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"MEDICINAL CHARACTER" IN THE PENAL PROCEDURE OF CCEO AND "FAIR TRIAL" IN THE CRIMINAL PROCEDURE CODE OF INDIA: A COMPARATIVE STUDY

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The author as a canonist and a civil lawyer compares the 'medicinal nature' of the ecclesiastical law with the 'fair trial' of Indian civil law under the following heads: 1. The "Medical Colouring" in the CCEO and "Fair Trial" in the CrPC; 1.2. Venue of Trial; 1.3. Transfer of Cases; 1.4. Preservation of Defendant's Good Reputation; 1.5. Right of Self-Defence; 1.6. Protection againt Self-incrimination; 1.7. Avoidance of Arbitrariness; 1.8. Burden of Proof on Procescution; 1.9. Mitigating Factors; 1.10. Right of Recourse or Appeal.

Introduction

The penal or criminal process in the church and state may at times be the only way to ensure that a person's rights are adequately safeguarded. CCEO[1] canon 24 §1 states that the faithful can legitimately vindicate and defend their rights before the competent

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[1] *Codex Canonum Ecclesiarum Orientalium* auctoritate Ioannis Pauli PP. II promulgates, Typis Poliglottis Vaticanis 1990: AAS 82 (1990) 1033-1363; For English Translation, Canon Law Society of America, *Code of Canons of Canons of the Eastern Churches*, Latin- English Edition (Bangalore: Theological Publications in India, 2003).

Church forum. The primary object of criminal procedure in India is to ensure a fair trial to every person accused of any crime. Due process of law is one of' the rights that can be vindicated if it is denied. It is conceivable that an accused person may, in some situations, better defend his rights and reputation by resisting an extra-penal form of correction and insisting instead on due process of law, even if this would require an administrative or judicial penal process.[2]

The prime and immediate question which is posed in this article is that are CCEO and Criminal Procedure Code of India comparable in the realm of penal process. The answer is that since both are two entities, the comparison is very difficult. Even though, a little knowledge in the field of civil law and the interest in the scientific study tempted me to penetrate in to the possibility of this comparison. The question here is that whether there is 'medicinal colouring' in penal process of CCEO and the fair trial in the criminal procedure code of India.

More pertinent to this article is simply to list the many safeguards and rights that a defendant enjoys in the penal process of both systems. In this way the elements of medicinal character and fair trial in the penal process are treated together to give a general sense of basic human and procedural rights while avoiding a lengthy, separate treatment of the two processes.

1. The "Medical Colouring" in The CCEO and "Fair Trial" in the CrPC

The following provisions are intended to provide a mechanism for the administration of penal or criminal process and its core object is to ensure for the accused a full and fair trial in accordance with the principles of medicinal character and natural justice. The whole object of the section is to afford the accused a fair and proper opportunity of explaining the circumstances which appear against him. The canons of the code, sections of CrPC[3] and the Supreme Court of India have held that if an accused is not given ample

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[2]Huels, John M., "The Correction and Punishment of a Diocesan Bishop," *Jurist* 49 (1989) 535.

[3]*The Criminal Procedure Code of India* (CrPC).

opportunities to prove his innocence, it may prejudice him and thus vitiate the trial.

1.1. Warning before Punishment

Withdrawal from contumacy occurs when the offender has truly repented the offense and made reparation for damages and scandal, or at least has seriously promised to do so. This is possible only through giving warning before punishment.[4]

CCEO c. 1407 says, "No penalty can validly be declared or imposed unless the offender has been warned at least once in advance to withdraw from contumacy and has been given a suitable time to do so." CrPC. ss.235 (2), 248 (2), 255 (2) say, "If the convicted person is not released after admonition or on probation of good conduct as mentioned above, the court shall (after hearing him on the question of sentence) pass sentence upon him according to law."

1.2. Venue of Trial

If the trial is conducted in the immediate vicinity of the delict or crime, the witnesses will be readily available and it could be convenient to both the prosecution and the defence. Moreover, the trial in such a nearby court is more conducive to the sense of social security.[5]

CCEO c. 1078 speaks, "In penal cases, the accused, even if absent, can be brought to trial before the tribunal of the place where the delict was committed, whereas CrPC s.177 says that every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed.

