ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE STUDIES

SCHOOL OF LAW

Selective Criminal Prosecution Vis a Vis Prosecutorial Discretion in Ethiopian Criminal Justice System: Theory and Practice

BY

Nabiyu Mikru

ADVISOR

Mr. Simeneh Kiros (Ass Prof.)

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DECLARATION

I **Nabiyu Mikru**, hereby declare that this research paper is original and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged.

Name: **Nabiyu Mikru**

Signature: ……

This dissertation has been submitted for examination with my approval as University advisor:

Advisor: **Mr. Simeneh Kiros**, (Ass Prof.)

Signature: ……..

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Advisor **Mr. Simeneh Kiros**, (Ass Prof.) _____

Signature

Examiners

1._____

Signature

2._____

Signature

Acknowledgement

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Abstract

The universal recognition of human rights in general and the right to equality in particular as inviolable human rights coincided with the consolidation of prosecutorial discretion in charging decisions which led to an interesting and intricate process that explores the mutual influence of these developments on each other and search for an ideal reconciliation between them.

The paper set to lay bare how the right to equality before the law might be jeopardized by the unmitigated discretion given to the prosecutor to name defendants with special emphasis on the experience in Ethiopia.

Chapter one tries to set the scene by exploring the concepts of prosecution, prosecutorial decision making and the right to equality. A compressive discussion is provided in an attempt to shed light on the origins and development of the concepts and the latent tension between them.

Chapter two will comparatively study how selective prosecution is handled in different national jurisdictions and international tribunals.

Chapter three explores the constitutionality and admissibility of the defense of selective prosecution and the problems associated with invoking and proving such claims in Ethiopian criminal justice system.

Finally a conclusion and a possible recommendation to tackle the problem will be provided**.**

Acronyms and Abbreviations

Art	Article
CCI	Council of Constitutional Inquiry
Constitution	Federal Democratic Republic of Ethiopia Constitution, 1995, proclamation number n 1/1995
DPP	Director of Public Prosecutor republic of Ireland
E.c	Ethiopian Calendar
EPRDF	Ethiopian People's Revolutionary Democratic Front
EPRP	Ethiopian People's Revolutionary Party
FDRE	Federal Democratic Republic of Ethiopia
Fed	Federal
HoF	House of Federation
ILO	International Labor Organization
ICC	International Criminal Court
ICCPR	International convention On Civil and Political Rights
ICTY	International Criminal Tribunal for Yugoslavia.
ICTR	International Criminal Tribunal for Ruanda.
Negarit gazz	Negarit Gazzeta
NGO	Non-Governmental Organization
NATO	Northern Atlantic Treaty Organization
Procl.	Proclamation
SPO	Special Prosecution Office
UDHR	Universal Declaration of Human Rights
UN	United Nation
US	United States

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CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

The right to equality includes, equality before the law and equal protection of the law, which is a fundamental human right under national and international instruments and constitutional right, whereas the governments in general and the public prosecutor in particular have been seen to criminally prosecute suspects selectively, such selectivity have an international and national nature, and also deferent categories have been applied for such selectivity.

Equality is usually said to be the cardinal element of human rights ideology and the telling feature of good society[1.] Equality is both a principle and a right, as a principle equality meant to assist or inform law makers, courts and the executive to take equality in to account in their respective power application, equality as of right is a substantive guarantee that individuals could invoke before court in discrimination case.

In order for a democratic government to have the acceptance and will of its nationals has to be adhered to the principle of equality before the law and the *equal protection component of the Due Process*, check and try to avoid situations of selective criminal prosecution (on the ground of unjustified standard having discriminatory nature) of crimes, in order to do that it has to conduct study of selective prosecution and act accordingly.

1.2 Literature Review

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status. Right to Equality, Article 25 of FDRE constitution.*

In this particular subject matter, I can safely conclude that there is no specific domestic and international literature written; from some who have tried to cover the issue in their writings are

[1] Mekonnen Fisseha, ***Revisiting affirmative action in Ethiopia***, Central Europe University, H.R L.L.M thesis, January 3,2010,P 10.

Mr. **Simeneh Kiros** and Mr. Cherenet Hordofa[2], they argued that in Ethiopian criminal justices system the public prosecutor is on duty to prosecute all crimes having sufficient evidence for conviction and also they have also mentioned that the FDRE constitution Article 25 guaranty equality before the law ….equal and effective protection, then they added that if there is any selectivity in prosecution on the part of the public prosecution one can raise such selectivity as a defense on the criminal charge and courts has to review the selectivity of the criminal .

There are some literatures in international level on the issue of selectivity in criminal prosecution and the desecration of the public prosecutor to prosecute and/ or not to, most of them involves on the issue of racial based selectivity, Yoav Sapir[3] in this article he consider the issue of unequal treatment from the defendants perspective that is when defendants claim they were singled out for prosecution on the basis of their race and the race of the victim and raising selectivity as a prosecution defense in the criminal justice system which is directed at black's (African Americans).

The Article also focused on the prosecutorial discretion, that discrimination and unequal treatment are at least as likely to occur in prosecutorial discretion as in other stages of the criminal process, and racial bias prosecution field on prosecutorial discretion. This selectivity in prosecution exists when the defendant can produce a threshold showing that similarly situated individuals of a different race could have been prosecuted but were not, and he concluded that the criminal justice system of US treats blacks more harshly than whites and racist and propose reforms to such racial selectivity in prosecution.

The same subject matter was raised by Besiki Kutateladze and his colleagues[4], in their compiled Articles they also add not only the public prosecutor the police and the court has contribution to the problem of selectivity and police's selective stop and frisk and courts sentencing based on racie and ethnicity influenced outcomes in the criminal justice system, in addition to broad discretionary to prosecute. In their aggregation of materials they conclude that prosecutorial

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[2] Mr Simeneh Kiros and Mr Cherenet Hordofa**, *Yewenjel meremera: yekereker Amerarena ketat Awesasen***, United Printers, Addis Ababa, 2015, P119 and 168.

[3] Yoav Sapir, "*Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal",* **Harvard BlackLetter Law Journal**, Vol. 19, 2003.

[4] Besiki Kutateladze,Vanessa Lynn, Edward Liang, ***Do Race and Ethnicity Matter in Prosecution? A Review of Empirical Studies***, Vera Institute of Justice June 2012.

decision making in US is associated with racial and ethnic disparities in case outcomes based on defendants or victims race directly or indirectly.

Mr. Drew S. Days, in his article[5] on the same issue of selective criminal prosecution has indicated that the federal government has a constitutional duty to take corrective action in charges of selectivity in nature on the basis of race (or on any other invidious grounds, for that matter) where they are unjustified and also in sentencing by ensuring adequate procedural mechanisms to be ensured, but he hasn't shown which procedural mechanisms to be put in place.

From the defense point of view, Melissa L.jampol has argued, If a person is charged selectively based on a threshold of standard, which is against the principle of equality, he/s may raise the defense of selective prosecution; a selective prosecution defense arises when a prosecutor brings charges against a defendant deliberately motivated by constitutionally prohibited "standard[s] such as race, religion or other arbitrary classification." The claim of selective prosecution is based upon Equal Protection considerations, in which a "defendant may demonstrate that the administration of a criminal law is 'directed so exclusively against a particular class of persons... with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law."[6]

Finally, Also the international criminal court (ICC) is said to have use the selective approach of prosecution, Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly in there writing[7] have argued that All of the cases that the ICC is currently investigating and prosecuting have to do with crimes allegedly committed in countries in Africa selectively.

1.3 Statement of the Problem

The effect of selective criminal prosecution on a threshold of standard, which is against the principle of equality before the law and its component to due process on overall constitutional order, is almost untouched issue especially on domestic literatures. So as to create a stable

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[5] Drew S. Days III, "*RACE AND THE FEDERAL CRIMINAL JUSTICE SYSTEM: A LOOK AT THE ISSUE OF SELECTIVE PROSECUTION"*,**MAINE LAW REVI25EW** Vol. 48:179.

[6] Melissa L.Jampol, "*Goodbye to the defense of selective prosecution"*, **Journal of Criminal law and criminology**, Vol87, Art 10(1997).

[7] Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly, ***Africa and the International Criminal Court***, International Law 2013/01, July.

political process, to insure peace and security this issue has to be addressed in each government which it would by itself undermine the supremacy and very purpose of the Constitution and the constitutional order.

Beginning from asking the point of criminal prosecution and selectivity in doing so, as well the desecration to prosecute and its extent is the fundamental task of this study. As regards authenticity, the big problem is that people do not obey and protect the law if they do not believe they have to be bound by it equally in equal situations. In order to be bound by it, they have to attach and served fairly and equally in the criminal justice system prosecution process or in the product itself. People also have to feel okay as to the contents for them to be bound by such a product. In selective criminal prosecution the actors involved in the process of it are to be determined mostly by the government organs of law enforcement or the government in control of public offices,

That is what was experienced in Ethiopia now and before also in transitional justice, many argue the legal practice has come with no due and proper respect to constitutional right of equality before the law, discriminatory of similar situations, and existence of in equality in all process of criminal justice system within the whole stake holders i.e. Actors involved in investigating police, public prosecutor office, courts and the public itself. for this reason many demands a substantive as well procedural criminal law change and struggle to it in different ways, then this study will extend and examine In addition to finding out the concept of existence of desecration of prosecution, charge of criminal prosecution selectively, and it is important to discover the traditions of grounds for selectivity and prosecution offices mostly venerable to it, the relationship between constitutional right to equality before the law, equal protection of the law, due process component and selective criminal prosecution and discretion to prosecute by whom? And its extent? Is to be examined comparatively? Therefore legality and equality is a prime facial for the effectiveness of a given constitutional order and it is essential to find out the means of challenging such selectivity and build a consensus nation.

1.4 Research Questions

The above problems in mind, that the researcher has developed an interest on the topic. Questions which the study investigates into include:

Q.1 the relationship of between the constitutional right to equality before the law, equal protection of the law component of the **Due Process**, **discrimination** with the selectivity in criminal prosecution.

Q.2 who should be the actors in criminal prosecution? In relation to, Constitutional right to **Equality before the law, equal protection** and duties/ burden of the law and selectivity in criminal prosecution approach.

Q.3 what is the relationship between constitutional right to equality before the law, selective criminal prosecution, public prosecutors **discretion to prosecute**, legitimacy and the implication, its extent, and sources of legitimacy to the **defense of selectivity** in prosecution?, and **Role of the government in the process** in Ethiopian federal legal system and practice.

Q.4 Examining **Practical compatibility of selective criminal prosecution** with the FDRE constitutional right to equality and equal protection of the law and practice of **discriminatory** general trend of criminal prosecution?

Q.5 what are the **reasons (unjustifiable standards (**constitutionally prohibited standard[s]**)) for selectivity** in criminal prosecution, what were the challenges, the relationship of the FDRE constitution right to equality before the law and selective criminal prosecution process in insuring constitutionality?

Q.6 what is the rational and legal ground for raising selectivity in prosecution as of a **defense and the comparative experience on the motion** based upon to the criminal charge and its component as a **procedural guarantee** to it.

1.5 Objective of the Study

The primary objective of the research is to investigate the theoretical as well normative element of selective prosecution ,to identify unjustifiable standards for selectivity, focuses on the introduction of selective prosecution, its nature and its relation to the right to equality(equality before the law and equal protection and/or duties of the law), secondly the relationship between them will be examined in comparative study and possible actions taken and the discretion of government/ public prosecutor, as well role of other organs such as investigating police officer finally, the paper will also try to see the Ethiopian experience normatively and gave a general

conclusion that is based on the aggregate judgments of the theories and their position in and managed to offer some possible recommendations.

Then studying the concept of selective prosecution is not only an issue of criminal procedural human right, but also issue of constitutionality, democratization and legal reform as well as government control.

1.6 Significance of the Study

The study has significance in creating **new** awareness on the political actors in the country so that they will contribute for the survival of the constitutional order. To be specific, it will have the following advantages:-

- This research has great importance in showing the problems as a problem that exist in the process of criminal prosecution, in securing equality before the law and equal protection of the law and its component of due process, so it is one of the manifold significances of the study that it gauges the equality this instrument, the study will accordingly determine the equality before the law in the FDRE constitution as one of democratic constitution and the practical application of this constitutional right.

- As it's the purpose of the constitutional right of Equality before the law and equal protection and burden of the law is to guarantee individuals by it's one of contemporary constitutional issue relating selective criminal prosecution and right to equality and equal protection of law/ equal burden of the law.

Studying selective prosecution is important not only empirically to appreciate the existence and the theoretical approaches are to be evaluated, but it will help us to understand the concept its normative existence.

In today's world equality before law is not only a national policy issue but also an international human right and a global way of living, then government organs in the exercise of their legitimate power has to be adhered to the principle, if not such organ will lose its acceptance, One example is that the ICC, because of its discriminatory (Selectivity) prosecution of Africans we can see its acceptance in Africa today.

Moreover, as the issue is yet unexplored, the thesis would have also an inspiration role for others to engage in an in-depth study on the subject.

- The knowledge generated by this study enables readers to grasp the necessary information with respect to the general and in particular Ethiopia the selective criminal prosecution and nature of its selectivity, vulnerable crimes, criminals and groups as well public prosecution division offices are to be examined. The study emphasis on the concern of right to equality and its relation to being selected to criminal prosecution, main subject of the FDRE constitutional right and comparative experience in participation, **role of government/ public prosecutor in the process**, Parts will be selected and analyzed on the basis of the research questions.

1.7 Scope and Limitation of the Study

This research work may suffer from certain short comings. Firstly, it pertains to absence of any other theoretical writings on the area and the practice-oriented analysis as regards to equality before the law right and selective criminal prosecution legal practice. This is mainly attributed to the underdeveloped jurisprudence of our Courts relating to these rights and practice. As a result, the researcher resorted to foreign jurisprudence so as to reveal the workability of integrated approach used to boost constitutionality rights. These enable readers to better understand how other jurisdictions afford protection to these rights and for the benefit of the public at large. Secondly, it is related to the unwillingness of my informants (interviewee) in the police, public prosecutor's office, Courts, and politicians to the research questions. As my research is not mainly depends on the primary data, I will try to find other informants from the Regional State Court and lawyers also. The other thing is related to research fund that as the research require much interviews and many data's need to be collected, for such filed works need fund to be enable the researcher there may be limitation to overcome some financial constraints and also time limitation may occur. Therefore, in the interest of precision, brevity, less volume, the usual time and resource constraints, the researcher will cut down certain sections and avoided in depth analysis in certain aspects of the content and which reduce the comprehensive and detailed nature of the research.

