Challenges and Implications of Using Suspect/Defendant-Turned Prosecution Witnesses in Ethiopia

Alemu Meheretu[*]

Abstract

Ethiopia has formally recognized evidence obtained from criminal participants in return for immunity and/or sentence reduction in the prosecution of some selected crimes, notably corruption, terrorism and trafficking in persons. However, in practice this prosecution tool pervades virtually all crimes. This article investigates the challenges and implications of relying on suspect/defendant-turned witnesses having regard to the contexts of the criminal justice system with a focus on the Federal Government. The article is informed by qualitative data drawn from court cases, in depth interviews and FGDs with justice actors: prosecutors, judges, and defense attorneys. I contend that although the use of such incentivized witnesses serves law enforcement purposes, it involves inherent as well as contextual challenges and implications to the criminal justice system. Exacerbated by frail fact-finding capacity, scant safeguards, and lack of enforceability, among others, it is prone to yield wrongful conviction, discrimination, impunity, and abuse and corruption.

Key terms: Incentivized witnesses, Justice collaborators, Informant witnesses, Suspect/defendant-turned witnesses, Evidence, Challenges, Ethiopia

Introduction

As crimes become more complex and sophisticated governments employ a myriad of evidence generating tools in order to prosecute criminals. The use of criminal participants or their evidence in return for a benefit takes substantial credit in this regard. In the USA, such witnesses are generally known as "informant witnesses"[1] or

[*] PhD, Assistant Professor, Jimma University.

[1] Nicholas Fyfe and James Sheptycki, *International Trends in the Facilitation of Witness Cooperation in Organized Crimes*, 3(3) EUROPEAN JOURNAL OF CRIMINOLOGY, 336-38 (2006).

"cooperating witnesses"[2] and include jailhouse informants and "accomplice witnesses"—co-participants.[3] The concessions the prosecution offers to such "incentivized witnesses" include: agreement not to prosecute, recommendation for lenient sentence at trial, reduction of charges, agreement to stipulate mitigating circumstances at sentencing, etc.[4] These arrangements have their basis in the US Sentencing Guidelines ("substantial assistance motion" where a defendant receives sentence reduction in exchange for his "substantial assistance" in the prosecution of others)[5] and plea agreements and are often known as *cooperation agreements* or *witness inducement agreements*.[6] In Europe the arrangement made with persons facing

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[2] See Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 2 (1992) (discussing cooperation agreements involving the exchange of leniency for information or testimony); R. Michael Cassidy, *Soft Words of Hope: Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. L. REV. 1129 (2004); Michael A. Simons, *Retribution for Rats: Cooperation punishment and Atonement*, 56 VAND.L.REV. 1, 2, (2003).

[3] Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents*, 6 OHIO ST. J. CRIM. L. 519, 522, 554-57 (2009) (Informant includes those who receive benefits for their testimony and is of two broad types: jailhouse informants and other informants who are "co-participants in the crime or other members of the suspect's criminal group"); Jessica A. Roth, *Informant Witnesses and The Risk of Wrongful Convictions* 53 AMERICAN LAW REVIEW, 737,747-48 (2016) (making similar distinctions as Mosteller does); Michael Cassidy, *supra note* 2, at 1133-34(distinguishing four kinds of informants: a tipster (citizen informant), confidential informant, jailhouse informant, and accomplice witness); Markus Surratt, *Incentivized Informants, Brady, Ruiz, and Wrongful Imprisonment: Requiring Pre-plea Disclosure of Material Exculpatory Evidence*, 93 WASHINGITON LAW REVIEW 523, 538-45(2018)(classifying (incentivized) informants into five categories: the jailhouse snitch, the professional snitch, the accomplice, the calumniator — one who falsely accuses others — and the confidential informant.); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 5 (OUP, 2011) at 123-141(where the author defines Criminal informant to include jailhouse informants, co-defendants, witnesses who were potential suspects themselves and some who sought reward money); Ariel Werner, *What`s in a Name? Challenging the citizen Informant Doctrine*, 89 NEWYORK UNIVERSITY LAW REVIEW, 2336, 2339 (2014); Michael L. Rich, *Coerced Informants and thirteenth Amendment Limitation on the Police–informant relationship*, 50 SANTA CLARA L.REV 681, 689-90 (2010); Ellen Yaroshefsky, *Introduction to the Cooperating Witness Conundrum: Is Justice Obtainable?*, 23 CARDOZO L. REV. 747,755-56 (2002) citing Rory K. Little, *The Cooperating Witness Conundrum: Is Justice Obtainable?* Cardozo School of Law Symposium (Nov. 30, 2000) (Proposing the replacement of "cooperating witness with criminal informant for those persons who are themselves involved in criminal activity and receiving some benefit from the government").

[4] R. Michael Cassidy, *supra* note 2, at 1142-43.

[5] See Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105 (1994); Ross Galin, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 FORDHAM L. REV. 1245 (2000); ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (New York University press, 2009) at 50.

[6] See H. Lloyd King, *Why Prosecutors are Permitted to Offer Witness Inducement Agreements: A matter of Constitutional Authority*, 29 *STETSON LAW REVIEW* 156(1999); James W. Haldin, *Toward a Level*

criminal charges or persons convicted of a crime whereby they provide information or evidence on others (notably on their associates) in return for a benefit are generally termed as "collaborators of justice" or "crown/state witnesses"[7] albeit, known with varied names across specific jurisdictions: Staatszeugen/State's witnesses (Germany), supergrasses (Northern Ireland), petiti (Italy), arrenpenditos (Spain).[8] The available benefits to collaborators of justice include: sentence reduction, immunity from prosecution, dropping of charges, and financial benefits.[9] Although these arrangements are often employed as a means to prevent and prosecute serious and complex crimes, notably organized ones,[10] in some jurisdictions such as Canada, USA and to some extent in Germany, they are also applied in less serious crimes.

Ethiopia has also formally embraced the analogous of this evidence generating tool—evidence/testimony obtained from criminal participants (suspects and defendants) in return for immunity from prosecution and sentence reduction — in some specific crimes including corruption, trafficking in persons and terrorism, but in practice it pervades almost all crimes.[11] This article investigates the challenges and implications of using suspect/defendant–turned witnesses having regard to the contexts of the Ethiopian criminal justice system. The article features some qualitative data drawn from experiences of the Federal Government using in-depth interviews and FGDs with representatives from justice sector actors and review of court cases, to the extent

Playing Field: Challenges to Accomplice Testimony in the Wake of United States v. Singleton, 57 WASH. & LEE L. REV. 515 (2000).

[7] See generally J.H. Crijns *et al*, COLLABORATION WITH JUSTICE IN THE NETHERLANDS, ITALY GERMANY AND CANADA: A COMPARATIVE STUDY ON THE PROVISION OF UNDERTAKINGS TO OFFENDERS WHO ARE WILLING TO GIVE EVIDENCE IN THE PROSECUTION OF OTHERS (2017) available at https://www.wodc.nl/binaries/2725_volledige_tekst_tcm28-324067.pdf visited on 05 oct.2020 ; see also a definition provided by the Council of Europe where it defines collaborators of justice as: "any person who faces criminal charges, or has been convicted of taking part in a criminal association or other criminal organisation of any kind, or in offences of organised crime, but who agrees to cooperate with criminal justice authorities, particularly by giving testimony about a criminal association or organisation, or about any offence connected with organised crime or other serious crimes." Council of Europe Committee of Minsters, Recommendation (2005) 9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice *(Adopted by the Committee of Ministers on 20 April 2005 at the 924th meeting of the Ministers' Deputies). Available at: https://www.coe.int/t/dg1/legalcooperation/economiccrime/organisedcrime/Rec%20_2005_9.pdf visited on 05 Oct. 2020.*

[8] Nicholas Fyfe and James Sheptycki, *supra* note 1, 336-38.

[9] J.H. Crijns *et al*, *supra* note 7, at 364-68.

[10] John C. Jeffries & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1103–09 (1995); Nicholas Fyfe and James Sheptycki, *supra note* 1 at 336-38.

[11] Alemu Meheretu (2018), *Exploring Criminal Informant Use in Ethiopia: Some Experiences From the Federal Government and selected Oromia Zones*, (unpublished), at 48-49.

available. Extensive and systematic interviews and FGDs were held with 35 informants from the justice sector institutions including prosecutors (19), defense lawyers (7) and judges (9). This is particularly relevant to solicit information on the informal practice, which is not normally available on the records. Some of the court cases used in this article were obtained from the interviews and FGDs. Access problems means suspect/defendant–turned witnesses are not included. In order to ensure anonymity of the participants in the interviews and FGDs, codes combining their occupation with numbers (e.g. prosecutor 01, judge 07) have been used in citing them.

The article is structured in five sections. The first section following this introduction briefly explores the rationales of using informants/collaborators of justice while section two sketches the use of evidence obtained from suspect/defendant-turned witnesses in Ethiopia. The third section unveils the challenges and implications of using such evidence in Ethiopia focusing on the Federal Government. The final section concludes the article.

1. Why Informants /Justice Collaborators?

In the past informants were viewed as incompetent witnesses if they stood to directly gain some benefit from their testimony.[12] Through time, this has changed and now they are increasingly used as prosecution tools, particularly in organized and complex crimes.[13] Researches indicate that prosecuting organized crimes using ordinary method of investigation has been proved to be ineffective. The nature of organized crimes, in particular their extreme secrecy and intermediary features, necessitate an extraordinary means to investigate and prosecute them.[14] Informants/justice collaborators, who are part of an organization and are familiar with its structure and functioning,[15] provide the means to dismantle the organization and prevent such crimes. Such instrumentality of informant witnesses has been described as[16]: "without informants law enforcement

[12] Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 112(2014).

