

NOTES CORNER

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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

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 limitations³. 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 Griffiths⁴, 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

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 own⁶. 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)

procedure as enshrined in the Criminal Procedure Code⁸, 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 is 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.

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 involvement⁹. 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.*

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 is 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 Instance 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 Instance 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 prosecution¹⁰, 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

¹⁰It 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.

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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NOTES ON GOOD GOVERNANCE

*Maru Bazezew**

Introduction

After the end of the cold war, good governance has become a topical issue. The influence of the international community and international organizations such as the World Bank and the International Monetary Fund (IMF) has enhanced the momentum towards good governance thereby enabling it to become an important concern of the international community at large especially with regard to the emerging democracies and developing countries like the ones in Africa. In some cooperation programs good governance is indeed the prerequisite for allocation of funds and financial aid.

In the political arena, the concept of good governance presupposes political pluralism, and the end of the cold war has led onto an epoch of democratization owing to the fact that the international community is cognizant of the obsolescence and pitfalls of one-party political systems. This is related with good governance because, the exercise of constitutional rights and freedoms like freedom of expression, assembly, formation of political parties, etc. facilitates the forum of popular participation in the political process that becomes a necessary setting for good governance.

Moreover, good governance is among the key instruments towards sustainable economic development. It enables resources to be used effectively and efficiently. And, economic decisions are made on the basis of grass-root needs and priorities. Corruption and abuse of power, that are detrimental to economic development, are also addressed under commitments and efforts of good governance. To this end, the United Nations and African Union have introduced draft resolutions to combat corruption.

Good governance might have different features. For example, the United Nations Economic and Social Commission for Asia and the Pacific has identified eight features of good governance: These are Accountability, Transparency, Responsiveness, Equitability and Inclusiveness, Effectiveness and Efficiency, Rule of Law, Participatory practices and Being Consensus Oriented. According to Wikipedia, the Free Encyclopedia, the characteristics

are Decentralization, Public Participation, Transparency and Accountability¹. And according to a conference conducted (in 1996) by the Danish government and EDI of the World Bank, the elements identified were: Decentralization, Public Participation and Integrity i.e., Transparency and Accountability.

Some of the characteristics identified by UNESCAP seem to be overlapping. If there is transparency and accountability, there could be effectiveness, efficiency and responsiveness. Similarly if there is decentralization and public participation, the system is more or less equitable, inclusive, effective, efficient and consensus oriented. Thus this paper shall focus on the following elements:-

- Decentralization
- Public participation
- Transparency
- Accountability
- Independent Judiciary (Judicial Independence)
- Rule of Law
- Public Sector Reform

Decentralization

Decentralization means giving some of the powers of the central government, an organization, etc. to lower level organizations around the country.² It is against concentration of power at the central or organizational level; and requires the empowerment of local administrative bodies and/or organizations. The more power is decentralized, the greater would participation of the society at large be enhanced.

Decentralization further requires governments to focus on policy issues at macro levels and avoid the role of being sole providers of goods and services by sharing these tasks with other smaller organizations and/or the private sector. Such decentralization is believed to have multifaceted advantages such a quick service delivery, wider options to consumers, lesser queues and minimal abuse of power and corruption.

Public Participation

The literal meaning of democracy is the rule of the people. Meaning the public is to be administered or governed by its own elected representatives. The

¹ Good Governance, Wikipedia, The Free Encyclopedia

² Oxford Advanced Learner's Dictionary, 6th Edition

quality of the democratization process shall impinge on how the process is participatory. In other words, the decision making process should involve the public. Good governance requires governments to adhere to the needs and serve the interest of citizens. This applies not only in the context of acts and policies but also with regard to the participation of the public in decisions affecting its interests

The participation of the public might also be through civic organizations which may play their part in promoting democracy and good governance. Their role may range from organizing/mobilizing the society to influencing policy makers.

