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COLLEGE OF LAW AND GOVERNANCE STUDIES

SCHOOL OF LAW

**ADJUDICATION OF SEXUAL CRIMES VIS-A-VIS THE DUE PROCESS
GUARANTEES OF THE ACCUSED IN ETHIOPIA**

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Adjudication of Sexual Crimes Vis -a-Vis the Due process Guarantees
of the Accused in Ethiopia

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Declaration

I, Eyerusalem Fantabel Asfaw, hereby declare that this dissertation is original and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged.

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This dissertation has been submitted for examination with my approval as university supervisor

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Abstract

This thesis examines the due process rights of the accused in the adjudication of sexual crime cases in the Ethiopian criminal justice system. It explores the legal and practical gaps of sexual crimes cases investigation and court proceeding in the judicial system. Using a human rights-based approach, which is anchored for international human rights principles and mechanisms, this thesis examines how these principles and mechanisms can remedy violations of the rights of accused in sexual crimes. The women and child justice sector professionals and institutions are the focus of this study. This thesis accordingly found out that there is a weak production of evidence and technologically in advanced investigation system. In addition lack of corroboration of evidence in sexual crime cases creates a heavy challenge on the accused to defend his/her case. This thesis concludes that a human rights based approach will be an efficient and effective strategy to pressure the government of Ethiopia to take the necessary legislative, administrative and judicial measures to ensure the rights of the accused. These measures will ensure the rights of the accused in the criminal justice process and enhances Ethiopia's compliance with its international human rights obligations.

List of Abbreviations and Acronyms

ACHPR	African Charter on Human and Peoples' Rights
Art.	Article
AU	African Union
CC	Criminal Code
CPC	Criminal Procedure Code
CRC	Convention on the Rights of Child
CCTV	Closed Circuit Television
ECHRS	European Convention on Human Rights
FDRE	Federal Democratic Republic of Ethiopia
FFIC	Federal First instance court
HoF	House of Federation
ICCPR	International Covenant on Civil and Political Rights
ICC	International Criminal Court
UN	United Nations
UDHR	Universal Declaration of Human Rights

CHAPTER ONE

Research Method and Design

1.1. Background and Justification

One of the greatest tragedies in the administration of criminal justice system is conviction of a person for a crime he/she did not commit. Above all false or wrong full allegations especially between families have its own repercussions over the accused, parents affair with others and on his personal self-esteem. Whatever the decision will be rendered by the court the accused reputation will be tarnished. Even after the accused innocence made clear the social stigma that attaches to a mere accusation of sexual crime lingers long.¹

The definition of terms such as sex, sexual intercourse and sexual crime has its own different meaning in different jurisdictions. Sex refers that it's a biological and physiological characteristics that define men and women.² The non legal definition of Sexual intercourse on the other hand can be defined as any contact between any part of the genitals of one person and the mouth or anus of another person or the penetration of the genitals or anus of another person with object.³

The Sexual crime definition in terms of international legal documents can be defined as it is a crime that may be done by male or female, it includes crimes such as rape, sexual assault, defilement of child, the production, distribution and possession of child pornography, sexual exploitation of child, child trafficking, and taking for sexual exploitation, soliciting solicitation, incest, importing a child for exploitation purpose, indecent exposure. This sexual crime may

¹Deborah H. Patterson, The Other Victim: The Falsely Accused Parent in a Sexual Abuse Custody Case, 30 J. Fam. L. 919 (1991)926.

²The office of the prosecutor, Policy Paper on Sexual and Gender Based crimes International Criminal Court(ICC), (2014)3.

³Texas Penal code 1974 chapter 21 section21, <https://status.capital.texas.gov>>accessed 1May 2020

occur within lesbian ,bisexual ,heterosexual ,homosexual, and transgender relationships. The act is cross class, gender ,race and religious belief. The act may be done by family members ,friends ,associates ,partners, and persons in authority.⁴

The International Criminal Court (ICC) defines sexual crime as an act that needs the doer to have committed an act of a sexual nature against a person, or to have caused another to slot in such an act, the act must be done though compelling another , or by coercion, such as that caused by fright of aggression, force, detention, psychological intimidation, or misuse of power, or by taking benefit of a coercive environment or a person's inability to give genuine consent.⁵As to the researcher the definition given by the ICC is more explanatory in terms of briefly accommodating the criminal law elements.

The term sexual crime is not defined in Ethiopian laws rather the law prescribes some frame work which would help us in defining the term. The basic law that governing the sexual crime is the criminal code under the section of crimes against morals and family.⁶

By taking the elements of the FDRE criminal code and the Convention on the Elimination of All Forms of Discrimination against Women(CEDAW)committee general recommendation no 19⁷on gender based violence as a reference, we can give expanded sexual crime definition as follows: sexual crime is it's a crime that includes acts that inflict physical, mental, or sexual

⁴ An Garda Siochana,GardaSiochana a Policy on the Investigation of Sexual Crime Crimes Against Children Child Welfare,(2nded),(2013) 10.

⁵The Office of Prosecutor (n 2)3.

⁶ FDRE Criminal Code ,2004 ,Proclamation no 414/2004, Art 620 ff Under Ethiopian legal frame work sexual crime is included under the Federal Democratic Republic of Ethiopia Criminal code Proclamation no 414/2004 .The code places sexual crimes under special part (part II),book III, Title Iv under the section of crimes against Morals and the family in particular crimes against morals this part section one herein after states injury to sexual liberty and chastity

⁷The European human rights advocacy center, A guide to using the un CEDAW committee and special reporter on violence against women in cases of gender based violence ,(2018)<ehrac.org.uk>2018/08>accessed 1 May 2020 The Committee General Recommendation No 19 outlines the definition of gender based violence as follows: it includes acts that inflict physical, mental or sexual harm or suffering ,threats of such acts ,coercion and other deprivations of liberty, the violence occurs within the family or domestic unit or within any other interpersonal relationship, or violence perpetrated by or condoned by the state or its agents regardless of where it occurs.

harm by doing acts of rape ,compiling man to sexual intercourse ,sexual outrage accompanied by violence ,sexual outrage on unconscious or physical restriction, or on minors and infants ,taking advantage of distress women, homosexual and other indecent acts and acts on minor, sexual intercourse with animal, traffic and organizing traffic on women and minors, habitual exploitations, obscene and indecent advertisement , publication and performances ,public indecency against morals perpetrated by family , domestic unit, interpersonal relationship ,state or its agents.

Researches indicated that the testimony of the victim is one of the main source of evidence in the Ethiopian criminal justice system. Evaluating evidence for sexual crimes is challenge for the judiciary. Some of the challenges are lack of clear standard of proof , (special investigation procedure ,policy ,program and Technique) , Backward Technology , lack of designed institutions and cultural issues.⁸Consequently, judgments given based on such weak evidences make the justice system unpredictable and unreliable, and the justice will not to be served well.

Though the current criminal code of Ethiopia was adopted recently, the criminal procedure is still in practice for more than half of century without slight modification. On the other hand Ethiopia does not have codified evidence law rather the laws are found in a scattered manner. In addition standard and burden of proof is not explicitly mentioned in the criminal procedure code. Due to such inconsistencies it's difficult to make the justice system human rights friendly. Amnesty international also recommended Ethiopia to make the Criminal Procedure Code fully in line with international standards of fair trial, to establish comprehensible rules on admissibility of evidence, to include standards and burden of proof principles , progress for the disclosure of witnesses, enhance the accused the right to present a defense, to allow secret discussion with legal counsel.⁹The easy way to make accusations for sexual crimes and weak investigation and trial procedure will affect the due process right of the accused. Thus ,this research aspires to assess the extent of the protection of due process guarantees of the accused and its importance for the common good of the society.

⁸HawiTarekegn and Amareworku ,'Sociology and Criminology-Open Access Challenges of the Strength of Evidences Presented to Ethiopian Courts in Rape Cases among Children Below 14 Years Old: The Case of West ShoaHigh Court' , Criminol an Open Access Journal, [vol 6],(2018)4-5.

⁹Ethiopia Submission to the United nations Human rights Committee, Amnesty International , (2011)20.

1.2. Statement of the Problem

There is not enough research done on sexual crime cases from the accused perspective. However, due to the continuing nature of the sexual offending and the pressure exerted upon sentences on people and the media, there is a further increase in sentence lengths guaranteed over the accused of sexual crimes.¹⁰

The human rights protection of detainees according to Ethiopia's report for United States Department of State Bureau of Democracy, the detainees did not appropriately enjoy their fair trial rights, the right to be presumed innocent, to have legal counsel in their choice, cross-examine witness and other rights due to inadequate (unprepared) defense lawyers, the tendency of courts to presume defendants innocent, there is lack of providing timely public defense or provide government access to held evidence.¹¹ The human rights watch also reported that there is arbitrary detention, violation of basic due process rights such as coercive confession, denial for access to lawyer in Ethiopia.¹² On the other hand according to the FDRE the first national action plan stated that there is lack of provision of free legal aid service during the pre-trial stage.¹³

Persons accused of sexual crime even if they have the right to enjoy their constitutionally guaranteed rights as the above reports indicated that it has practical limitations. The accused has the right to be presumed innocent until the otherwise is proved. To realize this right the prosecution bears the burden of proving the guilt of the suspect by collecting and presenting legally admissible evidence to courts. The government organ especially the police and public prosecutor have a duty to collect evidence to show the commission or omission of the crime.

¹⁰ Adam Sampson, *Acts of Abuse Sex Offenders and the Criminal Justice System*, Published Taylor and Francis e-Library, (2003) 40.

¹¹ United States Department of State Bureau of Democracy, Human Rights and Labor, Ethiopia Human Rights Report, (2019) <<https://www.state.gov/acrsssed>> 22 March 2020

¹² Awol Alemayhu, 'procedural Safeguards and Fair Trials Rights of Detained Persons During Pretrial Crime Investigation in Ethiopia: the Law and Practice in Case of Wolita Zone, Southern Ethiopia', *Global Journal*, [vol vii], (2017) 4.

¹³ *ibid*

However, in the context of Ethiopia production of evidence for sexual crimes it mostly depends up on the victims word and hearsay testimony and lacks the technologically supported investigation system.

Due to the absence of clear standard of proof in the criminal justice system judges offers an easy mode of evidence weighting mechanism . Most child sexual crime cases, court hearing passes through plasma television. That limits the accused right's to ask for cross examinations . Even if the criminal procedure law requires the criminal charge to include the time and specification of the crime , however, in the cases related with sexual crimes the charge is mostly established without indicating the specific the time of the crime this minimizes the accused right to defend the case .

The due process right and its elements such as equality of arms ,speedy trial ,the right to cross examine ,the right to counsel legal expert and other basic principles are seriously hampered through the practices. This researcher, therefore found the due process right of the accused in sexual crime cases needs to study against existing laws, the actual investigation system and evidence collection mechanism of sexual crime cases and the role of government towards the realization of the rights of the accused.

1.3. Significance of the Study

In the context of Ethiopia , research indicates that the sexual crime cases report is very high . According to the Ministry of Labor and Social Affairs between 1999 and 2003, the reporting of sexual offences was increased by 7%, while for rape the increase was 3%.¹⁴Regarding the crime reports at least 44 cases to police and 24 cases to hospital will be reported by victims' within 24 hours in as in Tikur Anbessa specialized and st .Paul's memorial Hospital of Addis Ababa.¹⁵

In light of the high level criminal reports versus the poor evidence production in sexual crime cases needs to be assessed very well to minimize the possibility of wrongful conviction over the

¹⁴Helen Wolde, ' Are Human Rights an Effective Remedy ?Children ,Sexual Violence ,and Criminal Justice in Ethiopia' , (LLM thesis ,Dalhousie University Halifax ,Nova Scotia 2014) 9.