1.8 Research Hypothesis

In previous days, many agree that criminal prosecution is only involves the public prosecutor and it's in desecration to do or not to do, selectivity in prosecuting a criminal charge as of right and defense was not analyzed properly. The main problem in realizing selective criminal prosecution in insuring Pease and security in a society and crime control participation of the police, public prosecutor and population directly in light of the constitution has its importance.

Generally, the issue is the grounds of selective prosecution, and its impact on the constitutional right and order of the country as a hole and its defense element, and participating all forces and interested groups in criminal prosecution with regard to the cause of the selectivity and the result to it and the government's role as one of essential factor, and the Ethiopian experience, whether it fulfill the general rule of procedural and content in criminal prosecution.

1.9 Research Methodology

The research uses a mixed research approach. For this paper, different literatures were studied on the subject matter to give a fundamental introduction to the topic, mainly based on assessment of the existing literatures legal and non-legal instruments relating to constitutional right to equality before the law and equal protection and due process component, criminal prosecution, selective criminal prosecution and desecration to prosecute, conceptual and theoretical framework, analysis primary and secondary sources will be used, and such, relevant legal literatures, books, article, data collected and journals regarding the issues to assess the legitimacy and as of defense a selective prosecution. Data collected through interviews, primary and secondary documents were analyzed with the legal framework of selective criminal prosecution in theoretical aspect and the experience of federal prosecution offices.

In the practical part I will make an appropriate interviews and personal observation and views of stake holders in order to be effective, literatures and data found in a form of practical criminal cases, books, articles, journals, minutes, researches and reports are essential inputs to the study.

CHAPTER TWO

Conceptual and Theoretical Framework

2.1 Prosecution in general; a conceptual and historical background

Criminal prosecution can be defined as an action or proceeding instituted in a court on behalf of the public to secure the conviction and punishment of one accused of a crime. The term is alternatively defined as a state party by whom criminal proceedings are instituted or conducted understandably both the act of bringing persons suspected of infringing criminal laws into justice and the party who carries out the same bear the name, prosecution. This equating of subject and object is understandable because once the action of prosecuting crimes is firmly established as a public matter it necessarily presupposes the state party who has the mandate to tackle the task. .it might be surprising for a modern observer accustomed to the dominant and indispensable role the state played in criminal suits to learn that this was not always the case. In fact until quite recently the conception of crime as an offence against the public and the involvement of the state were too foreign for any legal system.

> "In common law a crime was viewed not as an act against the state but rather as a wrong inflicted against the victim. The aggrieved victim, or an interested friend or relative would personally arrest and prosecute the offender, after which the courts would adjudicate the matter as they would a contract dispute or a tortious injury."[8]

For a long time states were contented with trying criminal matters and don't see the need to meddle on the part of either side. It was only with the revelation of the wide spread effects of criminal acts which aren't contained to the victim and the rise of a centralized state which consolidates sufficient power that governments finally claim the power to prosecute criminal cases as their sovereign prerogative. The notion of division of power also contributes to this

[8] Jack. M Kress , ''Progress and Prosecution**" the annals of the American academy of political and social science** , vol.423 (1976) p.100.

development by solving the riddle that how the state could be both the prosecutor and the adjudicator simultaneously.[9]

With the conception of crime as an offence against the public at large arises the need to have a professional and bureaucratically organized state party to represent the public which in turn gives rise to prosecution as we know it today. The appearance of the modern prosecutor can be traced to the beginning of the 18th century when the then colony of Connecticut adopted a system of public prosecution.[10]

The hitherto focal point of criminal cases, the victim, is relegated to the role of a mere witness for the prosecution or even dismissed as virtually unimportant. The Connecticut court decision seals the matter

> "In all criminal cases in Connecticut the prosecutor is the state. The offences are against the state. The victim of the offence isn't a party to the prosecution nor does he occupy any relation to it other than a witness, an interested witness may haps, but nonetheless only a witness……it is not necessary for the injured party to make compliant nor is he required to give bond to prosecute. He is in no sense a relator, he cannot in any way control the prosecution and whether reluctant or not he can be compelled like any other witness to appear and testify"[11]

The process of change from private to public prosecution is conclusive but by no means complete. The former runs parallel with the latter. Most jurisdictions maintain the residue of the private tradition by routinely permitting victims to participate in prosecution. [12]Though scholars

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[9] John. Worrall, **Prosecution in America; A Historical and comparative account in the changing role of the American prosecutor**, (2008), p 5.

[10] Id p.6

[11] Mallery V. Lane, (Connecticut appellate court, USA, 1921), **conn**. Vol.97, p.138

12 Roger A. Fairfax Jr, "Delegation of the criminal prosecution function to private actors" **university of California** , vol. 43, (2014) p.413

are against the idea which they argue runs contrary to the democratic process [13]or it is tantamount to an inappropriate delegation of sovereign prerogative.[14]

By appropriating the power to prosecute criminal offences for it-self and by mobilizing the resources that are available to it, the state or more properly the prosecuting agency assumes a formidable posture which it hopes would be the right antidote to the problem of crime. Due to the vast powers bestowed on him the prosecutor evolved from a weak figure head into a powerful political figure. [15]His ability to decide whether and what to charge give him perhaps the most power of any single actor in the criminal justice process. [16]"the discretion to bring the power of the government to bear upon an individual or to forbear even when cause existed to proceed' noted Fairfax commenting on the power of the American prosecutor "represents power unequaled by that vested in virtually any other civilian official save for presidential or gubernatorial pardon power"[17] but it soon became clear that such aggrandizement holds the intimidating potential of encroachment on the rights of victims and abuse of power. It was partly from this depressing prospect that constitutional rights of the suspect, the requirement of a higher degree of proof and other stringent procedural rules partly evolved different jurisdictions experiment with and employ various institutional mechanisms and ethical prescription in a bid to curb this power.

In the US to mitigate the ills of the unholy alliance between political power and judicial function the district prosecutor becomes an elective position, hence directly answerable to the local electorate at the ballot box [18] whereas in the UK the attorney is excluded from the cabinet in order to emphasize the necessary independence of that office from party politics.[19] The need to maintain a relative independence between the executive branch of the state and the prosecuting organ is keenly felt that it won't be an overstatement to say that there is a universal consensus on the matter as evidenced in the various policy documents and prosecution guidelines of countries

[13] Worrall, cited above at note 9, p.,6
[14] Fairfax, cited above at note 12, p. 413
[15] Worrall, cited above at note 9, p. 5
[16] Fairfax, cited above at note 12, p. 428
[17] Id p 430
[18] Worrall, cited above at note 9, p.6
[19] Geoffrey Flatman, "**prosecuting Justice**" ,(1996), p.2

around the globe. [20]The united nation guidelines for prosecutors falls short of advocating an institutional separation but emphasizes that prosecutors shall carry out their function impartially and avoid all political discrimination.[21]

The zeal to secure the independence of the prosecutor is counter balanced by the call to hold it accountable since independence without accountability poses an obvious danger to the public interest which requires the fair and just administration of the criminal justice system. Though it may be argued that there is some kind of accountability through the courts, it seems fairly well established however that the prosecutorial process is independent from the judicial process except in exceptional circumstances.[22] Ways that range from compelling the prosecutor to have consultation to elaborate guidelines which details how the prosecutor shall exercise his power of discretion are tried with varying degree of success. It however becomes increasingly clear that the ideals of independence and accountability don't sit well together.

In addition to the institutional arrangements, ethical prescriptions which portrays the prosecutor as dedicated to uncompromising pursuit of justice and impartiality whose interest therefore isn't that it shall win a case but that justice shall be done [23] are employed to guide and influence prosecutorial decision making

Ideally situated in the enviable position to ascertain truth and seek justice [24] It is held that in discharging its functions the prosecutor shall aspire to meet the objectives of fairness, consistency, transparency and accountability.[25]

The tension between independence and accountability is not felt anywhere more than as it does in selective prosecution. Let us try to see this enigmatic concept in some detail.

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[20] Ibid
[21] **United Nations Guideline on the role of prosecutors**,(1990) article 13(a) p.3
[22] Id p.5
[23] BERGER V. UNITED STATES,(sup.ct.,USA,1935) 295 **us** vol.295, p.,88
[24] Lisa D. Williams and Iris Hsiao, "**Sizing up the prosecution; a quick guide to local prosecution"**, (3rd ed. 2010) p 2.
[25] Ibid

2.2 Putting Selective Prosecution In Context

2.2.1 What is selective prosecution?

Some define the concept of Selective prosecution as the enforcement or prosecution of criminal laws against a particular class of persons and the simultaneous failure to administer criminal laws against others out-side the targeted class, based on an unjustifiable standard such as race, religion, or other Arbitrary classification. it might as well be argued that exercising the powers associated with prosecution such as bringing criminal charges, enabling access to diversion programs, dismissing charges, reducing charges, approving deferred prosecutions, negotiating guilty pleas, evaluating defendants' cooperation with the government, and recommending sentences to the advantage or disadvantage of defendants for reasons that range from personal vendetta to racial profiling qualify as some kind of selectivity.[26]

It is a matter of most importance to ensure that the huge power conferred on the prosecuting party isn't used for unjust and discriminating ends since it violates the ideal of equal protection of the law under which the system is premised [27]and ultimately threatens the wellbeing and existence of the society itself in no different way than the very ill it sought to eradicate i.e. crime. In Yick Wo Vs. Hopkins, The US Supreme Court observed that

"though the law itself be fair on its face, and impartial in appliance, yet, if it is applied... with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. [28]

It isn't without reason that the standard against which a prosecution system is judged shall be

"Is the system fair; first in the sense that it brings to trial only those against whom there is an adequate and properly prepared case and who it is in the public interest should be prosecuted ...,

[26] Raising Issues of Race in North Carolina Criminal Cases,(2014), p. 5.3.
[27] Sonja b. Starr and M.m. Rehawi, ''Racial disparity in federal criminal sentences", **j.pol.econ** no 6.vol 122, (2014) p.1328.
[28] Yick Wo V. Hopkins, (Sup. Ct., US,1886) **U.S.** vol.118 p374 (1886).

and secondly in that it does not display arbitrary and inexplicable differences in the way that individual cases or classes of case are treated locally or nationally?....."[29]

However the mere fact that a certain group is over represented in the prison population or the rank of the suspect doesn't imply a malicious intent on the part of the prosecution. It isn't up to the prosecutor to make sure that the felons evenly represent the demography .the problem of rife criminality within a certain segments of the community might constitute a proper discipline for the criminologist but shouldn't interest the prosecutor. it is feared that to let selective prosecution claims based on a showing of disproportionate impact will paralyze the criminal justice system altogether, since almost every rule has some sort of disparate impact.[30]

Selectivity per se isn't prohibited as long as it isn't exercised with the intention of discriminating against a specific group. In Oyler Vs Boles the US supreme court observes that 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification. [31]

In an attempt to maintain the uneasy and often precarious balance between the responsibilities of the government to prosecute criminals and the right of the accused to be accorded equal protection under the law[32]stringent rules which require the claimant to show not only the discriminatory effect of the prosecutorial policy but also that the policy is motivated by a discriminatory purpose are applied. In raising selective prosecution as a procedural defense in which a defendant argues that he should not be held criminally liable for breaking the law, as the criminal justice system discriminated against him by choosing to prosecute, he faces the onerous task of making a prima facie case of showing he is a member of a recognizable, distinct class, that a disproportionate number of this class was selected for investigation and possible

[29] The Government of Australia, The Royal Commission on Criminal Procedure, Report (1981), p.127-8.

[30] Id p.128

[31] Oyler V. Boles (Sup Ct, US 1962), **U.S** vol. 368, p.456

[32] United States v. Armstrong (Sup Ct, U.S 1996) **U.S**. vol. 517, p.456

prosecution; and that this selection was subject to abuse or was a not neutral process[33] before granted discovery in which the burden to prove shifts to the prosecutor.

In nut shell the presumption is that the prosecutor isn't acting with discriminatory intent and to prevail one shall prove not only the objective effects but also the subjective causes. Discovering such intent is often troublesome, as the decisions made by prosecutors generally aren't publically available.[34]

This put the defendant in an awkward position in which he can't get discovery without showing some evidence which can't be obtained without discovery.[35] Due to the lack of objective standards and hard facts that might shed some light to the mind of the prosecutor, uncovering the latter's discriminatory intent relies heavily on circumstantial evidence. In one case the US federal court found discriminatory intention in police officers' custom made t shirt and post cards celebrating arrest of black defendants but not in the white codefendants. [36]But more often than not the authorities have more sense to display such flagrant and self-incriminating behavior thus lodging and winning a selective prosecution claim became next to impossible producing an impasse that arrests equal protection gains of marginalized groups by setting a higher and uncompromisingly intent oriented standards and allow and affirmed bona fide discrimination which scholars argue fails to capture social inequalities that exist regardless of intention.[37]This is especially true with matters of race as it was claimed that traditional notions of intent don't reflect the true state of things, as 'decisions of racial matters are influenced to the large part by factors that are neither intentional in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decision maker's beliefs, desires, and wishes.[38]'

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[33] WAYTE V. UNITED STATES (Sup Ct, U.S 1985) **U.S Sup Ct Rep** vol.470 p.626 (Marshall, J., dissenting).

[34] Raising issues of race, cited above at note 26, p 5.4

[35] Gabriel J. Chin, "Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction", **journal of Gender, Race and Justice** vol. 6 (200), p. 253 and Kristen E. Kruse, "Proving Discriminatory Intent in Selective Prosecution Challenges - An Alternative Approach to United States v. Armstrong" **SMU L. REV** vol.58. (2005). p. 1534.

[36] United States of America v. Jones (US Ct of App, sixth circuit, U.S 1998)**,F.3d** vol.159 p. 969.

[37] Theodore Eisenberg, "Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication", **New York University Law Review**, Volume LII,(1977) P.36.

[38] Charles R. Lawrence "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism", **Stan. L. Rev** vol.39 (1987),p. 322.

Saphir proposes that a similarly situated individuals test which he argues will be sensitive to inequalities and biases that exist regardless of discriminatory intentions and rendered irrelevant impossible tests of proving intentions shall at least in cases of racial selection replace the current intention based standard to determine the existence of selective prosecution. This model will have two stages in the first stage the defendant shall prove that another similarly situated individual isn't prosecuted. Such showing by the defendant (that was not refuted by the prosecution) will shift the burden to the prosecution to disclose the full data with regard to people who were involved in conduct similar to the defendant's conduct, including racial profiles of suspects who were and were not prosecuted. The prosecution will have to show, using these data, that there has been no discriminatory practice…….. A failure to disclose all relevant data, or a failure of the data to demonstrate that there is no correlation between the race of the defendant and the decision to prosecute, will result in victory for the defendant.[39]

The Sapir model may arguably offer a better standard for racial groups but help little to clear the controversial concept of 'others' in light of the inconceivable ways people identify themselves and define the similarly situated others against whom they compare themselves in Armstrong, Wayte Vs. US , the defendant was charged with knowingly and willfully failing to register for the draft with the Selective Service .The defendant moved to dismiss the indictment on the ground that he was selectively prosecuted, since he and the other thirteen "vocal" opponents of the registration program were targeted out of an estimated 674,000 non-registrants. [40]In another case worth mentioning the defendant argues that he was singled out due to his outspoken support for a certain candidate in a presidential race.[41] For want of a better alternative the phrase "a recognizable, distinct class" shall be interpreted narrowly and in case by case basis if a ridiculous but conceivable preposition like 'I am singled out because I m a blonde while people with a black hair weren't' is to be avoided.