[13] Peter J. Tak, *Deals with Criminals: Supergrasses, Crown witnesses and Pentiti*, 5(2) EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE, 5, 13(1997); John C. Jeffries & John Gleeson, *supra* note 10.

[14] Nicholas Fyfe and James Sheptycki, *supra* note 1, at 338; John C. Jeffries & Hon. John Gleeson, *supra* note 10, at 1104 (Nothing that without informant witnesses, prosecution of the "culpable and dangerous individuals" in criminal organizations would be impossible because such high-ranking individuals purposefully operate behind the scenes such that "their guilt usually cannot be proved by the testimony of victims or eyewitnesses or by forensic evidence," and they "never confess").

[15] Peter J. Tak (1997), *supra* note 13, at 2.

[16] Alexandra Natapoff, *Snitching: Institutional and Communal Consequences*, Legal studies paper No. 2004-24, 2004, at 661, citing *United States vs. Bernal–Obeso*, 989 F.2d 311, 335(9th cir.1993).

officials would be unable to penetrate and destroy organized crimes syndicates, drug trafficking cartels, bank frauds…public corruption, terrorist gangs, money launderers….". They also enable governments to prosecute politically powerful or otherwise insulated criminal actors.[17] Rewarding of informant witness /justice collaborators with attractive concessions is thus needed to encourage them to come forward enduring any possible retaliations from their crime mates.[18] Therefore, the major rationale for the use of such evidence relates to its instrumentality to prevent and prosecute serious and organized crimes.

Ethiopian policy makers seem to rely on this rationale to introduce "substantial evidence" rewards to cooperating suspects/defendants in crimes of corruption, terrorism, trafficking and smuggling in persons.[19] Likewise, the Criminal Justice Policy embraces this investigative and prosecution tactic in complex and serious crimes provided that ordinary means of investigation is unable to tackle such crimes.[20]

The other rationale for informant witnesses/justice collaborators relates to administrative efficiency gains. It offers efficiency advantages to the system by making investigation and prosecution activities easier and cheaper.[21] It is considered as the "most cost-effective investigative tool in organized crimes", compared to other techniques such as surveillances and undercover operations.[22] In this sense, it can enhance the efficiency of the law enforcement; a rationale upheld by Ethiopian justice actors.[23] It is important to note, however, that this efficiency gain comes with considerable costs of compromising fairness, accuracy and due process rights.[24]

The final and least advocated rational for defendant's cooperation with law enforcement has to do with repentance. It is proposed that cooperation gives defendants the opportunity to repent and pay back to society by providing

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[17] R. Michael Cassidy, *supra* note *2* at 1137 (2004) (noting that criminal informant use "makes possible the detection of crimes that may otherwise go unsolved, allows for the apprehension of more dangerous criminals, and minimizes the risk of acquittal that could adversely affect public safety").

[18] J.H. Crijns *et al, supra* note 7 at 26; Robert P. Mosteller, *supra* note 3 at 551.

[19] Alemu Meheretu, *The Law of Criminal Informants in Ethiopia*, 13(3) MLR, 442(2019), see the section on rationales.

[20] FDRE, The Criminal Justice Policy of Ethiopia (2011), section 3.17.5 (a&b), at 22.

[21] David Leimbach, *Minimizing the Risk of Injustice in Cooperation Agreements* 7 DARTMOUTH L.J. 173,176 (2009) (Discussing the efficiency advantages of cooperation agreements); Alexandra Natapoff (2009), *supra* note 5 at 31.

[22] Thomas Gobar et al, *Community Effects of Law Enforcement Countermeasures against Organized Crime: A retrospective Analysis*, Report No 006, (2010), at 6; J. ALBANESE, ORGANIZED CRIME IN OUR TIMES (5th Edition. Cincinnati: Anderson, 2007), at 262.

[23] Alemu Meheretu (2019), *Supra* note 19, at 446-47.

[24] See section 4 below.

incriminating information on others.[25] It is claimed that cooperation serves retributive purposes in two senses[26]: First it gives "…defendants an opportunity to undergo a process of expiation — remorse, apology, reparation, and punishment — that can lead to true atonement". Second, cooperation with law enforcement itself amounts to punishment for the criminal informant: the stern stigma and ostracism from crime mates and the community at large can be taken as an "extra punishment".

Nonetheless, this penological rationale is open to challenge since it is quite questionable whether a defendant cooperates out of pure repentance. Some researches indicate that such motivations are rare.[27] Instead, it is highly probable that suspects/defendants assist law enforcement in anticipation of the benefits attached to cooperation (i.e., immunity or charge or sentence concessions or other benefits) or with a view to shift blame to others and to misdirect the investigation. Others may cooperate due to some ulterior motives: revenge or other perverse ends. Therefore, it stands to reason to argue that cooperation could be more likely to be tactical than an expression of remorse.

2. Overview of Use of Evidence Obtained from Criminal Participants

In Ethiopia, the use of evidence obtained from criminal participants in exchange for a benefit operates in two ways: formally and informally. The first relates to instances where such evidence is expressly recognized by a piece of legislation governing selected crimes such as corruption, terrorism, and trafficking in persons. The second variant relates to the practice of using suspect/defendant-turned prosecution witnesses in crimes beyond those authorized by law. This section does not engage with detail analysis of the practice, rather it outlines the practice centering on suspect/defendant-turned witnesses with a view to set background for the investigation of challenges and implications accompanying its use in Ethiopia, with a focus on the Federal Government.

2.1. The formal use of evidence obtained from criminal participants

The anti-corruption laws permit the use of suspect-generated evidence in return for immunity under two conditions:[28] 1) where a person involved in corruption provides

[25] Michael A. Simons, *supra* note 2, at 2.

[26] *Ibid.*, at 3-4.

[27] See generally, J. MADINGER, CONFIDENTIAL INFORMANT: LAW ENFORCEMENT'S MOST VALUABLE TOOL, (Boca Raton, Fla.: CRC Press, 2000).

[28] Article 43(1), The Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 434/2005 (herein after the Revised Anti-Corruption Special Procedure Proclamation);

"substantial evidence" against another participant; 2) the evidence is given before the institution of criminal charge. "Substantial evidence" connotes either of the following:[29] evidence "sufficient to bring conviction by itself"; or evidence which "serves as a basis to lead to other evidences"; or evidence when corroborated with other evidence "… is sufficient to bring conviction, and its absence makes conviction unlikely." From the language of the law the following general observations can be made: First, the degree of participation and the culpability of the suspect are not among the conditions for using such evidence. Thus, apparently so long as a suspect provides substantial evidence before charge is instituted, he can be immune from prosecution regardless of his degree of involvement in the crime. This does not align with the purpose of cooperation/immunity agreements — prosecuting more culpable defendants using less culpable ones. Second, the timing requirement for cooperation, which is "before the case is taken to court" and the targeted candidate for the deal: "a person who has been involved in corruption offence", limit the beneficiaries of the "substantial evidence" deal to suspects, plainly excluding defendant-turned witnesses. Third, the only concession recognized by law is immunity, thus other forms of concessions including sentence reduction and concessions related to the proceeds of the crime are apparently excluded. Fourth, although characterized by inherent unreliability, the law insists that the testimony of a suspect-turned witness has equal weight as that of ordinary witnesses.[30]

Likewise, the Anti-terrorism Proclamation upholds cooperation from criminal defendants but in a different fashion. First, it offers mitigation of sentence for those defendants who either plead guilty to their own crimes or disclose the identity of co-offenders.[31] Second, the concessions are limited to sentence reduction as opposed to immunity. Lastly, it provides no protection for cooperators against any possible renege by the government.

The use of evidence obtained from criminal participants has also found a place under the Anti-trafficking and Smuggling of Migrants Proclamation. The Proclamation sanctions the use of such evidence on three cumulative conditions[32]: where a suspect/defendant provides "substantial evidence" in a sense described under the anti-corruption law above; where such evidence is given before the case goes to court and

See also Article 8 (1) and (2) of the Crime of Corruption Proclamation No.881/2015(which recognize informant use and give cross-reference to the former).

[29] *Ibid.,* Article 43(2).

[30] *Ibid.,* Article 43(5).

[31] Article 33, The Anti-terrorism Proclamation No. 652/2009.

[32] See Article 23, the prevention and Suppression of Trafficking in persons and Smuggling of Migrants Proclamation No. 909/2015.

where the Attorney General authorizes it. The concessions available to suspect/defendant-turned witnesses in exchange for providing "substantial evidence" include sentence reduction and immunity[33], the implementation of which give rise to complex legal and practical issues.[34]

Finally, the witness protection proclamation recognizes immunity in exchange for cooperation/testimony – as a witness protection measure – provided that three cumulative conditions are satisfied[35]: the crime is so serious that it attracts a minimum of 10 years of rigorous imprisonment; and that the offence cannot be detected or prosecuted in the absence of such testimony; and that a threat of serious danger exists to the life, physical security, freedom or property of the suspect turned witness or his family.

The above laws regulate evidence obtained from criminal participants in return for a benefit, notably immunity and sentence concessions, mainly by stipulating general rules on the selection of eligible suspects and defendants, the available rewards and benefits due to them. Yet, the laws fall short of articulating clear, coherent and comprehensive standards as well as providing for sufficient protections and meaningful enforcement mechanisms on informant use.[36]

2.2. The informal use of evidence obtained from criminal participants

This concerns the use of suspect/defendant-turned witnesses in crimes not authorized by law – where a suspect or a defendant informally agrees to testify or provide evidence against a criminal participant in exchange for some concessions, notably exemption from prosecution. Interviews and FGDs with justice sector personnel, the investigation of available court cases and accessible police investigation files reveal that this variant is widely practiced. Asked whether and how often they use such witnesses, many prosecutors replied that they resort to it whenever triggered by evidence unavailability regardless of the nature of the crime, while judges and defense attorneys submit that they regularly encounter such witnesses.[37]

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[33] *Ibid.*

[34] Alemu Meheretu, *Supra* note 19, at 459-61.

