Legal Lacunas Associated to Withdrawal of Criminal Charges under the Contemporary Ethiopian Legal System: Review of Criminal Legal Frameworks in Comparison with Other Jurisdictions

Mihret Abebe (LLB.LLM), Phone +251912802925, E-mail cheku1997@gmail.com, Assosa University, School of law

Abstract

The criminal legal frame works of Ethiopia are one of the legal disciplines where adequate researches have not been undertaken by both academicians and legal practitioners. In recognition of this fact I have done this piece of work to contribute my own share in the field under consideration. The study has been conducted to review the existing Ethiopian criminal legal frame works governing withdrawal of criminal charges. Accordingly, the study has identified a lot of legal lacunas. Among the legal loopholes identified by the research , lack of clear, comprehensive, and specific legislations which regulates withdraw of criminal charges; especially absence of clear definition for the phrase "public interest" in the legislations which is described as the sole and chief justification for termination of criminal charges, absence of legal way outs for consideration of views and concerns of victims of crimes, want of review mechanism in case where the prosecutor refuses to initiate or withdraw criminal proceeding arbitrary, absence of time limitation for recommencement of criminal charges after withdrawal and vesting exclusive mandate of terminating criminal charges and other wide discretionary powers to Attorney General department alone and the like are the critical ones. Therefore, in order to tackle the aforementioned legal and practical constraints to the desired level, there researcher calls for amendment of the existing legal frame works and introduction of strong monitoring mechanism of the current practice of withdrawing changes by independent institution.

Key terms: Withdrawal of criminal charge, Public interest, Victim, General Attorney, and Discretionary power, and Resumption of Criminal charges.

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Introduction

Needless to say, one of the most commonly used and perhaps, the primeval approach of enforcing of criminal justice administration is through penalization of offenders. Yet, recorded histories of criminal justice administration have revealed that punishment of criminals may in some instances inadequate or totally undesirable owing to different reasons.

That is why many contemporary nations' criminal policy devised mechanism by which criminal charges can be withdrawn and prosecutors can decide not to institute charges discontinuation of criminal charges at all if it deems necessary in order to ensure effective protection of public interest.

There are many considerations and grounds for such kind of wide discretionary powers vested to the public prosecution authority. Among the various grounds of which cited for withdrawal and discontinuation of criminal charges, the protecting public interest is the most frequently cited reason. Of course the phrase public interest is the most contentious, elusive and hotly debated concept among many constitutional scholars and politicians of many countries. Yet in spite of this challenge still, it is incorporated in many nations' criminal justice administration policy and legislation.

Ethiopia can't be an exception to this scenario. As a result, the country has enacted a law which has given permits withdrawal and recommencement of criminal charges by the public prosecution department. Yet, these laws do have many legal loopholes and even the existing legal provisions governing the matters under discussion are too much obscure and incomplete and open to many interpretations.

Therefore, this short article is written mainly targeted at exploring legal gaps associated with these legal frameworks regulating the matter under consideration

1. The Concept of Withdrawal of Criminal Charge In General : Its Meaning and Rational

1.1 The Meaning of Withdrawal of Criminal Charge

Unlike many legal terminologies where there is difficulty of providing comprehensive and universally accepted definition, the phrase withdrawal of criminal charge has been given similar and comparable meaning and explanation in criminal legislation of many jurisdictions.

The dictionary and usual meaning of the word withdrawal is obvious and familiar one. It denotes formal abandonment or renunciation of one's abandonment of a claim, right, or possession.[1] So according to this definition "withdrawal charge" signifies willful rejection or renunciation of one's won legitimate right or claim. If stated otherwise it refers to the discontinuance or termination of a criminal proceeding by public prosecutor up on its own motion when ever circumstances justify to do so. Now let us consider definition of the phrase given by other jurisdictions as follows in order to grasp adequate know how about the concept.

The 1985 Australian Prosecution of Offenses Act defines withdrawal of criminal charge as" timely termination of proceedings with the interest of justice"[2]

Similarly Article 321 of the Indian criminal procedure code Section 321 states that the Public Prosecutor or the Assistant Public Prosecutor to withdraw 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 (emphasis added). [3]

Again Mr. Wubishet Mulat, who is a notable legal practitioner and advocate, has explained the concept withdrawal of criminal charge to mean discontinue or termination of a criminal

[1] See English by Oxford Dictionaries https://en.oxforddictionaries.com/definition/renounce.