¹⁵Z Lakew, 'Alleged cases of Sexual Assault Reported to Two Addis Ababa Hospitals Reported, East African Medical Journal' , [vol 78 no 2], (2001) 81.

innocent individuals .It also very important to identify the challenges of the adjudication of sexual crime cases and the accused due process rights protection. The study has its own critical value for the government to make reform on the justice sector. In addition it be taken as a reference to fill gaps and the problems. Possibly the research will be used as a secondary source for future researchers. By far this research will contribute its part to the development of jurisprudence in the area .

1.4. Scope of the Study

Of the various fundamental rights of the accused in international human right instruments ,this study is confines itself to assessing the due process right of the accused at federal level. Due to the research is doctrinal and it focus on the legal issues. In addition the governing laws of sexual crime cases are similar throughout the country. As a result the research is done at federal level by taking two sample areas. The jurisdictions selected for this study are the Federal First Instance Court, Bole and Lideta Women and Child benches , Women and Child related prosecutor Offices and Women and Child police Investigation Divisions .All the respondents to the interview were drawn from these sample centers. In effect, though the research focuses ,though not exhaustively on that often categorized under due process guarantees. The study did not delve in to the assessment of all due process right other than those ,the right to fair trial ,equality of arms ,the right to have defense lawyer, the right to examination of witness ,the right to confrontation, the right to have adequate compensation , the right to have speedy trial ,the right to bail ,presumption of innocence ,standard of proof, plea bargaining and judicial review. The study has also given a greater emphasis to evidence collection and investigation of sexual crimes. For having the brief outlook of the cases for the specific rights the research use the terms the accused and suspects alternatively . Regarding the age the child and adults cases are included.

1.5. Objective of the Study

1.5.1. General Objectives

- The main objective of the study is to examine legal and practical challenges associated with the adjudication of sexual crime cases in light of the guaranteeing the due process rights of the accused in Ethiopia .

1.5.2. Specific Objectives

The study seeks to address the following specific objectives

- To examine the adequacy of the Ethiopian laws, policies and programs relating to the protection of the accused rights in the adjudication of sexual crime cases
- To identify the practical problems surfacing in criminal proceedings in relation to the accused rights in sexual crime cases
- To analyze the extent to which international and regional human rights Protection mechanisms can address the challenges regarding the protection of the accused right from the stage of investigation up to adjudication.

1.6. Research Questions

- What are the normative foundations of the due process rights of the accused under international human right instruments?
- What are the international experience in evidence collection and investigation mechanisms , laws ,protocols or guide lines for sexual crime cases ?
- Are the Ethiopian normative frameworks relating to the protection of the accused rights in the adjudication of sexual crime cases adequate? If not, what are the legal lacuna out there?
- Are there practical challenges affecting the due process rights of the accused in entertaining the sexual crime cases? If so ,What are they ?

1.7. Limitations of the Study

The first constraint that encountered to this study is limited access to having relevant materials on the subject matter under the Ethiopian legal system. Besides, the absence of a full-fledged internet access for conducting the research is also another limitation of the study. Due to the institutions being only partially at work availability of sufficient data is another problem .

The limitation to have an organized data from the judicial organs was also a huge problem. The financial and time limitations were also another challenges in the conduct of this research.

1.8. Research Methodology

This research adopts a qualitative research design. For this purpose, both primary and secondary sources of information and data are employed. The primary sources of information are collected from legislations at international, regional, domestic levels. The FDRE constitution, criminal code, Criminal procedure code ,Draft criminal and Evidence code, Criminal justice policy are thoroughly dealt with. Different books ,journal articles and articles from the website are the secondary sources which the research chiefly resorted to .The legal analysis is adopted in conducting this research. The samples for the sexual investigation and evidence collection countries experience are taken from benchmarked countries such as Kenya ,Philippines and United states. The countries are selected because they are having best experience on sexual crime investigation mechanism than Ethiopia in terms of establishing the legal frame work . In addition in terms of differences in economic level and geography it enables us to view in a comparative way.

The court files for sexual related crimes were undertaken from Federal women and child benches and from the Federal supreme court cassation division .The women and child benches are purposefully selected because they are seen specific proportion of sexual crime cases. The research had made use of purposefully selective of eight cases, which can address the research questions of this research. Additional data was collected using a semi structured interview, among federal first instance women and child bench judges , focal persons for women and child cases of public prosecutors , women and child cases police investigation division officers and defense lawyers who worked in relation with women and child benches. Two judges ,Three public prosecutors , One police officer , One defense lawyer were chosen and a total sample size of Seven was included in the study. This informants are purposively selected as they have been working on sexual crime cases issues and their responsibilities towards the event.

1.9. Literature Review

The literatures reviewed in this regard falls either some literatures the normative frame work of due process rights or is linked to with from women's and children's right and some others cover only one of the due process rights of the accused. On the other hand some studies only focus on specific crime.

Tarekegn and Worku in their journal titled 'Sociology and Criminology-Open Access Challenges of the Strength of Evidences Presented to Ethiopian Courts in Rape Cases among Children below 14 Years Old: The Case of West Shoa High Court' assesses that the evidences presented to the court in rape cases are challenges of judges and prosecutors. The testimony of the victim is likely to be unreliable .the victims are mostly the only sources of evidence. Ethiopian law does not clearly provide the use of "beyond reasonable" as a standard of proof in criminal cases .As per their findings courts generally ruled in favor of victims to protect children's ,victims and to keep public interest as its hot issue for the government bodies .¹⁶

Gashawbeza in his thesis entitled "The implementation of law of evidence regarding the sexual abuse of children in Ethiopia" studies about evidence law in Ethiopia and its limitations as it is among the least-developed laws. In Ethiopia, in addition in child sexual abuse cases, there is no single and comprehensive law dedicated to only for children. Provisions on the rights of children generally and laws banning sexual abuse of children specifically can be found scattered in other laws, such as the Ethiopian Constitution, Criminal Code and Family Code of the country. Trials in child abuse cases should not be delayed because it help in fast-tracking the child's healing from the trauma.¹⁷

Arayaselassie with her Article "The Standard of Proof in Criminal Proceedings: the Threshold to Prove Guilt Abstract under Ethiopian Law" she discussed about the normative frame work of the standard of proof in Ethiopia. Standard of proof in criminal proceedings is not clearly stipulated in any piece of Ethiopian legislation. The absence of a codified and comprehensive law of evidence in

¹⁶Tarekegn and Worku,(n 8) 1.

¹⁷TT Gashawbeza,The Implementation of Law of Evidence Regarding the Sexual Abuse of Children in Ethiopia',(LLM thesis ,North west university 2014) 31.

Ethiopia requires us to explore the diverse substantive and procedural laws in order to examine a particular evidentiary notion such as the standard of proof. In her findings suggest that studying this standard in criminal proceedings requires a discussion of the related concept of presumption of innocence of the accused too.¹⁸

¹⁸ Hanna Arayaselassie Zemichael, 'The Standard of Proof in Criminal Proceedings: the Threshold to Prove Guilt Abstract under Ethiopian Law ',Mizan Law Review, [Vol. 8, No.1],(2014)91.

CHAPTER TWO

Due Process Rights of the Accused

The theory of due process of law has its origins in the ancient common law of England . The concept of due process has developed from clause 39 of Magna Carta in England .The reference to due process first appeared in a statutory rendition of clause 39 in 1354 states that

“No man of what a state or condition he be ,shall be put out of his lands or tenements nor taken ,nor disinherited ,nor put to death ,without he be brought to answer by due process of law.”¹⁹

The term due process in its broadest sense it is a legal requirement that state must respect all of the legal rights owned by the person. In the specific setting of detention ,trial or expulsion it requires to ensure fairness ,reasonableness, absence of arbitrariness and the limitations imposed on the individual right in question.²⁰There are four elements of due process these are quality in terms of administration of justice ,quality in terms of protection of the rights of the parties involved, efficiency and effectiveness. ²¹The concept of due process can be interpreted here as the right to be treated fairly, efficiently and effectively by the administration of justice .It requires the court rules to be administrated on the basis of legal principles and procedures . The administration of justice are extensively includes fair trial, presumption of innocence and independence and impartiality of the tribunals .

The concept of due process has four models the first one is formal model in this model there are no constitutional boundary on the capacity of the state to deny a person right ,provided that the deprivation is authorized by a accordingly enacted law E.gSingapore. Second one is the procedural model this model goes to step further and it require that any withdrawal of rights to validate the procedural fairness norms e.g India . Thirdly , the procedural – privacy model it

¹⁹ Magna Carta ,Statue of realm 1354 ,Art 39 <http://en.m.wikipedia.org>>accessed 5 March 2020

²⁰ United Nations Human Rights Office of High Commissioner, Basic Human Rights Reference Guide: Right to a Fair and Due Process in the Context of Countering Terrorism ,CTITF Publication Series,(2014) 4.

²¹ Icelandic Human Rights Center, The right to Due Process <www.humanrights.is>accessed 2 March 2020

holds that the restrictions imposed by due process on the ability of state to deprive a person of right are not only procedural but also substantive in the limited sense they impose constraints on the ability of the state to interfere with the individual privacy E.g United state. The fourth, one is the substantive model with this model , the limits forced on the state are not only procedural but also substantive in a sense that they impose constraints both on individual privacy and on the principle of criminal fault e.g south Africa. ²²Due process is a legal requirement that the state must respect all of the legal rights that owned to a person .

Under the Ethiopian context the concept of due process shown through art 43 of the 1955 revised constitution .²³On the other hand the present FDRE constitution under art 17(1) discussed the idea of due process right in this way ; “No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as enshrined by law”.²⁴This stipulation of the constitution considered to be unclear because of the missing of the term due process and it replaced by ‘ in accordance with the law’ and ‘established by the law’. There are arguments on whether this replaced words have the same place with the term due process .As to some studies there are hypothesis that it’s the ill transition of from the English version to Amharic version however the term due process is not equivalent with the terms as to the constitution. The other argument even the first legal instrument for the inclusion of due process “Magnacarata” also seems to use other phrases rather than the direct term of due process . The other more plausible argument is as due process right is incorporated in the international instruments which Ethiopia is treaty party , in effect Ethiopia is at a duty to implement this laws as to other domestic laws . Besides, the strict uses of terms on the right of liberty ,life and property at the FDRE constitution connotes that modified version of due process is already included. The history of constitutionalism also another insight that due process is not a new concept for Ethiopia since the adoption of the 1955 revised constitution. To conclude its clear that the concept of due process is in one way another it’s part of our law.²⁵As

²² Victor v .Ramraji ,’Four Models of Due Process, Oxford University Press’ ,[vol 2, No 3] ,(2004) 494-505.

²³ Revised Constitution of the Empire of Ethiopia, 1955, Neg. Gaz., Year 1 No1, Art 43 mentions that “ no one can be deprived of the right to own and dispose of property without due process of law.”

²⁴ FDRE Constitution , Proclamation No.1,1995,Fed.Neg.Gaz.Year 1No.1, Art 17 (1).

²⁵ibid

to the Ethiopian criminal procedure code the due process includes the decision to prosecute, the framing of charges, the selection of evidence and the withdrawal of charges.²⁶

2.1. Fair Trial

The right to a fair trial is at the heart of art 10 of (UDHR). It includes a number of individual rights and principles such as the right to a fair hearing, the right to a public hearing and pronouncement of judgment equality of arms, presumption of innocence, freedom from compulsory self-incrimination, the right to know the accusation, adequate time and facilities to prepare a defense, the right to legal assistance, the right to examine witnesses, the right to have an interpreter, the right to appeal in criminal matters, the rights of juvenile offenders no punishment without law, and the right to compensation for miscarriage of justice.²⁷ In addition the right to fair trial incorporated, under the International Covenant on Civil and Political Rights (ICCPR) art 14 explains that the various elements of a fair trial and their application in law and in practice. One may further note various articles in the Rome Statute on the International Criminal Court (ICC), which define in detail principles of criminal justice principles of fair trial.²⁸ The African Commission has also developed its own fair trial principles, which set out a number of general principles and guidelines applicable to all legal proceedings. The availability of competent legal assistance is crucial in carrying out successful litigation in court.²⁹

The right to a fair trial can be interpreted here as the ruling administered by courts held in accordance with established and authoritative legal principles and procedures, for the protection of individual rights. The right to a fair trial is essential for those accused of criminal offences, including sexual crime cases. Since it guarantees public hearing before a competent, independent and impartial tribunal established by law.³⁰ The fair trial right protect the rights of both the suspect and the accused from the beginning of an investigation up to the level of sentencing and appeal.

