JIMMA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE

SCHOOL OF LAW

PROSECUTION DUTY OF DISCLOSURE OF CRIMINAL EVIDENCE UNDER ETHIOPIAN CRIMINAL JUSTICE SYSTEM

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF LL.M. DEGREE IN HUMAN RIGHTS AND CRIMINAL LAW

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OCTBER, 2019
JIMMA, ETHIOPIA

Declaration

I hereby declare that this work which is entitled Prosecution duty of disclosure of criminal evidence under Ethiopia criminal justice system is my original work and has not been submitted before for any degree or examination in any other university or in any other institution before. And that all the sources I have used or quoted have been indicated and duly acknowledged as complete references'.

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As thesis research advisor, I hereby certify that I have read and evaluated this thesis prepared, under my guidance, by Maruf Aliye, entitled Prosecution duty of disclosure of criminal evidence under Ethiopia criminal justice system. I recommend that it be submitted as fulfilling the thesis requirement.

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As members of the Board of Examiners the LL.M thesis open defense examination, we certify that we have read and evaluated the thesis prepared by Maruf Aliye. We recommended that the thesis be accepted as fulfilling the requirement for the degree of Master of Laws Degree (LL.M).

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Acknowledgments

First and foremost I am thankful to the Almighty Allah and this research would not have been accomplished without his assistances.

I would like to express my sincere gratitude to my advisors Alemu Mihretu (PhD, Assistance professor of Law) and Abay Addis (LLM) without their advice, constructive comments, concerns and tolerance, this thesis would not have come out in its present form. I have immeasurably benefited from their critical, invaluable and constructive comments for accomplishment this study. My sincere thanks also go to all personalities who have been voluntarily reacting for my interviews for their invaluable suggestions which made the paper more comprehensive. A word of utmost appreciation also extends to my friends Yewulsew Yitberek and Kegnu Mulu those who read the research and provided to me with insightful comments.

Special thanks to my friend Ezedin Fedlu for the material, moral and intellectual support. My sincere gratitude also goes to my wife Temima Aman for her enduring support and motivation through the entire academic journey.

Acronyms

ACHPR	African charter on human and people's rights
Art	Article
BPR	Business Process Reengineering
CCI	Council of Constitutional Inquiry
CJP	Criminal Justice Policy
E.C	Ethiopian Calendar
ECPC	Ethiopian Criminal Procedure Code
EPRDF	Ethiopian People's Revolutionary Democratic Front
FDRE	Federal Democratic Republic of Ethiopia
FHC	Federal High Court
FSC	Federal Supreme Court
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
OSCOLA	Oxford Standard for Citation of Legal Authorities
SNNPRS	Southern Nation, Nationalities and Peoples regional state
Proc. No	Proclamation Number
RPE	Rules of Procedure and Evidence
UNHRC	United Nation Human Rights Committee
USA	United States of America

Abstract

In criminal justice system prosecutor have enormous powers in every phases of criminal cases from start of investigation to sentencing of defendants. While, if there is no controlling mechanisms for disparity of power and resource, it creates unbridgeable gaps of power and resource between the two parties and puts the defendant at serious disadvantage in relation to the prosecutor. One of fair trial components that used to control this imbalance of power and resource is prosecution duty of disclosure. Disclosure allows the defendant to gain knowledge of the case against him and therefore put him in the position to mount an informed defence. Having said that, disclosure is one of the most important step in the preparation of defence and safeguarding equality of arms which is enshrined under art 14(3b&e) of ICCPR. However, this research is to investigate whether prosecution duty of disclosure of criminal evidence is sufficiently incorporated in Ethiopian law. The research has revealed that, Ethiopian disclosure rule is accompanied by the problems that include; legal, structural and practical problems; the first, lack of clear legal recognition of prosecution duty of disclosure can be inevitable consequences of the inequality of the parties. Besides, the lack of clear rule of disclosure, witness protection proc. no. 699/2010 gives uncontrolled power for prosecutor to grant or reject anonymity/concealment of identity of witnesses; this is strongly jeopardize fair trial right of accused. Second, structural problems surrounding disclosure include; one-sided investigation process and non-participation of defendants and their lawyers in investigation process and prohibition of any communication with prosecution witnesses are the causes for non-disclosure. The third, the practice of CCI and federal high court indeed failed to manifested disclosure as duty of prosecution. The decisions were also reached without balancing the disclosure right and other competing interests.

Hence, the research used the combination of doctrinal legal research for analysis of laws and cases on the issues of disclosure; qualitative approach for investigation of practical applications of disclosure and it also used of some experiences from other jurisdictions that are used as a lesson for Ethiopia on how to balance competing interests. To that end, the study found out Ethiopian criminal justice system has not been expressly incorporated disclosure rule, absence of enforcement mechanism, legitimate limitation grounds with standards of balancing mechanism. Therefore, the research recommends that government should reform the existing Ethiopian laws of disclosure and enact disclosure rules that envisage fair proceeding.

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Chapter One

Introduction

1.1 Background of the Study

The idea of fairness during criminal proceeding is related with equality of arms of the parties to the cases.[1] However, the practical manifestation of criminal processes is afflicted by the false ideas of fairness and equality of arms of the parties.[2] This is the result of heavy power of prosecution to conduct investigations, to arrest and the enjoyment of a lot of investigative resources and the public prosecutor is a professional, trained and skilled in law, and it is the prosecuting arm of the government. Furthermore, it has been all the government power and resources to conduct the investigation and the prosecution. Irrespective of the economic strength of the country, this power and resource is boundless when seen in light of the poor accused.[3] The defendant is on other side weak power on truth finding process that resulted from absence of defence investigation.[4] If the crime is serious or the accused is considered to be dangerous she/he may not even be granted release on bail which consequently makes her/him unable to gather evidence or seek for witnesses in his/her defence. Hence, these create a structural gap between the two parties and an inequality of arms.[5]

Disclosure is an essential component of the principle of equality of arms that is minimum guarantee to rectify structural problems through promotion of the fullest possible presentation of the facts, the right to access/review prosecution evidence, opportunity to examine witnesses and time to prepare for defence.[6] One of procedural devices which help to minimize inequality is compulsory disclosure of evidences before trial.[7] Disclosure allows the defendant to gain knowledge of the case against and in favor of him and to puts in the position to an informed defence. The term "disclosure is the act or process of revealing or uncovering of evidence between adverse parties; it brings to light what could not be seen before".[8] "Disclosure is the

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[1] Andrew Ashworth, Human Rights, Serious Crime and Criminal Procedure (Sweet & Maxwell 2002) 11, 56

[2] Simeneh Kiros, *Criminal Procedure law; principle, rule and practice* (Xlibris Corporation 2009)

[3] *Ibid*

[4] There is no structural arrangement that allows to defendant and his lawyer to participating in investigation process; this puts the defendant at serious disadvantage in relation to the prosecutor.

[5] Simeneh , *supra note 2*

[6] Dr. Rohaida Binti Nordin & Shajeda Akther, 'Equality Of Arms: A Fundamental Principle Of Fair Trial Guarantee Developed By International And Regional Human Rights Instruments' (2014) *1Legal Network Series,* P.4

[7] Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1991)

[8] Bryan A. Garner, *Black's Law Dictionary* (8th ed. 2004)

procedure by which one litigant is enabled to force his opponent to make some or all of his evidence available for examination.[9] Disclosure is contributes to the fair and efficient administration of criminal justice by minimizing the undesirable effect of surprise at the trial and, contributing to an accurate determination of the issue of guilt or innocence.[10] The doctrine of disclosure is a means to achieve fairness in the proceeding that includes disclosing all the culpable, exculpable and impeachment evidence.[11] Culpable evidence is evidence that presented against the accused or establishing guilty.[12] The culpable evidence will form the prosecution case that usually should be disclosed prior to trial, so that the accused can prepare their defence. Exculpatory Evidence is deemed to be negating guilt, diminish culpability, and support an affirmative defense or evidences that could potentially reduce the severity of the sentence imposed.[13] Impeachment evidence is range of information/evidence that would expose weaknesses in the government's case or cast doubt on the credibility of government witnesses.[14]

The accepted legal basis for disclosure obligations is the right to a fair trial, in particular, the principle of equality of arms and the "minimum guarantees" which should be afforded to the accused, such as the right to "adequate time and facilities."[15] The principle of equality of arms is developed within the concept of the right to a fair trial, in the international context,[16] in both international human rights law and international criminal law and jurisprudences.[17] The prosecution's duty of disclosure in the context of international criminal law is developed through the concern of protecting basic human rights of the accused.[18]

Article 14(3) ICCPR provides that in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees...

Article 14(3) (b) of the ICCPR provided that *accused has the right to adequate time and facilities to prepare a defence*. According to Human Rights Committee general comment the term

[9] Cynthia E. Jones, 'A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence'(2010) *100 J. Crim. L. & Criminology 415*

[10] Mirjan Damaška, 'Reflections on Fairness in International Criminal Justice' (2012) *10 Journal of International Criminal Justice 611*

[11] Lisa M. Kurcias, 'Prosecutor's Duty to Disclose Exculpatory Evidence' (2000) 69 *Fordham L. Rev.* p.1205

[12] Cynthia E., *Supra note* 9

[13] *Ibid,* p.1215

[14] *Ibid*

[15] Vladimir Tochilovsky, Jurisprudence of the International Criminal Courts and the European Court of Human Rights*:* Procedure and Evidence *(*Martinus Nijhoff Publishers 2008) 274–84.

[16] William Schabas, An Introduction to the International Criminal Court (4th edn., Cambridge University Press 2011) 347

[17] Vladimir Tochilovsky, *supra note* 15

[18] *Ibid*

"facilities" has, among other things, been interpreted to mean that the accused and defense counsel must be granted access to appropriate information, files and documents necessary for the preparation of a defense and that the defendant must be provided with facilities enabling communication, in confidentiality, with defense counsel.[19]

Article 14(3) (*e*) of the ICCPR provided that *"accused has the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".*[20] The right recognized under article 14(3) (b) of the ICCPR which is right to adequate time and facilities to prepare a defence is linked to article 14(3) (e), obliged the prosecution to inform the defence of the witnesses it intends to call so that the accused may have sufficient time to prepare his defence.

On the other side international criminal trials, disclosure rules are mentioned in the statutes of Tribunals and Rules of Procedure and Evidence ('RPEs'). "*The prosecutor has make available evidence to the defence in a language which the accused understands within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused".*[21] The Rome statute of International Criminal Court, has more advanced in this matter in article 67 (1) paragraph (2) has expressed that the prosecution's duty to disclose all evidence including favorable evidence to the accused.[22] Also, article 54(1) (a) of ICC imposes a further duty on the prosecutors to proactively search for both incriminating and exonerating evidences.[23]

The enforcement mechanism that is provided under article 69(7)(b) of the Rome Statute and procedure and evidence rule 68 of ICTY provided that "the Court with the power to exclude evidence obtained in violation of internationally recognized human rights standards".[24] Different jurisdictions used different remedies for violation of disclosure right such as judicial remedies

[19] Human Rights Committee, General Comment No. 13/21 of April 12, 1984, Para 9 [hereinafter HRC General Comment 13]

[20] International Covenant on Civil and Political Rights Adopted by the General Assembly of the United Nations on 19 December 1966 (hereinafter ICCPR), article 14(3)

[21] The International Tribunal for former Yugoslavia, Rules of Procedure and Evidence (hereinafter ICTY RPEs), rule 66(Ai)

[22] The Rules of Procedure and Evidence of the International Criminal (hereinafter ICC RPEs), rule 67

[23] Rome Statute ICC, Article 54, provided that the Prosecutor shall establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.

[24] Rome statute of ICC, art 69(7b); ICTY RPEs, rule 68

includes postponements of trial, review of the cases, exclusion of non-disclosed evidence, and imposition of prosecutorial accountability include civil liability or administrative liability.[25]

Regarding the time of disclosure, in principle each party should have appropriate time to examine the disclosed evidence and adequately prepare for trial.[26] According to rule 121(3) of ICC provided that "*the prosecutor shall provide to the pre-trial chamber and the person no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intend to present at the hearing*".[27] This is supported by jurisprudence of international criminal tribunal, rule of disclosure applied during the pre-trial stages of the proceeding.[28]

Since disclosure duty bears particular importance to the fairness for the accused, non-disclosure should only be granted in exceptional circumstances, with authorization of the courts.[29] The first condition for non-disclosure is denial of access to portions of the file if disclosure would jeopardize ongoing investigations.[30] If disclosure could affect or reveal the techniques of criminal investigation or disclosure is caused to commission of further crime, the prosecutor can withhold evidence with authorization of the courts.[31] The ICTY provided that 'exceptional circumstance' that may be applied by trial- chamber to order the non-disclosure of evidences when disclosure may prejudice further or ongoing investigations.[32] The second limitation on disclosure is witness protection.[33] It would be logical to consider the issue of protecting witnesses who would testify against defendants who may have the resources to coerce or even take serious measures such as killing the witnesses to escape from justice.[34] ICC statute articles

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[25] Peter J. Henning, 'Prosecutorial Misconduct and Constitutional Remedies' (1999) 77 *Wash. U. L. Q.* 713 Available at: https://openscholarship.wustl.edu/law_lawreview/vol77/iss3/2 visited at August, 27 2019

[26] Alice Chang-Jung Yang, 'The Prosecution's Duty of Disclosure before International Criminal Tribunals' (PhD dissertation, Brunel University, 2016)

[27] ICC RPE, Rule121(3)

[28] *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Timetable, [15 May 2006], para 121 and 124.

[29] Brando Matteo Fiori, Disclosure of Information in Criminal Proceedings: A Comparative Analysis of National and International Criminal Procedural Systems and Human Rights Law (PhD dissertation, University of Groningen, 2015)

[30] Jenia I. Turner, 'Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons'(2016), 57 *Wm. & Mary L. Rev.* 1549

[31] *Ibid*

[32] ICTY RPEs, rule 69(2)

[33] Turner, *supra note* 30

[34] Rezana Balla, 'Witnesses protection in fighting in Organized Crime'(2016) *European Scientific Journal vol.* 8, No.25

54(3f) & 68(1) provides the measures to be taken in order to protect witnesses and their families, then that information shall not disclosed.[35] The third possible justification for non-disclosure is when evidence touches on the national security interests. Internationally, there are no clear binding laws that define the national security means. However, article 72 provides that "a State Party may deny a request for assistance if the request concerns the production of any documents or disclosure of evidence which relates to its national security".[36]

The international criminal tribunal also developed jurisprudences that resolve the competing interest, which are the disclosure right of accused and competing interest such as witness protection when they are at risk of danger.[37] In order to balance these competing interests, in ICTY *Tadic* case outlined five stringent requirements to non-disclosure of witnesses to defence. These conditions for anonymity are; first, "*there must be real fear for the safety of the witness or his or her family; second, "the testimony of the particular witness must be important to the Prosecution's case".*[38] *Third, the Chamber "must be satisfied that there is no prima facie evidence that the witness is untrustworthy; fourth, there must not be other protective measure other than granting anonymity of witness; fifth, measures taken must be "strictly necessary".*[39] In addition to these requirements, there is other means to uphold disclosure rule i.e. "delayed disclosure" mechanism, that the prosecutor can temporarily keep the names and identity of witness until the point in time as determined by a trial chamber mostly sometime before the commencement of the trial.[40] Once the danger passes, the prosecutor must inform the defense that the relevant portion of the file should be available for inspection.

In fact until recently in the Ethiopian context disclosure is not procedurally recognized as a duty of prosecution in the criminal proceedings, subject to unclear constitutional provision. The FDRE Constitution provided that, *"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*

[35] Rome statute of ICC, article 54, 57, 64,72 and 93
[36] *Ibid*, article 72(2)
[37] *Prosecutor v. Tadic*, (1995) ICTY Case No. IT-94-1), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, p 27
[38] Joanna Pozen, 'Justice obscured: the non-disclosure of witnesses' identities in ICTR trials'[2005-2006] *ILP* Vol. 38:281
[39] *Ibid*
[40] *Ibid*

evidence produced in their own defence, and to obtain the attendance of and examination of witnesses on their behalf before the court."[41]

Thus, the Constitutional provision is not clear about timing and scope of prosecution duty of disclosure of criminal evidence. Additionally, the criminal justice administration policy recognized the disclosure of both culpable and exculpable evidence to accused. In the criminal justice policy disclosure is an obligation of both the prosecution and defendant.[42] The criminal procedure code of Ethiopia does not give direct recognition to disclosure of criminal evidence. However, there is instance that can be considered as disclosure role in the criminal procedure, where the offence requires preliminary inquiry and such preliminary inquiry is held, at the conclusion of the proceeding; the record of the preliminary inquiry would also be given to the accused having the same content as the one given to the public prosecutor. The record is given to the suspect before even the public prosecutor decides whether to prosecute her/him.[43] Moreover, revised anti- corruption special procedure and rules of evidence proclamation no.434/2005 art.35, in preparatory hearing stage provides pre-trial disclosure of evidence to accused, but it is limited on complex cases at the discretion of the court.[44]

Despite, lack of clear rule in the constitution and the criminal procedure code about prosecution duty to disclose any evidences both culpable and favorable evidence including testimony of witnesses with detailed relevant personal information of the witnesses, witness and whistleblowers protection proc. no. 699/2010 and proc. no. 652/2009 allowed to the prosecutor to conceal identity of witnesses makes disclosure rule more complex in Ethiopia. For instance, without clear recognition of disclosure rule and balancing mechanism of competing interest, the proclamation states that protected persons (witnesses, whistleblowers and their families who have entered into protection agreement) will be protected by concealing their identity and ownership, change of identity, concealing their identity until the trial process starts and witness

[41]Federal Democratic Republic of Ethiopia Constitution (hereinafter FDRE Constitution), Art 20(*4)*

[42] Criminal Justice Administration Policy (the Policy) adopted by the Council of Ministers in 2011, p.33-35

[43] 1961 of Ethiopian criminal procedure code (hereinafter ECPC), art 80-90, preliminary inquiry may incidentally serve as disclosure purpose because of defendant's attendance and the opportunity to put the question to witness however, the main purpose of preliminary inquiry is preservation of evidence.

[44] Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No.434/2005, Art 35 [hereinafter Proclamation No.434/2005]

testifies.[45] In addition to that the criminal justice policy also set ongoing investigation and national security as limitation of disclosure right of accused.[46]

Therefore, this study focuses on the area of prosecution duty of disclosure of criminal evidences in the context of balancing of competing interests.

1.2 Statement of the Problem

Ethiopian criminal justice system is accompanied by problems of lack of clear recognition of prosecution duty of disclosure of criminal evidence.[47] These problems of criminal evidence disclosure are associated with legal, structural and practical dimensions. Regarding the legal problems of criminal evidence disclosure beginning from FDRE constitution article 20(4) which provides that; *"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".*[48] This provision indicates that access to evidence is the constitutional right of the accused to examine the evidence presented against her/him, but this provision of constitution does not provide whether the disclosure surely apply at pre-trial or trial stage, and the constitution limit its scope only to culpable evidence that present against defendants, but the constitution leaving no room for the duty to disclose favorable evidences to the accused.[49] The result of this unclear constitutional provision, the prosecution only focused on disclosing evidences which established guilt of the accused. Even the prosecution considers that the constitution does not imposed obligation for pre-trial disclosure of criminal evidence to accused.[50]

Additionally, the criminal procedure code does not expressly state disclosure of criminal evidence as obligation of prosecution to give accused before trial and it does not state at what stage in a criminal proceeding the evidence of the prosecutor to be made accessible to the accused.[51] Articles 124 of the code provided that the list of evidence of both parties are to be submitted after the date of the trial is fixed which clearly shows that the list need not be attached

[45]Witness and whistleblowers protection proc. no. 699/2010(hereinafter, Witness protection law), art 2 (6) & art 4
[46] The policy, *supra note* 42
[47] Wondwossen Demissie, *Ethiopian Law of Criminal procedure* (Illinois, 2012)
[48] FDRE Constitution, art 20(5)
[49] Simeneh Kiros. *supra note* 2
[50] Abebe Asamere, *Corruption Crime and its proceeding: comparative analysis with ordinary Criminal proceeding* (2012, Amharic version)
[51] Wondwossen, *supra note* 47

to the charge. Since there is no clear provision that requires the prosecutor to give a copy of the charge filed to accused before trial begins, even if the list of evidence were not to be attached to the charge, there is no guarantee that the accused will have pretrial access to the evidence of the prosecutor.[52] The charge sheet prepared complies with the forms of charges as annexed in the second schedule. It has only the three elements of the charge the caption, statement of the offence and particulars of the offence. The list of evidence is not considered to be part of the charge sheet.[53]

Moreover, preliminary inquiry which offence is required and such preliminary inquiry is held, at the conclusion of the proceeding, the record of the preliminary inquiry would also be given to the accused having the same content as the one given to the public prosecutor.[54] In preliminary inquiry may incidentally serve as disclosure purpose, because of defendant's attendance and the opportunity to put the question to witness however, the main purpose of preliminary inquiry is preservation of prosecution evidence.[55] Furthermore, revised anti- corruption special procedure and rules of evidence proclamation No.434/2005 art.35 provided the preparatory hearing which is served as pre-trial disclosure of evidence to accused, but it is limited on complex cases at the discretion of the court. However, preparatory hearing is procedural issues that lead by discretion of court not the right of accused.[56]

The criminal justice administration policy recognized disclosure of both culpable and exculpable evidence.[57] The criminal justice policy provides disclosure as an obligation of both the prosecution and defendant.[58] But, there is no law that can shift this policy guideline in to a binding document. And also the policy has no clear indication as to the extent of the obligation to disclose can be imposed upon the defence in compliance with right to silence, privilege against self-incrimination and presumption of innocence.

[52] ECPC, *supra note* 42, art.123 and 124
[53] *Ibid* , Second Schedule
[54] *Ibid*, art.92(2)
[55] *Ibid*, art 80-90
[56] Proc.no.434/2005, art 35
[57] The policy, *supra note* 42, section 4.5.2
[58] *Ibid*

The draft criminal procedure and evidence code of Ethiopia expressly provide that the "*prosecutor has duty to disclose all evidence including favorable evidence to the accused"*.[59] The draft code has no clarity about the stage of disclosure, the circumstances where disclosure will be limited and the way how to accommodate competing interests. The draft code does not incorporate rule of disclosure of criminal evidence and its limitation in clear manner. Thus, Prosecution duty of disclosure of criminal evidence is not clearly accommodated in the Ethiopian criminal justice system.

According to Alemu *[p]lea agreements can be inevitable consequences/manifestations of the inequality of the parties. This inequality is emanate from power disparity between the adversaries is quite pronounced in the Ethiopian criminal process. The causes of power disparity are lack of clear legal framework of criminal evidence disclosure rules and absence of effective enforcement mechanism or no clear sanction on prosecution`s failure to disclose evidence in Ethiopia.*[60] The relevancy of his work to this study is he assured that there is legal problem of disclosure of criminal evidence in Ethiopian criminal justice system.

Structural problems surrounding on disclosure process include; the prosecution has extensive resources, the unilateral investigation of prosecution and non-participation of defendants and their lawyer in investigation processes, and prohibition of any communicate with prosecution witnesses'. What is more, while detained, the accused is unable to assist in making inquiries and unable investigate evidence which is relevant to his/her case.[61] Moreover, structure of prosecution institution is hierarchical bureaucratic structure and lack of professional independence and politically affiliated, and there is no opportunity to disclose all materially relevant evidence to accused.[62] If prosecutor disclose evidence which are established accused innocence or mitigate the prosecution cases, that prosecutor may be subject to disciplinary measure, because from the very beginning prosecution institution is constructed to achieve high

[59] 2017 Draft Criminal Procedure and Evidence code of Ethiopia(hereinafter the draft code), art 20(4), "*በተከሳሽ ላይ የሞከርብ ሸረጃን በዚህ ህግ መሠረት ለፍርድ ቤት እና ለተከሳሽ እንዲደርስ ያደርጋል፣ በማናቸውም ሁኔታ ያገ ኘውን እና ለተከሳሽ በመላላክያ ሸረጃነት ሊጠቅምየ ሚቻል ሸረጃን ለፍርድ ቤት ወይምለተከሳሹይሰጣል፡፡"*

[60] Alemu Meheretu (PhD), 'The Proposed Plea Bargaining in Ethiopia: How it Fares with Fundamental Principles of Criminal law and Procedure' (2016) *Mizan Law Review*, Vol. 10, No.2

[61] Simeneh, *supra note* 2

[62] See Simeneh Kiros Assefa 'The Normative, Institutional and Practical Challenges in the Administration of the Criminal Justice in Ethiopia' (2010) *Ethiopian Human Rights Law Series Vol. III*

conviction rate whatever manner rather than ensure the fair process value.[63] This would lead to an actual disadvantage for the accused (not being able to prepare his case); equality of arms would be endangered.

