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NOTES ON THE IDEAL PROCESS IN THE ETHIOPIAN CRIMINAL PROCEDURE

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I. Background

The Ethiopian criminal justice system had various ways of investigating alleged crimes and punishing the identified offender. The *Fetha Negast* has rules governing various forms of legal transactions one of which is investigation and proof of offences, however insufficient and "unmodern" they were. In relation to investigation there were procedures called *"Lebashai", "Afersata", "Auchachin*" etc. However, it is only after the liberation from Italian occupation that Ethiopia established an official gazette in which laws are published and well-organized courts are established by which those laws are to be interpreted.

The Criminal Procedure Code is the second last code promulgated in the heydays of codification of laws in this country. It is meant to govern the criminal process. The study of criminal procedure may take either of the two approaches: the first alternative is considering it as a process, which is in fact much preferred, and taking a model case in which one may regularly modify certain relevant facts and can have a look at those procedures at each stage of the proceeding from the time information is communicated to the police until judgment is rendered. Alternatively, we can divide the process into four stages based on the institutions or the major actors involved in the criminal process.

These two approaches have no significant difference and one can see their co -existence in the whole study of criminal procedure. In every legal system the study of the law on criminal procedure is divided into four major parts for mere reason of convenience. The first part of the study basically deals with the *investigation procedure*. This part deals with how information may be communicated to the police so that it can commence investigation and various investigative activities that may be conducted. As for the investigation process, because of its delicacy of balancing interests and involvement of various activity of the police each of which tend to encroach the rights of

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citizens this part of the study of criminal procedure dwells on investigation at greater length.

Part two of the study is about the powers and responsibilities of the public prosecutor. The power of the public prosecutor differs from one legal system to another. It suffices to state that the power of the public prosecutor under Ethiopian law is limited. Although the powers of the public prosecutor are to be exercised for quite a short time when seen in comparison with investigation and adjudication, this power is a significant one in that the public prosecutor makes the first decision over the case. This part of the study dwells on the power of the public prosecutor and preparation of the charge which is basically dealing with the content and form of the charge. The third part of the study deals with the role of the court which is basically jurisdiction of courts, trial and judgment. There are, however, circumstances where the proceeding may be different for various reasons. The fourth and the last part of the study deals with post judgment remedies to a party who is not satisfied with the decision of the court.

Even though these four part discussion seems to be universal whether we look at it as a process or we study the powers and responsibilities of the legal actors, the law on criminal procedure in one legal system is different from another. This is because it is very much influenced by the political ideology which pervades a legal system. One that is most affected is the criminal procedure. Thus, it is imperative to give a glance how ideology affects the significance and efficacy of the law on criminal procedure.

II. Ideologies in, Significance and Efficacy of the Law on Criminal Procedure

Criminal procedure as part and "means" of substantive public law such as the Constitution and the Criminal Law has certain ideologies to pursue. Some authorities set models for the discussion of such ideologies in criminal procedure. In his *Two Models of the Criminal Process,*[1] Packer for instance, established two models of criminal procedure law: "The crime control model" and "the due process model".

In the crime control model, the basic proposition is that "the repression of criminal conduct is by far the most important function to be performed by the criminal process."[2] Crime should be controlled for the good of the public as

[1] *U. PA. L. Rev.* (1964) as cited by John Griffiths, 'Ideology in Criminal Procedure or A Third "Model" of the Criminal Process' 79 *The Yale La J.* (1970) P. 359 ff.
[2] Ibid P. 363

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security of the public comes first and this is one of the things that the government is supposed to do. It is a utilitarian model that if a crime is committed, the investigation, prosecution and trial of the offence must be accelerated so that the offender may get the penalty he deserves. This model pursues that the police and the prosecution offices need to be less restricted in their activity.

The due process model, on the other hand, has it as a fundamental process values that individuals' rights need to be respected throughout the whole proceeding and as power is always subject to abuse, even more so with police power, there has to be certain limitations[3]. That limitation is the rights of the suspect and the accused person. Thus, there are certain (rules) requirements, which need to be complied with during the investigation, prosecution and adjudication of offences. Such are the suspect's right to liberty, the right to privacy, the right to bail, privilege against self-incrimination, the rights to be informed of the reasons for the arrest of the person, presumption of innocence and the right to counsel.

However, these are not actually models or different ideologies operating separately. As rightly criticized by Griffiths[4], these are the two polarities between which the criminal process operates. Both are equally important. The public needs some sort of protection against crime so that criminals may not reign. But it is equally the interest of the public, as enshrined in our Constitution in particular, that citizens' rights be protected and respected. A person should not be arrested and his home cannot be searched; nor can he be convicted arbitrarily or without due process of the law. Thus, there has to be a balance between these two conflicting interests of the public.