²⁶ Ethiopian criminal procedure code, 1961, Proclamation no 185, Art 40, 42, 122

²⁷ Universal Declaration of Human Right, (Adopted 10 December, 1948), Art 10

²⁸ Rome Statute of the International the Criminal Court, (Adopted 17 July, 1998), Art 62-67

²⁹ The Office of Prosecutor (n 2)7.

³⁰ Ibid

2.2. Equality of Arms

Equality of arms principle is inherent part of the right of fair trial. Equality of arms find its expression from art 14(3) of the ICCPR and also, specifically relating to criminal proceedings, which refer to the enjoyment of fair trial rights in full equality.³¹ Equality of arms, refers the manner of ensuring parties as they have procedurally equal position during the court trial and ascertain them as equal position to make their case, which must be observed throughout the trial process. It means that each party must be afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage vis-à-vis the opposing party. Under the human right committee General comment 32 which explained about equality of Arms as ‘The right to equality before courts and tribunals also ensures equality of arms by establishing the same procedural right to be provided to all the parties unless distinctions are based on the law and can be justified on objective and reasonable grounds, not entailing actual disadvantage other unfairness to the defendant’.³²

In criminal trials, where the prosecution has all the machinery of the state behind it, therefore the principle of equality of arms is an essential guarantee of the right to defend oneself. This principle would be violated, if the accused denied the access to the information necessary for the preparation of the defense, if the accused was deprived of access to have expert witnesses or if the accused was excluded from an appeal hearing where the prosecutor was present etc.³³

2.3. The Right to Have Defense Counsel

The right to have defense counsel is the a right of suspect or accused who cannot afford to hire a lawyer. Litigating a criminal case necessarily requires the assistance of a lawyer, in the absence of which there will be a high probability of convicting an innocent.³⁴ The right to defend

³¹ United Nations Human Rights Office of High Commissioner (n 20)10.

³² UN Human Rights Committee, General Comment no 32

(2007) <<https://www.refworld.org/docid/478b2b2f2.html>> (accessed on 19 march 2020).

³³ Icelandic Human Rights Center (n 21) 5.

³⁴ Tsehai Wada, ‘The Right to Defense Counsel in Ethiopia; A Quest for Perfection’, *Journal of Ethiopian Law*, [Vol, XXIX], (2017) 22.

oneself in criminal proceedings in person or through legal assistance is stipulated under the international instruments such as art 11(1) of the UDHR³⁵ , art 14(3)(d) of ICCPR.³⁶ As to this laws everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. The human rights committee ,inter American commission and European court have all recognized that the right to fair trial as requires to fulfill access to have lawyer during detention interrogation and preliminary investigation Process.³⁷In Ethiopian case the constitutional recognition of the right to defense counsel is stipulated in the 1955 revised constitution.³⁸

In our country one of the reason the suspect to wait at jail is the absence of legal aid and the additional problem is supposedly the lack of independence of defense lawyers as they are obliged to obtain license. ³⁹Especially, in relation with the criminal cases access to legal aid is generally unavailable in police stations, the courts and prisons. The Government Budget allocation for legal aid is not meaningful. Persons accused of criminal conduct cannot expect legal advice in growing a defense or forming a plea to a serious charge, or in representing oneself in cases involving a prison.⁴⁰

³⁵ UDHR (n 27) Art 11(1)

³⁶ International Covenant for Civil and Political Rights,(Adopted 19 December , 1966), Art 14(3)

³⁷Chief Bassiouni ,Human rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions Duke Journal of Comparative & International Law,[vol3],[1993]30.

³⁸The Ethiopia revised constitution (n 26) Art 52 it says :”.....and have the assistance of a counsel for his defense ,who ,if the accused is unable to obtain the same by his own funds shall be assigned and provided to the accused by the court.”

³⁹ Comprehensive Justice system Reform program ,Baseline Study Report Primavera Quint, (2005) 20.

⁴⁰Hussein Ahmed Tura, ‘Indigent's Right to State Funded Legal Aid in Ethiopia’, International human rights law review, (2013)35.

2.4. Presumption of Innocence

The presumption of innocence means that everyone has the right to be presumed innocent until they have been proven guilty. The presumption of innocence is inextricably related to fairness in criminal due process and is fundamentally related to the protection of human dignity. Above all, it guarantees against misuse of power by those in who is in power and ensures the safeguarding of the basic concepts of justice and fairness.⁴¹

Fair trial is fundamental to the protection of human rights, imposes duty on the prosecutor the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.⁴²

The Universal Declaration of Human Rights under UDHR⁴³, and ICCPR⁴⁴ and several other international instruments recognize the right of the accused to be presumed innocent. According to the ICCPR it obliges the Public officials (including judges ,prosecutors ,the police and government officials) ,all of whom to avoid making public statement of the guilt of an individual prior to a convection. The Human Rights Committee deals about presumption of innocence under General Comment 32(1) section 25 says that a person charged with a criminal offence has the right to be presumed innocent until proved guilty according the law. persons accused for criminal act must be treated in accordance with this principle ,it is the duty of for all public

⁴¹ UN human rights committee ,General Comment No 32;ART 14 The Right to Equality Before Courts and Tribunals and Fair Trial ,90ths sess UN Doc CCPR/C/GC/32 UN DOC A/62/40 VOL 1 ,ANNEX 6 (23 AUGUST 2007)30.

⁴² Amnesty international ,Ethiopia : Commentary on the draft criminal procedure code <.,<https://www.amnesty.org>>accessed 16 march 2020

⁴³UDHR (n 27) Art 11

⁴⁴ICCPR (n 36) Art 14(2)

authorities from pre judging the outcome of the trial .It also requires the media to avoid news coverage undermining the presumption of innocence.⁴⁵

The FDRE constitution art20(3) stipulates that, During the proceedings, accused persons have the right to be presumed innocent until proved guilty according to law.⁴⁶ Ethiopia also adopted a constitution which incorporates and entrenches the principle of the presumption of innocence of the accused until proven guilty before an independent, competent and impartial court. The concept of presumption of innocence will be enclosed under fair trial right. The rights of defendants in the court Proceedings must not only be fair but also perceived to be fair in the eyes of the public. Fairness is very significant and it is up to judges to strike a balance between what is fair to the defendant and what is fair to the victim, within the applicable legal structure of guaranteed rights and parallel State obligations.⁴⁷

2.5. The Right to Bail

The Right to bail is one of the fundamental right to be protected. It is the right of the accused persons not to be denied bail right without just cause. The universal declaration of human rights art 11(1) recognizes this right by co relating with the concept of presumption of innocence.⁴⁸The domestic laws such as the FDRE Constitution art 19(6) recognized the right to be released on bail . On the other hand the conditions for having the bail right is recognized under Art 63 and the following provisions of criminal procedure code.⁴⁹

⁴⁵ UN Human Rights Committee, General Comment 32 section 25(1) the right to equality before the courts and tribunals and to a fair trial 90ths sess,Un doc ccpr/c/gc/32.UN Doc A/62 /40 vol 1 ,Annex 6 (23 August 2007)<[https:// www . judicialcollege.vic.edu.au](https://www.judicialcollege.vic.edu.au)>accessed 23 march 2020.

⁴⁶ FDRE Constitution (n 24) Art 20(3)

⁴⁷Arayaselassie (n 18) 89.

⁴⁸ UDHR (n 27) Article 11(1)

⁴⁹FDRE Constitution (n 24) Article 19(6)

In the present-day in our country specially in relation with bail right the suspects who are eligible for bail but who lack resources are always remanded in custody .The law does not offer alternatives situations such as conditional suspension of the accused.⁵⁰In addition to the criminal procedure code there are two restricting policies, the right to bail may be denied based on the nature of the offence allegedly committed .Different interest groups are advocating for a law that prohibits bail to different category of suspects. African child policy forum has been promoting the idea of denial of bail to those suspected of having committed certain crimes against children. Similarly, the Ethiopian Women lawyers Association is advocating the idea of denial of bail for those suspected of having committed certain crimes against women .This reflected under the federal draft policy document of federal government and it incorporates the ideas of these two organs.⁵¹

2.6. Standard of Proof

Burden of proof is the duty of a party to the litigation to establish by evidence his statement of facts by required level of certainty unless such fact is self clear.⁵²The standard of proof significantly affects the outcome of the cases in the litigation. The standard of proof reflecting the acceptable ratio of wrong full convictions and acquittals and plays a major role for this outcome. The principle of presumption of innocence guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt .It requires that the accused to take the benefit of doubt ,and treated in accordance with the principle.⁵³

The standard of proof in criminal cases is not established in our legal backup . The federal supreme court cassation division does not even give any binding interpretation on this issue. Nevertheless, there is a clue that the standard of proof in criminal cases is much higher than in civil cases . As to some author the criminal cases in courts of Ethiopia seen in the practice of

⁵⁰Comprehensive Justice System Reform Program (n 39) 45.

⁵¹Wondwossen Demissie , ‘The Right to Bail in Ethiopia :Respective Roles of the Court and the Legislature,’ (2009)21.

⁵²Simeneh Kiros Assefa, ‘The Principle of the Presumption of Innocence and Its Challenges in the Ethiopian Criminal Process’, Mizan law review,(2012)22.

⁵³ United nations Human rights Office of High Commissioner (n 20) 12.

the beyond reasonable doubt standard.⁵⁴ On the other hand the draft C.P.C art 317 provides the standard of proof duty over the prosecutor for proving the elements of crime ‘clearly and convincingly’ which is less rigorous on the prosecution compared to ‘proof beyond reasonable doubt’. ‘Clear and convincing’ standard of proof requires a claimant to prove a particular fact is substantially more plausible than not to be true or to prove there is a high prospect that a particular fact is true. However, Amnesty International recommended that the ‘clear and convincing’ standard of proof will undermine the right of the accused to presumption of innocence. Because ‘clear and convincing’ standard of proof only requires the prosecutor to prove only the high probability that the accused might have committed the crime.

The importance of the ‘beyond reasonable doubt’ standard is also reflected in international criminal tribunals and human right court as this standard is an integral part of the presumption of innocence. Amnesty International recommends the country that ‘clear and convincing’ standard of proof in the draft CPC to be replaced by ‘proof beyond reasonable doubt standard. When we see international instruments the standard proof is already included under the coverage of presumption of innocence. Besides, Ethiopia as a treaty party has a duty to follow the international principles stipulated under this laws.⁵⁵ In the human rights committee General comment 32 which clarified the obligation of the state parties no guilt can be presumed until the charge have been proved beyond reasonable doubt. By taking this some argues that beyond reasonable doubt standard also could be applicable in Ethiopia.⁵⁶ The cassation division decision on file no 09441⁵⁷ states that the art 141 and art 149 of the criminal procedure are using as standard of proof establishing provisions. Even if this provisions are not clearly stipulate the standard yet. Despite the fact that there is no clear law regarding the standard of proof in Ethiopia laws, the rules developed by the international instruments could be serve for our country through interpretation. However setting the weak burden of proof stipulations may pave the way for convicting innocent individuals.

⁵⁴ibid

⁵⁵UN Human Rights Committee (n32) 66.

⁵⁶Arayaselassie (n 18)92.

⁵⁷Feyisa Mame vs Public Prosecutor, FSSCD, File no109441,Decided on 5 January, 2008.

2.7. Speedy Trial

The focus on speedy trial issue is important because society expects its criminal courts to be forceful instruments both in controlling the crime and protecting the right of the accused, the inability of the criminal courts to dispose cases in a timely manner has emerged as a major concern.⁵⁸ The right to speedy trial has been endorsed in almost international conventions. According to ICCPR under art 19(1) declares that 'Everyone has the right to liberty and security of a person and that no one shall be subject to arbitrary arrest or detention'.

