

The Place of Prosecutorial Duty to Disclose Exculpatory Evidence during Pretrial in Ethiopian Criminal Justice System

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Abstract

This article explores the place of Prosecutorial Duty to Disclose Exculpatory Evidence in Criminal Proceeding in Ethiopian Criminal Justice System. It is intended to show whether or not the public prosecutor has a substantive obligation to disclose exculpatory evidence to the defendant in the current criminal justice system of Ethiopia.

After a thorough analysis of the existing relevant provisions of the FDRE constitution, Anti- Corruption Proclamation, the 1961 Criminal Procedure Code, FDRE Criminal Justice Policy and the Draft Criminal Procedure Code, the article finally concludes that (1) the scope of the obligation resting on the prosecutor to disclose exculpatory material is not sufficiently defined, articulated, and regulated under existing legal regime, (2) the prosecutorial duty to disclose exculpatory evidences in the pretrial stage is totally not yet regulated under the existing legal regime, & (3) the draft criminal procedure code is not sufficient to give a full pledged protection to the defendants right to access any prosecution evidences /incriminating or exonerating / in the pretrial stage of the proceeding.

Based on the above findings, the writer recommends that draft criminal procedure and evidence law should clearly include provisions that sufficiently define prosecutorial duty to disclose any evidence (incriminating and exonerating), form of disclosure and enforcement mechanisms whenever the Prosecutor violates its obligation in the pretrial stage. Besides, Article 20/4/ of the FDRE constitution should also be interpreted in light of the international human right standard so that the defendant will access any evidence in the possession of the prosecution in pretrial stage.

Keywords: Prosecutorial Duty to Disclose, Exculpatory Evidence, Criminal Proceeding, Ethiopia

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1. Introduction

The administration of the criminal justice system tries to strike a balance between the search for truth and the fairness of the process. The state has the primary responsibility of detection, apprehension, prosecution and conviction of offenders. In this process, the accused always faces the mighty state and this challenges the fairness of the criminal justice system. Using various tools, the law tries to maintain the balance between the searches for truth and ensure the fairness of the process. Therefore, criminal proceedings must provide several core rights to the accused and defend them against possible abuses. Among these rights, the right to disclosure holds a prominent position.

It has also been recognized that it is the duty of a public prosecutor to act fairly towards an accused. More recently, however, there has been an increased emphasis on the duty of the prosecutor to make known to the accused evidence or other information which has come to the prosecutor's attention and which might assist the accused's defence.¹In this respect, it has become 'a universal requirement in international criminal procedure

¹ Rt Hon Lord Coulsfield, Review Of The Law And Practice Of Disclosure In Criminal Proceedings In Scotland August 2007,P

that the prosecution discloses to the defense exculpatory evidence' in pretrial stage of the proceeding.¹ In spite of the core principle being universally recognized as an essential part to a fair trial, the scope of the duty and its legal recognition may differ from country to country.

In Ethiopia, the FDRE Constitution recognizes as per Art 20(4) the right of the accused to full access to any evidence presented against them as one of the fair trial rights. However, in the mind of the writer of this paper, the place of prosecutorial duty to disclose exculpatory materials in the pretrial stage in the context of the existing legal regime of the country is not clear and needs further inquiry.

Considering this, the primary objective of this paper is showing the place/if any/ of prosecutorial duty to disclose exculpatory evidences by exploring the existing legal regime and criminal justice policy of the country.

On top of that, this paper has secondary objective of making recommendations that will secure a system that is both practical and effective, recognizing the rights of the accused, the interests of victims and witnesses and the wider interests of justice.

To this effect, this paper is organized consisting three sections. The first section of this paper deals with introducing the meaning and justification of disclosure of evidence in general and prosecutorial duty to disclose exculpatory evidences in particular in criminal proceeding. The second section, tries to provide the writers analysis of the existing legal regime and criminal justice policy as to show the place /if any/ of prosecutorial duty to disclose exculpatory evidences in Ethiopian criminal justice system. And, in the third section of the paper the writer has made a concluding remark on the basis of the analysis made in section two and suggested certain points in the form of recommendations.