We might illuminates the matter by discussing in some detail, the various facets selective prosecution assumes in different types of cases and the interplay between the prosecutors' interest and the defendants position in each

[39] Sapir cited above at note 3 p.147
[40] Wayte V. United States (Sup Ct U.S 1985**) U.S Sup.Ct. Rep** vol.470 p. 604.
[41] United States v. Berrios (US Ct of App. , 2d Circuit, 1974**) F.2d** vol.501 p.1209.

2.2.2 Selective prosecution and its varying application

2.2.2.1 Organized crimes, targeting the big fishes

Organized crime perhaps deserves the title the most dangerous criminal activity, both in the catastrophic damage it causes and the relative hardship of bringing those involved into justice. Drug trafficking, money laundering, operating gangster groups and prostitution falls in this category. Due to the conspiratorial aura and the underground nature of the crime the law enforcement lists it as its priority. But don't found tackling it easy. Often witnesses don't come forward and even when they do they are scared to death that the organization's invisible hand might fall on them or their loved hands. Documentary evidences are hard to found and even harder to make the incriminating connection.

In such cases the prosecutor's case relies heavily on insider testimony. For this reason an elaborate witness protection schemes are devised and implemented to protect and assure the safety of the invaluable witness. Prosecutors' also used their discretion to grant immunity or deal very leniently with those who offer to give their testimonies on their bosses, i.e the most significant offender whose convictions is considered more important, both for the public interest and the individual career of the official, than the rank and file of the group. Such selectivity is justified since the offender is helping the law to have its way hence deserves lenient treatment to encourage others to come forward.

The selective treatment between the cooperating felon and the unrepentant and dangerous don might be justifiable. But what happens When a group of 'similarly situated individuals' is suspected of having committed various degrees of the same offense, and when the prosecutor only pursue the individual suspected of having committed the most serious offense. [42]Decisions in such cases are mixed. Some courts justified prosecution on the highest charge of certain individuals for the sole purpose of discouraging other people from committing the same offense. As one court noted, "Selective enforcement may...be justified when a striking example or a few examples are sought in order to deter other violators" [43] in State v. McCollum on the other hand a Wisconsin court dismissed prostitution charges against nude female dancers. In its decision, the

[42] John L.Worrall, "**Criminal Procedure: From First Contact to Appeal**", (2nd ed.2007), p 317.
[43] People v. Utica Daw's Drug Co, (Sup Ct of the NY, U.S 1962) **A.D.2d** vol.16 p. 21.

court pointed out that the male patrons of these dancers were not charged, even though Wisconsin law criminalized their behavior, as well.[44]

2.2.2.2 Collective crimes; putting a face to a ghost

There are some kinds of crimes in which it isn't possible to lay a hand or to point a finger to all the perpetuators due to the great number of participants. The classical examples are war crimes and genocide which currently undergo a process of individualization through international tribunals Fletcher claims that "something curious occurred in the nature of these offenses when they became the basis for individual liability at the International Criminal Court: they were subtly transformed into collective offenses." In such circumstances the cherished principle of individual responsibility waned away as the act for all practical purposes can't be conceived and carried out by a single individual or a group of individuals in their individual capacity. It might be argued with some force that the individuals involved can't be held personally accountable because it is virtually impossible to identify their part from the total magnitude of the act. Here is a scenario in which whole communities rise in defiance against the law, and some individuals are held accountable for the whole mess while others equally guilty goes unscratched. The obvious defense for the prosecutor is the lack of evidence and the physical impossibility of bringing everybody involved to justice.

The criminal system doesn't afford to drop the whole case and pretend it never happened.it needs to send a clear message for those who might try the same thing that such behavior can 't go unpunished even though the punishment may not be in accord with the requirements of justice

2.2.2.3 Prosecution or persecution; going for the easy prey

We have already seen how the specific characteristics of a crime necessitates even justify selective prosecution. However it isn't only the question what is the crime? But also who is the defendant? That matters. In spite of the widespread inequality in social and economic standing, racial and ethnic differences and the distance from political power that any state can't deny, selective prosecution on the basis of these differences isn't supposed to exist and unanimously

[44]State v. McCollum (Wis. Ct of app, Wisconsin,U.S 1990)159 **Wis**. 2d vol.159 p.184 and P. Fletcher and Jens David Ohlin, "***Defending Humanity: When Force is Justified and Why"*** (2008),p 186-187.

condemned when it occurs. It is selective prosecution proper in a sense that it exhausts the features of the concept and is the most favorite form most often invoked by defendants who attributes their singling out to their membership to ethnic minorities, their past record as habitual felons, political opinions, or personal animosity with those who has the power to make decisions. We will see how such black sheep of the prosecution is faring in the course of this study

2.2.2.4 Unaccounted crimes; pre textualizing

Prosecutors might fail to connect a certain crime to the suspect even though they are convinced of the latter's guilt. In such cases since they don't have the sufficient proof for the crime they resort to another charge in which they are confident to secure conviction. However, prosecutors are rarely chastised for this type of conduct. For example, in US Vs Sacco, a court noted that allowing a prosecutor to pursue lesser charges when the evidence to mount a more serious charge does not exist is perfectly acceptable.[45]

2.3 Naming a defendant; A Prosecutor's Dilemma

2.3.1 Discretionary prosecution; striking a balance between justice and cost

The first and most consequential discretionary decision a prosecutor makes is the charging decision. Determining whether to charge a suspect, and with what charge, has been described as "the broadest discretionary power in criminal administration.[46] As laws proscribing criminal conduct and sentencing enhancements expand, so too does the prosecutor's discretionary charging and plea bargaining power.[47] Even in states where the prosecutor is under a legal duty to prosecute, the need to commit the resources of the state on more serious crimes gives some room for limited discretion.

The pursuance of every charge would sap the prosecutors' energy and drain much needed resources that might be employed in systematic tackling of crime. Moreover too many acquittals are bound to call into question respect for law and the validity of the processes of the courts which in turn calls for a practical judgment to be made as to the sufficiency of the legally

[45] United States V. Sacco (US Ct of App. 9th Cir U.S 1970) **F.2d** vol.428 p 164 ,1970.
[46] Raising issues of race cited above at note 26 , p 5.2
[47] Ibid

admissible evidence. The prosecutor as a party who presents the case and sought conviction in a court insists on making those judgments hence prosecutorial discretion.

'It is now generally accepted that there are two fundamental considerations involved in any decision whether to prosecute. First, is the evidence sufficient to justify a prosecution, Secondly, is a prosecution required in the public interest. It is the first of these considerations that has occasioned prosecuting authorities the most difficulty in articulating a test which is principled but at the same time workable. How much evidence must there be before a prosecution will be justified; is a prima facie case sufficient, or is more required and if so, what? The standard of sufficiency of evidence was, first, that there should be a prima facie case and, secondly, that "a prosecution should not normally proceed unless there is a reasonable prospect of conviction" The second consideration in the decision whether to prosecute is whether a prosecution is warranted in the public interest. However, this consideration does not arise unless the prosecutor is first satisfied that there is a reasonable prospect of securing a conviction on the available evidence. No matter how compelling the public interest factors in favor of proceeding with a prosecution, they are irrelevant unless there is sufficient evidence to justify a prosecution.'[48]

The second test which prescribes that the decision to prosecute shall be in the public interest is a dominant consideration in the decision whether to prosecute in the sense that, although there is sufficient evidence to support a prosecution, nevertheless a prosecution should not proceed unless that is warranted in the public interest. The public interest consideration consists not only of those factors which may tend against proceeding with a prosecution although there is sufficient evidence available but also those factors which favor proceeding with a prosecution.[49]Within the broad framework of evidential sufficiency and public interest consideration the prosecutor enjoys unchallenged discretion to press charges or dispose of them. However, '…he is forced to make decisions under time and information constraints that preclude knowledge of alternative courses of action and future outcome. This uncertainty leads him to search for satisfactory rather than optimal solutions in his decision making."[50]

[48] Michael Rozenes QC ; **Prosecutorial Discretion in Australia today** (1996) , p 8.
[49] Id p. 11
[50]Lauren O'Neill Shermer, and Brian D. Johnson, 'Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts', **Justice Quarterly** (30 April 2009) p.9.

This obsession with certainty leads to a near universal aversion for trial cases because "more than anything else, trials produce uncertainty. [51]The uncertainty is exasperated by the prospect of a lengthy and costly trial as a result prosecutors are determined to get done with as much cases as possible through plea bargaining .

Negotiating guilty pleas is an important discretionary power of the prosecutor as the charging decision 'The impact of prosecutorial discretion in plea bargaining is magnified by the fact that the vast majority of criminal cases are resolved by plea agreements, which are rarely reviewed on appeal.[52]The guilty plea process involves a recursive decision-making process between the prosecution and defense counsel, which includes recurrent patterns of assessing the initial plea offer, negotiating the terms of the plea bargain, and settling on a final outcome.[53] Given time and information constraints, prosecutors are likely to employ decision-making shortcuts throughout case processing that tie offender characteristics, like age, race, and gender, to assessments of blameworthiness, community protection and practical case considerations. [54]This tendency is reinforced by the revolving door relationship between the parties involved ,that is the prosecutors and the defense counsels which was'…. embedded in local legal culture, shared value orientations, implicit behavioral expectations, and normative case processing strategies.[55]

Between themselves the charging decision and plea bargaining constitutes the prominent part of prosecutorial discretion and "almost predetermines the outcome of a criminal case, because the vast majority of criminal cases result in guilty pleas or guilty verdicts."[56]

Recapitulating the cost and certainty considerations involved in prosecuting every breach of the law defies even the huge resources of the state and makes some degree of selectivity in charging decisions and settling cases through plea bargaining imperative. Prosecutors being weary of uncertain and costly court proceedings increasingly opt to exercise their discretionary power to dispose cases through regressive requirements of evidential sufficiency and public interest

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[51] Ibid
[52] Raising issues of race, cited above at note 26, p 5.4.
[53] Shermer and Johnson, cited above at note 50 p 9.
[54] Ibid
[55] Ibid
[56] Angela J. Davis, "*Prosecution and Race: The Power and Privilege of Discretion*" **FORDHAM law Review**, vol. 67, No. 13, (1998) p.70.

considerations or through guilty plea processes to the degree that the fate of most cases is decided by these discretionary decisions, in the process 'creating a potential for bias to inter in and generate disparate outcome for similarly situated defendants'.[57]

2.3.2 Who shall see a court room? Choosing among villains

'Prosecutors, like other organizational actors, are faced with uncertainty that may lead them to develop decision-making schema that incorporate past practices and reflect the subtle influences of social and cultural stereotypes in society. These stereotypes emerge through an attribution process that links prosecutorial concerns with community safety to individual characteristics like race, ethnicity, age, and gender. According to this perspective, prosecutors are likely to develop "perceptual shorthand" that tie attributions of dangerousness to the ascriptive characteristics of offenders and their victims. Over time, social inequities may become routinized in decision making schema predicated on the assumption that past practices produced acceptable results'.[58]

This stereotypical attribution of prosecutors coupled with their vast discretionary powers perpetuates the unequal treatment of marginalized groups who stand to lose by such ascription. Harboring the notion of association of guilt with predefined character trait, prosecutors instinctively act upon them when confronted with such defendants and victims. In the face of deep rooted stereotypes the actual culpability of the defendant pale in significance. O'Neill et al hold that 'prosecutorial decision-making is guided by a set of focal concerns such as offender dangerousness and culpability ….. Importantly, though, the relative evaluation of these concerns is colored by an attribution process that links past behavior and social stereotypes to future outcomes.' [59]research concludes that young, male and minorities may be particularly unlikely to receive favorable charging treatment from U.S. Attorneys. Moreover, joint constellations of certain offender characteristics may result in compounded disadvantages for some defendants [60] hence young black male incurs much more wrath than white male or a Latino girl.

In addition to the blameworthiness and dangerousness of the defendant which is marred by stereotypical perceptions the chance of obtaining conviction is a major factor that influences the

[57] Raising issues of race, cited above at note 26, p5.3
[58] Shermer and Johnson, cited above at note 50 p. 9-10
[59] Id 11
[60] Id 12

decision of the prosecutor to pursue charges. largely measured in terms of favorable conviction rate prosecutor concerns about the practical consequences of charging decisions focus on the likelihood of conviction rather than the social costs of punishment.[61]

2.4 The Right to Equality

2.4.1 The meaning and status of the right of equality under international law

Modern state and society, unlike its predecessors which institutionalize the social and economic asymmetry of their members, not only affirms the equality of all human beings, but claims it to be self-evident and inherent to their nature. Thus maintaining and extending equality becomes the corner stone of the socio political order and the telling feature of a good society. Recognized as a cardinal element of universal human rights, it fosters the rise and consolidation of international human rights regime as a vanguard of human rights from the encroachment of national states. Hence the most important academic discourse and jurisprudence of the concept presupposes and remains entrenched to the international covenants and their legal apparatus.

Although acclaimed as self-evident or because of it no clear definition of the term is offered in the major international human rights documents (ICCPR or UDHR).equality is often portrayed as the absence of discrimination. It is widely accepted that equality and non-discrimination are positive and negative statements of the same principle. In other words, equality means the absence of discrimination, and upholding the principle of non-discrimination between groups will produce equality.[62] This admittedly negative definition leaves us with the equally troublesome question what is discrimination? From the various conventions that deal with the concept a universal 'composite concept of discrimination' emerges which contain the following elements

"… Stipulates a difference in treatment and has a certain effect which is based on a certain prohibited ground".[63]

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[61] C.BEICHENER D SPHOHN.,& FRENZEL,E DAVIS, **prosecutorial justification for sexual assault case rejection; guarding 'the gate way to justice** (2001) p.207.

[62] Li Weiwei, **Equality and Non-Discrimination Under International Human Rights Law**(2004) p 7.

[63] Compare id 8, and CERD art 1 CEDAW art 1.