In Ethiopian case provisions that link with speedy trial right such as the art 37 of C.P.C requires the investigative police officers to complete investigation without unnecessary delay.⁵⁹ Because if cases took too much time to make a decision, one of the parties to the litigation will be disadvantaged in away, witnesses may die or disappear, physical evidence may deteriorate, get partially or totally damaged and memory may be fade. In the Ethiopian context, the criminal procedure laws fail to provide specific time limit to complete an investigation, failure to provide sanctions over the prosecutor for not timely frame the charge, the indefinite nature adjournments in the criminal procedure code such as art 94(2), the absence of specific time limit to give judgments are can be taken as limitations on the exercise of speedy trial rights.⁶⁰ Given the problems mentioned in the above, the technological deficiency, the lack of evidence rule, and absence of effective and binding guidelines and a protocol are the main reasons that make the system difficult to give judgment within short period of time.⁶¹

2.8. The Right to Examination of Witness

Cross-examination can be taken as examination of reliability. The process of cross-examination has been taken as the "greatest legal engine ever invented for the discovery of truth."⁶² Cross-

⁵⁸ Law Commission Report, Speedy Trial in International Perspective, (2003) 2.

⁵⁹ Criminal Procedure Code of Ethiopia, 1961, Proclamation No 185, Art 37 (1)

⁶⁰ Tshai Wada, Timely Disposition of Criminal Cases in Ethiopia', (2010) 23.

⁶¹ Gashawbeza, (n 17) 66.

⁶² William J. Migler, An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings, 20 Chap. L. Rev. 357 (2017). 300.

examination is a key to a fair trial process. It is said to be essential to any civilized notion of a fair trial of paramount importance to the rights of the defense and the fairness of the trial and the greatest legal instrument for the discovery of truth. Cross-examination is one aspect of the right to a fair and public trial guaranteed in different legal instruments.⁶³

Under the international instruments coverage the accused has the right to examine or have examined, the witness against him or her to obtain the attendance and examination of witness on his or her behalf under the same condition as witness against him or her. The right to cross examination recognized under the following international instrument such as ICCPR⁶⁴ art 6(1) and 14 of the African Charter on Human and Peoples' Rights (ACHPR);⁶⁵ and art 6 of European convention under section 1 and 6(d)⁶⁶. The right to examination has two components first, the right to call witness to testify during the trial second, the right to examine prosecution witness. The defense must be given adequate opportunity to cross examine witness in the court including evidence from any witnesses as its enshrined under international instruments. Maintaining these fair trial rights are equally important to safeguards parties to the litigation⁶⁷. Cross examination is important for accused because confrontation enhances the accuracy of witness testimony and decreases the risk of wrongful convictions. The primary purpose of the confrontation clause is to help discern reliable evidence.⁶⁸ It will also enhance the defense to have the opportunity to challenge the prosecutors evidences.⁶⁹

⁶³Tadesse Melaku, 'The Right to Cross-Examination and witness Protection in Ethiopia: Mizan Law Review', [Vol. 12, No.2], (2018) 40.

⁶⁴ ICCPR (n 36) Art 2(1),3,14,26

⁶⁵ African charter on Human and People's Rights,(Adopted 27 June, 1981), Art 2,3,6,7,8,26

⁶⁶European Convention on Human Rights , (Effective 1953), Art (6) (d) which read as follows:

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

⁶⁷ ICCPR (n 36) 14(3)(e)

⁶⁸J. Brad Reich, When Is Due Process Due: Title IX, the State, and Public College and University Sexual Violence Procedures, 11 Charleston L. Rev. 1 (2017)70.

⁶⁹Melaku (n 63)40.

2.9. protection of Accused Rights

2.9.1. Judicial Review

The concept of judicial review enables the accused to request a reopening of the case because of the discovery of potentially new evidence, that is not previously known despite due diligence by the party. Judicial review is recognized under art 14(6) of the ICCPR and this provision obliges that previous conviction shall be revised on the ground of new or newly discovered evidence to prove that there has been a miscarriage of justice in the case. Unless the previous conviction is reversed the covenant does not allow persons wrongly convicted to claim compensation for the wrong full detentions. The covenant requires states to establish a mechanism to conduct re trial of the case after its finally decided.⁷⁰ The African court of human rights protocol under art 48(1)⁷¹ also provides the same obligation. It says that an application for revision of judgment may be made to the court only when it is based up on discovery of a new fact of such nature has to be a decisive factor that it was unknown both to the court and party causing revision provided that such ignorance was not due to negligence.

In the Ethiopian case after the exhaustion of all available appeal stages the Ethiopian criminal procedure is silent about the possibility of review of criminal judgment. However, in the criminal system which lacks the binding law which clearly stipulate standard of proof and evaluation of evidences, the disparity between the applying the standard of proof and guilty verdicts, the admissibility issues over the cases that have poor corroborations such as sexual crimes its inevitable to exit wrongful convictions. It is very challenging to give remedy for

⁷⁰ICCPR (n 36) Art 14(6) states that when a person has by a final decision has been convicted of criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered facts shows conclusively that there has been a miscarriage of justice ,the person who has suffered the punishment as a result of such conviction shall be compensated according to law ,unless its proved that non disclosure of the unknown fact time is wholly or partially attributable to him.

⁷¹ Protocol to the African Charter on Human and people's rights on the Establishment of an African Court on Human and people's Rights ,(Adopted on ,1998),Art 48(1)

wrong full convictions in Ethiopia. However, to fill the legal lacuna the Ethiopian courts needs to assess the international instruments and required to entertain the case of judicial review .⁷²

2.9.2. The Right to Get Adequate Compensation

Peoples who are wrongfully convicted may experience psychiatric and emotional effects from the convection and subsequent imprisonment. They may also experience continual emotional effects from the convection and detachment from society.⁷³ Persons subject to compensation for unlawful deprivation of liberty , unlawful arrest or detention to redress for their harm which is done by the act of state officials. The very reason to compensate is both the wrongly convicted as well as unlawfully arrested or detained is a recognition that they suffered from deprivation of their liberty and state failed to full fill the human right obligations. This rights are governed under the international instruments such as art 9(5)⁷⁴ of the ICCPR provides that ‘anyone who has been the victim of unlawful arrest or detention shall have an enforceable right for compensation.’ The other provision art 14 (6)⁷⁵ of ICCPR also illustrates that an individual must have been convicted by a final decision of a criminal offence including minor offences to qualify for compensation for miscarriage of justice in particular for the wrong full convections.

In current Ethiopia the FDRE Constitution is silent about compensation for those cases of unlawful arrest ,unlawful detention and wrongfully convicted persons. The criminal justice policy provides that all persons who were convicted and punished for the crime but later proved innocent are supposed to deserve proportional compensation for the damage they suffered. However, the active binding law is not at work. To fulfill this legal lacuna the Ethiopian courts needed to develop strong jurisprudence over the interpretation of international instruments and make governing decisions.

⁷² Tesfaye Bonsa, 'Wrongful Convictions and the Quest for the Remedies Under the Ethiopian Criminal Justice System', (LLM thesis, Addis Ababa University 2015) 27.

⁷³MulunchWoldetsadikossa, Ethiopia Legal Frame Work Regarding Compensation for the Wrong full Convection , J.L Poly and Globalization , (2016) 66.

⁷⁴ICCPR (n 36) Art 9(5)

⁷⁵Ibid Art 14(6)

2.9.3. Plea Bargaining

Plea bargaining defined as any agreement by the accused to plead guilty in return for a promise benefit.⁷⁶ The defendant agrees to plead guilty for the specific charge or charges in exchange. The grounds to deal with the prosecutors can be to drop one of the charged offenses (called charge-bargaining), recommend a reduced sentence (called sentence bargaining), or both. Plea bargaining is above all essential in contexts where there are limited judicial resources, in a state where high case flows, or in a situation where mandatory minimum sentences encourage defendants to bargain for a lighter punishment. The bilateral advantage of plea-bargaining is it used as a means to avoid victims additional psychological trauma. In the context of international crimes, it used as a means to further national reconciliation.⁷⁷

The Ethiopian criminal procedure code does not include the plea bargaining element. However, the draft criminal procedure and evidence law art 169 and the following provisions included the idea plea bargaining.⁷⁸ The FDRE Criminal Justice Policy embodies reforms aimed plea bargaining. The policy justifies the reasons to introduce plea bargaining from the different perspectives such as to increase the efficiency of the justice system, remorse and even though this alternative of plea bargaining helps reduce case backlog of cases.⁷⁹ The plea bargaining element is included in the draft criminal procedure and evidence code has the following features firstly, it covers all types of crimes, secondly, the power to plea bargain vest to the power of the prosecutor, thirdly, it provides legal conditions such as voluntariness requirement, the duty of disclosure, the requirement of sufficient evidence and principle mandatory legal representation.⁸⁰

The advantage of plea bargaining also can be seen from the perspective of providing speedy resolution of cases, removing doubts about the outcome of trial and proofing the guilt for a

⁷⁶Alemu Meheretu, 'The Proposed Plea Bargaining in Ethiopia :How it fares with Fundamental Principle of Criminal Law and Procedure', Mizan Law Review, [Vol.10,NO 2],(2016) 55.

⁷⁷Kimthuy Seelinger, Helene Silverberg and Robin Mejia, 'The Investigation And Prosecution of Sexual Violence, Human Rights Center University of California Berkeley',(2011) 45.

⁷⁸ The FDRE Draft Criminal procedure and Evidence law, Art 169 ff

⁷⁹Brad Reich (n 68) 45.

⁸⁰Meheretu (n 76) 412.

specific charge . Above all the accused by accepting the plea agreement might benefit from the risk of receiving maximum sentence .⁸¹

The existence of plea bargaining is very crucial especially for sexual crime cases because most of the time the cases are ended up in guilty pleas. As a result the existence of plea bargaining may get the benefits for the accused to have reduced charges or reduced sentence , it minimize the unnecessary extensive litigations .Also there are grounds where the act is done with the victims consent too. In this scenario the charge will be opened only because it's a crime public but not by interest of the parties.

2.9.4.SexualCrime Investigation and Evidence collection : Comparative Experience

The National protocol for sexual Assault United States in its department of justice office on violence against women's National protocol for sexual assault follows strict investigation procedure in such away; 1, Initial Contact (Build consensus among involved agencies regarding the procedures) 2, Triage and intake(Health care providers needs to address patients needs) 3, Documentation by Health Care Personnel(Ensure the completion of all appropriate documentation, educate examiners on proper documentation, ensure the accuracy and objectivity of medical forensic reports) 4, The Medical Forensic History(Taking investigative interviewing and obtain medical forensic history) 5,Photography(It consider forensic photography), 6,Exam and Evidence Collection Procedures (Collecting evidences as much as possible using the guide line) 7. Alcohol and Drug-Facilitated Sexual Assault (Follow toxicology testing procedures)8, STI Evaluation and care (Victims encouraging for sexually transmitted test) 9,Pregnancy Risk Evaluation and Care(Address pregnancy test for all in reproductive area) 10,Discharge and Follow-up (Advocates ,health care workers and victims) 11,Examiner court Appearances is the very stringent medical examination process by including many professional staffs (Improve examiners to testify to the court).⁸²

⁸¹ Colombia Human Rights Law Review , 'Plea Bargaining', Jailhouse Law Manual, (2011) 22.

⁸²U.S Department of Justice Office on Violence Against Women, A National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents , (2nd ed), (2013) 32 .

On the other hand the sexual assault investigation process of Philippines is investigated through the government agency called National Bureau of Investigation (NBI). The investigation team includes Doctors, police officers, fingerprint technicians, photographers, clerks, chemists, stenographers. When a woman reports the case the initial report will be given to the Complaints and Recording Division, then she will be sent for the Violence against Women and Children Division, in this stage her statement and any witnesses to the event will be taken. Another division for the Technical Services will be the next to see. The Medico-legal Division, which leads by specially trained doctors they may undergo a medical forensic examination. The Biological samples, injury related documents and a neuro-psychiatric report will be collected and then the report will be prepared. The findings of medico-legal evidence tests such as for drugs and alcohol, bloodstains, seminal stains and semen and other tests are forwarded to the forensic chemistry division. Finally, all the evidences gathered by this all divisions will be forwarded to the Department of Justice.

