PROSECUTING CRIMINAL OFFENCES PUNISHABLE ONLY UPON PRIVATE COMPLAINT

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Article 1 of the Ethiopian Penal Code of 1957 states that "the purpose of criminal law is to ensure order, peace and the security of the State and its inhabitants for the public-good." The Code achieves this purpose by laying down prohibitions from acting or obliga tions to act whenever it is in the general interest that one should act or refrain from acting. Whosoever commits a criminal offence by disregarding these prohibitions or obligations is answerable, therefore, to the community. Hence the principle that criminal offences are prosecuted and punished, on behalf of the public, by the State acting as the agent of the citizens. There are offences, however, which do not jeopardize the order, peace and security of the State and its inhabitants but are contrary solely to the rights of a given individual. These are offences of a purely private or personal character, the effect of which does not extend beyond the individual thereby injured. In such cases, the State, though it is generally responsible for instituting criminal proceedings whether or not the victim of the offence agrees thereto, will not carry out this duty unless the victim indicates affirmatively that he wants the offender to be prosecuted.

The prior consent of the injured party is required, firstly, because public interests are not at stake as the offence does not endanger the society at large, and secondly, because the institution of proceedings, against the will of the injured party, might often be more harmful to him than the commission of the offence, for it might draw the attention of society to certain facts, such as his spouse's unfaithfulness or his child's dishonesty, which are precisely what he does not want known publicly. In these situations, the institution of criminal proceedings is conditional upon a complaint first being made by the individual concerned.[1] Where he makes a request to this effect, the State then acts, not on behalf of the public, but as the custodian of his rights for the purpose of prosecution and punishment insofar as this is possible. This raises two questions: which are these offences so punishable on complaint and what are the effects of such a complaint being made.

The Penal Code does not specifically set out a complete list of offences punishable only on complaint and Article 217 confines itself to making reference to the Special Part of the Code or any other law defining "offences of a predominantly nature which cannot be prosecuted except upon a formal accusation or request, or a complaint in the strict sense of the term, of the aggrieved party or those claiming under him."

Many provisions in the Special Part of the Penal Code prescribe that "Whosoever... is punishable, *on complaint*, with...." These are Articles 388 (2) (destruction of documents belonging to a relative); 407 (breach of professional secrecy); 409 (disclosure of scientific,

1. The word "complaint" as used in the Penal and Criminal Procedure Codes means a request, by the injured party or those having rights from him, which is "an essential condition setting in motion the public prosecution" (Article 216 of the Penal Code). This complaint must be distinguished fro n an "accusation" which may be made by anyone and which, like a complaint, is "in the nature of an information" *(ibid.)*, but, unlike a complaint, is "merely the occasion setting in motion the public prosecution" *(ibid.)*. This distinction is clearly made in Articles 11 and 13 of the Criminal Procedure Code dealing respectively with "accusation in general" and „offences punishable on complaint"

industrial or trade secrets); 539 (1) (common wilful injury not in aggravating circumstances); 543 (3) (common injury caused by negligence); 544 (assault); 552 (intimidation); 553 (threat of accusation or disgrace); 555 (deprivation of powers of decision);[2] 563 (1) (ascendant abducting a child); 570 (violation of the right of freedom to work); 573 (violation of the privacy of correspondence); 587 (prescribing that all offences against the honour are punishable on complaint; see, however, Articles 256, 276 and 278); 593 (sexual offences without violence against women in distress);[3] 596 (seduction);[3] 612 (indecent publicity); 614 (fraud and deceit in marriage); 618 (adultery); 625 (failure to maintain one's family); 629 (prescribing that all offences against property committed within the family are punishable on complaint if they do not involve violence or coercion); 632 (abstraction of things jointly owned); 643 (misappropriation); 644 (unlawful use of the property of another); 645 (misappropriation of lost property); 649 (damage to property caused by herds); 650 (1) (disturbance of possession not in aggravating circumstances); 653 (damage to property in aggravating circumstances); 661 (fraudulent exploitation of public credulity); 665 (incitement to speculation); 666 (incitement of minors to carry out prejudicial transactions); 671-676 (offences against intangible rights); 680 (fraudulent insolvency); 681 (irregular bankruptcy) and 721 (1) (a) (petty offences of a private nature).[4]