Transparency

Transparency is the basic pillar of democracy. Good governance guarantees the right of the public to know what is being done by its government. Since governments and their officers assume public office or public responsibility on behalf of the public, their mandate has the corresponding requirement of being open to the public.

To reiterate the words that the writer recalls from a public statement “*public office is a public trust.*” The officers are the trustees; and both the trust and the trustees are created for the benefit of the public. Since public servants are acting as trustees, good governance requires them to disclose what is being done on behalf of the public.

Accessibility to the *media* is another important aspect of transparency. The media is expected to serve as a bridge between the public and the government. Through the media, the public will be able to know what is being done by those institutions that are entrusted with public trust and by the trustees, i.e the persons in charge. The public responsibility of the media is thus to avoid the extreme pitfall of being a mere public relations forum of governments, and equally avoid the other extreme of a non-constructive or nihilist stance. Every media that adjusts information in tune with what government officials would like to hear and read in fact misinforms both the government and the public thereby breaking the bridge between them.

Article 12 Sub-Article 1 of the FDRE Constitution clearly stipulates that “The conduct of affairs of government shall be transparent.” This constitutional provision is mandatory and does not make any exception. Any information requested by citizens must thus be given by public officers, unless the information is inherently confidential such as personal (in contrast public)

information. Unfortunately, however, public officers tend to refuse to disclose information under the guise of confidentiality. It is thus essential to minimize the scope of information which can be considered confidential, so that unconstitutional restrictions can be avoided. For example, if an individual applies for a license, and his/her application is not accepted or rejected, the public institution in charge has no valid reason to refuse stating the grounds of its decision.

Accountability

Accountability is the other cornerstone of good governance, and it holds public officers or political decision makers responsible for their decisions, deeds, acts that apparently includes omissions. In other words public officers are not allowed to act as free riders. The principle of accountability could also be related to acts of citizens or their elected representatives. In the latter case, accountability might be considered as political responsibility.

Accountability promotes the principle of checks and balances. In Sweden, for example, the government is responsible to the parliament. If the parliament declares that the Prime Minister or any other Minister no longer enjoys its confidence, the speaker shall discharge the Minister concerned³. In France, when the National Assembly carries a motion of censure, or where it fails to endorse the programme or a statement of general policy of the Government, the Prime Minister must tender the resignation of the Government to the President of the Republic⁴. In the Federal Republic of Germany, there is what is called constructive vote of no confidence. Where the Bundestag lacks confidence on the Federal Chancellor it may be entitled to request the President of the Republic to dismiss the Federal Chancellor.⁵

In the writer's opinion, although reporting to the elected representatives may be one of the mechanisms to ensure the accountability of a government, it does not actually reflect the political responsibility of the government. It may simply help to know what is being done by the government and question the same. Compared to the aforementioned legal systems, reporting to the legislative organ may not secure the political responsibility of the government.

According to Article 12(2) of the FRDE constitution, any public official or an elected representative is accountable for any failure in official duties. The

³ Swedish Constitution Ch. 1 Art. 6 and Ch. 6 Art. 5

⁵ German Basic Law, Art. 67

⁴ French Constitution, Art. 50

accountability is limited to the failure of discharging official duties. But what will happen if a certain public official is found committing an offence? Does it mean that he/she will not be held responsible? For example, in United States of America if the President, Vice-President, and all civil officers of the United States are found committing treason, bribery or other offences and misdemeanours, they shall be impeached by the Senate and ousted from his/her office.⁶

Article 12(2) of the FDRE Constitution does not state to whom public officials are to be liable or responsible. But when it is read in conjunction with Article 72 (2) of the Constitution, the Prime Minister and his cabinet members are responsible to the House of People's Representatives. However, when compared with the aforementioned legal systems, the responsibility is not clearly identified. It simply says that these officials are responsible to the House. The Heads of the Governments in France, Germany and Sweden (and the President, the Vice-President and other civil officers in USA) are responsible to the respective legislative organs and their responsibility is unequivocally stated.

