Introduction

As in most of disciplines criminal evidence has also its own guiding principles. They serve as guideline to shape the evidence and proof process. There are three general principles and goals of evidence laws. First the desire to discover the truth, second the need to protect innocent from wrongful conviction, and the need to maintain the propriety of the criminal process (see Ethiopian draft criminal evidence law 2009, article 3). In each of these general principles there are detail principles. Among others the following four detail principles are important for my discussion. The relevancy of evidence and exclusion of prejudicing evidence that promote discovery of the truth and, rights based principle and public interest principle that limit the discovery of truth.

This paper aimed at discussing four detail evidence principles in light of Ethiopian draft criminal evidence law 2009 (here in after draft rule or DR). Thus the concept of the principles and the draft evidence rules will be discussed in each part. The paper employs analytical method of discussion that only focus on the draft rule. The paper has three parts. Part I, discuss two principles under the draft rule that promote the discovery of evidence. Part II discusses two principles that limit the discovery of truth. The final part will provide a concluding remark in general.

Part I

Under this part the two principles, relevancy and exclusion of prejudicing evidence, will be discussed in light of the draft rule. First of all it is important to highlight the concept of the principles in brief. Principle of relevancy is about the appropriateness of evidences for a given issue. In general evidences that are relevant to the fact at issue should be taken or considered; otherwise it should be excluded from consideration in determining the fact at issue. The relevancy of evidence is tested based on different parameters. In general evidence of probative value to the fact at issue is relevant and evidence that has no probative value is irrelevant. There is no specific measurement to determine whether the evidence is relevant or not, but ordinary logic or reasonable inference or experiences may be employed. In conclusion any evidence or relevant fact which has proximate to the fact at issue or have value to prove the existence or non-existence of the fact at issue is relevant evidence. However, it does not mean that all relevant

evidence is used for determination of the issue. As I will discuss in the part two some relevant evidence may be excluded.

The principle that prejudicial evidence should be excluded is the other evidence law principle which facilitates the discovery of the truth. This principle is much related to the principle of presumption of innocence. The principle provides that any evidence which create a risk of bias against the accused should be precluded. This is because the evidence my lead the fact finder to the wrong conclusion as to the guilty of the accused. For example the character or previous conviction of the accused likely enable the fact finder to judge the partially against the accused. Of course this is also true for wrongful acquittal if the good character of the accused presented as evidence, but not happen in practice unless in sentencing stage. The principle is not also without exception. Under the coming sub-sections the draft rules will be assessed in light of the above two principle of evidence.

Relevancy of evidence under the draft rule

The draft rule provides the meaning -"Evidence" means anything or process, that enable to prove or disprove relevant fact, which includes witness or accused testimony, document, electronic information, presumption of law, presumption of fact by court and exhibit (DR art. 3/19). "relevant evidence"- Include Evidence that directly or indirectly help to determine the result of a act, shows or create suspicious on a fact that needed to be proved, describe or prove or disprove or support fact at issue, or indicate the time or place or perpetrators relation or prove (DR art. 3/20). In addition article 273/5 of DR defines what relevant fact means in general. Accordingly relevant fact means a fact that have relation with the fact at issue the proof of which has a capacity to prove or disprove the fact at issue. Relevant facts include; cause, purpose, opportunity, preparation, continuous conducts, circumstantial facts before, during and after, character … any fact that proves or disprove the fact at issue (RD art. 273/2).

From the above definition we can see that the DR has provided provisions that are helpful to test the relevancy of evidences. Accordingly, as the definitions given above show that both the prosecutor and accused should adduce evidence which is relevant to establish their case. Evidence is relevant if they are important to prove relevant facts for the fact at issue. Evidence that does not help to establish relevant facts to the fact at issue are irrelevant. In short first the

fact finder should determine the existence of relevant facts to the fact at issue. This can be using his experiences, logic or reasonable inferences. Then the fact finder should determine whether the evidence has relation with and capacity to prove the relevant facts that he determine first.

When we see the effects of irrelevant evidences the court may at its own initiation or by the request of the parties may exclude the evidence. Theoretically it is clear that irrelevant evidences are inadmissible. But when we see the DR under it article 278 it says except in the DR or other special laws stipulated otherwise relevant evidence is admissible. It does not explicitly provide the fate of irrelevant evidences. However, simply from the contrary reading of the same article we can infer that irrelevant evidences are inadmissible. Under article 290 of DR the relevancy of question to the witness can be contested by the accused. Even if the accused did not rise the question the court by its own initiation may order the correcting of the question before the witness give answer to the question (DR art. 292/5). As I will discuss in part II in detail, relevant evidence may be excluded for the sake of accused right protection or public interest or efficiency. How relevancy promote discovery of truth? As regards this question avoiding unnecessary evidences from consideration will prevent confusions and complexities. If the process consider irrelevant evidences it may become complex and may lead for ignoring relevant evidences. This in turn will cause difficult in the discovery of truth. From the above discussion it is clear that the DR consider the principle of relevancy of evidence.