[35] Articles 3(1) and 4(1) (f), Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No.699/2010. For the discussion of such conditions, *Ibid.*, at 466-68.

[36] *Ibid.*, at 469-71.

[37] FGDs and interviews with judges, prosecutors and defense attorneys, April 04-20/2018; March 06-07/ 2018; where three-forth of them (out of 35) indicated flipping suspects/defendants into prosecution witnesses is a familiar practice. For a detail examination of the practice, See Alemu, *supra* note 11.

This informal practice covers any crime, including but not limited to, homicide, rape, willful injury, robbery, copyright and trademark violations, fraud, usury, theft, breach of trust, using cheque without cover, crimes against the constitutional order, and tax related crimes.[38] In one case of aggravated theft[39] of electronic devices carried out by a group of seven offenders during several nights, 'accomplices' who transported and bought the stolen devices were turned into witnesses in exchange for dropping of the charges against them. All the seven principal offenders were convicted and received 17 years of rigorous imprisonment each. In another aggravated theft case[40] involving five principal offenders, police managed to arrest only one of the main offenders. In an informal deal struck with the prosecution, this suspect led to the arrest of the remaining offenders and the recovery of the stolen property. The remaining four defendants were finally convicted based on his testimony. Moreover, in one fraud case[41] committed by three defendants, the main offender fraudulently agreed to sale to another a seized contraband material (sugar & cooking oil) presenting himself as a custom`s official. He then received birr 250,000. To facilitate the crime, he hired two assistants. The prosecution flipped the two assistants (defendants) into witnesses to have the main offender convicted. Prosecutors also rely on suspect/defendant-turned witness testimony in return for informal immunity in the prosecution of crimes of rioting, and crimes against the constitution and constitutional order.[42]

Further, judges observed that they often learn the use of suspect/defendant-turned witness during trial where the admissibility of such testimony is challenged by the defense; an objection commonly overruled:[43] "prosecutors use criminal defendants as witnesses and the defense`s challenge on admissibility of such witnesses is generally rejected for the court has no mandate to determine whom the prosecution should call as a witness." Indeed, in *Yordanos Abay vs. Prosecution*[44], the Federal Cassation Court simply rubberstamped such informal practice claiming that no law prohibits the prosecution from using defendants as prosecution witnesses. Here, the Court seems reluctant even to review the standards used to select such witnesses and set standards for their subsequent use.

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[38] *Ibid.*

[39] Interview with prosecutor 04, April 11, 2018.

[40] Interview with prosecutor 10, April 16, 2018.

[41] Interview with prosecutor 07, April 16, 2018.

[42] FGDs and interviews with judges, prosecutors and defense attorneys, April 04-05, 10-11 and 20/2018. My attempt to locate the court files on this was not successful.

[43] FGD with judges, April 04 &10, 2018 (translation mine).

[44] *Yordanos Abay vs. Public Prosecutor*, FEDERAL SUPREME COURT CASSATION DECISION, *Vol. 12, File No.57988*, 10/05/2003 E.C., p.196.

Likewise, defense attorneys submitted that they ordinarily experience the use of suspects and defendants as prosecution witnesses; a prosecutorial practice they usually object it on grounds of legality, fairness and reliability, but with no avail due to the passivity of the court.[45] Some went further to blame lower courts' approach on such testimony. One defense attorney noted[46]: "despite signs of clear motivations from suspect/defendant turned witnesses, many judges simply treat them as ordinary witnesses, attaching similar weight as that of ordinary witnesses." Indeed, judges seem to admit this with some caveats:[47]

> *The court does not take any presumption against a suspect/defendant-turned witness. He/she undergoes the ordinary examination process and the court attaches the weight the testimony deserves like that of ordinary witnesses. However, where the testimony raises some suspicion, the fact that a witness has received some leniency helps shape our decision.*

The following cases further illustrate major aspects of the practice. In *Federal prosecutor vs. Kiros Negash et al*[48] five defendants consisting of two police officers were charged for ordinary homicide and aggravated robbery. A suspect who was involved in the commission of the crime from its plotting to execution, among others, by transporting defendants to and from the crime scene was made to testify against the rest of the defendants to have them convicted; some of them in absentia. In return he benefited from the dismissal of the case against him. Indeed, as the only direct evidence available, his testimony was essential that without his testimony conviction would have been unlikely.

Although both ended up in acquittal, the prosecution employed suspect-turned witness testimony in two cases involving breach of trust and forgery. In *prosecutor vs. Yabibal Tesfaye et al* [49] two defendants were charged for the crime of breach of trust involving sale of a car worth 1.5 million which was delivered to the first defendant in trust. Another person suspected of the crime of *receiving* contrary to Article 682 of the Criminal Code for purchasing the car, was turned into a witness and testified against the two defendants in return for exemption from prosecution. The case of *Prosecutor vs. Yonatan Manjura et al* [50] involved three counts of forgery and misleading of justice, with one of the counts relating to the creation and use of a forged loan agreement worth

[45] FGD with defense attorneys, April 11 /2018.

[46] Interview with defense attorney 01, April 10, 2018 (translation mine).

[47] FGDs with Judges, April 10,2018 (translation mine).

[48] *Federal prosecutor vs. Kiros Negash et al*, Federal High Court, *File No.113062, 10/07/2006E.C.*

[49] *Federal Prosecutor vs. Yabibal Tesfaye et al*, Federal First Instance Court, *File No.150214, 06/10/2009 E.C.*

[50] *Federal prosecutor vs. Yonatan Manjura et al*, Federal First Instance Court, *File No.165453, 26/07/2010 E.C.*

5.5 million Birr by an heir and agent of the deceased with a view to snatch the shares of another heir. One of the suspects who claimed to have witnessed the conclusion of the forged loan agreement admitted wrong and testified against the main participants before court in exchange for dropping of her own case.

In another pending case of fraud[51] the prosecution flipped into a witness a suspect who allegedly participated in handing over "bribe money" to a fraudster who promises to secure the release of a defendant by bribing judges and prosecutors. It is interesting to see how this case would unfold as the suspect-turned witness is the spouse of the defendant. Apart from issues on the weight of her testimony spousal privilege could be a barrier.

Drawing from FGDs and interviews, and review of court files, it can be concluded that the informal practice exhibits the following salient features: First, it covers crimes ranging from economy related crimes such as theft to serious crimes against persons and against the state such as homicide and the so called crimes against constitutional order; Second, although diverse and inconsistent standards apply, the most frequently used standards to select witnesses from among participants are lack of evidence and degree of participation; Third, the concessions and benefits granted to such witnesses include informal immunity, withdrawal of charges, closure of a file, charge or sentence reduction, suspension of sentence, witness protection benefits, preferential treatment in prison condition, expunge of fingerprints, and returning of bail bonds/securities. Forth, both defendants and suspects are turned into prosecution witnesses. The arrangements are made in a subtle way – either during the investigation where confessions tendered as per 27(2) of CPC will ultimately give way to testimony reduced as per Article 30 of CPC or during the trial stage using the instrumentality of withdrawal or amendment of charges, areas where courts adopt a laissez-faire policy. To be sure, the timing of permissible withdrawal and amendment of charges prescribed by the law (which is *any time before judgment),* the absence of regulation on grounds of withdrawal, and the laxity of permissible grounds for charge amendment[52] are conducive for such tactics. Fifth, the practice is largely insulated both from internal and external review and, hence, it is not enforceable should the prosecutor renege, in particular. In practice while the prosecution has powerful leverages to enforce the

[51] *Public prosecutor vs. X* (As the case is pending full citation is withheld).

[52] See Articles 119-121 of CPC and The General Attorney Establishment Proclamation, Proclamation No. 943/2016.

informal deal through threats of prosecution, the cooperating defendant has none with the exception of internal administrative recourses, which are often not reliable.[53]

3. Challenges and Implications of Using Suspect/Defendant-turned Witnesses

Evidence obtained from criminal participants provides governments with essential law enforcement tool in terms of investigating and prosecuting crimes effectively and efficiently. However, they also entail challenges to any criminal justice system. In this section, the author argues based on available data drawn from fieldwork that such evidence in general and incentivized witnesses testimony - those who receive benefit for their testimony, in particular are met with two types of challenges as it applies to Ethiopia: a) challenges inherent to witness inducement; which are exacerbated by specific contexts of the Ethiopian criminal justice; b) challenges specific to the Ethiopian criminal justice.

3.1. Unreliability and wrongful conviction

Although ordinary witnesses are not immune from concerns of unreliability, the problem is much pronounced with incentivized witnesses. These witnesses could tender untrustworthy testimony simply to shift blame to their associates and receive the maximum leniency or immunity from the prosecution or due to some ulterior personal motives of revenge or bias against an innocent person.[54] Attractive and inducing concessions from the prosecution including the protection of anonymity and immunity or the promise of liberty are so powerful. In the circumstances, such witnesses have strong incentives to tender false testimony that can yield wrongful conviction. This has been proved to be true elsewhere, making incentivized witnesses one of the leading causes of wrongful conviction[55], which has not been even contained by traditional

[53] See section 3.6 below.

