints experts, it also gives them specific instructions regarding the facts to be verified and the report.[67] In the normal course of things, the expert is expected to submit a written report. The report forms part of the record.[68] Once, the expert made his report to the court, he will be examined by the court and the parties after he enters an oath or makes an affirmation.[69]

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65 Civ. Pro. C., Art 261(3); Crim. Pro. C., Art 136(2) and 142(2).
66 FDRE Const. Art 20(4).
67 See, for example, Civ. Pro. C., Art 136.
68 Civ. Pro. C., Art 133(2).
69 Civ. Pro. C., Art 133(3); Crim. Pro. C., Art 136(2), 142(2).

A testimony is challenged for its logical consistency, veracity and reliability intrinsically, almost exclusively by cross-examination of the witness. The expert report is not documentary evidence but a testimony. It is stated in both procedural codes that the purpose of cross-examination is to show to the court that the testimony given in the examination-in-chief is untrue, contradictory, unreliable, etc.[70] In so far as a given question enables the party or her lawyer to achieve the purpose of the cross-examination, the law does not limit the scope of facts on which such cross-examination may be conducted. In expert testimony, particularly, the cross-examination may focus on four major areas. The first subject for cross-examination is completeness of materials the expert examined for the conclusion she drew. The second subject is reliability of the procedure the expert used in conducting her examination. The third subject is the content and logical rigor of her report, i.e., the possibility of different or contrary conclusions. The fourth subject for cross-examination is relating to the expert herself; she may be cross-examined on her competence, on her professional impartiality, that the report is a product of her expertise, etc.[71]

This manner of impeachment of expert opinion evidence may be more appropriate for court appointed experts because the party may not have the procedural opportunity to counter by other expert opinion evidence.

Such impeachment is possible only if the said expert submitted his report well in advance of his appearance in court for examination.

7.2. Countering the Expert Opinion Evidence Extrinsically

Also, once the proponent presents his expert report and testimony, the opponent may counter the finding and testimony of the expert by producing counter evidence. This counter evidence may be expert opinion evidence, lay witness testimony, or any other evidence the fact admits.

Another Expert Opinion Evidence - where the opponent presents his expert opinion evidence, such expert must be given the same data that was given to

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70 Civ. Pro. C., Art 263(3); Crim. Pro. C., Art 137(3).

71 Kailey, *supra*, n 3, at 10; J. Grossman, *supra*, n 12, at 15; Godden and Walton, *supra*, n 3, at 278-279; Keane and McKeown, *supra*, n 11, at 535, 540.

the proponent's expert and he must also be given the report of the proponent expert.

As the report forms part of the record, the opponent expert is also examined based on his report and his findings. In fact, he is subject to the same scrutiny the proponent's expert is subjected to. Therefore, his report and his findings need to be given to the proponent expert to make cross-examination by the proponent possible.

The Federal Supreme Court Cassation Bench made a binding decision that expert opinion evidence may be challenged by an expert with better expertise.[72] This approach is not correct at least for four reasons: first, it creates a "battle of experts."[73] The decision will turn on the excellence of the expert in his area of expertise instead of on the facts. Second, the determination of expertise becomes impossible. The parties in selecting experts, they have to find "the best" in town in order to win their case. That would create confusion as to competence of the experts. An expert with five years experience is not as good as the one with ten years experience. However, a retired expert with thirty-five years of expertise is not as good as an expert who is still active with only fifteen years of experience. Third, the decision on the ultimate issue is the power of the court and the assistance of the expert is limited to a particular fact whose competence and credibility is yet to be tested.

Respondent's expert has a better education, experience than that of petitioner's does not mean that respondent's expert is more credible than that of petitioner as suggested by the Cassation Bench. If credibility is determined solely based on the degree of expertise of the experts there is no role for the court in determining the facts at hand. Fourth, if the expert opinion is discredited only by the opinion of an expert with better experience, then there is no room for lay witnesses who personally observed the facts. In fact, this decision of the

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[72] *Takele Balcha v. Azeb Tsegaye* (Federal Supreme Court Cassation Bench, Cass. File No 47960, 21 December 2010) Vol. 12, at 322.