Section one

Prosecutorial Duty to Disclose Exculpatory Material

To begin with the concept of disclosure in criminal matters, it is governed largely by well-established common law principles.² As long as its meaning is concerned, according to the Black's Law Dictionary it is defined as the act or process of finding or learning something that was previously unknown.³ In criminal law the provisions on disclosure regulate the process of revealing evidence to an opposing party.⁴ In other words, it is the act or process of revealing or uncovering; it brings to light what could not be seen before.⁵

Although there is international agreement that disclosure is an essential part of a fair trial, the scope might differ. The opinions on how to regulate disclosure between parties will traditionally differ in civil law opposed to common law countries. In civil law countries, the defense will generally be informed of the case by a *juge d'instruction* in charge of the *dossier*.⁶ This *dossier* will include incriminating as well as exonerating evidence. In common law countries, a party driven system will require the Prosecution to disclose evidence in a timely manner to the defense. The Prosecution is seen as officer of justice who carries the public duty to disclose any evidence relevant to the defense.⁷ This evidence must include exonerating material which cannot be held back.⁸ Although these systems might be differently organized, what remains essential is that the accused is informed timely of the case against him so that the principle of equality of arms is guaranteed and efficiency will be achieved.

¹ J. Jones, 'Disclosure In A. Cassese (Ed.), *Oxford Companion To International Criminal Justice*, 2009

² Prosecution Disclosure (And Non-Disclosure) In Criminal Matters. *A Paper Presented For Continuing Legal Education Purposes On 23 June 2012, At The Aboriginal Legal Service Nsw/Act Ltd (Western Zone) Dubbo Office*

³ Black's Law Dictionary, 2004; M. Klamberg; *Evidence In International Criminal Trials: Confronting Legal Gaps And The Reconstruction Of Disputed Events*, 2013, P. 296.

⁴ K. Gibson And C. Lussiaá-Berdou, 'Disclosure Of Evidence' In K. Khan, C. Buisman And C. Gosnell, *Principles Of Evidence In International Criminal Justice*, 2009, P. 306.

⁵ Brando Matteo Fiori, *Disclosure Of Information In Criminal Proceedings :A Comparative Analysis Of National And International Criminal Procedural Systems And Human Rights Law*

⁶ Id, P 308

⁷ *Ligeia Quackelbeen*, *The Prosecutorial Duty To Disclose Exculpatory Material Appropriate Remedies And Sanctions: The Necessity Of Implementing A Code Of Conduct* ,P

⁸ Ibid

The duty to disclose exculpatory material can relate to material the prosecution has in its possession, material it knows of or can be interpreted as a proactive duty to search for exonerating material. On top this, as the primary purpose of this paper is concerned with prosecutorial duty to disclose, it is essential to the rights of the accused that he be informed of the case against him and therefore disclosure provisions ensure that materials in the possession of the prosecutor are handed over to defense.

Thus, the Prosecutor has a duty to disclose information or material to the accused, which in any way tend to suggest his innocence or mitigate his guilt, or which may affect the credibility of the prosecution' evidence.¹ In this regard, the Prosecutor's duty is proactive in nature and does not depend on the defence requesting the disclosure or the court ordering it. Furthermore in factual application of the rules governing the disclosure regime the prosecution may not compound all types of relevant evidence in one single submission and thereby burden the defence with the task of separating the incriminating from the exonerating evidence during its review of the materials.² Thus, the contemporary understanding in adversarial system is that the prosecution is obliged to disclose incriminating and exculpatory evidence to the defence separately and its failure has sanctions.³ Accordingly, in the following section the writer will make an attempt to analyze our laws and policy with the view to evaluate the place of prosecutorial duty to disclose exculpatory materials in our criminal justice system.