By a differential treatment we mean any unjustified distinction, exclusion, restriction or preference directed against the group alleging discrimination, or resulted from unreasonable promotion of one group at the expense of others. It is clear that not all differentiation of treatment constitutes discrimination under the Covenants. The Human Rights Committee has stated in General Comment No.18 that differentiation of treatment is permissible if: (1) the goal is to achieve a legitimate purpose; (2) the criteria for such differentiation are reasonable and objective.[64] That means there must be a legitimate aim and a reasonable relationship of proportionality between the legitimate aim and the discriminatory measure under review.

For the act to qualify as discrimination the deferential treatment must result in a disparate or disadvantageous effect on the group concerned. Such emphasis on effect contrasts with the purpose oriented approach and signals the end of the latter as a determining factor to establish discrimination. 'Consequently a discriminatory intention is not a necessary element of discrimination. The emphasis on the 'effect' of policy rather than the intention means that neutral measures will be considered 'discriminatory' if in fact they negatively affect a group.'[65]

The recurrent grounds in major international conventions on which making discrimination is forbidden include race, gender, color, language, religion, political or other opinion, national or social origin, property, birth or other status. [66]Whether the list is exhaustive or enumerative remains open to debate. Some claim that the phrase other status is meant to incorporate unstated grounds that range from refugees to the elderly and persons with disability, making in essence the ground on which the distinction is based, unnecessary to ascertain the existence of discrimination.[67]Whereas others maintain that the list is exhaustive and the phrase other status shall be interpreted as referring to distinct identifiable group in the sense and spirit of the other categories rather than as any ground which they argue would effectively undo the very existence of the list.[68]

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[64] http://www.unhcr.org/ last visited on July 24, 2016.
[65] Weiwei, cited above at note 55,p 10.
[66] Universal declaration of human rights (1947) art 2, **International covenant of civil and political rights (1966) art 2(1)and art26,International labor organization Convention,** no 111.
[67] Weiwei cited above at note 55, p 13
[68] **Human Rights Committee General Comment No. 18.**

Bearing the above discussion in mind we can safely conclude that the meaning of the right to equality under international law as the absence of unjustified differential treatment based on prohibited grounds which have a nullifying and impairing effect regardless of malicious intent. However to which rights and degree that such non discriminate treatment should be extended? do we have to understand that every action of the state shall be impartial? the collective reading of article 2 of ICCPR which reads "each state party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" and article 26 of the same document that prescribes "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political range from refugees or other opinion, national or social origin, property, birth or other status" makes clear that the right to equality contains the non-discriminate enjoyment of human right that are enumerated and recognized as such by international human rights law and the prohibition of any discrimination based on the specified grounds on the equal treatment of the law and equality before the law.

Both Articles 2 and 7 of the UDHR and Article 2(1) of the ICCPR mandate non-discriminatory treatment only in so far as the rights set out in the respective human rights instruments are concerned. Although they guarantee one important civil right to all persons on a non-discriminatory basis, they cannot be read to constitute a general norm of non-discrimination invocable in other contexts, but rather limited to the rights considered in the instruments."[69]

Article 26 of the ICCPR on the other hand provides an autonomous right of equality. This means that Article 26 may be violated although no other right in the Convention is violated or applicable,[70]which effectively extends the right to equal protection of laws to legislations beyond those guaranteed in the covenants .in the brooks case the human rights committee upheld that "though the provision *does not, for example, require any states to enact legislation to provide*

[69] The International Convention on the Elimination of All Forms of Racial Discrimination, Vol. 15, 1966.
[70] Weiwei cited above at note 55 p 17.

for social security. However, when such legislations are adopted in the exercise of a state's sovereign power, then such legislation must comply with Art. 26 of the covenant,"[71]

2.4.2 Equality before the law and its implication to criminal prosecution

UDHR Article 7 reads: "All are equal before the law and are entitled without any discrimination to equal protection of the law." Almost identical language is found in the first sentence of Article 26 of the ICCPR. "Broadly speaking, two quite different meanings seem possible: that the substantive provisions of the law should be the same for everyone; or that the application of the law should be equal for all without discrimination. The former interpretation would seem unreasonable; for example, in most countries women are not required to perform military service, while it is unnecessary that the law should prescribe maternity benefits for men. It would seem therefore that the meaning rather is to secure equality, without discrimination, in the application of the law, and this interpretation is borne out by the travaux preparatoires" [72]this view with its rejection of any privileged status and uncompromising uniform applicability of laws regardless of the individual differences represents the traditional ideal as symbolized by the famously blindfolded lady of justice. it must be admitted that such formalistic approach by no means exhausts the meaning and significance of equality before the law since it ignores the vast inequalities prevalent in society and it must be counterbalanced by a Kantian ideal which holds that the law ought not only to avoid creating new inequalities, it must also play a crucial role in *securing* the equality of all in the first place. [73]

It may seem obvious that justice in the criminal law *must* mean equal treatment of all offences. This retributivist conception was associated with a strong conception of the imperative of equality before the criminal law: Offenders who had committed equally blameworthy acts should suffer punishments of equal magnitude.[74] But such offence egalitarianism is challenged by a felt need to individualize which maintains the difference between individual offenders hence

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[71] Project group of NCHR,CUPL and FAC ***Textbook on International Human Rights Law*** (2002) p. 389.

[72] A. Robertson, ***Human Rights and the World***, *(*1972), pp. 86-90.

[73] Malcolm Thorburn, **Rethinking the Philosophical Foundations of Substantive Domestic Criminal Law two Conceptions of Equality before the (Criminal) Law** , p 8.

[74] James Q. Whiteman, "Equality in Criminal law: the two divergent western roads", **Journal of Legal Analysis** Volume 1, Number 1, 2009, p. 124.

justifying unequal treatment [75]what the latter lacks in egalitarian appeals it gains in pragmatic demands of justice. The ensuing struggle between the two contrary views can best be witnessed in the area of discretion. The former's attempt to eliminate official discretion from the criminal justice system as a threat to equal treatment is frustrated by its reintroduction at a different phase of the system the curbing of judicial discretion is bound to strength prosecutorial discretion.[76]

Coming to terms with the unavoidability of discretionary power the egalitarian movement sought to spot where the greatest threat to equality lies the American legal system perceives the post-conviction phase as the one where un egalitarian factors lurks their way into the system. Therefore it develops a sentencing guideline which aims at eliminating inappropriate variations in sentencing and makes equality of punishment the rule and engages in eliminating parole or cabin the discretion of parole boards. [77] In doing so it unwittingly strengthens prosecutorial discretion and neglects the biasing potential of the pre-sentencing phase.

"Whereas the continental (European) system generally choses primarily to pursue equality by limiting discretion at decision points, charging, investigation, arrest, and detention. Consequently, while the contemporary Continental systems have evolved few measures intended to combat discretion in punishment, they have developed many measures intended to cabin prosecutorial discretion."[78]

2.4.3 Selective prosecution; treating equals unequally?

The most important contribution of the discourse on equality to the theory of selective prosecution is the emphasis on impact rather than purpose. The international covenants that altogether replaced or made subordinate the requirement of intent in favor of effect to define discrimination precludes the hitherto unrivaled status of the former in domestic jurisdictions.it is the view of this author that the cumbersome intent oriented standards required of the defendant to prove the existence of discriminatory motive on the part of the prosecutor can no longer be held on the face of these international instruments.in his dissenting opinion in the south west

[75] Id 125
[76] Id 126
[77] Id 128-129
[78] Id 136

Africa cases Judge Tanaka explains what was in his view a customary interpretation of the international law discrimination based on race, found that different treatment is permitted he said

> "When it is just arbitrariness which is prohibited, means the purely objective fact and not the subjective condition of those concerned. Accordingly, the arbitrariness can be asserted without regard to motive or purpose"[79]

In addition to effectively discarding motive as the main standard of discrimination the international jurisprudence that evolve around the right of equality offers instructive insight into the justified bases of differential treatment that can qualify as legitimate, by requiring states to prove the existence a legitimate aim and a reasonable relationship of proportionality between the legitimate aim and the discriminatory measure under review.[80]This view has a far reaching implication on selective prosecution claims by limiting the prosecutor's defense in differentiating between defendants to those justified under international law.To sum up by the process of universal ratifications and through the customary international law status it enjoys, the right to equality as recognized under international human right covenants, found its way into domestic legal regimes causing important alterations to the concept of selective prosecution.

[79] *South West Africa Case*, Second phase, **I.C.J Report**, (1966).
[80] Human rights committee comment, cited above at note 61

CHAPTER THREE

The defense of selective prosecution in different jurisdictions a comparative study

3.1 Selective Prosecutions at National level*

3.1.1 USA

In Yick Wo V. Hopkins, the U.S. Supreme Court struck down a San Francisco ordinance that prohibited the operation of laundries in wooden buildings. San Francisco authorities had used the ordinance to prevent Chinese from operating a laundry business in a wooden building. Yet the same authorities had granted permission to eighty individuals who were not Chinese to operate laundries in wooden buildings. Because the city enforced the ordinance only against Chinese-owned laundries, the Court ordered that Yick Wo, who had been imprisoned for violating the ordinance, be set free.[81]

Since Yick Wo V. Hopkins the US supreme court developed a considerable jurisprudence on selective prosecution claims based on the 14th amendment of the constitution which prohibits singling out defendants from potential culprits on the ground of race, gender or other inadmissible grounds as a threat to equal protection.

Scholars and jurists engaged in a century old effort to come up with a right formula which entertain such claims without risking a total collapse of the criminal system that culminated in US V Armstrong which set a two prong standard requiring claimants to show the prosecutorial policy has both a discriminate effect and motivated by a discriminatory purpose to be proved by some evidence testifying similarly situated individuals of a different race could have been prosecuted but were not.[82]

The satisfaction of this test will lead to the shift in the burden of proof to the prosecutor who would then be ordered to discovery, which requires the latter to reveal evidence in its possession

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* *The fact that USA and Ireland are selected as examples in this chapter shouldn't be construed as implying selective prosecution is more prevalent in these countries than others. the selection has to do with the availability of data in the states.it is also aimed that USA will show the practice in common law tradition and Ireland that of the civil law*

[81] Yick Wo V. Hopkins cited at note 28.

[82] U.S V.Armstrong cited at note 32, p469.

to the inspection of the claimant/defendant. The failure to comply with a discovery order may result in dismissal.[83]

To prevail on a selective prosecution challenge, a defendant must first make a prima facie showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not. State v. Rogers, 68 N.C. App. 358, 367 (1984)" A defendant alleging "that he has been selectively prosecuted . . . must establish discrimination by a clear preponderance of proof. [84]

Contrary to the customary 'beyond reasonable doubt test' applied to conviction or the shade of reasonable doubt to determine innocence.

The claim of selective prosecution should be raised pretrial or it may be deemed waived. [85]

3.1.2 Ireland

The Director of Public Prosecution is granted special protection from the intrusion of courts in exercising his discretionary powers to initiate charges. Once there is a reasonable possibility that a valid decision has been made by the Director not to prosecute, or to prosecute, a decision by the Director is not reviewable by the High Court. Review in the form of discovery is permissible only when there is evidence suggestive of an impropriety on the part of the DPP*.[86]

In Dunphy [a minor] -v- Director of Public Prosecutions, the applicant was aggrieved at the DPP's decision to prosecute her in circumstances where her co-accused had been given the benefit of the juvenile diversion program. She sought discovery of documents touching on the decision to prosecute. The Supreme Court refused the application and stated that, where the "special protection" was relied on by the DPP, a special evidential standard rested on the applicant. [87]

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*Director Of Public Prosecutor of Republic Of Ireland

[83] People V. Ochoa, (Ct.App.California, U.S.A 1985) **Cal. Rptr .**vol.212. p 4.

[84] State V. Pope,(N.C. App.Ct. North Carolina,U.S.A 413, 2011) **U,S Sup.Ct.Rep** vol.413 p.415–16.

[85] People V. Carter (N.Y. App. Div.New York, USA 1982). **, N.Y.S**.2d vol. 450203.

[86] (Unreported, High Court 2005) (Charleton J.) as quoted in Micheál O'Higgins, **Reviewing Prosecution Decisions** (2008) p 15-18.

[87] Ibid

A motion on the DPP's decision whether to prosecute or not, including on grounds of selective prosecution must show that it infringes the constitutional principles of fairness and fair trial and is motivated by mala fide or influenced by an improper motive or improper policy.[88]

3.2. Selective prosecution before international tribunals

3.2.1. The Nuremberg trials

Nuremberg is epoch making since it was the first international tribunal of its kind which claims and assumes competence to try individuals. the fact that the whole process is characterized by a hastily prepared charges which are drawn from an ill-defined and obscure if not practically nonexistent international laws and judges composed entirely from the victor nations of the world war, didn't undermine the trial's role in setting precedent to subsequent international tribunals.

It was complained that the crimes were just picked out of thin air. The charges could have been drawn up by some poet or philosopher, for no specific item of legislation, passed by any specified legislature, was alleged to have been broken. [89] The treaties based on which conviction was sought for the crimes of crimes against humanity, crimes against peace, conspiracy to wage war and war crimes are far from clearly prohibiting such acts [90]and the status of the London agreement which establishes the court to try crimes retroactively [91]lends credence to the claim that the whole process was a farce designed to air the appearance of justice for the vendetta of the victors.

However nothing made a lasting damage on the reputation of the Nuremberg trials than their blatant selectivity.it was convincingly and horribly laid out that the nations who through their representatives pretend to try these cases were equally guilty of the same atrocities. Every single one of the charges could have been equally well laid at the Allies door. During the course of the war the allies had engaged in planned and actual invasion of neutral sovereign nations, bombing of cities and other civilian targets. Summary execution, ill treatment and forced labor of war

[88] Ibid

[89] Richard Harwook; **Nuremberg and other war crime trials a new look**, 1978, P.57.

[90] George A.Finch "Nuremberg trial and international law"; the **American journal of international law,** vol 41 no 1(jan 1947) p 6.

[91] L.C. Green, **The Contemporary Law of Armed Conflict**, 1993, p 39.

prisoners and keeping concentration camps.[92] The frantic attempt which led the allies to confine the jurisdiction of the court to those individuals and organizations associated with axis powers [93] only helps in revealing the apparent double standards. Their embarrassment lest their part might be disclosed was such that "Only one tu quo que (thou also) argument was allowed during the defense case, in relation to the less contentious issue of submarine warfare. The defense was not allowed to raise any arguments based on the Versailles Treaty, Soviet atrocities, Allied bombing, the expulsion of German settlers or maltreatment of German POWs"[94].