Regarding the practical aspect of disclosure; it is clear that criminal procedure code need not attaching evidence with charge sheet, but the practice tried to rectify this problem that prosecutor obliged to attach to lists of evidence in charge sheet and this evidence given sometime pretrial stage and most of the time trial stage. The problem at this point is, the principle of disclosure is not limited only listing the name and address of witness rather it includes; a lists/names of the witnesses with written statement taken by investigators when interviewing the witnesses; a list of the exhibits and their statements that are intended by the prosecution to be produce at the trial; any statement made by the accused at any time intends to adduce in evidence as part of the case for the prosecution; copies of all expert witness reports in the possession of prosecutor relating to the offence; all favorable evidence in the prosecution's custody and control.[64] However, in Ethiopian federal courts practice only disclosing lists of witnesses considered as disclosure right of accused.[65] If there is issue of protection of witness, the lists of witnesses and their statements is not given to defendant without due diligent assessment of actual risk on security of witnesses, no results of police investigation are given to the defendant.[66]Council of constitutional inquiry decided cases that disclosing identity and address of witnesses is not considered as fair trial right of accused, the only right of accused is the right to cross-examine prosecution witnesses.[67]

Therefore, "*in Ethiopian criminal justice lack of clear recognition of disclosure can be inevitable consequences of the inequality of the parties. In such cases, the defendant unaware of both the nature of the charge prepared and evidence marshaled against him, is simply in a disadvantageous position to make an informed decision. This leaves the defendant vulnerable than the prosecution and ultimately militates against fairness and outcome accuracy".*[68]

Additionally, this poor disclosure/non- disclosure is cause to lengthy and time-consuming

[63] Interview with Fathu Nure, he was federal prosecutor and now private legal counsel and he entertain so many issues related to with disclosure of criminal evidence and witness protection, (Addis Ababa, Ethiopia, 8 April 2019)

[64] Bruce A. Green, 'Federal Criminal Discovery Reform: A Legislative Approach' (2013) *64Mercer L. Rev.* 639 Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/656 accessed at May 6,2019

[65] Interview with Tadele Bereded, Prosecutor in Federal General Attorney,(Addis Ababa, Ethiopia, 8 April 2019)

[66] *Ibid*

[67] *Amhara Region prosecutor vs. Ali Hussen eta l,* CCI, file no. 1365/2007E.C (unpublished)

[68] Alemu Meheretu, *Supra note* 59

litigation that affects the smooth conduct of a criminal trial sometimes causing to wrongful conviction.[69]

Besides, the lack of clear rule in the constitution and criminal procedure code of Ethiopia about whether the prosecutor is expected to avail any evidence (culpable and favorable) including testimony of witnesses with detailed relevant personal information of the witnesses, some proclamations allow for the prosecutor to conceal identity of witnesses and whistleblowers.[70] For instance, witness and whistleblowers protection proc. no. 699/2010 states that protected persons (witnesses, whistleblowers and their families who have entered into protection agreement) will be protected by concealing their identity and ownership and change of identity, until the trial process starts and witness testifies.[71]Anti-terrorism proclamation no.652/2009 also provides strict rules which prohibit disclosing or mentioning the name of the witnesses in any order, judgment or records related to the case.[72]

The fact that witnesses are playing an indispensable role in the justice system, that they assist the court in deciding the guilt or otherwise of the accused person. At the same time there may be cases that exist when the life or privacy of those who testify against an accused will be threatened, if the identity of the witnesses is known to the accused or his relatives and friends. Hence, it becomes very important to protect the witnesses to make sure they are not intimidated in order not to fear revealing the truth in court.[73]

However, there is no any phrase in article 20(4) of FDRE constitution that envisages restriction of the right in the interest of witness protection. The problem of this issue is not giving protection to witnesses, rather the constitution and other laws has no amicable solution to how can strike a balance between disclosure right of accused and non-disclosure for protection of witnesses and

[69] For instance the case of *Brady v. Maryland* (1963) U.S.S.*C* 87, the prosecutor withhold evidence that prove the defendant Brady participation of crime as accomplice of homicide and the prosecutor charged defendant as principal participant of crime of homicide. Then defendant was convicted the crime of homicide in the state of Maryland and finally US supreme court reversed the decision after discovery of evidence that prove participation of accomplice. This non-disclosure prosecution was caused to wrongful conviction and retrial.

[70] Witness protection law, 699/2010, Anti-Terrorism Proclamation No.652/2009 are allows to prosecutor to conceal identity of witness for the protection of witness.

[71] Ethiopian Witness law, *supra note* 44, art 2 (6) & art 4

[72] Anti-Terrorism Proclamation No. 652/2009, *Federal Negarit Gazzeta*, 15th year, no.57, Art. 32 [hereinafter cited as 'Anti-Terrorism Proclamation No.652/2009']

[73] Wekgari Dulume, 'Ethiopian Witness Protection System: Comparative Analysis with UNHCHR and Good Practice of Witness Protection Report'(2017) *Oromia Law Journal, Vol 6, No. 1*

also other competing interests.[74] And also Ethiopian witness protection law does not give sufficient power to the courts in order to makes rigorous assessment of the need of witness protection. The actual practice shown court accepts the unilateral non-disclosure of the public prosecutor and denied the accused access to evidence in most of the time, even identity of the witness is not submitted to court itself that mean there is no opportunity to court to examine witnesses to check the actual existence of risk or intimidation of witnesses before the trial.[75]

1.3 **Research Questions**

This study aims at answering the following central questions:

- ✓ To what extents Ethiopian criminal justice system accommodates the prosecution duty of disclosure of criminal evidence?
- ✓ What are the enforcement mechanisms of prosecution duty of disclosure of criminal evidence?
- ✓ How can we balance between the disclosure right of accused vis-à-vis competing interests such as witness protection, national interest and ongoing investigation?

1.4 **Objectives of the Study**

This study has both general and specific objectives. The general objective of the research aims to study the prosecution duty of disclosure of criminal evidence under Ethiopian criminal justice system.

The research also has specific objectives, these are:

- ➢ To explore the legal and practical aspects of prosecution duty of disclosure of criminal evidence under Ethiopian criminal justice system.
- ➢ To examine scopes of prosecution duty of disclosure criminal evidence under Ethiopian criminal justice system.
- ➢ To investigate timing or the stages of proceeding that require to disclosure of evidence.
- ➢ To assess the enforcement mechanisms/remedies for failure/ of prosecution duty of disclosure criminal evidence.

[74]Michael Tilahun, 'The Two Competing Interests: Equality of Arms *vis-à-vis* Anonymity of Witness; The Case of Ethiopia' available at: www.abyssinialaw.com accessed at April 28,2019

[75] Tadele, *supra note* 64

- To assess the legitimate grounds to limit disclosure of criminal evidence under Ethiopian criminal justice system.
- To examine the possible solution to accommodate competing interests of the disclosure right of accused vis-à-vis and witness protection, national interest and ongoing investigation.

1.5 **Significance of the Study**

The significance of this research is demonstrated a rule of disclosure is therefore an important to guaranteeing material equality (equality of arms), the idea that a state should ensure some level of equality between the stronger and a weaker party through for example imposing obligation on the prosecution to disclose all relevant evidence to defence. Hence, the study is important to show a clear picture how unjustified non-disclosure of evidence affects equality of arm of accused.

The research on other side, it can serve as a standing step for advocacy groups, legislators, prosecutors and judges; to enact, implement and interpret disclosure rule. Furthermore, the research will also give insight to the researchers and subsequent studies that might come up with detail and specific study on disclosure of criminal evidence with subjected to limitation owing to non-disclosing for the protection of competing interests.

1.6 **Scope of the Study**

The research only delimited assessment of the prosecution duty of disclosure of criminal evidence under Ethiopian criminal justice system. In principle prosecution must disclose culpable, exculpable and impeachment evidence. However, there are exceptional circumstances that provide non-disclosure for the protection of national security and witness/victims, protection of ongoing investigation process. The study also tried assess the possibility of limiting (exceptional circumstance) disclosure right of accused for the protections of competing interests. The area of study is delimited to only have been taking place in Federal justice institutions. The justice institutions for the purpose of this research public prosecutor form Federal General Attorney, Federal High Court Judges and private legal counsel worked in Federal courts. Therefore, this study specifically deals with prosecution duty of disclosure of criminal evidence and its implication on equality of arms and its limitation for the protection of competing interests' in law and practice of Ethiopian criminal justice system, specifically under Federal justice institutions.

1.7 Limitation of the Study

There was a shortage of time and resources in order to effectively deal with each and every aspect of the subject matter. Additionally the shortage of materials and cases on the issues of prosecution duty of disclosure of criminal evidence in Ethiopian context has hindered the detail consideration of the issues.

1.8 Research Method

1.8.1 Approach of the Study

The research used a combination of doctrinal legal research, qualitative approach and experiences from other jurisdiction some extents. In engaging in doctrinal legal research aim to the assessing what the law is, in terms of legislation and the application of law at contention/ case law/. It is doctrinal since the study investigated disclosure legal regimes of Ethiopia and look for the compatibility of the laws with the international human rights standards to which Ethiopia is party. Therefore, doctrinal research more relevant to answer the research questions; what extents the Ethiopian laws accommodate the prosecution duty of criminal evidence disclosure and what are the enforcement mechanisms (sanction on prosecution`s failure to disclose evidence) of criminal evidence disclosure. In order to ensure validity and confidence in the findings, the study used qualitative approach to examine the practical application of disclosure rule in the Ethiopian context. This approach helps to obtain direct experiences of the justice machinery. It also helped the researcher to identify the possible challenges and constraints of disclosure rule and its implication on equality of arms. Highlighting the legislation and practice of some jurisdictions are relevant to answer the question how can one strike a balance between competing interests of the disclosure right of accused vis-à-vis competing interests. It focuses on the legislation and cases law to see how foreign courts handle the conflicting between witness protection measures and disclosure right. For this purpose, the experience of five countries from the two major legal system such as UK, Australia, New Zealand, from common law legal system and South Africa and Japan from hybrid and civil law legal system respectively included. The use of experiences of other jurisdiction is suitable for this study which evaluates the feasibility and desirability of balancing of disclosure right and witness anonymity and taking lesson to adopt balancing mechanism.

A qualitative analysis of relevant theoretical concepts, international criminal procedure and evidence rules, and jurisprudence of international Tribunals and Ethiopian legal framework, cases and data's gathered are made.

1.8.2 **Data Collection Methods**

The research employed data collection methods which include: primary documentary sources and interview. *Documentary sources and literatures includes: policy documents that is criminal justice policy*, the 2017 draft criminal procedure code and now(October, 2019) send to council of ministers of Ethiopia, laws (including the FDRE Constitution, the 1961 criminal procedure code, other special substantive and procedural laws; including witness protection proclamation no. 699/2006, anti-terrorism proclamation no.652/2009 and revised anti- corruption special procedure and rules of evidence proclamation no.434/2005, have been analyzed in relation to duty of disclosure of prosecution, justifications for non-disclosure, challenges and disproportionate impacts on accused.

The research used international criminal tribunals' statutes and rules of procedure and evidence and jurisprudences of ICTY, ICTR and ICC and international human rights instruments (include ICCPR and HRC general comments related to disclosure of evidences and evaluate balance mechanism of competing interests. Other sources in particular, literature related with subject matter and literature on the experience of countries selected for comparison.

Interviews: in doing of qualitative research approach interviews are the most common technique of data collection. The researcher used face-to face in order to get information for the practical application of disclosure criminal evidences from key informants.

Cases Analysis: It also carried out on some selected cases decided in Federal High Court and FDRE Council of Constitutional inquiry that specifically related with issues of disclosure of criminal evidence.

1.8.3 **Sampling and Study Area**

Due to the nature of the subject matter of the study and resource constrained, the researcher used non-probability sampling. Among the techniques of non-probability, the research employed purposive and quota samplings are appropriate. Purposive sampling used to adequately access from key sources and persons are targeted. Cases and litigation of disclosure issues is not common in every criminal proceeding, unless purposely targeted source and it could not be available other sampling techniques.

In order to ascertain all dimensions of the problems the research employs quota sampling for the inclusion of the composition of participants' from different stakeholders of the criminal justice institutions. Therefore, three Judges from Federal High Courts, three public prosecutors from Federal Attorney General and three from private lawyers those who worked in Federal courts.

1.9 **Review of Related Literature**

As to the researcher's knowledge, there is no research conducted directly in the area of prosecution duty of disclosure of criminal evidence in the context of balancing of the competing interests in Ethiopia. By and large there is shortage of literature in the area of fair trial in general and prosecution duty of disclosure criminal evidence in particular. A few literatures related to disclosure of criminal evidence in Ethiopia were conducted so far. For Example, Simeneh Kiros in his book on "Criminal Procedure law; principle, rule and practice" found out that "FDRE constitution has not adopted adequate measures to realize the right to pre-trial access of in favor evidence."[76] The main concern of his study is not disclosure and its relevancy to equality of arm rather he assesses rules and principle of criminal proceedings. In addition to this Simeneh Kiros in his article "The principle of the presumption of innocence and its challenges in the Ethiopia criminal process" proposed that "to strike a balance between the search for truth and the fairness of the process, 'accused has the right to have full access to any evidence presented against him".[77] But, his main focus is the values of truth finding, not special focus on prosecution duty disclosure of criminal evidence. Dr. Alemu Meheretu in his article "The Proposed Plea Bargaining in Ethiopia: How it Fares with Fundamental Principles of Criminal law and Procedure" found out that "among the basic principles of criminal procedure 'equality of arm' is a fundamental principle of fair trial, involves giving each party a reasonable opportunity to present and defend its case, in those conditions that will not put any party at a disadvantage against its opponent".[78] In his work he finds out that in order to ensure plea of bargaining equality of arms is important element and to achieve equality of arm, rule of disclosure of criminal evidence is essential element, however, there is no clear legal recognition and remedies for violation of disclosure in Ethiopia. But, the main concern of his research is assessing the relevance of disclosure of criminal evidence to equality of arm in fair process to enhance plea

[76] Simeneh Kiros *supra note* 2

[77] Simeneh Kiros, 'The Principle of the Presumption of Innocence and its Challenges in the Ethiopian Criminal Process', (2012) Mizan Law Review, Vol. 6, No. 2,

[78] Alemu, *supra note* 59

bargaining power of accused in Ethiopia, but not about prosecution disclosure of criminal evidence exclusively.

Furthermore, Wondwossen Demissie in his book *"Ethiopian law of Criminal procedure"* discussed that "Ethiopian criminal justice failed to recognize disclosure of evidence as fairness value required".[79] Almost all of these research works mainly focused on the principles and rules of criminal procedure in Ethiopia rather than dealing with the disclosure as human right that has been taken as obligations prosecution.

The other work related on the issues of disclosure of evidence was conducted by Brigadier-General Tateq Tadesse in his book of *"Basic Concept of Evidence Law"* revealed that the legislative history of Ethiopia criminal procedure code and some provision of criminal procedure code such as preliminary inquiry showed that there was strong intention to incorporate pre-trial disclosure of evidence in Ethiopian criminal procedure. The drafter of criminal procedure code Sir Charles Mathew transplanted criminal procedure code from common law countries India and Malaysia were clearly incorporated rule of disclosure of evidence. [80]And he argued that 'FDRE constitution art 20(4) should be interpreted as accused has right to pre-trial disclosure of all evidence.[81] But his work is basically basic principle of evidence and it is not address what sort of evidences are disclose rather he rose there is the provision serve as role of disclosure in criminal procedure code. Tateq's work has not any solution for how to resolve the two competing interests in Ethiopian legal regimes.

The other important work is Stanley Z. Fisher's book, *"Ethiopian Law of Criminal Procedure"* provided that "preliminary inquiry is a vital for discovery function to accused by listening to the prosecution witness at the inquiry, and by studying the written dispositions afterwards, he may learn what evidence the prosecution will present against him at trial, and prepare his defense".[82] His work was not about the legal recognition of right to disclosed to all evidences to accused in Ethiopian criminal procedure, rather than analyzing indirect role of preliminary inquiry is served as the disclosure of criminal evidence to accused.

The other important works for this researcher conducted by Wekgari Dulume in his article *"Ethiopian Witness Protection System: Comparative Analysis with UNHCHR and Good Practice*

[79] Wondwossen, *supra note* 46
[80] Brigadier-General Tateq Tedessa, *Basic Concept of Evidence Law* (Addis Ababa university printing press 2005)
[81] *Ibid*
[82] Stanley Z. Fisher's, *Ethiopian Law of Criminal Procedure* (Haile Sellassie I university 1969)

of Witness Protection Report" provided that 'witness protection is indispensable parts of justice system because without witness attestation, it is impossible to convict offenders and acquit innocent. However, in Ethiopian there are problems on implementation of the law due to lack of necessary fund, organized staff, awareness about the law is concluded.'[83] His work is main effectiveness of witnesses protection in Ethiopian justice institutions that have mandate to implement the witness protection law, but not assessing witness protection in light of accused right to access all evidence against and for to accused.

Unlike the previous works, this study intended to assess the prosecution duty of disclosure criminal evidence and how strike balance the competing interests may be resolved in Ethiopian criminal justice system.

1.10 **Ethical Considerations**

Ethical consideration to all data's were collected through the permission of individuals or authority, the researcher has be take due care to get the permission and to properly preserve the collected data. The researcher has got numerous copies of letters from the School of Law of Jimma University to appealing all the concerned justice institution and individuals to cooperate the researcher in letting access to collections and willing to be interviewed in the course of this study. Further, in the interpretation of data, the researcher will provide an accurate account of the information and the researcher would not use language or words that are not biased against persons or the institution. The public prosecutors, judges and private legal counsels whom researcher interviewed have consented verbally for their name to be freely cited in the research, and none of them asked for anonymity unless judges not willing to record their voices. Consequently, the researcher has freely divulged the name of all the informants as they have permitted. The OSCOLA fourth edition rules of citation are pursued throughout the research.

1.11 **Organization of the Study**

The research report is organized into five chapters. The first is an introductory chapter. The second chapter presents concise conceptual and normative framework of prosecution duty of disclosure of criminal evidence. The third chapter devoted to assess and analysis of the legal and practical aspects of prosecution duty of disclosure of criminal evidence under Ethiopian criminal justice system, and provided balancing of mechanism of competing interests and attempt to

[83] Wekgari, *supra note* 72

present the analysis of data gathered based on interviews. Finally, the paper presents the findings with conclusion and recommendations in the last chapter as ways forward.

Chapter Two

Conceptual and Normative frameworks of Duty of Disclosure Criminal Evidence

2.1 Concepts of Duty of Disclosure of Criminal Evidence

In a broad sense "Disclosure" means the act of revealing that which was previously unknown.[84] In the context of criminal proceedings, the term refers to 'the uncovering of evidence and other information between the parties of legal proceedings before and during these proceedings'.[85] "In criminal cases disclosure is the formal process by which the defense and prosecution access information relevant to a criminal investigation".[86]

Traditionally, disclosure was not explicitly recognized by procedural or human right laws, but disclosure would occur as matter of discretion of the prosecution.[87] However, through development of international human rights law and jurisprudence found this right to be part of more wide-ranging rights enshrined in many states constitutions and human rights instruments (such as the right to make a defence, "the right to have adequate time and facilities to prepare for a defence", and the right to a fair hearing.[88] Now disclosure is integral part of the fair trial right of accused. The underlying reason behind the inclusion of disclosure rights alongside other fundamental rights is that it is a critical tool for the accused to mount a meaningful defence.[89] When both the prosecution and the defence are cognizant of the arguments and evidence that the opposing sides intend to rely on, trials will run smoothly.[90]For instance, the accused needs to know the identity of prosecution witnesses before the trial commences; only through such disclosure can the accused challenge the credibility of witnesses.[91] From that view point, it is

[84] Bryan, *supra note* 8

[85] Büngener L, *Disclosure of Evidence in International Criminal Trials - A Historical Overview* (PhD Thesis, University of Marburg, 2012) 5

[86] The Justice project, *Expanded Discovery in Criminal Cases : A Policy Review* (2007)

[87] Langer M & Roach K ' Rights in the criminal process: a case study of convergence and disclosure rights' in Tushnet M, Fleiner T & Saunders C (ed) *Routledge Handbook of Constitutional Law* (2013)275

[88] *Ibid*

[89] *Ibid*

[90] Ashworth A & Redmayne M., *The Criminal Process* (2010), 259.

[91] *Ibid*

obvious that disclosure promotes efficient and fair trial, whereas non-disclosure has a direct effect on the accused's case, it may amount to affecting equality of arms.[92]

2.2 Purposes of Disclosure of Criminal Evidence

2.2.1 To assist in timely preparation of accused's case and avoiding trial at Surprise

In criminal cases, perhaps the most significant disparity between the government's capacities to defend is derives from the government's vastly superior ability to discover information concerning the alleged crime; the defence on the other hand in most cases has neither the resources nor the investigative tools. However, disclosure is as guarantees of equality of arms that the accused person must be have opportunity to defend him/her. Hence, the prosecution disclosure is to afford the accused to know the case and it provides the information to particular version of the facts and to develop a list of issues.[93] Furthermore, the truth is more likely to be revealed at trial if the defence has been given an early opportunity to investigate the evidence and prepare the case.[94] Surprise evidence may leads to poor justice. However, attacking the other party by surprise might not be the best way to achieve the objectives of criminal trials. In this regard, the disclosure rule will be able to prevent trial by ambush where accused only learns of prosecution evidence at the trial and it becomes practically impossible to rebut the evidence.[95]

2.2.2 To testing credibility of prosecution evidence

Cross-examination is a vital for court fair trial process. It provides an opportunity to challenge the trustworthiness of witness and expose lies and contradiction in the oral account by the witnesses. The demeanor of the witness, the manner of giving her/his testimony, physical and emotional reaction to questions in cross-examination may hold the key to ascertaining the veracity of the testimony. The significance of confrontation for the defense is, therefore, very critical. Once capacity of the witness is ascertained, the defendant or his / her lawyer starts to study the character of the witness listed by the prosecutor. Being capable to testify doesn't mean being an honest witness who testifies truthfully. Further, disclosure has been as a 'powerful and

[92] *Ibid*
[93] Edward SG Dennis Jr, 'The Discovery Process in Criminal Prosecutions: Toward Fair Trials and Just Verdicts' (1990) 68 Wash. ULQ 63.
[94] Alice, *supra note* 26
[95] Brenda Mwale, The Balancing of Competing Rights: The Right to Disclosure at the International Criminal Court (2015)

valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story.[96]

Persons may lie or give a false testimony for various reasons. They might do it intentionally to incriminate the defendant out of hate or they might mistakenly testify wrongly because of memory loss or distorted or sketchy memory recollection but appearing to be a solid testimony from clear memory. It is up to the defendant or his / her attorney to study the character of the witness in order to challenge the testimony given during cross-examination.[97] For instance, the defendant's lawyer may find out that the witness presented by the prosecutor has a record of being convicted for giving false testimony/opinion more than once or twice; in addition to pointing out this fact to the court during cross-examination, the lawyer should find technical ways to impeach credibility of the witness. Hence, the appearance of witness in the courtroom enables the judges and accused to observe his/her reaction while being questioned and this may be crucial to assess the credibility and trustworthiness of the evidence. Therefore, to impeach credibility of the witness or his testimony/opinion, defendants / lawyers need to know the identity of the witness and conduct their research accordingly.[98]

On cases where the identity of the witness is totally concealed, defendants or lawyers couldn't get any information which may impeach credibility of the witness. Such blind flying, might even lead the court to accept the testimony of a convicted person who is infamous for giving false testimony / opinion in courts without any checking; especially on cases where the character and credibility of the witness is not challenged on cross-examination, because the defendant or his/ her lawyer is not provided with any information as o the identity of the witness or his background. However, if the defendant or his / her lawyer is presented with at least the basic information as to the identity of the witness, defendants will have a chance prepare strong cross-examination which challenges the credibility of the witnesses' testimony or the witness him/

[96] Phonebe Bowden et al, Balancing Fairness to Victims, Society and Defendants in the Cross-examination of vulnerable Witnesses: an impossible Triangulation?'(2014)*Melbourne University Law Review* Vol 37:539
[97] James Lindsay Glissan, *Cross-Examination Practice and Procedure: An Australian Perspective* (Butterworths, 2nd ed, 1991) 73–4.
[98] *Ibid*

herself. Therefore, disclosure is has utmost importance to the rights of the defense and the fairness of the trial and the greatest legal device for the discovery of truth.[99]

2.2.3 Minimizing Wrongful Convictions

The prosecution's primary obligation is to disclose any relevant material that might undermine the case for the prosecution.[100] Wrongful convection may be resulted from the suppression of exculpatory evidence by prosecutor.[101] Evidences will be invaluable on determining criminal responsibility or innocence of the defendant. Unless the evidences are disclosed to the defendant's and his lawyer they unable to challenge such false, inconsistent, or paradoxical testimonies of witnesses that may lead to wrong conviction.[102] Thus, disclosure rules also have the effect of reducing "other common causes for wrongful convictions, such as eyewitness misidentification, perjury and false confessions".[103]

And one can argue that in order to properly cross-examine the witness, accused should know the person who will give the testimony and be prepared accordingly for fruitful cross-examination.[104] Otherwise, it would be difficult to the lawyer or the defendant to study the character and background of the witness and come up with critical cross-examination questions to impeach credibility of the witness during the trial.[105] Thus, disclosure is important to defendant to well-prepared defence and argument with a critical cross-examination that may be helpful to impeach credibility of the witnesses' testimony and in effect to avoiding wrong convictions.

2.2.4 Ensure Fairness of the Proceeding

The primary goal in all criminal process is the same: to convict the guilty and acquit the innocent. The need to ensure the acquittal of the innocents, restricts the vigor with which guilty

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[99] David Lusty, 'Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal' (2002), *Sydney Law Review,* vol. 24 available at: <http://www.austlii.edu.au/au/journals/SydLawRw/2002/17.pdf > accessed 23 may 2019, pp. 361-362.

[100] Stanley Z. Fisher, The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England, (2000) 68 *FORD. L. REV*. at 1394.

[101] James Lindsay, *supra note* 104

[102] Dennis Eady, 'Miscarriages of Justice: The Uncertainty Principle' (PhD dissertation, Cardiff University, 2009)

[103] *Ibid*

[104] Griffin, Lissa. 'The Correction of Wrongful Convictions: A Comparative Perspective' (2001) *American University International Law Review* 16, no. 5 1241-1308.