Independent Judiciary (Judicial Independence)

Every organ of a human being has its own function. The heart plays a vital role. When the heart collapses, the function of the human body will also collapse. Accordingly, judicial independence is the heart of rule of law. When there is no independent judiciary, it is hard to think of rule of law and good governance. An independent judiciary is also the bedrock of separation of powers or checks and balances. An independent judiciary is indeed essential for the very existence of the government itself⁷.

Judicial independence may be classified into individual and institutional independence. The independence could be either internal or external. Rule of law requires judges to be independent internally from their colleagues and from the influence of superior courts, and externally from the executive and the legislative organs of the state. They should also be insulated from any internal and external pressure while discharging their judicial business. Judges should be bound only by the constitution and the law.

According to the principles of good governance, the administration of internal affairs should be left to the courts themselves. In this context, it seems appropriate to cite a decision rendered by the Canadian Supreme Court which reads as follows:-

⁶United States Constitution, Art. 2, Sec. 4 | ⁷Article 104a of Bahrain Constitution

(One of the) essential condition(s) of judicial independence is the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function. Judicial control over such matters as assignment of judges...has been considered the essential or minimum requirement for institutional independence⁸.

In addition to procedural independence from the executive upon appointment, crucial issues such as merit, experience, integrity and remuneration schemes determine the extent to which judges are independent from all forms of internal and external influence including the litigants themselves.

Rule of Law

Rule of law is one of the core components of good governance. However, it is the most said, but the least practiced. It is to be noted that *Rule of law* should be distinguished from *rule by law* and *rule of persons*.

Rule of law ensures the subjection of governments to the law. No one including government officials is to be above the law. Max Weber called it *legal domination*. The government must act according to law. But it is not possible to think of legal domination or prevalence/supremacy of law simply by having written laws. Having formal written laws alone may not thus secure rule of law, because the content of the law, the composition of the law makers and the law making process are crucial.

BoLi gives three important meanings to rule of law, namely in its role as regulatory of government power, in view of its function as guarantor of equality before the law (a concept endorsed by Dicey as well), and rule of law as formal and procedural justice.⁹

In its function as regulatory of government power, rule of law controls abuse of power, and it plays a pivotal role towards ensuring limited government. This is also an essential feature of constitutionalism as expounded by Barnett. For example, governments may not abuse their discretionary powers, and may not change laws whenever they want to unless the situation so warrants. To this end, law requires formal law making procedures. It should also be pre-fixed and pre-announced thereby rendering *ex post facto* laws impermissible. To illustrate, an act which was not considered as an offence at the time of the commission cannot be retroactively criminalized by a new law.

⁸ Waller Valente v. her Majesty the Queen, Canada Supreme Court, file number 17583, decided in 1985

⁹ www.oycf.org/perspectives/5-043000/what_is_rule_of_law.htm

Equality before the law is the second meaning of rule of law. The law does not distinguish between persons on the basis of status, gender, religion, social position, wealth, or any other ground. And as stated above, *Formal and Procedural Justice* is the third meaning of rule of law. According to BoLi formal and procedural justice embodies the following principles. These are, a complete set of prefixed and pre-announced decisional and procedural rules that are fair accompanied by the transparency and the consistent application of these decisional and procedural rules.

Public Sector Reform

Reform of the public sector is instrumental to the achievement of the elements of good governance mentioned here-above. It is, however, to be noted that public sector reform does not mean retrenchment or down sizing, but making the public sector more efficient and effective, accountable, transparent, customer oriented and responsive. The writer would like to acknowledge the efforts that are being made by the Ethiopian government to reform the civil service. The extent to which the paper works put in place and the commitments declared are put to practice will determine the pace of Ethiopia's achievements in the path of good governance. _____ ■

JURISPRUDENCE NOTES: NATURAL LAW

*Elise G. Nalbandian**

Introduction

One possible response to the question, “*what is Law?*” has been to delineate the boundaries and say that Law is self-defining as Kelsen did in his Pure Theory of Law. However, there are a lot of other theories that reject Kelsen’s theory and these theories may have a wider view of Law. For example, Dworkin rejects the Kelsenian view in favour of the conception of law as a mixture of Natural Law, Legal Positivism, Legal Realism and also Social and Political theories of Law. Aside from Dworkin’s suggestion which combines the ideas of the few key schools of Jurisprudence, the other schools keep a clear distinction between their schools, if not their theories.