The Nuremberg trials also were selective in another sense. The defendants were handpicked from potential culprits in a singularly unconvincing manner. 'The defendants had been arbitrarily selected according to a list thrown together by the Soviets at Potsdam. Because Himmler was dead, Kaltenbrunner was drafted in in his place. When Kruppwastaken ill, the Americans wanted to "field" his son instead. [95]

3.2.2. Tokyo trials

The wake of the Second World War witnessed another trial. "The problem that has incited most criticism is that of "comfort women." No crimes against "comfort women" were prosecuted in the Tokyo Tribunal or in any national tribunals except for one national trial against the crime of raping Dutch "comfort women" by Japanese occupiers of Netherlands' Indonesian colony. Another controversy about the trial concerns the biological and chemical weapons experiments on humans. U.S. prosecutors granted immunity to those involved with Unit 731 and the Japanese use of biological and chemical weapons was exempted from prosecution. Exclusion was also applied to a third category of offenders, including the heads of dreaded Kempeitai (Japan's Gestapo), leaders of ultra -nationalistic secret societies, and industrialists who had profited from the aggression. [96] The familiar argument of selectivity based on the utter lack of charges on the

[92] Harwook cited above at note 89, p 57-58.

[93] Charter of the trial article 6 as quoted in **INTERNATIONAL MILITARY TRIBUNAL (NUREMBERG) Judgment of 1 October 1946** p.14

[94] Harwook, cited above at note 89, p58

[95] Ibid

[96] Zhang Wan Hong ; "FROM NUREMBERG TO TOKYO: SOME REFLECTIONS ON THE TOKYO TRIAL" **CARDOZO LAW REVIEW**[Vol. 27:4) p 1675-1676.

winners' side was also invoked and led to posterity's view of the trial as a Far East version of Nuremberg plagued by the shortcomings of the latter.

3.2.3. International criminal tribunal for the former Yugoslavia

The ICTY is created by United Nations Security Council Resolution no 827 in 1993 to prosecute and adjudicate war crimes, crimes against humanity, and genocide committed in the territory of the former Yugoslavia on or after January 1991 [97]established with the blessing of the Security Council, some acclaimed it as the first truly international court. [98]

Truly international or not its performance during its protracted existence of over two decades falls short of being satisfactory with regard to selective prosecution. The tribunal's fixation with local offenders while turning a blind eye to NATO atrocities attracts criticism. For each indictment of Serbian commanders with respect to murder, wanton destruction of civilian property, war crimes and prima facie war crimes, a comparable case can be made on NATO generals but no NATO commander or pilot faces trial. ICTY established a committee to review NATO bombings only to conclude that there should be no investigation on the latter's use of cluster bombs[99]. The tribunal also prefers to assume an apologetic stand with NATO bombings of civilian targets and the subsequent killings of non-combatants by insisting that it was an incidental aim of disabling the Serbian military command and control system.[100]

The US meddling in the tribunal's affairs by arbitrarily refusing or rendering of information and openly threatening individuals by indictment in ICTY [101]informs us the magnitude of the former's influence and the subsequent selectivity inherent in the latter. Particularly noteworthy is the fact that while the Prosecutor has been reported unable to indict Croatian generals for the 1995 ethnic cleansing of the Krajina because the U.S. government has refused to provide

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[97] Patricia M. Wald, "The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court**"** **Journal of Law & Policy** undated Vol. 5:.P.87.

[98] Fatou Bensouda et al, The **ICC and the Yugoslav Tribunal: Upholding International Criminal Law**?, (2014)P.6.

[99] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia p 74,75.

[100] Id, p.76.

[101] Robert M. H ayden; **Biased Justice: Human rightsism and the International Criminal Tribunal for the Former Yugoslavia,**(1999) P.560

requested information, it and the British were more than happy to cooperate with the indictment of Milosevic. [102]

ICTY was hailed for its recognition of rape as a war crime and indict and convict perpetuators on that account. The so called foca indictment is worth noting in this regard.[103]Despite these few high profile convictions and indictments the Trial was accused of selectivity over 20,000 women were the victims of rape," but, as of January 12, 1999, only seventeen accused perpetrators were awaiting either arrest or the completion of their proceedings. [104]

3.2.4. International criminal tribunal for Rwanda

In the aftermath of the genocide, the UN and the international community which had dismally failed to prevent or stop the massacres – thought that a creation of an ad-hoc criminal tribunal for Rwanda would restore peace and stability in the region, and contribute to national reconciliation in Rwanda [105] Although the trial managed to indict and convict the major figures in the genocide it was severely criticized because it fails to prosecute members of the then rebel Rwanda patriotic forces, precursors to the incumbent government. [106]There is a plethora of reports and documents evidencing the horrendous massive human rights abuses and serious violations of international humanitarian law by the Tutsi ex-rebel movements. This policy of 'selective justice' has attracted many criticisms from Rwandans, particularly Hutus, who see the ICTR as a form of victor's justice. [107]

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[102] Raymond Bonner, "War Crimes Panel Finds Croat Troops 'Cleansed' the Serbs**", N.Y. TIMES**, March 21,1999.

[103] Kate Nahapetian, "Selective Justice: Prosecuting Rape in the International Criminal Tribunals for the Former Yugoslavia and Rwanda", **Berkeley Journal of Gender, Law & Justice**, volume 14 issue 1, p 130 (1999).

[104] Id p 132

[105] Francois-Xavier Bangamwabo **International criminal justice and the protection of human rights in Africa** (2009)p 107.

[106] Leila Nadya Sadat, "Trans judicial Dialogue and the Rwandan Genocide: Aspects of Antagonism and Complementarity**" LEIDEN J. INT'L** L. (2009) vol. 22 p 546.

[107] Bangamwabo cited above at note 105 p 111.

3.2.5. The special court for Sierra Leone

The mixed result from international ad hoc tribunals and the growing distrust on the ability of domestic courts to try suspects and successfully bridge differences in post conflict phases led the international community to experiment with a hybrid model which blends the institutional apparatus and laws of both the international and the domestic arenas.

The special court for Sierra Leone has been established following this model. The statute of the court made it clear that its competency shall be limited to prosecuting persons who bear the greatest responsibility for serious breaches of international humanitarian law and domestic law,[108]Which allows the court to try a remarkably low number of cases but also raise concerns it will not be able to bring a measure of accountability for the crimes that matches the level of the human rights catastrophe that occurred, that the people of Sierra Leone need, and that the victims deserve? [109]However the court is praised for bringing into justice leaders from all warring factions, including to the dismay of some, the civil defense forces. [110]

3.2.6. The special court for Cambodia

Although the extraordinary chambers in Cambodian courts(ECCC) isn't able yet to try many cases to assess its bearing on selective prosecution concerns are growing that due to the highly irregular nature of ECCC's criminal procedure which doesn't include the principle of non bis in idem(a person cannot be tried for something for which he or she has already been convicted or acquitted).which is relevant to the case of a former Khmer Rouge leader, Ieng Sary, who was tried and convicted, albeit in controversial circumstances [111]and the Cambodian policy of granting pardons and amnesties for those surrendering to the government which aren't in accord with the international community's expectation that no amnesty shall bar the prosecution of genocide and war crimes will inevitably result in inconsistent and selective justice. The government feared that the UN standards might result in the trial of more Khmer Rouge

[108] **STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE**, Article 1.

[109] Human Rights Watch report "**Bringing Justice: the Special Court for Sierra Leone Accomplishments, Shortcomings, and Needed Support"** (2004), Vol.16, No. 8(A) p 2-3).

[110] Charles Chernor Jalloh, "Special Court for Sierra Leone: Achieving Justice?" **MICH. J. INT'L L.**vol 32 (2011) p. 425.

[111] SUZANNAH LINTON, "CAMBODIA, EAST TIMOR AND SIERRA LEONE: EXPERIMENTS IN INTERNATIONAL JUSTICE" **Criminal Law Forum** vol. 12,(2001) p 199.

members than the former was willing to try. The continued political instability in Cambodia might not allow for such a sweeping measure. [112]

3.2.7. The Special court for East Timor

The Special court for east Timor is criticized since it involved mostly relatively low level defendants. albeit the promise of its founding legislation which confers on the panel the exclusive jurisdiction on serious criminal offences, the high profile defendants, most of them Indonesian officers eluded indictment and responsibility due to the Indonesian refusal to extradite its nationals. [113]

3.3. The two tales of ICC; the champion of the defenseless or the symbol of discrimination

The international community toyed with the concept of international criminal tribunal endowed with the jurisdiction to try serious atrocities deemed to be a universal threat, hence deserve universal condemnation for the major part of the last century. the mixed if not disillusioning result of the ad hoc tribunals and the growing consensus on the need to enforce international law contribute to the emergence of a permanent international criminal court.

The ICC has jurisdiction over three categories of crimes: genocide, crimes against humanity, and war crimes. [114]Cases come before the ICC in one of three ways. The U.N. Security Council, acting under Chapter VII of the U.N Charter, may refer to the Prosecutor a "situation" in which "one or more of such crimes [within the jurisdiction of the Court] appears to have been committed". Alternately, a State Party may refer such a "situation" to the Prosecutor. Finally, the Prosecutor may commence an investigation independently, or "proprio motu," after concluding there is a "reasonable basis to proceed" and provided the Pre-Trial Chamber, acting upon he Prosecutor's submission, authorizes the investigation. [115]All of the cases that the ICC is currently investigating and prosecuting have to do with crimes allegedly committed in countries in Africa.

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[112] Eileen Skinnider, "ICCLR Experiences and Lessons from "Hybrid" Tribunals: Sierra Leone, East Timor and Cambodia" **International Centre for Criminal Law Reform and Criminal Justice Policy** 2007 p 23.

[113] **"Global Policy Forum on the Ad Hoc Tribunal for East Timor**", found at http://www.globalpolicy.org/intljustice/etimorindx.htm.) last visited at august 2016.

[114] **Rome Statute of the International Criminal Court,** adopted at July 17, 1998, 2187 U.N.T.S. 90.

[115] Id art 13(a),(b0,(c)

This has raised questions as to whether this is an example of the selectivity of international criminal law. [116]

To the embarrassment of African leaders, most of those among ICC's list are sitting heads of state and other prominent Africans. Al basher of Sudan and Kenyatta of Kenya are worth citing. This move perceived by the AU as predatory resulted in an ongoing showdown between African states who sided with their colleagues and ICC whose relentless pursuit against African statesmen continue unabated even after Fatou Ben Souda, a fellow African, became chief prosecutor of the latter. Sub Saharan countries with the notable exception of South Africa blatantly defy complying in effecting the arrest of the Sudanese president. [117]In May 2013, the Kenyan government successfully lobbied AU members to adopt a resolution calling for the cases to be referred to Kenya for national proceedings to be taken, rather than being left to the ICC , [118]The African states and scholars who sympathize with their cause accuses ICC of selective prosecution by pointing out the same atrocities committed elsewhere, such as Israel and Syria didn't led to ICC investigation[119] they seem to took it for granted that this discriminatory effect was the result of an equally discriminatory prosecutorial policy which they in turn traced it to skewed power relations in the UN Security Council and political and ideological interests of the west. [120]

Those who view the court as a champion of victims of unspeakable crimes who are denied justice because of the utter inability and unwillingness of the domestic justice system to bring the perpetuators into justice because it was manipulated by them, hailed the court's performance. They argue that ICC's focus on the continent is a natural result of the large number of atrocities committed there. [121]It is not the court's fault if the majority of the culprits came from Africa as far as there is good reason to pursue charges against them. And even the staunchest opponent of the court couldn't claim the charges are baseless fabrications. they also invoke the complementarity principle of the court which states that the court will view the case only if the domestic system is unable and unwilling to try them and policy and logistical considerations

[116] Max du Plessis cited above at note 7
[117] Id P.4
[118] Id p.5
[119] Id. P.2
[120] Ibid
[121] Ibid

which dictate the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes. [122]To explain away the protests of African states, the opponents charged back by indicating in the main situations that it has dealt with, the ICC seems to go after one of the parties to the conflict and not the others. It has gone after Joseph Kony in Uganda but not Mouseveni; it has gone after militia leaders in the Congo but not the government. [123]

The argument concerning the question whether ICC practices selective prosecution or not can't be reproduced here in its entirety. I think the above discussion suffices to sketch the two contrasting views in their broad form.

3.4. Selective prosecution and transitional justice proceedings: compatible or conflicting?

More often than not regime changes are accompanied by widespread violence, subjugation, injustice and a near total destruction or untrustworthiness of the former institutions. the infliction of large scale atrocities leave millions disoriented and traumatized. To break from a vicious circle of subjugation and victimization and achieve a lasting peace and reconciliation the post conflict society has to effectively deal with the past, redress the wrongs committed without jeopardizing the reconciliation process, hence transitional justice.

Transitional justice is a complex process that covers the establishment of tribunals, truth commissions, lustration of state administrations, settlement on reparations, and also political and societal initiatives devoted to fact-finding, reconciliation and cultures of remembrance. [124]The paramount need to maintain and consolidate the newly gained peace and to settle scores with the past led to the emergence of different models of transitional justice.

Advocates of the legalist approach have emphasized criminal justice as a means to deter future human rights violations and to support peace building.[125] Another argument is that criminal

[122] "**Paper on Some Policy Issues Before the Office of the Prosecutor**" ICC Policy Paper (2003) p 7.
[123] Thomas Christiano, **The Problem of Selective Prosecution and the Legitimacy of the ICC**, (2015) p 1.
[124] Martina Fischer **Transitional Justice and Reconciliation: Theory and Practice** p 407.
[125] Id 409

justice will stigmatize the elites who perpetuate conflict, and help separate individual from collective guilt, breaking the cycle of violence. [126]From this model stems international and hybrid tribunals discussed above." The law applied against the defendant in these trials varies considerably. It can be new law that applies ex post facto; old law that was on the books of the old regime but never enforced; international law that was nominally respected in the old regime but not incorporated into the legal system; or old law that was in fact enforced but not, for improper reasons, against the perpetrators who are now on trial. Some post transition governments employ the intermediate device of retroactively extending statutes of limitations that had expired. Formal punishments will be handed to convicts along with purging and lustration" [127]The other model has balanced the merits of trials against other accountability mechanisms. Truth commissions have been promoted as alternatives to prosecutions and as important mechanisms for counteracting cultures of denial. a truth commission is considered as a means "to engage and confront all of society in a painful national dialogue, with serious soul-searching, and attempt to look at the ills within society that make abuses possible"[128] truth trials deemed prosecution and punishment undesirable and often ended by granting blanket amnesty.