Section Two

Prosecutorial Duty to Disclose Exculpatory Evidences in Ethiopian Criminal Justice System

The Ethiopian Criminal Justice System as it stands now, is governed overall by the following laws: namely; (i) The Constitution of FDRE (ii) The FDRE Penal Code & other special penal legislations on specific offences (Anti -Terrorism, Anti-Corruption, Dangerous Vagrancy etc) and (iii) The 1961 Criminal Procedure Code of Ethiopia. In addition to these binding laws, there are criminal justice policy and the draft criminal procedure code which are not binding but has paramount importance for academic purpose. Thus, the writer has made an attempt to analyze the non-binding policy and draft procedure as to show how the prosecutorial duty to disclose exculpatory evidences is placed and predicted to be placed in our criminal justice system.

2.1 The FDRE Constitution

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) recognizes disclosure of information as one of the rights of the accused. It provides that “[d]uring proceedings accused persons have the right to full access to any evidence presented against them, to examine witnesses testifying against them, to adduce or to have evidence produced in their own defence, and to obtain the attendance of and examination of witnesses on their behalf before the court”⁴. Under this provision . Thus, based on this provision the writer of this paper argues that the public prosecutors of Ethiopia have no constitutional duty to disclose exculpatory evidences to the accused person during proceedings for the following two reasons. First, the wording of the constitution says "...any evidence presented against them..." Here, though the phrase "any evidence.." at first glance gives the impression that disclosure of exculpatory evidences is guaranteed, its qualification with the phrase ".....presented against them." clearly excludes it. Second, the constitution provided disclosure of evidence to the benefit of the accused as a right, not as a duty on public prosecutor entailing legal consequence for its non-disclosure. Third, it is also not clear as to on whom does the obligation to disclose evidences rest. But we can make inferences by contextually reading the same provision that it rests on both the court and the public prosecutor.

The last but not the least justification that let me to conclude that FDRE constitution does not recognize the duty of public prosecutor to disclose exculpatory evidences is that, it is not clear whether or not pretrial disclosure is allowed or not . On this point the argues on the basis of the contextual meaning of this particular article⁵ that seems to provide only the rights of the accused during trial as it seems to deal with examination in chief , cross and re-examination of the witnesses .

¹ Negri, “Equality Of Arms – Guiding Light Or Empty Shell”.In Bohlander (Ed.), *International Criminal Justice: A Critical Analysis Of Institutions And Procedures*, P. 56.

² See Supra Note 8,P

³ Supra Note 8

⁴ *Constitution Of The Federal Democratic Republic Of Ethiopia*, Proc. No. 1/1995, (Hereinafter The Fdre Constitution). Art. 20 (4).

⁵ Id,Art.20

Having said this much about the constitutional provisions gap on the matter under consideration, I went to explore in the following section as to whether public prosecutors have a statutory duty to disclose exculpatory evidences in our criminal justice system. To do so, I opted to discuss first, in the binding and effective substantive and procedural laws which regulate the criminal justice system of Ethiopia. Thus, in the following sub section I will try to analyze first the substantive laws, then procedural laws.

2.2 Substantive Criminal laws

As the law stands now, prosecutorial duty to disclose exculpatory materials to defendant have no expressed statutory recognition in Ethiopia. However, inferences can be made from the close reading of the revised anti-corruption proclamation.¹ Accordingly, under article 35 - 41 of the proclamation, which provided the committal of preparatory hearing where it appears to a court that a charge of corruption offence reveals a case of such complexity and as a result of which the trial is likely to be of such length, and where the purposes for conducting preparatory hearing as stated in the proclamation is to identify issues which are likely to be material to the case, to assist the parties in comprehending the issues, to facilitate the proceedings and to assist the court in the management of the trial.

From this justification we can infer that preparatory hearing play the role of disclosure of evidences in that they are meant to achieve fairness and efficiency to criminal proceeding. However, the scope of the prosecutorial duty to disclose did not include disclosure of exculpatory evidences as the thorough reading of the proclamation reveals otherwise.² For instance, it compels the prosecutor to prepare the prosecution evidence and any explanatory material in such a form as appears to the court to be likely to assist the proceeding and submit same to the court and the accused, not exculpatory evidences.³

Hence, in the opinion of the writer prosecutorial duty to disclose exculpatory evidences in Ethiopia has no substantive law recognition. Thus, it could be better to analyze the 1961 criminal procure code as to ascertain whether it encompasses such obligation or not in the following sub section.