These schools of Jurisprudence include the Natural Law Theories, the Legal Positivist Theories, Legal Realist theories, Social theories and many more. However, Natural Law theories are the basis of Jurisprudence as everything within the study of Jurisprudence reacts to the theories within this school of thought (either directly or indirectly). Therefore, a proper understanding of the concepts of Natural Law theories is key to the study of Jurisprudence and it is the intention of these notes to lay out a clear foundation of Natural Law.

The following notes on Natural Law Theories will be split into three segments. The first part will summarise the whole evolution of the Natural Law Theories. The Second part will then explore in more depth Aquinas’s classical natural law theory and the third part of the discussion will focus on the modern natural law theories of both Fuller and Finnis.

1. The Evolution of Natural Law Theories

We must have witnessed an awful/unnatural event. How did we know that it was unnatural? In thinking about this question, many examples of what is natural and unnatural may come up. For example, Shakespeare’s tragedies are full of the contrasting of natural and unnatural orders and the reader will always be able to appreciate the unnaturalness (evil or wrongness) of certain acts. Thus by judging something to be unnatural, Shakespeare accepts that

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there is a natural order with natural laws. But what is natural order in a social structure and where does natural law come from?

Throughout the ages, different eras have seen theories being put forward following crises of legitimacy (as Jurisprudence develops in response to such crises). Some of the most prominent examples of the sources of the natural law theories have emerged out of a) Greek Philosophy, b) Roman Law, c) Christian Theology and d) Social Contract Theories.

1.1 Greek Philosophy (Plato and Aristotle)

Prior to Greek City States, Society was based on families, localities and *nomos* (spirit of law) - There was a proper order and *nomos* was the appropriate way of acting as gods interfered with private lives. In a City State though, there was a weaker sense of *nomos* as there was a clear leadership, where the most powerful families ruled the City States and there were more directives which were also clearer to the public at large.

Plato wrote in reaction to the City States and the way these were governed. He explained that there was a distinction between Law (which is an approximation of justice) and Conventions. For Plato, justice was the most important perfect/absolute value but Plato contended that this could only be glimpsed as there was not much of it and it was not fully achievable in conventions which represented real law. So for Plato, Justice is an absolute value at which law should aim and furthermore, law that is bought and is based on wealth and other similar considerations is not just, even if it is law.

To quote Plato: “In my opinion...only such law as can be considered right as aims, like a good bowman, always at that which has something of the externally beautiful and which neglects everything, be it wealth or something else of that kind, which is devoid of virtue.”

Aristotle also responding to the system of city states presented a natural law theory. Unlike Plato, he did not seek absolute values, his values lie in nature and nature has elements of change and stability- this is *telos* – things evolve towards their end and humanity is no different. So Aristotle came up with a teleological reasoning to say that man was a social creature as well as a political one and thus to flourish, man had to build a society to survive as well as a political society/state so as to govern communities of man. In short, for Aristotle, the Greek City States system or the *polis* was an opportunity to achieve man’s natural purpose and was man’s ultimate achievement.¹

¹ Note that, for Aristotle, only free Greek men were humans.