[105] *Ibid*

can be pursued. Among the key devices are used to facilitate this goal; disclosure of criminal evidence is most important instruments for achieving this core values of criminal process.[106]

Advance disclosure, which is allowing a criminal defendant to find out information relevant to the prosecution at an early stage, would minimize the risk of convicting an innocent person.[107] Disclosure represents a key procedural instrument in remedying the autocratic and one-sided process of criminal investigations. The right to disclosure of evidence is predominantly based on the concept of fair trial rights. This is because disclosure primarily seeks to protect the accused's rights in criminal trials granting the accused adequate facilities for the preparation of the defence.[108]

A related task of criminal evidence disclosure is to ensure the integrity and fairness of the trial and reach a more reliable outcome in criminal cases. The right to disclosure, now commonly known in US,[109] emerges from the concept of due process, which requires that the procedures by which laws are applied must be even handed, so that individuals are not subjected to the arbitrary exercise of governmental power. Since the defence and his/her lawyers only have very imperfect opportunities to challenge the prosecution's cases,[110] liberal disclosure rules are the essential tools for the defence to challenge the prosecution's case and prepare its defence. Thus, the principle of presumption of innocence could be seriously eroded by not giving the defence a sufficient opportunity to cast doubt on the prosecution's case. Damaška has commented accurately, that "restraints placed on disclosure make it harder for the American defence to rebut the prosecution's evidence, thus indirectly decreasing prosecutorial evidentiary burdens".[111] In other words, too limited disclosure rights of the defendant could have a detrimental effect on the presumption of innocence.[112]

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[106] Epp John, *Building on the decade of disclosure in criminal procedure* (Cavendish Publishing Limited, 2001)

[107] Edward SG Dennis Jr, 'The Discovery Process in Criminal Prosecutions: Toward Fair Trials and Just Verdicts' (1990) 68 *Wash. ULQ* 63.

[108] Victor Bass, comment *Brady v. Maryland* and the Prosecutor's Duty to Disclose'(1972) *The University of Chicago Law Review*

[109] *Brady v. Maryland (*1963), it was the landmark decision of USA Supreme court provided that the prosecution's duty to disclose exculpatory materials to the defence. Brady confessed that he participated in the crime, but it was his accomplice who performed the act of killing. However, the prosecution withheld the statement of his co-accused, who admitted that he did the actual killing.

[110] Dennis Jr, *supra note* 107

[111] Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure' (19731) *University of Pennsylvania law Review* p.534

[112] *Ibid*

Therefore, disclosure primarily has the chance to put forward a full defence, thereby greatly increasing chances of securing a fair administration of criminal proceeding. A fair trial instills confidence in the system in the public at large and increases the offender's chance of rehabilitation.[113]

2.2.5 Judicial Efficiency

"Disclosure is an essential procedural safeguard that helps to make the legal system more transparent by increasing pretrial disclosure, and ensures a fair procedure by allowing each side in a trial to adequately prepare their case".[114]

It ensures that non-contentious issues are resolved at the preliminary stages of the proceedings. In effect, disclosure facilitates the right to an expeditious trial. It encourages resolution of cases including in appropriate circumstances entering a guilty plea in the early stages of the proceedings, it enables the court to make an informed determination on the innocence or guilt of the accused person and prevent wrongful convictions.[115]

Accordingly, it could promote the accuracy and confidence of criminal trials, and enhances judicial efficiency. The experience of those jurisdictions, which adopted more liberal discovery rules, also shows a more efficient process, with less reversals and retrials, and more cases resolved earlier in the process.[116]

2.3 Duty of Disclosure of Criminal Evidence in Adversarial and Inquisitorial Legal Traditions

2.3.1 Disclosure in Adversarial system

The comparative account of pretrial evidence disclosure was minimal throughout the common law world; as the result of party autonomy there was the longstanding norm that one party need not aid the other's preparation by sharing evidence prior to trial. More importantly assumption, the prosecution and defence have equal powers and rights to investigate and present their cases.[117]

However, the rise of professional police forces and prosecution agencies, that dominate evidence gathering in criminal cases, and in the contrast defendants have often a weak capacity of

[113] Epp John, *Building on the decade of disclosure in criminal procedure* (Cavendish Publishing Limited, 2001)
[114] The Justice Project, *supra note* 87
[115] *Ibid*
[116] *Ibid*
[117] John H. Langbein, *The Origins of the Adversary Criminal Trial* (2003)

investigate facts and produce evidence independently.[118] Moreover, the following important justifications that have been caused to common law jurisdiction depart from the traditional rule of party autonomy and non-disclosure by prosecution prior to trial. First, asymmetry of power between the parties i.e. in criminal justice system there are unbridgeable gap of power and resources between the public prosecutor and defendants. While the prosecution enjoys state resources and powers, the defence has none of these and remains very weak. These power disparities between the adverse parties are common in common law legal system.[119] Furthermore, according to Damaska "the rule of disclosure is necessary in contest model to reduced procedural ambush to level competing notion of fair contents; in contest model the arrangement of procedural and evidence rules are more complex and lead by party autonomy, but disclosure actually enables parties' in fact finding process, emerging and generating pressure for judges to intervene fact finding process".[120] The second reason for disclosure obligations prior to trial is aim to avoid surprise evidence in the trial that hinders more truth-finding. In adversarial system, there are two adversaries, the prosecution and the defence, who present their cases before an impartial judge. In this system, the judge is an umpire and acts as a referee between the two adversaries.[121] In this it has been long tradition of adversarial trial process, and the evidence gathering is absolutely by the party rather than by judicial or quasi-judicial officials. The judicial role in evidence gathering is minor. This situation in certain circumstance may affect the accuracy of fact finding. Conversely, pre-trial disclosure in general facilitates accurate judgments.[122] And modern reforms of pre-trial disclosure practices occurred against an historical presumption minimal role of judges in the proceeding. Because, judges' role is increased due to setting disclosure timetables, facilitate evaluate the reason of non-disclosure presented by prosecution, and sometimes order the prosecutor to disclose evidence to accused.[123] Finally, an explicit rationale for pretrial disclosure is obliging prosecutors to share their evidence before trial is to make criminal process more efficient, through facilitating guilty pleas, by clarifying disputed issues for trial or negotiated resolutions more efficient, and to improve the truth-finding to reach accurate

[118] Darryl K. Brown, 'Evidence Disclosure and Discovery in Common Law Jurisdictions' (2018) *The Oxford Handbook of Criminal Process*
[119] Brando Matteo Fiori, *Disclosure of Information in Criminal Proceedings: A Comparative Analysis of National and International Criminal Procedural Systems and Human Rights Law* (Wolf Legal publisher, 2015)
[120] Damaška, *supra note* 7
[121] Cryer R, Friman H, et al, *An Introduction to International Criminal Law and Procedure* (2 ed, 2010) 426.
[122] Edward SG Dennis Jr, 'The Discovery Process in Criminal Prosecutions: Toward Fair Trials and Just Verdicts' (1990) 68 *Wash. ULQ* 63.
[123] Brown, *supra note* 118

verdict.[124] The critiques often point to the party centric aspect of adversarial system as defect for expeditious and impediment for the search for the truth.[125] Damaska proposed reason in this regard that favoring disclosure evidence is the demand of the government prefers bargaining and negotiation of between the parties and such negotiation leads to out-of court settlement and abort official proceeding. The compulsory disclosure of information forced litigants to interact, enable them to appraisal the relative strength of their case and in doing so encourage settlement.[126] These are contributing factor for substantial pretrial disclosure duties are comparatively recent developments.[127] However, the concern about common law disclosure rules, does not lead all jurisdictions to make the same application. For instance UK has detailed disclosure requirements for the defense.[128] Whereas U.S. has narrow disclosure schemes respond to this need for nondisclosure by simply not requiring prosecutors to disclose large categories of information, such as witness identities. In addition to specific concerns about witness intimidation or evidence tampering, disclosure can also compromise the viability of government informants, undercover agents, and secret surveillance tactics such as wiretaps.[129]

Moreover, pretrial disclosure has gradually become understood to make both trials and negotiated resolutions more efficient, and to improve the truth-finding capacity and fairness of criminal process. The emerged of disclosure norm that the government must disclose relevant evidence in its possession, even though that does not support the prosecution's case.[130] Rules also typically impose greater duties on the defense to disclose significant portions of its evidence before trial. This was stronger shifts away from a tradition in which parties had no duties to disclose evidence prior to trial to make both trials and negotiated resolutions more efficient.[131] For these reasons common law criminal justice systems moved away from their tradition of non-disclosure.[132]

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[124] Jenny McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31 Legal Stud. 519, 532.
[125] Alice, *supra note* 26
[126] Damaška, *supra note* 7
[127]Brown, *supra note* 118
[128] *Ibid*
[129] Jenny McEwan, *supra note* 122
[130] *Ibid*
[131] *Ibid*
[132] *Ibid*

2.3.2 Disclosure in Inquisitorial Systems

In civil legal system the term "disclosure" is not frequently used, instead referring to a right to inspect the investigative file is known as "*dossier"* approach.[133] In civil law on defense inspection of the file before trial is in many respects similar to disclosure rules.[134]

According to Damaska, *[t]he continental trial, the purpose of investigation is not only to screen unfounded charges, but also to prepare evidentiary material for examination by the court. The extent to which the defendant is entitled during this investigation to acquaint himself with evidentiary material (for example, by studying the dossier or participating at proof-taking activities) despite differently regulated from jurisdiction to jurisdiction*.[135] The defence will receive dossier at a much pre-trial stage, that is, when the investigation phase is already closed.[136] According Damaska the reason behind broad disclosure rule in continental law is the parties are obliged to all relevant material and evidence surrendered to court/ investigative judges, such document become common to prosecutor and accused.[137] In an inquisitorial system however, the main trial is dominated by the judge who decides in which evidence is taken and who evaluates the collected evidence. But, the defence has little or no power to conduct investigations. The system entails unitary investigation where the judge assumes the role of the chief interrogator of the witnesses and the defendant. [138]

For instance Italian criminal procedure code article 466 grants the right to the defendants and their lawyer to consult the trial dossier and to make a copy of material.[139] Moreover, "*article 468 of Italian criminal procedure code stated that when the parties intend to request the admission of the testimony of witnesses, experts and technical counsel they must deposit in the registry of court, at least seven days before the date set for the beginning of the trial, a list indicating the circumstances in which these witnesses will testify"*.[140] In addition, section 147 of German procedure code provided that *"the defence is allowed to access entire investigative file or dossier that such information is necessary for an adequate defence. In such instances, such provision should*

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[133] Turner, *supra note* 30
[134] *Ibid*
[135] Damaska, *supra note* 111
[136] Stanley Z. Fisher, 'Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports' (1993)*28 NEW ENG. L. REV.* 1, 18
[137] Damaska, *supra note* 5, p. 135
[138] Langer M 'The Long Shadow of the Adversarial and Inquisitorial Categories' in Dubber MD & Hörnle T (ed) *The Oxford Handbook of Criminal Law* (2014) 895.
[139] Fiori, *supra note* 29, p.76
[140] *Ibid*

not endanger the purpose of the investigation".[141]The dossier contains evidence gathered by the prosecution and police or any state investigating agency and may contain both inculpatory and exculpatory evidence.[142]

Today, the defendant's right to review the investigative file is grounded in the human right to a fair hearing before a court of law, the principle of "equality of arms", and fair trial principle.[143] "The defendant has an opportunity to review and respond to; this is known as the fair hearing principle, the right to review the file is also seen as an element of equality of arms".[144] During the investigative stage, defense attorneys can review all the evidence gathered by the police and the prosecution, unless, the prosecution restricts disclosure on specified grounds.[145] The grounds are, when the prosecution evidence is contained national security; prosecutors may withhold the names and addresses of endangered witnesses and, prosecutors may deny access to portions of the file, if disclosure would jeopardize ongoing investigations.[146] These restrictions must be based on concrete evidence of the potential danger to the investigation for example, that the defendant who has access to the file through his lawyer would seek to destroy evidence, interfere with investigative measures, or influence witnesses. The restriction on grounds of risk to the investigation can only be justified on a temporary basis. Once the danger passes, the prosecutor must inform the defense that the relevant portion of the file is now available for inspection.[147] As a result, the dossier will disclose all the incriminating evidence and exculpating evidence.[148]

In the contrary the reciprocal defence disclosure are mandatory of the defendant's including documents such items as private letters and possibly even diaries, will be forcibly produced and included in the file of the case.[149]

Therefore, the researcher would not dwell on the entire debate of disclosure rule on inquisitorial and adversarial system, but it limits only the above some difference on disclosure rule in the models.

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[141] Section 147 (7) of the German Criminal Procedure Code
[142] Turner, *supra note* 30
[143] *Ibid*
[144] Cassidy RM, 'Plea Bargaining, Discovery and the Intractable Problem of Impeachment Disclosures' (2011) 64 *Vanderbilt Law Review* 1429
[145] Damaška, supra note 7, noted that "*the Continental defendants acquires an unlimited right to 'discovery' from the prosecution only after pretrial investigators have had ample opportunity to obtain information from him and to convert this info into technical evidence; the prosecutor can well afford to give the defence a look".*
[146] Turner, *supra note* 30
[147] *Ibid*
[148] Damaška *supra note* 111
[149] *Ibid*

2.4 Scope of Duty of Disclosure of Criminal Evidence

Prosecution disclosure duty in criminal proceeding falls into two broad categories: (1) evidence that the prosecution plans to present at trial to prove the defendant's guilt; (2) evidence in the prosecution's possession that it does not plan to present at trial; it is favorable to the defense.[150]

2.4.1 Prosecution Duty of Disclosure of culpable Evidence (Evidence of guilt)

One of the fundamental rules of the criminal process is that the prosecutor must provide to the defence with all the documents and other materials that will be introduced into evidence to prove the guilt of the accused.[151] In this regard a system of disclosure determines that the accused is granted access to the documents, records, for the preparation of his or her defence. Such access is to ensure the advance knowledge of the prosecutorial case.[152]

2.4.2 Disclosure of Favorable Evidence

The Disclosure doctrine imposes an affirmative duty on the prosecutor to investigate, preserve, and disclose favorable information located in the prosecutor's files, as well as information in the possession of any member of the prosecution team.[153] Favorable evidence includes both exculpatory evidence that negates guilt and impeaching evidence that undermines the government's case.[154]

2.4.2.1 Exculpatory Evidence

Evidence is deemed to be exculpatory if it tends to negate guilt, diminish culpability, support an affirmative defense (duress, self-defense), or if the evidence could potentially reduce the severity of the sentence imposed.[155] Exculpatory evidence includes third party confessions, victim or complainant recantations, eyewitness identifications of another person as the perpetrator, as well as descriptions of the perpetrator that are inconsistent with the defendant's appearance.[156] It *a*lso

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[150] Brown, *supra note* 118

[151] Andrew Ashworth & Mike Redmayne, *The Criminal Process* 259 (4th ed. 2010); David Corker & Stephen Parkinson, *Disclosure in Criminal Proceedings* (2009) 61-72

[152] McIntyre, Equality of Arms--Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (2003) 16 *Leiden J. Int`L*., 269,

[153] *Brady v. Maryland* 373 U.S. 83 (1963).mandated that the trial prosecutors provide the defense with favorable information collected by the government during the course of its investigation, including information that either negated guilt or undermined the government's case.

[154] E. Jones, *supra note* 9

[155] *Ibid*

[156] *Ibid*

included forensic evidence that affirmatively excludes the defendant as the culprit or fails to link the defendant to crime scene evidence including physical evidence such as DNA, fingerprints, or bite marks.[157] For instance in the USA, this principle was observed and expanded in *Brady v. Maryland case*, which became the landmark case decision of the prosecution's duty to disclose exculpatory materials to the defence. Brady confessed that he participated in the crime, but it was his accomplice who performed the act of killing. However, the prosecution withheld the statement of his co-accused, who admitted that he did the actual killing.[158] This statement was not disclosed to Brady's lawyers until Brady was convicted and sentenced. The Supreme Court reversed the conviction, saying that; *"The suppression by the prosecution of evidence favourable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution".*[159] In International criminal tribunal in the case of *Lubanga* the Trial Chamber of ICC provide "prosecutor shall disclose exculpatory evidence that shows the innocence of the accused, which mitigates the guilt of the accused and which may affect the credibility of the Prosecution's evidence".[160]

Therefore, the prosecutor has duty to disclose any favorable to accused or his/her lawyer before, during or after the commencement of the trial in advance.

2.4.2.2 Impeachment Evidence

"Impeachment evidence encompasses a broad range of information that would expose weaknesses in the government's case or cast doubt on the credibility of government witnesses".[161] Impeachment evidence includes any information regarding a witness's prior convictions, biases, prejudices, self-interests, or any motive to fabricate or curry favor with the government. Impeachment evidence also consists of prior inconsistent statements of the witness and any prior failure of the witness to identify the defendant.[162]

Non-disclosure of favorable evidence does not result in a violation of disclosure, however, unless the defense can establish that the withheld evidence was material or prejudicial to the

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[157] Ellen Yaroshevsky, 'Prosecutorial Disclosure Obligations' (2011) 62 *Hastings L.J.* 1321. Available at: <https://repository.uchastings.edu/hastings_law_journal/vol62/iss5/8> accessed at June 6,2019

[158] *Ibid*

[159] *Brady v. Maryland case, supra note* 153

[160] *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, *AC,* Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber 8 July 2010.

[161] E. Jones, *supra note* 9

[162] *Ibid*

defendant.[163] In other word defence burden of proof such suppressed evidence which would create a reasonable doubt of the defendant's guilt.[164] However, Rule 66 (B) of ICTY, it is the prosecutor who makes the initial determination whether a particular piece of material is exculpatory which is the prosecutor supposed to be acting in "good faith".[165] If prosecutor violate this duty the defence has the shoulder of duty of prove as provided in *Delalić* the Trial Chamber provided that defence should established materiality of withholding evidence. The material in question is if non-disclosed evidence "tends to suggest the innocence or mitigate the guilt of the accused or affect the credibility of prosecution evidence".[166] Similarly in *Lubanga* trial chamber of ICC opined that "the primary duty lies on the parties to identify relevant material evidence, the chambers only have powers to will determine whether such information can be disclosed".[167]

Therefore, the prosecution has a duty of disclosure of any material exculpatory evidences in the contrary the defendant has the burden of prove the violation prosecution duty of disclosure that evidences create reasonable doubt on the defendant guilt.

2.5 International Normative frameworks of Duty of Disclosure of Criminal Evidence

The accepted legal basis for disclosure obligations is the right to a fair trial in general, equality of arms in particular as 'minimum guarantees' which should be afforded to the accused, such as the right to adequate time and facilities provided under article 14(3 b) of ICCPR.[168] According to UN HRC interpretation the term "facilities" has been interpreted that "the accused and defense counsel must be granted access to appropriate information, files and documents necessary for the preparation of a defense and that the defendant must be provided with facilities enabling communication, in confidentiality, with defense counsel".[169]Moreover, Human Rights Committee *[t]he right to adequate facilities to prepare a defence requires that, in addition to*

[163] *Ibid*
[164] *Ibid*
[165] *Prosecutor v Kordić and Čerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 183
[166] *Prosecutor v. Delalić et al*., IT-96-21, Decision on Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996, para. 7.
[167] *Prosecutor v. Thomas Lubanga Dyilo, in* Brando Matteo Fiori, *Disclosure of Information in Criminal Proceedings: A Comparative Analysis of National and International Criminal Procedural Systems and Human Rights Law* (2015)
[168] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (hereinafter ICCPR), art 14(3b)
[169] Human Rights Committee General Comment No. 13/21 of April 12, 1984 [hereinafter General Comment 13], para 9

information about the charges, the accused and their counsel should be granted timely access to relevant information. This information includes witness lists and information, documents and other evidence on which the prosecution intends to rely (inculpatory material). It also includes information that might lead to the exoneration of the accused (exculpatory material), affect the credibility of evidence presented by the prosecution, support a line of argument of the defence or otherwise help the accused prepare their case or mitigate a penalty.[170] Disclosure provides the defence with an opportunity to learn about and prepare comments on the observations filed or evidence to be adduced by the prosecution. The duty of the prosecution to disclose information that might assist the defence is broad and continues throughout the trial proceedings (before and after witnesses testify). The prosecution must monitor the testimony of witnesses and disclose information relevant to the credibility of witnesses.[171] Thus, the cumulative reading of art 14(3) (b) of the ICCPR to adequate time and facilities to prepare a defence, and art 14(3) (e), are imposed obligation on prosecution to disclose all relevant evidences, so that the accused may have sufficient time to prepare his defence.

In other side prosecution duty of disclosure of criminal evidence provided under international criminal law and rule of procedures and evidence as an essential elements of equality of arms, which is provided under art 20 of ICTY statute and rule 66(b) of ICTY/R RPE and rule 76 of ICC provided that prosecutor shall duty to disclose all evidence including lists and statements of witnesses and all documents that intend to established guilt of the defendant. This shall be done sufficiently in advance to enable adequate preparation to defence.[172] In addition to duty of disclosing culpable evidences, prosecutor has duty to disclose all relevant evidences to defendant which is provided under rule 68 of ICTY/R RPE, "prosecutor shall disclose any material that suggest the innocence or mitigate the guilt of the accused or affect the credibility of prosecutor evidences".[173] The same stipulation provided under ICC statute, article 54 (1)(a) & 67 which imposes a duty on the Prosecutor to investigate "incriminating and exonerating circumstances equally".[174] In addition to international legal documents, regional human rights instrument such as African charter on human and people's rights under article 7 guarantees fair trial rights that

[170] General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial', UN Doc. CCPR/C/GC/32 (2007)
[171] Amnesty International, *second edition of the Fair Trial Manual* (Amnesty International Publications, 2014)
[172] Art 20 of ICTY statute; rule 66(b) of ICTY/R RPE; Rule 76 of ICC of RPE
[173] Rule 68 of ICTY/R RPE
[174] Article 54 (1)(a) & 67 of ICC statute

includes notification of charges adequate preparations of defence, examination of witnesses.[175] However, this provision is not as comprehensive as ICCPR on the issues of fair trial specifically disclosure right. But, the African Charter article 30 & 45 empowers African Commission to discharges interpretative mandate, elaborating the provisions through resolutions and making recommendations on specific human right issue affecting the continent. [176]Hence, as per those provisions the African Commission developed first resolution on fair trial norms, "resolution on the right to recourse and fair trial" at its 11th ordinary session in Tunis, Tunisia, in March 1992.[177]The resolution amplifies article 7 of the African Charter and stressed that 'the right to a fair trial is essential for the protection of fundamental human rights and freedoms'.[178] The resolution provided that fair trial right include: in the determination of charges against individuals, the individuals shall be entitled in particular to have adequate time and facilities for the preparation of their defence and communicate in confidence with counsel of their choice.[179] To sum up, it is well recognized that the disclosure of criminal evidence including exculpatory material is fundamental and of paramount importance to the fairness of proceedings before the international criminal tribunals. The rationale of this duty is that the prosecution has superior and sometimes even sole access to the information including exculpable evidence. The prosecution's duty to disclose exculpatory evidence is one of the best available ways to rebalance the inequality of arms between the two parties.[180]

2.6 Timing of Disclosure of Criminal Evidences

The controversial issue of disclosure is time of disclosing of all evidence to accused. There is the broad consensus that disclosure of all evidences prior to trial. This is the reason that adequate disclosure allows to defence and his attorneys to conduct critical pretrial investigations and allows for greater scrutiny of evidence before trial.[181] Regarding timing of disclosure is provided under rule 66 of ICTY regulate the Prosecutor's disclosure to the defence from the pre-trial stage

[175] African Charter on Human and Peoples' Rights(hereinafter African charter), (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986),

[176] Besides any other tasks which may be entrusted to it by the Assembly of the AU, the African Commission performs three primary functions: It promotes and protects human and people's rights and interprets the provisions of the African Charter arts 30 & 45.

[177] See Resolution on the Right to Recourse and Fair Trial in Recommendations and Resolutions Adopted by the African Commission on Human and Peoples' Rights (2002) http://www.achpr.org (accessed 8 August 2019).

[178] *Ibid*, Preamble.

[179] *Ibid*, *art* (e)

[180] Alice, *supra note* 26

[181] Bruce A. Green, 'Federal Criminal Discovery Reform: A Legislative Approach' (2013) *64Mercer L. Rev. 639*

through to the trial and appeal stage.[182] The prosecutor is required to disclose to the defence as soon as possible and as they come into his or her possession, without waiting for a date to be set for the commencement of trial, copies of all prior statements of all the witnesses are intends to call; and at least prior to the date of testimony by the witness copy of any items intends to use at trial during the testimony of its witnesses.[183]

Rule 66(A) (ii) of the ICTR RPEs stated prosecutor shall disclose all evidences to accused 'no later than 60 days before the date set for trial.[184] Rule 121(3) of ICC reads that: "*the Prosecutor shall provide to the Pre-Trial Chamber, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing".*[185]

Accordingly, disclosure should be provided to defence in advance of the trial in order to ensure sufficient time for case preparation and investigation. Late disclosure would constitute a violation of the disclosure duties. For example, in *Nyiramasuhuko* case, the Chamber found "the prosecution's explanation for lack of disclosure unacceptable and ordered full disclosure of the prosecution witness statements accordingly".[186] In *Karadžić*, the ICTY Trial Chamber also stated that "disclosure of witness statements during trial and several months after they had been in the possession of the prosecution violated Rule 66(A) (ii) and it was unacceptable".[187]

Therefore, the time of disclosure through pre-trial, trial and appeal stages of the proceeding. In principle evidence is disclosure to defence in early stage that ensure a fair and effective criminal process. However, in certain circumstance delay disclosure may impose specific time limitations until commencement of the trial, and disclosure rule may apply during the time of appeal when evidence found after pronouncement of conviction and sentence.