[73] Godden and Walton, *supra*, n 3, at 264.

Cassation Court contradicts with the decision it passed in *Anbessa City Bus Enterprise*[74] and *Yessu PLC*.[75]

If the witness is qualified as an expert in the field, she examined the material given to her employing preferred and reliable methods or procedures, and stated the conclusions she drew from such examination and based on her expertise, she has done her job and her testimony is admissible. However, if the opponent's expert does the same and reached at a different conclusion, the court evaluated the evidence regarding the reliability of such testimony. As indicated above, the expert opinion evidence is not the only evidence; it is one of the evidences presented by the parties. Therefore, expert opinion evidence must be evaluated in the background of the other evidence and the circumstances of the examination.[76]

Lay witnesses - The findings of the proponent expert may be challenged by producing lay witnesses regarding facts they personally observed. Their testimony may not necessarily be direct on the issue to be addressed by the expert opinion evidence but the court may make its own inference.

The Federal Supreme Court Cassation Bench made two contradictory decisions on this issue. In *Takele*,[77] Respondent purchased a photo printing machine from Sharp General Trading. While Petitioner was transporting the machine, his vehicle was involved in an accident. The dispute is whether the photo printing machine is damaged and the extent of the damage.

Sharp General Trading is said to have examined the machine and it wrote a report concluding the machine is damaged and the damage is total. Petitioner on his part called witnesses who have heard Sharp General Trading employees

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74 *Anbessa City Bus Enterprise v. Zenebework Kebede, et. al.,* (Federal Supreme Court Cassation Bench, Cass. File No 43453, 24 November 2009) Vol 12, at 388.

75 *Yessu PLC*, *supra*, n 7.

76 In assessing the expert evidence the court may have regard to, among others, the (a) quality of the reasoning; (b) correctness of the factual presentation and underlying assumptions; (c) scientific validity; (d) soundness of the expert's methodology; (e) quality of the expert's investigation; (f) experts qualifications and reputation; (g) objectivity of the expert; (h) the expert's performance under cross-examination. See in general Evan Bell "Judicial Assessment of Expert Evidence" in *Judicial Studies Institute Journal 2010:2*

77 *Takele, supra*, n 74.

stating that the machine is not damaged. The Somali Regional State High Court decided for Petitioner in this matter and the decision was affirmed by the State Supreme Court. The Federal Supreme Court held, "as can be read from the provisions of Civ. Pro. C., Art 136(1) expert opinion evidence may be discredited by opinion evidence of another expert with better knowledge and skills on the subject." [Translation ours]. It concluded that such evidence cannot be discredited by lay witnesses and entered judgment that the lower courts made a fundamental error of law and reversed the decision.

Few months later, the same Bench in *Yessu PLC*[78] decided otherwise. The dispute is about who caused a damage to a machinery and Petitioner presented expert witnesses and Respondents presented lay witnesses. The Court held, the expert should give his opinion objectively. Where there is no issue of objectivity raised, the court invoked a rule that "in civil context...lay evidence should not be preferred to expert evidence without good reason."[79] Based on this rule the Court upheld the expert opinion.

In *Anbessa City Bus Enterprise*,[80] an earlier decision, the Cassation Bench relegated expert opinion evidence to circumstantial evidence. It held that, "as the expert opinion evidence is based on opinion [rather than personal experience] it is not strong enough to rebut eye witness testimony. Eye witness testimony is direct evidence" and therefore superior to circumstantial evidence.

Despite inconsistencies of the foregoing Cassation Bench decisions, the general tendency appears to be expert testimony may be impeached by lay witnesses if they are convincing.

Court Appointed Experts - The expert is a witness in the strict sense of the term and he needs to meet the procedural requirements of an ordinary witness. First, he must appear in court. It is provided both in the civil[81] and criminal

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78 *Yessu PLC*, *supra*, n 7

79 This rule is not found in the Ethiopian legal system nor is there such practice developed by the courts. However there is such rule in the English law. Keane and McKeown, *supra*, n 11, at 546.

80 *Anbessa City Bus Enterprise*, *supra,* n 76.

