

Withdrawal of Criminal Charges for the Sake of Public Interest in Ethiopia: Exploring Legal Gaps and Way Forward

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Abstract: All criminal cases do not lead to either conviction or acquittal after completion of trial. Midway, the cases may be withdrawn from the records of the criminal courts. In Ethiopia, power to withdraw criminal charges for the sake of public interest is absolutely vested in the hand of Attorney General (AG). Unfortunately, the Ethiopian laws are failed to define and lists some illustrations what constitutes public interest. In such a case, the AG has become lynch pin in disposal of cases otherwise than on merits. Thus, such power of the AG for withdrawal of criminal charges from prosecution for the sake of public interest has become a controversial topic in the criminal proceedings and in fact it is a peculiar power entrusted to the AG. The main objective of the article is to examine the existing normative frameworks of Ethiopian criminal justice system that regulating withdrawal of criminal charges for the sake of public interest. In order to achieve the intended aims, this article has employed doctrinal legal research on which legal analysis of the principal legislations was the focal point. In so doing, the study has identified a lot of legal vacuums. Accordingly, the study found absence of clear and comprehensive definition of the phrase public interest; lack of legal way outs for consideration of views and concerns of victims of crimes; absence of review mechanism in a case where the AG withdraw criminal charges arbitrary; lack of time limitation for continuation of criminal charges after withdrawal and empowering exclusive mandate and wide discretionary power to AG in withdrawing criminal charges alone are the main ones. Amongst others, it is recommended that the Ethiopian law maker should amend and enact a law governing withdrawal of criminal charges under the guise of public interest.

Keywords: Withdrawal of Criminal Charges, Public Interest, Attorney General (AG), Discretionary Power

1. Introduction

In criminal justice system of any state, ensuring peace and security possess is a central position. In order to serve this purpose, they enact criminal laws to prevent crimes by giving notice of offences and penalties. However, if persons violated this law, punishment of the criminal takes place and this punishment presuppose prosecution among others.

Until now, recorded histories of criminal justice administration have discovered that punishment of criminals may in some instances insufficient or totally undesirable owing to different reasons. Thus, we do not charge every individual who commit an offence. That is why many contemporary jurisdictions' criminal policy devised mechanism by which the criminal charges can be withdrawn

and AG authority can withdraw criminal charges at any time before judgment for justified purposes.

There are a number of different reasons why criminal charges may be withdrawn by AG authority. Among the various grounds of which frequently cited for withdrawal of criminal charges, the protecting public interest is the one reason. Of course, the phrase public interest is the most contentious, elusive and hotly debated concept among many scholars. Thus, the phrase public interest is in vague. Even though such debate among authors; still, it is incorporated in many jurisdictions' of criminal justice administration policy and legislation.

Our country, Ethiopia can't be an exception to this above mentioned issues. To that effect, Ethiopia has enacted laws which have given permits to withdraw and recommencement

of criminal charges by AG [1]. As per Article 2 (6) of Proclamation No. 943/2016; AG means head of the Federal AG appointed by the House of Peoples Representatives. Even though our country has been made laws governing withdrawal of criminal charges for the sake of public interest, these existing laws do have many legal vacuums; thus, too much unclear, incomplete and pave way to many interpretations.

Against this backdrop, this article examines the legal vacuums associate within existing laws regulating withdrawal of criminal charges under the guise of public interest and its way forwards. In order to attain its aims, this research employed a doctrinal based research method which involves examining both primary and secondary sources. The primary sources that are used by the researcher are:-the 1995 Federal Democratic Republic of Ethiopian (here in after FDRE) Constitution, the Criminal Procedure Code (here in after CPC) of the 1961, Ethiopian Criminal Justice Policy (ECJPO) (2011), the Federal Attorney General Establishment (here in after, FAGE) Proclamation No. 943/2016 Proclamation No. 943/2016 and the Revised Draft Criminal Procedure and Evidence Code (here in after, RDCPEC) of the 2021 were assessed and reviewed. The secondary sources such as books, journals, articles, unpublished materials like thesis focusing on the issues under study were used and analyzed.