Whenever an offence is committed in violation of any of the above-mentioned provisions, no action may be taken except at the initiative of the person qualified under the law for making the necessary complaint.[5] If the offence is a flagrant one, the offender may not, it seems, be arrested without a warrant unless a complaint is first made. Article 21 of the Criminal Procedure Code states (1) that, in cases of flagrant or quasi-flagrant offences, proceedings may be instituted without an accusation or complaint (in the general sense of information) being made, unless the offence is punishable on complaint (in the technical sense of the term) and (2) that the offender may in such cases be arrested without a warrant in accordance with Articles 49 ff. It may be argued that sub-article (2) dealing with arrest is as general as it could be and that had it been intended to prohibit an arrest without a warrant from being made when the flagrant or quasi-flagrant offence is punishable on complaint, this prohibition would have been expressly laid down in sub-article (2) or, like the prohibition from instituting proceedings, in sub-article (1) of the said Article 21. There are, however, a number of reasons which militate towards a different construction of this Article. Firstly, it is debatable as to whether the words "in such cases" appearing in sub-article (2) are meant to refer to all cases of flagrant and quasi-flagrant offences or only to those where proceedings may be instituted without an accusation or complaint being made, i.e., all cases where the offence is not punishable on complaint *(stricto sensu)*. Secondly, when a flagrant offence is committed, justice is set in motion by the mere fact of the arrest; to allow an arrest without a warrant when the offence is punishable on complaint would be inconsistent with the principle that it

2. If the offence is committed in aggravating circumstances, as defined in Article 561, no complaint should be required (although Article 561 does not expressly so provide) owing to the seriousness of the punishment that may then be ordered (rigorous imprisonment not exceeding five years).

3. If the offence is committed in aggravating circumstances, as defined in Article 598, no complaint should be required (although Article 598 does not expressly so provide), since the punishment is then rigorous imprisonment not exceeding ten years.

4. Although Article 721 is very general, it would appear that only offences under Articles 778, 787, 794, 796-798, 805 (if private property), 806, 807, 810, 812 and 813 of the Penal Code fall within this category. As for the complaint required by Article 721 (1) (b) of the Penal Code; see note 12 *infra*.

5. If this offence is committed together with another offence not punishable on complaint, the public prosecutor may, in the absence of a complaint, prosecute only for the latter offence. He may not disclose that another offence has been committed, nor may the court increase the sentence on the ground of concurrence of offences as though the accused had also been charged with, and found guilty of, the offence punishable on complaint.

is for the injured party to set justice in motion. Thirdly, one of the purposes of an arrest without a warrant in flagrant cases is to prevent public order from being disturbed or further disturbed; yet, he who is about to commit or is committing an offence punishable on complaint does not disturb public order. Finally, to permit an arrest without a warrant when the flagrant or quasi-flagrant offence is punishable on complaint would as often as not result in defeating one of the main purposes of the complaint, that is, to avoid scandal when the injured party does not want certain things known. This is probably the strongest argument against taking the said Article 21 to mean that such an arrest is permitted. It is undesirable, to say the least, that any one, whether a member of the police or a private person (see Article 50 of the Criminal Procedure Code) should be entitled, for instance, to grab by the neck and bring to the nearest police station, *coram populo*, two persons he finds in the act of committing adultery. It seems that an arrest should not be made in such a case except by, or at the request of, the injured spouse. For obvious reasons of convenience, the complaint should then be made orally to the police, and not in writing as required by Article 14 of the Criminal Procedure Code, so that the arrest, if to be made by the police, may be made forthwith. This oral complaint should thereafter be confirmed in writing.