When we come to Africa the neighboring country Kenya has investigation guide line called: National Guide lines on the management of sexual violence in Kenya, this guide line follows the following procedures obtaining consent, history taking and examination from head to toe examination (Genito – anal) will be held. The investigation divides into technical management of survivor and investigation for evidence purpose. The forensic management will investigate all crime scene area findings including DNA test. Management of physical injuries, post exposure prophylaxis, pregnancy prevention, prophylaxis of sexually transmitted infections, hepatitis B prevention, medical management of adult men survivors, medical management of perpetrators of sexual violence are the procedures to follow by for sexual crime cases by Kenyan government.⁸³ The investigation team includes the police surgeon or health practitioners, nurses, psychological counselors, social workers, psychiatrists will be participants of the process.

⁸³ Ministry of Medical services, National Guideline on Management of Sexual Violence in Kenya, (2nd rev. ed), (2009) 1-15.

CHAPTER THREE

Practical Examination of the Legal and Institutional Frameworks pertaining to the protection of the Due process Rights of the Accused in Sexual Crimes Ethiopia

3. 1. Conviction Rate in Sexual crime Cases

According to the year 2012 E.C six months FDRE General Attorney report , crimes committed against women's and children including sexual crimes conviction rate was as follows: As to the report around 547 cases passed through litigation. The 137 files got a decision from these 128 of them were conviction verdicts ,9 of them acquittal,75 of them closed by non appearance of the accused,23 of them for lack of the witnesses ,1 by reconciliation and 1 of them by death. 335 of them are transferred for the coming month .The Attorney General set conviction rate standard for prosecutors .The standard of conviction rate set by the Attorney General for these two reporting years was set out to reach the convection ratio up to 96 % and in these two consecutive reporting years it achieved to convict 93.4% cases.⁸⁴ Similarly in the year 2011E.c last year's annual report with similar conviction rate standard ,from 815 cases the 355 cases got a decision: the 312 were conviction only 43 of them were acquittal.⁸⁵ This ratio could give as some insight that the possibility of convection in sexual crime cases is very high.

⁸⁴ The FDRE General Attorney Six Months Report, (2019/2020)34.

⁸⁵ The FDRE General Attorney Annual Report,(2019)16.

3.2.Manner of Evidence Collection and Investigation

3.2.1. Evidence Production

The development of the Ethiopian evidence rule is traced back to the ancient fetha Negest which the document governs both secular and spiritual issues. Law of evidence in Ethiopia is among the least-developed laws of the country. Ethiopia does not have separate codified evidence law rather evidence rules are scattered through the codes. The Ethiopian Evidence system shares both common law and civil law feature.⁸⁶

Relevancy is one of the rule of evidence rule which shows an affair of logic. This means the judges when evaluating the relevancy of evidences it is just done by using ordinary logic, common sense and experience. Whereas the admissibility rule is always comes after the evidence has passed the relevancy test .In other words an evidence to be admissible it required to be relevant. The sufficiency of evidence that is admitted due to its relevance is offered by the court and is proved in the course of litigation .Whatever types of evidences that has a tendency of relevance to prove a material part of the issue is admissible. Once a particular evidence has passed the admissibility test, the next process is the weight, proof and demonstration of evidence.⁸⁷The Ethiopian law does not have specific detailed provisions regulating the admissibility and exclusion of evidence. Due to lack of specific law regulating admissibility issue the court exercises wide discretion in this subject. The court failed to systematically review the evidence presented by the prosecutor , partly through lack of necessary normative frame work determining admissibility of evidence.⁸⁸

Types of evidences that are currently in use by almost all legal systems can be classified as direct and indirect (circumstantial)evidence. Direct evidence is provided by witness through giving oral testimony of something they perceived with their own senses.⁸⁹ In addition direct

⁸⁶Kahasay Debassu and Andualem Eshetu ,Evidence in Ethiopia,(2012)<<http://www.abysiniaalaw.com>>accessed 2 February 2020

⁸⁷Gashawbeza(n 17)35.

⁸⁸ Amnesty International, Justice Under Fire Trials of Opposition Leader, Journalists and Human Rights Defenders in Ethiopia , International Secretariat ,(2011) 40.

⁸⁹ Eshetu A and Debassu.K (n 86) 30.

evidence has a first-hand relationship with the disputed fact .The eyewitnesses and judicial admissions can be mentioned as direct evidence. Circumstantial evidence(indirect evidence) is an evidence that tends to establish a conclusion by inference.⁹⁰ It is possible to say that an evidence that does not fall under the category of direct evidence is considered as circumstantial evidence. The findings in the crime scene area such as Fingerprints, medical evidence, and materials found in the area can be taken as circumstantial evidence.⁹¹

3.2.2.Direct Evidence

3.2.2.1.Victims' Testimony

The first-degree witness in sexual crime cases are victims. The first hand information about the criminal act is only established from the victims word. As to the findings of this research the sexual crime cases mostly depend on this victim's word. The existing Ethiopian evidence law does not impose an age limitation on the eligibility of an eyewitness. Children's can be testimonies before our courts. The court hearings for the cases of children's are will be supported by CCTIV technology.

CCTV is currently in use in our courts, which have established women and child crime case seeing benches. The benches assisted by CCTV since 2004 E.c. The transmission allows the child's live testimony to be broadcast from one room to another room in the courtroom. The transmission is through television accompanied by the presence of social workers and child psychiatrists. Social workers and child psychiatrists help with the questioning of the child who is giving testimony through CCTV by the monitory of the judge. In this situation the accused could not confront witness face to face. The right to face to face confrontation with a witness in trial is explicit that the accused shall enjoy the right to be confronted with the witness against him/her. Since the right to cross examine is protected through the confrontation .⁹²Also the right to confrontation is an inherent part of the right to fair trial. In this scenario there are two parties

⁹⁰Ibid . 32

⁹¹Gashawbeza (n 17)33.

⁹² Anna Frissel and James M.Vukelic ,Application of the Hearsay Exceptions and Constitutional Challenge to the Admission of a Child's Out of Court Statements in the Prosecution of Child Sexual Abuse Cases in North Dakota ,(66 1N.D .LRev .5999 1990) 603.

whose constitutional rights the law should strive to protect. One is the victim, who is demanding justice, and the other is the suspect (accused), who is presumed to be innocent until proven otherwise. In this regard there is no developed jury prudence in our country to balance these two interests. In the right to confrontation theory for the true implementation of the right to confrontation in a given system it requires well established procedural principles and rights. Such as the actual presence of the accused, oral and immediate examination of the evidence, genuine opportunity to cross examine.⁹³ Litigations without respecting the equality of arms is hard to imagine. Each party must have the opportunity to present the case without disadvantaging the other. However, the accused right may collide with others while protecting the interest or privacy of victims and security of witness. In the European court of human rights jurisprudence the exercise of establishing a balance between these two rights subject to the principle of proportionality and further limited by strict necessity. As a result simply provoking public interest or right of others cannot be acceptable. When certain measures allowed to protect the victim such measures can be reconciled with adequate and effective exercise of the rights of defense.⁹⁴

Our constitution has a room for the protection of the right of the accused and witness. The accused the right of confrontation is recognized under the FDRE constitution art 20(4)⁹⁵. On the other hand from the witness protection side art 20(1)⁹⁶ of the constitution it refers that camera proceedings with the view of ensuring public moral, privacy of parties and national security is allowed. However, practically even there is a situation where those matured witness will give their testimony through the CCTV and will limit to ask cross examinations properly.⁹⁷ while the need to protect witness is understandable and acceptable. Besides, due care must be taken during the interpretation and application of the elements found in the constitution to not jeopardize the accused the right to defence and fairness right. The broad interpretation of

⁹³Ibid. 607.

⁹⁴ Arman Zrvandyan, The Right to Confrontation in International Criminal Proceedings, (LLM thesis 2011) 50.

⁹⁵ The FDRE Constitution (n 24) Art 20(4)

⁹⁶Ibid Art 20(1)

⁹⁷ Interview with Solomon Tadesse, Defence lawyer, (Lideta 8 March 2020)

this right may affect the accused the very constitutional rights. Well, in this case the well established procedural principles are needed to entertain such cases. In addition like that of European courts experience efficient and effective representation of the accused is required to be established for the proper application of the law.

3.2.3. Indirect Evidence

3.2.3.1. Hearsay Evidence

Hearsay is defined as every statement made other than by a witness on the position, when presented to prove the fact of the matter stated. From this definition it can be inferred that hearsay is written or spoken words out of court.⁹⁸

When hearsay is at issue art 137(1) CPC is an important provision, it provides that “questions put in examination in chief shall only relate to the facts which are relevant to the issue to be decided and such facts only of which the witness has direct or indirect knowledge”. Here there are arguments where hearsay evidence are come be fall under indirect knowledge or it can be considered as circumstantial evidence. In this regard there is no clarity of laws in Ethiopia. In addition our evidence law is not clear whether hearsay evidence is admitted as a rule or exception. As to Gashawbeza ,if hearsay is admitted, the party against whom it is offered obviously has no chance to cross-examine the original declarant. The courts even has little opportunity to ascertain the degree of responsibility exercised by the original declarant in making the statement, and the court’s time may be wasted with matter that have very little weight. So applicability and admissibility before courts should be scrutinized with caution.⁹⁹

On the other hand the federal cassation division gives a governing decision on admissibility. In the crime of rape the court ruled that so far as hearsay evidence validates the truth, it should be made admissible since the victim ensures its reliability. By taking this assertion and the spirit of criminal procedure code it can be conclude that hearsay admissible before our courts. However, as to the FDRE Constitution art 20(4) it provides that “accused persons have the right to full

⁹⁸Gordon Van Kessel ,Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach, (1998)485.

⁹⁹Gashawbeza(n 17)35.

access to any evidence presented to examine witnesses testifying against them ,to adduce or to have evidence produced in their own defence ,and to obtain the attendance and examination of witness on their behalf before the court.”¹⁰⁰The aim of this law is to open a room for a defendant to defend the case with the help of cross examination. However, hearsay evidence limit the right to cross examination. In this scenario if hearsay taken as a rule which may deprive the constitutional right to confront his accusers of the accused. In order to avoid arbitrary decisions it’s fair to make hearsay evidence as inadmissible.¹⁰¹ On the other hand the draft criminal procedure code Article 14 come up with impressive idea and solved the controversy by making the hear say evidences as an inadmissible as a rule. It provides expectation to be admissible by saying that only where the law expressly provides so.¹⁰²Due to hearsay evidence limitations arguments presuppose that to be taken as exception.

One of the argument against hearsay is possibility of deception in this case there is no guarantee to check whether the statement made due to the influence of fabrication.¹⁰³The Information gained directly from a person who claims to have seen the commission of a crime is likely to be more accurate than information gained from that person through an intermediary. Hearsay evidence by its nature as second-hand evidence and factual assertions is particularly susceptible to creation and manipulation in the context of party-controlled fact finding.¹⁰⁴In sexual crime cases mostly hearsay evidences are presented before our courts. Practically, the issue of false allegation is a common challenge for the justice system. Some of the reasons for the false allegation are familial pressure, for having pre anti HIV vaccine , unwanted pregnancy issues and disputes with their lovers .¹⁰⁵By false and organized evidences there is a high probability to punish innocent individuals. To minimize the risk there was a trend to institute a charge over those false accusers .But now a days the prosecutors do not take this measures to avoid fears of

¹⁰⁰ FDRE Constitution (n 24) Art 20(4)

¹⁰¹ Tesfaye Abate, ‘Hearsay Evidence’, Mizan Law Review ,[Vol.6 ,NO.1],(2012)141-143.