This article is divided into four sections. Next to introduction, the second section discusses the conceptual framework of withdrawal of criminal charges and public interest. The third section examines normative framework governing withdrawal of criminal charges while forth section critically assesses the gaps within existing legislations and policies regulating withdrawal of the criminal charges for the sake of public interest in Ethiopia. Finally, section five comes up with conclusion and the way forward.

2. Definition of Withdrawal of Criminal Charges and Public Interest

2.1. Withdrawal of Criminal Charges

There is no single definition for the notion “withdrawal of criminal charges.” However, different nationals’ criminal legislation has provided the meaning of withdrawal of the criminal charges. For instance, in Australia, the 1985 Australian Prosecution of Offenses Act defines withdrawal of criminal charges as timely termination of proceedings with the interest of justice [2]. Likewise, Article 321 of the Indian criminal procedure code states that the Public Prosecutor or the Assistant Public Prosecutor to withdrawal or discontinue from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried [3].

According to the definitions indicated above, withdrawal of criminal charges refers to the discontinuance or termination of a criminal proceeding by public prosecutor up on its own motion whenever circumstances justifying to do so.

Unlike the above jurisdictions, in Ethiopia, neither the CPC of the 1961 nor the FAGE Proclamation No. 943/2016 has

directly defined what withdrawal of criminal charge is.

When we look into proclamation, it states that “AG has the power and duties to institutes the criminal charges by representing the federal government, litigates, withdraw charges when found necessary in the interest of public, resumes withdrew charges. Indeed, AG Office is authorized to issues directive concerning the withdrawal of criminal cases having national interest with consultation of the Prime Minister” [1]. Since its enactment five years ago, AG Office is not yet issued directive concerning the withdrawal of criminal cases having national interest. Thus, this provision is wholly dedicated to address the power and duties of the AG which deals with withdrawal and recommencement of withdrawn the criminal charges.

In similar fashion, Article 122 of the CPC of Ethiopia which deals with withdrawal of criminal charges has not contained the meaning of it except indicating the possibility of withdrawing charges by public prosecutor at any stage of proceeding with leave of court.

In nutshell, it is possible to define that, withdrawal of criminal charges refers to termination or discountenance of criminal proceedings of alleged criminals by AG or any other competent organ conferred with such power with a view to stop prosecution usually with leave of court with a view to protect public interest.

2.2. Public Interest

How should the notion of public interest more precisely be understood in general and by public prosecutors specifically? Public interest is a phrase that escapes precise definition. Although the phrase is in common usage in law and politics, it is widely recognized that, public interest is an ambiguous and mutable phrase that can arguably mean anything or nothing at one and the same time [4]. Some authors considered public interest like a horse on which anyone can ride [5]. Thus, it is an amorphous, complex and tricky concept which is typically not defined in any laws [6].

For example, the Black’s Law Dictionary defines public interest as “the welfare or well-being of the general public that warrants recognition and protection. It is something in which the public as a whole has a stake, especially an interest that justifies governmental regulation”[7].

There are for and against arguments on the concept of public interest. For some scholars, public interest is essentially anti-democratic because, it subjects the legitimate interests of individuals to the invented wishes of a majority community, while for others individuals will often have shared interests and that these can be pooled within some broader notion of the public interest [8]. These groups argue that, a legitimate reason for societies to establish criminal justice systems and prosecution services is to serve public interest and the common good.

When we come to Ethiopia, the question may be raised whether public interest can be defined, and is it even desirable to attempt to define it? Article 26 (3), 27 (5) and 29 (6) of FDRE Constitution put limitations to the rights of privacy, manifestation of religion or belief and freedom of expression

respectively, to protect public safety, peace (national security), health, education, public morality and fundamental rights and freedoms of others [9]. However, the constitution couldn't provide any definition for these phrases. ECJP of 2011 under its no. 3.9 also empower the public prosecutor to withdraw the criminal charges based on public interest [10]. Even though the ECJP tries to define what constitutes public interest, it couldn't provide any comprehensive legal definition for the phrase public interest [10].