2.7 Enforcement mechanisms of Disclosure Rules

The right to a fair trial also gives rise to the duty imposed on the prosecutor to provide pre-trial disclosure to the accused, subject to protecting the competing public interests. Failure by the prosecution to adhere to the rules of disclosure can undermine the right to a fair trial and the

[182] Rule 66 of ICTY RPE
[183] Alice, *supra note 26*
[184] *Ibid*
[185] Rule 121(3) of ICC
[186] *Prosecutorv Nyiramasuhuko et al*, No. ICTR-97-21-I, *Decision on Defence Motion for Disclosure of Evidence* (1 November 2000) at para. 17.
[187] *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Eighty-Seventh Disclosure Violation Motion* (10 March 2014) at para. 12.

administration of justice, and lead miscarriages of justice and the resulting erosion of public trust in the legitimacy of the criminal justice system. Consequently, the duty of a court, in addressing a breach of the rights of the accused is to provide a remedy that ensures that justice is done while ensuring the integrity of the judicial process.[188]

The remedies are procedural and substantive in nature. The procedural conditions relate to the stage of the proceedings, the timing of the application and the level of court where the application is to be made. The substantive conditions include the stipulation that the least intrusive satisfactory remedy will be granted and that the accused must demonstrate actual prejudice to the preparation or conduct of his defence before remedial inquiries can begin. One exception to the latter condition is the existence of a burden on the prosecution to justify departure from the standard practice of providing the defence with the opportunity to inspect and copy witness statements and the exhibits thereto. This will usually occur in relation to public interest issues.[189]

In different jurisdictions proposes remedies to address the problems of disclosure rule violations in two mechanisms. These are; (1) give judges a more active role in policing disclosures; (2) increase the prosecutorial accountability.[190]

2.7.1 Judicial Intervention

The judicial remedies for the violation of disclosure of criminal evidences for defendants, when the prosecutor fails to fulfill its duty to evidences are resolved in two ways. These are instruction and sanction.[191]

When disclosure violations are discovered pretrial, the court granting the defendant permission to argue that the failure raises a reasonable doubt about the defendant's guilt and court orders the prosecutor to disclose the suppressed evidence.[192] When evidence that should have been disclosed earlier emerges during or shortly before trial, the court should consider instructing the prosecutor to disclose all evidence.[193]

Granting instruction/order for disclosure as response to a disclosure violation may not an effective sanction because, it is important to deterrent prosecutors who would purposely

[188] John Arnold Epp, *Building on the decade of disclosure in criminal procedure* (Cavendish Publishing, 2001)
[189] *Ibid*
[190] *Ibid*
[191] Jason Kreag, 'The *Brady Colloquy'* (2014) 67 *STAN. L. REV. ONLINE 47*
[192] *Ibid*
[193] E. Jones, *supra note* 9

withhold favorable evidence and it has consequences. First, defendants that have been detained pretrial are forced to endure a more prolonged loss of liberty by the prosecutor failure to comply with its disclosure duty. Defense will be required to spend additional time, money, and effort to make effective use of the new information. This, in turn, leads to the needless waste of judicial resources when courts must respond to additional motions and conduct evidentiary hearings stemming from the belated disclosure of exculpatory evidence.[194]

The other spectrum sanction is the remedy of dismissal. The dismissal of the indictment would be an effective sanction to deter prosecutors from suppressing of evidence and would adequately address the harm to defendants and the courts, dismissal of criminal charge as sanction, but that is rarely imposed. Generally, courts will only dismiss criminal charges as a sanction for disclosure violations when there is a pattern of egregious disclosure violations or when disclosed evidence has been permanently lost or destroyed by the government.[195]

Under the current state of the law, there are factors that make pretrial litigation and adjudication of disclosure violations extremely difficult. First, Prosecutors are in exclusive possession of the evidence collected during the criminal investigation. Second, defence and defence counsel may not have information whether there is favorable evidence subject to disclosure. The third, in most cases disclosure litigation is an interlocutory matter; it does not appealable unless, non-compliance of disclosure rules affects the final verdict.[196]

In order rectify the problems of judicial intervention remedy of disclosure violation, prosecutorial accountability is important.

2.7.2 Prosecutorial Accountability for Failure of Disclosure

"The primary duty of a lawyer engaged in public prosecution is not to convict, but to justice is done".[197] The disciplinary rule requires the timely disclosure of evidence "that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment".[198] The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.[199] The underlying rationale of the ethics rules of the general requirement to seek justice with the specific prohibition against withholding facts or witnesses

[194] *Ibid*
[195] *Ibid*
[196] Epp, *supra note* 188
[197] Peter J. Henning, 'Prosecutorial Misconduct and Constitutional Remedies' (1999) 77 *WASH. U. L.Q. 713*
[198] Ellen, *supra note* 158
[199] *Ibid*

favorable to the defense highlights the importance of disclosure.[200] For instance in the 2013 ICC code of conduct for office of the prosecutor, section 3 art 51&52 provided that members of the office shall comply with the applicable rules on disclosure of evidence and inspection of material in the possession or control of office in a manner that facilitates the fair and expeditious conduct of the proceeding and fully respects the rights of person under investigation or the accused with due regard for protection of victims and witnesses. Disclosure shall include: (a) evidence that shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence; and (b) any documents or information by order of the chambers. And art 73 provided that members of office of prosecutors alleged misconduct before court under arts 52&53 and comply with any measure imposed by court.

Moreover, American Bar Association(ABA) Model Rule of professional conduct 3.8d,provided that "the prosecutor shall make timely disclose to the defence all evidences or information known by the prosecutor that intend to negate the guilt of accused or mitigate the offence and sentence".[201] Therefore, prosecutor's violation of the obligation to disclose evidence including favorable evidence accounts for more miscarriages of justice than any other type of malpractice, and subject to disciplinary measure.[202]

Individual prosecutors responsible for disclosure violation could decrease the chance withholding of evidences to accused. Depending on the nature of the prosecutor's answers, such punishment could take the form of prosecution either judicial sanctions, or discipline sanction.[203]

2.8 Limitations of Duty of Criminal Evidence Disclosure

Duty of disclosure is not absolute, but is subject to limitation with respect to both the timing of disclosure and withholding information for justified on the basis of the existence of a legal privilege. In criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigating crime, which must be weighed against the rights of the accused.[204]

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[200] J. Kreag, *supra note* 189
[201] USA, Federal Model Rules of Professional Conduct R. 3.8(d) (2010)
[202] Bennett L. Gershman, *Prosecutorial Misconduct* (2d ed. 2005)
[203] J. Kreag, *supra note* 189
[204] Paul Anthony, 'The Duty to Seek Out, Preserve and Disclose Evidence to the Defence' *(*2005)*Judicial Studies Institute Journal* 80

2.8.1 Witness Protection

As Jeremy Bentham said that "*Witnesses are the eyes and ears of justice*",[205]i.e. the roles of witnesses are indispensable in the criminal justice system of any country by reporting of crime and giving evidence relating to the commission of an offence they bring the criminal justice machinery into action.[206]

At the same time, witnesses may face intimidation on themselves and/or their families. Thus, where witnesses and victims feel threatened, undermining their willingness and ability to come forward, society as a whole is denied justice. Not only this the justice system undermined and justice in particular case denied, but at an individual level, witnesses may themselves become victims of the investigation and judicial processes.[207]

The very nature of witness protection is emanate from international covenant on civil and political rights refers to 'respect to for inherent dignity of human person'[208] and stated 'no one shall be subject to arbitrary or unlawful interference with his privacy, family or correspondence, or to unlawful attack on his honors and reputation'.[209] Therefore, witnesses' safety is important justification for the restriction of the right to disclosure. Accordingly, the issues of witness protection provided under international criminal tribunals' art 22 of ICTY statute, rule 69, 75 of ICTY and ICTR RPE respectively and art 68 of ICC statute provided that in exceptional circumstance with the application of prosecutor to the trial chamber to order the non-disclosure of witnesses or their family who may in danger or at risk.[210]

To sum up, these international tribunals statutes and rule of procedure and evidence provide different protective measure (i) *non-disclosure of identity*; (ii) *protection from media and public photography, video and sketch*; (iii) *allows for testimony to be presented by electronic or other special means;* (iv) *anonymity*, are which provide for the general protection of victims and witnesses.

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[205] Mrs. Priyanka Dhar, 'Witness Protection and Justice Delivery System in India - A Critique' (2016) *GJLS VOL IV, No 1*
[206] *Ibid*
[207] *Ibid*
[208] ICCPR, art 10
[209] *Ibid*, art 17
[210] Art 22 of ICTY Statute; rule 69, ICTY RPE; 75 of ICTR RPE; art 68 of ICC statute

2.8.2 On-going Investigations

Disclosed evidences/information that may prejudice an ongoing investigation should not be disclosed.[211] Prosecutors may deny access to portions of the file if disclosure would jeopardize ongoing investigations. This restriction must be based on concrete evidence of the potential danger to the investigation for example, that the defendant or his lawyer would seek to destroy evidence, interfere with investigative measures, or influence witnesses.[212]

Disclosure may not be appropriate if circumstances of disclosure reasonably be expected to have a detrimental impact on current or future investigations.[213] Another important circumstance whether to release information could reasonably be expected to prejudice (i.e. impair or damage) the ability of the government or an agency to obtain similar information in the future.[214] According to rule 66(c) & 81(2) ICTY and ICC provided that prosecutor can withhold information/evidences, when disclosure may prejudice further or ongoing investigation.[215] Therefore, the situation where the Prosecutor is in possession of evidence which should be disclosed to the defence, but the restriction on grounds of risk to the investigation can only be justified on a temporary basis. Once the danger passes, the prosecutor must inform the defense that the relevant portion of the file is now available for inspection.[216]

2.8.3 National Security

Prosecutor often invokes an argument based on the common interest to keep certain documents or witnesses confidential or to exclude them during a trial.[217] The essential notion is that States may interfere with certain individual rights in exceptional circumstances, when their independence, sovereignty, territorial integrity, constitutional order and/or public safety are threatened.[218] The substantive content of national security is depend on national legislation, but Global Principles on National Security and the Right to Information (in June 12, 2013) which provide information's that are not disclosed to accused or public for the protection of national

[211] NSW ombudsman, Managing Information Arising Out of an Investigation (2009)
[212] Turner, *supra note* 30
[213] *Ibid*
[214] *Ibid*
[215] Rule 66(c) ICT; rule 81(2) ICC
[216] Turner, *supra note* 30
[217] Didier Bigo eta l, 'National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges' *(*2015)
[218] *Ibid*

security.[219] Principle 9 provides that information that legitimately may be withheld the following categories of evidence or information: information related with ongoing national defense plan, system of production of weapons, method and source of national intelligence service and information related with intergovernmental diplomacy.[220] The rationales arise mainly from the state's need to protect the information in order to facilitate the gathering intelligence, to prevent the state's pose a security threat, but it does not mean that court accept evidence associate with national security without scrutinized it.[221] Appeals Chamber of *Blaškic* case stated that "*states cannot unilaterally refuse to disclose evidence to accused on the grounds of national security"*.[222] Therefore, decision held that the tribunal had ultimate powers to 'scrutinize the validity of States' security interests[223].

2.9 Balancing of the Rights of Accused and The Competing interests

The balance of rights has to be interpreted carefully for the interest of justice, both rights the defendant's right to a fair trial and other competing interest should have to be safeguarded.[224] A fair trial has two objectives in view, i.e. first, it must be fair to the accused and secondly, it must also be fair to prosecution or the victims. Thus, it is of utmost importance that in a criminal trial rights and interests should be balanced.[225]

International Tribunals are allowed by their statutes to restrict the accused's right to a public trial and the right to the accused to examine or have examined witnesses against him. The needs to balance the disclosure right of the accused vis-à-vis the protection of witnesses.[226] The principle of balancing interests thus began in the tribunals.[227] These principles are delayed disclosure and anonymity of witnesses only in exceptional circumstance. Delayed disclosure' aims at respecting the fundamental interests of both the accused and the witnesses, and

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[219] Global Principles on National Security and the Right to Information (the Tshwane Principles) (Published by Open Society Foundations and Open Society Justice Initiative2013)
[220] *Ibid*, principle 9
[221] Van Harten, Gus. 'Weaknesses of Adjudication in the Face of Secret Evidence' (2009) *International Journal of Evidence and Proof 13.1,* 1-27.
[222] *Prosecutor vs. Blaškic* ICTY (AC) Judgement, 29 July 2004 in Alice Chang-Jung Yang, *The Prosecution's Duty of Disclosure before International Criminal Tribunals* (PhD dissertation, Brunel University, 2016)
[223] *Ibid*
[224] Salvatore Zappala, 'The Rights of Victims v. the Rights of the Accused' (2010) 8 *Journal of International Criminal Justice* 137.
[225] Law commission of India, consultation paper witness identity protection and witness protection programs (2004)
[226] Segun Jegede, *The Right to a fair trial in International Criminal Law (*Martinus Nijhoff, 2010) p. 547
[227] N A Affolder, 'Tadic, the Anonymous Witness and the Sources of International Procedural Law' (1997-1998) 19 *Michigan Journal of International Law* 445.

confidentiality of investigation techniques. Delayed disclosure mechanism, the prosecutor can temporarily keep the names and other identifying information of witnesses confidential to the accused up until the point in time as determined by a trial, mostly sometime before the commencement of the trial.[228] Therefore, 'delayed disclosure' is one mechanism that used to means striking a balance between the two crucial interests of the accused and the above competing interest.

The second mean of balancing mechanism is in order to grant anonymity of witnesses only in exceptional circumstance which was settled in *Tadic* case that set out five balancing test between the right of the accused to disclose witnesses and the need to protect witnesses; these judge-made guidelines were how to weigh these two interests.[229] The first test was "*there must existence of a real fear for the witnesses' safety or that of their family, and real grounds for fear of retribution if the witnesses' identity is released".*[230] The *Tadic* judgment explained that *[i]t is generally sufficient for a court to find that the ruthless character of an alleged crime justifies such fear of the accused and his accomplices. With the extreme violence of the crimes, and the power which the accused once wielded, fear of confronting such a defendant may be a paralyzing prospect for any witness particularly with the knowledge of the horrific acts these individuals are capable of committing are consider as there are existence of real fear.*[231] However, the prosecutor must establish that there is likelihood that the particular witness will be interfered with or intimidated once their identity is made known to the accused and his defence team. The witness personal feelings are not in themselves sufficient to establish any real danger or at risk. In order to warrant an interference with the rights of the accused, those fears must be well-founded in fact.[232]

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[228] Sangkul Kim, **'**The Witness Protection Mechanism of Delayed Disclosure at the Ad Hoc International Criminal Tribunals' (2016) *IX JEAIL 1*

[229] Joanna Pozen, 'Justice Obscured: The Non-Disclosure of witness' Identities in ICTR Trials' *International Law and Politics* Vol. 38:281

[230]*Prosecutor v. Dusko Tadic* ICTY (1995) (Hereinafter *Tadic Decision*) Decision on the Prosecutors Motion requesting Protective Measures for Victims and Witnesses, (para. 62); Anna M. Haughton 'The balancing of the rights of the accused against the rights of a witness in regard to anonymous testimony'(2000)

[231] Mercedeh Momeni, 'Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victim and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal of the Former Yugoslavia' (1997) 41 *How L.J.* 155, 172; Rechard A. Falk, 'Due Process and Witness Anonymity' (1997) 91American Journal of International Law 75-79.

[232] *Prosecutor v Karadzic*, No. ICTY-95-5/18-PT Trial Chamber: Decision on the delay disclosure (5 June 2009) at para. 11

The second test was the *"witnesses' testimony must be relevant to the Prosecutor's case".*[233] Where the offence may not be revealed or established by another means otherwise than by the testimony of the witnesses that need protection.[234] The third test the trial chamber "*must be satisfied that is no prima facie evidence that the witness is untrustworthy".*[235] The Trial Chamber in *Tadic,* established guidelines in evaluating a witness credibility to ensure a fair trial when granting anonymity. The guidelines are as follows: *[t]he first judges must be aware of the identity of the witness, in order to test the reliability of the witness; secondly, the defence must be allowed ample opportunity to question the witness on issues unrelated to the witnesses identity, location, or traceability, such that incriminating information can be examined while witness retains anonymity; thirdly, the trial chamber will not release identifying information about the witness without the witnesses express consent; forth, the identities of the witnesses must be released when security and fear are no longer factors*.[236]

The fourth test "the tribunal itself is no in position to offer protection to the witnesses or their families after receiving their testimony".*[237]* The inability of the Tribunal/ other organ to provide an adequate witness protection program is a substantial factor in the issue to permit anonymous testimony.[238] The fifth test "chamber must determine ineffectiveness of any witness protection program other than granting witness anonymity"; for instance, where the defendant can interview the witness but is unaware of the witness identity, or in camera proceedings, or by voice or through video".*[239]* These all protective measures are may be ineffective or insufficient to protect witnesses unless granting full anonymity of witnesses. Therefore, measure taken (anonymity) must be "strictly necessary".[240]

To sum, disclosure is one of the most important methods to redress the structural imbalance between the prosecution and defence. Regardless the procedural model, since the structure of most criminal justice systems heavily rely on the prosecution to conduct investigations and carry out the importance task of searching the truth, the prosecutor enjoys a lot of investigative

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[233] *Prosecutor v. Dusko Tadic* ICTY, *supra note* 223, at (para. 63)
[234] *Ibid,* para 63
[235] *Ibid*
[236] *Ibid,* at para. 63
[237] *Ibid,* at para. 65
[238] Creta, 'The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the international Criminal Tribunal for the Former Yugoslavia' (1998) *20 Hous J Int 'I L* 381
[239] *Prosecutor v. Dusko Tadic* ICTY, *supra note* 223, at para. 66
[240] *Ibid*

resources and tools at his disposal. This creates a structural gap between the two parties and an inequality of arms. Without proper disclosure from the prosecution, the inequality of arms between the prosecution and defence could not be rectified, and there is a danger that the accused would not receive a fair trial. The doctrine of disclosure has the purpose to achieve the fundamental fairness of the criminal process, to safeguard the procedural integrity as the one means to minimize wrongful conviction. Therefore, the prosecutor has duty that can always be trusted to disclose all evidence to accused including exculpatory evidence, which might harm its own case. Evidently, any violation of this duty has a negative influence on the accused's rights and directly affects the ability to prepare the defence. Prosecutorial disclosure in good faith is not enough. It is submitted that the courts should be more active in supervising the prosecutors and increasing prosecutorial accountability with regard to the disclosure of evidence. Prosecution duty of disclosure evidences to accused is not absolute, but it is subject to limitation with respect to both the timing of disclosure and withholding information for justified protection of competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigating crime, which must be consider. The principle of balancing interests thus began in international tribunals. These principles are delayed disclosure and anonymity of witness with stringent requirements.

Chapter Three

Prosecution Duty of Disclosure of Criminal Evidence under Ethiopian Criminal justice System: law and practice

3.1 Prosecution Duty of Disclosure of Criminal Evidence under Ethiopian Criminal justice System

3.1.1 The Prosecutorial Duty of Disclosure of Criminal Evidence under FDRE Constitution

The FDRE Constitution provides that, "human rights and freedoms emanating from the nature of mankind, are inviolable and inalienable". [241] Many of the constitutional rights provided under constitution relating to the administration of the criminal justice system emanate from the recognition of the natural rights of the person, such as, the right to have full access to any evidence presented against him, is one of the means to achieve fair trial. [242]

In this regard FDRE Const. Art 20(*4) read as follows:*

"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".[243]

This provision indicates that accused persons should have sufficient opportunity to defend their case. In other words "knowing the evidence of the prosecution helps to the accused to challenge admissibility and credibility of the prosecutor's evidence, or casting doubt on the prosecution's evidence through cross-examination".[244] Moreover, the provision allows to accused to know the identity of the prosecution's witnesses allows and it is crucial to collect information about the background of the witnesses, and their association with the case. Furthermore, evaluating the strength of the prosecution's evidence, the accused will be able to decide whether to plead guilty or not where the prosecution's evidence is so strong that it proves the guilt of the accused. If the accused pleads guilty, he/she may be benefit from mitigation of punishment. Thus, these

[241] Federal Democratic Republic of Ethiopia Constitution (hereinafter FDRE constitution), art 10(1)
[242] Simeneh Kiros Assefa, 'The Principle of the Presumption of Innocence and its Challenges in the Ethiopian Criminal Process'(2012) *Mizan Law Review*, Vol. 6, No. 2,
[243] *Ibid*
[244]Wondwossen, *supra note* 47

purposes would be served, if the accused has right to access all evidence of the prosecutor before trial begins.[245] Subject to relevancy of this provision FDRE constitution article 20(4) lacks clarity on timing, scope and limitation ground on disclosure of criminal evidence. In this regard Wondossen argued that "*article 20(4) of the constitution simply recognizes the disclosure right in a general fashion. The provision needs details subsidiary laws that provide the stage and scope disclosure of evidence"*.[246] To strengthen this argument there is case of *Public Prosecutor* v. *Tamirat Layne* entertained by Federal Supreme Court of Ethiopia.[247] In this case the public prosecutor introduced a document which contained a written statement made by accused, the prosecutor was not willing to disclose to the accused before the trial court. Defense lawyers objected the admissibility of the document on several grounds. One of their reasons was that if the documents were admitted, it would have the effect of depriving accused persons of their right to pre-trial access of evidence and right to confront witnesses testifying against them. The court rejected the objection raised by defence lawyers by stating "non-disclosure of evidence before trial to accused does not constitute a violation of the right of the accused to cross examine witnesses testifying against".[248] Therefore, this trial bench was not as such concerned for protect the pre-trial disclosure of evidence in meaningful manner.[249] Article 20(4) of FDRE Constitution indicates that the accused has right to access to evidence presented against her/his, but this provision does not provide when the disclosure surely apply either pre-trial or trial stage. In this regard, Simeneh argued that "*pre-trial disclosure of evidence is not introduced in the FDRE Constitution with express recognition of time*".[250] In support of the argument Simeneh raised important case, *Special Public Prosecutor v. Kidanemariam Birhami, et al* in Federal High Court of Ethiopia.[251] The Court rejected a request to exercise the constitutional right of the defence to have access to evidence based on FDRE Constitution art 20(4). The Court articulated that "*apart from serving as a general principle of law, FDRE Constitution art 20(4) cannot serves as a*

[245] *Ibid*
[246]Wondwossen, *supra note* 47
[247] See more *Case Report of Public Prosecutor* v. *Tamirat Layne,* FSC file no.1/89E.C (published *by* Federal Supreme Court, 1994 E.C)
[248] *Ibid*
[249] *Ibid*
[250] Simeneh, *supra note* 2
[251] *Special Public Prosecutor v. Kidanemariam Birhami, et al* (Federal High Court, 1998) Crim.F. No. 642/89 in Simeneh Kiros Assefa 'The Normative, Institutional and Practical Challenges in the Administration of the Criminal Justice in Ethiopia' (2010) *Ethiopian Human Rights Law Series Vol. III*

provision of the criminal procedure code to regulate a criminal proceeding".[252] The court further stated that the constitutional provision does not specify the time at which such access is to be exercised.[253] Furthermore, the constitutional provision also limits its scope only list of culpable (incriminating) evidence that presented against defendants.[254] In support of this argument, the interpretation of art 20(4) FDRE Constitution made by CCI provided that "the right of accused persons has only to cross-examination, but the accused has no right to access the names and addresses of witnesses".[255] This is indicated that there is no constitutional guarantee on disclosure right in general. Particularly, there is no constitutional room that imposed obligation on the prosecution to disclose all relevant information including exculpable evidence to the accused. However, Simeneh affirmatively argued that "this practice is being changed in federal courts recently the accused get into the charge sheet along with list of evidence".[256] However, the scope of disclosure is not limited only giving lists of witnesses attaching with charge sheet; rather it includes; lists/names of the witnesses with written statement taken by investigators when interviewing the witnesses; lists of the exhibits that are intended by the prosecution to be produce at the trial; any statement made by the accused at any time intends to adduce in evidence as part of the case for the prosecution; copies of all expert witnesses reports in the possession of prosecutor relating to the offence; all favorable evidence in the prosecution's custody and control, regardless of whether it helps or hurts the defense.[257] Therefore, giving lists of witnesses do not mean that existence of pre-trial disclosure of evidence to accused in practice of the courts. The other author Menbere Tsehay who was the then vice president of the Federal Supreme Court and the vice chairperson of the council of constitutional inquiry of Ethiopia came up with an argument that goes, the FDRE Constitution art 20(4) ought to be interpreted as public prosecutor has an obligation to disclose evidence to accused before trial; and the prosecutor should not be withholding evidences from accused. The criminal evidence serves to ascertain or to prove guilty or innocence of accused and protecting accused from conviction through unreliable evidence.

[252] *Ibid*
[253] *Ibid*
[254] Simeneh Kiros, *supra note* 2
[255] *Mehadi Aley and others*, File No. 2356/2009 (Council of Constitutional Inquiry, *Hamle* 29, 2009 E.C.)
[256] See Simeneh, *supra note* 242
[257] Bruce A. Green, 'Federal Criminal Discovery Reform: A Legislative Approach' (2013) *64Mercer L. Rev.* 639 Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/656 accessed at May 6,2019

Hence, Pre-trial disclosure of evidence is most important instrument to achieve this objective.[258] However, this argument provides only in theory, but not part of the practice as regarding as pre-trial disclosure of evidence to accused in the practical implementation and interpretation of art 20(4) of the constitution by the court and council of constitutional inquiry. Moreover, the literal interpretation of article 20(4) of the Constitution does not warrant any restriction on this right. In other word there are no constitutional guaranteed limitation grounds of disclosure of criminal evidence.[259]Therefore, FDRE Constitution has lacks clarity about stages, extents and limitation grounds on which duty of criminal evidence disclosure.

3.1.2 Disclosure of Criminal Evidence under Criminal Procedure Code of Ethiopia

Art. 124. - Witness summonses.

(1) So soon as the date of the trial has been fixed, the public prosecutor and the accused shall give the registrar a list of their witnesses and experts, if any whose presence is necessary. The registrar shall forthwith issue summonses in the form prescribed in the third schedule to this Code.

(2) The public prosecutor and the accused shall be responsible for ensuring that all exhibits to be produced at the trial shall be in court on the day fixed for the trial.