2.3 The Criminal Procedure Code

Next to the substantive criminal law, the pertinent law that deals with procedural matters in criminal matters is the 1961 of the Criminal Procedure Code. It is still applicable as the basic procedural law regulating criminal proceedings in Ethiopia. It has predominantly adopted the adversarial system and is influenced by the Malayan Code of Criminal Procedure.⁴

Though the code has been dominated by adversarial system, uncommon to the adversarial system its close scrutiny reveals the fact that the rules governing investigation and production of evidences do not clearly stipulate the disclosure of information in general and the prosecutorial duty to disclose exculpatory evidences in criminal proceeding. That is to say, disclosure of information (non-incriminating or incriminating) by the public prosecutor is not expressly recognized as an obligation in the code.

There are, however, some provisions from which inferences can be made. The provisions of the code which help to make an inference are provisions regulated to preliminary inquiry.⁵ In this regard, the prosecutor is required to open his case and to call his witnesses in the presence of the accused by the request of the court which conducts the preliminary inquiry.⁶ As the very purpose of conducting preliminary inquiry in our code is to record the testimony of witnesses of public prosecutor who are susceptible of disappearance and thereby to compel them to present bond for further attendance before such court.⁷ Further, after the witnesses for the prosecution have been heard and their evidence recorded, the court asks the accused whether he wishes to make a statement in-answer to the charge and his statement is recorded.⁸ Hence, disclosure of evidences has the purpose of informing the accused about the kinds and contents of prosecution evidences, the accused will get the

¹ Proclamation No. 434/2005, Revised Anti-Corruption Special Procedure and Rules Of Evidence, Federal Negarit Gazeta No. 19 2nd February. 2005

² Id, Art. 36

³ Id, Art. 37

⁴ Stanley Z. Fisher (1969), *Ethiopian Criminal Procedure, A Sourcebook* (Addis Ababa: Haile Selassie I University), Introduction, P. Xii.

⁵ Article 80- 92 Of The 1961 Criminal Procedure Code Of Ethiopia

⁶ Id, Art. 84

⁷ Id, Art.90

⁸ Id, Art.85/1/

opportunity to know the evidences of the prosecution and evaluate their probative value during the process of preliminary inquiry, as a result, it can be concluded that the rules governing the process impliedly recognize disclosure of evidences before the formal trial process begins.

However, regarding its scope and purpose it's not what is meant by ideal disclosure. Here, first it is only provided for particular types of offences and offenders as enshrined under article 80/1/ and /3/ of the code. Second, it does not allow presentation of evidences which mitigate or exonerate the defendant rather it seems to regulate only evidences of the prosecution which are presented against the defendant. As a result, it can be concluded that the 1961 criminal procedure code of Ethiopia do not recognize prosecutorial duty to disclose exculpatory evidences.

2.4 The Criminal Justice Administration Policy

The Criminal Justice Administration Policy was adopted by the Council of Ministers in March 2011 to direct basic governmental actions and decisions in enforcing the criminal justice system in line with constitutional principles, rules and values.¹ Its objectives include improving the various aspects of the criminal justice system and providing indicators for laws within the system that need to be introduced and others that need amendment.² In outlining the principles and strategies on which it is based, the Policy confirms the commitment to uphold and enforce constitutional rules and principles as well as the various international legal instruments to which Ethiopia is a party. 'The decision-making process in criminal proceedings', it continues, shall be one in which 'the innocent are properly sorted out apart from the guilty.'³ The Policy is applicable on all bodies and institutions that take part in criminal matters and the criminal justice system.⁴

Disclosure of Evidences is comprehensively recognized in part four of the policy which contains provisions that are meant to improve the effectiveness and fairness of the criminal justice system. In this part, under the section⁵ titled "disclosure of evidences, plea of guilty and plea bargaining ", it recognizes the disclosure of evidences in detailed manner as to achieve efficiency and fairness in criminal justice system.