However, theories notwithstanding, societies constantly evolve and social structures with them. The Greek Empire with its City States/*polis* came along and was seen as the peak of human nature's achievements then obviously, the Imperial structure of Alexander the Great was going too far. In response to this structure though, the Stoics said that there is a common interest between humans (as defined by Aristotle to mean Greek free men) and everyone else ("the Barbarians"). This they argued arises out of the universal essence of humanness and this gave rise to the concept of the "*Cosmopolis*" which states that local laws are and must be trumped by higher (international) laws which apply to all who share the common traits of humanity.

1.2 The Roman Empire (*Jus Civile and Jus Gentium*)

After the Greek Empire, the vast Roman Empire, made up of a lot of foreign countries with Rome as the ultimate master, came into being. One of the major challenges for this empire was the problem of how to organise the rules and law.

In response to this problem, the Law of Rome had to be based on the interests of all the parts of the empire and thus the narrow *Jus Civile* was not sufficient. Hence, to deal with the foreign areas of the empire, the *Jus Gentium* was compiled by the Roman lawyers with the focus on common interests of humanity in all parts of the empire (at least with regards to trade). This "international" trading law started to acquire superiority over local laws and got confused with the concept of *Cosmopolis*. This developed a certain system of international law, namely that international law should apply to all nations and so it is possible to conclude that *Jus Gentium* is the root of today's International Law.

1.3 Christian Theology

St. Thomas Aquinas wrote during the 13th Century AD during the time of the Holy Roman Empire at the peak of Papal power. At this time, the Church was competing for power with the Princes ruling over the various powerful principalities. The Church saw these principalities as a threat to its power and as a result the Church had to create a system to co-exist with the powerful Princes. This was mainly due to the fact that conquest and vassalship (techniques of acquiring power for the princes) were clearly not the answer for the Church and Christianity as a religion could not (at that time) produce a workable secular authoritative system. So Aquinas looked at Aristotle's theory and adapted it to the Church's needs.

According to Aquinas, the laws that exist are Divine Law, Natural Law and Human/Positive Law and these three operate in a hierarchical system. Under this theory, the principalities could have their own local law for their own areas (Positive Law) and this meant that the Princes could rule their own principalities as long as the local laws they made were based on an authority derived from Natural Law. However, these Positive Laws could be trumped by Natural Law- i.e. if it was decided that the Prince's authority cannot be based on natural law due to unnatural events in the principalities etc. But more importantly, the Positive Law and the Princes' authority could be trumped by Divine Law. This is as when the Pope declared a Prince to be a heretic; all laws made by the Prince were such that they should not be obeyed, thereby making the Church the institution that could pronounce the highest form of Law. (Note: For more on Aquinas, see Part 2 of these Notes).

Further developments followed within Christian Theology and the nature of Law especially during the period of the Reformation in the 16th Century which ended the ecclesiastical supremacy of the pope in Western Christendom and resulted in the establishment of the Protestant churches. This split in Western Christianity resulted in different states adopting the different branches of Christianity. As a result, one state could see the others who followed the different branches as heretics thereby making relations between these states quite strained. However, heresy or not, the states had to continue to deal with each other even if it meant that Divine Law was no longer as big a concern. So a new theory of Law was needed to allow international relations without giving an emphasis to Divine Law. What resulted from this project of creating International Law without depending on Divine Law was Grotius's reestablishment of a *Jus Gentium* system in establishing secular treaty relationships.

1.4 Social Contract Theories

Unlike the last three theories of natural law that can be said to be conservative approaches to creating authority, the Social Contract theory is different. Unlike the other three systems, it is based on the concept of "man" as a rational being who has rights no matter his position in society at birth. This theory has to be understood as a rise of the individual as this theory advocates the view that man is not born into a position and all men are born equal as persons who can later define their own positions. That means that the person is not necessarily restricted by stations determined even before birth. These comparatively "radical" concepts took root around the time of the Industrial Revolution. Before this time, family and birth stations used to stratify social position. The rise of the mercantile and manufacturing classes

meant that people could create their own social position. This resulted in a system where all are equal as all have an essence of humanity, but the question as to the authority to rule of the rulers in this system comes from also arose.