Under FDRE criminal code, further, there are also extensive provisions which deal with public interest, public health, security [11]. It is worth considering that no Ethiopian laws so far defined what constitutes public interest. From my point of view, although public interest is an elastic concept that means different things in different contexts, at least a list of public interest matters could be set out in the laws. Thus, the list would not be exhaustive, but may provide the concerned body with useful guidance.

3. Normative Framework Governing Withdrawal of Criminal Charges in Ethiopia

In this part, which is the major part of the paper, an attempt has been made to examine legislations governing withdrawal of criminal charges for the sake of public interest and its gaps in Ethiopia. Accordingly, the CPC of the 1961, the ECJP of 2011, FAGE Proclamation No. 943/2016 and the RDCPEC of the 2021 will be analyzed in depth as follows.

3.1. The Criminal Procedure Code of Ethiopia (Proclamation No. 185/1961)

This is the first Criminal Procedure Law in the history of Ethiopia. The 1961 CPC, a code still in force nationwide, is a product of the codification endeavor of mid-20th century. It gave the power to the public prosecutors authority to give decisions to prosecute or not to prosecute, to withdraw and also to close police investigative files [12]. The drafters of this law tried to incorporate a concept of withdrawal of criminal charges for the sake of public interest [12]. This law stipulated public interest under article 42 (1) (D) and 122 of the CPC respectively. The full content of this provision is provided as follows.

Article 42. Cases where proceedings shall not be instituted

(1) No proceedings shall be instituted where:

(d) The public prosecutor is instructed not to institute proceedings in the public interest by the minister by order under his hand.

Similarly, under the same code article 122 states the following:

Article 122-Withdrawal of Charges

(1) With the permission of the court, the public prosecutor may before judgment at any stage of the proceedings withdraw any charge other than a charge under Art. 539 (homicide in the first degree) or Article 671 (aggravated robbery) [13].

- (2) Where the public prosecutor informs the court that the withdrawal of a charge is on the instructions of government, the court shall, if it is satisfied that the public prosecutor has been so ordered, grant permission to the public prosecutor to withdraw the charge.
- (3) Where no new charge is framed under the provisions of Article. 119 the accused shall be discharged.
- (4) The court shall give reasons for allowing or refusing withdrawal of a charge.
- (5) The withdrawal of a charge under the provisions of this Article is no bar to subsequent proceedings.

The above provision does not explicitly mention the justifications to withdraw charges but Article 2 of the provision states that withdrawal of charge is due to government instruction. It is not clear from which government organ or public sector that an instruction may be given. However, if we interpret it as the channel of instruction has to be within justice sector not from other branches of government because no laymen are in a better position than lawyers to decide on legal issues and this does not affect their autonomous power. Under Article 122, withdrawal of charge is subject to court permission where it may allow or refuse it depending on whether the reason of being ordered to withdraw satisfies the court. From this, what we may infer is that public prosecutor has no as such discretionary power to withdraw charges and the court cannot refuse if it is satisfied that the public prosecutor is ordered to withdraw. Crimes of homicide in the first degree and aggravated robbery are exceptions in which the withdrawal of a charge is impossible [12].

3.2. The Ethiopian Criminal Justice Policy of (2011)

ECJP of 2011 under its no. 3.9 articulate that when public prosecutor found necessary in the interest of public, it shall give an order to discontinue criminal investigation [10]. The different point stipulated under this policy is that the public prosecutors are duty bound to inform the AG or his superior prosecutor reasons of discontinuance of criminal investigation in written form [10].