It must be clear that the sole purpose and effect of the complaint is to enable the *public prosecutor* to institute proceedings. It may not be held that offences punishable on complaint are offences which may be prosecuted only by the injured party. The second paragraph of Article 217 of the Penal Code states that "this form of... complaint upon which... the bringing of the *public* action depends...." The bringing of the public action obviously means the institution of proceedings by the public prosecutor. It is quite true, as will be seen later, that a private prosecution may be instituted with regard to offences punishable on complaint, but this is permissible only after the public prosecutor has found himself unable to carry out his duty to institute proceedings as he is bound by Articles 216 of the Penal Code and 40 of the Criminal Procedure Code to do whenever any breach of the law occurs. As noted above, the public prosecutor will act as custodian of the injured party's rights insofar as is possible; only when this is not possible may the injured party substitute himself for the prosecutor.

Regarding the manner in which offences punishable on complaint are to be prosecuted, the Penal Code and the Criminal Procedure Code must be read together. Thus, the person or persons against whom an offence punishable on complaint has been committed may set justice in motion by making a complaint in accordance with Articles 220 of the Penal Code and 13 ff. of the Criminal Procedure Code unless the offender is a juvenile, in which case the provisions of Article 172 of the Criminal Procedure Code will apply.[6] The question as to who is qualified to file a complaint is resolved by Articles 218 and 219 of the Penal Code. It must be noted, however, that the general rules contained in the latter Articles are sometimes departed from in the Special Part of the Penal Code. In cases of adultery, for instance, the right of complaint does not pass to the next-of-kin (Article 619), contrary to what is provided for by Article 218.

The complaint must be made within three months of the injured party's knowledge of the offence (as a complaint may, according to Article 15 of the Criminal Procedure Code, be made against an unknown offender) or that of the offender (Article 220 of the Penal

6. Pursuant to the rule of indivisibility (Article 222 Penal Code), if several persons are involved in the commission of one and the same offence punishable on complaint, they will all be prosecuted even though the complaint is made with regard to only some of them; if the offence is not punishable on complaint but some participants cannot be prosecuted in the absence of a complaint (*e.g.*, Article 629 (2) Penal Code), the rule of indivisibility does not apply.

Code), unless the law itself makes it clear that this period of three months begins to run from a different date, as is the case under Articles 599 and 614 (2) of the Penal Code. After a complaint has been made, a police investigation will be held as provided for by Articles 22 ff. of the Criminal Procedure Code. After considering the findings of the police, the public prosecutor, ordering further investigations in questionable cases, will either close the police investigation file with an unappealable decision (Article 39 of the Criminal Procedure Code) or institute proceedings unless there are reasons why proceedings may not or cannot be instituted (Article 42 of the same Code).

When the public prosecutor institutes proceedings with respect to an offence punishable on complaint, the ordinary provisions regarding the charge and the trial will apply (Articles 94 ff. of the Criminal Procedure Code) or, where appropriate, those regarding petty offences. (Articles 167-170 of the same Code).[7]

However, as the public prosecutor prosecutes only because the injured party has expressly requested him to do so, it follows that, where the complainant declares that he no longer wants the offender to be prosecuted, *i.e.*, where he withdraws his complaint as he is entitled to do under Article 221 of the Penal Code, the public prosecutor is compelled to withdraw the charge.[8] The accused may not, as a rule, object to such withdrawal and demand that the case should be carried forward.[9]

Where, for reasons which are to be given in writing to the injured party (Article 43 of the Criminal Procedure Code) in the manner prescribed by Form V in the Third Schedule to the said Code, the public prosecutor refuses to institute proceedings with respect to an offence punishable on complaint, proceedings may nonetheless be instituted, depending on the reasons upon which this refusal is based. If the public prosecutor refuses to prosecute for any of the reasons set out in Article 42 (1) (b) - (d) of

7. According to Articles 100 of the Penal Code and 154-159 of the Criminal Procedure Code, the injured party may then apply for permission to join in the criminal proceedings with the view of merely claiming compensation for the damage arising out of the offence. See Graven, Joinder of Criminal and Civil Proceedings, 1 Journal of Ethiopian Law 135 (1964).