As we have pointed elsewhere transitions that follow the legalistic approach their rhetoric on the need to try and convict offenders notwithstanding, are inevitably criticized as inherently selective.no transitional justice trial, local international or hybrid can claim it brought all the culprits to justice and more often than not is branded as a victor's justice. Familiar arguments of the impossibility of indicting everyone involved due to financial, political and evidentiary reasons are often invoked. A potentially viable approach to explain the widespread presence of selective prosecution in transitional justice proceedings can be sought in the nature of transitional justice itself. There appears to be broad agreement that transitional states facing mass atrocities may adopt a policy of targeted, highly selective prosecutions which leave the vast majority of

[126] Bell, Christine. **Peace Agreements and Human Rights**. Oxford: Oxford University Press (2000) see also Minow, Martha **Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence**. (1998).

[127] Eric A. Posner and Adrian Vermeule "TRANSITIONAL JUSTICE AS ORDINARY JUSTICE" **CHICAGO PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 40**, March 2003 university of Chicago p 5-6.

[128] Fischer cited above at note 124, P. 410.

criminals unprosecuted. [129] Orentlicher, for example, who has advanced the best known and most systematic argument for a duty to prosecute under international law, also argues that a state may, and even should, fulfill its international duties through a program of partial, "exemplary" prosecution. [130]By prosecuting the few, rather than the many, the transitional state may seek to acknowledge past wrongs, assign blame, mark a break from the past, and provide some sense of collective justice without jeopardizing the forward-looking goals of a liberalizing political transition.[131] However odd or even legally questionable it may appear selective prosecution won a rare favor from transitional justice trials as a desirable element and introduced into the process christened as exemplary prosecution.

[129] ALEXANDER K.A. GREENAWALT "JUSTICE WITHOUT POLITICS? PROSECUTORIAL DISCRETION AND THE INTERNATIONAL CRIMINAL COURT" **INTERNATIONAL LAW AND POLITICS** [Vol. 39:583 2007 p 620.

[130] Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" **YALE L.J.** vol. 100 (1991)p. 2598-99

[131] id 621

CHAPTER FOUR

The Defense of Selective Prosecution under Ethiopian Legal System

4.1 Selective Prosecution vis a vis the constitutional right of equality

The FDRE constitution recognizes the right to equality as a fundamental human right. Article 25 of the constitution reads "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law." In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, color, sex, language, religion, political or other opinion, property, birth or other status."[132]the right to equality before the law is granted a unique status that save the right to be free from inhuman and degrading treatment it is the only human right which can't be suspended even in a state of emergency, hence almost paradoxically it maintains an asymmetrical relation with the other fundamental rights.in other words the right to equality is unequal meaning more important than the other rights the constitution recognized.[133]

It unequivocally prohibits any discrimination on the specified grounds and extends equal protection to everyone without consideration to his race, sex gender, or other arbitrary classification. In its wording and strong egalitarian spirit it resembles the 14th amendment to the US constitution and seems to have been inspired by the international human rights movement. The latter observation is reinforced by the fact that the constitution made it a point to prescribe that the fundamental rights and freedoms enshrined in it to including the right to equality shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.[134]

The constitution's uncompromising stand on the equal protection of the law, its verbatim repetition and categorical endorsement of international human right instruments such as UDHR as a guideline leaves no doubt on where it stands with regard to selective prosecution.

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[132] Federal Democratic Republic of Ethiopia Constitution, 1995, article 25, proclamation number 1/1995, Fed. **Neg.Gaz**. year 1, no 1.

[133] Id article 18,art 93(4)

[134] Id article 13(2)

As far as the constitution is concerned Singling out defendants on the ground of their race, gender, nation or any of the other grounds stated is a violation of the right to equality before the law hence unconstitutional. We will not be much mistaken if we assume the cross reference to international human rights instruments has the effect of introducing the composite concept of discrimination and the shift in international jurisprudence from intent to effect to determine discrimination. Nothing in the provision's wording and spirit suggest that bona fide discrimination is justified. the constitution's insistence to set the manner of interpretation according to international instruments together with its recognition of international agreements as an integral law of the land strongly imply that it considers the international dimension as a bench mark to understand and interpret the universal human rights incorporated in chapter three.by making the auspicious decision to incorporate international principles as a standard to interpret the fundamental human rights in general and the right to equality in particular the makers of the constitution admits the universal status of these rights and establish the international standards with their jurisprudence as an ultimate adjudicator to define the meaning, scope and degree of protection due to those rights.

Bearing this in mind it is only natural to conclude that selective prosecution with its ambivalent relationship with the right to equality as understood in international human rights law found its way to the Ethiopian constitution and legal system.

4.2 Non judicial constitutional interpretation and the role of the judiciary

Chi Mgbako et al argues that The Ethiopian system of non-judicial constitutional review doesn't serve to protect the human rights of citizens because it leaves the federal and state governments with virtually unlimited power.

> "By invoking the issue of constitutional interpretation, whether such an issue does or does not exist, the HOF can always deprive the judiciary of the power to adjudicate sensitive cases dealing with the limits of executive power."[135] Asefa Fiseha traces the origin of the HOF as uncontested interpreter of the constitution to the nature of the federation and the reluctance of the framers of the constitution to vest such power on the judiciary will result in unnecessary

[135] Chi Mgbako et al, "Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its impact on Human Rights Impact", **Fordham International Law Journal** Volume 32, Issue 1 (2008) Article 15, p 290-91.

judicial adventurism.[136] In one instance the CCI in Biyadiglign Meles et al v. Amhara National Regional State ruled that violations of rights by the executive do not amount to reviewing constitutionality of laws and thus parties have to seek remedy from the courts. This stand could arguably be employed in contesting selective prosecution claims before courts since the prosecutor is part of the executive branch. However Asefa seems to think the extension of the power of interpretation given to HOF by proclamations 250/2002 and 251/2001 have wiped out or at least attempted to wipe out the jurisdiction of the courts: federal and state. [137]

Yonatan Tesfaye approaches the problem from the need of the framers of the constitution to avoid the counter majority dilemma. The argument runs that unelected and unaccountable judges shouldn't be allowed to nullify the actions of democratically elected legislature. Thus the interpretation of the constitution must be endowed to a body that embodies the will of the majority. but the practice of appointing members of the HOF by state councils contrary to the constitution's insistence they have to be elected by the people directly or by the state councils thwarted the plan to avoid the counter majoritarian dilemma and reintroduce the problem since the appointees are almost in the same position as judges of the Ethiopian courts. Yonatan believes that the political nature of the house, the inability of the members to engage in constitutional adjudication, its decision making procedure and limited number of sessions makes it less suited to the task of constitutional review.[138]

4.3 The FDRE criminal law and criminal justice policy

Echoing the constitutional right to equality before the law Article 4 of the FDRE criminal code declares "Criminal law applies to all alike without discrimination as regards persons, social

[136] Assefa Fiseha, Dr, "CONSTITUTIONAL ADJUDICATION IN ETHIOPIA:EXPLORING THE EXPERIENCE OF THE HOUSE OF FEDERATION (HOF)", **MT7.AN LAW REVIEW**, Vol. 1 No.1, (2007), p 10-11

[137] Id 17

[138] YONATAN TESFAYE FESSHA, "JUDICIAL REVIEW AND DEMOCRACY: A NORMATIVE DISCOURSE ON THE (NOVEL) ETHIOPIAN APPROACH TO CONSTITUTIONAL REVIEW", **Afr. J. Int'l & Comp. L.** vol.14 (2006) p 75-77

conditions, race, nation, nationality, social origin, color, sex, language, religion, political or other opinion, property, birth or other status.

> *"No difference in treatment of criminals may be made except as provided by this Code, which are derived from immunities sanctioned by public international and constitutional law, or relate to the gravity of the crime or the degree of guilt, the age, circumstances or special personal characteristics of the criminal, and the social danger which he represents."*[139]

It denounces any discriminatory application of criminal law based on the stated grounds in unequivocal terms and warrants differential treatment only as provided in the code and went on to list them in an effort to be more specific. Much of the exceptional conditions which justify difference in treatment can pass as reasonably persuasive. However one can't help wondering whether the grounds such as gravity of the offence, degree of guilt or personal characteristics can be used as justification in prosecutorial decision making including selective prosecution and whether such profiling is strictly in accord with the constitution.

Admittedly the cited provision is a broad description of the criminal law ideal and the legislator may has in mind the post-conviction and punishment phase when it talks about the exceptional grounds that justify differential treatment than the prosecution and trial as evidenced in the term criminal rather than suspect or accused.

The code recognizes nondiscrimination as a fundamental principle in the enforcement of the substantive provisions.it reaffirm the commitment of the Ethiopian criminal justice system to the equality of everyone as far as the applicability of criminal law is concerned.

The criminal justice policy is another matter. Apart from some illusive and non-committing references to the constitutional and international principles, values and provisions it fails to incorporate nondiscrimination as a fundamental principle of the policy. rather than forming broad national roadmap which reflects the visions, needs and the priorities of the overall system and devising the proper institutional framework to that end as a typical policy document should do, it astray to details of procedure like conducting search and seizure.it needlessly and

[139] Criminal Code of Ethiopia, art.4, proclamation number 414/1997, **,fed. Negg. Gazz**, year 10.

redundantly enumerates grounds for not pressing charges, dropping of charge and resumption of the same which are already listed in the criminal procedure code.it anticipates and pave the way for the acceleration of the strengthening of prosecutorial discretion by acknowledging the prosecutor's power to grant immunity and witness protection without considering the determinant potential such power may have on the constitutional rights of citizens. The closest it came to the issue of selectivity is in part 13.4 in which it indicated that a prosecution should give priority for offences which have high punishments, multiple offences and repeated offenders. [140] All in all the criminal policy fails to appreciate the problem and to come up with a policy guideline to deal with selective prosecution. It is my impression that the FDRE criminal justice policy is the most poorly defined, incomplete and that can less be considered as a policy than a draft criminal procedure rule.

4.4 Selective prosecution as a procedural defense under Ethiopian law

The Ethiopian criminal procedure code fails to mention selective (unequal and discriminate) prosecution as one of the legitimate grounds to objet the charge. Article 130(2) lists the following grounds

(a) That the case is pending before another court: or

(b) That he has previously been acquitted or convicted on the same charge: or

(c) That the charge against him has been barred by limitation or the offence with which he has been charged has been made the subject of pardon or amnesty: or

(d) That he will be embarrassed in his defense if he is not granted a separate trial, where he is tried with others: or

(e) That no permission to prosecute as required by law has been obtained: or

(f) That the decision in the criminal case against him cannot be given until other proceedings have been completed: or

[140] **FDRE criminal justice policy**, (2003 E.c). p 12

(g) That he is not responsible for his acts. [141]

Whether the list was meant to be exhaustive or illustrative was the subject of an ongoing debate until the federal supreme court cassation bench (herein after the court) in Tesfaye Tumoro Vs the Federal Ethics and Anti-Corruption Commission reasons that the list of objections enumerated in the provision can't be interpreted as exhaustive and concludes other grounds can be invoked to object charges. [142]It is tempting to assume the claim of selective prosecution naturally qualifies as one of these unmentioned grounds, but nothing in the court's decisions warrants such enthusiasm. In Yordanos Abay Vs the Federal Prosecutor it deals with the issue in a very unsatisfactory and uncharacteristically summarily manner. The appellant complained that she was singled out for prosecution since her codefendant was exonerated because she was willing to testify. The court dismissed the claim by stating that there is no law that prohibits the prosecutor from dropping charges in favor of a defendant in order to make him a witness to the prosecution against the other apparently similarly situated defendant. The court didn't deem it necessary to consult the constitutionally guaranteed right of equality and to the rich international jurisprudence it refers.[143]

Is the court implying in spite of the high flying promises of the constitution the prosecutor is in fact free to name anyone it wants as defendant and arbitrary drop charges for another? The court's failure even to note in passing the constitutional right of equality as related to the issue coupled with its apparent discomfort in dismissing the case with the cryptic phrase "there is no law.." can be explained by the fact that the task of interpreting the constitution is assigned to the house of federation[144] and the subsequent confusion it creates in the judiciary on its role to apply the constitution without interpreting it. Did the court feel that entertaining claims of selective prosecution involves interpreting the constitution?

Scholars and practitioners are divided in their opinion whether the defense of selective prosecution constitutes a justiciable matter.

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[141] The Criminal Procedure Code of Ethiopia, Proclamation number 185/1954

[142] *Tesfaye Tumaro vs the federal ethics and anti-corruption commission*,(Cass. file no. 73514, Vol. 14)

[143] *Yordanos Abay Vs the federal prosecutor* (cass.. File no.57988 ,Vol. 12)

[144] FDRE Constitution, cited at note 125, Article 62

Mr. Bula Wagari, a judge in the Federal High Court criminal bench is of the opinion that the courts aren't entitled to interpret the constitutional right to equality to the extent of rejecting charges. Furthermore he thought that since the claim of selective prosecution posed a threat on the criminal justice system not on the individual defendant as such it shouldn't be invoked as an objection to the charge against the latter. Therefor he doesn't think any amendment to the effect of introducing selective prosecution as objection would be necessary.[145]

Mr. Aaron Degol, a manager in the federal high court, disagrees. He argues a mere application without interpretation isn't possible. Moreover he is of the opinion that article 13(1) of the constitution gives courts the responsibility and duty to respect and enforce the provisions of chapter three including the right to equality. Since it is a purely a legal issue not a political one selective prosecution defense should be allowed. He thinks the problem is particularly rife in tax, customs, corruption and terrorism cases and proposes a sweeping reform that includes institutional restructuring which deals with prosecutorial discretion and procedural rules that sets the burden and degree of proof applicable in selective prosecution claims.[146]

Mr. Melkamu Ogo is in full agreement with Aaron on the constitutionality and the acute need of permitting selective prosecution defenses. He warns not doing so would have far reaching consequences that range from inhibiting citizens the right to get justice and unduly jeopardizing presumption of innocence to encouraging criminal behavior and will ultimately lead to bias and loss of public confidence in the criminal justice system.[147]

Mr. Mohamed Ahmed, the president of the federal first instance court believes that selective prosecution is a prohibited act both constitutionally and ethically. He observes that there is a practice in which some prosecutors invoke different provisions to charge individuals who are suspected of committing the same crime to let some of the defendants have a bail right while others are denied. He nevertheless argues courts shouldn't have any role with respect to the charging decision which is an exclusive prerogative of the prosecutor but enlists the human

[145] Interview with Mr. Bula Wagari, federal high court judge, At his Office, July 13 2016, 7:00a.m
[146] Interview with Mr. Aaron Degol, court manager at Federal High court, At His Office, July 18 2016,6:00 pm,
[147] Interview with Mr. Melkamu Ogo, Attorney and Consultant at Law, at His Office. July 8, 2016, 4: 00 pm.

rights commission and ombudsman as stake holders in the matter and a possible resort for the victims of selective prosecution.[148]

Simeneh Kiros *and* ***Cherenet Hordofa*** argued that in Ethiopian criminal justice system the Public Prosecutor is on duty to prosecute all crimes having sufficient evidence for conviction and they have also mentioned that the FDRE constitution Article 25 guarantee equality before the law ….equal and effective protection. They added that if there is any selectivity in prosecution on the part of the public prosecution, one can raise such selectivity as a defense on the criminal charge and the courts have to review whether the defendant is actually selected.[149]

From the melancholic decision of the court and the enlightening discussion with scholars and practitioners we learn that selective prosecution with its potentially destructive effect on the right to equality is a peripheral concept in the Ethiopian justice system. The constitution with its well-meaning incorporation of the right to equality and the international standards which are supposed to be guidelines in enforcing it result in neither a rise of judicial activism that portrays itself as a watch dog of human rights which vigorously experiments with the international jurisprudence the constitution conveniently provides, nor in legislative venture which aims to put a procedural and statutory framework that deals with the tormenting question of selectivity. Rather by assigning the role of interpretation to a non-judicial organ it threatens to create an insoluble renvoi between the judiciary on the one hand and the house of federation and the council for constitutional inquiry on the other which has the potential to risk the protection of human rights.