1.3. Transfer of Cases

It is required that the accused must be informed before the taking of any evidence that he is entitled to have the case inquired into or tried by another magistrate; and if the accused objects to the proceedings

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[4]Huels, John M., "The Correction and Punishment of a Diocesan Bishop," *Jurist* 49 (1989) 539.

[5]R.V. Kelkar, *Criminal Procedure Code*, 5th Edition (Lucknow: Eastern Book Company, 2008) 89.

being conducted before the magistrate taking cognizance of the offence, the case will have to be transferred to such other judge or magistrate.[6]

CCEO c. 1059 §2 speaks that the referral to the Roman Pontiff, however, does not suspend the exercise of power by a judge who has already begun to adjudicate a case of an appeal; for this reason, the judge can continue with a trial up to the definitive sentence, unless it is evident that the Roman Pontiff has called the case to himself, whereas CrPC. s.191 speaks that the failure to tell the accused of his right to be tried by another magistrate vitiates the trial. Further, the refusal of the accused person's request for transfer in such a case would be illegal.

CCEO c. 1059 §1 speaks that by the reason of the primacy of the Roman Pontiff, any member of the Christian faithful is free to defer his or her case at any stage or grade of the trial to the Roman Pontiff. Being the supreme judge for the entire Catholic world, he renders judicial decisions personally, through the tribunals of the Apostolic See, or through judges he has delegated. CrPC. ss.406-408 say that if an accused person has reasonable case to believe that he may not receive a fair trial at the hands of a particular judge or magistrate, he should have the right to have his case transferred to another court.

1.4. Preservation of Defendant's Good Reputation

It is a violation of a fundamental right of the faithful to damage unlawfully their good reputation (c. 23). Penal law and procedure manifest a concern for upholding the good reputation of the accused. The following provisions protect the defendant from needless harm to his reputation through an unnecessary process.[7]

In this regard CCEO c. 1468 §§1, 2 say that before a penal process can begin against anyone, the hierarch must oversee an investigation into the facts and circumstances of the alleged delict and the imputability of the accused. Care must be taken during this investigation to

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[6] S. N. Misra, *The Code of Criminal Procedure 1973*, 15th Edition (Allahabad: Central Law Publications, 2008) 32.

[7] Huels, John M., "The Correction and Punishment of a Diocesan Bishop," *Jurist* 49 (1989) 507, 539.

prevent harming the person's reputation and CrPC s.190 says a magistrate may take cognizance of any offence upon receiving a complaint of facts which constitute such offence; or, upon a police report of such facts; or, upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed. If the magistrate is not satisfied with the result of the investigation he may subsequently make an inquiry himself or direct a fresh investigation.

When CCEO c. 1469 §2 says that even after the hierarch has decided to initiate a penal process, he is required to abandon it if new evidence should call for this, CrPC s.204 speaks that if the magistrate is not satisfied with the result of the investigation he may subsequently make an inquiry himself or direct a fresh investigation.

CCEO c. 1475 §I says that the hierarch can also freely decide to renounce the process at any point during the trial, whether at the request of the promoter of justice or on his own initiative. In the same way CrPC s.192 speaks that the magistrate may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding.

Whereas CCEO c. 1482 says that at any point in a trial, the judge is required to stop the proceedings and issue a sentence absolving the accused if it is clearly proven that he did not commit the offense, CrPC s.190 speaks that taking cognizance of an offence by any magistrate does not involve any formal action or indeed action of any kind but occurs as soon as a magistrate as such applies his mind to the suspected commission of an offence for the purpose of proceeding to take subsequent steps towards inquiry and trial. It includes intention of initiating a judicial proceeding against an offender in respect of an offence or taking steps to see whether there is a basis for initiating judicial proceeding.

When CCEO c. 1475 §2 says that if the hierarch renounces the case during the trial, the renunciation, for validity, must be accepted by the accused; the latter may wish to have the trial proceed to a finding of 'not guilty', CrPC s.200 speaks that it provides that a magistrate taking cognizance of an offence on a complaint shall examine upon

oath the complaint and the witnesses present, if any, and that the substance of such examination shall be reduced to writing and shall be signed by the complainants and the witnesses, and also by the magistrate.

