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**COMPARING BAIL RIGHT TO THE CRIMES OF
RAPE AND CORRUPTION**

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ADDIS ABABA, ETHIOPIA

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Introduction

Every individual has the right to liberty, which is one of the fundamental rights guaranteed in the constitution of many countries. Among which, Ethiopia is one, that envisaged the right to liberty including bail right in its constitution under article 19(6), and it cannot be denied unless the law allows to do so.

Right to liberty may be limited when a person is accused and convicted of an offence. When we limit the liberty of the accused, a conflict of interest may arise between the accused on the one hand and the community on the other. This means that, the accused wants to respect his/her/ liberty until he/she proved guilty and the community might want the accused to be under custody until the exhaustion of adjudication. As a result, balancing the demands of the accused and the community seems necessary. Bail is one of such a balancing solution provided by law.

There are certain conditions to be fulfilled where an offence is bailable (allows bail rights). According to Article 63 of Criminal Procedure Code of Ethiopia, bail is allowed when an offence do not carry death penalty, punishable with less than 15 years rigorous imprisonment and there is no a possibility of actual death and for crimes of corruption which are punishable with more than 10 years imprisonment and by a contrario reading of Article 67 when the accused is appear at court, he may not commit another offences and he may not tamper witnesses.

In the contrary, an offence can not be bailable where it carries death penalty, punishable with more than 15 Years or more rigorous imprisonment or there is a possibility of victim's death or if the accused is not appear when the court required him, he may commit another offences or he may tamper with witnesses and in offences of corruption

punishable with more than 10 years imprisonment. In these cases the offences are non bailable so that bail will be denied.

According to Articles 63 and 67 Ethiopian Criminal Procedure Code bail right is only denied or allowed if the above conditions are fulfilled. In addition to that the legislative body by taking in to consideration offences of corruption which is against public policy particularly against the economy of the society issued laws that deny bail for a crime of corruption which punished with more than 10 years imprisonment. However, that is not a case for crime of rape which has much more negative impacts such as social, moral and economical problems on society. Particularly on women who are parts and parcel of the society.

Therefore, the writer focus on this paper will be to compare an offence of corruption with an offence of rape with regard to bail rights. The writer has limitations to attaches court cases because of the involuntary of the personnel of the court.

This paper has three chapters. The first chapter has deals with the definitions and historical background of the three important terms of the paper, bail, rape and corruption furthermore purpose and requirements of bail .

The second chapter focuses on, types, causes and consequences of rape and corruption furthermore focuses on the similarities and difference between crimes of rape and corruption.

The third chapter deals with comparing bail rights of offenses of rape and corruption in general. It also tries to see court decisions on bail in the two offences. Finally it has conclusion and recommendations.

CHAPTER ONE

I. Definitions and Historical Perspectives of Important Terms of the Paper

1.1 Definition of Bail

Concerning the definition of bail there is no clear cut definition given to it. Most Ethiopian laws, including the FDRE constitution, the criminal procedure code, the anti-corruption special procedure and rules of evidence (proc. No 434/2005) which govern the right to bail don't clearly define what the word bail is all about.

However Art 63/ (2) of the Ethiopian criminal procedure code gives us some hint about bail. The provision says "no person shall be released on bail unless he has entered in to a bail bond, with or without sureties, which in the opinion of the court is sufficient to secure his attendance at the court when so required to appear". That means bail is a means by which an arrested person would be released from detention after securing his attendance at the court when so required by entering in to bail bond. Therefore, according to Article 63(2) bail is a security given to the court by arrested person to appear in court when he/she is required.

Event if our laws do not clearly define what bail means, it is important to look at the meaning of bail from different sources.