Aquinas' answer to this would have been that people have a divine sanction to rule- one is born to rule. For a Social Contract Theorist, this answer is defective as all are born equal. Thus, to find an answer to this question, the Social Contract theories of Hobbes and Locke will have to be looked at closely.

Hobbes in "The Leviathan" and Locke in "The Second Treatise of Government" wrote theories which are essentially different but both fall under the broad spectrum of social contracts. Both agree that all human beings are equal and rational and no one is destined or pre-destined to fulfil a function as each society is formed on the basis of social contracts formed in the pre-society state. The pre-society state is best described as a state-of-nature when:

“...men live without other security then what their own strength and their own inclination shall furnish them withal. In such condition, there is no place for industry because the fruit thereof is uncertain and consequently no culture of the Earth; no navigation, nor use of the commodities that may be imported by sea; no commodious buildings...no arts, no letters, no society and continual fear and danger of violent death; and the life of man, solitary, poor, nasty brutish and short”²

To come out of this chaos, according to this theory, people will come together and sign up to a social contract whereby a formalised government will be the logical outcome to keep the chaos in check. Thus, in a Hobbesian society, as long as there is a King who is capable of maintaining the order, he will remain the King, and his authority is legitimate as long as he does his job. Hence, the authority is given to the King implicitly from the social contracts.

On the other hand, Locke's social contract theory is more revolutionary as he contends that people will agree to a social contract and give authority to another body to protect a system of property, but can take away authority they have given, if for some reason, their interests are not best served. Thus the social contracts in a society operate to allow institutions to keep order for a time, but that it is the peoples' own will that they give up or have given up

² Thomas Hobbes, "The Leviathan", MacPherson Ed. 1968

some of their freedoms for the sake of security, however these freedoms are not permanently removed from the people.

2. A Classical Natural Law Theory: Aquinas

St. Thomas Aquinas was a monk in the 13th Century who was fully cognisant that the world was a dark and dangerous place where societies could easily suffer the terror of bandits, rebellions, wars, famines, plagues etc. On the other hand, he was living at a time where there was a lot of optimism centred on the city state system of principalities as centres of culture and excellence. At this time, the Holy Roman Empire was extremely powerful and the Church was a dominating institution which needed to preserve a semblance of its power while accepting this positive form of secular power practiced by the princes. So Aquinas, by looking at Aristotle's ideas of the *polis* tried to formulate a new theory of natural law.

At the beginning, Aquinas's theory faced a lot of challenge from the Church as the Church held that secular power is irrelevant as it was believed that it was life after death that was important. Hence, Aquinas tried to combine Christianity with Aristotle's theory to explain what Law is and where it comes from.

His legal theory encompasses four types of law. '*Eternal Law*', which comprises of God-given rules governing all creation, '*Divine Law*' as revealed by scriptures, '*Natural Law*', which is a segment of eternal law that can be discovered by a special process of reasoning as per Aristotle and other "pagan" authors and finally specific '*Human Law*' or positive laws made by humans for the common good and supported by reason. The interrelation between these different types of Law can be summarised as being contained in two crucial propositions that stand out in Thomist philosophy. First, human laws derive their legal quality and their binding nature due to the fact that as human laws are an attempt to achieve the common good and to achieve a human society, they are an extension of natural law. However, there are differences between natural and human laws as human laws are necessary to deal with the evil people and to enforce the laws by way of sanctions as natural law does not provide any sanctions. Secondly, any purported law (human) which is in conflict with natural or divine law is unjust and a corruption of law and thus is not binding by virtue of its own legal quality.