Escaping to lists some factors amounts to public interest considerations in withdrawing a charge presented before court, ECJP has envisaged public interest test by listing factors to be considered in discontinuing a particular criminal investigation. These standards are listed under No. 3.12 of ECJP. Accordingly:

- a) Where the committed crimes are very minor as prescribed in laws specifically and likely a very nominal penalty would be imposed;
- b) Where the suspect is elderly or seriously ill and cannot attend the proceeding;
- c) Where it was believed by AG that the customary laws and institutions brings better last long solution between the victim and suspect than formal criminal justice administration regardless of the nature of the crime;
- d) Where proceeding will have detrimental effect on international relation or national security;
- e) Where the committed crime was crime upon compliant in

which the victims and defendant reconciled on the case;

- f) If the prosecution brings disproportionate the harm; where the committed crime is punishable with simple imprisonment and the suspect admitted the offence, apologized and ready to rectify the loss or harm that was caused on victims;
- g) Due to failure to bring the case timely to competent court and if its significance is not important, where the offence is very minor and the harm sustained is very nominal in which the suspect is not aware of criminal nature of the conduct absolutely and others.

From the above illustrations, the ECJP tries to define what constitutes public interest in deciding to discontinue a particular criminal investigation. However, it has failed to clearly specify matters which have to be considered in assessing public interest in case of withdrawal of criminal charges that has been lodged before court.

3.3. Federal Attorney General Proclamation (No. 943/2016)

The current Federal AG office of Ethiopia was established on May, 2016 by virtue of FAGE Proclamation No. 943/2016. The AG is empowered to institute, litigate, withdraw and resume criminal a charge by representing the federal government when it found necessary in the interest of public [1]. Further, it is authorized to issue directive concerning withdrawal of criminal cases having national interest with consultation of the Prime Minister [1]. However, until the writing of this article, the Federal AG office has not yet issued directive.

According to the above cited provisions, the main justification for withdrawal is public interest not government instruction and there is no request court to grant permission. For this reason, the AG decides whether to withdraw or not based on involvement of public interest which requires withdrawal of charges. However, the law has neither defined the phrase public interest nor it has tried to provide an illustration which can serve as an explanation of what constitutes by phrase public interest. Some author, strongly believe that leaving the mandate of determining what matters or circumstances constitutes public interest in the hand of the executive alone is equal to a permitting the office of AG to abuse its power which in turn will seriously jeopardize fundamental rights of citizens protected by the constitutions and other laws of the country [14]. Apparently, it would have been better had the legislature at least mentioned some indications or circumstances which are eligible to be considered as grounds of public interest [14]. Of course, the legislature could not and should not be exhaustively list all situations which can be considered as sufficient justifications for withdrawal of the criminal charges as should be effectively addressed on case by case bases.

3.4. The Revised Draft Criminal Procedure and Evidence Code of the 2021

To build modern criminal justice system which is consistent with the FDRE constitution, fundamental

principles of criminal procedure and human right instruments ratified by Ethiopia, the RDCPEC is recently revised and the work of revision is on progress. Article 206 (1) of the RDCPEC of the 2021 prescribes that public prosecutors can withdraw a charge at any time before judgment by informing court when it found necessary in the interest of public [15]. In effect, courts have been left with no powers to control such power in order to minimize the likelihood of abusing the process. The use of word “informing” in the provision implicate that the court has no power to reject or otherwise dismiss the application made for the withdrawal of criminal charges for the sake of public interest. In fact, it is not an application but rather a notice of withdrawing criminal charges. Not only the court has no power to reject the application made for the withdrawal of criminal charges but also the AG is not place under legal obligation to give reason for his decision not to continue with prosecution.

Although the RDCPEC encompasses some prospect, yet it is neither define the phrase public interest nor it is try to provide any illustration in relation to what circumstances or cases are eligible for public interest, thus, it is not comprehensive enough.

4. Major Gaps and Issues of Laws Governing Withdrawal of Criminal Charges in Ethiopia

From the above discussed legal regimes concerning withdrawal of criminal charges in the names of public interest, one can raise several multifaceted legal issues which are open to diverse interpretation and application. Accordingly, the main loophole of laws and issues includes the following:-