¹⁰² Draft criminal procedure code, Art 14

¹⁰³Gashaw Sisaye,Admissablity of Hearsay Evidence in Criminal Trials :an Appraisal of the Ethiopian Legal Frame work ‘,Harmaya Law Review ,[vol 5],(2016)63.

¹⁰⁴ Van Kessel (n 98) 487.

¹⁰⁵Interview with Liya ,Public Prosecutor,(Bole 6 March 2020)

reporting for sexual crimes on behalf of victims.¹⁰⁶ Within this all problems most of the sexual crime cases are brought before the court by hearsay witness.

The following cases are sample of cases which are instituted by hearsay evidences. The charge is brought before the FFIC on file no 277672¹⁰⁷ for the violation of art 27/1/ and 620/1/CC attempted rape .The evidences brought before the court for this cases were only the victim testimony and hearsay testimonies. The documentary evidences is only about the age estimation of the victim. The accused convicted for 4 years rigorous imprisonment. In addition in file no 103994¹⁰⁸ was brought before the Bole first instance court. The prosecutor opened two charges on the defendant for making the indecent act up on minors according to art 627(3)¹⁰⁹ of the CC .The evidence brought for this court shows that the victim testimony and hearsay testimonies. The documentary evidence were medical results which explain that there was no defloration and birth certificate of the victim .The defendant was did not defend in this case .Finally the court convicted the accused for 1 year and 8 months imprisonment. Again in this case the medical result is not provided as relevant evidence .And it could be said that the charges are instituted mostly by verbal testimonies. The professionals who participated in medical and forensic examinations were not included as expert witnesses .The displayed medical evidences does not even prove the guilt of the accused , It does not have relevance for the specified cases either. This may give some insight as to how sexual crime cases are instituted without support by another corroborative evidence.

3.2.3.2. Forensic Evidence

Forensic investigation is an investigation made by scientific methods in police laboratories which may include the fingerprints ,biochemical analysis ,arson, and document examination.¹¹⁰ The forensic samples taken from the crime scene area are circumstantial evidences which are very frequently used items of identifying a perpetrator through different jurisdictions.

¹⁰⁶ ibid

¹⁰⁷ Abdurahman Ahmed vs prosecutor, FFIC, File no 277677, Decided on 25 February 2012 E.c

¹⁰⁸ Sega Amlak Negussevs prosecutor, FFIC, File no 103994, Decided on 22 January 2012 E.c

¹⁰⁹ FDRE Criminal Code (n 6) Art 627(3)

¹¹⁰ Amnesty International (n 42) 12.

Presentation of circumstantial evidence before courts plays a major role in proving whether the abuser is guilty or not. In our country the evidentiary rules are found both in substantive and procedural laws. In the criminal cases according to the FDRE criminal code art 51¹¹¹ when there is a doubt in the responsibility of the accused expert examination can be order. In addition the physical examination when deemed necessary according to art 34¹¹² of CPC the police may order for the physical examination the examination in this cases extended to blood test. The current practice in our courts there is no standard to identify scientific evidence as commonly accepted or not accepted. All evidence are potentially qualified to be admitted in the trial process.¹¹³This may be seen in the decision given on the admissibility and importance of circumstantial evidence by the Federal Supreme Court Cassation Division decision on file No. 75980.¹¹⁴ The decision mentioned art 137(1) of CPC and which concluded that according to this provision circumstantial evidences are legally admissible in Ethiopian law. Similarly, the federal cassation division on file no 152719¹¹⁵ in the litigation to identify paternity, passed a decision that the DNA test can be taken as a defense to disprove paternity or maternity. From this decision it can be concluded that forensic evidences are admissible before our courts.

The development of solid scientific evidence that has exonerated those falsely accused of sexual crimes. In some cases the innocent man was incarcerated for years by false accusations. The recent Technological advancements in forensic science, such as DNA samples has chief roll for exoneration of the problem.¹¹⁶The DNA testing has chief roll both to exonerate the wrongly convicted and to identify the guilty.¹¹⁷However, investigators of sexual crimes in Ethiopia seem to have ignored the importance and weight of this circumstantial evidence. In Ethiopia there is no well organized forensic science institute. Federal police forensic science investigations as

¹¹¹ Criminal code (n 6) Art 51

¹¹² Criminal procedure code(n 26) Art 34

¹¹³ ibid

¹¹⁴Semachew Lengerh VS Customs and Revenues South District ,FSCCD, File no 75980,Decided 02 July 2004E.c

¹¹⁵ W/o Birtukan Tadesse vs Yeshimebet Tadesse ,FSCCD, File no 152719,Decided on 23 September 2011 E.c

¹¹⁶ Aviva Orenstein, Special Issues Raised by Rape Trial, (76 Fordham L. Rev. 1585 2007)<<https://ir.lawnet.fordham.edu>>accessed 23 December 2020

¹¹⁷Braden L Garret, Due process, (78 Fordham L.Rev 2919 2010)<<https://home.org/blog/lawjournal/view/17>>accessed 13 April 2020

well as the regional ones have no clear rules principles or guide lines. Most of their work is not supported by scientific rules.¹¹⁸ DNA tests will be made by taking the crime scene findings such as blood, saliva, hair and other body parts. Practically, this kind of DNA results are rare to be seen before our courts. In some scenario the semen may be found or the victim may be pregnant, however, there is little experience on behalf of prosecutors to corroborate this evidences by DNA test .Unless the defendant disproves this fact, there is a tendency on behalf of courts to take the benefit of doubt to the victim.¹¹⁹ However, there is very low probability for the accused to disprove the fact by making DNA test. Due to the DNA test is not available in the government hospitals and its costly to make in private. When prosecutor raise the victims pregnancy as aggravating circumstance in the charge sometimes through the court order the DNA test will be made.¹²⁰In this case the prosecutor will be cover the cost. Besides, as to the prosecutors explanation there is no specific budget in the ministry for this purpose. The principle of presumption of innocence requires the glut to be proved whichever the standard of proof provides. In addition this right guarantees that the accused has the benefit of doubt by imposing the burden of proof on the prosecution.¹²¹ Thus in any case accused can be convicted or punished only when the compliant has proved the case. In this case the accused needs not satisfy the judge about his innocence. However the practice to shift the burden to the accused is against the principle of presumption of innocence.

Another challenge for the investigation system is victims reluctance to come to the police forthwith on happening of the crime .Timing is very critical for making DNA test, the evidence such as the men's semen required to be collected within 72 hours .However ,due to the absence

¹¹⁸Behaylu Girma ,'Forensic Science Evidence under Ethiopian criminal justice system: The case of Homicide in Addis Ababa', (LLM thesis ,Bahir Dar University 2014)51.

¹¹⁹ Interview with Asahib Bzunhe, Federal First Instance Court Judge ,Ledeta Federal First Instance Court (Ledeta 1 March 2020)

¹²⁰ Interview with Enku Asnake ,Public Prosecutor,(Bambis 10 March).

¹²¹Worku Yaze ,'Burden of Proof ,Presumptions and Standards of Proof in Criminal Cases' ,Mizan Law Review ,[vol 8 ,no 1],(2014)43.

of knowledge or by another the victim will come to the hospital lately after take bathes . In this scenario the necessary evidences may be lost .¹²²

3.2.3.3. Medical Evidence

The medico legal evidence is defined as documented evidence of genital and extra genital injuries , emotional states as well as the samples such as the saliva ,semi fluid , that are taken for legal purposes.¹²³ Medical evidence, proven by physical and psychological indicators, most of the time tells the court what happened and not who inflicted the abuse. To have reliable medical evidence the coordinate team of investigation is very important However like that of experiences seen in Philippines or Kenya there is no an efficient and coordinated investigation team in Ethiopia. In a countries like United states of America physician who conducts the medical examination may appear before the court for further investigation and elaboration of some of the medical facts. However, in our courts these medicinal examiners probably come to court through the court order otherwise they are not listed even in the charge. Medical evidence helps the court in determining different legal aspects related to sexual crime. The process of medical examination might be range from identifying the age of the victim to examining the result of the abuse.¹²⁴

Ethiopia has one of the lowest birth registration system in Africa.¹²⁵ Birth registration is one of the most important rights recognized under the CRC. The later clearly stipulates that the child shall be registered immediately after birth art. 7. Similarly, according to the UN Guidelines (1997), “states should ensure the effectiveness of their birth registration programs”. It obliges countries for the realization of this right. For sexual crime cases the age test will be provided by the prosecutor or by the court order .When the certificate is given from a non-Governmental organ the courts to be certain will order Age test. Due to minimum available medical centers

¹²² Interview with liya (n 105).

¹²³ U.S Department of Justice Office on Violence Against Women(n 82) 32 .

¹²⁴ Gashawbeza (n 17)37.

¹²⁵ Fourth Conference of African Ministers Responsible for Civil Registration Experts Meeting , Civil Registration and Vital statistics: from Planning to Implementation , Fourth Conference of African Ministers Responsible for Civil Registration ,AUC/CRMC4/2017/7 ,(2017)<www.apai-crvs.org >acssed 2 may 2020

and backward technology the test mostly will take a long time and this hampers speedy trial right of the accused. The other difficulty for the judiciary is the fact that hospitals spell out the age of the victim within an age range, which results in only an approximate age. The age estimation has a crucial role in sexual crime cases. As to the criminal code if the accused is young in age the laws applying for juvenile delinquency will be applied. For the crimes that are limited in Age, if the victim age is estimated in between the ranges stated by the criminal code and out of that range there is a tendency to take the lesser one and charge by the aggravating provision. In this case due to the failure to establish and prove the exact age of the child the accused might be punished in a savior way.¹²⁶ From the perspective of punishment, the general comment for torture gave its concern that Ethiopia to establish the minimum age responsibility.¹²⁷

3.3.Manner of Police Investigation in Sexual Crime Cases

Crime investigation is a systematic search for the truth with the primary purpose of finding a positive solution to the crime with the help of objective and subjective clues.¹²⁸ Evidence collection is the core part of the investigation process. Criminal procedure in its broadest sense includes the rules and principles which governs the enforcement of criminal proceedings. The Ethiopian criminal justice process incorporated the procedures of Interrogation of accused persons by the police, institute a charge by the prosecutor finally the enforcement of

¹²⁶Wolde (n 14) 55.

¹²⁷ Report of a Committee Against torture, Convection Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Forty Fifth Session, (2010) <<https://digitallibrary.un.org>> accessed 4 march 2020: As to the committee "The state party should raise the minimum age of criminal responsibility according to the international standards and classify persons above 15 and under 18 years of age as young persons who are subjected to lighter penalties 157-168 of the criminal code and may not be kept custody with adult criminals. It should ensure that its juvenile justice system is in conformity with the international standards such as the United Nations standard minimum rules for the administration of juvenile justice (Beijing Rules) 53.

¹²⁸ Colombia Human Rights Law Review, Plea Bargaining, 9 Jailhouse Law Manual, (2011).

committal for trial or enforcement of sentences by prison administrations.¹²⁹The general objectives of criminal investigation include the identification of the crime, gathering of evidence, individualization of the crime, arrest of the criminal as well as the recovery of stolen property and involvement in the prosecution process.¹³⁰

The effectiveness of the criminal justice system will greatly depend on the quality of initial work done by the police. In sexual crime cases the initial work by the police begins once the complaint or information about the crime is received. The Police are expected to collect and investigate all possible evidence that would help with the prosecution according to art 22 and the following provisions of the Criminal Procedure Code of Ethiopia.

The investigation of Sexual crime cases will be held on the women and children police investigation divisions on each sub cities of Addis Ababa. The one stop centers are also available for sexual crime cases in Gandi Memorial ,Abet and St.poulose Hospitals. The Justice Centre for Coordinated Care of Women and Children became operational in Gandhi Memorial Hospital, was opened in Addis Ababa since the year 2012 .In this centers the police, prosecutor ,psychologist and medical examiner are working together. But their task is limited to receiving a complaint or information. The police stations are left with complete responsibility for investigating offences and for making the initial decision to start criminal proceedings. Once the police and prosecutor are of the opinion that criminal proceedings are to be lodged, the next step is to collect evidence but in this case as to one of the prosecutor says that after the victim gave his /her words there was a situation to call the suspect without collecting enough evidences related with the crime. ¹³¹The Ethiopian sexual crime cases unlike other jurisdictions such as the

¹²⁹Elias N .Stebek , ‘Legal Sector Reform Pursuits in Ethiopia :Gaps in Grassroots Empowerment ’,Mizan law Review, [vol. 9no.2] ,(2015) 66 .