According to St. Thomas's theory, the Church retains the power to establish that some human laws cannot be laws, while still allowing leaders to rule as they see fit as long as the first principles of natural law such as "do no harm

to man” from which all law is derived is not mutated. Thus, as long as rulers could provide a reasoned justifications as to why the law is for the common good, the human law would have the power to bind in conscience. In short, what Aquinas does is to allow positivist or human law to acquire a level of moral sanctity while allowing the Church to retain the option of declaring a leader heretic and invalidating his laws. This allows the leaders of the principalities to gain legitimate power while allowing the Church to retain its own power over the Princes. This also allowed later writers to use the same reasoning of gaining human laws from natural law to develop a conception of natural rights that every man is endowed with and cannot be infringed by leaders.

This legal theory is not without criticism. As mentioned before, human law has to create proper sanctions to ensure the enforcement of what is right but Aquinas believes man’s inclination is to do good. He further argues that the “good” can be reasoned and the difference between good and evil are self-evident. However, some critiques such as David Hume³ in 1739 advocated a stance of Noncognitivism⁴ and pointed out that theories of natural law are flawed in the sense that they contain naturalistic fallacies. What this criticism points out is that, in such natural law theories, there is a failure to separate “what is” from “what it ought to be”. Hume argued quite clearly that “what ought to be” cannot be derived from “what is” even if all the information in the world and of human nature provides proof that anything ought to be done.

3. Modern Natural Law Theories

One major problem with natural law is that just when it has gotten into shape and the theory influences the reality and the reality fits in with the theory, as is human nature and the nature of the world, circumstances change and the theory seems to be left behind. For example, Aquinas tried to accommodate the specific problems of his time and place in the 13th century in Catholic/Christian Western Europe so his theory ran into trouble in the 17th Century during the Reformation when the common Christian faith of Western Europe split in two. Puffendorf in the 17th Century tried to adapt his theory into a more universal theory to deal with Protestant and Catholic relations, and in its time and place this theory worked. Now think of the 20th and 21st centuries and consider the cosmopolitan and increasingly globalised nature of the world where there is now more awareness of the different religions as well as

³ Hume D, “Treatise of Human Nature, Mossener Ed. 1739

⁴ This is the view that there is no rational procedure by which what is morally right and wrong can be known objectively

multiplicity of ideas of what is right or good. Ultimately no superiority can be claimed easily for any one ideology over the countless others and this makes it impossible to base natural law on any one religion. Furthermore, another feature of modern times is the increasing amount of laws and regulations maintaining order. This begs the question whether morality is still that important in law.

Aquinas recognised that as humans continue to become more civilised, natural law increasingly becomes more limited as it is less necessary to have to reason and deduce what is right and wrong. This means that what is lawful need not be defined in terms of morality as the larger body of regulations that is a feature of more civilised societies will be in place easily clarifying what is legal and right. These are some of the reasons why natural law thinking started to decline and Positivism according to Austin took hold in the minds of Jurists in the 19th Century until mid-20th Century. However, after the Second World War, natural law thinking has been revived, mainly by two modern natural lawyers, Fuller and Finnis who developed the Aquinas theory to apply to “modern problems”.

3.1 Fuller’s Theory of Natural Law

Fuller’s Theory of Law was published after the Second World War, after the horrific events seen in Nazi Germany. In this era, some of the legal academics such as the German Positivist Lawyers felt guilty as they felt they had surrendered some of their protections to become so positivist that they had justified the horrific events that unfolded under the Nazi Regime by saying that everything that happened did so under the dictates of law. Fuller’s theory on the other hand, taking this experience into consideration, strives to appreciate the difference between tyranny and law.

Fuller’s natural law theory tries to avoid the problems of religious and moral relativity. Instead, he works with natural law to prove the amorality of the regulation as he believes that natural law is procedural and so, he strives to theorise what the rule of law is. To do so, Fuller bases his theory on the proposition – “Law is the enterprise of subjecting human behaviour to the governance of rules”⁵. He then argues that this involves a reciprocal element between rule-makers/rulers and the ruled in that the two groups have to communicate before a person can be made to feel obliged to obey the law. Thus, he sets out to clarify when a Law has to be obeyed and to do this he

⁵ Lon L Fuller, “American Legal Realism” 82 *University of Pennsylvania Law Review* 429, 443 (1934) at 2

lists eight conditions or “*indices*” for the making of a law before the law can be obeyed. These conditions include that laws are: 1) general rules, 2) public (people have to know about the rules), 3) prospective, 4) comprehensible, 5) consistent/not contradictory, 6) possible, 7) stable (don’t change too often), 8) applied (there must be a convergence between the rules and the official behaviour).