When CCEO c. 1113 §1 speaks that the judges and other tribunal personnel are always bound to secrecy in all penal cases and CCEO c. 253 §2 says that the notary must be a priest in all cases in which the reputation of a priest can be called into question. CrPC s.327(2) says that an inquiry or trial related to the rape and sexual offences (ss. 376, 376 (a.), (b), (c), (d) must be conducted in camera (privately). But CrPC s.327(1) says that generally the public has access to it, so far as the court can conveniently contain them. When CCEO c. 1113 §3 says that the judge can also bind the witnesses, experts, the parties and their advocates to observe secrecy if persons' reputations are at stake, CrPC s.327 (2), (3) say that the presiding judge have the power to allow a particular person to attend the inquiry or trial conducted in camera if he thinks fit. Only with the permission of court, a person can print or publish any matter related to any proceedings conducted in camera.

When CCEO c. 1470 says that the acts of the penal case and related documentation are to be kept in the secret archive of the curia, CrPC. s.353 (4) speaks that where the judgement is read out, it shall be immediately made available for the parties free of cost.

When CCEO c. 1110 that that once a case has been legitimately introduced, a judge can and must proceed, even ex-officio, in penal and in other cases that regard the public good of the Church or the salvation of souls. The judge can supply for the negligence of the parties in furnishing proofs or in lodging exceptions whenever the judge considers it necessary in order to avoid a gravely unjust sentence, CrPC s.314 (4) says that no adjournment of the proceedings shall be granted for the purpose of filing the written arguments unless the court, for reason to be recorded on writing, considers if necessary to grant such adjournment.

When CCEO c. 1090 §2 says that the judicial vicar is not to substitute judges once they have been designated, except for a very serious reason to be expressed for validity in a decree, CrPC s.326 says that the judge or the magistrate who hears entire evidence should give

the decision. A departure from this principle has been permitted by section 326 apparently on grounds of expediency. According to section 326, whenever any judge or magistrate after having heard and recorded whole or any part of the evidence in an inquiry or trial, ceases to exercise jurisdiction therein and is succeeded by another judge or magistrate having such jurisdiction, the judge or magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself. However if the succeeding judge or magistrate considers further examination of any witness as necessary in the interests of justice, he may re-summon any such witness, and after such further examination, cross-examination, if any, as he may permit, the witness shall be discharged.

1.5. Right of Self-Defence

The right of defence is necessary for the validity of the proceedings; if it is denied the sentence is vitiated by irremediable nullity[8]. The right of self-defense is protected in various ways in procedural law of CCEO and CrPC. [9]

CCEO c. 1486§1, 1° says that the accused has the right to be informed about the accusation and the proofs, giving him the opportunity of self-defence. In the same way, CrPC s.238 speaks if the magistrate taking cognizance of an office considers that there is sufficient ground for proceeding, he shall issue process against the accused person through summons or warrants in order to enable the accused to know the prosecution witnesses and to prepare him for their cross-examination. When the accused appears or is brought before a magistrate at the commencement of the trial, the magistrate shall satisfy himself that he has supplied to the accused copies of the police report, FIR[10], statements of persons recorded by police during investigations, etc.

CCEO cc. 1474 §1; 1139 clearly speaks the self-defence includes the right to counsel. In a judicial process, the judge must invite the

[8]CCEO c. 1303 §1, 7°.

[9]Huels, John M., "The Correction and Punishment of a Diocesan Bishop," *Jurist* 49 (1989) 539.

[10]*First Information Report* (FIR).

accused to appoint one or more advocates or procurators to represent him in the trial and CCEO cc. 1474 §2; 1139§2 says that if the accused fails to do so, the judge must appoint an advocate, on his behalf. In the same way, CrPC s.303 speaks that the code confers on the accused person a right to consult and to be defended by a legal practitioner of his choice and CrPC s.304 (1), (4) speaks that the right to counsel would however remain empty if the accused due to his poverty or indigent conditions has no means to engage a counsel for his defence. The indigent accused obviously stands the risk of denial of a fair trial when he does not have equal access to the legal services available to the opposite side. To an extent the Code has attempted to find a solution to this problem. It has been provided that where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense of the State. Further the Code has empowered the State Government to extend the application of the above provision to any class of trials before other courts in the State.