8. Although this case is not specifically dealt with in the Criminal Procedure Code, it should be clear that Article 122 of the said Code is inapplicable. If the complaint is withdrawn at any time before judgment, the proceedings must be discontinued and the public prosecutor must, therefore, withdraw the charge whether or not the court agrees thereto. The situation is then the same as if no complaint had been originally made. Consequently, as is provided by Article 217 of the Penal Code, the court has no power to try the offence and no penalty may be imposed. Without prejudice to the provisions of Article 141 of the Criminal Procedure Code, an order for the discharge of the accused ought to be made which will, in fact, amount to an acquittal since a new complaint may not be made regarding the same facts (Article 221 of the Penal Code). Another instance where proceedings must be discontinued as a matter of right, though on different grounds, may be found in Article 619 of the Penal Code (death of injured party in adultery cases).

9. This is without prejudice to the provisions of the last paragraph of Article 222 of the Penal Code, according to which the accused may "insist on being tried" but only when he is charged with others and the complaint is withdrawn regarding only part of the accused persons. Nothing, however, permits one to say that this is a general rule that may be invoked even when only one person is being tried for an offence punishable on complaint. It is regrettable that the accused cannot always require that the proceedings be continued so that he be found not guilty and acquitted instead of being discharged. This is of importance in view of Article 441 of the Penal Code which does not apply unless the person against whom a false accusation has been made is found to be innocent. In this connection, it should be held that, for the purposes of the said Article 441, the discharge of the person to whom the complaint relates has the same effect as an acquittal, as has been suggested in note 8 *supra*. (A similar view may be found in the *Recueil officiel des arrêts du Tribunal fédéral suisse* 72 IV 74 or *Journal des Tribunaux* 1946 IV 184.) If this were not so, the complainant could withdraw his complaint whenever he felt that the accused would be acquitted and he would then escape the application of Article 441, in appropriate cases, on the ground that technically speaking the accused was not found innocent.

the Criminal Procedure Code, his refusal is final (as it is, also, when the offence is not punishable on complaint). But if the prosecutor refuses to institute proceedings because he is of the opinion that there is not sufficient evidence to justify a conviction, that is, he considers in accordance with Article 42 (1) (a) of the Criminal Procedure Code that he is unable to prove that the offender is guilty of the offence to which the complaint relates, a remedy is available to the injured party. What then is the nature of this remedy and what are its effects?

The remedy consists of providing the injured party with a certificate specifying the offence to which the refusal relates, stating that public proceedings will not be instituted with regard to such offence, and authorising the injured party to conduct a private prosecution with respect thereto (Article 44 (1) of the Criminal Procedure Code) at his peril and at his own expense (Articles 46 and 221 of the same Code). [10] A copy of the certificate, for which there is unfortunately no form in the Third Schedule to the Criminal Procedure Code, will be sent to the court having jurisdiction, enabling it to ascertain, in accordance with Article 150 (2) of the Criminal Procedure Code, that the offence charged by the private prosecutor actually is the offence in respect of which he has been authorized, under the certificate, to institute private proceedings.[11]

The question may be asked whether the certificate is to be automatically issued upon the public prosecutor's refusal to prosecute, in which case it ought to be attached to the copy of the decision sent to the injured party in accordance with Article 43 (2) of the Criminal Procedure Code, or whether it is issued only at the request of the injured party, in which case this request ought presumably to be made within the same period of time as an appeal under Article 44 (2) of the said Code. Although the law makes no specific provision on this point, the first solution should prevail. Since the public prosecutor may, in no case, object to the institution of private proceedings after he has declined to prosecute on the ground of lack of evidence, it is of little importance whether the certificate is issued automatically or on application. This being so, the more convenient practice of giving the certificate immediately, regardless of whether the injured party intends to make use of it, ought to be followed.