Prejudicial evidence should be excluded

This principle related to the substantive right and procedural guarantee of accused person-presumption of innocence. This principle may be included within the second broadest goals of evidence law that is the need to protect innocent from convection. This principle protects accused from being considered as guilt before the final judgment. In other word prejudicial evidences lead the fact finder to prejudge the case at hand in the middle of the process and reach at conclusion about the guilt of the accused before the final judgment. This causes bias or partiality against the accused to receive punishment even if s/he is innocent.

The draft rules (DR), to this effect, provide provisions that prohibit the production of evidences that have prejudicial effect. Among other the DR exclude the production of character evidence and prior criminal record at the trial stage. Whether good or bad behavior of the accused

adduced as evidence by the prosecution is inadmissible (DR art. 280/1). This provision excludes both good and bad character of the accused. In practice it is clear that prosecutor mostly do not use good character of accused as their main target is conviction. Even if prosecutor said to be neutral, in practice the situation of promotion and transfer to urban area depends on the rate of conviction that a prosecutor accumulate. This systematically oblige prosecutor to focus on the conviction of the accused. Thus mostly they may use the bad character of the accused as evidence. However, the law excludes such evidence *ab intio* fearing there might be prejudice against the innocence of the accused. Even if the good character is used as evidence it is already excluded by law. This is important to prevent wrongful conviction of innocent persons and also prevent letting unpunished criminals. This facilitate truth discovery by preventing erroneous truth or false conclusion made based on the behavior of the accused. The production of behavior of victim is not excluded to be used as evidence by the accused (DR art. 280/2). In such case the prosecution is allowed to adduce the character of the accused as evidence to challenge the evidence of the accused as to the victim's behavior. This is important because the accused may use the victim's behavior to escape liability. Thus the law has to strike balance, permit the prosecution to challenge the accused.

Besides the DR under its article 281, excludes prior criminal record or similar conduct from being used to prove the criminal act in trial. Here the previous criminal record, whether similar to the crime at the trial or not, is not admissible. Because, one the accused should be considered as innocence until proved guilty and second this will make bias the fact finder as to the accused recidivist behavior and may conclude that the accused is guilty. A person who commits a crime before does not mean that he will or he commits another similar or different crime in the future. But from the reading of the whole provision the prohibition of prior record is only to proof *actus reus* of the crime. Because, the same article provides that to prove the plan, preparation, identity, opportunity or intention prior record can be used as evidence.

Part II

This part provides a brief discussion of the other two principles of evidence laws that has a capacity to limit the discovery of truth. The first principle is right-based principle or principle of fairness, which state that any evidence gained against the law or rights of accused person should be excluded or made inadmissible. This principle gives protection for the accused rights in such a

way that it strike balance between the government power and individual liberty. The clear assumption behind this principle is that if the law accepts evidence gained in violation of the law itself the notion of the rule of law will be at risk. This may promote government to violate the rights of the suspects and accused. This also affects the fairness of the process of proof. Since the government has power to infringe the rights and accused has no means to prevent such encroachment, the law serves as arbitrator to remedy such unfairness through excluding evidence gained in violation of rights of the accused. From the perspective of ensuring rule of law and fairness, therefore, evidence which are relevant and important to determine the case will be excluded from consideration.

The second principle is public interest. Even if the evidence is relevant and important for the public interest reasons the evidence may be excluded. This the type of evidence sources are different the rationales for exclusion are different. For example public security and privileges are those particular reasons for exclusion that I will discuss as the part of the generis term-public interest. Any evidence the disclosure of which might endanger the national security may be not adduced as evidence before the court of law. Those potential witnesses who enjoyed privilege may not oblige to testify. In the first case it is clear that the security of the nation and state prevail over certain cases that involve individual or small group interest. In the second case the erosion of public confidence against certain social institutions may endanger the existence of the institutions itself or may cause public disturbances. For example in client-lawyer relation, if the conversation from the relation admitted as evidence the public confidence on the institution of advocacy will be eroded and the existence of the institution of advocacy will be very less or even if it exists it will become useless. A detail discussion will be made in the sub-section dealing with public interest principle in light of DR. Generally the exclusion of relevant and important evidences clearly limits the discovery of the truth. But this does not mean that truth cannot be discovered without such evidence but becomes very difficult as compared to the situations if the evidences were admissible.

Right-based principle or principle of fairness

There are rights in violation them evidence may be gained that would not be the case otherwise. This does not means that evidence cannot be gained unless the investigator act against the rights of the suspect or accused but evidence might be gained through torture; violating right to legal

counsel, through promise, and other means otherwise it is not such easy to get them. These rights might be substantive rights or procedural or both. For example right to be free from torture, right to legal counsel, right against self-incrimination, right to silence, right to privacy and fair trial in general. Evidence rule must consider such rights and should protect as well as be consistent with such rights.