[2] See Section 23 (A) of the 1985 Australian Prosecution of offences Act.

[3] Article 321, of the criminal procedure code of India 1973. For further information read more at: http://www.livelaw.in/govt-cant-withdraw-criminal-cases-whimsical-arbitrary-manner-allahabad-hc-fb-read-judgment/

proceeding which is already logged before court of court of law which has a jurisdiction to hear and decide the matter (emphasis added) [4]

Coming to our country, Ethiopian, neither the criminal procedure code proclamation no. 185/1961 nor the Federal Attorney General establishment Proclamation No. 943/2016 has directly defined what constitutes withdrawal of criminal charge.

For the purpose of proper examination of the law, proclamation number 943/2016 article 6 (3) (E) which is wholly dedicated to address the power and duties of the Attorney General which deals with withdrawal and recommencement of withdrawn criminal charge is presented as follows for .

This provision reads states that "It institutes criminal charges by representing the federal government, litigates, withdraw charges when found necessary in the interest of public, resumes withdrew charges. However, issues directive concerning the withdrawal of cases having **national interest** with consultation of the Prime Minister" t

Thus, from this provision of the proclamation, we can easily infer that the legislator seems to attach the meaning discountenance of criminal charge by employing the phrase " withdrawal of criminal charge. This can become clear when we look the Amharic version of Pro. No 943/ 2016 Article 2 (3) (E) which states that "…..**የፌዴራል መንግስትን በመወከል በጉዳዩች ክስ ይመሰርታል፣ ይከራከራል፣ ለህዝብ ጥቅም አስፈላጊ ሆኖ ሲያገኘው ክስ ያነሳል፣ የተነሳ ክስ እንዲቀጥል ያደርጋል**:: " Here the underlined Amharic word " **ክስ ያነሳል**" clearly shows that withdraw means termination of a criminal proceeding which is already lodged by the prosecutor to a court of law having a jurisdiction to see the matter or the one which is under investigation by police department.[5]

Similarly article 122 the criminal procedure code of Ethiopia article which deals with withdrawal of criminal charge has not contained the meaning of withdrawal of criminal charge except indicating the possibility of withdrawing charges by public prosecutor at any stage of proceeding with leave of court the just like that of the aforementioned proclamation.

[4] Ato Wobshet Mulat is mostly known for his legal comments that he commonly writes to Ethiopian Amharic Reporter news paper section called " Behig Amlak", which literary means "by law of God ". See reporter Amharic news paper issued on Feb.18/2018 the section entitled" Behig Amlak.

[5] See Proclamation 943/2016, a proclamation which provides for establishment of Federal Attorney General, 22nd Year, No. 62, 2nd May 2016, A.A Article 2 (3) (E).

Yet, from the above definitions of the word withdrawal of criminal charge provided by different nation's criminal legislations and scholars of the field, we can safely draw the following working definition for this study aim. Withdrawal of criminal charge refers to termination or discountenance criminal proceedings of alleged criminals by public prosecutor 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.

1.2 The Rationale behind Withdrawal of Criminal Charge

Sometimes it becomes the interest of criminal justice administration to withdraw criminal charges framed or which are going to be famed against suspected offenders irrespective of the availability of sufficient and strong evidence which is capable enough to obtain conviction of the latter by weighing the possible advantage and disadvantage of the outcome of the case.

In recognition of this truth many modern criminal legislations has come up with new ways of dealing such cases i.e criminal cases in which the institution of charge is disadvantages to the criminal administration system. One of these, perhaps the most widely known one is provision of discretionary power to their prosecution government organ either to withdraw criminal charges or not to initiate criminal charges at all.

Almost all jurisdictions across the world have provided more or less similar justifications. In order to adequately understand the reason bind recognition of the idea of withdrawal of criminal charge, let us examine the rationales provided by some selected countries for inclusion of the concept of withdrawal of criminal charge.