Accordingly, both prosecutorial and defence disclosure is recognized in the policy.⁶ As the main objective of this paper is indicating prosecutorial duty to disclose exculpatory evidences in our criminal justice system ,the policy under the caption called " disclosure of evidences" underlines the necessity of reforming the existing legal framework/substantive and procedural laws / by new legal regime which accommodate the prosecutorial duty to disclose both exculpatory and incriminating evidences to the defendant in the pretrial stage of the proceeding as a principle.⁷

The policy further, stipulates that this prosecutorial duty to disclose evidences has the purpose of creating a conducive environment for the plea bargaining process in between the defendant and the public prosecutor. This expectation of the policy can be taken as additional importance of disclosure in our case.

As regards, the content and mode of disclosure of the information/evidence that has to be disclosed by the prosecutor, the policy provides certain minimum standard by saying that the prosecutorial duty of disclosure should at least create a privilege to the defendant to look at the evidences presented against him, examine them, present his own defence evidences and to demand the appearance of some witnesses in his favor.⁸ From this wording of the policy, it can be concluded that a mere notification of the identity of the documentary and personal evidences is not enough to get the prosecutor released of his duty to disclose.

Though the policy enshrined the prosecutorial duty to disclose evidences /exculpatory and incriminating / as discussed above. It is not without exceptions.⁹ The grounds of exceptions are provided from a-f in the same section. The content of grounds of exceptions which are provided under "a" and "b" are related with (i) evidences which has a role of showing the procedures , guide lines , techniques and methods of committing

¹ Council Of Ministers Of The Fdrc (2011), The Criminal Justice Administration Policy Of 2011, *The Translation Is Mine*.

² Id, Sec. 1.3.

³ Id., Sec. 1.4

⁴ Id., Sec. 1.6

⁵ Id. Sec. 4.5

⁶ Id, Sec. 4.5.1/A/

⁷ Id, Sec. 4.5.2/A/

⁸ Ibid,Sec.4.5.2/C/

⁹ Ibid,Sec.4.5.3

already committed offence or an offence likely to be committed or (ii) evidences that let the defendant released of liability or (iii) evidences which casts doubt on the impartiality of the court or (iv) creates obstruction of justice.

From these grounds, the writer concludes that the exceptions tend to prohibit the public prosecutor from disclosing exonerating evidences in the pretrial stage of the proceeding which the same policy seemed to have allowed in the beginning as a principle.

Needless to mention that the grounds of exceptions provided under "c" , "d" , "e" and "f" of the policy are compatible with accepted standards of exceptions allowed in pure adversarial system , human right standard and democratic state in that they are related with the security of the state , public interest and protection of the right of others . However, one long standing common law exception to the common law duty of disclosure is the doctrine of public interest immunity, previously known as 'crown privilege'.¹is not absolute rather its legitimacy is also under courts evaluation , not under discretionary power of the public prosecutor as evidenced by statement provided below in case law .

*"There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done."*²

Accordingly, it is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence.

In contrast to the common law exception , the exceptions provided under "a" and "b" of sec.4.5.3 of our criminal justice policy are not only contrary to the accepted standard but also totally prohibit what the policy seemed to have allowed in sec.4.5.2 .as explained above. Furthermore, the policy unlike other Countries³ which adopted adversarial system does not urge on the need to have enforcement mechanism.

Having the above gaps of the policy and its non-binding nature in mind, the writer found it plausible to go on to analyzing how the prosecutorial duty to disclose exculpatory evidences is placed in the draft criminal procedure code of Ethiopia. Hence, the following discussion is devoted to this end.

3.5. The Draft Criminal Procedure Code

The drafting of a new code of criminal procedure has been underway for a number of years now. It is meant to be applicable in both Federal and State courts in the country. The draft has undergone several revisions and substantial changes may take place before it is submitted to parliament and possibly become a binding law. The following discussion is based on the Draft by the Ministry of Justice as it stood in 2003 E.C. (2011) and numerous changes may have been made to it since. Its provisions relating to the issue of disclosure of evidences by the prosecutor are discussed here as useful indicators of where our law is generally headed in dealing with these issues.