CCEO c. 1155 mentions that a petitioner can bring a person to trial with several actions at once, either concerning the same or different matters, so long as the actions do not conflict among themselves and do not exceed the competence of the tribunal approached. In the same manner, CrPC s.218 (1) states a basic rule that "for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately". The object of this rule is to save the accused from being embarrassed in his defence if distinct offences are lumped together in one charge, or separate charges are tried together. If the accused is to be tried in one trial upon different charges on different evidence, it is not unlikely that the court might get prejudiced against the accused person.

When CCEO c. 1132 mentions that the judge and the notary are also to attest that the act was read to the parties and witnesses verbatim, CrPC s.228 (2) is also in the same manner saying that where the charge has been framed against the accused as mentioned above. It shall be read and explained to him; he shall then be asked whether he pleads guilty of the offence or claims to be tried.

CCEO c. 1217§2 speaks that in cases regarding the public good a judicial confession and other declarations of the parties can have a probative force that the judge must evaluate together with the other circumstances of the case, but full probative force cannot be attributed to them unless other elements are present and thoroughly corroborate them. CrPC s.229 says that if the accused pleads guilty, the court shall record the plea and may, in its discretion, convict him thereon. A person is taken to have pleaded guilty only if he has pleaded guilty to the facts constituting ingredients of the offence without adding anything external to it. If an accused that has not been confronted with the substance of allegations against him, pleads guilty to the violation of a provision of law, that plea is not valid plea at all.

While CCEO c. 1152 speaks that a penal action is extinguished by prescription, by the death of the accused, by pardon granted by competent authority, CrPC. s.468 is also in the same tune saying when the accused appears or is brought before the court, he may raise the preliminary plea that the criminal proceedings against him are barred by the limitation of time prescribed by law. No court, after the expiry of the period of limitation, shall take cognizance of an offence which is punishable with fine only or with imprisonment up to three years.

While CCEO c. 1228 says that the accused has a right to propose his own witnesses and introduce other kinds of proofs, CrPC s.231 (1) speaks that the accused shall be called upon to enter upon his defence and adduce any evidence in support of his defence. If so desired by the accused, process for the purposes of the attendance of any witness or the production of any document or thing, shall be issued by the court.

While CCEO cc. 1235; 1236 speak that the accused has the right to know the names of the witnesses who may be testifying against him and to petition their exclusion for a just cause, CrPC s.207 is a little elaborative saying in any case instituted on a police report, the magistrate is required to furnish to the accused, without delay and free of cost, a copy of the police report, the first information report, the statements recorded under section 161 (3) of all persons whom the prosecution proposes to examine as its witnesses, the confessions and statements, if any, recorded under section 164. However, if the

magistrate is satisfied that such document is voluminous, he shall, instead of giving a copy thereof to the accused, direct that the accused (or his pleader) will only be allowed to inspect it. The object of supply of copies to the accused is to put him on notice of what he has to meet at the time of the inquiry or trial and to prepare himself for his defence.

CCEO c. 1240 says that ordinarily the accused's advocate or procurator may be present for the examination of the witnesses. But CrPC s.205 is elaborative saying it empowers the magistrate to dispense with the personal attendance of the accused person under certain circumstances. According to that section, whenever a magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused person and permit him to appear by his pleader. But the magistrate inquiring into or trying the case may in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and if necessary, enforce such attendance in the manner provided in the Code.

CCEO c. 1251 says that the accused also has the right to have witnesses recalled for further examination, CrPC s.246 (5) speaks that if the accused refuses to plead or does not plead guilty, or claims to be tried, or if the accused is not convicted by the magistrate on the accused pleading guilty, the magistrate shall require the accused to state at the commencement of the next hearing of the case, or in an appropriate case, even forthwith. If he wishes to cross-examine any of the prosecution witnesses whose evidence has been taking and he indicates his desire to so cross-examine, the witnesses named by him shall be recalled.

CCEO c. 1131; 1476 says that all judicial acts, whether the acts of the case, that is, those acts that concern the merits of the question, or the acts of the process, that is, those that pertain to the manner of proceeding, must be put into writing. The defence briefs and observations given in writing. CrPC s.314 (1), (2), (4) say that any party to a proceeding may after the close of his evidence address concise oral arguments. If the court considers that such arguments are not concise or relevant, it may regulate them. A party before concluding the oral arguments, if any may submit a memorandum to the court setting forth concisely and under distinct headings, the

arguments in support of his case. Every such memorandum shall form part of the record, and a copy of the memorandum shall be furnished to the opposite party.