For instance the Indian supreme court while deciding the case Sheo Nandan Paswan Vs. State of Bihar and others (1983) has identified the following three major different but interrelated grounds for withdrawal of criminal charge as per Section 321 of the code .[6] There are;

1. Implication of persons as a result of political and personal vendetta,

2. Inexpediency of the prosecution for reasons of State and public policy, and

3. Adverse effects that the continuance of the prosecution will bring to the public interest in the light of the changed situation.

When we closely examine each of the above justifications all of the reasons are fall within the domain of public interest protection and rule of law.

[6] Supra note 4, (http://www.livelaw.in/govt-cant-withdraw-criminal-cases-whimsical-arbitrary-manner-allahabad-hc-fb-read-judgment/)

Similarly by virtue the 2001 special guideline of prosecutors of Northern Ireland, director of public prosecutor should withdrawal criminal charge contains if the case involves a public interest. What is more special in this guideline is that it has enumerated some indication of parameters to know the existence or non-existence of public interest. Accordingly factors like where the court is likely to impose a very small or nominal penalty, where the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by an error of judgment, and the like[7].

Like that of Ireland, Paragraph 4.5.3 of code of prosecutors of UK contains an indicative list of considerations that may lead the director of public prosecution (DPP for short as they call it) to withdraw criminal charge. The Code requires that existence of public interest requires to discontinue criminal suits. And to this end the code has mentioned several grounds which can justify termination of charges.[8] Here I would like to remind readers that since almost most of grounds of "public interest" justifications mentioned in England code of prosecutors are verbatim copy Northern Ireland, I have opted to skip it in order to avoid unnecessary redundancy.

On the top of the aforementioned jurisdictions, section 579 (1) of the Criminal code of Canada provides that the prosecutor may withdraw criminal charges for protection of public interest and has expressed what sort of grounds amounts to be public intersect .

When we come to Ethiopia, similar justification is mentioned by the legislature in proclamation no.943/2016 article 6 (3) (E). Yet, no definition is attached to what public interest is under this law. In the subsequent parts of the study will examine in detail the Ethiopian and other countries legislations dealing with withdrawal of criminal charges.[9]

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[7] See the 2001 Northern Ireland guideline for criminal prosecution, office of director off prosecution issued in accordance with article 30 of the constitution and prosecution of offences act 1974, (pp.15-20)

[8] The Code is available through http://www.ppsni.gov.uk., browed at 9/17/2018

[9] In this regard it is advantageous to mention what is said by the Australian Law Reform Commission. The commission has expressly noted: Public interest should not be defined. And, in a Federal Court Freedom of Information case, justice Brian Tamberlin wrote: The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where the public interest resides. Derived from The Public Interest" and Prosecutions - Amnesties, Prosecution & the --- https://amnesties-prosecution-public-interest.co.uk/.../ (9/20/018)

2. Legal Frameworks Dealing With Withdrawal of Criminal Charge In Ethiopia

In this part of the study, which is the major part of the study, an attempt has been made to examine legislations governing withdrawal of criminal charges of the country in comparison with other selected jurisdictions experience. Accordingly proclamation No. 943/2106 which provides for establishment of Federal Attorney General and the Criminal procedure code of Ethiopia Proclamation no. 185 of 1961 will be examined in depth. Now let us explore these laws them as follows.

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

Federal Attorney General of Ethiopia was established on May, 2016 by virtue of Proclamation No. 943/2016. As explained in the aforementioned part of the study, the department of Attorney General is empowered to institute, litigate, withdraw and resume criminal charges by representing the federal government when it found necessary in the interest of public. Moreover it is authorized to issue directive concerning the withdrawal of cases having **national interest** with consultation of the Prime Minister". Seen on the surface the above provision of the proclamation seems clear and self explanatory. Yet, the close reading of the provision reveals that there are myriad of legal issues which deserve further illustration and there are also some legal vacuums which should have been addressed by the law maker. Among these legal loopholes which are overlooked by the legislature, following are the prominent ones.

I. Primarily even if the law states that the Attorney General can withdraw criminal charge for reason of "public interest", there is no definition or any illustration in relation to what circumstances or cases qualify for " public interest."