Criminal procedure law, in effect, makes such balance in the process of investigation, prosecution and adjudication of offences. Procedure as viewed in the context of adjudication is considered as a means for rectitude or accuracy of decision and correct application of the law. This is just an aspect of it - to aid the attainment of substantive fairness. There is also what we call procedural fairness - the procedure having its own end, which derives from values independent from outcome- *respect for the human person* which are sometimes referred to as process values. By this the law makes a clear choice that truth is not an absolute and an overriding value of the criminal justice system.

At the end of the proceeding we may have any of the four possible outcomes: a) convict the guilty; b) acquit the innocent; c) acquit the guilty; and

[3] Ibid

[4] Ibid. P. 364

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d) convict the innocent person. These are the only alternatives from among which we make our preferences known. The first two are correct and just outcomes. The third is tolerable while the last is the worst outcome. Those preferences seem to be end values but there are process values built within them.

Procedure is no more a step to be taken mechanically so as to achieve a certain end; rather procedure is an end in itself, which also brings about another end. It is true, however, that no process in the world is perfect. The efficacy of criminal procedure is measured against the achievement of balanced result between protection of community against crime and the right of the suspect and the accused person; i.e. *the extent to which the system facilitates the enforcement of the Criminal law, by bringing offenders to speedy justice by lawful means, and the extent to which innocent citizens are left undisturbed*[5].

III. The Procedure in a Typical Criminal Case

Crime is a social phenomenon; hence a social fact. It is said to be a social evil, that societies alike endeavor to avoid. Though it is not possible to avoid it, nations exert concerted efforts to reduce incidents of crime to a higher degree so as to establish some sort of security in citizens and regulate the security of state by maintaining certain degree of law and order. Though this is the objective of criminal law, it has a procedure how this may be achieved which has a different objective of its own[6]. The diverse nature of crime and the circumstances in which it is committed makes the investigation and adjudication process diverse. Leaving aside the exceptionally different procedures we need to follow at various stages of the proceeding, a typical criminal proceeding follows a certain ideal procedure. Though this procedure is not the only route that we have to follow in the investigation, prosecution and adjudication of crimes for we may have new facts added to it or absent from, the general trend of a proceeding follows the following procedure. However, as there is a big and sometimes unbridgeable gap between the law and the practice as an *ideal*[7] procedure, the following paragraphs discuss the

[5] Fisher, S. Z. *Ethiopian Criminal Procedure: A Sourcebook*, (Addis Ababa: HSIU, 1969), P.3.

[6] The 2005 Draft Criminal Procedure Code, for instance, under Article 2 provides that *[t]he purpose of criminal procedure law is to secure speedy and compete exposure of offences in conformity with the basic procedural principal law as laid down in the Federal Democratic Republic of Ethiopia Constitution, so that no innocent persons may be criminally prosecuted or convicted, persons accused obtain fair trial and person found guilty be subject to just punishment*

[7] The Ethiopian Criminal Procedure Code is respected more by breach than by compliance. (*Cont. on next page*)

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procedure as enshrined in the Criminal Procedure Code[8], the FDRE Constitution, the 1957 Criminal Code and other relevant laws.

1. In the normal course of things a typical criminal case begins with an accusation by any person or a complaint made by the victim or a person claiming under him. There are certain formal requirements to be complied with when such complaint/accusation is made which are more stringent in cases of offences that are punishable only upon complaint. The police officer or the public prosecutor to whom the accusation/complaint has been made shall reduce such accusation/complaint into writing and read it over to the complainant who shall then date and sign it. There are also cases where the police officer himself observes the commission of an offence, which are said to be flagrant cases, wherein the investigation of an offence begins with the arrest of the suspect.
2. Whatever the mode of initiation of investigation, which may be (accusation, complaint or personal observation of the commission of the offence by the police), the investigation is said have begun when the information is communicated to the police. The investigation proceeding is a proceeding for the purpose of gathering evidence to reach a decision whether the suspect (or the arrested person) is a probable offender or not. This part of the proceeding in basically constituted of four things: a) the arrest of the suspect; b) interrogation of him; c) search of the person and premises of the suspect; and d) examination of witnesses and view of places and other things. (It does not mean, however, mean that all of them have to be undertaken in a single proceeding).
3. In non-flagrant offences, if the police has sufficient evidence to believe that the suspect (i.e. the person against whom the accusation/complaint has been lodged) has probably committed the offence, it may call the suspect by summons. Where the summoned person appears, he shall be interrogated by virtue of Art. 27 (2) ; but should he fail to appear before the police, the latter shall take such steps that are necessary to effect the arrest of the suspect - the only alternative is to apply to a court of law for an arrest warrant. Upon receipt of the application for an arrest warrant by the police,

[7] (*cont.*) In this statement of the ideal procedure, there are many statements that put the legality of many technical matters in investigation and adjudication into question. Those words are carefully selected and the statements are crafted based on the provisions and the spirit of both the Constitution of the FDRE and the Code (setting aside the sloppy provisions).