While CCEO c. 1193 says that if the citation is not legitimately intimated, the acts of the process are null, unless the party nevertheless appeared to pursue the case, Cr. P. C. ss. 211-214 speak that in all trials under the code the accused is to be informed of the accusation in the beginning itself. In case of serious offences it is further required that the accusation is precisely and clearly formulated in writing. It is always for the court to frame a charge against the accused. The charge sheet is to be given to the accused or to his advocates.

CCEO c. 1299 §1 speaks that if in the text of the sentence an error in calculation turns up, a material error occurs in transcribing the dispositive section or in relating the facts or the petitions of the parties, or some parts necessary are omitted, the tribunal that rendered the sentence must correct or complete it either at the request of a party or *ex-officio*, but always after the parties have been heard and decree appended to the bottom of the sentence, CrPC s.216 also speaks in the same way that any court may alter or add to any charge at any time before judgment is pronounced. However, the court should not alter or add to any charge to the prejudice of the accused person. The following procedure is to be followed after the alternation or addition of the charge: (a) every such alteration or addition shall be read and explained to the accused, (b) the court may, after such change has been made, proceed with the trial as if the altered or added charge had been the original charge, (c) if the change is likely to prejudice any party as aforesaid, the court may either direct a new trial or adjourn the trial for such time as may be necessary.

While CCEO c. 1281§1 says that the defendant and his advocates have the right to inspect the acts of the case, including the testimony of witnesses; if this right is denied the process is null. A copy of the acts can be given to the advocate upon request,[11] CrPC ss.281(2), (3),

[11]Huels, John M., "The Correction and Punishment of a Diocesan Bishop," *Jurist* 49 (1989) 507, 538.

(4), (5) speaks that whenever the accused is examined by any other magistrate, or by a court of sessions, the whole of such examination, including every question put to him and every answer given by him is to be recorded in full by the judge or magistrate himself or where he is unable to do so own to a physical or to the incapacity, under his direction and superintendence by some officer of the court. The record is to be in the language in which the accused is examined and if that is not practicable it is to be in the language of the court. The record shall then be shown or read to the accused, and if he has any difficulty in understanding the language in which it is write, it shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers. Thereafter the record shall be signed by the accused and by the magistrate or the judge, who shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

As CCEO c. 1478 clearly mention that in the discussion of the case the accused always has the right to write or speak last, whether personally or through his advocate or procurator. This ensures that the defendant will have sufficient opportunity to address all the evidence presented against him, CrPC s.313 (1) also mention that for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the court may at any stage put such question to him as the court considers necessary; shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case.

The sense in CCEO c. 1217 §2 and CrPC s.313 is same by stating that a judicial confession and other declarations of the parties can have a probative force that the judge must evaluate together with the other circumstances of the case, but full probative force cannot be attributed to them unless other elements are present and CrPC s.313 says that no accused can be convicted simply because he admitted guilt despite his non-implication in the offence by all witnesses since the statement under section 313 does not constitute evidence.

Here for CrPC s.315 (1), we are finding any parallel in CCEO. An accused person can be a competent witness for the defence and may give evidence on both in disproof of the charges made against him or

any co-accused at the same trial. However, he shall not be called as a witness except on his own request in writing. Secondly, his failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any co-accused at the same trial. An accused person who volunteers to be a witness in defence, is in the same position as an ordinary witness, and is therefore subject to cross-examination by the prosecution and evidence brought out in such cross-examination can be used against his co-accused.

Here CCEO c. 1240 and CrPC s.273 are contradicting. When CCEO c.1240 says that the parties cannot be present at the questioning of the witnesses unless the judge has decided to admit them, especially when the matter concerns a private good, Cr PC s.273 says that all evidence is to be taken in the presence of the accused person, except in the case of an accused person has absconded, and that there is no immediate prospect of arresting him.

1.6. Protection against Self-incrimination

The basic elements of protection against self-incrimination in the trial procedural system are given below.

Both CCEO cc.1471 §2 and CrPC ss.313 (2), (3), (4) are same on this principle. When CCEO cc. 1471 §2 says that during the instruction of the case, the accused cannot be compelled to confess the offence or constrained to take an oath. No accused is bound to confess to an offence; therefore, the judge is not allowed to require an oath from the accused. However, the accused can spontaneously swear an oath,[12] CrPC ss.313 (2), (3), (4) speaks that no oath is to be administered to the accused when he is examined; nor shall the accused render him liable to punishment by refusing to answer question, or by giving false answer to them.