The draft rule under article 279 provides lists of inadmissible evidences. Confession or any evidence gained from the suspect or accused through use of force and incriminate himself in in admissible. Whether the Amharic term "**በሃይል ተገዶ**" is equal to the term torture or coercion as the constitution provide is not clear. But it is better, in my opinion, to translate word by word as "use of force" since it includes both terminologies. Thus evidence gained through torture, cruel, inhuman or degrading (CIDT) manner as well as any other means that involves use of force should be excluded (DR art. 279/1/a). This is because it is violation of rights of individuals and the principle of a democratic society- rule of law. Among the rights that are protected by this provision the right to remain silent/right against self-incrimination, and right to be free from torture and CIDT during interrogation are the main.

Besides, any evidence gained in contrary to the laws regarding special evidence gathering methods (DR art. 279/1/b and art. 110). Special evidence gathering procedure is only granted by federal high court or regional Supreme Court. This procedure is permitted for crime of corruption, money laundry, tax and custom related crimes, financial support for terrorist activities, computer crimes, terrorism, human trafficking, rape, crime against the government and constitutional order (DR art. 104 cumulative with art. 64). The methods includes interruption in the electronic means, telephone, letter of a person, voice or video record by using devices in the private property or place or by spying, documents and different photos. Any of evidence that is gained in contravention to the fulfillment of the procedure is inadmissible, even if they are relevant and important. In addition any electronic evidence gained contrary to the previous procedure is inadmissible (DR art. 313). These provisions protect the right to privacy of the suspect or accused.

Public interest

Privilege

There are information and evidences that disclosed due to the existed or existing social and professional relations. Information disclosed to the professionals like lawyer and medical doctor due to the service relation between them and their clients. These persons are having gained privilege not to disclose the information or not to testify before court against their client (DR art. 283/1). This is to maintain the confidence between the public and the professional institutions. The law seems to strike balance between public trust to the institutions, the professionals' morality and the truth. It is clear that if privilege was not available the public will not trust professional and the profession and professionals will face huge crisis. Thus, it is better to risk the truth as there might be alternative choice to discover it. Religious father or leader as the case may be is not obliged to disclose information they gained due to the religious relationship between them and their religious service takers. This is to maintain public confidence on the religious father thereby maintaining religious values. Besides, it is to protect the moral value and conscience of the religious fathers.

The information disclosed to the partner of marriage during the marital relationship is also no obliged to be disclosed (DR art. 283/2). It is true that family is the foundation of the society that should be protected. In this case if the law obliges one of the partners to disclose such information the marital relationship would not based on truth and clear communication between the partners. The relationship between husband and wife will be very confidential that might affect the stability of the family- which also has impact on the stability of the society. In all these cases the information may be very relevant and very important to reach to the truth but better to risk consequence of its inadmissibility than confronting the result of its admissibility.

Confidential information and documents

Government employee cannot disclose any information or document, the confidentiality of which is provided by the law, as evidence to the public prosecutor. In addition even if the law does not provide so, if such information or document is related to the national security the court may order the high official of concerned institution to decide on it. When the court belief that the information or the document has nothing to do with national security to determine whether the discloser would harm the public interest or not in closed chamber. The whole procedure may also be seen by camera/closed chamber (See RD art. 385/1-3/).

Any confidential information or document which is considered as confidential by law is automatically excluded. Prosecution cannot produce such information and documents as evidence, any government employee in whose had such information is available cannot and shall not disclose even if the information or document is very important to decide the case. For example a national security employee cannot testify as to how its institution use to destroy enemy in a wrongful ways, defense army cannot testify how the military used the tactic to committee war crime. This is because it is the general strategy of the military against the enemy, the disclosure of which endanger national security. The problem in this regard is who should raise the question that information or document is confidential in case where the law is silent about the information or the document- is the public prosecutor, the witness or the defendant or the court? I think since the issue is about the whole public interest all of them in proceeding may apply for non-disclosure of the info-or- document. But, there is no clear and objective standard to determine whether information or a document involves public interest. It is better to determine the issue on case by case basis.

In case where information concerns with the national or public interest bun not involve national security issues the court in camera proceeding will determine whether the discloser of information or document harm the national interest or public interest. However, there is no meaning or indicative illustrations about what constitute national or public interest.

Concluding remark

The draft rule of evidence under its article provides the objective it wants to achieve. Theoretically as discussed above there are detail principles that are devised to attain the objective set by the law. Even if the draft rule did not provide those principles under a specific article, as the above discussion shows at least the four principles are addressed in different provisions of the draft rule. As the forgoing brief outlined principle serve as guideline to the rules or laws. The draft evidence rule take in to consideration those evidence principle as a guideline.

However, as in part one and two shown there is still clarity issue that invite interpretation. It is clear that as much as possible law should be clear and open. Different terminologies still require clarity, such as the Amharic term “**በሃይል ተገዶ**”. Besides who should decide information involve national security, public or national interest…etc.