4.1. Unfettered Discretionary Power of AG

Article 6(3)(e) of FAGE Proclamation No. 943/2016 provides that, “the AG has the responsibility to institutes criminal charges by representing the federal government, withdraws charges when found necessary in the interest of the public, resumes withdrew charge based on directive enacted with consultation of the Prime Minister.” These powers seem to be exclusive and unlimited discretionary power given to the AG and cannot be questioned in any court of law. As indicated earlier, the court has no power to reject or otherwise dismiss the application made for the withdrawal of criminal charges for the sake of public interest. In such a case, AG are not always as fair as we expect when making decision to withdraw criminal charges, sometimes their decisions can be influenced with corruption, political affiliation and personal conflict of interest that are likely to affect their impartiality [16]. Fore instances, the AG conducted press conference on 25 February, 2020 states that the government suspended charges of 63 suspects of corruption and human rights violation in order to promote democracy and national unity in Ethiopia. Beside this, the AG also conducted press conference on 25 March, 2020

states that the government suspended charges of 39 suspects of low participation in identity violence [17]. From this, one can surmise that AG has been withdrawn the corruption and human rights violation cases in the name of public interest to favour a chosen few or the privileged who have accessed to the corridors of others influence.

Furthermore, research found that some cases withdrawn in the name of serving public interest were no connection with serving the interest of the public. Rather, it only fetches impunity and appears misconduct. For instance, discontinuing rape cases or discontinuing cases of perjury against churches for the reason of public interest [18]. Such blatant abuse of the phrase public interest makes the criminal justice system a very hard task and to that effect the credibility of Rule of Law will be lost.

4.2. Lack of Clear Legal Definition of the Public Interest

As indicated earlier, the phrase public interest is escaped precise definition in any Ethiopian Laws. Thus, Ethiopian laws have failed to define or provide some indications as circumstances that constitute public interest. In the absence of such definition and indications, AG is being face difficulties in application of the public interest and this may open door for abuse, corruption, political affiliation and partiality. Some research revealed that AG has being misused public interest to withdraw a case that does not have connection with serving public interest [18].

4.3. Absence of Time Limitation for Recommencement of already Withdrawn Criminal Charge

The withdrawal of criminal charges for the sake of public interest does not amount to an acquittal, and accordingly, the accused may brought before the court on the same charges [19]. In other words, it is a discharge and does not operate as a bar to subsequent trial of the accused person. Here, the problem is that Ethiopian law has failed to indicate under what conditions the AG can resume charges that has been already withdrawn and absence of time limitation for recommencement after withdrawal of the criminal charges. Once, AG has withdrawn criminal charges for the sake of public interest, its likelihood to be resumed is low as it would be forgotten.

4.4. Belie the Purpose of Criminal Law

FDRE Criminal Code aims at the prevention of crimes by giving due notice of the crime and penalties prescribed by law and should this be ineffective by providing for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others, or by providing for their reform and measures to prevent the commission of further crimes [11]. Consequently, in a case where the phrase public interest is abused by AG, his/her decision to withdraw criminal charges for the sake of public interest will not achieve this purpose of criminal law as the accused or suspect go free without getting the punishment he or she deserve. Hence, the purpose of criminal law remains

fruitless. Deterrence purpose of criminal law left without effect.

4.5. Against Equality Rights

Another concern of the public interest as a ground for withdrawal of criminal charges is that its implication on the right to equality which is cardinal principle of criminal law and value of criminal procedure. As stated under Article 4 of FDRE Criminal Code and Article 25 FDRE Constitution everyone is equal before the law. Under the principle of equality like circumstances are required to be treated equally and unlike have to be treated alike. However, in the task of deciding criminal cases in which public interest require or does not require prosecution individuals who are suspected of commission of similar offences under similar circumstances will not be treated alike. One research reveals that selective prosecution has the potentially of destructive effect on the right to equality [20]. This shows us that the side effect of withdrawal of criminal charges for the sake of public interest causes discrimination among defendants. This assertion is not a speculation but a problem on the ground accompanied by empirical data. One author found that prosecuting poor defendants and dropping a charge for wealthy defendants grounding on invidious factors under the shadow of public interest manifests the existence of discrimination practically [21]. Thus, all public power given to AG is a public trust and cannot be jettisoned, hijacked, bent or abused to favour a chosen few or the privileged who have accessed to the corridors of others body influence.