[54] Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1383 (1996)(noting that their desire to avoid criminal liability or to obtain leniency is so strong that they could do or say anything which takes them to this end); Christine J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 786 (1990) ("It is in [their] interest not only to implicate others to minimize [their] own role and exaggerate the roles of their co-conspirators."); J.H. Crijns *et al* , *supra note* 7 (noting that the benefit attached to collaborating could undermine their reliability).

[55] This is the case for instance in the USA, accounting about 46 percent of capital wrongful convictions. See Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, Center on Wrongful Convictions, *Northwestern University School of Law*, 2004, *available at* <http://www.law.northwestern.edulwrongfulconvictions> last accessed 20 April 2019; see also

mechanisms of ensuring reliability of witness testimony such as cross-examination and oath.[56]

In Ethiopia, while comprehensive data/research on the subject matter is unavailable, piecemeal evidence suggests that the risk of false testimony among suspect/defendant-turned witnesses and thus wrongful conviction is a real cause for concern. FGDs and interviews reveal that the practice of using suspect/defendant-turned witnesses risks fabrications and perjury. One prosecutor notes[57]: while suspect/defendant-turned witnesses provide an effective means to investigate and prosecute crimes, they are equally problematic in a sense that they could be unreliable. That is why, in practice, they alone cannot sustain a valid conviction." Another prosecutor adds to make the concern more explicit[58]: "there are practices where some investigators and prosecutors threaten a potential witness (suspect) with serious charges. I fear that this might taint the credibility of his/her testimony.

Judges and defense attorneys made similar observations, both acknowledging the practical benefits of turning suspects and defendants into prosecution witnesses, expressed their doubts over the reliability of their testimony. Some of them suspect that innocents fall victims of false suspect/defendant-turned witness testimony in many politically motivated prosecutions. This is particularly true in crimes of rioting, crimes of terrorism, and crimes against the constitution and constitutional order.[59] Defense attorney 07 noted: "I really doubt suspect-turned witnesses where in many cases there are clear indications that their testimony is either motivated or coerced. Can you expect

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Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 76, 87–88 (2008) (out of 200 DNA exonerations 18 percent are caused by false informant testimony); S. Greer, *Where the grass is greener? Supergrasses in comparative perspective.* In INFORMERS, POLICING, POLICY AND PRACTICE. (R. Billingsley *et al* eds., Devon: Willan Publishing, 2001); George H. Harris, *Testimony for sale: The law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1(2000); ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN AMERICAN JUSTICE SYSTEM, 63-105(Praeger, 2002); Graham Hughes, *supra* note 2, at 7-12; Christine J. Saverda, *supra* note 54, at 786-87; Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. (2006).

[56] R. Michael Cassidy, *supra* note 2, at 1130; Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 809 (2002); Bryan S. Gowdy, *Leniency Bribes: Justifying the Federal Practice of Offering Leniency for Testimony*, 60 LA. L. REV. 447,462-67 (2000).

[57] Interview with prosecutor 05, April 13, 2018 (translation mine).

[58] Interview with prosecutor 11, April 17, 2018 (translation mine).

[59] FGDs and interviews with judges, prosecutors and defense attorneys, April 04-05, 10-11 and 20/2018. During interviews two justice actors shared me this: *in one case, where an opposition figure was accused of terrorism, the prosecution used a criminal who claims to have witnessed the commission of the crime. The opposition figure was convicted as charged and sentenced to life. But it was revealed that the government organized false testimony against him.* Interview with defense attorney 06, and prosecutor 04, April 20, 2018.

credible testimony from a tortured witness/suspect? That is how it sometimes works …". Judges recount[60]: although a suspect-turned witness helps bring to justice offenders in group and complex crimes in respect of which evidence may not be available, criminals may abuse it simply to avoid conviction or for some other concessions.

On the other hand, some justice actors including prosecutors and judges seem to downplay the above risks. They opined that with the necessary guarantees put in place, the risks could be effectively controlled. For instance, Prosecutor 07 has to say this[61]: "given their firsthand knowledge suspect-turned witnesses could provide vital evidence in the prosecution of more culpable offenders. In practice these individuals pass through rigorous scrutiny from selection all the way to cross-examination during the trial." Judge 01 observes[62]: the credibility of such witness is tested against the statement he tenders at the police station. Nonetheless, as shown above, the efficacy of such traditional mechanisms is dubitable.

Apart from the observations made and experiences shared by justice actors, a review of specific contexts of the Ethiopian criminal justice suggest that false testimony from suspect and defendant-turned witnesses would pose a formidable challenge to the system. In what follows, I argue that such specific contexts as weak fact-finding capacity, scant safeguards, and preoccupation with efficiency would nurture unreliable witness testimony from such incentivized witnesses.

a) Weak Fact finding Capacity

The fact-finding capacity of the criminal process is so weak that false information from suspect/defendant-turned witnesses, who have firsthand knowledge about the details of the crime and thus possess positional advantage to maneuver facts, can be processed easily. Criminal investigations, inhibited by meager skilled personnel, resources and technology, utterly lack the required rigor and quality. For instance, scientific evidence, and forensics remain substandard, at times unavailable. Thus, sometimes it is possible that the main, if not, the sole source of evidence could be suspect or defendant-turned witnesses whose veracity cannot be properly tested using independent evidence. Ethiopian prosecutors and police may not be reliable gatekeepers against false testimony from such sources. Most of our prosecutors are young and less experienced; lack the training, experience, and resource to properly screen the reliability of such

[60] FGD with judges, April 04/2018.
[61] Interview with prosecutor 07, April 16,2018 (translation mine).
[62] Interview with judge 01, April 10, 2018.

witnesses. Inversely, the practice of witness coaching is laden with risks of promoting false and misleading testimony, inadvertent or otherwise.[63] Further, with prosecutors and police prone to confirmation bias[64], they may lack the objectivity to properly screen the accuracy of testimony from incentivized witnesses[65] and might be reluctant to look for independent evidence. Thus, reliance on such testimony in the event "where the prosecution controls the selection, preparation and compensation of cooperating witnesses, poses a significant risk of wrongful conviction, especially when combined with other risk factors". [66]

Worryingly, the practice of turning suspects into prosecution witnesses that involves, on top of luring concessions, a multitude of tactics to break any resistance from the former would militate against accurate testimony. Such tactics include threat with severe charges, overcharging, actual detentions, lying about the probative value of prosecution evidence, suggesting that a co-accused has confessed, approaching the suspect using intermediaries, including his loved ones.[67]

Furthermore, the court's fact-finding approach and rigor, in general and within the context of incentivized witnesses, in particular could tolerate unreliable testimony and thus inaccurate outcome. The defense often challenges the competence and admissibility of suspect/defendant-turned witnesses invoking prejudice, bias and unreliability; it also questions the standards used to flip suspects and defendants into witnesses.[68] However, sometimes judges are reluctant to review the practice of turning suspects/defendants into prosecution witnesses. In one theft case[69] before the Federal Cassation Bench where the turning of the first defendant into a witness against the second defendant in return for dropping of the charge against her was challenged, the court simply sanctioned the practice without inquiring into the standards used for flipping, reasoning that no law prohibits the prosecution from using such witnesses. As shown under section 3.6 below, prosecutors often successfully invoke this case to justify

[63] Alemu, *supra* note 11, p. 58.

[64] Jessica A. Roth, *supra* note 3, at 755 (`If the informant's version of events is consistent with the prosecutor's pre-existing view of the case, the prosecutor tends to become more certain of the veracity of that account and, hence, less skeptical of the informant`).

[65] David Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509, 528 (1999); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 943-44 (1999).

[66] *See* George C. Harris, *supra* note 55, at 58; DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT, AND ITS IMPACT ON THE INNOCENT (2012).

[67] FGDs with prosecutors and defense attorneys, April 04, 05 and 11 /2018.

[68] FGD with defense attorneys, April 11 /2018.

[69] *Yordanos Abay vs. Public Prosecutor*, *supra* note 44, at 196.

unrestrained and informal flipping of suspects and defendants into prosecution witnesses, which is worrying.

In another corruption case[70] involving five defendants, the prosecution moved to withdraw charges against two of the defendants after its witnesses have been heard with a view to use them as witnesses against the rest three defendants. The court endorsed by majority the withdrawal and later admitted the testimony of the two defendants reasoning that:[71] "The prosecutor has exclusive mandate to withdraw charges and there is no law which prohibits him from calling a defendant whose case has been withdrawn as an additional witness pursuant to Article 143(1) of Criminal Procedure Code." On top of reflecting the court's reluctance to scrutinize such testimony, this ruling contradicts a relevant and specific law: the Anti-corruption law that unequivocally limits the time for cooperation *before the institution of charge*, which plainly excludes defendants.[72] It also undermines the rights of the defense and principles of fairness, since the defendant-turned witness had attended the examination of prosecution witness and thus might have learnt the defense's strategy.

Even worse, at times judges limit defenses' opportunity to test the veracity of suspect/defendant-turned witnesses by construing the scope of cross examination very restrictively to cover only issues raised under examination-in-chief,[73] thereby prohibiting the probing of such witness based on his records, the benefits he collects from the prosecution, and other related factors. Still others restrict defenses' right to confrontation on grounds of the privilege against self-incrimination. In *Federal Prosecutor vs. Kiros Negash et al*[74], the defense's motion to cross-examine a suspect-turned witness, based on reasons of his arrest and how he ended up being a prosecution witness, was erroneously rejected on grounds of the privilege. Similarly in another terrorism case[75] the defense's attempt to cross-examine a suspect-turned witness using his degree of participation, was overruled in response to the prosecution's objection that such cross-examination infringes the witness's privilege against self-incrimination. These restrictions, which seem to overlook assurances of immunity the law or the

[70] *Federal Prosecutor vs. Abebe Birhane and others*, Federal High Court, File No. 203074, 30/06/2010 E.C.