¹³⁰Alemayhu shiferaw ,’Evaluating the Application of Human Rights Principles in Crime Investigation in Ethiopia: case Study of the Addis Ababa City Police’,(Dissertation, University of South Africa 2010)73.

¹³¹ Interview with Ruhama Almnh,public prosecutor,(Ledeta ,3 March)

Philippines or Kenya is not lead by investigation protocol or guide line .The existing one stop center team lacks coordination.

The issues that makes sexual crime investigation difficult are the hidden nature of sexual crime cases, the difficulty to find sufficient evidence and lack of advanced criminal investigation systems and technology.¹³² Though there are competing interests in sexual crime cases the professionals needs to see cases from the accused side too because the accusation based on sexual crime is being used as a tool in the society to accuse each other. The society knows that the issue is sensitive and favored and they are using it as a tool for revenge by accusing their foes . As to one of interviewee when the victims are child or women the special considerations by laws as a vulnerable group , on the other hand the accused protected rights coming to in the same plate in this scenario there is a tendency to resemble to victim.¹³³ It is not an easy task to compromise competing interests however it's important to find amicable ways to harmonize the two interests.

Currently in the investigation system it is difficult to get corroborative evidence on sexual crime cases. Due to lack of enough trained and specialized police investigation team ,the medical reports information is kept in general terms and it is difficult to take as relevant evidence, the absence of available investigation guide guidelines for the sexual crimes . This factors pushed the police, public prosecutor and others who are working in the area to follow their own personal skill and knowledge during the investigation.¹³⁴ However, this kind of experience will result inconsistency in terms of handling sexual crime cases.

3.4. Sexual Crimes provisions and the Criminal Code

The principle of legality has recognition both at the International and domestic level. Apart from other, it demands the crime to be clearly defined in advance so that the public can know what acts and/or omissions make them criminally responsible. If there is no such clear law, there is no crime and hence punishment. Among other things, the principle of legality requires a clear

¹³² Interview with x, Police Officer,(Bole,3 march 2020).

¹³³ Interview with Eyerusalem Demsse ,Federal First Instance Court Judge,(Bole 1 March 2020).

¹³⁴ Interview with x Police Officer (n 132).

conduct as *actus reus* of the crime. The principle of legality is recognized under the Ethiopian law.¹³⁵

In relation to sexual crimes, when we see the provisions of the CC it could be found the vague or ambiguous provisions. When we see art 620(1) CC it reads that whoever compels a woman to submit to ‘*sexual intercourse ...*’¹³⁶The italicized term sexual intercourse which is not defined both in the criminal code or in the minutes of the CC. Therefore it is difficult to categorize which acts are considered as sexual intercourse and which are not in this vein. Although there is no clear law over the subject probably the act includes the penetration of genitals, the mouth or anus of another person or an object. The principle of legality requires a legal provision specifically forbidding the conduct. However, the CC fails to specify the conducts which are included under sexual intercourse. This may result practical inconsistencies in terms of interpretation. Since the criminal cases limits the liberty of the subject, the law requires it to be strictly interpreted.

Similarly, when we see art 622 CC Sexual Outrages Accompanied by Violence it stipulates that ‘Whoever, by the use of violence or grave intimidation, or after having in any other way rendered his victim incapable of offering resistance, compels a person of the opposite sex, to perform, or to submit to’ *an act corresponding to the sexual act.....*, or ‘*any other indecent act ...*’¹³⁷The italicized phrases are not defined Criminal Code or under the minute of the CC. As a result it opens a room for establishing criminal charges in the alternative grounds, save they have their own different penalties. There is a tendency to punish criminals in different way even for the similar crime.¹³⁸

As to Wada, the possible meaning for these italicized words is as follows “corresponding act in the absence of source material it may be that the lawmaker has in mind non genital copulation such as anal, oral, digital, mechanical. On the other hand indecent acts are very vague the probable acts may be touching kissing may be taken as indecent acts. Also he gives an insight

¹³⁵ Glory Nirmala and Serkaddis Zegeye, Criminal law Teaching Material, (2009)59.

¹³⁶ FDRE Criminal Code (n 6) Art 620(1)

¹³⁷ FDRE Criminal Code (n 6) Art 622

¹³⁸ Interview with Ruhama (n 131).

that such broad terms will naturally pose serious problems of interpretation on the part of the judiciary.¹³⁹

Lack of clarity in the law and lack of precedent on these issue results in inconsistency. As a result the framing of the charges and giving decisions on this provisions are seen cases by case basis. According to the principle of legality the perpetrators must be punished by taking in to account their mensra. If the law is very vague and don't known which act is fall under which law it is very hard to establish the mental element of the accused. It may result in to punishment over the mental element of the accused. When the charges are instituted by citing ambiguous terms the court mostly identifies whether it falls under the specified provisions or not after the witness hearings. In this situations if the charge is instituted by highly punishable provision then there will be a high probability of denial of the bail right of the accused .One of the element of the principle of legality is the strict construction of the law. Thus, broad articulation of terms will be against this principle.

3.5.Problems Related to the particulars of Criminal Charges

A charge is a formal document containing an allegation that a person named there in has committed an act prohibited by the criminal law by describing necessary facets both under the statement of the offence and particulars of the offence .The charge has two functions first it is a means by which the accused is informed of what charges he has to answer to in order to make a rational decision whether to plead guilty or not guilty. Second ,it is an instrument to identify whether its conducted by prosecutor or private. The purpose of specification of time is to enable the defendant to know what charges have to answer without restricting the right to defense and in order to inform the court and to prove the case before the court.¹⁴⁰ Art 20(2) of FDRE Constitution states that accused persons have the right to be informed with sufficient particulars of the charge brought against them and be given the charge in writing. Also, the CPC of Ethiopia requires the specifications of the charge the time ,place conduct ,and subject matter of

¹³⁹Tsehai Wada, 'Rethinking the Ethiopian Rape Lawjournal of Ethiopian law',[Vol.xxv.No.2],(2012).

¹⁴⁰Simeneh Kiros, Criminal Procedure Law :Principle Rules and Practices,(2010)320.

the crime to be clear.¹⁴¹ Such particulars are necessary for the accused in terms of giving reasonable information about the nature of the charge, to be able to know what defense to offer and, moreover, to be able to know whether he/she be prosecuted a second time for the same misdeed.¹⁴² Particulars of the offence are a significant part of the charge. Obviously, offences are committed in certain a space of time and place .The CC also provides that a crime is committed at a place where and at a time when the criminal performed or failed to perform the act penalized by the Code.¹⁴³ However, the charges presented for sexual crime cases mostly do not have clear time specifications .

Now, let us take some sample the charges that are brought before courts .The charge presented to Ledeta Court on May 15 /2010 E.c on file no 260627 ¹⁴⁴ which has two counts on the violation of art 627/1/ and 627/3/ of CC sexual outrage committed on infants the charge states that 'the accused made sexual intercourse with a minor of opposite sex on the *unknown day and month* in the year 2009.... '.Another file that is brought before the Lideta court in file no 268753¹⁴⁵ the charge is instituted for the violation of art 27/1/ and 627/1/ of the CC . The accused was charged for having sexual intercourse with opposite sex minor on the *unknown day and time* on 2010 .This kind of lack of clarities over the charges may affect the accused opportunity to defend his case properly. These sample charges give an insight in to how the charges are presented before courts without fulfilling the particulars of the charge. At a minimum threshold the time at least is not specified within a range.

¹⁴¹ Criminal Procedure Code (n 26) Art 111(1)(c)'the time and place of the offence and where appropriate ,the person against whom or the property

¹⁴² Aderajew Teklu and Kedir Mohammed ,Ethiopian Criminal Procedure Teaching Material , (2009)23.

¹⁴³ FDRE Criminal code (n 6) Art 25.

¹⁴⁴ Seladin Meki vs prosecutor , FFIC, File no 260627,Decided 18 December 2011 E.c

¹⁴⁵ Sentayhu Abdu vs prosecutor , FFIC ,File no 268753,Decided 9 may 2011 E.C

3.6. Institutional Challenges

3.6.1. The Federal police Commission

The commission has autonomous federal government organ and having investigation of crime as one of its objectives¹⁴⁶. One of the power and duty of the organ is to investigate crime failing under the jurisdiction of federal courts.¹⁴⁷ Crime investigation is the process of selecting offenders and manifestation of truth in a rational and systematic way supported by sufficient evidence. It involves the gathering of evidence in support of the suspicion that a certain crime has been committed by the alleged offender.¹⁴⁸ As to the respondents in the sexual crime cases the polices do not properly investigate cases . Even after seeing the crime scene mostly they do not capture basic circumstantial evidences. There is a tendency to wait until the victims give them information. There is no enough special and technical training on sexual crime cases for the investigators. As a result, does not have adequate knowledge about the systematic way of crime investigation for sexual crime cases.¹⁴⁹

The skill and personal qualification of sexual crime investigators is a key to the effective and impartial crime investigation. They have to have basic knowledge on medical and forensic issues and other relevant course. The investigation team composed of with different professionals is important for the system .In this case each polices are not expected to be equipped with all the necessary skills of data gathering ,analysis, and presentation of evidence.

Regarding the resource, the technology capacity of the Ethiopian police has been very weak as it was not supported by sufficient number of well trained investigators and scientific investigation facilities. In many countries proof in criminal cases largely depend up on forensic evidence produced by utilizing highly specialized techniques of scientific investigation. The reality in Ethiopia is different there is only one forensic laboratory for the whole country with

¹⁴⁶ Ethiopian Federal police commission Establishment proclamation No.720/2011

¹⁴⁷ Ibid Art 6(4)

¹⁴⁸ Alemayhu shiferaw ,'Evaluating the Application of Human Rights Principles in Crime Investigation in Ethiopia: Case Study of the Addis Ababa City Police',(Dissertation, University of South Africa 2010)73.

¹⁴⁹ Interview Ashib(n 119).

serious capacity limitations. The other regional forensic centers are in the ongoing process. Evidence in our criminal cases therefore depend up on oral testimony of witness with its own problems including unreliability, and timely availability of individual witness during the criminal proceedings.¹⁵⁰ Though the government is the primary duty be are in respecting and protecting human rights in general and the accused due process rights in particular is a responsibility of every one.

3.6.2. The Federal Attorney General

The Attorney General has very broad power and duties in criminal matters. Save the powers given to the police, it has the power to make necessary follow up in the course of investigation and a gives necessary instruction.¹⁵¹ The prosecutor is a lawyer versed in law does not warrant the prosecutors mastery of prosecutorial skills and diligence in his duties. However, the gap in skills and competence could still be observed .The prosecutor skill and competence deficiencies in some prosecutors ,has been found to cause denial of the right of the accused to expiated trail. For example let's take the following case. The case in file No. 272453¹⁵² was brought before Lideta First Instance Court. The prosecutor accused the defendant, for committing a crime corresponding to the sexual act or any indecent act up on a minor against a 9 years old girl child in violation of art 627 (3)¹⁵³ of the CC .The crime was alleged to have been committed on February 9 ,2011E.C. As stated in the charge, the defendant had invited the victim to visit his house and committed the alleged crime . The public prosecutor presented the evidence that the victim testimony and two hearsay testimonies and documentary evidence is the accused admission to the police and to the court and the victims birth certificate is attached. After considering the evidence presented by both parties, the court ordered the accused to produce his defense. The accused followed the case from prison because of he denied his bail right. .Under this process the court find out that the accused is mentally ill. Finally, the court in November

¹⁵⁰Taye Assefa, Digest of Ethiopia's National Policies ,Strategies and Programs, Forum for Social studies,(2008)330.