4.6. Concerns of Victims' Rights or Their Families

In criminal cases there is the concept that crime is perceived as an offence against not just the individual, but society, and is accordingly a matter for the state [22]. Though the victim of the crime is the one who is suffered from physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights [23], it is the state which takes over the prosecution of the offender to the exclusion of the victim. However, this does not mean that victims are not required participate in criminal justice system [24]. For instances, if AG unreasonably or without any lawful ground withdraw criminal charges using its power of prosecutorial discretion, how can victims of crimes or their families can challenge such kinds of unfair decisions of the AG in absence clear statutory remedies which can enable them to protect their constitutionally protected rights? Thus, we cannot lay down an idea that victims or their families are satisfied with decision made to withdraw criminal charges for the sake of public interest. The other countries experience like United Kingdom, Kenya and Nigeria shows that victims of crimes are allowed to challenge the decision to withdraw the criminal charges by Prosecution Authority under the guise of public interest if the latter unlawfully terminate proceedings [16]. However, Ethiopian laws were failed to incorporate the victims' rights to challenge the decision to withdraw criminal proceeding unlawfully by AG.

4.7. Lack of Review Mechanisms

For transparency and accountability in democratic state, it is crucial to have an internally check and balance of power and protection of victims' rights as well as to promote equitable criminal justice [16]. Here, the very critical question is whether any interested person in Ethiopia can apply for internal or any other body seeking reviews of AG decision to withdraw criminal charges for the sake of public interest, and to whom can he or she apply? Under which law can he or she apply? These questions are not answered under Ethiopian laws. In Ethiopia, the decision to withdrawal of criminal charges for the sake of public interest is not made subject to review by the AG office internal review mechanism; regular courts or any other neutral governmental organ. Thus, AG's decision is not challengeable. Consequently, absence of review mechanisms of the decision to withdrawal criminal charges by AG may not only put victims' interest at stake but also undermine transparency and accountability. In the opinion of the author, such kind of unlimited and wide discretionary power is sensitive to abuse and infringement of rights guaranteed by different substantive and procedural laws of Ethiopia. Hence, in order to minimize the threat of misuse of power, exercise of such power should be subject review by regular courts or any other independent organs to ensure its legitimate usage.

5. Concluding Remarks and Way Forward

A public prosecutor may not always seek for judicial determination of the guilt or innocence of the perpetrator of a criminal offence. Sometimes, he may consider public interest as a justification to withdraw criminal charges against the accused from prosecution. As discussed above, Ethiopians' AG has unfettered and wide discretionary power in deciding to withdraw any criminal proceedings at any stage before judgment is delivered in any court for the sake of public interest. Sadly, Ethiopian laws have failed to define or provide some lists that constitute public interest. Thus, the phrase public interest is vague and open to misuse. Since AGs' action cannot be questioned or reviewed by any other bodies, he might be abuse his absolute discretionary power. Therefore, it has been revealed that the Ethiopian normative frameworks governing withdrawal of criminal charges for the sake of public interest has been faced several multifaceted legal vacuums and issues which are open to diverse interpretation and application.

In order to rectify such legal gaps and issues, author specifically submits the following recommendations:

- (i) The upcoming new draft criminal procedure and evidence law should come up with detail, clear, and comprehensive legal definition of the phrase public interest and also it should come up with some indications or circumstances which are eligible to be considered as a ground of public interest for withdrawal of criminal charges. In such a way that it is

important to rectify the existing and possible potential threats of abuse power by AG under the guise of public interest.

- (ii) Article 6(3)(e) of FAGE Proclamation No. 943/2016 which have exclusively vested the mandate of the power to withdrawal criminal charges for the AG should be amended in order to make it open for scrutiny either by ordinary courts or any other neutral external organ.
- (iii) There has to be time limitation and clear and objective criteria's for recommencement of withdrawn of the criminal charges so as to prevent undue utilization of its wide discretionary power by AG.
- (iv) Withdrawal of the criminal charges for the sake of public interest by AG should be taken into account the principles of equality and the main intended objectives of the general criminal law. That, it should not be defeated the very purpose of criminal law and equality among the perpetrator of a criminal offence.

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