[71] *Ibid.* (translation mine).

[72] See Article 43(1) of the Anti-corruption Proclamation, which explicitly limits the timing for criminal informant use at the period *before the charge is instituted.*

[73] The basis for such conservative interpretation is the language of Article 137(3) of the Criminal Procedure Code which defines the purpose of cross examination to showing to the court what is erroneous, doubtful and untrue in *the answers given in the examination in chief (Emphasis added).*

[74] *Federal Prosecutor vs. Kiros Negash et al*, Federal High Court, *File No. 113062,10/07/2006 E.C.*

[75] Interview with Defense attorney 05, April 10, 2018.

prosecution confers to such witness, are likely to impair accurate fact-finding and eventually the integrity of the outcome.

Added to this is the stance of some judges on the value of suspect/defendant-turned witness testimony. They simply treat it like any ordinary witness testimony, taking no precautions having regard to its inherent unreliability.[76] One judge captured this[77]: "there is no special procedure to handle a testimony from suspect/defendant-turned witnesses. No special examination applies to such witnesses. They are just examined the way other witnesses are examined." Admittedly, as shown below, the law demands courts to do so with respect to crimes of corruption. Yet, some judges seem to extend this to any crime involving flipped prosecution witnesses, i.e., to the informal practice. However, by giving undeserved weight to such testimony, this approach could undermine outcome accuracy.

b) Scanty safeguards against false testimony

In Ethiopia, such substantive and procedural safeguards against false evidence as vigorous cross-examination, duty of disclosure, effective legal representation, strong standards of proof and judicial review, are non-existent or remain scanty at best. With the bulk majority of deals with suspects /defendants operating underground without the knowledge of the court and the defense, the latter lack the information basis to test the credibility of suspect/defendant-turned witnesses. Even where the deal becomes public in one way or another, several factors would impair reliability screens to distort the ultimate outcome. It is a matter of fact that most defendants do not receive legal representation, thereby lacking the expertise to expose unreliable incentivized witnesses. The duty of disclosure, which is not fully recognized with effective enforcement mechanisms[78], is likely to handicap the defense as well as the court in testing or evaluating the reliability of such testimony. Nor are there detailed guidelines and standards that regulate the selection, handling and reward of suspect/defendant-turned witnesses. Added to this is courts' reluctance to cautiously review the practice of turning suspects/defendants into prosecution witnesses, which is already detailed above. Furthermore, the gaps in criminalizing and enforcing perjury could contribute

[76] FGDs with Judges, April 04, 10/2018.

[77] Interview with Judge 03, April 10, 2018 (translation mine).

[78] The Constitution simply guarantees the accused the right to have full access to evidence presented against him, leaving out exculpatory evidence. See Article 20(4), The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Federal Negarit Gazeta, (1995) (Herein after the FDRE Constitution). Moreover, so far no law provides for enforcement mechanism should the prosecution fails to disclose such evidence.

to the concern of unreliability. The proclivity of suspect and defendant-turned witnesses to perjury coupled with their rare effective prosecution largely owing to evidentiary problems could undermine deterrence thereby militating against the accuracy of verdicts.[79] Indeed, the likelihood of apprehension and conviction is believed to have the strongest deterrence effect. To a certain degree, the lenient treatment of perjury involving victims other than those wrongfully convicted due to perjury (i.e., the lower range of simple imprisonment prescribed as punishment which can go as low as ten days) could adversely impact suppression of perjury. Admittedly, the upper range of punishment for perjury, which reflects a more serious punishment and seems to adopt an eye for an eye principle of sentencing to witnesses responsible for wrongful conviction,[80] would fare better in this regard, albeit with its own flaws elsewhere.

Besides, the low standard of proof required and applied in criminal prosecution means incentivized witness driven wrongful conviction is a possibility. The FSC Cassation Division has lowered down the standard of proof for criminal cases to that of *clear and convincing*[81], a lower standard applied in some jurisdictions in civil cases of special nature such as child custody cases. There are unverified claims among some prosecutors and defense attorneys that in practice the standard is even lower than this, a mere balance of probabilities.[82] Such lower standards could easily be satisfied by incentivized witnesses, a piece of evidence that appears trustworthy, but in actuality is very deceptive and inherently unreliable.[83]

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[79] For more see Alemu, *supra* note 11, at 85-87.

[80] The article reads:

Article 453(1): Perjury

Whoever being a witness in judicial or quasi-judicial proceedings knowingly makes or gives a false statement…

Where, however, in a criminal case, the accused person has been wrongly convicted or has incurred rigorous imprisonment of more than ten years in consequence of the witness's act, the witness may himself be sentenced to the punishment which he has caused to be wrongfully inflicted.

[81] See *Ato Girma Tiku vs. Federal Ethics and Anti-corruption Commission*, Federal Supreme Court Cassation Bench Vol. 10, File No.51706, Hamle 21/2002E.C., p.210; *Tamirat Nigussie et al vs. Benshangul Gumuz Regional State Prosecutor*, FEDERAL SUPREME COURT CASSATION DECISIONS, Vol. 17, File No. 97203, Meskerem 30/2007E.C., p.147; W/ro *Abeba Arefayinie vs. Tigray Regional State Prosecutor*, Federal Supreme Court Cassation Bench, Vol.18, File No. 104923, Megabit 28/2007E.C. p.243; *Feyisa Mamo vs. Federal Prosecutor*, Federal Supreme Court Cassation Bench ,Vol. 19, File No.109441, Tir 17/2008E.C.

[82] This was incidentally raised in the FGDs with prosecutors and defense attorneys, April 05/2018; April 11/2018. Yet, it requires systematic study to arrive at such a conclusion.

[83] Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 *CARDOZO L. REV.* 829, 852-53 (2002); Stephen S. Trott, *supra note 54 at* 1383; Ellen Yaroshefsky, *supra* note 65, at 945.

c) Unabated Efficiency drives

The prevailing institutional preoccupation with efficiency and conviction rate among[84] coupled with the possibility of overrating testimony from suspects and defendants (party and insiders to the criminal participation) could militate against a thorough scrutiny of their testimony. For long, the focus of Ethiopian justice institutions, including the prosecution and the judiciary, tends to be on enhancing the efficiency of the process at any cost.[85] The use of suspects and defendants as prosecution witnesses, which is valued most in securing conviction and shortcutting procedural and evidentiary barriers of conviction, comports very well with such preoccupation to the disadvantage of accuracy and fairness.

These efficiency drives are even evident from the way the law treats the testimony of incentivized witnesses. While the anti-corruption proclamation requires the testimony of suspect-turned witnesses to have equal weight with that of the testimony of ordinary witnesses, the witness protection proclamation forecloses the invoking of a reward such a witness receives for discrediting his testimony.[86] Both stipulations discourage thorough scrutiny of reliability based on relevant factors having direct bearing on reliability, including the concessions exchanged, the antecedents of the witness/suspect, terms of the agreement, etc. This would taint the accuracy of verdicts.

All the above variables combined would create conducive environment for suspect and defendant-turned witnesses who retain firsthand knowledge about the details of the crime to create false testimony and get away with it to the detriment of innocents.

3.2. Adverse Effects on Investigation

While evidence obtained from incentivized witnesses serves an indispensable role to effectively investigate crimes, it can also turn out to be counterproductive. A confluence of factors could shape this undesired outcome in the context of Ethiopia. These encompass the easiness and high probability of conviction such evidence furnishes to prosecutors, vectored against the resource and time intensive nature of investigations (especially in complex crimes), the weakness of the investigation, the underground (informal) nature of the agreement with such suspects and defendants, absence of judicial review on the practice of flipping suspects /defendants into prosecution

[84] See Alemu Meheretu, *Introducing Plea bargaining in Ethiopia: Concerns and Prospects,* (PhD thesis, University of Warwick, UK, 2014).

[85] *Ibid.*

[86] See Article 43(5), The Revised Anti-Corruption Special Procedure Proclamation and Article 26, Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No. 699/2010.

witnesses, and lack of effective accountability systems. All combined have the potential to turn investigations into simple inducement of suspects with a benefit, which would culminate in heavy reliance on their testimony/evidence. This would encroach on the thoroughness and quality of the investigation, and ultimately the accuracy of verdicts. Put simply, where investigators heavily rely on such piece of evidence, cases may not be well investigated, thereby overlooking other independent sources of evidence that can augment outcome accuracy.

Of the problems, the relationship between weak investigation and the use of evidence obtained from criminal participants represent a kind of vicious circle. The two feed each other. Weakness of investigation could prompt the latter's use. Justice actors including prosecutors and defense attorneys point to the weakness of criminal investigation as a reason to resort to suspect and defendant-turned witnesses.[87] It is true that the use of such witnesses can fill in the deficiency of the investigation. However, it can also have negative implications at least in two senses.

First, the weakness of the investigation could adversely impact on the reliable use of suspect and defendant-turned witnesses, i.e., the thorough finding, selection and rewarding of such witnesses. For instance, because of lack of sufficient information on the degree of participation, more culpable defendants can be flipped into witnesses. In one contraband case[88], the suspect was promised immunity in exchange for leading evidence. While the suspect delivered his part, the prosecution declined the offer on grounds of the suspect's criminal record and subsequent discovery of another witness. Likewise, in one corruption case[89], a prosecutor who promised immunity to one of the suspects in exchange for information implicating other participants reneged later to ultimately have the suspect convicted. Perhaps, the prosecution might have tendered such promise without sufficiently investigating the case. Such practices may have their own backlashes not only on the rigor and quality of the investigation but also in securing future cooperation from suspects and defendants.