Another question is whether, as of the time that he has been issued a certificate, the private complainant may exercise all the rights which the public prosecutor would have in public proceedings. Although a provision like Article 153 (1) of the Criminal

10. Where the public prosecutor refuses, on the ground of insufficiency of evidence, to institute proceedings with respect to an offence which is not punishable on complaint, a different remedy is available to the injured party. He may not be authorized to conduct a private prosecution but he may, in accordance with Article 44 (2) of the Criminal Procedure Code, appeal against the refusal and seek an order to the effect that the public prosecutor be compelled to institute public proceedings. As this order is sought from the court that would have appellate jurisdiction if proceedings were instituted, it follows that should proceedings be instituted by order of that court and the case come before the said court on appeal, the judges having made such order should disqualify themselves and not sit on the appeal, for as a rule a judge may not act twice in the same case in a different capacity.

11. Since the certificate may be issued only in cases of insufficiency of evidence, it may happen that there be doubts as to the nature of the offence committed. There should then be nothing to prevent the private prosecutor from framing a charge containing alternative counts under Article 113 (1) of the Criminal Procedure Code, provided that the offences thus charged are all punishable on complaint. Consequently, the certificate should not be too restrictive regarding the offences against which private proceedings may be instituted, and the public prosecutor might well allow the complainant to charge the offender with common wilful injury not in aggravating circumstances, under Article 350 (1) of the Penal Code, and, in the alternative, with common injury caused by negligence, under Article 543 (3) of the same Code. It must be clear, however, that the provisions of Article 113 (2) of the Criminal Procedure Code will apply even though the certificate does not reserve the possibility of framing alternative charges.

Procedure Code would induce one to answer in the affirmative, it seems more reasonable to consider that certain powers, and particularly the power to select the court having local jurisdiction, are retained by the public prosecutor even though he does not prosecute. If a reasonable doubt arises as to the place where the offence punishable on complaint was committed (see Article 102 of the Criminal Procedure Code), it should not be held that the power to direct the place of trial, which is normally exercised by the public prosecutor in accordance with Article 107 of the said Code, passes to the private prosecutor, for this might cause confusion. It should rather be held that, in such a case, the public prosecutor must, prior to issuing the certificate, decide as to the court in which the complainant will file his charge, and such court ought, therefore, to be mentioned in the certificate. This interpretation is confirmed by Article 44 (1) of the said Code which, as has been seen, compels the public prosecutor to send a copy of the certificate to the court having jurisdiction, which term does not mean only material jurisdiction but includes personal and local jurisdiction, also. Should several courts have local jurisdiction, the public prosecutor would clearly be unable to comply with this duty if it were not for he and he alone to decide in which of these courts the private prosecution would have to be conducted.

The effect of a certificate having been issued is that the injured party or his representative, as defined in Article 47 of the Criminal Procedure Code, may institute proceedings in the court mentioned in the certificate. He will frame a charge, [12] and the case will then proceed in accordance with the provisions of Article 150-153 of the Criminal Procedure Code.[13] It will be noted that even in these cases the injured party may apply to be allowed to claim compensation while at the same time conducting the prosecution (Article 154 (3) of the Criminal Procedure Code),[14] unless the accused is a juvenile (Article 155 (1) (a) of the same Code).

The above explanations are without prejudice to the provisions of Article 48 of the Criminal Procedure Code, according to which a private prosecution may be stayed at any stage thereof at the request of the public prosecutor, if it appears in the course of such prosecution that the accused committed a more serious offence than that for which the certificate had been issued under Article 44 (1) of the said Code. An example would

12. According to Article 108 (1) of the Criminal Procedure Code, no charge need be framed when the prosecution relates to a petty offence, in which case the provisions of Articles 167-170 of the said Code are applicable. In connection with petty offences, a peculiar situation arises under Article 721 (1) (b) of the Penal Code, which prescribes that breaches of subsidiary legislation are prosecuted upon a complaint being made by the duly authorized representative of the Government Agency transacting the business specified in the law which has been violated. Although one may be inclined to think that a complaint should be dispensed with, for these are not offences of a private nature, the purpose of this requirement may be to avoid the public prosecutor's instituting proceedings in cases where, under the law which has been violated, a settlement may be effected *(e.g.*, customs cases). But difficulties will occur when, a complaint having been made, the public prosecutor refuses to prosecute on the ground of lack of evidence, for, if a certificate were issued under Article 44 (1) of the Criminal Procedure Code, one could hardly speak of a private prosecution since the representative of the Agency concerned would prosecute on behalf of the State. This is why it may be advisable to hold that the complaint referred to in the said Article 721 (1) (b) is not a complaint *stricto sensu*, but an accusation. Cases of this nature should, therefore, be subject to the rules regarding the prosecution of offences which are not punishable on complaint and a refusal to prosecute should be dealt with under Article 44 (2) of the Criminal Procedure Code.