81 Civ. Pro. C., Arts 111, 112, 261.

procedure codes[82] that witnesses appear in court. However, it need not be a physical presence. If the person is outside of the country or in a remote area if coming to court is inconvenient or extremely costly, the court can hear such witness either by a commission in civil matters[83] or via video link both in civil and criminal cases. Second, he must enter an oath or make an affirmation that he will testify the truth.[84] Third, at least in criminal cases, he must be open to cross-examination by the defendant.[85] It is only when all these three procedural requirements are met that a person could properly be referred to as "a witness".

However, where the expert is appointed by the court, the procedure is far less clear and the practice is even worse.

In criminal matters, the issue is whether the expert gave opinion that is adverse to the interests of the defendant. Where the expert gave an opinion that is adverse to the interest of the defendant, the latter has a constitutional right to confront any witness that gives testimony against him. This right includes the personal attendance of the expert in court, entering an oath or making an affirmation to testify the truth and being open to questions that may be put to him by the defendant. This is the same whether the expert is called by the public prosecutor or appointed by the court. Likewise, if the expert is appointed by the defendant, the public prosecutor must have the opportunity to cross-examine the expert witness.

Where it is a civil matter there are two modes of appearances of the expert. If the expert is appointed by the parties, he would appear before the court for cross-examination by the other party.[86] However, if it is a court appointed expert, the attendance of the expert is the discretion of the court.[87] Therefore, impeachment of court appointed expert in civil matters appears to be the discretion of the court.

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82 Crim. Pro. C., Art 136 for prosecution witnesses and Art 142 for defence witnesses.

83 Civ. Pro. C., Art 125, and 127 ff.

84 Civ. Pro. C., Art 133(3); Crim. Pro. C., Art 136(2), 142(2).

85 The Constitution is broad in its statement of the right to confrontation. Art 20(4) provides that "accused persons have the right to full access to any evidence presented against them, to examine witnesses testifying against them..." Thus, defendant's right to confrontation of witnesses can never be restricted on any ground.

86 Civ. Pro. C., Art 261(1); Crim. Pro. C., Art 136(3).

87 The provisions of Civ. Pro. C., Art 136(2) make reference to the provisions of Art 133.

9. Admissibility and Reliability of Expert Opinion Evidence

The rules on expert opinion evidence are put in place to help the court to make use of the best available knowledge regarding a fact that is scientific, technical or requires otherwise specialised knowledge. In making use of such expertise, the court must have effective control of the expert and understanding of her opinion so that the court disposes of cases based on relevant, admissible and reliable evidence.

In order to show to the expert that the court is in control of the determination of the facts, it must give proper instruction to the expert as to the facts to be disposed and the content and scope of her obligation. This also helps the court to obtain a relevant opinion that is helpful for the determination of the fact in issue. As a matter of fact, the determination of relevancy of the expert opinion to the facts pending before the court does not appear to be complicated. It is only other factors that come into play that confuses the issue of relevancy. Often the court appears to have seen some of the opinions beyond its power. For instance, in *Tilahun*, the court stated that Amanuel Specialised Mental Hospital has the "authority" to decide competence.[88] This suggests several things which obviously are wrong. Also, simply because the report comes from a government institution influences the court's judgment of the evidence.

Once the court determines expert opinion report is relevant to the fact in issue, it must ensure the evidence is admissible, such as, by proper appreciation of the suitability of the fact for expert opinion, that the other party is given the opportunity to cross-examine the expert, particularly in criminal matters, proper assessment of competence of the expert, her presentation of the report and those other factors that otherwise affect admissibility of the expert opinion evidence.

However, as much as suitability of the subject matter for expert opinion evidence extends back to the relevancy of the evidence, competence of the expert and presentation of her report extends to reliability. Where, for instance, two opposing expert opinion evidences are presented by both parties that are relevant and admissible, the determination of which expert opinion is more

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[88] *Tilahun*, *supra*, n 38

credible depends on several factors. The completeness of the information, reliability of the methodology the expert used, the logical rigor in analysing the facts and the soundness of her reasoning, the degree of the likelihood of the conclusion she drew from the facts, her independence, her appearance before the court and her answers to questions by the parties, such as, making the subject matter simple to understand, her confidence and other demeanour which we appreciate in lay witnesses matter. The court must exclusively focus on the facts and ignore other factors. This further reduces the battle of experts and puts the court on the driving seat.[89]

10. Concluding Remarks

It is discussed in great length that the use of expert opinion evidence is riddled with a multitude of predicaments both in matters of *fact* and *legality*. But few are outstanding.