Secondly, there could be a tendency on the part of investigators to simply invest in evidence from criminal participants in disregard of other independent sources to the detriment of quality and effective investigation. This tendency is effectively incentivized by absence of judicial review on such evidence, which gives prosecutors a free hand to turn one of their defendants into a witness anytime before judgment, which is also common in practice.[90] The prosecution uses its withdrawal and charge amendment

[87] FGDs with prosecutors and defense attorneys, April 04, 2018, March 6, 2018 and April 11, 2018.
[88] Interview with prosecutor 12, April 17, 2018.
[89] Interview with defense attorney 07, April 12, 2018.
[90] Alemu Meheretu (2018), *supra* note 11, at 37-39.

powers as tactics to turn defendants into prosecution witness. For instance, in one tax evasion case[91] where the agent and the owner (principal) were charged, the prosecution sought adjournment for amendment of the charge immediately before the hearing of evidence had commenced. The court granted the motion and adjourned the case. Then the prosecution came with an amended charge that turned the agent into a prosecution witness. Sometimes the prosecution resorts to such tactics even after its evidence is heard where it learns that the chance of success is slim. This was the case in *Federal Prosecutor vs. Abebe Birhane and others*[92], for example, where the prosecution had withdrawn charges of corruption against two defendants at later stages of the trial (after prosecution witnesses were heard), displacing a clear law that requires to the contrary[93], with a view to turn them into witnesses against other co-offenders. This move sanctioned by the court without even inquiring into the reason(s) why the prosecution was not able to use such witnesses at the right time i.e., before the institution of the charge.

These common practices could have the effect of discouraging thorough and effective investigation and prudent charging decisions, whom to charge and whom to use as a witness. Investigators would lack the diligence and the incentive to look for independent sources of evidence. These would ultimately weaken the investigation. From the above discussion, one can conclude that weak investigation can be the cause as well as the effect of resorting to criminal participant-generated evidence.

3.3. Propensity to corruption and abuse

The notion of transparency, which is vital in ensuring accountability, demands that government's actions including the operation of the criminal process should be carried out in a transparent way. However, many studies reveal that the use of incentivized witnesses is largely arcane and consequently prone to corruption and abuse.[94] In Ethiopia, the context under which suspects and defendants are turned into prosecution witnesses would invite one to arrive at a similar conclusion. Epitomized by its secrecy (which can insulate any scrutiny), informal negotiation (off the record deal), broader discretion bestowed to investigative and prosecution organs with scanty

[91] Interview with judge 08, April 12,2018. For discussion of more cases, see Alemu, *supra* note 11, at 39-41 and at 46-49.

[92] *Federal Prosecutor vs Abebe Birhane and others*, *supra* note 70.

[93] Article 43(1), The Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 434/2005.

[94] See R. Michael Cassidy, *supra* note 2, p.1130; Alexander J. Menza, *Witness Immunity: Unconstitutional, Unfair, Unconscionable*, 9 SETON HALL CONST.L.J. 505, (1999); Alexandra Natapoff (2004), *supra* note 16, at 663.

checks/procedural safeguards of the criminal process[95] and absence of legal representation, reliance on evidence from criminal participants is a suspect for corruption and abuses. This concern is more pronounced in the event where a reliable accountability system is absent and justice sector corruption is not uncommon.[96]

Deals with suspects and defendants can be simply used to further individual needs as opposed to institutional needs. Almost all justice actors who participated in this study express their concerns that turning suspects /defendants into prosecution witnesses is open to abuse and corruption. One prosecutor warns[97]: "The practice harbors broad propensity of vindictiveness and favoritism. One can use it to attack a 'foe' or favor a 'friend'." This is particularly troubling with regard to the informal practice, which is devoid of transparency, any sort of review and even enforceability in the event of breaches of the informal agreement between the prosecution and the defendant/suspect. Yet, in one case the Federal Cassation Court simply rubberstamped such practice without articulating sufficient safeguards against potential abuses noting that[98]: "the prosecution retains the discretion to determine whether to prosecute a defendant or withdraw a pending charge against such defendant and turn him into a witness. There is no law that prohibits such move."

It is also open to abuse and political corruption. Indeed, some justice actors revealed that suspect/defendant-turned witnesses had been used for politically motivated prosecutions and convictions involving crimes of rioting, crimes of terrorism, and crimes against the constitution and constitutional order.[99]

3.4. Undermines the purposes of punishment and public confidence

The effectiveness of a justice system depends on the trust, acceptance and cooperation of the people it governs.[100] Yet, relying on evidence obtained from criminal participants could compromise this in many senses. Suspects and defendants receive benefit

[95] For instance, pretrial judicial review of prosecutorial discretion does not apply. Even at the trial stage, cooperation agreements can be informally enforced without the court`s knowledge and thus without its scrutiny.

[96] Linn A. Hammergren, JUSTICE SECTOR CORRUPTION IN ETHIOPIA IN DIAGNOSING CORRUPTION IN ETHIOPIA: PERCEPTION, REALITIES AND THE WAY FORWARD FOR KEY SECTORS (Janelle Plummer(ed), Washington DC, The World Bank, 2012) at 183-4 and 214-17. See also Transparency International`s Corruption indexes.

[97] Interview with prosecutor 11, April 16, 2018.

[98] *Yordanos Abay vs. Federal Public Prosecutor, supra* note 44 (translation mine).

[99] *Supra* note 59.

[100] Tom Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*?" *Columbia Public Law Research Paper* No. 06-99 (April 1, 2008), at 11–15.

including immunity not because they deserve it but simply because they assist law enforcement; which bears no rational connection with principles of sentence determination. Even worse, more culpable defendants can be treated lightly merely because they have more information/evidence to trade than their less culpable mates[101] creating what is called the `co-operation paradox'.[102] Further, where the state exempts one from criminal liability simply because he/she provides evidence, it signals a message to the public that the state is trading off its right to punish, which in turn undermines the credibility of criminal norms[103] and public confidence in the justice system. Many professionals are inimical to the very idea of the state dealing with `culprits` whom it has the duty to hold accountable.[104] One US court lamented (though subsequently recanted it)[105]: "If justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so."

In Ethiopia, although evidence from criminal participants serves law enforcement ends, it could undermine the purpose of punishment. Ethiopian criminal law demands that penalties and measures reflect the purposes of punishment, and that courts determine sentences appropriate for each case having regard to the degree of guilt, the gravity of the crime and the circumstances of its commission.[106] Yet, the reward of suspects and defendants in exchange for their information or testimony departs from these standards of sentencing. Instead it has the effect of promoting impunity and/or treating more culpable defendants leniently, which would further dent an already weakened public trust in the justice system. In one case[107] involving usury and drawing of cheque

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[101] Cynthia Kwei Yung Lee, *supra* note 5, at 139; Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 212 (1993) (criticizing cooperation paradox whereby more culpable defendants receive lesser sentences).

[102] "kingpins" many receive lower sentences than their underlings because they have more information to trade. See Nicholas Fyfe and James Sheptycki, *supra* note 1 at 347; Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, Federal Sentencing Reporter, 8(5) IMMIGRATION AND SENTENCING (Mar.-Apr., 1996), at 292-295; Stephen J. Schulhofer, *supra note* 101.

[103] Peter J. Tak (1997), *supra* note 13, at 13; Alexandra Natapoff (2004), *supra* note 16, at 683; Daniel C. Richman, Cooperating Defendants, *supra note* 102, at 293 (Noting that this "…conveys destructive and contradictory normative messages that may undermine the moral and expressive validity of the law its self").

[104] Cassidy, R. Michael, *supra* note 2, at 1129-1177; J.H. Crijns *et al*, *supra* note 7; See also A. Vercher, TERRORISM IN EUROPE: AN INTERNATIONAL COMPARATIVE LEGAL ANALYSIS. (Oxford: Oxford University Press, 1992).

[105] Frank O. Bowman, *Departing is Such Sweet Sorrow: A year of Judicial Revolt on 'Substantial Assistance' Departures Follows a Decade of Prosecutorial Indiscipline* 29 STETSON L. REV. 7 (1999).

[106] See Articles 87 and 88 of the Criminal Code of the Federal Democratic Republic of Ethiopia, 2004.

[107] Interview with prosecutor 09, April 16, 2018.

without cover, a person suspected of drawing of cheque was turned into a witness in order to prosecute the crime of usury, a less serious crime than the former.[108] This is contrary to the purpose of punishment as well as the very rationale of flipping suspects, i.e., "using a little fish to catch a bigger one."

Indeed, many justice actors share the risks of evidence obtained from criminal participants in undermining the purpose of punishment while some others simply emphasize on its enforcement arsenal.[109] It is generally true that sentencing practices and public confidence are directly correlated.[110] Thus, lenient treatment of criminals would be met with low public confidence in the justice system. This is equally valid in Ethiopia where there is strong tendency of correlating the deterrent effect of punishment with the severity of punishment among the society as well as the lawmaker.[111]

In addition to its inherent dissonance with the purposes of criminal law, lack of standards on the use of evidence obtained from criminal participants could exacerbate the problem. With few exceptions[112], the standard for selecting, evaluating and rewarding suspect/defendant-turned witnesses is left unregulated. Thus, prosecutors simply use such impressionistic expressions in picking witnesses from among criminal participants: "in order to ensure conviction it is rather better to use the suspect or the defendant as a witness than pursuing charges against him." As discussed elsewhere, prosecutors also turn defendants into witnesses even late at the trial stage using the instrumentality of amendment and withdrawal of charges. This opens a room for the prosecution to exercise unfettered discretion to pick and reward defendants simply based on practical considerations that have little or nothing to do with the purpose of criminal law. It could also send a wrong message to the public that something fishy is going on, thereby undercutting further the legitimacy of the justice system.