Articles 124 of the code indicated that the list of evidence of the prosecutor does not explicitly require to attaching with the charge sheet. The list of evidence of both parties is to be submitted after the date of the trial is fixed which clearly shows that the list need not be attached to the charge.[260] Abebe Asamere come up with the argument that "in Ethiopian criminal proceeding pre-trial disclosure of criminal evidence is no recognized, because art 124 of the code only require that both prosecutor and accused submit lists of evidence to the registrar of court after the date of the trial is fixed".[261] The clear reading of this provision shows that disclosing of evidence only to the court; not adverse parties to each other. Abebe asserted that practical manifestation of the federal courts shown that the courts send summon with charge to accused without the list of evidence that present against them. Now, there is little bit changes that courts send summon with

[258] Menbere Tsehay Teddese(PhD), *Ye Ethiopia Fith Getsitawoch* [Aspects of Ethiopian Justice] (Addis Abeba, December 1999 E.C), pp. 208-209.
[259] See more explanatory note of FDRE constitution on art 20(4)
[260] See more Ethiopian Criminal procedure code (hereinafter ECPC) , art 124
[261] Abebe, *supra note* 50

lists of evidences of both witnesses names and address and lists of documentary evidences before trial.[262]

Thus, criminal procedure code does not recognized pre-trial disclosure of lists of witnesses and their statements, documents and other information relevant to accused in advance of trial, and it does not recognize access to favorable evidence to accused in any circumstances.[263] The reason behind lack of clear legal recognition of duty of disclosure in Ethiopia law is that "*the Ethiopian criminal procedure system predominantly exhibits adversarial features, and there is the need for the comprehension and enforcement of the respective burdens and standards of proof borne by litigants in criminal trials".*[264] In adversarial approach there is norm of parties' autonomy that one party need not aid the other's preparation by sharing evidence prior to trial.[265] As stated in chapter two that norms (the norms of non-disclosure) is completely changed and prosecutor is obliged to disclose all material evidences to accused.[266] However, in Ethiopia still disclosure rule is not recognized as human right or procedural right.[267] This problem might be attributed with inadequacy of the legal frameworks and absence of jurisprudential development in the issues of disclosure and the perception of prosecutor that is built on achieving high convection rate rather than achieving fairness of criminal proceeding.[268]

Even though, lack of clear recognition of disclosure of criminal evidence in the criminal procedure code, there is instance that preliminary inquiry which is provided under the criminal procedure code served as disclosure role. The most important issue for this thesis is not assessing rules and procedure of preliminary inquiry rather purpose of preliminary inquiry serves as disclosure of criminal evidence to accused.

During committal of preliminary inquiry the prosecutor is obliged to introduce witnesses testify the commission of crime and accused has an opportunity to cross-examine the witnesses.[269] This is an opportunity to the accused to know in advance of the prosecution's witnesses and the nature

[262] *Ibid*
[263] *Ibid*
[264] Worku Yaze, 'Burdens of Proof, Presumptions and Standards of Proof in Criminal Cases' (2014) *Mizan Law Review, Vol. 8, No.1*
[265] Jenia I. Turner, 'Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons'(2016) *57 Wm. & Mary L. Rev*. 1549
[266] John H. Langbein, *The Origins of the Adversary Criminal Trial* (2003)
[267] Wondwossen, *supra note* 47
[268] Interview with Liben Abdi, Prosecutor in Federal General Attorney,(Addis Ababa, Ethiopia, 8 May 2019)
[269] See more art 83(2) of ECPC

of their testimony.[270] This has significance to access the prosecution's evidence to accused to prepare his/her defence.[271]According to Tadesse, *"the most important function of preliminary inquiry is an opportunity to defendant to understand the case against him/her and prepare his/her defence in advance. In relation to this, Ethiopian criminal procedure code under art 92/2/ recognized as the right access to the copy of records that made during preliminary inquiry to accused".*[272] Thus, committing preliminary is important to defendant to prepare his/her as the same as disclosure rule.

Moreover, a preliminary inquiry has impeachment purpose when a witness testifies twice, one during the preliminary inquiry and for the second time during trial. Thus, there is a possibility that the witness will make inconsistent statements, thereby impeaching himself. The more witnesses say during the preliminary inquiry, the inconsistencies will arise between their testimony at the preliminary inquiry and at trial.[273] Hence, it is good strategy for the defence to extensively cross examination prosecution witnesses at the preliminary hearing, so as to be able to impeach the prosecution's witnesses at trial.[274]

Therefore, preliminary inquiry recognized under criminal procedure code of Ethiopia may be incidentally serve as disclosure purpose, because of defendant's attendance and the opportunity to put the question to witnesses and trying to discrediting them. And once preliminary inquiry is held, the record of the preliminary inquiry would also be given to the accused having the same content as the one given to the public prosecutor.[275] However, the current practice of preliminary inquiry consider as only to preservation of evidence that helps to established guilty of accused.[276]

3.1.3 Preparatory Hearing served as Disclosure of Criminal Evidence

The notion of a "preparatory hearing" was introduced to the Ethiopian criminal justice system in 2001 by the anti-corruption special procedure and rules of evidence proclamation,[277] and revised in 2005.[278]

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[270] Stanley Z. Fisher's, *'Ethiopian Law of Criminal Procedure'*(Haile Sellassie I university 1969)
[271] *Ibid*
[272] Brigadier-General Tateq Tedessa, *'Basic Concept of Evidence Law'*(Addis Ababa university printing press, 2005 Amharic version)
[273] *Ibid*, p.270
[274] *Ibid*, p.271
[275] ECPC, art 92/2/
[276] Teddela, *supra note* 65
[277] Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 236/2001

Preparatory' hearing refers to a "pre-trial process where both the public prosecutor and the accused present their version of the criminal case to the trial court".[279]Preparatory' hearing in a criminal proceeding is applicable only to corruption cases, and even in corruption cases it is not mandatory.[280] The necessary condition for conducting preparatory hearing is the complexity of the cases likely takes long time that determined by court.[281] The preparatory hearing may be likely to serve as pre-trial disclosure as the purposes listed under article 36 of the proclamation.

Turning to the purpose of preparatory hearing, art 36(1) lists four purposes: identifying issues which are likely to be material in the case; assisting the parties in comprehending the issues; facilitating the proceedings; and assisting the court in the management of the trial.[282] In conducting the preparatory hearing, the court may order the public prosecutor to prepare and submit both to the court and the accused three types of documents: a written statement on facts and evidence; the prosecution evidence and any explanatory material in such form as appears to the court to be likely to assist the proceedings; a written notice of documents[283] and any exhibits and documentary evidence relevant to those facts.[284]

Thus, purpose of preparatory hearing articulated to simplify the complexity of the case thereby making the matter manageable both to the parties and the court.[285] The same is true pre-trial disclosure of criminal evidence is ensures that non-contentious issues are resolved at the preliminary stages of the proceedings. In effect, both disclosure and preparatory hearing facilitates the right to an expeditious trial. It encourages resolution of cases including in appropriate circumstances entering a guilty plea in the early stages of the proceedings and it enables the court to make an informed determination on the innocence or guilt of the accused person and prevent wrongful convictions. These are the common purpose of preparatory hearing and pre-trial discovery of evidence. However, in the practice shown that in the case between *Federal Prosecutor vs. Melaku Fenta, et al.,*[286] where defendants were charged for corruption offences and during preparatory hearing the Prosecutor submitted only lists of witnesses against

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[278] Proc.no.434/2005, Art 35-41
[279] Wondewoseen, *supra note* 47, p. 272
[280] Proclamation No. 434/2005, *supra note* 43, art 35
[281] Simeneh Kiros, *Criminal Procedure law; principle, rule and practice* (Xlibris Corporation 2009)
[282] Proc.no.434/2005, art 36(1)(a-d)
[283] *Ibid.*, Art 37
[284] *Ibid*, art 38
[285] Abebe , *supra note* 50
[286] *Federal Prosecutor vs. Melaku Fenta, et a, et al*, [2012] F HC 141356/2012

defendants. The defendants thus requested the court to order the public prosecutor to give them the content of the depositions of witnesses by the police. The Federal High Court framed the issue "whether testimony of witnesses during investigation should be given to the defendant?"[287] Thus, the court rejected defendants request by stating the "defendants request was not based of law".[288] The court further ordered the public prosecutor to prepare a statement that describes the facts which the witnesses would testify about as per proclamation no 434/2005, art 36. However, the principle of preparatory hearing is not only access of lists of witness, but include prosecutor have an obligation to disclose any information received from witnesses during an interview conducted by police. The very purpose of the preparatory hearing is to assisting the parties in the issues and to achieving speedy trial. But, the above decision of the court was inconsistence with both preparatory hearing and pre-disclosure of evidence.

3.1.4 Duty of Disclosure of Criminal Evidences under FDRE Criminal Justice Policy

The FDRE Criminal Justice Policy introduces prosecution duty of disclosure of criminal evidence as the most important reform.[289] The policy read as follows; *[I]n order to achieve the efficiency, effectiveness, expeditiousness and fairness of the criminal proceedings; prosecutor and accused should disclose any evidences to each other before trial. This duty should be incorporate in newly laws in future. Recognition of disclosure rule in the legal framework is relevant to accused to plea guilt, to enter plea bargaining with prosecutor, to facilitate alternative dispute resolution mechanisms.*[290]

Thus, during incorporation of disclosure rule in criminal procedure and other related laws the following circumstance should be taking in to account; Public prosecutor should disclose any of for and against evidences to accused before commencement of trial unless public prosecutor sufficiently believed that pre-trial disclosure of criminal evidences to accused affect fair proceeding and right of witnesses/victims. Criminal evidences that are disclosed by prosecutor to accused should be aimed to ensure and respect the right of accused 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 and;

[287] *Ibid*
[288] *Ibid*
[289] The policy, *supra note* 42 p.33-35
[290] *Ibid*

accused should disclose any evidences used to defend the case against his/her to prosecutor before trial.[291]

The interesting points the policy is the adoption of obligation disclosure of criminal evidence on both prosecutor and accused before trial and prosecution of duty to disclosure of both inculpable and exculpable evidence to accused. The fact that there are arguments proposed for and against defense disclosure. Those who oppose increased defence disclosure also argue that the notion of defence disclosure "degrades the presumption of innocence and privilege against self-incrimination".[292] This view asserts that defendants, who are presumed innocent, are compelled to contribute to their own conviction and the States are required to remunerate their lawyer to comply with pre-trial disclosure obligations.[293] However, the proponents argued, requiring an accused to disclose the substance of their defence early on, 'will no more incriminate the defendant nor help prove the case against him or her than it does when it is given in evidence at the hearing.[294] Therefore, the policy has no clear indication what extent an obligation to disclose can be imposed upon the defence in compliance with human rights of accused such as right to presumption of innocence, right to silence.

And, it is used as only guideline/road map to government for enactment laws related to criminal justice system in future and it is not relevant to adverse parties to claim as rights in the litigation, because there is no law that can shift this policy guideline in to binding documents.

3.1.5 Duty of Disclosure of Criminal Evidence under 2009 E.C Draft Criminal Procedure Code

The Draft Criminal Procedure Code, incorporate many fundamental principles of criminal Procedure and human rights that are recognized under international human rights and FDRE Constitution. Those principles/rights are include: the principle of presumption of innocence,[295] the principle of equality[296], the principle of equality of arms,[297] the principle of pre-trial disclosure of evidence[298] and principle of truth discovery.[299]

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[291] *Ibid*

[292] Barton L Ingraham, 'The Right to Silence, the Presumption of Innocence, the Burden of Proof and a Modest Proposal: a Reply to O'Neill' (1996) 86 *Journal of Criminal Law and Criminology*, 559

[293] *Ibid*

[294] Lucy Line, eta l, 'Pre-Trial Defence disclosure South Australia Criminal Proceedings: Time for Change?' (2016) 37 *Adelaide Law Review*

[295] The draft Criminal Procedure and Evidence code of Ethiopia 2009 E.C (hereinafter draft code), art 5

[296] *Ibid*, art 7

[297] *Ibid*, art 13

[298] *Ibid*, art 20(4)

[299] *Ibid*, art 16

The important principles for this thesis are equality of arms and pre-trial disclosure of evidence which are provided under draft code of Ethiopia which is expressly stated that *"the criminal proceeding should ensure equality of prosecutor or private prosecutor and accused" (italic is added).*[300] This principle is to ensuring both parties enjoy comparable opportunities so that the balance in the criminal process is enhanced. This principle underpins some procedural guarantees that are the duties of the prosecution disclose documents and other evidence which the accused requires to prepare his case. However, Amnesty International stated that the draft code article 13 have not comprehensive elements of the right to equality of arms, nor the draft code include the right to prompt disclosure of charges and evidence in the prosecution's possession, and the right of the accused to adequate time and facilities to prepare his or her defense and enforcement mechanism when prosecution failed to disclosing evidence of accused.[301] Moreover, art 20(4) of draft code provided that "*the prosecutor has duty to disclose all evidence including favorable evidence to the accused".*[302] Amnesty International has also concerned that there are no detailed disclosure rules in the draft code on ensuring compliance, or accountability in the event of failure to comply with article 14 of the ICCPR disclosure as one means of ensuring on equality of arms. Amnesty International recommends that articles 13 and 20(4) of the draft CPC reworked in a way that explicitly incorporate key procedural aspects to ensure full realization of the right to equality of arms and disclosure of criminal evidence including: The right of the accused to have pre-trial access to information, evidence and any "exculpatory material",[303] in possession of the prosecution; the right of the accused to adequate enforcement mechanism/sanction for the failure of disclosure.[304] Therefore, until this research is complete the draft code is not incorporate disclosure criminal evidence clear enough. The draft code has no clarity about timing of disclosure that evidence required to disclose; legitimate justification/ground to limit disclosure right of accused; and absence of legally recognized remedies in draft code.

Therefore, the duty of disclosure of criminal evidence under Ethiopian laws including the draft code is accompanied by problems include the timing of disclosure (there is no apparently

[300] *Ibid*, art 13

[301] Amnesty International, Ethiopia: Commentary on the Draft Criminal Procedure code available at: <https://www.amnesty.org/en/documents/POL30/002/2014/en/.> access at May 20, 2019

[302] Draft code, *supra note* 271 art 20(4)

[303] Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defense (for instance indications that a confession was not voluntary).

[304] Amnesty International, *supra note* 301

recognized pre-trial disclosure), absence of effective enforcement mechanism (no clear sanction on prosecution`s failure to disclose evidence), and lack of clear legally justified limitation grounds of disclosure right of accused.

3.2 Limitations of Disclosure of Criminal Evidence under Ethiopian Law

3.2.1 Witness protection as limitation of Disclosure under Ethiopian Law

Some scholar argued that the literal interpretation of article 20(4) of the Constitution does not warrant any restriction on the right; it seems an absolute right which gives the right to get full access to any evidence presented by the prosecutor, (including identity of the witness).[305] Furthermore, the reading of FDRE Constitution, art 20(1) refer to *in camera* proceedings with the view to ensure the privacy of parties, public moral and national security. Here the literal meaning of word "*party" does* not cover the witnesses. Thus, the personal safety of the witness has no constitutional basis for protection in Ethiopia.[306] According to Tadesse, "*the amharic version of the constitution the word yememelket (የመመልከት) indicated that accused has right to know the name and identity of witness in order to search the character of the witness and to challenge the testimony given during cross-examination*".[307] To impeach/discredit the witness or his testimony/opinion, defendants/lawyers need to know the identity of the witness and conduct their research accordingly. On cases where the identity of the witness is totally concealed, defendants or lawyers could not get any information to impeach credibility of the witnesses.[308] Therefore, in such a case one could rationally presumes that the defendant would get an access to witnesses' identity with other relevant information such as age, sex, place of residence, nationality without any limitation.

However, some may argue that, since there is no such thing as an 'absolute right', the right to access to evidences could be limited to protect the security of witnesses.[309] The very nature of this right is not absolute, however, may be limited in case where the attendance of witnesses may expose them to the threat to the life or property of the witnesses or their relative merely because of aiding justice organs.[310]

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[305] Michael Tilahun, 'The Two Competing Interests: Equality of Arms *vis-à-vis* Anonymity of Witness; The Case of Ethiopia' available at: www.abyssinialaw.com accessed at April 28,2019

[306] Tadesse Melaku, 'The Right to Cross-Examination and Witness Protection in Ethiopia: Comparative Overview'(2018) *mizan law review*, Vol. 12, No.2

[307] Tateq, *supra note* 272 p. 294

[308] *Ibid*

[309] Wekgari, *supra note* 73

[310] *Ibid*

Even if article 20(4) of the FDRE Constitution provides for the right of the accused persons to confront witnesses testifying against them and does not refer to witness protection. Nor there is any phrase in article 20(4) that envisages restriction of the right in the interest of witnesses' protection or other interests. The justifications for non-disclosure come from articles 14, 15 and 26 of the FDRE Constitution, which recognize the right to life, security and privacy, respectively, of everyone, including witnesses security which are recognized subsequent legislations.[311]

Furthermore, article 38 (2) of the revised anti-corruption special procedure and rules of evidence proclamation no.434/2005,[312]and article 32 of anti-terrorism proclamation no.652/2009 provides protection of witnesses when disclosing evidence posed danger on the life and security of witnesses.[313] Anti-terrorism law provides strict rules which prohibit disclosing/mentioning the name of the witnesses in any order, judgment or records related to the case. Nowadays, Ethiopia has witness and whistleblowers protection proc. no. 699/2010 states that protected persons (witnesses, whistleblowers and their families who have entered into protection agreement with attorney general) will be protected by concealing their identity and ownership, change of identity, concealing their identity until the trial process starts and witness testifies.[314] In addition, Ethiopian criminal justice policy introduced non-disclosure of criminal evidence for the protection of witness from reprisal or danger on security of witnesses.[315] The policy provided that disclosure of all criminal evidence to accused is a fair trial right, but the witnesses protection as exceptional circumstances of non-disclosure.[316] And the policy has given direction for its implementation, by stipulating that provisions protecting witness shall be added in laws like criminal procedure code and other related one. Therefore, these proclamations and criminal

[311] *Ibid*

[312] Proc. No. 434/2005, art 38 *provided public prosecutors may apply to court keep identity of witnesses in secret during preparatory hearing and if court authorizes, the identity of witness will be kept secret. This provision provides that granting of non-disclosure is the ultimate power of the court and prosecutor could not unilaterally withhold name and identity of witnesses.*

[313] Article 32 of Anti-Terrorism Proclamation No.652/2009 provides Protection of Witnesses and read as follows; 1/ *Where the court, on its own motion or on an application made by the public prosecutor or by the witness, is satisfied that the life of such witness is in danger, it may take the necessary measure to enable the withholding of the name and identity of the witness. The measures it takes may, in particular, include: a) holding of the proceedings at a place to be decided by the court; b) avoiding of the mention of the names and addresses of the witnesses in its orders, judgments and in the records of the case; c) issuing of any directions for securing that the identities and addresses of the witnesses are not disclosed; and d) ordering that all or any of the proceedings pending before the court shall not be published or disseminated in any manner*.

[314] Witness and whistleblowers protection proc. no. 699/2010 of Ethiopia[hereinafter witness protection law]

[315] The policy, *supra note* 42, under section 4.5.3(c)

[316] *Ibid*

justice policy provides witnesses anonymity that is aimed at protecting witnesses who would be put in an overwhelmingly intimidating position and to encourage witnesses who would help on finding the truth. But, the rules made it very difficult for the defendant and his lawyer who in normal course of things, would have a chance to get the name of the witness to study the credibility of the witness or even the capacity of the witness. There is a tension between witness anonymity and the right to disclosure and cross- examination. In practice of terrorism cases court almost always accept the application of prosecutor to withholding the name of witnesses to accused without assessment of existence of real danger on the witnesses' security.[317] And also the court could not impose prosecutor to take other protective measure other than anonymity of witnesses, [318]such as "police measure to enhance physical security that include prevention of threatening situation, intimidations, property damage or simply fear of reprisal".[319] However, federal courts most of the time have not been amicable solutions in the protection of competing interests. [320]

3.2.2 On-going investigation as limitation of Disclosure Right under Ethiopian law

In principle the Prosecutor has obligation to timely disclose any evidence in possession or control including evidence that "show the innocence of the accused, or mitigate the accused's guilt, or which may affect the credibility of prosecution evidence".[321] When an allegation is made against someone, the investigator will begin an investigation. From the outset the investigator has a duty to record, retain and review material collected during the course of the investigation in order to obtain evidence whether it is incriminatory or exculpatory. The investigator reveals this material to the prosecutor to allow for effective disclosure to the defence.[322] Thus, we can understand that duty of disclosure begins during the time of an investigation, and investigators have a duty to conduct a thorough investigation, manage all material appropriately to the case and the accused. The obligation to disclose is, nevertheless,

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[317] Interview with Teddela Berered, Prosecutor in Federal General Attorney,(Addis Ababa, Ethiopia, 8 May 2019)
[318] *Ibid*
[319] United Nations Office on Drugs and Crime, *Good practices for the protection of witnesses in criminal proceedings involving organized crime*, (2008) p.4.
[320] Tadesse Melaku, 'The Right to Cross-Examination and Witness Protection in Ethiopia: Comparative Overview'(December 2018) *Mizan Law Review*, Vol. 12, No.2
[321] Daniel J. Capra, 'Access to Exculpatory Evidence: Avoiding the Problems of a Prosecutorial Discretion and Retrospective Review' (1984) 53 *Fordham L. Rev*. 391 Available at: http://ir.lawnet.fordham.edu/flr/vol53/iss3/2 accessed at 15 May, 2019
[322] UK Attorney General office, 'Review of the efficiency and effectiveness of disclosure in the criminal justice system'(2018), available at: www.gov.uk/government/publications visited at 15 May, 2019

subject to some restrictions.[323] One of such restriction is designed to protect documents or information obtained by the prosecution on condition of confidentiality for the purpose of generating new evidences.[324] Therefore, information that may prejudice an ongoing police investigation or information that may reveal confidential investigative techniques used by the police is generally protected from disclosure. It may not be the interests of justice revealing details of on-going investigations or to disclose its operational or investigative methods.[325]

As stated above the both FDRE constitution and criminal procedure code has no limitation clause on disclosure of criminal evidence on ground of protection of confidentiality of techniques of further criminal investigation.[326] Tadele, prosecutor in federal attorney general argued that [i]n the practice of Ethiopian criminal process investigation process is always secret to defendants and their lawyer. Initially, disclosure rule is not well-established as fair trial guarantee in Ethiopian criminal justices system. It is not logical discussing exceptions without clear legal recognitions of principles. Hence, we couldn't argue that non-disclosure for the protection of the confidentiality of ongoing investigation as limitation ground in Ethiopia.[327]

This indicates Ethiopian criminal investigation process has no clear objective to balancing substantive truth finding and fairness of process rather it has major emphasis on crime control.[328] Despite, lack of clear binding laws that recognize pre-trial disclosure of criminal evidence as right of accused, criminal justice policy provides exceptional circumstance of non-disclosure/withholding of criminal evidence for the protection of investigation clandestineness when such disclosure prejudice future investigation of crime and criminals.[329]

CJP provided that, unless public prosecutor used to prove its case, the following evidences shall not be disclosed to the accused; "*the circumstance where disclosed evidence/information able to show on-going investigative techniques, methods of information collection, and procedure of investigation and if disclosure creates favorable condition to escapes the suspect/or if disclosure cause for committing additional crime in the forthcoming;*[330]*and if the evidence*

[323] Jenia I. Turner, 'Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons' (2016) 57 *Wm. & Mary L. Rev.* 1549
[324] James K. Stewart, Deputy Prosecutor of ICC, 'Fair Trial Rights under the Rome Statute from a Prosecution Perspective: ICTR Symposium' (2014)
[325] *Ibid*
[326] FDRE constitution, Art 20(4)
[327] Teddela, *supra note* 317
[328] *Ibid*
[329] The policy, *supra note* 42, section 4.5.3
[330] *Ibid*

prejudice/prevent preparation of indictment and if disclosure affects the proceeding or cause miscarriage of justice or affect impartiality of court".[331]

The policy provided that the restriction for the protections for methods of information collection, and procedure of investigation, if the evidence prejudice/prevent preparation of indictment and if disclosure affects the proceeding or cause miscarriage of justice or affect impartiality of court can only be justified on a temporary basis. Once the danger passes, the prosecutor must inform the defense that the relevant portion of the file should available for inspection. Though restrictions provided under of CJP has temporary basis, it is very vague and it seems as complete restriction of disclosure in pre-trial stage. Because, it is not clear what matter of disclosure of evidences are affect impartiality of court; how disclosure reasons for miscarriage of justice.

3.2.3 National Security as limitation of Disclosure under Ethiopian law

Principle of National Security and the Right to information (Paris principle) provides the following negative definition; *legitimate national security interest refers to an interest, the genuine purpose and primary impact of which is to protect national security, consistent with international and national law. A national security interest is not legitimate if its unrelated to national security, such as protection of government or officials from embarrassment or exposure of wrongdoing; concealment of information about human rights violations, any other violation of law, or strengthening or perpetuation of a particular political interest; or suppression of lawful protests*.[332] Besides, this the preamble of Paris principle stated that the principles incorporated in Paris principle reflects international and national law and standards, evolving from best practices, and the general principles of law recognized by the community of nations[333] and the Principles provided that state may be withheld information or evidences on legitimate ground of national security. However, emphasizing that striking appropriate balance between the disclosure right and withholding of evidence is vital for ensuring fair process of criminal proceeding. In addition, balancing guidance can be sought from the global principle on national security and right to information which elaborates on the issues of disclosure and national security. According to the principle an application to withhold information based on national security interest should only be justified if the government can demonstrate that restriction (1) is only in the principle of

[331] *Ibid*, 4.5.3(b)
[332] Global Principles on National Security and the Right to Information (the Tshwane Principles) held in Paris 11th December 2012
[333] *Ibid*, preamble

legality and legitimacy i.e. an interest to legitimately justify withholding, it must be clearly defined in law prescribed by domestic law; (2) it is necessary a disclosure must threaten to cause substantial harm to a legitimate interest this is known as the harm test, (3) restriction is subject to judicial oversight i.e. judiciary should have the authority to order the release of information if they determine that information does not need to be kept secret, despite a public authority's assertion that national security justifies withholding the information.[334]

While, in Ethiopian legal regime the term national security is no defined, even in Ethiopian National Security Council Establishment Proclamation No. 257/2001 does not defined what national security mean. On the other hand, Ethiopian policy and strategy on foreign affairs and national security specifically states that, "national security policy must first ensure national existence or survival. Ensuring national security means protecting the population from strife, war and disintegration".[335] However, this is not clear definition of national security rather it seem purpose of the policy.