1. Some of the reports do not address the issues directly and thus, they are not helpful to the court in deciding the issue at hand. For instance, criminal responsibility (insanity) relates to the mental capacity of the accused person whether she understands the nature and consequence of her actions or to control herself according to such understanding. In such determination the relevant time is the time of commission of the alleged criminal actions. Further, defendant is liable to criminal punishment equivalent to her degree of responsibility.

   The psychiatric evaluations presented are all about the condition existent at the time of evaluation of defendant (patient). All of those reports indicate that defendant is either fully responsible or irresponsible. None of the reports state that defendant is partially responsible. *Chala Qeneni*[90] for instance was a suspect for partial responsibility.

   Likewise, autopsy reports are all about internal and external examinations; they do not consider toxic substance and underlying

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89 Keane and McKeown, *supra*, n 11, at 546.
90 *Chala*, *supra*, n 19.

health issues. The conclusion is therefore drawn from an incomplete examination of the subject matter which is susceptible to error. The report, in fact, states "the main cause of death" of the victim which is not recognized by law rather than "the cause" of death. It is only stating the obvious that those reports are not relevant to the fact in issue and, thus, not admissible.

2. The reports are introduced as documentary evidence of an expert opinion so that the court could act on the basis of the findings of the expert. None of the reports, state the qualifications and expertise of the expert who is said to have conducted the examination; none of those reports state, other than the police technical examination reports, the procedure employed in conducting the examination. They all send a standard one-page formatted paper and one line conclusion usually not even a full-statement, the findings of the said examination. They do not consider all the relevant information to enable us test the reliability of the findings.

3. Many of the cases cited here are criminal matters. Again, many of those expert opinion reports are against criminal defendants with serious consequences. In none of the cases discussed here (both civil and criminal matters) the expert appeared in court to explain the report and to explain the findings of the examination. This nullifies the criminal defendant's constitutional right to cross-examination. Stated otherwise, those reports are not constitutionally admissible.

4. While the state does not have monopoly of expertise, those expert reports, principally in criminal matters, are produced by government institutions. The reports come by a heading paper of the respective institutions with their aura for which the court is giving the weight more than what it deserves. This negatively affects the proper assessment of the expert evidence. Under such circumstances, the findings of the "expert" are hardly challenged by the adverse party because of this dominant practice; it is not even closely looked at by the court.

5. This in clear terms means, in criminal matters by admitting irrelevant, inadmissible and unreliable evidence, the state is "punishing" its ill and poor.

Now after having read this article, one would then ask whether this topic deserves such a research article. The researchers are not attempting to give an academic cover to a practice which pretty much likes the practice of witchcraft from the point of the criminal defendant who is required to enter his defence or who gets convicted based on so-called expert evidence while there is literally nothing he knows about the expert, the examination process and never had a chance to cross-examine such witness. Having appreciated the depth and breadth of problem relating to the use of all forms of expert opinion evidence, it is only an attempt to show the extent of such failings in the manners of use of expert opinion evidence and the immense nature of the measure it requires to be taken to give it semblance of fairness.

In order to make better use of the expertise of our experts and to make decisions based on relevant, admissible and reliable evidence, there are only few steps the court needs to take. The court must first determine the subject matter, because it is scientific, technical or require otherwise expertise is suitable for expert opinion evidence; second, the person selected as expert must possess relevant and appropriate expertise. The expert must then prepare a report to the court and the parties. The report must include competence of the expert, completeness of the material given to her for examination, the methods or procedures available in the profession and the one she chose to employ, her findings and the degree of certainty of her conclusions.

Once the report is submitted to the court and both parties have the chance to review it, such expert must appear in court in person to explain her findings and answer questions from the parties. She must enter an oath or make an affirmation to testify the truth.