Clearly, for Fuller, law is not about individual *ad hoc* actions for individual rules and cannot be applicable if no one knows about it. Thus these eight ‘*Indices of Law*’ are meant to indicate what is a law following the natural law processes. The absence of even one of these elements in the making and the implementation of the rules will not be enforceable as they are not law. In other words, the legality of rules lies in meeting these conditions. Furthermore, Fuller believes in the morality of these eight conditions and even goes on to state that evil regimes cannot fulfil these conditions and will not respect them so these indices of law have a “drag-effect” on the evil regime as the illegality of their rule will be obvious and easily condemnable.

The harshest critique of this theory comes from H.L.A Hart, the author of “The Concept of Law”, who claims that just because someone does something well does not make it legal, so these conditions do not make the rules made under them more legal. He then goes on to point out that these conditions may possibly assist illegality in an evil regime.

3.2 Finnis’s Natural Law Theory: Fairness and Substantive Morality

Finnis’s theory is more complicated than Fuller’s . This is due to the fact that Finnis includes standards of substantive morality in his theory by indicating that the common good is what we have to strive for. He argues that what is good cannot be reasoned out rather, it is self-evident and is known to all. So how can what is good be self-evident?

Finnis’s enterprise may be described as meta-liberalist – his argument seems to suggest that there is so much cultural diversity that there has to be universal values running throughout all societies. He has enumerated seven such basic universal values to include: 1) life, 2) knowledge, 3) play, 4) aesthetic experience, 5) friendship, 6) religion (endeavour of reflection on more than what there is) and 7) practical reasonableness (the desire to preserve the six other values in an intelligent ordered fashion).

Finnis holds that these values do not need to be justified, and states that if not followed, the reasons for not following the values must be presented thus in-

dicating their importance and the need to follow them. Finnis goes so far as to state that any effort to make one of these values seems valueless is in itself an affirmation of the self-evident value. Thus, it is a cyclic argument and it seems to suggest that the values have value in themselves.

In short, humans have an understanding of what is the common good according to Finnis's general argument. There are more particular values as well but these are all derived or are derivable from the seven basic universal values and each value is emphasised to different extents throughout the life of a person. Finnis then goes on to explain that there is an important distinction between individual and common good. The focal case is the ideal (laws for the common good) and everything else (individual good) is an approximation of the law at its ideal state. Or in Finnis's own words:

“...this ensemble of rules and institutions being directed to reasonable resolving any of the community's problems...for the common good of that community, according to a manner and form itself adapted to the common good by features of specificity, minimization of arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities.”⁶

Summary

In summarising the contents above, it becomes clear that Natural law has enjoyed various incarnations and the theories produced have varied widely throughout history. It is therefore very difficult to say that there is a single natural law theory. It is for this reason that any chapter covering natural law doctrines has to differentiate between the various theories that arose in different eras, keeping in mind the fact that these theories were developed in response to criticism of the older natural law theories as well as contemporary social pressures. Whereas the older theories adopted approaches closely linked with ethics and morality, the contemporary natural law theories as presented by modern legal jurists such as Finnis focus on “basic human goods”⁷ such as life, knowledge, aesthetic experience etc. which are all self-evidently and immeasurably worthwhile, thus avoiding difficult debates about ethics and morality. ■

⁶ J.M. Finnis, “Natural Law and Natural Rights”, Oxford: Oxford University Press, 1980

⁷ http://en.wikipedia.org/wiki/Natural_Law