4.5 Duty to prosecute, the role and ethical guidelines of the public prosecutor in Ethiopia

The office of public prosecution starts as a department in the Ministry of law and justice. Through the ages it endured an obscure and uncertain relationship with the ministry, briefly won its independence under the Derg rule only to be re amalgamated with the ministry of justice during EPRDF's regime. [150] Though prosecution of special crimes like military offences were hitherto routinely delegated to special prosecutors[151] the post 1991 era heralds an unprecedented decentralization of prosecutorial power and the rise of special and administrative prosecutorial

[148] Interview with Mr. Mohamed Ahmed, president of , federal first instance court, October 10 2016, 2:00P.m
[149] Simeneh Kiros and Cherenet Hordofa, cited above at note 2, P 119 and 168.
[150] Ministry of Capacity Building **,Comprehensive Justice system Reform Program**, (2005) P.90-91
[151] Tilahun Teshome ,**Akabi Hignet ; Muyawna Sinemigbaru**,2000 E.C p 28

bodies. This chaotic process is culminated with the recent establishment of an independent attorney general which is given a broad investigative and prosecutorial power. Among other things the establishment proclamation reaffirms the attorney general's power to give no case or closing decision after reviewing completed investigation files where conditions provided under the criminal procedure law are met.[152] Article 42 of the criminal procedure code lists these conditions

(I) No proceedings shall be instituted where:

(a) The public prosecutor is of opinion that there is not sufficient evidence to justify a conviction: or

(b) There is no possibility of finding the accused and the case is one which may not be tried in his absence: or.

(c) The prosecution is barred by limitation or the offence is made the subject of a pardon or amnesty; or

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

(2) On no other grounds may the public prosecutor refuse to institute proceedings.

Sub article two makes it clear that with the exception of these grounds the prosecutor is under a legal duty to institute charges. With respect to withdrawal and resuming of charges article 122(1) and (5) prescribe respectively

"With the permission of the court the public prosecutor may before judgment at any stage of the proceedings withdraw any charge other than charge under Art.522 (homicide in the first degree) or Art. 637 (aggravated robbery) and the withdrawal of a charge under the provisions of this Article is no bar to subsequent proceedings."[153]

[152] Federal Attorney General Establishment Proclamation, Article 6(3)(c) Proclamation Number ,943/2016,**Negarit gaz** year 22
[153] Ibid

The provisions of article 42(1(d) which gives the ministry the power to instruct the prosecutor to discontinue the charge and article 122 which prescribes the prosecutor could withdraw the charge with the exception of homicide and aggravated robbery by applying to the court was repealed by proclamation no 39/85.[154]

In article 6(3(e)) of proclamation no 943/2016 the charges in which withdrawal wasn't possible are quietly dropped nor is any reference made to the permission of the court.[155] Through such ingenuity and sidestepping procedural nicety the prosecutor becomes the sole master when it comes to dropping or continuing of charges. The only situation that clouds this newly gained discretion is his duty to consult with the prime minister on issues concerning the withdrawal of cases having national interest.

By systematically strengthening the role of the prosecutor in commencing, discontinuing and restarting investigation and determining guilty plea the proclamation subtly consolidates prosecutorial discretion to unprecedented degree. It goes out of its way to insure that with the exception of an internal appeal system the prosecutorial decision shall not be subjected to institutional accountability.[156]

Forerunning the attorney general establishment proclamation comes the controversial witness protection proclamation No 699 which gave the prosecutor and the ministry which happens to very conveniently united under the attorney general, a power to single handedly decide protection measures including immunity from prosecution in lieu of testimony against defendants charged with crimes punishable with rigorous imprisonment of ten or more years. [157]Despite its lip service on the need to take into account the potential damage the intended protection may cause on the rights of another person, the proclamation literally relegates the judiciary to the role of baby-sitting the witness, obediently insuring whether the protection

[154] The transitional government of Ethiopia the office of central attorney general establishment proclamation, proclamation number 39/1985, **negarit gazz,** year 52, number 24.
[155] Attorney General establishment proclamation cited above at note 152.
[156] Id. Article 6 (3) (a) (d) and Article 18
[157] Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation, Article 3(1) Proclamation No. 699/2010),**negarit gaz** year 17.no 06

measures were properly implemented. The crucial decision of granting witness protection was safely made out of the reach of the courts except in cases involving minors.[158]

It is interesting to see how this image of an all-powerful prosecutor can be reconciled with the meager powers and the narrow room of maneuvering given to him in the criminal procedure code.

It can't be logically maintained that the prosecutor is under a legal duty to file charges but can withdraw the same charges arbitrarily raising the dubious claim of public interest. Apparently the grounds initially used to make the decision to prosecute in the first place must be invoked to justify withdrawal. Unfortunately once the courts are quietly relieved of their power no one is entrusted with the task of ascertaining whether the conditions are fulfilled to warrant withdrawal. Even if we assume that in spite of the proclamation's anxiousness to purge them from encroaching prosecutorial autonomy the judiciary should and do maintain some power which checks the prosecutor's excesses it's effort to curb prosecutor's discretion is doomed to be frustrated due to the latter's grip on the investigation process.

This disturbing development isn't welcomed in the prosecutor's office itself. Mr. Negussie Shekita who served in Federal Ethics and Anti-Corruption Commission as a prosecutor and who is currently a public prosecutor at the Attorney General voices his concern that the legal and professional obligation of the prosecutor to ensure that a speedy and quality justice is served to the society might be undermined due to the inherent contradiction between the role of the prosecutor to press charges as long as sufficient evidence exists and the apparently problematic notion of discretion to select and prosecute. He identifies that selective prosecution is likely to happen when a single prosecutor is assigned to decide on who shall be prosecuted from a list of potential suspects and when a superior interferes in the crucial charging decision. He admits that there is no institutional mechanism available for those who claim they are selectively prosecuted but he suggests that the decision could be contested before the attorney general and believes that nothing prohibits the latter from rechecking the decision and order the pressing of charges against unprosecuted suspects if the claim happens to have merit. Mr. Negussie stresses the need for an ethical prosecutor who is committed to discharge the constitutional obligation entrusted to

[158] Id. Article 5 (3), 9 (4) , 23 (1)

him and takes the constitutional rights of the suspect seriously to tackle the issue of selective prosecution. [159]

This brings us to the recurrent view which treats selective prosecution as an ethical transgression hence an essentially ethical matter which appears only when the prosecutor acts unethically. Tempting as it is to relegate the problem as ethical misconduct of some corrupt prosecutor, we have little evidence to ascribe it to the malevolence of the specific prosecutor. It would be farfetched to employ the ethical guidelines enumerated in Federal prosecutor Administration Regulation no 44/98 to charge the prosecutor of misconduct in cases of selective prosecution since there is nothing which implies such act constitutes ethical misconduct[160]. Let's be clear there is no denying that a prosecutor's partiality or other unethical conduct contributes in perpetuating selective prosecution. At that level an ethical remedy would be appropriate. But an ethical code alone uncoupled with an institutional arrangement would be impotent to tackle the problem of selective prosecution which is embedded in the system itself.

The rise of a powerful prosecutor which becomes disturbingly undistinguishable from its common law counterpart poses another danger. The absence of statutory bar on the number and conditions of withdrawing and resuming charges leaves suspects to the traumatic menacing of the prosecutor and facing the whole process anew whenever the latter feels like it.

To recapitulate the introduction and strengthening of discretion coupled with the persistence of the remnants of the duty to prosecute leaves the prosecutor equipped with virtually unrestrained power ill fitted to the model set in the criminal procedure code. The actual effect of this latent tension remains to be seen. what is clear at this point is the prosecutor's discretionary power deviates from the original model in a way that has ominous prospect of encroachment on human rights and the halfhearted attempt to combine discretionary prosecution with the traditional model of duty to prosecute is problematic if not downright impractical.

[159] Interview with Mr. Nigussie Shekita Shegen, Public Prosecutor at the Office of Attorney General, September 4 2016, 2:30 pm.

[160] Federal prosecutors administration regulation, council Of Ministers regulation ,arts 64,-68,71, regulation number 44/98,federal **negarit gazz,** year 5, number 8

4.6 Selective prosecution case reviews

Notwithstanding the uncertainty surrounding the constitutionality and justiciability of invoking the right to equality to justify selective prosecution claim and the virtual absence of procedural framework, a handful of selective prosecution defenses are raised to object charges in criminal trials. In this section we will see how these defenses fare in their daring endeavor to bring selective prosecution to the fore of criminal defense. We will also review the alleged grounds invoked by the prosecutor in the respective cases and their constitutionality.

4.6.1 Federal Ethics and Anti-corruption Commission Vs. Wondesen Alemu et al.

In Federal Ethics and Anti-Corruption Commission Vs. Wondesen Alemu et al the 6th named defendant object the charges against her by showing that nine other individuals receive the same area of land in the same manner as she does but the commission single her out for prosecution whereas the others remained unprosecuted. The commission's prosecutor rejects the objection by insisting that the commission has the power to decide whom to prosecute and can decide against filing charges to another or name him as a witness. The high court using the double jeopardy defense of the other defendants as an excuse dismiss the charge maintaining the commission's right to file a fresh suit against the 6th defendant without ruling on the defense of selective prosecution.[161]

The above mentioned case is the most fitting example which explains the attitude and understanding of the parties concerned on the enigmatic concept of selective prosecution in Ethiopian justice system.

The defendant claims the constitutional right of equality prohibits selectivity between similarly situated individuals. The prosecutor replied it has discretion to choose defendants from a potentially higher number of culprits based on its internal rules. The court, without even bothering to hear these allegedly legitimate selection criteria, decided to altogether ignore the issue.

[161] Federal Anti-Corruption Commission Vs. Wondwosen Alemu et. al. (6 people),(federal high court), File Number 149111, 8/11/2006 E.C (unpublished).

The high court decision is not only odd in failing to rule on the objection it also is singularly vague in its reasoning concerning the unprosecuted individuals' relevance to the case. It goes at some length on the matter particularly emphasizing the fact that both the claimant and the persons mentioned were given the extra land based on a single minute taken at 8/3/98 EC. The court failed to see the relevancy of this evidence in proving the discriminate treatment between the claimant and the persons who weren't named as defendants in both the former and the case at hand; instead it twisted it to justify the other defendants' claim that it was a double jeopardy.[162] According to this reasoning persons who were named in another file can object a filing of a new charge other persons who are charged with a crime based on the same facts and evidence which incriminate other persons who for some reason weren't named as defendants couldn't invoke the apparent double standard as a defense. They can't even get the courtesy of expressed denial. They are simply ignored.

It would have been illuminating if the Commission gives some detail in his reply on the justifiability of the selection between potential suspects. apparently it wasn't referring to the witness protection proclamation since the charges against the defendant was brought based on article 407(1)(a) and(b) which is punishable with a rigorous imprisonment not exceeding ten years which makes a witness to the prosecution ineligible for protection under the proclamation. Article 43(1) the revised anti-corruption special procedure proclamation which grants 'immunity to Any person who has been involved in corruption offence and who, before the case is taken to the court, provides substantial evidence as to the offence and the role of his partners, may be given immunity, [163]has no relevance to the case since it wasn't claimed they give substantial evidence not to mention nothing in the reply or the evidence produced by the prosecutor shows the persons were considered as witnesses let alone as indispensable whistleblowers.

This writer tries in vain to prove the existence of a special anti-corruption cases assessing and determining selectivity guideline which is hinted by the prosecutor. However the cumulative reading of article 7(8) of proclamation no 433/2005 [164]and article 3(2) of proclamation no

[162] Ibid

[163] Revised Anti-Corruption special procedure and rules of Evidence proclamation, proclamation Number 434/2005,**federal negarit gazette**, year 11, number 19

[164] Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation, Proclamation Number 433/2005,**federal negarit gazette**, year 11, number 18

699/2010 conclusively proves there is no special protection scheme for corruption whistle blowers. Consequently the commission's illusive referral to internal procedure which justifies selective prosecution is hardly legal if not nonexistent

4.6.2 Federal prosecutor V. Ali Adris Mohamed et al.

I have come across another selective prosecution defense invoked in Federal Prosecutor Vs. Ali Adris Mohamed et al. the 1st named defendant objected the charges of instigating, conspiring and attempting to commit act of terror by claiming that the first witness to the prosecutor wasn't prosecuted even if he admits he was a high ranking official of the said "terrorist" organization. He furthermore produces a witness to the effect that the prosecution's witness was offered acquittal and coerced to testify. I couldn't get the reply of the prosecutor. The court however found no difficulty in dismissing the objection by ascertaining that selecting some of the suspects when there was no way of reveling the offence rather than their testimony as quite acceptable. It reasons that police selects the more dangerous culprit and the used the testimony of the lesser one. It fails to refer the witness protection proclamation but repeats article 3(1) (a) verbatim. The court repudiates the defiance witness's testimony categorically by alleging that he too was a suspect in an act of terror.[165] It is ironic to see how one terror suspect qualifies as a credible and truthful witness and accorded protection and another one's testimony was dismissed first hand because he is a "suspected terrorist". The court find the very idea that police might intimidate or promise immunity to the witness blasphemous, baseless but all the same justified.[166] In its anxiousness to exonerate the police it even fails to determine whether the witness was a protected person as defined in article 6 (1) of the proclamation. The police isn't given the power to grant immunity but the court took no notice of it and confuses the application process prescribed in art 6(2) (b) with actual granting of immunity reserved to the ministry. Fixated on the police it totally ignores the prosecutor who actually calls the witness. The court was more than obedient in complying with article 26 which states that The fact that a witness is entitled to protection in accordance with this Proclamation may not be invoked as a ground to diminish the credibility of his testimony and extend it to mean a terror suspect's testimony not accorded protection and not willing to testify for the prosecution shouldn't be given the same

[165] Federal Public Prosecutor Vs. Ali Adris et al (3 persons), (federal high court) file number 134044, 02/04/2007 E.C, unpublished.
[166] Id.

credibility or worse should be denied of having a grain of truth. According to this formula witnesses who are willing to testify are given immunity and other elaborate witness protection packages and are treated as credible by decree before they testify which practically results in taking them at their word since they were granted the protection because of the impossibility of proving the case in any other way. It is hard not to be sync lest they may use their position to incriminate or frame others. The situation is exasperated by the courts' irrational dismissal or belittling of a contrary testimony by a suspect in terrorism charges. Between the words of the two the court unhesitatingly believes the former.it is needless to say this selectivity between testimonies helps in perpetuating and aggravating selective prosecution.