II. Secondly there is no legal provision which accords an opportunity for consideration of views of actual victims of crimes or their representative or families in deciding withdrawal of criminal charges

III. Thirdly the proclamation has vested the mandate of both withdrawing and resumption of criminal charge within the exclusive mandate of the attorney general and lastly

IV. The proclamation failed to indicate under what conditions the prosecutor can resume withdrew charges and no time limitation is framed for recommencement of criminal charges?

As stated earlier repeatedly article 6 (3) E) of proclamation no. 943/2016 states that the "public prosecutor is empowered to withdraw criminal charge when it found it necessary in the "interest of public." (emphasis added) . 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. Yet, the writer of this paper strongly argues 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 Attorney General to abuse its power which in turn will seriously jeopardize fundamental rights of citizens protected by the constitutions and other laws of the country. For me, 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. Of course, the legislature cannot and should not excursively mention all situations which can be considered as sufficient justifications for withdrawal of criminal charge as should be effectively addressed on a case by case bases.

The practice in many other jurisdictions indicates that prosecutors are usually allowed to withdraw criminal charges for purpose of defending public interest. And to this end the grounds of public interest are either precisely defined by law or possible circumstances of public interest are indicated via illustrative provisions.

For instance, the Northern Ireland Code for Prosecutors Act, Act 2002 under paragraph 4.3.5 of the Code lists some instances where the prosecution can be withdrawn for the public interest. Accordingly, there is public interest in the following instances;

i. Where the court is likely to impose a very small amount or nominal punishment.

ii. Where disclosure of information contained in the charge to the public could likely harm sources of information, international relations or national security.

iii. Where the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by an error of judgment or a genuine mistake

iv. Where the offence is not of a serious nature and is unlikely to be repeated.

The second legal lacuna of the proclamation is its failure to incorporate mechanisms of entertaining the concerns of victims of crimes or their families while the prosecutor decides to withdraw criminal charges. For instance, if a public prosecutor unreasonably or without any

lawful ground refuses to initiate a proceeding or 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[10] prosecutor in absence clear statutory remedies which can enable them to protect their constitutionally protected rights? . Yet the practice in other countries shows victims of crimes are allowed to challenge the decision not to prosecute of prosecutors if the latter unlawfully terminate or refuse to initiate proceedings.

For instance in UK there is a law called " Code of practice and victims" enacted by Ministry of justice which enables victims to challenge the decision not to prosecute or withdrawal of criminal charges. So, using this law victim's crimes or their families can air their grievance to the prosecutor itself so as to pressure it to re-consider its original decision.[11] Again the republic of Canada a law reform is underway by the government to provide for internal review of the decision of the prosecutor for victims of crimes.

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

On the top of above the Attorney General proclamation discussed above, the criminal procedure code of Ethiopia article 42 (1) (D) of the criminal procedure code states that " no criminal proceeding shall be lodged when the public prosecutor is instructed not to institute proceedings in the public interest by the Minister by order under his hand (Emphasis added)." Similarly under the same code article 122 states the following; Article 122 Withdrawal of charges.

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[10] Tian Li, "Victims Opportunity to review decision not to prosecute made by Crown Prosecutor", (2013), Page 129-130, Electronic thesis and dissertation Respository.1779, available at http://ir.lib.uwo.ca/etd/1779. For this study the word victim refers to a person to whom a harm was done or who suffers physical, emotional, economic, loss or suffering as a result of commission of an offence. See Declaration of Basic Principles of Justice for Victims of crime and abuse of power, United Nation General Assembly, Resolution No.. 40/34, UNGAOR, 40th session.

[11] Code of Practice for Victims of Crime (1st October 2005)", Available at http://eps.gov.uk/victim , date of browse on 8/26/2018. Prosecutor.

(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 Art. 671 (aggravated robbery).[12]

(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 Art. 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.

If we examine the above article sub-articles of the Ethiopian criminal Procedure code, we can raise several multifaceted legal issues which are open to diverse interpretation and application.

Below here, I have raised some of the critical legal issues that deserve serious reconsideration.