Like the above limitation of disclosure Ethiopian criminal justice policy provides national security grounds as limitation disclosure. The policy read as follows; *evidences/information or a document should not be disclosed if it has detrimental effect on international relations or national defence or security of state, and evidences considered as secret information in appropriate laws of state.[336] Unless Council of minister decided to disclose to the public/court any evidences/information that found in Councils documents shall not be disclosed.[337]Evidences related with economic interests or financial intelligence of state and evidences consider as secret in appropriate laws of Ethiopia shall not be disclosed to accused.[338]*

Therefore, non-disclosure provided under policy on the ground of national security seems to an absolute exemption from disclosure, but this absolute non-disclosure obviously affects fair trial right of accused; not only that, it affect accuracy of verdict of the courts. In order to rectify these difficulties; evaluating the need of non- disclosure for the protection of national security should be subject to a decision of the court. Accordingly, in order to balance the national security and

[334] *Ibid*, Principle 3 &5
[335]Asmelash Yohannes(PhD),'Enhancing Human Rights Protection and National Security by Proscribing a 'Terrorist' Organization: the Ethiopian Dilemma' (2016) *Mekelle University Law Journal* Vol. 4
[336] The policy, *supra note* 42, 4.5.3 (d)
[337] *Ibid*, 4.5.3(e)
[338] *Ibid*, 4.5.3(f)

disclosure right of accused, the principle of judicial scrutinize is most important mechanism.[339] For instance in Belgium, judges have the authority to order the release of information, if they determine that information does not need to be kept secret, despite a public authority's assertion that national security justifies withholding the information.[340] In Ethiopian context "courts do not ever have the authority to examine/classified information whether or not information fall in national security".[341] Besides, this there is no mechanism to balance national security and disclosure right of accused in the legal framework and the practice of the courts.[342] According to Paris principle information related with violation of human rights never regards as national security. In the contrary, in Ethiopian context there no law that can be classified information as national security or not.

To sum up, disclosure is an essential part of fairness and manifestation of truth finding. The FDRE constitution art 20(4) provides accused has right to full access to any evidence presented against him/her. However, this provision indicates the constitution does not provide when the disclosure certainly applies either pre-trial or trial, and the constitution limit its scope only culpable (incriminating) evidence against defendant.[343] Therefore, FDRE Constitution lacks clarity on stages and extents of duty of criminal evidence disclosure. Additionally, the criminal procedure code does not expressly recognized pre-trial disclosure of criminal evidence and its does not state the extents that require to disclosed evidence to accused. However, circumstance where preliminary inquiry and preparatory hearing are recognized under criminal procedure code and anti-corruption rule of evidence and procedure proclamation respectively are used as pre-trial disclosure. But, still these rules also deficient to exact substitution of disclosure, for the reason that it depends on discretions of prosecutor, court and complexity of the cases. In spite of lack of clear legal recognition of disclosure criminal evidence; there are limitation on disclosure for the protection of witnesses provided under proclamation no.699/2010 and 652/2009 and protection national security and on-going investigation techniques in the policy.

The remedy of this constitutional gap is filling through implementation of article 14(3) (b) of the ICCPR which affords "accused has the right to pre-trial access of all relevant evidence including

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[339] Sandra Coliver, National Security and the Right to Information(2012) Available at; http://www.right2info.org/exceptions-to-access/national-security Sandra.Coliver@opensocietyfoundations.org accessed 30,May 2019

[340] *Ibid*

[341] Interview with Ezedin Fadlu, Prosecutor in Federal General Attorney,(Addis Ababa, Ethiopia, 8 April 2019)

[342] *Ibid*

[343] Simeneh Kiros, *supra note* 2

both culpable and exculpatory evidence".[344] For that reason, Ethiopia is state party of ICCPR and she has obligations to follow rules and interpretations of ICCPR provisions. Because, article 9(4) of FDRE Constitution which is stated that *"international agreements ratified by Ethiopia are an integral part of the law of the land".*[345] In addition to this, art 13 (2) of the Constitution prescribes a mandatory rule of interpretation specifically applicable to the bill of rights such that the fundamental rights and freedoms guaranteed therein "shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights (UDHR) and the International Covenants on Human Rights and international instruments adopted by Ethiopia.[346]

Therefore, the cumulative reading of art 14(3/b) (e) and art 9(1) and 13(2) of the FDRE Constitution clearly appreciate that prosecutor has duty to timely disclose all relevant evidences including evidence that intends to lead exoneration of the accused (exculpatory material), or evidence that affect the credibility of evidence presented by the prosecution, support a line of argument of the defence or otherwise help the accused prepare their case or mitigate a penalty. An important issue is whether Ethiopian court applied this line of interpretation is put in to question. What if the prosecutor failed to disclose evidence? Is there any legally recognized mechanism to obliged prosecutor? These issues will discuss the following sections.

3.3 Enforcement mechanisms for Duty of Disclosure of Criminal Evidence under Ethiopian Criminal justice system

The integrity of criminal justice system should be preserved to maintain public confidence through ensuring of fair trial process. [347] The universal principle a fair trial right imposed duty on the prosecutor to provide pre-trial disclosure to the accused, subject to the competing public interests.[348] Failure by the prosecution to adhere to the rule of disclosure can undermine the right to a fair trial and the administration of justice. [349] Additionally, failure of disclosure upshot

[344] According to Human Rights Committee in general comment 32, para 33 provide that "the right to adequate facilities to prepare a defence requires that, *in addition to information about the charges, the accused and their counsel should be granted timely access to relevant information. This information includes witness lists and information, documents and other evidence on which the prosecution intends to rely (inculpatory material). It also includes information that might lead to the exoneration of the accused (exculpatory material), affect the credibility of evidence presented by the prosecution, support a line of argument of the defence or otherwise help the accused prepare their case or mitigate a penalty".*

[345] FDRE Constitution, art 9(4)

[346] *Ibid*, art 13 (2)

[347] Epp, *supra note* 188

[348] *Ibid*

[349] House of Commons Justice Committee, Disclosure of evidence in criminal cases (HC 859), Eleventh Report of Session 2017–19, 20

handicapping preparation of the defense; infringe expeditious trial and diminish the ability of the criminal justice system to distinguish accurately between the guilty and innocent.[350]

The strict enforcement mechanism or sanction for breach of disclosure obligations would undoubtedly expedite proceedings and ensuring equality of arms in criminal process.[351] The non-disclosure remedies might be available in two ways; these are procedural and substantive remedies.[352] The procedural remedies related to the stage of proceedings, the timing of the application and the level of court where the application is to be made.[353] The substantive remedies include; legislative stipulation of measure for the violation of disclosure rules that is granted in constitutional or procedural laws.[354] For instance non-disclosure remedies might be through adjournment; criminal case review,[355] new trial when violation/non-disclosure is discovered after trial and dismissal of the indictment would be an effective sanction to deter prosecutors from suppressing evidence and exclusion of non-disclosed evidence that would adequately address the harm to defendants.[356] Consequently, duty of disclosure should be enforced through judicial institution such as courts, and prosecution institution are under duty to addressing a breach of the disclosure right of the accused, through provision of specific a remedy that ensures that justice is done.[357]

3.3.1 The Silencing of Ethiopian Courts on Enforcement of Disclosure Right

Legislative protection is not an end by itself, unless it has to be reinforced by judicial application in case where there is violation by means of punishing violators and redressing the victims of that violation. Courts have a key role to play in ensuring accountability, addressing impunity and

[350] Elizabeth N. Dewar, 'A Fair Trial Remedy for *Brady* Violations' (2006)*Yale Law journal* v.115:p 1450

[351] Gabriel Amann, 'The disclosure regime before the ICC: The right to a fair trial'; Scheffer , 'A review of the Experiences of the Pre-Trial Chamber and Appeals Chamber of the International Criminal Court regarding the Disclosure of Evidence' (2008) 21 *Leiden Journal of Int`L*., 151, 162

[352] Epp, *supra note* 188

[353] *Ibid*

[354] Elizabeth, *supra note* 350

[355]Bidish Sarma, 'Using deterrence theory to promote prosecutorial accountability' (2017) *Lewis & Clark law review* Vol. 21:3 *p. 9 provided that "reviewing of the Criminal case through direct appeal and post-conviction review provides one means of ensuring that prosecutors observe their constitutional and professional obligations. This process of judicial review asks courts to determine not simply whether prosecutorial misconduct occurred, but also whether any misconduct actually violated a defendant's rights, and if it did, whether that violation undermines the verdict's validity".*

[356] *Ibid*

[357] In 2001, the ICTY Judges adopted Rule 68 bis RPE which provides that the Pre-Trial Judge or the Trial Chamber, proprio motu or at the request of either Party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the rules'.

ensuring remedies to the victims of human rights violations.[358] The remedy will be completed if the courts decisions are enforced by the other organ of the state.[359] Accordingly, art 2(3) of ICCPR expressly imposes an obligation on states to ensure that any person whose rights are violated shall have an effective remedy, and that those who claim a remedy have thereto determined by competent judicial authorities.[360] When we see Ethiopian context, art 13(1) of the FDRE constitution imposed obligation on the courts to enforce bill of rights which are provided under chapter three of FDRE constitution. This duty bears important implications in relation to disclosure violations. Thus, Ethiopian courts have duty to enforce disclosure right of accused which is provided under art 20(4) of FDRE Constitution. However, the constitution has no lists of available remedies for failure of the prosecution to disclose criminal evidence. In fact the constitution by nature very general law, it might not be includes something of everything. It requires subsequent legislation either procedural or evidence law that should be incorporate lists of remedies for the violation of disclosure. Notwithstanding, lack of explicitly recognition of disclosure under criminal procedure code, article 94(2) (e) of the code requires that the accused not to be taken by surprise by the prosecution's evidence. This provision orders the trial to be adjourned if "evidence is produced either by the prosecution or the defence which takes the other side by surprise and the production of which could not have been foreseen".[361] The only available remedy in Ethiopian criminal procedure code for non-disclosure of criminal evidence is adjournment. While, once trial is over remedy of adjournment is irrelevant to redress a breach of the disclosure right of the accused.

According to the study produced by Center for International Human Rights Law & Advocacy (CIHRLA) stated that *"while, FDRE constitution provided rights the right to access government-held evidence and cross-examines prosecution witnesses; in practice, however, the criminal courts unable to provides remedies for the disclosure violations, resulting from court weak power of enforcing, overburdened, and subject to political influence".*[362] The study also found that *"in cases important to the government, judges were more likely to sway their decisions with*

[358] *Ibid*
[359] Bayenew Lisanework, An Appraisal of the Enforcement of International and Regional Human Rights Obligation in Ethiopia (2011)
[360] See more article 2(3) of the ICCPR
[361] See more art 94(2e) of ECPC
[362] Center for Human Rights Law & Advocacy (hereinafter CIHRLA), Divide, Develop, and Rule: Human Rights Violations in Ethiopia(2018)

explicit instructions or still more likely, with what they believed the government wanted."[363] In principle abuse of power by the public prosecutor and police misconduct would not stand in the face of an independent, competent and impartial court.[364] However, the study also claims that "*in Ethiopia there has been an effort to recruit judges and prosecutors who are being active members or affiliates of the ruling party.*"[365] Moreover, Human Right Watch reported that "*the judiciary in Ethiopia lacks independence and has in fact been used on numerous recent occasions as a tool with which to implement flawed legislation and to crack down on peaceful dissent*".[366] In 2018 Universal Periodic Review Ethiopia accepted recommendations to strengthen the criminal justice system to ensure easy and fair accessibility to all citizens, respect the right to a fair trial, and respect the rights of all persons to due process of law, particularly the presumption of innocence.[367] Furthermore, US State Department Reports on Human Rights Practices of Ethiopia provided that; *[u]nder FDRE constitution, accused persons have the right to "a fair public trial without undue delay, a presumption of innocence, legal counsel of their choice, appeal, the right not to self-incriminate, the right to present witnesses and evidence in their defense, and cross-examine prosecution witnesses. The court did not always presume a defendant's innocence, allow defendants to communicate with an attorney of their choice, provide timely public defense, or provide access to government-held evidence. And, in practice the government did not always respect the right of access to evidence it held. Defendants were often unaware of the specific charges against them until the commencement of their trials. In some sensitive cases deemed to involve matters of national security, notably the Ginbot 7 and OLF trials, detainees stated that authorities initially denied them the right to see attorneys. Defendants were often unaware of the specific charges against them until the commencement of their trials.*[368]

Without appropriate or meaningful sanctions, such as ordering prosecutor to disclose, dismissal or indictments or exclusion of non-disclosed evidence, postponing of trial until evidence

[363] *Ibid*
[364] Manual for Embassies of EU Member States Strengthening the National Human Rights Protection System 49(2009) available at http://www.globalequality.org/storage/documents/pdf/manual%20nhrps-web.pdf accessed at 15, May 2019
[365] *Ibid*
[366] Human Rights Watch, Ethiopia: 25 Years of Human Rights Violations, 2016
[367] Report of the Working Group on the Universal Periodic Review*: Ethiopia*, (2018), U.N. Doc. A/HRC/27/14 155.91 available online at <https://documents-dds ny.un.org/doc/UNDOC/GEN/G14/077/54/PDF/G1407754.pdf?> visited at 15, August 2019
[368] U.S. Department of State, Human Rights Practice: Ethiopia (in 2014, 2016, 2017 and 2018)

disclosed to accused, disclosure duty would not be enforced. However, as already shown the issue of lack of effective protection of disclosure rights in Ethiopian courts have been a regular topics in reports of human rights defenders and UN human right council periodic review, where they have expressed concern about, absence of clear legal recognition of substantial remedies for violation disclosure and political pressure on judges are obstacles to enforcement of disclosure right of accused.[369] These are negatively affects the preparation of defence and equality of arms became violated in Ethiopian criminal courts. Hence, it is clear that Ethiopian judicial system does not explicitly provide remedies or sanctions for disclosure violation.

In order to demonstrate absence of judicial remedies for failure of disclosure by prosecutor, the following domestic cases analyses are most relevant to evaluate enforcement mechanism of disclosure in Ethiopia.

3.3.1.1 CCI's Decision in case of *Amhara Region prosecutor vs. Ali Hussen eta l*

Recently the Council of Constitutional Inquiry received a case forwarded from Amhara Regional Supreme Court, which was believed to have issues for constitutional interpretation. The case was revolves around defendants charged with alleged the violation anti-terrorism proclamation and the prosecutor concealed the identities/names of the witnesses brought against the defendants; the defendants challenged this concealment claiming that they have constitutionally granted right to have full access to any evidence presented against them, including knowing the identity of the witnesses presented against them.[370] However, the prosecutor challenged the claim of the defendants arguing based on anti-terrorism proclamation No.652/2009 article 32(c) and Witness and whistleblowers protection proc. no. 699/2010 on article 4 (h) & (i) provides that, for protection reasons, identity of the witness and their addresses will be concealed or even the testimony will be done in camera.[371] On the other hand defendant argued concealing identity of witnesses against right to pre-trial access of evidence and right to confront the credibility of prosecution witnesses.

The second line of argument forwarded by the defendants that the prosecutor unilateral concealment of the identity of the witnesses without the permission of court is strictly against human right principle of access to evidence. Considering the above facts, the court forwarded the

[369] CIHRLA, *supra note* 362

[370] *Amhara Region prosecutor vs. Ali Hussen eta l,* [CCI], 1365/2007E.C (unpublished)

[371] *Ibid*

case for constitutional interpretation with the issue of whether non-disclosure witnesses as violation of constitution? However, the committee of Constitutional Inquiry decided that 'the case doesn't pose any issue for constitutional interpretation rather the case relates to interpretation of law which should be address by court'.[372] With regard to the issue of constitutional interpretation for article 20 (4), even though the constitutional inquiry refused to admit that the case forwarded doesn't need constitutional interpretation on this part; the committee tried to clarify the general message of the article 20(4) granting the right to examine the witness presented against them is to achieving the fair trial, and this article only gives defendants a right to examine witness (cross-examination) and it doesn't give defendants any right to obtain the name, identity or addresses of witness presented against them.[373] Committee further argued that "obtaining the name and address of witness has no any connection with fair trial right of accused and this constitutional provision does not recognized access to the name and address of the witness presented against the accused".[374] However, the 'clarification' given by the Committee of Constitutional inquiry appears to be flawed for various reasons. First of all, the clarification failed to address or clarify the full stipulation provided on article 20 (4). The full stipulation of article 20(4) can be interpret accused the right to access any of evidence including identities of witnesses'. However, the committee disregarding part of the article; "*the right to get full access to any evidence presented against the defendant",* and the Committee of Constitutional inquiry stated that "the only granted right in the constitution is the right to cross-examine witnesses presented against them".[375] Such partial clarification, besides failing to clarify the whole or genuine meaning of article, it seems that the article is interpreted narrowly that affect constitutionally granted right of defendants. Secondly, even though the constitution states defendants have a right to full access any evidence presented against them without any exceptional clause, the two proclamations (anti-terrorism proclamation No.652/2009 & witness and whistleblowers protection proc. no. 699/2010) allows to the prosecutor unilateral concealment of identity of the witness or their address and take other measures mentioned in the proclamations with only application of prosecutor. In other word the court accept the application of the prosecutor without scrutinize such application, because the witnesses protection law give

[372] *Ibid*
[373] *Ibid*
[374] *Ibid*
[375] *Ibid*

ultimate power to prosecutor to conceal the identity of the witness. If the court requires to assess the necessity of the concealing the witness, there is no mechanism to check the existence of the real damage on the witness security. However, committee stated that "*it is the power of the court to investigate whether revealing identity of witnesses for the defendant would bring a danger to the witnesses, and the court has power to grant disclosure or approve concealment of the identity based the finding of its investigation".*[376] Third, the committee disregards the stipulation of ICCPR, art 14(3b&e) provided that access to evidence includes the pre-trial access of name and identity of witnesses.[377] This constitutional clarification makes the issue more complex, because the right to full access is not only the right to cross-examination, it include access to the identity of the witness and the statements given during the investigation. This inconsistency requires a meticulous clarification or constitutional interpretation since the two proclamations minimizes the right access to evidence/disclosure right granted in the constitution.

Fourth, this constitutional interpretation disregard the current practice in courts demonstrated that defendants or their lawyers usually get charges with lists of witnesses, and sometime a short brief about the facts which the witnesses would be testify given to accused. Only exceptional cases such as terrorism crime and corruption crime prosecutor conceal the witnesses, even in these crimes total concealment is not constitutional aspiration, because access to evidence is human right of accused. It seems that this practice is developed from understanding article 20(4) of the constitution in a manner which requires the prosecutor is expected to disclose identity of witnesses presented in his favor. Nonetheless, the practice of courts revealed that there is the existence of pre-trial disclosure of lists of evidence, the Committee of Constitutional inquiry utterly concluded that the prosecutor has no obligation to disclose the identity of witnesses presented against the defendant. Therefore, the explanation of Committee of Constitutional inquiry is inconsistent with constitutional sprit and interpretation of HRC ICCPR art 14(3d,e) access to evidence is interpreted as access to all evidence including evidence favorable to accused, and it incorporate access to the name and address of the witnesses.

3.3.1.2 FHC Decision in case of *Federal Prosecutor vs. Gurmesa Ayano et al*

The Federal Prosecutor accused of Gurmesa Ayano and others accused of "*incitement, planning, preparation, conspiracy and attempt to commit a terrorist act in alleged pursuit of the Oromo*

[376] *Ibid*
[377] General comment 32, *supra note,* 170 para 33

Liberation Front (OLF)'s objectives which took place in different parts of Oromiya regional state".[378] The defendants are accused of masterminding the latest Oromia protests. [379]

In the case the prosecutor requested anonymity of witnesses' through alleging the intimidation and real fear in witnesses present against defendants' pressure and vengeance which might result if their identity is known.[380] The prosecutor didn't provide name and identity of the witnesses that are protected persons as defined in article 32 of ant-terrorism proclamation 652/2009. According to prosecutor, the reason behind withholding the name and address of witness is that they are living in the same area with the defendants and their families. The defendants object the requests of prosecutor through raised withholding witnesses' inconsistence with constitutional right to access to all evidences and the right to cross-examine witness presented against them. The court reject objection of defendants and accept the requests of prosecutor without appropriate assessments on the existence of real danger on the witnesses' security. [381] Nevertheless, it is not sufficient to show that the witness is put at risk of interference resulting from witness living the same area with defendants and their families, unless prosecutor should be establishes the likelihood of interference resulted from living the same area.[382] Therefore, the author argues that this court ruling is in favor of withholding the identity of prosecution witnesses, but it failed the properly balance between the rights to cross-examine against protecting witnesses. The ruling is likely to have a negative effect on fair trial and can adversely affect the fundamental rights of accused persons in this case.

3.3.1.3 FHC Decision in case of *Federal Prosecutor vs. Engineer Hailu Shawel eta l.*

The prosecutor charged Coalition for Unity and Democracy (CUD) leaders and journalists, civil society activists and human rights defenders.[383] The charges against those arrested included: Outrages against the Constitution and the Constitutional Order (article 238 of the 2005 Criminal Code of Ethiopia; Obstruction of the exercise of Constitutional Powers (article 239); Armed rising or civil war by inciting, organizing or leading armed rebellion against the government (article 240); Attack on the political or territorial integrity of the state (article 241), later dropped; Impairment of the defensive power of the state (article 247); High treason (article 248); and

[378] *Federal prosecutor vs Gurmessa Ayano Weyessa eta l*,[2015] FHC 178365 (unpublished)
[379] *Ibid*
[380] *Ibid*
[381] *Ibid*
[382] *Prosecutor vs. Karadzic*, ICTY (TC) Case No.: IT-95-5/18-PT decision on prosecution motion for delay disclosure 5 June 2009
[383] *Federal Prosecutor vs. Engineer Hailu Shawel eta l,* [2005] FHC 43246/2005 (published, 2008)

Genocide (article 269) - later amended to attempted genocide. Most of these charges carried a possible penalty of death or life imprisonment.[384] The principal defendants were convicted on most of the charges and most were sentenced to life imprisonment or long prison terms, while some other defendants were acquitted. However, after an extraordinary Ethiopian mediation initiative, all those convicted were released under presidential pardons after they signed a letter to the Prime Minister "apologizing for their mistakes".[385]

The prosecutor presented 19 video tapes, 2 audio tapes, over a thousand pages of documentary evidence, and had lists of over 370 prosecution witnesses only to the court. The prosecution did not present any statements made, or allegedly made by defendants. The defence counsels requested the court to give order to disclose lists and identity of witnesses. The Court had rule against the request made by defence counsel for the prosecutor to disclose the list of witnesses based on alleged concern for the safety of the witnesses.[386]

As a result, until the last hearing before the prosecutor's first witnesses appeared in court, the defendants and their legal counsel did not have any information on the witnesses, nor on what they were going to testify about. Furthermore, at the first hearing of witnesses' testimonies, the judges ruled that witnesses' identities could not be disclosed to the public, even after their appearances in court. Even documentary evidences were not disclosed to defendants until the trial was commenced.[387]

As mentioned above, the right of equality of arms would not be meaningful if the accused and their counsel were not given adequate time and facilities to prepare the defence. This right must include access "to all materials that the prosecution plans to offer in court against the accused"[388] as well as the right to confidential communications with counsels.[389] These rights were violated during the trial in this case. Furthermore, "documents seized by the police from the homes,

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[384] *Ibid*

[385] *Ibid*

[386] *Ibid*

[387] Amnesty International, Justice Under Fire: Trials of opposition leaders, journalists and human rights defenders in Ethiopia (Amnesty International, July 2011)

[388] Human Rights Committee, General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial', UN Doc. CCPR/C/GC/32 (2007).

[389] Principle 8 of the Basic Principles on the Role of Lawyers clearly states that: "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials."

offices or computers of defendants were not returned to them".[390] The court denied requests by defendants to return such documents for the purpose of preparing their defence. It was noted above that the prosecutor, until trial started did not provide any documentary or other evidence to support the charges against defendants. These left the defendants with no/very little information, beyond the generic charge sheet, to enable them to prepare a defence.[391] According Amnesty international reports on this case "throughout their trial, the judges repeatedly refused requests by their defence lawyers to disclose the lists of prosecution witnesses".[392] The Court accepted at face value of the prosecutor's argument that these witnesses could not be disclosed on account of concerns for their personal security. However, it is a recognized international standard that in order to have sufficient time to prepare a defence, prosecution should be given the lists of prosecution witnesses in advance.[393] Although there are exceptions to this standard, including in order ensuring the protection of witnesses, such exceptions should not infringe the right of the defence to "equality of arms".[394] Until the day the witnesses appeared in Court, defendants were not even informed of the issues on which the witnesses were called to testify. This severely hampered the preparation of cross-examination and research into the witnesses' and credibility of their testimonies. Thus, essential elements of fair trial were disregarded; in particular the right to adequate time and facilities to prepare a defence was hampered by the Court's ruling against advance disclosure of prosecution witnesses.[395]

3.3.1.4 FHC Decision in case of *Federal prosecutor vs. Abubeker Ahamed eta l*[396]

The Ethiopian Muslim Arbitration Committee is a group of religious scholars that sought solutions between the Muslim community and the government concerning the government's interference in the Islamic Affairs Supreme Council (the official Islamic authority in Ethiopia), as well as the controversial indoctrination of Ethiopian Muslims to an Islamic sect.[397] They also pleaded the government to reopen Awoliya College, country's only Muslim college, which had

[390] Amnesty International, *supra note* 387
[391] *Ibid*
[392] Amnesty International, *supra note* 387
[393] The African Commission on Human and Peoples Rights has stated that "the prosecution shall provide the defence with the names of the witnesses it intends to call at trial within a reasonable time prior to trial which allows the defendant sufficient time to prepare his or her defence." (African Commission, Principles and Guidelines on Fair Trial and Legal Assistance in Africa)
[394] Amnesty International, *supra note* 387
[395] *Ibid*
[396] *Federal prosecutor vs. Abubeker Ahamed eta l*,[2012] FHC, 124754, (unpublished)
[397] Aljazeera America, *Ethiopia Politicizes Courts to Strangle Dissent*, (July 10, 2015) available at www.addisstandard.com accessed at 24, April 2019

been closed because the government claimed that the institution supported radicalization Islam.[398] In July 2012, the government arrested and charged the leaders and supporter of Ethiopian Muslim Arbitration Committee with the attempt or conspiracy of "plotting acts of terrorism" contrary art 3 sub articles (1, 2, 4, and 6) of Anti-Terrorism Proclamation of 652/2009 of Ethiopia.[399] The charge also made accusations include, "organizing and communicating, including via telephone, to recruit members to incite violence and participating with terrorist organizations under article 4 of the anti-terrorism proclamation.