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[108] Compare Articles 693 & 712 of the Criminal Code of Ethiopia.

[109] FGD with defense attorneys, judges, and prosecutors held on April, 04- 05,10/2018 and March 06-07/ 2018.

[110] See Sara E. Benesh and Susan E. Howell, *Confidence in Courts: A Comparison of Users and Non-Users*, 19 BEHAV. SCI. LAW, 199,202 (2001); J. ROBERTS AND L. STALANS, PUBLIC OPINION, CRIME AND CRIMINAL JUSTICE (1997, Boulder CO: Westview); J. DOBLE, CRIME AND PUNISHMENT: THE PUBLIC`S VIEW (1987, CITY: public agenda Foundation).

[111] Alemu, *supra* note 84, at188.

[112] See for example the general standards provided for under Article 43(1) of the Anti-corruption proclamation.

3.5. Disparate Treatment /Discrimination

In general many scholars agree that the use of incentivized witnesses emasculates the principle of equality.[113] This problem would be all the more pronounced in Ethiopia whose criminal justice system is already riddled with lack of certainty, consistency and fairness. A confluence of general as well as specific variables could expound the problem of disparate treatment among criminal suspects/defendants. Although the FDRE Constitution and the Criminal Code guarantee the right to equality and proscribe differential treatment among similarly situated defendants[114], incentivizing witnesses for their testimony operates on disparity of treatment among equally culpable suspects/defendants or those having a comparable degree of blameworthiness. Thus, while those who cooperate to supply evidence may receive some form of sentence or charge concessions, or complete immunity, those who refuse to cooperate or have nothing to trade, may face harsh criminal charges.

The decision of who to prosecute and who to immunize often is "based on impermissible considerations, bearing no rational relationship to a legitimate government purpose."[115] From the investigative archives the author managed to have access, the standard used to turn suspects or defendants into prosecution witnesses is unclear, or at least is not explicit; the relevant documents indicating the use of impressionistic statements to justify the practice.[116] Interestingly, the FGDs with prosecutors reveal some plausible standards[117]: degree of participation, lack of evidence, complexity of the crime, severity of the crime and the weight of information obtained from the witness.

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[113] See for example, Alexander J. Menza, *supra* note 94, at 531 (arguing that granting a witness immunity in exchange for testimony results in unequal enforcement of the laws); J.H. Crijns *et al*, *supra* note 7, at 27 (summarizing literature showing that arrangements with "justice collaborators" clashes with proportionality and equality principles); Cassia Spohn & Robert Fornango, *U.S. Attorneys and Substantial Assistance Departures: Testing for Interprosecutor Disparity*, 47 CRIMINOLOGY 813, 827–28 (2009); Christopher T. Robertson and D. Alex Winkelman, *Incentives, Lies, and Disclosure,* 20(1) JOURNAL OF CONSTITUTIONAL LAW, 32, 42 (2017); Stephen J. Schulhofer, *supra* note *101 at* 211-12(criticizing cooperation for causing paradoxical disproportionalities in sentences); S. Greer, Supra note 55; Ronald S. Everett & Roger A. Wojtkiewicz, *Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing*, 18 J. QUANTITATIVE CRIMINOLOGY 189, 206–07 (2002).

[114] See Art 25, FDRE Constitution and Art 4, The Criminal Code of Ethiopia 2004.

[115] Alexander J. Menza, *supra* note 94, at 532.

[116] Such expressions are employed: "mezigebun wutetama lemadireg yireda zend tekesash betekesashnet kemiketilu yilk miskir mehonachew yeteshale hono bemegegnetu";"tetertariwn kemasketate yilke wode miskirnet tekeyro kalun biset yeteshale hono silagegnenew"; literally to mean: *in order to ensure conviction it is rather better to use the suspect or the defendant as a witness than pursuing charges against him.*

[117] FGDs with prosecutors, April 04, and April 05 /2018.

However, this does not mean that prosecutors use the above standards consistently nor are they required to do so by law. Mixed with its inherent disparate treatment of like cases, absence of defined standards on the use of suspects/defendants as prosecution witnesses invites inconsistent and unpredictable decisions, if not discrimination. For instance, in one sexual outrage case involving two minor defendants of opposite sexes, both having `consented` to the intercourse, it is not clear why the female minor was used as a witness to prosecute the male minor.[118] Besides, in *Federal prosecutor vs. Yonatan Manjura et al*[119], of the three suspects who participated in the preparation of a forged loan agreement by attesting that a valid loan agreement has been concluded, only one of them was picked and turned into a prosecution witness while the rest were prosecuted. From the records, it is not clear how and why such a suspect was selected; perhaps her willingness to cooperate could explain this. Even worse, sometimes suspects with a higher degree of participation and guilt are converted into witnesses to prosecute co-offenders with similar or even lesser degree of guilt.[120] The above differential treatments, which could be simply based on suspect's decision or ability to cooperate or the prosecution's subjective considerations as opposed to established and principled factors of sentence determination (including the degree of guilt or the seriousness of the crime) could culminate in unequal treatment of similarly situated suspects or defendants — discrimination.

Furthermore, even within those suspects/defendants willing to cooperate, the types and the amount of concessions extended to them do not reflect the degree of individual guilt and the gravity of the crime, prominent factors in sentencing. Instead, it depends on factors extraneous to sentence determination such as the degree of cooperation, their bargaining power, the weight/value of the testimony given, own description of degree of participation in the crime which often downplays own role and exaggerates the role of others, the strength of the prosecution case, and other subjective considerations. Indeed unwittingly, while the value of evidence/testimony is a fundamental factor in trading "substantial evidence" for immunity under the law, the degree of participation and seriousness of the crime are not.[121]

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[118] Interview with defense attorney 01, April 10/2018.

[119] *Federal prosecutor vs. Yonatan Manjura et al, supra* note 50.

[120] Alemu, *supra* note 11, at 35-36.

[121] None of the laws that recognize the use of evidence obtained from criminal participants in return for immunity or other concessions consider degree of culpability or participation as a requirement for witness selection. See Alemu, *supra* note 19.

Finally, comparable cooperation/assistance of criminal participants may generate disparate concessions from the prosecution, deliberate or otherwise.[122] This could be the case at least in two situations. First, similar cases could be treated quite differently solely depending on the prosecutor's conception of her/his discretions and roles. For comparable cooperation while some prosecutors grant informal immunity others prefer charge or sentence reduction simply because they believe that they lack the power to extend informal immunity.[123] Second, leaving the prosecution with almost unbound discretion, with no comprehensive standards to select and reward 'cooperating' suspects/defendants coupled with lack of review mechanisms, is likely to invite differential treatment of similarly situated suspects/defendants based on some invidious grounds or motives.

Disparate treatments among criminal suspects /defendants have the potential to make the justice system unpredictable and unfair in terms of its outcome and sentences to ultimately erode its integrity and legitimacy further.

3.6. Lack of legal framework and enforceability

Evidence obtained from criminal participants is largely unregulated in Ethiopia. The exception could be crimes of corruption, terrorism, trafficking and smuggling in persons where its application is formally sanctioned, though in general terms. Even then there are no detailed standards and procedures to govern it. In all other cases, albeit some argue that the FSC Cassation Division in *Yordanos Abay vs. Federal prosecutor*[124] has authorized the use of suspect/defendant-turned prosecution witnesses and that some prosecutors successfully invoke this case as an authority, it remains unregulated. However, the authority of this case is contested for the court lacks the mandate to sanction such practice in the presence of a clear law to the contrary.[125] Further, it is uncertain whether the decision sets a precedent or it is just an obiter dictum. The available facts and issues from the case left this issue obscure.[126] That said, although prosecutors rarely invoke it to justify the entrenched practice, one could resort to the Witness Protection Proclamation No. 699/2010 that grants protection measures

[122] *Supra* note 113; Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 *S. CAL. L. REV.* 501, 560 (1992).

[123] FGDs with prosecutors, April 04 and April 05/ 2018.

[124] *Yordanos Abay vs. Federal Prosecutor*, *supra* note 44.

[125] For more, see section 3.7 below.

[126] While it appears that the defense challenges the conviction claiming fundamental error of law, it is unfortunate that the basis for such claim (the arguments made) is not summarized in the decision of the Court.

including immunity to witnesses, which also covers suspect/defendant-turned witnesses.[127] However, the strict conditions attached to the protection measures[128] shows that reliance on such witnesses in return for immunity is not envisaged in a scale it is practiced.

On the other hand, in the absence of any procedure that regulates decisions to discontinue/dismiss charges against "cooperating" suspects/defendants invites some prosecutors simply to rely on a variety of legal provisions. While some invoke the Federal Attorney General Establishment Proclamation No. 943/2016 (Article 6), others stretch the provisions of the 1961 Criminal Procedure Code by analogy (Articles 42 and 30) and some others simply discontinue charges without invoking any procedural law.[129]

The use of evidence procured from suspects/defendants in exchange for a benefit often operates informally. No formal agreement is concluded; nor is there any clear enforcement mechanism set forth by law. This holds true even in the circumstances where it is formally recognized as is in corruption cases. However, in practice prosecutors are in advantageous position. The threat to press charges of perjury or misleading justice[130] and the use of leading questions against hostile witnesses[131] provide them with strong arsenal against possible breaches from the defense. Prosecutor 01 observes[132]: "in most cases, once they appear to testify, suspect/defendant-turned witnesses do not renege and turn hostile for they know for sure that they will face prosecutions which usually commence with an immediate arrest." Another prosecutor added: "Often I warn them to testify as agreed or they will face multiple charges". Prosecutor 06 recounts[133]: "where flipped witnesses turn hostile, we employ two alternatives: attempt to rectify the problem using leading questions or remove their privilege and pursue perjury/misleading of justice charges against them." Thus those who dare to renege would do it under the pain of punishment. In one attempted homicide case[134] involving two spouses as defendants, the prosecution entered an informal agreement to drop charges against the wife on condition that she testifies against her husband. The prosecution failed as the witness turned hostile to

[127] Articles 3(1) and 4(1) (f), Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No. 699/2010.