¹⁵¹ The Federal Attorney General Establishment proclamation No 943/2016 Art 6(3)b

¹⁵²Fesha Kibrom vs prosecutor , FFIC, File no 272453,Decided 17 November 2012 E.c

¹⁵³ FDRE Criminal Code (n 6) Art 627(3)

17,2012 acquitted the defendant. However ,if the police and prosecutor before charging this person do the investigation well it was not important the defendant to stay in the jail for months. Waiting until defendants to rise such a health problem as a defense is not the right approach and which highly violates the human right of the accused. And it's obvious that the very principle of criminal law is its to punish the intention. As though insanity on the other hand, is a ground to avoid criminal liability .Opening a charge without making better investigation over this facts will besides the accused, it will have adverse effect on the courts to have unintended to longer hearings.

The reopening of the files which was closed by art 42 (1)(a) CPC¹⁵⁴by the instruction of the prosecution screening organ of the general attorney could be taken as another problem. In the conditions when there is a complaint by the victims or when they are believe that the case is still enough for prosecution. . However this kind of trend will affect the suspects to live their own stable life still there is an opportunity for the reopening of a case at any time.¹⁵⁵

The prosecutors dealing with sexual crimes do not get enough special training on sexual crime cases. While training that deals with the specific to sexual crime is essential . special training in terms of handling the sexual crime case is important to protect the accused rights. As to the head of public prosecutor Children and Women's Office, the public prosecutors hesitate to take the responsibility to work on sexual crime cases. By mentioning that in the absence of enough evidence it's difficult for them to give a decision. On the other hand not enough effective and efficient cooperation with other organs and institutions on processing and preparing the sexual crime cases are to be mentioned. The coordination between appropriate professionals such as child rights advocates, social workers, and medical professionals, forensic professionals at the investigation level is relevant to take into consideration the accused right during case preparation.¹⁵⁶Efficient coordination is usually compromised due to limited awareness on the part of law enforcement personnel and lack of resources, which has an adverse effect on the rights of the accused who need a timely and effective response from the justice system

¹⁵⁴Ethiopian Criminal Procedure code (n 26) art 42 (1)a.

¹⁵⁵Interview Ruhama(n 131).

¹⁵⁶ Interview with Enku (n 120).

3.6 .3.TheDefense lawyers Bureau

The Ethiopian constitution under art 20 (5) provides that ‘accused persons have the right to be represented by legal counsel of their choice ,and ,if they do not have sufficient means to pay for it and miscarriage of justice would result ,to be provided with legal representation at state expense.’ In addition art 21(2) of the Constitution provides that “all persons shall have the opportunity to communicate and visited by..... legal counsel.” The only provision that can be cited for defence counsel from the criminal procedure code is art 61 it says that ‘ any person detained or arrested or on remand shall forth with to call and interview his advocate...’but this provision has its own limitations for the non-inclusion of the accused .

The practice to appoint defense counsel from the public defender office was started in 1996.Regarding the appointment of defense lawyers, there is no single standard by the Supreme Court to appoint them to different courts. However, since once defendant appointed by legal representative no longer represent himself and relay only up on the effectiveness of his representative, the defense counsel effective representation should be given an emphasis .Therefore if the court appointed a representative that is not provide the standard of reasonably effective representative ,the defendant considered as denied his right to counsel.¹⁵⁷

As to the findings the accused are not represented by the fair number of defense lawyers .The defense lawyers have limitations in terms of enough preparation for litigations, establishing well prepared defenses visiting the accused at the prison and filing cases for appeal .The institutional independence here mentioned as a major problem. The institution is under the supervision of the Federal Supreme court. As a result budget and resource issues are under the control of the Supreme Court. There is no transport allowance and the service is only available for two days within a week. Due to this problems they mostly get their clients at the court. The special trainings are not mostly given, even trainings established for police and prosecutors almost in all do not include defense lawyers. The number of lawyers who will be assigned for each child and women related benches are two ,besides those who work for this bench as the same time will work for other benches too. In this scenario it is too difficult to make better

¹⁵⁷ Andrew Haas, International Human Rights Law and Fair Criminal Trial, Oromiya Justice Sector Professionals Training and Legal Research Institute,(2009)39.

preparation for the litigation.¹⁵⁸ In the present condition even in Bole bench the defense lawyers are available only on Wednesday, so the cases with defence lawyers will only be seen in that day. In the pre trial stage our law is silent about the stage and degree of participation defense lawyers . A suspect under police detention cannot lawfully assert this right, for she/he has to wait till is formally charged. Nonetheless, though a trial is a major proceeding, the pre-trial proceedings are equally important to determine guilt or innocence and this legal lacuna will be highly affect the suspects right.¹⁵⁹

¹⁵⁸Interview with Solomon (n 97).

¹⁵⁹Wada, (n 34)53.

Chapter Four

Conclusion and Recommendation

4.1. Conclusion

The findings of the present study revealed the types of evidences mostly presented to court in sexual crime cases are testimony of the victim, hearsay testimony and medical reports. Among them testimony of the victim is the main source of evidence used to prove the case. This study, explored the type of evidence presented to court for sexual crime cases is challenging for professionals in terms of evaluating the weight of the evidences. The study further shows that testimony of a victim in these cases is likely to be fabricated because of, revenge against a boyfriend or lover, familiar pressure or when there is dispute or by any other reasons.

In our country case the investigation system is not supported by the modern technologies. There no governmental DNA testing facility available in the country. The medical examinations mostly do not have relevance for the case. The samples that are found around in the crime scene area almost to be said for all cases not considered as evidence. The sexual crime investigation does not followed by investigation guide line or protocol. In addition the sexual crimes investigation process does not followed by the special investigation team which include diverse professionals. In this case judges may called upon additional witnesses to be convinced or remove their doubt on the commission of the offence. The interviewees also claimed that they pronounced judgments on most cases not fully convinced by the evidences due to the weakness of the evidences presented to the court. In this scenario scientific evidence has paramount importance. Because the judgments given by judges not fully convinced might affect innocent people and promote false allegation of sexual crimes among the society. This ignorance might also lead to denial of right to innocence of accused persons the constitutional right and prejudice the justice system in general. The adjudication process will be un duly delayed or it could be the reason for the accused being in jail for long. Which is against the very principle of speedy trial.

The absence of codified evidence law could be another factor for not applying consistent investigation procedure for the handling of sexual crime cases. In addition the non revision of the

criminal procedure code negatively affected the accused right because it lacks to include the modern concepts of human rights. Even if the criminal cases required the strong production of evidences ,due to the lack of clear standard of proof measurement most of sexual crime cases are adjudicated by weak production of evidences . The silence of our laws to include judicial review ,plea bargaining and compensation clauses it minimize the opportunity to be released those who are unlawfully or arbitrarily arrested. Even tough, this kind of legal set ups are very crucial in terms of avoiding unwanted full trial scale proceedings and trial costs ,minimize the arbitrary actions of government officials and asserts accountability above all it will ascertain trustworthily of the justice system .Besides ,the judiciary have the power to interpret laws and to fill the legal lacuna ,however, which is not seen practically. As the investigation system is relayed on the verbal witness there are risks of false fabrication of accusations. For that matter the role of defence lawyers is inevitable. However, the practice shows that the defence lawyers representation has its own efficiency problems. As human right is an inter related concept the proper application or protection of the presumption of innocence it also protects the bail right of the accused. The establishment of conducive environment for the confrontation of witness who called against the accused it directly realize the accused right of cross examination so they are interrelated with each other. The due process rights of the accused are recognized under the international instruments which Ethiopia is a treaty party. This international instruments besides establishing international norms they requires states compliance. However ,diminishing this rights enforcement by domestic laws and practices is not acceptable and it's against the principle of international law.

4.2.Recomendation

The government should revise the criminal procedure code though the criminal code is revised and come up with very broad modification on sexual crime cases ,the procedure does not have the plat form to specially treat the sexual crime cases. The government is recommended to enact the single codified evidence law .Hence the laws are scattered and does not have special laws over the evidence gathering, the clear standard of proof ,admissibility and relevancy of evidences. It will have great advantage to avoid the doubts and inconsistencies through adjudication of criminal cases. It's also must be caution that it is dangerous to convict accused people in the absence of corroboration among the presented evidences. Therefore, the need for

pretrial discovery and well prepared evidence examination is very critical. For the mutual benefit of the government and the accused and to facilitate speedy trial, the inclusion of plea bargaining element especially for sexual crime cases is very important. On the other hand for the countries that does not have strong criminal justice system, the probability of convicting innocents is expected. So to give available remedy for the miscarriage of justice which is done by both government and its officials is crucial. It is recommended that the government to revise the laws and to include the plea bargaining, review of judgment and compensation for the wrongful conviction elements.

At a policy level or beyond that the special sexual investigation procedure or guide line should be legislated. The investigation system needs to be followed by clear and governing procedure. In sexual crime cases for the benefit of both the victim and the accused it needs to be done as a team from diverse professions such as the team includes the police, psychologist, forensic professionals, medical teams this also needs the legal governing guide line.

From the perspective of realizing the accused right to have legal counsel the government needs to establish the institutionally independent defense lawyer organ. The bargaining power of the defense lawyer should be improved by reestablishing the institution as an independent organ, to resolve the budgetary, human resource, efficiency and competency limitations.

The training and the training manual should be available to all sectors who take part on the sexual crime adjudicating system such as the judges who preside over trials involving crimes of sexual crimes because it can play a crucial role in managing the trial in ways that can either support or undermine effective prosecution of these cases. The public prosecutors, defense lawyers legal advocates and polices also needs to be given the essential trainings as they have irreplaceable position to make a life for the justice system. The continual trainings very important to avoid the personal negative thoughts such as sensitivity or bias attitudes over presiding the cases. Over all it will advance the capacity of the professionals in terms of adjudicating the sexual crime cases.

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Appendixes

Appendixes I

Interview Questions

I. Greeting and introducing the moderator and note taker with participants.

II. Introducing the main objectives of the study ;

I am undertaking research on **‘Adjudication of Sexual crimes in Ethiopia visa vis due process guarantees of the Accused Right in Ethiopia’**. The objective of these study is see the Legal, Technical ,Institutional frame works for accused right protections , To Identifying the legal and practical gaps and suggest solutions for the protection of accused rights, so I would like to confirm that this any information you gave to me will be kept confidential and the information will be use for Academic purpose.

III. Introducing the main objectives of the discussion

The main objective of this discussion is to collect the information on how the accused right is protected from investigation up to the hearing ,the practical challenges regarding the protection of the accused right in relation with sexual crimes, the possible solutions to protect the due process right of the accused in relation with sexual crimes.

IV. Obtaining consent ; I kindly request your consent because each and every your professional say is very important to give a life for this paper .Thank you !

Appendix II

1. Sex

2. Position

3. Interview Time

- I. Are there any special investigation techniques, procedures or special evidence gathering mechanism used in cases related to sexual crimes ?
- II. Are there any special laws ,policies and programs relating to the protection of the accused rights in relation with sexual crimes?
- III. What do you think are the gaps in the law and the enforcement in criminal proceedings in relation with the accused rights in case of sexual crimes?
- IV. Do you know if courts refer to international and regional human right protection mechanisms and process in criminal proceedings relating to sexual crimes?
- V. Do you think there are problems in the law and practice its administration with regard to the protection of accused rights in cases relating to sexual crimes ?if so would you elaborate it ?
- VI. What do you think of the admission of hearsay evidence in sexual crimes cases against the right of accused?
- VII. What is the primary reason to protect the rights of the accused in general? Accused rights who suspected in relation of the accused in specific?
- VIII. In order to protect the right of accused what kind of legal ,technique ,institutional solutions do you think we have to establish?
- IX. Do Not you think that the judicial system favors women and disregards the rights of men?

Summarizing the discussion

I. Accepting any comments, questions or suggestion

II. Showing appreciation to participants and closing the discussion