[8] The 1957 Penal Code is replaced by the 2005 Criminal Code. There are provisions which were meant to be transferred from the old Penal Code to the draft Criminal Procedure Code, and thereby not included in the new Criminal Code. My reference to the 1957 Penal Code is thus, with respect to those provisions that are of procedure nature such as Art 217 ff.

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the court shall consider whether the attendance of the person is *absolutely necessary* for the investigation and *cannot be obtained otherwise*. Such decision shall be based on the evidence that are produced by the police officer and the law i.e. whether the police officer has sent summons and the summoned person after receiving the summons has failed to appear and the offence is not one, which is triable in the absence of the accused. In flagrant offences, however, the police effects arrest without warrant. Once the person appears before the police, whether by summons or arrest, with or without warrant, the consequence is eventually the same - ARREST.

4. Once the person is arrested, the police conduct interrogation over the arrested person. The police before conducting the interrogation must first inform the arrested person that he has the right to remain silent and should he make any statement such statement shall be recorded and put in evidence in his trial.

5. As part of the investigation process, the police may conduct search with or without warrant as the case may be. Subject to the exceptions embodied in the law, the police have to obtain court warrant to conduct search. The court shall issue such warrant of search only if it is satisfied that "the purpose of justice or any other inquiry, trial or other proceedings" in the Criminal Procedure Code will be served by such warrant. Should the court grant the warrant, it shall specify the place where the search is to be conducted and the items to be searched and seized. There are, however, circumstances where search may be conducted without warrant. This is where "the offender is followed in hot pursuit and enters premises or disposes of articles the subject matter of an offence in premises" and information is given to the police that an item which may be relevant as evidence in respect of an offence is concealed or lodged in any place in the premise provided:

   a) the offence is punishable with more than three years imprisonment; and

   b) the police has good grounds for believing by reason of the delay in obtaining a search warrant such articles are likely to be removed.

6. The police may also examine witnesses who are said to have observed the commission of the offence or who have other relevant information about the offence, the offender or the person against whom or the thing in respect of which the offence has been committed. The police may go to the place where the offence is said to have been committed or where immovable evidence is present and it may view matters depending on the nature of the case.

7. If the offence complained of is not punishable with rigorous imprisonment

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as a sole or alternative punishment or where it is doubtful that the offence has been committed or that the arrested person has committed the offence (this does not work for flagrant offences), the investigating police officer may release the arrested person at his discretion, with or without sureties that he will appear at such place, on such day and at such time as may be fixed by the police. If the person is not released by the police for whatever reason, however, he has the right to appear before the court within 48 hours. The court before which the arrested person appears either releases him on bail or remands him into custody as the case may be.

8. The arrested person has the right to be released on bail. Matters of bail are normally decided by having regard to the nature of the offence and the character of the offender. Looking at the nature of offences, they are either bailable or non-bailable having regard to the provisions of the law which in turn is based on the seriousness of the offence as in the provisions of Article 63 of the Code. After the adoption of the FDRE Constitutions, all offences are bailable because it provides for law and judicial involvement[9]. Issues of bail are entertained either on the application of the arrested person or on the motion of the court. In examination of facts for matters of bail the court generally considers the character of the arrested person/the accused. If the person is not likely to appear on such date and hour as may be fixed by the court or, is likely to tamper with evidence or to commit further offences, the court may deny bail. Thus bail is denied basically to ensure the continued presence of the arrested person before the court and in some cases to enable the police officer to complete his investigation and not basically to incapacitate the arrested person from committing further offences in the face of presumption of innocence and the core reasons of bail. If any of the above conditions are not in existence, bail may be granted upon the production of certain security assessed in terms of money all the time.

9. Bail is not a punishment. Upon granting bail, the court should demand a reasonable security which the arrested person can afford and which can compel the person to be released on bail appear before the court. Thus when the court determines the nature and amount of security it is with a view to enabling the arrested person exercise his rights as well as to secure the continued attendance of the person throughout the whole proceeding. If the type of guarantee that is required is personal guarantee, the guarantor has the obligation to ensure the continued presence of the person released on bail at the pain of losing anything that has been promised or deposited (by the guarantor.)