[128] Alemu, *supra* note 19, at 466-68.

[129] FGD with prosecutors, April 05, 2018.

[130] See Article 446 of the Criminal Code of Ethiopia 2004.

[131] Article 44 of Proclamation No. 434/2005 authorizes prosecutors to use leading questions upon obtaining the permission of the court.

[132] Interview with prosecutor 01, April 4, 2018 (translation mine).

[133] Interview with prosecutor 06, April 13, 2018 (translation mine).

[134] Interview with prosecutor 03, April 11, 2018 (translation mine).

save her husband. Her husband was acquitted but she was convicted of *misleading of justice* and received six months of simple imprisonment.

The individual circumstances of most suspects and defendants (who are often unrepresented and uniformed), means such threats with multiple charges provide the prosecution a powerful tool to enforce the deal. Yet, another concern may emerge: by discouraging the flipped witnesses from rectifying his false testimony (who agrees to falsely testify first and wants to recant this latter), it could be counterproductive to result in a coerced false testimony.

For the prosecution the problem rests elsewhere, on the fact that some defendant/suspect-turned witnesses disappear upon their release on bail.[135] With a view to prevent this, such witnesses are sometimes detained for months or their surety/bail bond withheld until they testify before court.[136] The use of detentions and withholding of surety as enforcement tools is problematic. First, the practice infringes the accused right to bail since it does not fall within the circumstances[137] that justify denial of bail. Similarly, withholding surety beyond the release of the suspect contravenes the law and amounts to unlawful seizure of one's property.[138] Second, the practice could leave detrimental policy upshots to cooperation. By discouraging potential cooperators, it would militate against the smooth and continued use of suspect/defendant-turned witnesses.

In contrast to the above, the suspect or defendant-turned witness lacks meaningful enforcement mechanism should prosecutorial breach of promise occur. Having no guarantee on the delivery of concessions, he lives in a state of uncertainty; he entirely and blindly places his trust on the prosecutor. This starts with lack of clarity on the nature and effects of the deal struck with the prosecution – it can involve closure of the proceedings (as per Art 42(1) (a)) or withdrawal of charges or informal immunity. In principle, nothing prevents the prosecution from re-opening the case and pursuing a charge against the witness. If such breach occurs no court of law entertains it. The following case can illustrate a sense of the problem. In one case involving theft of gold, a woman who stole and sold gold to a man was made to testify against the man and later she was prosecuted of theft.[139] Apparently, the woman may have got some promise of immunity or lenient treatment from the prosecution, which was perhaps withdrawn

[135] FGD with prosecutors, April 04 & 05/2018.

[136] *Ibid.*

[137] Article 67, Criminal Procedure Code of Ethiopia, Negarit Gazeta, Extraordinary Issue No.1 of 1961, (1961) (Herein after CPC).

[138] *Ibid.*, Article 71.

[139] Interview with prosecutor 04, April 18, 2018.

later or alternatively honored in terms of maneuvering facts to result in sentence mitigation, although the prosecutor insisted that there was none.[140] It is worth noting that enforcement related problems are not limited to the informal practice. Sometimes suspect/defendant-turned witnesses face prosecutorial reneges even in its formal variant.[141]

In conclusion, in Ethiopia evidence obtained from criminal participants in exchange for a benefit/incentive is epitomized by the fact that it largely applies in ordinary crimes without a legal authorization and in those formally recognized cases, it lacks detailed procedures and guidelines. In the main, the practice is not subject to both internal and external review. This could encourage arbitrary use, if not abuse of such testimony. Nor is it immune from corruption as shown above under section 3.3.

3.7. Incompatibility with the criminal procedure law

The Criminal Procedure Code proscribes the offering of any inducement to a criminal suspect[142]: "No *police officer or person in authority* shall offer or use or make or cause to be offered, made or used any inducement, threat, promise or any other improper method to *any person examined by the police*". Here the phrase "person in authority" can be interpreted to include prosecutors. Apparently, the turning of suspects into prosecution witnesses, which involves clear inducements and promises with a view to buy testimony or information, stands in clear contradiction with this provision. Ostensibly the language: "any person examined by the police" seems to suggest that this prohibition is limited to the investigation stage, excluding the offering of inducements afterwards by the prosecution. However, this is not the case as it contradicts the purpose of the prohibition, which is prevention of false confession/testimony regardless of the identity of the inducer. Further, the caption and the content of the Amharic version of the provision make this clear by proscribing inducement of testimony by police or person in authority, which includes the prosecutor.

Thus, while the use of such piece of evidence in crimes of corruption, terrorism and human trafficking can be taken as an exception or an amendment to the Criminal Procedure Code[143], its horizontal informal application to any crime utterly offends the law. The defense raised a similar argument in *Federal Prosecutor vs. Abebe Birhane and*

[140] *Ibid.* This could be verified from the investigative file but my attempt to locate it was not successful.
[141] Alemu, *supra* note 19, at 457.
[142] See Article 31 of the CPC, *supra* note 137.
[143] See the saving clauses/inapplicable law clause of each proclamation.

others[144] but regrettably the court simply overlooked the matter, or at least its ruling is not evident from the records.

Conclusion and Recommendations

The need to fight crimes, especially organized crimes prompted many jurisdictions to experiment various policy options, use of collaborators of justice/incentivized witnesses being one of them. Ethiopia has also sanctioned this policy option in selected crimes namely terrorism, corruption, and trafficking and smuggling in persons, albeit its regulation remains by and large patchy. However, in practice it is not just limited to the above few crimes. Informally, it permeates nearly all crimes ranging from less serious to complex ones. Thus, in the main it is a covert practice that lacks enforceability.

While it is true that the use of incentivized witnesses and their evidence can enhance the efficiency and effectiveness of criminal prosecutions, as shown in this article, it also entails plethora of challenges and undesirable implications (both potential and actual) in many ways. It is inherently a problematic institution characterized by uneven treatment of similarly situated defendants (discrimination), unreliability that can yield wrongful conviction, dissonance with the purpose of criminal punishment, and lack of transparency that invites abuses and corruption. The material, legal and institutional contexts of Ethiopia could sustain and nourish these defects. Such procedural and substantive safeguards against misuses and flaws of evidence from incentivized witnesses as, legal representation, robust cross examination, disclosure, pretrial review mechanisms, clear guidelines and standards, enforcement mechanisms and sanctions, and effective judicial review, are largely non-existent, or at best remain scanty. Weak prosecutorial and police accountability systems (both internal and external), weak investigation system, and lower standards of proof could aggravate the above problems further.

Against these milieus, two policy alternatives could emerge on the use of evidence obtained from incentivized witnesses in Ethiopia:

Option (1): Do away with evidence obtained from criminal participants in return for a benefit: Making such evidence categorically inadmissible as a matter of law. Although comprehensive empirical data on some of the blemishes relying on such piece of evidence, including wrongful conviction, is yet to be available in Ethiopia, the principled objections against incentivized witnesses presented above could warrant this

[144] *Federal Prosecutor vs. Abebe Birhane and others*, *supra* note 70.

option. Nonetheless, its utility in fighting the otherwise impenetrable organized crimes may be tempting for any government. Its instrumentality to fight organized and complex crimes means it will remain one feature of the justice system in the years to come. Indeed, with evidence obtained from incentivized witnesses holding a legislative footing in several laws including the anti-corruption and witness protection proclamations, and the criminal justice policy authorizing it, and justice actors embracing it by stressing on its importance, this would be the case for Ethiopia.

Option (2): Reforms on use of evidence obtained from incentivized witnesses: This calls for strict regulation of such evidence gathering tools having regard to its inherent flaws and specific contexts of the Ethiopian criminal justice system. Leaving the principled objections against it aside, and emphasizing up on its utility, this option sounds feasible. This option, which demands interventions directed at ameliorating the above challenges and implications, could include such policy and legal reforms as:

i) Tight regulation on the use of such evidence: it should be limited to organized and complex crimes whose investigation may not be effectively handled through ordinary means of investigation i.e., it should be an exceptional and last resort measure. This calls for banning of the entrenched informal practice and restricting the use of incentivized witnesses to those exceptional crimes authorized by law and the setting forth of detailed standards and guidelines on selection and reward of such witnesses.

ii) Instituting enhanced guarantees such as mandatory legal representation; liberal cross-examination enabling the defendant to effectively test the reliability of incentivized witness testimony; the requirement of corroboration to such testimony; and disclosure of the agreement struck with such witnesses and other related materials.

iii) Providing for meaningful enforcement mechanisms and sanctions. These could include, among others:

- The requirement of written agreement between the prosecution and the cooperating suspect/defendant detailing their respective obligations and benefits;
- Granting of "use immunity" to the potential witness (suspect/defendant-turned witness): Clauses which protect reneges to the effect that anything the witness says should not be used in evidence against him in a criminal prosecution, with the exception of perjury and misleading of justice; and that undisclosed evidence would be inadmissible;

- Internal reviews within the office of the prosecution and robust judicial oversight on the use of suspects /defendants as prosecution witnesses (on their selection, evaluation and reward).

iv) Enhancing the capacity of justice actors: familiarizing justice actors with the risks of incentivized witness testimony, the skills needed to detect unreliable witnesses and the precaution to be taken in order to mitigate the challenges.

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