When CCEO c.1299 §1 speaks that if in the text of the sentence an error in calculation turns up, a material error occurs in transcribing the dispositive section or in relating the facts or the petitions of the

[12]Diederich, Donald F., *The Right of an Accused in a Criminal Trial to Refuse to Testify against Himself According to the Norms of Canon Law and the Federal Law of the United States* (New York: Catholic University of America, 1963) 34.

parties, or some parts necessary are omitted, the tribunal that rendered the sentence must correct or complete it either at the request of a party or *ex-officio*, but always after the parties have been heard and decree appended to the bottom of the sentence, CrPC s.362 says that no court when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.

CCEO c.1482 says that the judge must absolve an innocent party even if the action has been extinguished. A number of circumstances cause a penal action to become extinguished, for example, the lapse of the period of prescription within which a case can be prosecuted. Even if the action is extinguished, should the judge in the case come into possession of evidence which clearly demonstrates that the offence was not perpetrated by the accused, he must declare this in a new definitive sentence and absolve the accused; and he must do this regardless of the grade or stage trial and CrPC s.468 speaks that when the accused appears or is brought before the court, he may raise the preliminary plea that the criminal proceedings against him are barred by the limitation of time prescribed by law. Section 468 enjoins that no court, after the expiry of the period of limitation, shall take cognizance of an offence which is punishable with fine only or with imprisonment up to three years.

1.7. Avoidance of Arbitrariness

The process attempts to avoid arbitrary decisions made by a single superior or judge; other advisors or officials must be included in the process, whether it be administrative or judicial.[13]

According to CCEO cc.1295 §4, 1297, 1298, the judgement is to be concluded with the indication of the date and place where it was rendered, with the signature of the judge or judges in collegiate tribunal and the notary. The sentence is to be intimated as soon as possible, indicating the time within which an appeal can be placed. The intimation of the sentence can be made either by giving a copy of the sentence to the parties or their procurators or by sending them a copy. CrPC s.353 says that the judgement in every trial shall be

[13]Huels, John M., "The Correction and Punishment of a Diocesan Bishop," *Jurist* 49 (1989) 538.

pronounced in open court by the presiding officer immediately after the close of the trial or at some subsequent time of which notice shall be given to the parties by delivering the whole of the judgement; by reading out the whole of the judgment and by reading out the operative part of the judgement and explaining the substance of the judgement to the accused. Where the judgement is delivered by delivering the whole of the judgment, the presiding officer shall cause it to be taken down in shorthand, sign the transcript and every page thereof as soon as it is made ready, and write on it the date of the delivery of the judgement in open court. Where the judgement or the operative part is read out, it shall be dated and signed by the presiding officer on open court.

In CCEO c.1472, it is said that in a judicial trial, the hierarch entrusts the prosecution of the case to the promoter of justice, but in CrPC s.302 (2), it is said that the Advocate-General or government advocate or Public Prosecutor or Assistant Public Prosecutor shall have the right to conduct prosecution and that in such case no permission of the magistrate for conducting the prosecution would be necessary.

The CCEO c.1473 says that if the hierarch imposes any temporary disciplinary measures during the process itself in accord with canon 1473, he must first hear the advice of the promoter of justice and cite the accused, but there is no parallel canon in CrPC.

When CCEO cc.1084 §I, 3°; §2 say that certain penal cases are reserved to a collegiate tribunal of three judges; in the judgment of the bishop, very difficult cases or cases of greater importance can be entrusted to the judgment of three to five judges, CrPC s.9 say that every courts should be presided over by a judge.