[9] Sub-article 6 of Article 19 provides that *[p]ersons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person.*

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10. In the majority of cases, however, the investigating police officer cannot complete his investigation within 48 hours from the arrest of the accused. Thus he requests the court for remand to enable him to complete the investigation. The court after examining the evidence produced by the investigating police officer, if it is satisfied that the arrested person is likely to tamper with evidence, then it grants remand; stated otherwise, bail is denied to the arrested person. Remand is granted, however, only for a maximum of fourteen days on each occasion. Apparently, the number of remands in custody are required to be within the bounds of the constitutional right of the accused to speedy trial.

11. Bail is denied not to shift the burden to the suspect by the inefficiency of the justice machinery, but by having regard to the exigencies of the situation. Thus, the police has the obligation to complete the investigation without unnecessary delay. The police shall enter all relevant information, which are accessible to it in the investigation diary and in the investigation report day by day as are provided for in the law. On the date of adjournment, the court examines whether the investigating police officer is showing progress in the investigation activity and whether the grounds for denying bail are still outstanding in the absence of which there is no remand despite the fact that investigation is not completed. After completing the investigation, he shall forward the investigation diary accompanied by the investigation report to the public prosecutor.

12. Upon receipt of the police report, the public prosecutor may decide that further investigation be conducted or preliminary inquiry be held or close the investigation file or refuse to institute a charge against the suspect.

13. Preliminary inquiry is a judicial process whereby the public prosecutor has its evidence recorded until the day of the trial. If the evidence is testimonial evidence, such witnesses shall enter bond that they will appear on such date and hour as may be fixed by the court for the trial. The preliminary inquiry is mandatory where it is related to grave offences such as aggravated robbery and first degree murder and it is optional depending on the discretion of the public prosecutor as in offences that are within the jurisdictions of the high court.

14. Upon receipt of the records of the preliminary inquiry or the police report, the public prosecutor has the power to decide whether to prosecute the suspect. There are certain limitations over the power of the public prosecutor that he can not institute a charge if the suspect has died or is a young person below the age of nine or the offence is subject to amnesty or pardon, or the suspect cannot be prosecuted as it is provided for under any special law or under public international law for there is such as diplomatic

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immunity. In other cases, however, the public prosecutor has to decide based on the sufficiency of evidence.

15. Where the public prosecutor believes that there is sufficient evidence, it shall frame a charge and file it before the court, having jurisdiction. The charge serves two purposes: judicially informing the accused what charges he has to answer to and to initiate the trial. Formally, a charge has four parts: the caption, the statement of the offence, the particulars of the offence and the list of evidence. In terms of content the emphasis in placed on the particulars of the offence. It should contain the name of the accused, the offence with which the accused is charged and its legal, moral and material elements, the time and place of the offence, the law and the article which is said to have been violated and where appropriate the person against whom or the thing in respect of which the offence has been committed. As mere description of the dry facts is found to be insufficient to inform the accused what charges he has to answer to, the circumstances under which the offence is said to have been committed shall be described.

16. The court may order the public prosecutor, on its own motion or upon the application of the parties, to alter the misstatement or add the omitted fact or to frame a new charge as the case may be where there is any error in stating any of these things or omission, and if such omission is substantial or misleads the accused or is likely to defeat justice .

17. In order to prepare and file the charge, the public prosecutor needs to know whether Ethiopian courts have jurisdiction over the matter and if so, which level and which locality court has jurisdiction over that particular offence. The question whether Ethiopian courts have jurisdiction over an offence or judicial jurisdiction is not in issue almost in all cases. But which level of court and in which locality a court has jurisdiction over a particular offence are the questions that always bother the public prosecutor.

18. In the existing federal structure of courts, criminal jurisdiction may be exercised both by federal and regional (state) courts. However, as no state has legislated criminal law so far, it is only the federal criminal law that is still in operation. Thus criminal matters are at present the jurisdiction of federal courts only. However, as there are no federal courts all over the country, the jurisdictions of the Federal First Instant and Federal High Courts are delegated to the State High Courts and State Supreme Courts in localities where there are no federal courts. Thus jurisdiction over offences is distributed among Federal First Instance, High and Supreme Court and State High and Supreme Courts. State First Instant Courts do not have jurisdiction over criminal matters today under the existing law.

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19. After determining which tier of court has jurisdiction over the offence the public prosecutor shall determine which local court has jurisdiction. Normally it is the court within the local limits of whose jurisdiction the offence has been committed which has jurisdiction over the offence. If there are several local areas that are involved in the case, the courts in each local area, which is involved in the case, has jurisdiction over the matter. However, having regard to cost and convenience the public prosecutor has discretion to determine before which court to institute the charge.