Public prosecutor suppressed the prosecution witnesses and documentary evidences to defendants, and the identity of witnesses were not verified by the court, despite requests by defense counsels. Defence counsels requested to court to order prosecutor to disclose witnesses through arguing withholding witnesses against the rights to equality of arms and affecting rights to cross-examination and preparing their defence.[400] However, Federal High Court ruled that the right access to evidence is provided under art 20(4) of constitutional is a general guiding principle and the stage at which evidence is to be accessed is limited to the security of witnesses are endanger.[401] Therefore, Court's ruling against advance disclosure of prosecution witnesses and that may affect right to adequate facilities to prepare their defence. The author could not deny the potential danger or intimidation by terrorist organizations, those persons who would be able to give evidence for the prosecution. However, in the ruling of the court had no reasonable justification accepting the argument of prosecutor. In other word the court had no mechanism to assess whether the real existence of danger on the security and life of witnesses and their families or properties.

Therefore, we can understand that there are no clear legal and practical remedies for violation of prosecutorial duty of disclosure of criminal evidences and the Federal Courts couldn't develop any the mechanism of evaluation of the existence real fear or intimidation of witnesses' security or their families or properties. As the case revealed that the exceptions override the principle i.e. the court gave more emphasis protection witnesses than accused right to access to evidence, because the court u without scrutinized the request of prosecutor to withholding witnesses.

[398] *Ibid*
[399] *Ibid*
[400] *Federal prosecutor vs. Abubeker Ahamed eta l, supra note* 396
[401] *Ibid*

3.3.1.5 CCI Decision in case *Federal prosecutor vs. Dr. Merera Gudina eta l*[402]

Federal prosecutor have brought multiple criminal charges against the prominent opposition political leader Dr. Merera Gudina chairman of Oromo Federalist Congress (OFC); Dr. Berhanu Nega the leader of the opposition patriotic ginbot 7 and 3rd defendant Jawar Mohammed a head of OMN Television and prominent Oromo activist were charged in absentia under the same file with Dr. Merera Gudina.[403]

According to first charge against Dr. Merera and the two co-defendants accuses all the three of breaching Ethiopian criminal code article 32/1/a&b/, 27/1/ and 238/1&2/ that deal with attempt to violently overthrow the constitutional order. Accordingly, it accuses they were being the leaders and instigator of the yearlong public protest that rocked in Ethiopian prior to the declaration of the two consecutive states of emergency declaration. It also details that the riots were involved in creating pressure against the government, threating society through the means of violence and attempting to disrupt constitutional order.[404]

The second charge in the same file is brought against two media institution OMN and ESAT both foreign based television stations. Besides, the criminal charges of contravening art 32/1/a/, 34/1/, 38 and art 5/1/b of anti-terrorism proclamation. Both media institutions were accused of fueling the protests by serving as communication tool for terrorist organization such as Oromo liberation front (OLF) and patriotic G7.[405]

The third charge accused of Dr.Merera, violation of art 12/1/ of directive of the second state of emergency proclamation which made any contact with individuals that the government designated as a terrorists and by this the charge refers to accused Dr. Merera meet and discussed with the second defendant Dr. Berhanu Nega of PG7 during his trip to Europe.[406]

The fourth charge accused Dr. Merera contravening of art 486 of Ethiopian criminal code and accused gave false and damaging statement about the government to media. The charge specifically mention a radio interview Dr.Merera gave to the VOA in which he disputed

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[402] *Federal prosecutor vs. Dr. Merera Gudina eta l*, FHC 192283/2009E.C *(*unpublished)

[402] *Ibid*

[403]*Ibid*

[404] *Ibid*

[405] *Ibid*

[406] *Ibid*

government claim that it had foiled a terror plot in Addis Ababa during the time of world cup qualification match between Ethiopia and Nigeria in Dec,2013.[407]

The prosecutor in its charge confirmed that address and name of witnesses were not disclosed to the defendants for protection the security of witnesses as per anti-terrorism proclamation no.652/2009, article 32(c).[408]

The defence team objected that unilateral non-disclosure of witnesses by prosecution is contrary the fundamental right of accused of access to evidence and right to confront.[409] Besides, this they argued "no need of witnesses' protection until prosecutor demonstrates how the case threatens to the safety of witnesses".[410] Federal High Court Lidata branch 19th criminal bench was refers the case to council of constitutional inquiry (CCI) for constitutional interpretation on whether the lists of prosecutor witnesses should be disclosed to the defendant or not. The CCI ruled that witnesses' protection is not considered as violation of constitutional right of access of evidence provided under art 20(4) and CCI remand the case to the court to continue the hearing, while protecting identities of prosecutor witnesses. In the ruling of CCI stated that "the intention of framer of the constitution was not to provide disclosure of identity of witness as fair trial right, rather the right to cross-examination is constitutionally granted right".[411] The point of departure that disregard by CCI is "full access to any evidence" seems to imply that the personality and credibility of the witness are also the subject of examination by the accused and his defence lawyer; the testifier and the testimony are inseparable. The court heard prosecution witnesses without avail the full list of witnesses to Dr.Merera defense team.[412]

Moreover, on December 25, 2017 prosecutor have submitted to the court ten more CD claiming that contain additional evidence against defendants. And the prosecutor has also asked the court not to allow the defence team to access the new set of evidence. The defence team objected that "prosecutor addition of the new set of evidence come after already finished and it contrary with the right to prepared one's own defence. However, the courts overruled the defence team objection and accept additional evidence submitted by prosecutor.[413] The difficulty is the prosecution requests to the court not to disclose documentary evidences to defendants without

[407] *Ibid*
[408] *Ibid*
[409] *Ibid*
[410] *Ibid*
[411] *Ibid*
[412] *Ibid*
[413] *Ibid*

legitimate justification. The court also accepts request of the prosecution the non-disclosure of documentary evidences. This leads to violation of equality of arms principle, because it might be reasonable non-disclosure for the protection of witnesses, yet to what non-disclosure of documentary evidences. It may be fair if non-disclosure of witnesses' identity and address on the ground of witness safety, if there is actual danger on the life and the families of witnesses, even though there treat on the life and the families of witnesses, the prosecutor should be established the likelihood existence of the real danger. Denial of disclosure of documentary evidence is not acceptable in any circumstance unless such documentary evidence contain national security issues.

Therefore, in this case the researcher observed the two problems from the perspective of disclosure principle; first, CCI ruled out the case no need of the constitutional interpretation, but in it explanation non-disclosure for the safety of witnesses is not against the constitution. This line of argument implies safety of witnesses always override disclosure right of accused, because without clear balancing parameter accepting every argument of prosecution withholding witnesses amount as disregarding of equality of arms in general disclosure rights in particular by CCI. The second without any legitimate reason the court accepts additional documentary evidence of prosecution and rejected the request of the defence team to disclose that evidence is clearly against equality of arms.

In principle when a disclosure violation occurs, other than ordering disclosure there are several remedies in different jurisdiction and international tribunals such as postponement/adjournment until prepare their defence, exclusion or struck out of witnesses from witness lists where prosecutor had not disclosed witnesses and their statements, for instance UK police and criminal evidence act provided that "excluding evidence on the basis of an abuse of process arising from non-disclosure may also appropriate;"[414] release of accused where failure of disclosure result by prosecution and dismissal of indictments until evidence disclosed to accused.[415] While, cases ruled by CCI and Federal High court revealed that there were no properly scrutinized mechanisms of the existence of specific factual and legally justification for the non-disclosure evidence by prosecution. The decisions were also reached without balancing the human right of the defendant right to disclosure. Moreover, the CCI and Federal high court has indeed failed to

[414] Epp, *supra note* 188
[415] *Ibid*

give any remedies for violation of disclosure. Therefore, in Ethiopian criminal proceeding disclosure of criminal evidence is the most disregarded right of accused.

3.3.2 Absence of Prosecutorial Accountability for Failure of Disclosure under Ethiopian law

Prosecutor is the most powerful actor in the criminal justice system that decide whether to bring criminal charges, what charges to bring, whether to engage in plea negotiations, through these powers can determine punishment a criminal defendant will face.[416] However, prosecutions have comes to be misconduct that is contributory source of many of major problems in criminal justice system.[417] Thus, prosecutorial accountability is one of remedy for the regulation of prosecutorial misconducts.[418] At this point, misconduct refers to prosecutorial actions that violate defendants constitutional and other significant rights or violate ethical rules tied closely to those rights.[419] Prosecutorial misconduct comprehends a wide range of action/omission, including courtroom misconduct; such as making inflammatory comments in trial, mishandling physical evidence (destroying evidence or case files), and withholding exculpatory evidence.[420]

These misconduct are not only undercut the fairness of the process, but it also calls into question the legitimacy of substantive outcomes.[421] To resolve these problems, prosecutors must be held to account for violations of legal and ethical designed rules to protect defendants. The modes of prosecutorial accountability are: criminal liability,[422] civil liability,[423] and internal disciplinary accountability.[424]

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[416] Erik Luna & Marianne Wade, 'prosecutor as Judges' (2010) 67 *Wash. & Lee L. Rev*. 1413, 1414–15

[417] MonroeH.Freedam, 'The Professional Responsibility of the Prosecuting Attorney' (1967)55 *GEO. L.J.* 1030

[418] Angela J. Davis, 'The legal profession's failure to discipline unethical prosecutors (2007) *Hofstra law review* Vol. 36:275

[419] Bidish Sarma, 'Using deterrence theory to promote prosecutorial accountability' (2017) *Lewis & Clark law review* Vol. 21:3

[420] Angela J. Davis, *supra note* 418

[421] Peter A. Joy, 'The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System' (2006) *Wis. L. Rev.* 399, 403 (reviewing studies that show "prosecutorial misconduct has proven to be one of the most common factors that causes or contributes to wrongful convictions");

[422] *Ibid*, provide that *"in some circumstance prosecutorial wrongdoing may constitute criminal conduct for which prosecutor could be charged, tried and sentenced. In this scenario prosecutor who is charged is accountable for contravening a criminal statute that enact violation of defendant rights as criminal act. However, criminal liability has not been relevant to criminal liability for violation of disclosure obligation, because it is difficult to prove as a meaningful mode of prosecutorial accountability in fact".*

[423] *Ibid, civil liability generally entails financial responsibility for damages.*

[424] Bruce A. Green &Samuel J. Levine, 'Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis' (2016) *Ohio state journal of criminal law, vol* 14:143

Among prosecutorial accountability internal accountability is the most important enforcement mechanism of duty of disclosure of criminal evidence that is imposing obligation on ethical code of conduct of prosecution that prohibit the prosecution from suppressing the fact or secreting evidence that are capable of establishing the accused innocence.[425] The scholar suggested that internal disciplinary measure more attractive deterrent for prosecutorial misconduct than reversal, or dismissal of charge, because it is directed specifically at the misconduct of the prosecutor and is less expensive for the criminal justice system than a new trial.[426] The primary duty of all prosecution is not to convict, but to perceive justice is done. Prosecutor must conduct fairly in a way that fully respects the rights of the accused.[427] Thus, fair trial remedy of non-disclosure would also be directed at the individual prosecutor responsibility is more effective remedy of duty of disclosure violation. [428]

Despite, there is unclear constitutionally recognized right to access to evidence, in any circumstance there is no prosecutorial accountability for violation of defendant constitutional right specifically disclosure right of defendant in Ethiopia".[429]

The reasons behind for lack of prosecutorial accountability in Ethiopia criminal justice are; the first, the failure of express legal recognition of prosecutorial accountability for the violations of constitutional rights of defendants.[430] The second, the Federal[431] and Regional[432]prosecution institution have no clear internal prosecutorial accountability in relation with the violation of fair process of criminal justice system, rather prosecutorial arrangement designed to impose obligation on every individual prosecutor to achieve higher standard of convection rates.[433] Due to this structure arrangement of public prosecutor office, there is a no/little disclosure rule; even there may be circumstance the prosecutor intentionally withholds evidences that favorable to defendants, specifically politically sensitive cases.[434]

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[425] Elizabet Napier Dewar, 'A Fair Trial Remedy for *Brady* Violations' (2006) *Yale law journal* 115:1450

[426] Enrico B. Valdez, 'Practical Ethics for the Professional Prosecutor' (2011) *ST. Mary's journal on legal malpractice &Ethics* Vol. 1:250

[427] *Ibid*

[428] *Ibid*

[429] Interview with Liban Abdi , Prosecutor in Federal General Attorney,(Addis Ababa, Ethiopia, 8 April 2019)

[430] *Ibid*

[431] Council of minster regulation no.44/98 Federal prosecutor administration of Ethiopia

[432] SNNPR prosecutor administration regulation no 8/96 has no any obligation to disclose evidence to accused or non-disclosure of evidence to accused is not considered as violation of ethical code of conduct of the prosecution.

[433]Interview with Yawlsaw Yitbarek, he was Prosecutor in SNNPR; now legal counsel at regional and federal courts and lecturer of law in Wokite University (Worabe, Ethiopia, 9 May 2019)

[434]Liban Abdi, *supra note* 429

The third, in addition to the absence of normative guarantees for the duty of disclosure, the result of the political considerations for the appointment and dismissal of the leader of prosecution institution is one of the reasons for non-disclosure of evidence.[435] Hence, the leaders of this institution selected based on political affiliation, and then they lead the institution in eyes of political objective.[436] For instance, the program initiated by the ruling party EPRDF,[437] and the government is implementing the 'justice reform program' "የፍትህ ስርአት ማሻሻያ".[438] In this program, by the leadership of the ministry of justice or justice bureau of regions, and reviews the every discretion of the prosecutor.[439] The committee did not bothered about fair criminal process, rather more concerning to make the justice organ loyal to the government.[440] In point of fact, the committee discussed every matter in criminal justice process and intervene specific cases to gives direction for concerned justice sector. If the prosecutor has any contact with defendant or if it made pre-trial disclosed of evidence, it is assumed be the practice of corruption what they called "rent seeking" or "selling of the case file".[441] Moreover, BPR manual of ministry of justice provided that every individual prosecutor should realized 97% of convection rate of the total cases.[442] And the efficiency of individual prosecutor is measured through the extent of conviction rate that he/she achieved.[443] This implies that if prosecutor ones charged the defendants those defendants should be convicted in any means.[444]

Therefore, non-disclosure of criminal evidence by prosecutor is one of prosecutorial misconduct that affects fair administration of criminal justice system. The application of prosecutorial accountability helps to cure prosecutorial misconduct. The prosecutorial accountability established either of the following; through review of criminal cases, criminal liability, civil liability and administrative liability. However, in Ethiopian criminal justice system there is no well-established prosecutorial accountability that helps to enforce prosecutorial duty of disclosure.

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[435] *Ibid*
[436] Ibid
[437] Is an abbreviation of Ethiopian People's Revolutionary Democratic Front
[438] A manual on Good governance movement program for justice sectors, (2005) the hard copy is found in the author's hand.
[439] *Ibid*
[440] *Ibid*
[441] Yawlsaw, *supra note* 433
[442] FDRE ministry of justice, *BPR manual* (2012)
[443] *Ibid*
[444] Liban Abdi, *supra note* 429

3.4 Balancing of Disclosure of Criminal Evidence vis-à-vis Competing interests under Ethiopian law and practices

It is difficult to balance the two rights and find an acceptable equilibrium that satisfies both parties. The principle of equality of arms asserts that parties have an opportunity to present their case in a manner which does not place them in a disadvantageous position as compared to their opponent.[445] This principle has been included ICCPR article 14 are designed as specific tools to include the principle of equality of arms principle under the umbrella of fair trial rights. According General Comment of HRC, the right to have adequate time and facility for preparation of a defence means: (1) getting adequate time to prepare defence depending on the circumstance of the case and (2), getting facilities which include 'access to documents and other evidence which the accused requires to prepare his case'.[446]Adequate facilities interpreted as disclosure of both incriminatory and exculpatory evidences to accused.[447] Disclosure is to avoid any unfairness to the defendant who might be overwhelmed by the power and evidence presented against him/her by the prosecutor. Thus, to avoid such unfairness the ICCPR granted the defendant to get access to almost any evidence which the defendant needs to prepare his defence; this includes obtaining documents and other evidences the prosecutor presents to support the allegations made.[448] Ethiopia is a state party to the ICCPR that is expected to adherent to the rules articulated in the covenant. Thus, article 20 (4) of the FDRE Constitution provides that defendants have the right to full access to any evidence presented against them. But, the constitution still is not clear in the issues of disclosure of criminal evidence that need further clarification either interpretation or subsequent legislations.

Even though, disclosure of criminal evidences is noble means of fair trial, disclosure may result witnesses security endanger, if disclosure is prejudice ongoing investigation and national security/interests. The Ethiopian criminal justice system introduced measure that adopted protecting witness, concealing identity of the witnesses that would pose a serious threat witnesses; however, art 4(1) of the witness protection proclamation provides detaile measures and programs applicable severally or jointly including the following; physical protection of person, residence and property of witness; relocation at the expense of the state, change of

[445]Dr. Rohaida Binti Nordin & Shajeda Akther, 'Equality Of Arms: A Fundamental Principle Of Fair Trial Guarantee Developed By International And Regional Human Rights Instruments' (2014) *1Legal Network Series,* P.4
[446] HRC, General Comment 13, para 9
[447] *Ibid*, General comment 33 para 32
[448] ICCPR, art 14

identity, provision of self-defense weapon, immunity from prosecution for an offence for which he provide information, free medical service in public health institution, counseling and opportunity for employment and education, covering cost of living case of loss of capacity to work as a result reprisal. Most of these programs may not affect the right of the defense to fair trial. However, there are other provisions of the proclamation that restrict disclosure right; includes changing identity of witness, the prohibition against the accused to contact the witness, taking testimony *in camera* and behind screen and providing evidence via electronic devices.[449]In the face of such measures, it would be difficult, or even impossible to expose contradictions or the motive of witness to falsely incriminate the suspect, lies and prejudices or his prior criminal record for perjury, misrepresentation or forgery thereby significantly reducing the chances of the defense to refute the charges against him.

Thus, the need for safeguards against such risks, and disclosure contributes toward fair trial thereby serving as one of the prevention schemes against of unwarranted convictions. There is need of the legal and practical amicable solution to solve the possibility of procedural unfairness against the defendant who is denied of adequate facilities (evidences presented against and in favor) to prepare his/her defence and competing interests. It wouldn't be very hard to imagine the fate of ill-prepared defence for the allegation and evidence presented by the public prosecutor who has strong power and resource as compared to the defendant. Therefore, this part of the thesis trying to assess are there any balancing solution Ethiopian law and practice.

3.4.1 Empowering the Court to granting anonymity of witnesses'

The balancing solution provided under Ethiopian witness proclamation sets three conditions under which witnesses are protected; the first condition, *"protection is applicable to witness who wishes to give testimony or whistleblower who gives information on suspect punishable with ten or more year's rigorous imprisonment or with death penalty"*.[450] Putting this more stringent condition is more important to protect fair trial rights of accused, because giving protection to witness for testimony of minor crime highly affects capacity of accused to discredit the trustworthiness of witnesses.[451] Second, "where offence may not be revealed without the testimony of the witness or whistleblower's information", in other word the testimony of witness

[449]Ethiopian witnesses law, s*upra note* 45, art 4
[450]*Ibid*, art 3(1)
[451] Interview with Negash Kidane, judge in Federal High court ,(Addis Ababa, Ethiopia, 9 June 2019)

is necessary to prove of guilty of accused.[452] The third condition is existence of serious danger to the life, physical security, freedom or property of the witness or whistleblower or their respective family.[453] These conditions provided under witness protection law is seem cumulative requirement for granting anonymity of witness. However, the problem here is who investigate the existence of threat or real fear? How serious danger is established? For instance, *Karadžić*, case in ICTY trial chamber provided that in order to determine the existence of real fear chamber sets three conditions; "*there must be objective likelihood of interference resulting from disclosure to the accused".*[454] That means the prosecutor must established that *"there is likelihood that particular witness will be interfered with or intimidated once their identity is made known to accused and his defence team. The likelihood interference must be objective; while the personal feeling or subjective fears expressed by the witness are not sufficient to establish any real danger or risk".*[455] The second requirement is "*danger or risk must be specific rather than general basis for request",*[456] that means *"there must be specific evidence of such a risk relating to particular witnesses, rather than an indeterminate risk relating to witnesses in general".*[457] The third, Trial Chambers have considered length of time before the trial at which disclosure to the accused that "the greater the length of time between the disclosure of identity and the time when the witness is to give evidence, the greater the potential for interference with that witness".[458] One may raise the question how this ICTY decision relevant for Ethiopian criminal courts? In this regard there are two main theories on judicial decision-making; the legal, and the strategic model.[459] The legal model theory proposed into two ways; the first *"if the existing body of law is not adequate for the society that is being developed; thus, a new body of law must be created. Where shall this law be found, and what form will it take? We may first consider how some other nations or international law have dealt with these problems so as to*

[452] Ethiopian witnesses law, *supra note* 45, art 3(1a)
[453]*Ibid*, art 3(1 b)
[454] *Prosecutor v Karadžić*, ICTY No. IT-95-5/18-PT, *Decision on prosecutor motion delay disclosure and variation for protection measure* (5 June 2009), at para. 11

[455] *Ibid,*
[456] *Ibid*
[457] *Ibid*
[458] *Ibid*
[459] Wayne Sandholtz, How Domestic Courts Use International Law(2015) *Fordham International Law Journal, Volume 38*, Issue 2

compare their solutions with the solution that Ethiopia adopted".[460] The second, national courts also can invoke international jurisprudence and international legal material as to guides, or aids in the interpretation of domestic laws; they refer to international norms not because they are but because they are useful.[461] The strategic model holds that judges add to the attitudinal approach that used avoid the constraints imposed on them by other institutional actor including high courts, the executive, the legislature and public opinion. Judges acting strategically will cite international legal materials to bolster their decisions against resistance or backlash from other actors.[462]

Therefore, international jurisprudence and standards are relevant either to incorporate in domestic law or used as authoritative interpretation for domestic courts.

Whereas in Ethiopia, the two proclamations have problems related with who decides on the issues of witness protection measures and the means of assessment on the actual risk on witness security. Anti-terrorism proclamations allows granting power of witness protection to the court, on its own motion or on an application made by the public prosecutor or by the witness, is satisfied that the life of such witness is in danger.[463] Accordingly, the power to allow or disallow an application rests with the court, but proclamation 699/2010 confers this power on the Ministry of justice (currently the Federal Attorney General) decision which is not appealable.[464] It follows that proclamation 699/2010 has impliedly repealed power of courts under proclamation no.652/2009. This line of interpretation is further strengthened by the explicit reference with "special protection agreement with minors' will be submitted for the approval of a higher court".[465] On cases other than special protection agreement with minors, it is up to the Minister of Justice to grant witnesses protection up on receiving application to this effect from various sources.[466] Therefore, Ethiopian witness protection law does not empower the court to grant anonymity of witness, however this affect fair trial right of accused unless every actions in proceeding are checked by the independent institution. So far, the court accepting the unilateral non-disclosure of the public prosecutor and denied the accused access to evidence in all of the

[460] Robert Allen Sedler, 'The Development of Legal Systems: The Ethiopian Experience' (1967)53 *Iowa L. Rev*. 562 Available at: https://digitalcommons.wayne.edu/lawfrp/236 visited at August 23, 2019
[461] Sandholtz, *supra note* 459
[462] *Ibid*
[463] Ethiopian Anti-Terrorism Proclamation 652/2009, art 32
[464] *Ibid*, art 25(2)
[465] *Ibid*, art 9
[466] *Ibid*, art 6&7

cases discussed in the above. This practice is contrary to the human right of pre-trial access to evidence and weakens the administration of the criminal justice as the evidence are not properly tested by defendant. In this regard there is important case that entertained by FDRE Council of Constitutional Inquiry.

The case of *Federal prosecutors vs. Mehdi Ali eta l* ,[467] accused of committing terror offences and they involves a constitutional complaint on the two reasons; the first, defendants argued that the failure to disclose witness identity by the prosecutor is violated art 20(4) of the FDRE Constitution. The defendant also argued that the absence of limitation clause in the constitution demanded the advance disclosure of all evidence including witness identity is an obligation of prosecutor to defendants, so that they could prepare for the trial. They argued that their prior knowledge of the witnesses was crucial for the preparation of the defense and, ultimately, the fairness of the trial and the search for the truth.

The second line of defendant argument is unilateral non-disclosure of prosecution without prior permission of the court is contrary with constitution stipulation of the right to access to all evidence. Accordingly, the court referred the case to the CCI to check constitutionality of art 32(b) and Art 4 (1)(h)(j) of Proclamations 652/2009 and 699/2010, respectively.

After evaluation of the defendants application, the CCI reject the first argument of the defendants by reasoning that art 20(4) of the constitution is only affirms the right of accused persons to cross-examination, but the defendants have no right to the access of names and address of witnesses, nor does the constitution impose the duty on the prosecution to disclose such information. The council in tries to investigate the intent of the framers of the FDRE constitution, it noted that "the reason for exclusion of disclosure rule in the constitution is to protection from pose danger or for the safety of witnesses rather than ensuring the fairness of the trial".[468] This decision clarified that FDRE Constitution does not guaranteed disclosure criminal evidence.