4.6.3 The Federal Prosecutor Vs. Gurmesa Ayano et al.

In a pending terrorism trial between the Federal Prosecutor and Gurmesa Ayano et al the defendants are accused of plotting, instigating and carrying out the riot which took place in different parts of Oromiya regional state. The government not only acknowledged that a relatively higher percentage of the population in the areas took part in the violence but also calls some of the participants to testify against the defendants. However it failed to provide any rational why the defendants should be singled out for prosecution. One couldn't help to wonder given the chance of distortion and the resulting injustice inherent in the idea of immunity and other witness protection schemata, granted for the witness in lieu to his testimony who is getting the better end of bargain the suspect turned witness or the law enforcement? The absence of clear criteria, which makes sure the protected person, poses less danger to the society than the defendant reduced the ingenuity of the whole mechanism into trading the prosecution and conviction of one defendant for another hence selectivity in disguise.

In the case at hand the prosecutor requested a testimony in camera alleging the pressure and vengeance which might result if their identity is known[167]. The request is odd at the least. The prosecutor didn't provide evidence that the witnesses are protected persons as defined in article 2(2) of the proclamation. It even hints that they are living in the same area with the defendants and their families which suggest that if they are beneficiaries of protection the danger to which they are prone doesn't warrant their relocation. The request for a testimony in camera as a

[167] The federal prosecutor vs Gurmessa Ayano Weyessa,(federal high court), file number 178365, 05/03/08 E.C(unpublished)

protection for the witnesses is doubly absurd since the prosecutor could pick up a more effective measure for instance it could request hearing testimony behind screen or by disguising identity if the point was to keep the identity of the witness concealed from the defendant and his families who presumably could retaliate. The defendant apparently knows the identity of the witness who testifies in camera and would have no difficulty of passing the information to the would be vigilantes. The request only makes sense if the prosecutor's intention is not to protect the witness but his testimony by relieving him of the tension of public trial. In an effort to get its invaluable witnesses out of harm's way the prosecutor practically makes them out of the reach of justice.

The selectivity – immunity – conviction cycle comes full circle. A suspect will negotiate with the attorney general claiming he is privy to incriminating evidence against some dangerous criminals who couldn't be brought to justice for want of evidence. His evidence apparently couldn't be cross checked due to the cryptic and clandestine nature of the crime, hence there is little else than his word to vouch for his credibility. Based on this unreliable and unsubstantiated evidence the prosecutor will pursue charges against the defendants. While our civic minded whistle blower not only enjoys immunity but can literally alter court procedure to fit his needs. More importantly the whole horse trade is conducted unbeknownst to the judiciary.it is little wonder a criminal justice system which is characterized by such circular logic would sooner or later be corrupted.

4.6.4 Special Prosecutor Vs. Mengistu Hailemariam et al.

Perhaps the most notorious case concerning selective prosecution is the red terror trials. 5,198 people were prosecuted the vast majority of defendants were charged with genocide and war crimes, and faced alternative charges of having committed aggravated homicide and willful injury. According to article 6 of Proclamation No. 22/1992, the SPO is mandated to investigate and institute an action only against the members of the defunct regime. The crimes were committed within the context of a revolution, and the political parties that were targeted were allegedly themselves assassinating top military officers of the Derg while the country was also fighting against external invaders and secessionist movements. The brutal measures taken by the targeted political groups have not been investigated by the SPO. In effect, many more, who took part in the atrocities, remain unpunished. So the trials appeared to be a victor's justice

which permits a cycle of revenge.[168] It was thought unfair that the actions of those who belonged to the EPRP and other radical groups were not subjected to investigation and prosecution. The other complaint relates to crimes committed in the context of the armed conflict. Accordingly, even if the Derg sought to stamp out the armed resistance in various parts of the country using brutal tactics in violation of the laws and customs of war, it could not be said for sure that the rebels themselves never resorted to such tactics. Thus, an honest and objective prosecutor could not have proceeded against only one side of the conflict. In short, the selective prosecution of members of the Derg, while there are also other people who could have been made to bear responsibility for the ultra-radicalization of a generation and their victimization, is an example of victor's justice in operation. Although it was legally imperative and the right thing to prosecute Derg officials, one could argue that the process was not designed to get to the bottom of the nation's past problems. The idea that the trials were aimed at bringing about internal reformation of the system by punishing perpetrators loses some credibility due to the perceived partiality of the process. [169]

6.7 Invoking and proving selective prosecution: procedural and institutional considerations

So far we have seen that despite the constitutional recognition of the right to equality and the affirmation of the same by the substantive criminal law actual selective prosecution defenses are rare and invariably met with summary dismissals and tacit obliviousness. The uncertainty concerning the role of the judiciary in interpreting the fundamental constitutional rights, the steadily growing discretionary power of the prosecutor and the virtual nonexistence of procedural rules that are devised to deal with the issue contribute to the enduring underestimation of the problem of selective prosecution which in turn leads to its actual escalation.

The motion and order of discovery is unknown in Ethiopian criminal justice system. Even the criminal procedure code which prescribes the prosecutor to bring charges on every case

[168] Alebachew Birhanu, **Transitional Justice and the creation of Human Rights Culture in Ethiopia**, unpublished,2008, P. 23,34

[169] Tiba. F. K., "The Trial of Mengistu and Other Derg Members for Genocide, Torture and Summary Executions in Ethiopia, in Prosecuting International Crimes in Africa", PULP (Pretoria University Law Press, Pretoria, South Africa,(2011) pp.173

excepting on a few expressly stated grounds, provides no follow up mechanism to make sure the prosecutor was living up to its expectation or to deal with a complain of selective treatment when one was alleged. This legal lacuna is further pronounced by the recently introduced draconian legislations that increases the prosecutor's power at the expense of the judiciary. The latter is now handicapped to scrutinize prosecutorial decisions even if it wants to, whereas the former is given a free hand in deciding the commencement, discontinuation and resumption of investigation and prosecution, flatly refusing courts to inquire on the discriminate application of its powers by alleging the special desirability of the witness or the existence of un accessible internal rules. The newly promulgated attorney general establishment proclamation denied any role to the judiciary in handling complaints concerning prosecutorial decisions.

The attorney general as an institution has no legal duty to reveal documents and other evidence concerning its decisions to press charges or no case decisions. The shadowy public forum to be established by the attorney general who is supposed to ensure public accountability has no power to review the prosecutor's files.[170] Article 21(1) of freedom of mass media and access to information proclamation no 590/2008 which states public bodies "…. may refuse a request for access to a record or a request to confirm or deny the existence or nonexistence of any information if the record contains methods, techniques, procedures or guideline for the prevention, detection, curtailment or investigation of a contravention or possible contravention of the law, or the prosecution of alleged offenders; and when the disclosure of such information would be likely to prejudice the effectiveness of those methods, techniques, procedures or guidelines or lead to the circumvention of the law or facilitate the commission of an offence."[171] can easily be used to decline any demand to reveal prosecutorial documents.

Not even a rudimentary form of concepts like malicious intent, bona fide discrimination, a similarly situated others test or a special standard and burden of proof that are vital to invoking and proving selective prosecution claims exists in our legal system.

The trend towards effect based standard of discrimination in international jurisprudence of equality which found its way through constitutional endorsement and its implication on selective

[170] Attorney general establishment proclamation, cited above at note 152, Article 13.

[171] Freedom of mass media and access to information proclamation, article 21(1) proclamation no 590/2008,**fed. neg. gaz**, year 14, number 47.

prosecution claims isn't even noted let alone to be seriously analyzed due to the utter indifference of academicians concerning the matter.

As we have seen in chapter one domestic court remain skeptical of using effect to determine discriminate treatment due to its potential to paralyze the system since every prosecutorial decision has some disparity effect. Assuming that selective prosecution is a legitimate procedural defense in Ethiopia to which model should we adhere? Shall we run the risk of total collapse of the justice system by allowing effect based selectivity claims or should we opt for the notoriously difficult intent oriented approach which will be virtually impossible due to the unaccountable and secretive prosecutorial decision making not to mention the courts' impotency to order discovery. Or should we come up with a hybrid model which effectively filters absurd effect based claims without exposing claimants to the impossible task of proving biasing purpose on the part of the prosecutor.

Issues of jurisdiction shall also be addressed. The current renvoi between the judiciary and the house of federation concerning the interpretation of constitutional rights hinders the rise of a committed human rights regime that, adjudicate and in the process develop an indigenous jurisprudence on issues related to human rights including selective prosecution.

The absence of scholarly discourse, interest groups and NGOs that work on the multi-faceted relationship between prosecutorial decision making in general and selective prosecution in particular on the one hand and minorities and other marginalized groups on the other also have a stake in its perpetuation. The ethnic, gender and political dimensions of the problem aren't yet explored.

CHAPTER FIVE

Conclusion and Recommendation

5.1. Conclusion

The shift from private to public prosecution results in the rise of a centralized and bureaucratically organized prosecutor who is endowed with a considerable power and a large resource to combat crimes. But this development has the side effect of creating asymmetry between the prosecutor and the suspect which has a dire threat on the rights of the latter.from this threat stem constitutional and procedural mechanisms which sought to curb prosecutorial discretion and consolidate the defendant's position ***vis a vis*** the prosecutor.

Prosecutorial discretion is identified as the major factor in which biasing influences found their way into a criminal justice system. When discretion is greatest, so is the chance of bias and discrimination. The charging decision and plea bargaining powers are especially susceptible to abuse if proper institutional safeguards aren't put in place.

Prosecutorial discretion and the right to equality cross each other's road with respect to the issue of selective prosecution. The former with its emphasis of equal protection of the law and equality before the law considers unjustified differential treatment as a threat to fundamental human rights whereas the latter put forward concerns of public interest and evidentiary sufficiency to legitimize some degree of selectivity.

Municipal jurisdictions in a bid to compromise the two ideals devise a formula and procedural rules which requires uncompromisingly intent oriented bias to admit selective prosecution claims. The international human rights jurisprudence sails in a different direction and equates discrimination with disparate impact. Scholars point to the disastrous effect of the latter to the system and found the former's insistence on impact as a sole criterion of selectivity unsatisfactory. Sapir proposes that a similarly situated individuals' test which will have two stages in the first stage the defendant shall prove that another similarly situated individual isn't prosecuted then the burden will shift to the prosecutor to produce justification for the apparent difference in treatment. Failure to do so will be enough to dismiss the case. This approach

divorces the arguably impossible task of proving intent of the prosecutor and allows for a greater accountability of prosecutional decision making.

Ethiopia recognizes the right to equality in its constitution and prescribes it has to be interpreted according to international principles offered in human rights instruments. But such protection is eclipsed by the uncertainty concerning constitutional interpretation and the absence of procedural framework which can be utilized in forwarding and entertaining selective prosecution claims. The legislative trend towards strengthening prosecutorial discretion at the expense of the judiciary by extending the former's power to grant immunities and special protection which gives the impression that the prosecutor is free and unaccountable (at least as far as the courts are concerned) in its prosecutorial decision making. The situation is further exasperated by the relatively little attention given to the problem and the virtual lack of judicial dynamism which attempts to apply/interpret the constitutional provisions in dealing with selective prosecution claims. The courts are uncomfortable to rule on such defenses and often disregard it totally or accept the prosecutor's claim of its discretion uncritically. The criminal justice policy is of little help in clarifying on the basis and rational for selective prosecution and the role of the judiciary in such matters.

The institutional framework of the recently established attorney general which severs any institutional accountability of the attorney as far as reviewing complaints is concerned together with the absence of legal obligation which orders it to reveal decision making information and procedures makes the odds of successfully invoking and proving selective prosecution next to impossible. The absence of rules of discovery, mechanisms to force the prosecutor to produce evidence in its possession, and clear legal definition and weight of concepts like similarly situated, differential treatment burden and degree of proof and the like helps in perpetuating the problem in Ethiopia despite of the high flying promises of the constitution and international standards. Though the relative obscurity of the concept together with the inaccessibility of prosecutorial decision making documents makes it impossible to determine the prevalence of the problem, I conclude from the cases analyzed that the grip of selective prosecution is unmistakable in our criminal justice system t and defenses based on singling out defendants is strictly in accord with the constitution and the substantive criminal law.

5.2. Recommendations

I recommend a sweeping procedural and institutional reform which includes

- An explicit mention of selective prosecution as a procedural defense and the introduction of discovery procedure and preponderance of evidence to prove a prima facie case of discrimination according to Sapir's model of showing the non-prosecution of others who are similarly situated.
- Awareness creation programs to lawyers and other stake holders by the bar association and other concerned bodies with a view to mainstream the concept of selective prosecution and alert the justice system on the potential ills and solutions of the problem
- A clear rule to dictate the prosecutor in considering the factors which are employed to pass the initial charging decision and clearly prescribing an active role to review the prosecutor's decision for courts together with unambiguous procedure to entertain such decisions
- Making the attorney general institutionally accountable by compelling it to render its internal documents related to its decisions public and reviewable
- incorporation of an ethical rule which explicitly forbids prosecutors from selectively prosecuting suspects
- A consideration of the discretionary powers granted to the attorney general and its possible effect of introducing plea bargaining and withdrawal & resuming of charges together with a ceiling in the number of reopening cases.
- A formulation of criminal policy which clearly identifies the ills of selective prosecution and which integrates practical guides to tackle it with the increasing role of the prosecutor.
- Ending the renvoi concerning the interpretation of human rights incorporated in the constitution in a way that empowers courts in addressing defenses based on such rights.

- Commencing a learned and lively scholarly discourse on the concept of selective prosecution which experiment with the international instruments and the constitutional provisions and calls attention on the wide ranging implications of the matter.

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