13. According to Article 166 of the Criminal Procedure Code, the case may not proceed in the absence of the accused. This, however, is without prejudice to the provisions of Article 170 (4) of the said Code which permit judgment to be given forthwith if the accused fails to appear without good cause in private proceedings relating to a petty offence. The wisdom of the latter rule would appear to be questionable.

14. Regarding the trial of the civil claim and the effects of a withdrawal of complaint, conviction, discharge or acquittal (Articles 157-159 of the Criminal Procedure Code) see our article quoted at note 7 *supra*.

be if the certificate were issued with regard to an offence under Article 644 of the Penal Code (unlawful use of the property of another) and it were disclosed during the trial that the accused actually had the intention of obtaining an unlawful enrichment and should, therefore, have been charged with an offence of theft in violation of Article 630 of the Penal Code.[15] In this respect, it must be clear that a stay of proceedings should not be ordered whenever new evidence is produced and the public prosecutor declares that had he known such evidence before, he would not have refused to prosecute on the ground of insufficiency of evidence but would himself have instituted public proceedings. It seems that a stay of proceedings should be ordered only when it appears that the offence actually committed is such that the public prosecutor could, in no case, have issued a certificate under Article 44 (1) of the Criminal Procedure Code because this offence *is not punishable on complaint*. Although the said Article 48 does not expressly so provide, one should consider that after a certificate has been issued, the public prosecutor may not interfere in private proceedings unless the case clearly is not one in which only private interests are involved.

CONCLUSION

These are the general rules to be followed when an offence is committed that cannot be tried except upon the request of the person whose rights or interests have been affected by the offence. Similar rules will seldom be found in other countries for, although many foreign laws provide for offences punishable on complaint, few of them authorize the institution of private proceedings, as this is deemed contrary to the principle that prosecution and punishment are not an individual but a collective concern and that a person who commits a criminal offence is answerable to the community, regardless of the fact that only one member thereof has been injured.

The system laid down in the Ethiopian Criminal Procedure Code of 1961 is much more restrictive, and rightfully so, than the one which existed previously. According to Section 9 of the Public Prosecutors Proclamation No. 29 of 1942, impliedly repealed by the Criminal Procedure Code, when a criminal case was not conducted by the public prosecutor, the court was bound to permit the injured party to conduct the prosecution either personally or by an advocate, irrespective of the nature or seriousness of the offence or of the reasons why the public prosecutor did not prosecute. This provision, which so emphatically stressed the importance of the part traditionally played by the injured party in criminal proceedings, resulted in disregarding the fundamental differences that exist between civil and criminal liability and procedure, as did also the now abolished practice of avoiding certain criminal prosecutions by paying blood money. It is only proper that this difference should be clearly made today in the provisions of the respective Penal and Criminal Procedure Codes relating to offences punishable on complaint.

15. Article 48 of the Criminal Procedure Code unfortunately fails to specify how the public prosecutor will be informed, and this may require that the public prosecution department send a representative to attend all private prosecutions, a rather inconvenient requirement. Since the cases in which a private prosecution may be stayed are (if the suggested construction of Article 48 is correct) cases where public proceedings should have been instituted in the general interest, it should have been provided that a private prosecution may at any time be stayed by the court of its own motion or on application. This should be the case particularly when the more serious offence disclosed (such as theft, triable by an Awradja Guezat court) is outside the jurisdiction of the court trying the less serious offence charged (such as unlawful use of the property of another, triable by a Woreda Guezat court).