However, the Council accepts the second argument of defendants that "anonymity of witness applied only with the permission of the court".[469] In this case, the council accept the defendants objection of legality of unilateral non-disclosure of evidence by prosecution and council

[467] *Federal prosecutors vs. Mehdi Ali eta l,* [2016] *FDRE* CCI, file no.*2356/09E.C*
[468] *Ibid*
[469] *Ibid*

provided that prosecutor couldn't unilaterally withholds the names and addresses of witnesses without court permission, even though it has no any clues to how can the balance of interests.[470] Therefore, the CCI has failed to properly articulate the importance of the prosecution duty of pre-trial disclosure criminal evidence, and the reasoning fails to appreciate the significance of disclosure right. The CCI has not properly scrutinized the existence of international human right justification of disclosure that is relevant to this case. The decision was also reached without balancing the minimum guarantee of human right of pre-trial access of all relevant evidence to accused.

Moreover, according to respondents of Federal High court judges Iyasu Abebayaw and Ajame Gemeda stated that '*in practice of federal courts, there are no clear standards of balancing mechanism of disclosure rights and public interest, especially witness protection. However, current practice granting anonymity of witnesses is power of court through taking account of the seriousness of the cases, economic powers of defendants that they may perhaps intimidate or endanger the security of the witnesses'*.[471] However, some lawyer argued that still the court accepts the prosecution non-disclosure of witnesses in the name of the safety of witnesses' security without rigorous assessment of the actual existence of risk.[472] For instance *prosecutor vs. Abdi Mohammed (Abdi Iley) and others* accused of terrorism and violation of constitutional order.[473] The prosecutor claims non-disclosure of witnesses' identities in the name of witnesses' protection. Defendants' lawyer challenged the prosecution assertion, via arguing withholding of witnesses identity contrary to disclosure right of defendants. However, the court accepts prosecution argument to withhold identities of name to in favor of witnesses' protection due to the horrific nature of crime. The issue at this point is not granting or rejection of witness anonymity, rather the court couldn't be reason out its assessment on existence of risks on witnesses security and how to the court made a balance with disclosure rights of defendants. However, it clear that in *Abdi Iley* case court could not consider any evidence or if any other means to assess real risk on the security of witnesses. At that moment the court could not order the prosecutor to establish the existence of real danger on security of witness. [474]

[470] *Ibid*
[471] Iyasu Abebayaw and Ajame Gemeda, judges in Federal High court, (Addis Ababa, Ethiopia, 9 June 2019)
[472] Tedele, *supra note* 65
[473] Fana Broadcasting Corporation, new of trial of *prosecutor vs. Abdi Mohammed (Abdi Iley) eta l*, (Addis Abebe 15 Feb,2019)
[474] *Ibid*

For instance as stated in chapter two of this thesis, in international tribunal ICTY in *Tadic* case provided that the one of essential condition for granting anonymity of witness is the "prosecutor has an obligation to provide evidences that established trustworthiness of prosecution witnesses".[475] In addition, the trial chamber of *Tadic case*, established guidelines to appraising a witness credibility to ensure a fair trial when granting anonymity. These guidelines are*; "the Judges must know the identity of the witnesses that they may be able to test the witnesses reliability; the defence should have ample opportunity to question the witnesses on all issues unrelated to the witnesses identity, location, or traceability, such that incriminating information can be examined while witness retains anonymity".*[476] Since defendants and their lawyers would eventually get their chance to cross-examine testimony of the anonymous witness, would be amicable solution which protects the anonymous witness from being forced to disclose his/ her identity and at the same time confirming that the anonymous witness is capable and credible enough to testify on the matter at hand.[477] Although in Ethiopia federal courts have no means to checked the trustworthiness of prosecution witnesses; prosecution has no any duty to prove trustworthiness his witnesses and there is no the possibility to the court to know the witnesses identities before the trial.[478]The current practice in anti-terrorism proclamation no.652/2009 & witness and whistleblowers protection proclamation no. 699/2010 of Ethiopia does not provides any means to check the credibility and intention of prosecution witnesses to incriminate the defendant out of hate or they might mistakenly testify wrongly because of memory loss or distorted.[479] The court accepts the application the prosecution to conceal witness identity without assessment of credibility of prosecution witness. Therefore, defendants' opportunity to test the credibility of prosecution witnesses and preparation of defence become hampered.[480]

Therefore, empowering of judiciary to grant or reject anonymity of witness is a strong tool to avoid miscarriage of justice which may be borne out of jeopardizing disclosure right simply because noble causes such as witness protection.

In order to indication limitation of Ethiopian witness protection law; the research tries to exploring of other jurisdiction legislative and judicial responses which have good experience in

[475] Anna M. Haughton, 'The balancing of the rights of the accused against the rights of a witness in regard to anonymous testimony'(2001)
[476] *Ibid*
[477] *Ibid*
[478] Negash, *supra note* 451
[479] Interview Binyam Abebe, private legal counsel in Federal courts, (Addis Ababa, Ethiopia, 10 June 2019)
[480] *Ibid*

balancing of rights and other interests such as UK, Australia, New Zealand, South Africa and Japan. For instance in UK the Contempt of Courts Act, section 11 which provided that "*in any case where a court have power to allows a name or other matter to be withheld from the public in proceeding before the Court, the Court may give such directions prohibiting the publication of the name or matter in connection with the proceeding as appear to the court to be necessary for the purpose for which it was so withheld*".[481]

The court held that for maintaining the appropriate balance, the following must be satisfied before an order for witnesses anonymity can be granted: *[t]here must be real grounds for fearing the consequences if a witness gives evidence and his/her identity is revealed; the evidence must be sufficiently pertinent to prove crime commission; the prosecution must satisfy the court that the creditworthiness of the witness has been fully investigated and the results of that inquiry have been disclosed the defence; the court must be satisfied that no undue prejudices is caused to the defendant; and the court can balance the need for anonymity including the consideration of other ways of providing witness protection (e.g. screening the witness or holding in camera hearing where members of public are excluded).*[482]Thus, the law and cases law of UK lay down that the court has inherent power to grant anonymity of witness and adopt guidelines to balance accused disclosure right.

In Australia, there is Australian Evidence Act, section 2A(1)(b) deal with 'special witnesses' who are described as persons suffering from trauma or are likely to be intimidated or to be disadvantaged as witnesses. Special arrangements can be made by the court in their favors including exclusion of public or the accused from the court.[483] Therefore, in Australia the court has inherent power to grant anonymity of witnesses.

New Zealand Evidence Act, incorporate witness anonymity to making protection to all witnesses if their lives were likely to be endangered.[484] It also laying down a detailed procedure for the court to follow; under section 13C (4) provided that the judge may makes an anonymity order if he/she is satisfied that *[t]he safety of witness or of any other person is likely to be endangered, or there is likely to be serious damage to the property, if the witness 's identity is disclosed; and either there is no reason to believe that the witness has a motive or tendency to be untruthful*

[481] UK, the Contempt of Courts Act, 1981
[482] Law Commission of India, witness identity protection and witness protection programs (2004) R vs. Taylor (Gary): (1995) Crim LR 253, (CA)
[483] Australian Evidence Act 1989 section 2A(1)(b)
[484] New Zealand, Evidence Act of 1908 amended by the Evidence Amendment Act 1997

having regard(where applicable)to the witness's previous conviction or the witness's relationship with the accused or any associates of the accused, or the witness credibility can be tested properly without the disclosure of witness's identity ; and the making of the anonymity would not deprive the accused a fair trial.[485] Moreover, the Evidence Act, Section 13G clearly empower the courts to direct screening or the appointment of an 'independent counsel' to assist the court.[486]

The South Africa Criminal Procedure Code under section 153, permits criminal proceeding being held in cameral particularly it is necessary to protect privacy of the victim.[487] The Courts have a power to permit the witness to give evidence preferred to permit the witness to behind 'doors' or to give the witness anonymity not reveal their addresses. Therefore in South Africa granting power of anonymity of witness and procedure to ensure fair trial rights of accused reserved the court.

Japan Code of Criminal Procedure provided that, "if the judge believes that a witness will be unable to fully testify due to the presence of the accused or of spectators, the court may order such accused or spectators to withdraw from the court room during the examination of the witness".[488] Code of Criminal Procedure also permits the court to order the examination of the witness at any place other than the court, or on date other than those fixed for public trial.[489]

Therefore, in the modern criminal justice system witnesses' protection is indispensable part of the criminal proceedings. Unless witnesses are adequately protected, the witnesses may turning in hostile or become silent on the reporting of the crime commission. On the other aspect, the defendant has the right to access to all evidence including the name and address of the witnesses is the fair trial right of the defendants. Thus, as shown above different jurisdictions try to balance those interests in a ways of giving broad discretionary powers to courts to assess the necessity of witness protection and without overriding disclosure right of defendants. So far, states also empower the court to appoint independent counsel to assist the court. Judiciary also further empowered to developed guidelines of balancing mechanism either through legislation or cases law that used as precedents that is depends on context of the legal system. In all the above

[485] *Ibid*, section13C (4)
[486] *Ibid*, Section 13G
[487] The 1977 South Africa Criminal Procedure Code, section 153
[488] Japan Code of Criminal Procedure which was amended on 18th August, 1999 and 19th May, 2000 Under section 96
[489] *Ibid*, section 96.1(4)

jurisdictions judiciary has inherent power to checks and approves or reject anonymity of witnesses based on substantial evidence that justify the need for protection.

While, in Ethiopian context witness protection law 699/2010 cases other than special agreement with minors, in all case granting power of anonymity is given to Ministry of Justice/now Attorney General/.[490] The law permits to Attorney General both granting power of anonymity and taking specific measure that required by the witnesses. This law makes Ethiopian court become impotent regarding adoption of clear balancing mechanism for competing interests. Therefore, empowering the court is one of the potential solutions for the problem on grant or reject application of witness could be one way of balancing the interests.

3.4.2 Delayed Disclosure

The doctrine of disclosure requires full access of evidence to the defense, but not necessarily the always prior to trial.[491] The current working practice in federal court of Ethiopia revealed that defendants and their lawyers received names of witnesses with issues that the witness would testify at date of trial.[492] This type of balancing mechanism called delayed disclosure.[493] Under International tribunals the 'delayed disclosure' is one of the key balancing means of accused rights and witness protective measures.[494] *"Delayed disclosure temporarily keeps the names and other identifying information of witnesses confidential to the accused until the point in time as determined by court before the commencement of the trial. Any delay disclosure therefore is permitted only to the extent that the defences right to adequately prepare for the trial is not prejudiced".*[495] It is noted that the degree of risk on witness is directly dependent on the time between when the identity of the witness has been disclosed and when he has to give evidence the longer the time is caused to the greater the risk.[496] The notion of adequate time is determined on case by case basis which is depending on the facts of each case. The Ethiopian witness protection law doesn't incorporate this type of balancing mechanism. However, the law clearly provided that the identity of a witness does not disclose until the trial process begins and the

[490] See more Ethiopian witness protection law proc.no. 699/2010, art 9
[491] Sangkul Kim, 'The Witness Protection Mechanism of Delayed Disclosure at the Ad Hoc International Criminal Tribunals'(2016)
[492] Iyasu, *supra note* 471
[493] Kim, *supra note* 491
[494] See Rule 69 of the ICTY and ICTR Rules
[495] Kim, *supra note* 491
[496] *Ibid*

witness testifies.[497] The Federal High Court practice had some sort of delay disclosure of identities of witnesses, but such disclosure is commenced at time the trial is started. The defence counsel Fatu argued that this type of delay disclosure may help defendants to prepare their defence, in order to challenge the testimony of prosecution witness during cross-examination. However, this delay disclosure has no/little relevance for the defence preparation, because defendant/the lawyer has no adequate time investigate the character of witnesses and opportunity to know untrustworthy of witnesses.[498]

Therefore, it is not an easy task to find compromising solutions for the stress between the disclosure right and protection of witnesses. However, it is not an impossible to find a relatively amicable ways to harmonize the rights and interests. The giving broad discretionary power to court to grant anonymity of witness, empowering the court to appoint expert team/unit to provides recommendation on alternative protective measure to court and delay disclosures are sound balancing mechanism of the disclosure right of accused and other competing interests. However, Ethiopian law and practice are not sufficient enough to strike a fair balance between the above mentioned competing rights and interests.

To sum up, disclosure is minimum guarantee to rectify power imbalance between the prosecution and accused. Recognition of disclosure of criminal evidence helps to attain equality of arms. This allows the defendant to gain knowledge of the case against and in favor to him to puts in the position to an informed defence. However, until recently, disclosure is not procedurally recognized as a 'duty' of prosecution under Ethiopian criminal proceeding. This is result of legal, structural and practical gaps. When we say the legal gaps started from FDRE Constitution art 20/4/ which is provided that accused persons have the right to full access to any evidence presented against them, nonetheless it is not clear whether disclosure applied to pre-trial. Also the provision of constitution limits its scope only culpable evidence that against defendants, but the constitution does not incorporate disclosure of exculpable evidence as duty of prosecution. Likewise this affirmed by clarification of CCI on issues raised as per art 20(4) of the FDRE constitution. The council provided that intention of the framer of the constitution has been only for recognition of the right to cross-examination than incorporation of disclosure of criminal

[497] See more Witness protection measure which is provided under art 4/1/h of 699/2009.

[498] Interview Futhu Nuru , he was Prosecutor in Federal General Attorney; now private legal counsel,(Addis Ababa, Ethiopia, 9 April 2019)

evidence. What's more, the criminal procedure code has not been expressly incorporated disclosure of criminal evidence as obligation of prosecution. However, preliminary inquiry which is recognized under the criminal procedure code that may eventually serve as disclosure purpose, because of defendant's attendance and the opportunity to put the question to witness, however the main purpose of preliminary inquiry is preservation of evidence. In addition, preparatory hearing which provided under anti- corruption special procedure and rules of evidence proclamations served as pre-trial disclosure of evidence to accused, but it is limited on complex cases at the discretion of the court.

In fact the Ethiopian government takes commitment for amendment of criminal procedure code and prepared draft criminal procedure code. But, the draft procedure code still doesn't rectify the problems related with timing of disclosure, legitimate limitation grounds of disclosure and enforcement mechanism of duty of disclosure of criminal evidence.

Notwithstanding to unclear disclosure rule under domestic law of Ethiopia, ICCPR which is integral part of the law of Ethiopia is clearly recognized duty disclosure of criminal evidence; yet, there is no clear and sufficient enforcement mechanism or sanction for the failure of disclosure by prosecutors in the existing criminal justice system of Ethiopia.

In the practice of the federal courts disclosure is not more than giving list of evidence, even though the charge sheet format also does not require prosecutor attach lists of evidence with charge sheet. Moreover, in the interpretation of CCI in the *Federal prosecutors vs. Mehdi Ali and other case*, held that restriction on disclosure of the name and address of witnesses were not unconstitutional. The Federal Courts practices override disclosure right and give more emphasis to limitation of disclosure such as witnesses' protection, and protection national without clear amicable solutions. Therefore, prosecution duty disclosure of criminal evidence is not well recognized under Ethiopian criminal justice system.

Chapter Four

Conclusion and Recommendations

4.1 Conclusion

This thesis provided a detailed assessment of prosecution duty of disclosure of criminal evidence and relevant practices in Ethiopian criminal justice system. The term disclosure refers to uncovering of evidence and other information between the parties of legal proceeding. Disclosure is complex legal issue that covers different branch of law as it involves procedural aspect as well as human rights law. The criminal process is afflicted by imbalance of power between prosecutor and defendant. Prosecutions control the direction and outcome of all criminal cases, particularly through enjoying more investigative resources, charging and plea-bargaining decisions. These broad discretionary powers of prosecutors are caused for imbalance of power between prosecutors and accused. Disclosure is an essential component of the principle of equality of arms that used as a solution for structural gaps through promotion of the fullest possible presentation of the facts, the right to access/review prosecution evidence, opportunity to examine witnesses, time to prepare for defence.

The research demonstrates the purposes of disclosure, which is the practical manifestation of principle equality of arms, within the broader goals of achieving of equality of arms. Advance disclosure which is allowing criminal defendant to find out information relevant to the defendant at early stage, for effective preparation of his/her defence, to minimizes risk of convicting innocent, helps to make legal proceedings more transparent and efficient and provides opportunity to defendant to test the trustworthiness of prosecution witnesses. Accordingly, the prosecutor should be discloses both culpable and exculpatory evidence in his/her possession to the defence before trial.

The legal basis for prosecution duty of disclosure criminal evidence is the fair trial right, particularly the principle of equality of arms which is the minimum guarantee which should be afforded to the accused, such as the right to adequate time and facilities which is provided under ICCPR art 14(3). Though international human rights instruments expressly recognized disclosure right, the rule and dynamics of prosecution duty of disclosure are largely depends on the legal tradition. In civil law tradition, there is broader rule of disclosure that accused has the right to

rights to inspect the investigative file or dossier. The dossier contains evidence gathered by the prosecution and police or any state investigating agency and may contain both culpable and exculpatory evidence. The reason behind broad disclosure rule in continental law is the parties have obligation to surrender all relevant material and evidence to court/ investigative judges, such document become common to prosecutor and accused. While, disclosure in common law tradition is minimal, because parties in proceeding are autonomous and defence have equal powers and rights to investigation and present their cases. However, the development of international human rights law has been important implication for reforming historical presumption of non-disclosure.

Though disclosure is right, it is not an absolute right, there are circumstance that justified to restricting disclosure to safeguarding competing interests, such as protection of ongoing investigation, witnesses' security protection and national security. International criminal tribunal designed guideline to balance the fair trial rights of accused vis-à-vis competing interests; such as to grant anonymity of witness, the tribunal must be satisfy the real existence of danger or risk on security of witnesses; there must be objective likelihood of interference resulting from disclosure to accused, the testimony of the witness is relevant to established the commission of crime, the trial must be satisfied that is no evidences that established the witness untrustworthiness. In addition to this balancing mechanism, other jurisdictions empower the court to establish of independent body/unit that to assist and provide recommendation regarding to the actual existence of risk on witnesses security and protection measure to court/tribunals. Moreover, delay disclosure also important mechanism for accused right to access to evidence.

Despite, the undeniable importance of prosecution duty of disclosure of criminal evidence, it is not well recognized under Ethiopian criminal justice system. This problem of disclosure is strongly related with legal, structural and practical problems. Regarding the legal problem started from FDRE constitution under article 20(4) which is provided that accused has the right to access to any evidence presented against his/her. The clear reading of this provision implies that the scope of disclosure right provided under the constitution is only limited evidence that established the guilty of the accused. This constitutional provision also lacks clarity on timing of disclosure and enforcement mechanism. In addition to that the criminal procedure code of Ethiopia does not expressly recognized disclosure of criminal evidence as duty of prosecutor at

all. However, preliminary inquiry that is incidentally served as pre-trial disclosure of evidence to accused. Moreover, as of preliminary inquiry, preparatory hearing also served as pre-trial disclosure of evidence to accused, but it limited only complex corruption cases and discretion of court, not as right of accused.

The Draft FDRE Criminal procedure code introduces the disclosure of both culpable and exculpatory criminal evidence as duty of prosecution duty. However, the draft procedure code still doesn't rectify the problems related with timing of disclosure, legitimate limitation grounds for non- disclosure and enforcement mechanism of duty of disclosure of criminal evidence.

Ethiopian Criminal justice policy incorporated disclosure of evidence as duty of both prosecutor and accused. Additionally, the policy includes disclosing exculpatory evidence as duty of prosecution, but still there is no law that imposes obligation on the prosecutor to disclose evidences that favorable to the accused. The policy has no any clues how this duty enforced if the prosecution failed to disclose. Furthermore, without clear and sufficient recognition of disclosure right, Ethiopian witness protection proclamation 699/2010 is permits to prosecutor for unilateral non-disclosure of evidence and it limits power of courts to scrutinize the necessity of non-disclosure.

It is clear that disclosure is a fundamental component of equality of arms that gives a reasonable opportunity to prepare and defend its case. However, it requires well-established enforcement mechanisms. As shown above enforcement mechanism categorized into substantive enforcement mechanisms include; dismissal of indictments, postponement of trial, review of criminal cases, and exclusion of non-disclosed of evidence; and procedural enforcement mechanism is embodied the stage of proceedings, the timing and the level of court where the application is to be made. However, in Ethiopian criminal justice does not incorporate any of the above remedies for failure of disclosure by prosecution. Therefore, the Ethiopian criminal justice system does not clearly and sufficiently recognized prosecution duty of disclosure of criminal evidence.

Structural problems surrounding on disclosure process include; the prosecution has extensive resources, and the advantage of being the first to be informed of an alleged crime. The unilateral investigation and non-participation of defendants and their lawyer in investigation processes, prohibition of communicate with prosecution witnesses. What is more, while detained, the

accused is unable to assist in making inquiries and the accused does not know which evidence is relevant to his/her case then the defendant become disadvantageous.

In the practical application of disclosure in Ethiopia, it is not more than disclosing the mere list of witnesses and documents. However, principle of rule of disclosure include list of witness with written statement, defendant recorded statement, all documents and objects with in the government possession custody or control and statement of expert witnesses. In the practice of CCI constitutional interpretation, for instance in the cases between *Amhara Region prosecutors vs. Ali Hussen eta l* clearly provided that "obtaining the name and address of witness has no any connection with fair trial right of accused and this constitutional provision has no any recognition to access to the name and address of the witness present against the accused". Therefore, this is clearly contrary to international human right understanding of disclosure.

Therefore, this thesis concluded that Ethiopian criminal justice system has indeed failed to clearly incorporated prosecution duty of disclosure of criminal evidence, absence of effective enforcement mechanism on prosecution`s failure to disclose evidence and there is no clear mechanism to balance interests.

4.2 Recommendations

Based on these findings of the research, the researcher recommends the following to be considered by the government;

1. The criminal procedure code should be amended in a way that:
    - ✓ It clearly incorporates prosecution duty to pre-trial disclosure of both culpable and exculpatory evidence to the accused;
    - ✓ It incorporates enforcement mechanism for the failure of prosecutor to disclose;
    - ✓ It clearly sets the legitimate limitation grounds of disclosure right of the accused.
2. In fact the draft criminal procedure code incorporated disclosure of both culpable and exculpable evidence as duty of prosecution, but it has problems on timing/stage, enforcement and limitation grounds of non-disclosure, So that;
    - ✓ The draft criminal procedure code should have clear timing/stages/ of disclosure;
    - ✓ The draft code should incorporate enforcement mechanisms when prosecution failed to disclose evidence and

- ✓ The draft code should incorporate legitimate limitation grounds of non-disclosure of evidence.

3. Witness and whistleblowers protection proc. no. 699/2010 should be amended focusing on the prosecution unilateral non-disclosure and granting anonymity of witnesses in a way that;
    - ✓ It empowers the Courts to assess the necessity of witnesses' protection measure and granting anonymity of witnesses. This power should be granted to the courts to run the trial process in a way to ensure justice during the trial process. In cases where exceptional issues such as witness protection come in picture; based on solid evidences justifying the need for protecting witness, court should grant or reject application for full or partial anonymity of witnesses.
    - ✓ The witness protection law should have stringent procedure to grant anonymity of witness, for instance the prosecutor must establish existence of real grounds for fearing the consequences if a witness gives evidence and his/her identity is revealed. Then the court reasonably satisfied that there is no motive or tendency of untruthful or false testimony/perjury, the testimony of anonymous witness must be relevant to prove the crime commission, and the court must satisfy non-existence of other protective measure than granting anonymity. It will be better empowering the court to appoint independent expert counsel/unit if the case requires to provide impartial recommendation for the necessity of witnesses' anonymity. Establishing Independent court counsel/unit helps to conduct a study on existence of actual risk on the witnesses' security, the motive or tendency to be untruthful or the witness's previous conviction and the trustworthiness of anonymous witnesses presented by the prosecutor and give recommendation to court.
4. The CCI/HOF and courts should interpret and enforce the FDRE constitution, art 20(4) in lines with the stipulation of ICCPR art, 14(3).
5. The FDRE Attorney General should reform the structural arrangement of prosecution that designed to achieve high conviction rate in a way that;

- ✓ It should examine its internal disclosure practice and incorporate prosecution duty of pre-trial disclosure of all relevant evidence in prosecutor ethical code of conduct;
- ✓ It should incorporate prosecutorial accountability action against individual prosecutor for the violation of ethical duty of disclosure
- ✓ Attorney General should give extensive training about disclosure and its implication to the prosecutors and judges.

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1. *Brady v. Maryland* (1963) 373 U.S Supreme Court para. 83.

Appendix

Interview questions guideline

The participants were selected from public prosecutor, judges and private legal counsels from federal justice institution with purposive sampling techniques of non-probability sampling. The natures of questions are unstructured interview questions. Unstructured interview are situation in which the interviewer does not follow a rigid forms of questions, they encourage capturing of respondents perception in their own perspectives.

Therefore, the following interview questions are prepared as follows;

I. Interview questions to Public prosecutor

1. Do you think that disclosure of criminal evidence is important to fair trial?
2. If so, what are evidence that disclosed by prosecutor to the accused?
3. When evidence is disclosed to accused in practice?
4. Are there any duties on prosecutor to disclose any favorable evidence to accused in practice?
5. What are the legitimate grounds for non-disclosure by prosecutor?
6. Do you think that Ethiopian law of disclosure is sufficient to achieve the fairness of the proceeding? If not what are the main problems?

II. Interview questions to defence counsel

1. What are evidences that you received from the prosecution?
2. When such evidences are disclosed by prosecutor in practice?
3. Do you think disclosing name and identity of prosecution witnesses before trial relevant to accused defence rights?
4. Have you ever received any favorable evidence to from prosecutors? If not, why?
5. Are there any enforcement mechanisms if prosecution failed to disclose evidence?
6. Do you think the practice of disclosure is sufficient to ensure fair trial rights of accused?
7. If not what the main problems associate with disclosure of criminal evidence in Ethiopia?

III. Interview questions to judges

1. What evidences are disclosed to accused?
2. When evidence is disclosed to accused?
3. Are there any enforcement mechanisms to the disclosure? If yes, would you mention the basic ones? If not, how do you enforce it?
4. How the court balance disclosure right of accused and argument of prosecutor claim non-disclosure for the protection of competing interests such as witnesses protection, national security and protection of ongoing investigation techniques in practice?
5. Do you think that Ethiopian law of disclosure is sufficient to achieve the fairness of the proceeding?