CCEO c.1475 §2 says that the accused must accept renunciation and not just be informed about it. In a penal trial, should the promoter of justice elect to renounce the action either at the direction or with the consent of the hierarch, for validity, the renunciation must be accepted by the accused. The reason for this is obvious. A promoter of justice will most likely renounce a case only when it is clear that it is not going to be possible to prove the charges which have been made against the accused or obtain the desired penalty. By renouncing the action, this provides the hierarch with the

opportunity of presenting the case once again should new or more convincing proofs be forthcoming. The accused, on the other hand, may very well prefer to have a definitive sentence rendered and executed resulting in a *res iudicata* which would protect him form the "double jeopardy" of ever having to face the same charges again in a new trial. Hence, he can elect not to accept the renunciation which would then compel the tribunal to bring the case to conclusion with a decision presumably absolving the accused of the charges against him. But CrPC s.300 (1) says that a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall not be liable to be tided against for the same offence while such conviction or acquittal remains in force. It may, however be noted that the term "acquittal" here does to cover the dismissal of a complaint or the discharge of the accused. Where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favor of an accused, such a finding would constitute an estoppels or *res judicata* against the prosecution as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence for which the second trial is permissible by law.

1.8. Burden of Proof on Prosecution

The both codes do mention about the spirit in which the duties of the promoter of justice and public prosecutor are to be discharged.

When CCEO c.1207 §l says that the burden of proof is on the promoter of justice and others who bring charges against the defendant, CrPC ss.301 and 302 speak that the burden of proof is on the public prosecutor and others who bring charges against the defendant.

When CCEO cc.1152 and 1414 §2 speaks that the minimally, it must be proven that the accused committed an external violation of a law or precept,[14] the prosecution of which has not been barred by the appropriate statute of limitations, there is no parallel section in CrPC.

[14] M. Hughes, "The Presumption of Imputability Insanity and Imputability Canon1321," in E. Mc- Donough, "A Gloss on Canon 1321," *Studia Canonica* 21 (1987) 19-36.

Under CCEO c.1414 §§1, 2, it is said that in addition, before imposing or declaring a sanction the judge or superior must have moral certainty that the accused committed an offense that is seriously imputable by reason of *dolus* (deliberate intention to violate the law) or, in limited cases stated in the law, at least by *culpa* (negligence).[15] But in CrPC, the prosecution has to prove beyond any doubts.

1.9. Mitigating Factors

Since the canons below are the clear expression of medicinal character of the penal process of CCEO which lacks in CrPC.

In CCEO c.1409, it is said that even if the defendant is found guilty of committing a delict, there may be mitigating factors that would excuse from the prescribed sanction altogether, or may warrant some lesser means of punishment.[16] For many offenses, canon law grants discretionary power to the judge or superior to impose the penalty or not, to temper the penalty, or to impose a penance in its place. Even if a law requires that the stated penalty be imposed the judge or superior still has wide discretionary latitude. He can postpone to a more opportune time the infliction of a penalty, if it is foreseen that greater evils will occur from an overly prompt punishment of the offender, or refrain from imposing a penalty, or impose a lighter penalty, or employ a penance if the accused has reformed and scandal has been repaired, or if the accused has been or, it is foreseen will be sufficiently punished by civil authority, or suspend the obligation to observe an expiatory penalty if it was the person's first offense after having led a praiseworthy life and if the need to repair scandal is not pressing. The judge or superior can also refrain from imposing a penalty and provide for some other means of reform whenever the offender had only an imperfect use of reason, or

[15]T. J. Green, "Sanctions in the Church," p. 901; idem, "Penal Law Revisited: The Revision of the Penal Law Schema," *Studia Canonica* 15 (1981) 150.

[16]M. Hughes, "The Presumption of Imputability Insanity and Imputability Canon1321" in E. McDonough, "A Gloss on Canon 1321," *Studia Canonica* 21 (1987) 34.

committed the offense out of fear, necessity, in the heat of passion, in drunkenness, or in a similar mental disturbance.[17]

1.10. Right of Recourse or Appeal

The both Codes specifically provide by law definite provisions regarding the circumstances in which an appeal shall lie.

When CCEO c.1481§I says that the defendant may even appeal a sentence convicting him of an offence when no punishment is imposed, in order to seek to have his innocence declared in a higher court, we cannot see any parallel section in CrPC.