20. Upon filing the charge, the evidence pertaining to those allegations in the charge are to be deposited in the registry where the accused or his counsel access those evidence to see whether they are reliable or not and to prepare their defense. A copy of the charge accompanied by list of evidence and if preliminary inquiry has been conducted, a copy of such record, shall be sent to the accused.

21. Upon receipt of the charge the court fixes the date and the hour for the hearing. On such fixed day the charge is read over and explained to the accused where after he shall be asked if he has any objection to the charge. His objection may be related to the form or content of the charge or the case is pending in another court, or has been seen and decided finally or it is subject to amnesty or pardon or any other objection that substantially affects the outcome of the case.

22. If the accused does not have any objection or his objection is not sustained, the court shall then ask the accused whether he pleads guilty. If the accused admits the commission of the offence in the terms stated in the charge or he admits all the elements that constitute the offence with which he is charged, he is said to have pleaded guilty and the plea of guilty shall be entered. There is a possibility, however, to amend the plea of guilty to one of the plea of not guilty later in the proceeding before judgment is entered. Again even when the accused pleads guilty, the court may demand the public prosecutor to corroborate the plea with evidence depending on the seriousness of the offence and its conviction.

23. Where the accused denies the charge or the public prosecutor is ordered to corroborate the plea of the accused, the court shall call upon the public prosecutor to produce evidence whatever the nature of that evidence may be. If it is testimonial evidence, the public prosecutor as a proponent shall conduct the examination-in-chief and the accused or his counsel may conduct the cross-examination if he wishes and the public prosecutor again conducts the re-examination if there is any cross-examination and if the public prosecutor wishes too. The scope and purpose of each type of examination is different.

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24. After going through all the evidence (including documentary evidence and exhibits, if there are any) the court makes its ruling depending on its conviction. If the court is not convinced that the prosecution has proved his case to the required degree of proof, it shall acquit the accused without calling him to enter his defense and if he is in custody the court shall also order the release of the person. If the prosecutor proves his case, however, the court calls up on the accused to enter his defense. Such ruling may be made by the court forthwith after the conclusion of the case for the prosecution or on the next adjournment depending on the complexity of the case and the evidence produced thereto.

25. As to the production of and examination of evidence in the defense proceeding, the parties follow the same procedure as in the prosecution proceeding. The examination-in-chief is to be conducted by the accused or his counsel, the cross-examination by the public prosecutor and the re-examination by the accused or his counsel again.

26. After the conclusion of the case for the defense the court shall make a final ruling on the guilt of the accused: conviction or acquittal. If the court is satisfied that the accused/his counsel rebutted the case for the prosecution[10], the court shall acquit the accused and if he is in custody, it shall order his release. Should the court convict him, however, the court shall call upon the prosecutor to produce evidence relating to the antecedents of the accused that are relevant to either aggravate or mitigate the penalty. If it is for aggravation, the accused shall have the right to be heard and he may reply thereto. Finally, the two parties may make final address to the court based on issues of law and issues of fact relating to evidence. In any case the accused has the final word. If there are more than one accused, the court determines in which order the accused persons shall make their final address.

27. The court in writing its judgment should consider all the relevant facts that were alleged by both parties. It frames the issue and addresses the same in the judgment. It shall consider the evidence that were produced for and against the prosecution. It shall also state the reasons why a certain item of evidence is admitted or rejected and state what weight has been attached to each item of evidence. Whatever conclusion the court has made

[10] It is not written under any branch of Ethiopian law that a case has to be proved beyond reasonable doubt but the readings of many of the judgments particularly the old judgments indicates that that is the standard of proof in criminal matters. This can also be inferred from some of the provision of the Anti-corruption special procedure and evidence law. If proof to beyond reasonable doubt degree by the prosecution is required to convict the accused, it stands to reason that the defense need not defy all the proof by the prosecution but lower the degree of proof of the prosecution within the reasonable doubt degree.

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by way of inference from those proved facts is a judgment.

28. If both or either of the parties is not satisfied with the decision of the court, they may, as of a right, lodge an appeal to the next higher court for review. Normally appeal is one. If the appellate court confirms the decision of the lower court that decision of the higher court is final. If the appellate court reverses or varies the decision in some way, however, a second appeal lies to the other next higher court. Such is the case with cases that are tried by the Federal First Instance Courts.

29. If the judgment is a final one from which appeal does not lie or if appeal has been exhausted and there is a fundamental error of law, a party may lodge a petition to the Federal Supreme Court to have his case reviewed in cassation. With that a party goes to execution of judgment. ■

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