Primarily just like that of proclamation 943/2016 , the criminal procedure code fails to define or provide some indication as circumstances that constitutes " public interest. Secondly, noting has been mentioned in criminal procedure code as justification to discontinue or withdraw criminal charge except for a decision not to lodge a prosecution for reason for public interest. However, the proclamation has indisputably cited public interest as a ground for both termination of prosecution and a decision not to prosecute. Thus, in this regard the proclamation no. 943/ 2016 seems better and acceptable

Another point which is worth of consideration is the point mentioned under article 122 (2) . Pursuant to this provision, the court are duty bound to grant permission for withdrawal of charge automatically so long as the public prosecutor confirms to the court having a jurisdiction to decide the case that it has been instructed by government to withdraw the charge.

Yet, unlike the Ethiopian Criminal procedure code where the courts are not allowed to investigate whether the reason provided by the prosecutor to withdraw criminal charge is genuine and within the public interest scheme, the practice of other states reveals that courts are allowed to assess the decision of the prosecutor. For instance the article 321 of the Indian

[12] Take note that the Ethiopia government has enacted anew criminal code criminal code in the year 2003. As per this new criminal code aggravated robbery and homicide in the first degree are treated under article and 539 respectively in the new code.

criminal procedure code allows withdrawal of charges with the consent of the court only.[13] Thus, in India permission for withdrawal of charges cannot be granted mechanically by mere request of the prosecutor and instruction of government. Rather request for withdrawal must be for proper administration of justice and only in Public Interest. However, such kind of procedure is not available in Ethiopia criminal laws as the prosecutor is solely empowered to withdraw charges.

The Third major area of critics is that in both legal frameworks, the prosecutorial department is vested with exclusive and unlimited discretionary power while withdrawal of criminal charges. And the decision not to prosecute is not made subject to review by the office internal review mechanism, regular courts or any other neutral governmental organ. In view of the writer such kind of unrestricted and wide discretionary power is sensitive to abuse and infringement of rights guaranteed by different substantive and procedural laws of the country. Thus, in order to minimize the threat of misuse of power, exercise of such power should be subject to review by regular courts or any other independent organs to ensure its legitimate usage.

3. Conclusion and Recommendation

3.1 Conclusion

In this study, a number of issues have been raised both from the legal and practical perspectives of the topic under consideration. Among these matters, the definition of the concept withdrawal of criminal charge and its justification are reviewed in detail see. On the top of that the contemporary Ethiopian legal frameworks which are issued to regulate withdrawal of criminal charge such as proclamation no 8943/2018, the Ethiopian Criminal procedure code, Criminal code, pardon, and amnesty laws legal loopholes have been explored. Moreover, the experience of India, Canada, and the UK in the area of withdrawal of criminal charge has been considered with a view to tract sufficient comparative lessen in the area.

3.2 Recommendation

Here in below the study has come up with viable recommendations which the researcher deems capable of rectifying the legal lacunas identified by the research.

[13] Article 321, of the criminal procedure code of India 1973. For further information read more at: http://www.livelaw.in/govt-cant-withdraw-criminal-cases-whimsical-arbitrary-manner-allahabad-hc-fb-read-judgment/

First and for most, there is a need to have detailed, clear, and comprehensive legal framework in order to properly regulate legal issues like decision not to prosecute, withdrawal, and recommencement of criminal charges so as to rectify existing and possible potential threats of abuse its wide discretionary power by the attorney general. Specially for proper administration of the criminal justice system, the justification of the "public interest", which is recognized by the law as sole ground for withdrawal of criminal charges should either defined precisely or adequate indication of examples such interests should be incorporated in criminal procedure code or other separate laws so as to monitor the legitimacy of the decisions of the prosecutor.

Moreover the existing criminal procedure code and the establishment proclamation of Attorney General (Pro. no 943/2016) which have exclusively vested the mandate of the power to decide not to prosecute and withdrawal of criminal charges for the prosecutorial department should be amended in order to make it open for security either by ordinary courts or any other neutral external organ.

Again there has to be time limitation and clear and objective criteria's for recommencement of withdrew charges so as to prevent undue utilization of its discretionary power by the public prosecutor.

Above all, a system should be designed and institutions should be established in order to consider the grievances of those who are directly affected by crimes such as victims of crimes and other interested parties interest should be priory considered before the decision not to prosecute, withdrawal and resume charge is undertaken. To this end, the government should work to establish both an internal and external review mechanism of the decision not to prosecute and withdraw criminal charges by the attorney general to ensure rule of law in general and to protect rights and interests of victims in particular.

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