The Draft reiterates the constitutional principles of fair trial rights. Under part three which deals with plea of guilty it states that the prosecution bears the duty to disclose evidences /exonerating and incriminating / to the defendant in the pretrial stage so that the plea bargaining process will be enhanced .⁴In this respect, disclosure is understood as only a means to achieve plea bargaining process, it is not recognized as a distinct theme in comprehensive manner by clearly showing the content of the evidences, the form of disclosure, grounds of

¹ See Supra Note 3

² Id, In *Sankey V Whitlam* (1978) 142 Clr 1 Gibbs Acj Stated At 38-9:

³ For Instance *In England, As Per Criminal Procedure Amendment (Case Management) Act 2009* (Nsw) Section 146 The Mechanisms Of Enforcement Are Provided As Follows;

(1) *Exclusion Of Evidence Not Disclosed*

(2) *Exclusion Of Expert Evidence Where Report Not Provided*

(3) *Adjournment*

(4) *Application Of Sanctions*

(5) *Regulations*

⁴ The Draft Criminal Procedure Code ,Article 213.

exceptions and mechanisms of enforcement. From this it can be argued that not only the existing legal regime but also the new draft criminal procedure code provisions do not expressly recognize prosecutorial duty to disclose exculpatory evidences to the accused in Ethiopia.

Section Three **Conclusion and Recommendations**

3.1 Conclusion

In view of the above analysis of the relevant provisions of the FDRE constitution, Anti- Corruption Proclamation, the 1961 criminal procedure code, FDRE criminal justice policy and the draft criminal procedure code, first, it can be concluded that the scope of the obligation resting on the prosecutor to disclose exculpatory material is not sufficiently defined, articulated, and regulated. It is needless to mention how this happened in each type of law as I have already made point by point conclusion on the analysis part under section two of this paper.

Second, it can also be concluded that the prosecutorial duty to disclose exculpatory evidences in the pretrial stage is not yet regulated as the analysis made on the existing laws/ relevant provisions of the FDRE constitution, Anti- Corruption Proclamation, the 1961 criminal procedure code/ reveals in our criminal justice system. Thirdly, the writers conclusion related to the inferences made from the relevant provisions of the non-binding draft criminal procedure code and the FDRE criminal justice policy, though the policy has a detailed stipulations on the matter under consideration, some of the exceptions allowed are not only contrary to what is accepted in the common law jurisdiction but also is interpreted wrongly will totally exclude the prosecutorial duty to disclose exculpatory evidences in the pretrial stage and what is proposed by the draft criminal procedure code is not sufficient to give a full pledged protection to the defendants right to access any prosecution evidences /incriminating or exonerating / in the pretrial stage of the proceeding.

Considering the fact that the right to a fair trial is protected under a number of international as well as regional human rights treaties¹ and prosecutorial duty to disclose exculpatory evidences is part of this fair trial right which is based on the justification that the Prosecution is generally in a better position to gather evidence and the only way to repair this imbalance is to allow the defense to look into the evidence gathered by the Prosecution, the writer suggested for the following measures in the form of recommendations.

3.2 Recommendations

1. I recommend that the new draft criminal procedure and evidence should clearly include provisions that sufficiently define prosecutorial duty to disclose any evidence /incriminating and exonerating /, form of disclosure and enforcement mechanisms when Prosecutor violates its obligation in the pretrial stage.
2. Article 20/4/ of the FDRE constitution should also be interpreted in light of the international human right and international criminal laws standard so that the defendant will access any evidence in the possession of the prosecution in pretrial stage.

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¹ Art. 8 Of The American Convention On Human Rights 'Pact Of San Jose Costa Rica', Accessible On http://www.oas.org/Dil/Treaties_B-32_American_Convention_On_Human_Rights.htm, 1969; Art. 6 Of The European Convention Of Human Rights, Treaty Series Of The Council Of Europe No. 005, 1950; Article 14 Of The International Covenant On Civil And Political Rights, United Nations Treaty Series Vol. 999, 1966 And Achpr.

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