It is said under CCEO cc.1310; 333§3; 45§3 that there is, however, no appeal from a sentence of the Supreme Pontiff himself or of the Apostolic Signatura[18], nor is there recourse against a decision or decree of the Roman Pontiff.[19] But in CrPC s.393 the tone is little different saying consistent with the general rule that no right of appeal unless specifically provide by law. However these provisions have been delimited by disallowing categorically the right of appeal in certain cases. It will be convenient to consider those cases first. No appeal in the petty cases. No appeal from conviction on plea of guilty. Where an accused person has pleaded guilty and has been convicted on such plea, there shall be no appeal. No appeal from the judgement of the full bench or of constitutional bench of the Supreme Court.[20]

One component of fair procedure and natural justice is the provision under CrPC s.397 for reviewing the decisions of criminal courts for the purpose of correcting possible mistakes and errors in such decision. The reviewing process not only provides for a corrective mechanism against real errors but it is also useful to inspire better confidence in the public mind regarding the administration of justice. The reviewing of a decision can be made by the very court which gave the decision or it can be done by superior courts.

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[17]Huels, John M., "The Correction and Punishment of a Diocesan Bishop," 540.

[18]The highest court/tribunal in the Catholic Church.

[19]Huels, John M., "The Correction and Punishment of a Diocesan Bishop," 540.

[20]Kelkar, *Lectures on Criminal Procedure*, 251.

Obviously it is more expedient if the reviewing is done by a superior court. The Code provide for a review either by way of an appeal or way of a revision.

CrPC s.392 says that when an appeal is heard by a high court before a bench of judges and they are divided in opinion, the appeal with their opinions, shall be laid before another judge of that court, and that judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion. However, if one of the judges constituting the bench or where the appeal is laid before another judge, that judge, so requires. The appeal shall be reheard and decided by a larger bench of judges.

Under CrPC s.395 (2), a court of Session or a metropolitan magistrate may refer for the decision of the high court any question of law arising in the hearing of a case pending before such court or magistrate. Such a reference can be made only on a question of law and a question of fact.

Cconclusion

The law considers the infliction or declaration of a penalty to be the last resort only after other means have been used to secure the reform of the offender and to repair any harm or scandal that has been caused.[21] No penalty can be inflicted or declared without a canonical process. The law favors the judicial process, but in most cases the competent superior is free to choose an administrative process for just causes.[22]If the accused wishes to defend himself against charges of wrongdoing, the penal process is the best way to ensure that his defence is fully heard, that the testimony of his accusers becomes a part of the acts of the case open to review, and that all other procedural rights; including recourse or appeal, are respected. A constitutional right of all the faithful is the right to due process of law, "the right to be judged in accord with the prescriptions of the law to be applied with equity" (c. 24 §2). Apart from a formal process this right can be jeopardized. Without the safeguards built into the penal process, especially the judicial

[21]Huels, John M., "The Correction and Punishment of a Diocesan Bishop," 540-542.

[22]Moodie, Michael R., "Defense of Rights: Developing New Procedural Norms," *Jurist* 47 (1987) 423.

process, there can be too great a reliance on the good judgment of the hierarchical superior who can find a person at fault without any process and pressure him to resign, to accept a transfer, to delegate powers to another, or to agree to some other extra-penal solution that the accused may not believe is justified.[23]

If we watch the above said discussions, we know that even though many canons of penal process of CCEO have similar parallels in the sections of CrPC, penal process of CCEO is more medicinal in character than the sections of CrPC. But CrPC gives a general sense of basic human and procedural rights which is called "fair trial".

Is there any meeting point of the concept medicinal character in the penal process of the Church and the concept of "fair trial" in the penal process of the State. The meeting point in the goal of punishments. The goal of punishments in the church and the State is of the reformation of the accused. The goal is attained only when the authorities of the Church and State impart the accused at least the minimum of fair dealings which are the basic rights of the accused.

The procedural law is designed to protect the exercise of the parties' right to participate in the search for truth. There are possibilities for either absolute denial of the right of defence. The total denial or substantial limitation of this right may result in either remediable or irremediable nullity of a definitive sentence if procedural requirements are not faithfully followed. And this must be verified in each case by taking into consideration all concrete circumstances surrounding it. The Church is supposed to be the mirror of justice in the world. The principal function of a tribunal is to mete out justice in the name of the Church. Therefore, every tribunal has the innate obligation to be mirror of justice in the world. In a democratic nation, the right of an accused to a "fair trial" is quintessential. An unfair trial is an anathema to the rule of law. The right to a fair trial is considered absolute, its concomitant rights, such as the presumption of innocence and the right to remain silent may, in appropriate circumstances, be restricted provided the overall fairness of the trial remains.

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[23]Huels, John M., "The Correction and Punishment of a Diocesan Bishop," 535.