For instance, Black's law dictionary provides the meaning of bail as "to procure release of one charged with an offence by insuring his future attendance in court and compelling him to remain within the jurisdiction of court"¹

According to Encyclopedia of criminology "Bail is a pretrial procedure permitting an arrested person to stay out of jail by depositing a set amount of money as security that the person will show up for trial"²

Similarly, according to Ratanla and Dhirajla "bail means release of person from legal custody it presupposes that he is in custody. Person who is under no such restrain cannot be granted bail"³. Bail in its

fundamental concept is security for the prisoner's appearance to answer the charge at a specified time and place. It is natural and relevant for any court to consider such security in relation to and in the light of the nature of the crime charged and the likelihood or otherwise the guilty of the accused there under”⁴

According to Gold Farb, Ronald L. “the word bail has a various of legal connotations. All have something to do with a situation which one holds something or someone for another. Some say that etymologically, the word derives from the old French word "bailey" meaning to deliver, or a bucket or scope used to dip water out of a boat. In practical usage the word “bail” has been defined as when the accused is released on one’s promise to return him/her to lawful authority and on fulfillment of certain condition in support of that promises”⁵

In Wikipidia, (the free Encyclopedia) the word “bail” is defined as some form of property deposited or pledged to a court in order to persuade it to release a suspect from jail, on the understanding that the suspect will return for trial or forfeit the bail (and be guilty of the crime of failure to appear)⁶

According to the code of criminal procedure, the dictionary as well as the Law Lexicon define bail as security for appearance of prisoner on giving of which the accused is released from jail pending investigation, inquiry, trial or appeal.⁷

According to the American jurisprudence “Bail refers to the means of procuring the release of a person charged with an offence by ensuring his attendance in court when he is required.”⁸

Even though there are various meanings given for the word “bail”, the most common definition of bail can be described as a procedural device through which an accused or defendant promises to secure his appearance before a court of law on the date fixed there by means of depositing some amount of money or its equivalent property so that he will be able to be released from jail during a pretrial stage.

1.1.1 Historical Background of Bail

The Bail right has been used for a long period of time. There is no exact time showing when bail is practicable. But bail pending trial has existed back to the days of medieval period of England. And its original motive of bail is different from the modern concepts of release on bail. It might have arisen from the {sheriff's} desire to avoid the costly and burdensome personal responsibility. The accused died because of unsanitary conditions in the prisons since trials were delayed by the infrequent visits of the judges.

These practices of releasing the accused upon their or other persons depositing bond was standardized when it was codified into the English legal framework. The conditions under which pre-trial release was permissible and the powers of the sheriff in determining sufficient security were specified. And to ensure that the accused would appear on the date set for his trial, a third party has to assume a personal responsibility for the accused on penalty of forfeiture of his own property.⁹

In England, releasing the accused on bail was an old procedure. It originated in medieval era where by, when the accused asks to be released on bail, the court must determine whether this is to be allowed or not. In addition excessive bail also forbidden in England. ¹⁰ That is to say that the bill of rights forbids the requiring of excessive bail however, most courts use their own judgments as to what sum is adequate and not being excessive.

Experience in England shows that very few persons admitted to bail fail to appear for trial. In modern times, judges urge magistrates to grant bail very readily and where the offense is a small one and the day of trial is distant to accept the recognizance of the accused himself.¹¹

In the USA the bail clause was copied from the England bill of Rights Act, by which the sole purpose of it was limited to assuring the presence

of the accused in trial. There in America, an accused had an absolute right to bail in all but capital cases as provided in the federal law and most state laws.¹²

Besides that in Anglo American law "bail" is a procedure by which a judge or magistrate sets at liberty one who has been arrested and imprisoned in connection with a crime upon receipt of security to ensure the released person's later appearance in court for further proceeding in the matter. The security itself is called bail".¹³

In the U.S, majority of the states have constitutional provisions guaranteeing that all alleged criminal offences are bailable by sufficient sureties except for capital offences where the proof is evident, or the presumption is high.

In the other states and in the federal system, where the constitution grants no such absolute rights to bail, the judicial officers who administer bail have greater discretion regarding the granting of bail in particular cases. In addition the US constitution and the constitutions of almost all states contain provision forbidding excessive bail.¹⁴

In France bail application is a bit different and is said to be rarely used. Here a person accused of an offence, which is punishable with two years imprisonment if domiciled in France may not be detained for more than five days after his first appearance before the judge d'instruction. All other detentions are limited to four months. The accused may request provisional release if he was detained for more than five days. In such cases, the judge d'instruction has complete discretion to grant a provisional release without bail and without regard to the nature of the offence. The amount of bail in cash and it must be sum sufficient to the amount of civil damages cost incurred by the prosecution.¹⁵

The use of bail to insure the appearance of an accused is not frequently employed. In France the accused has no right to provisional release from custody conditional upon his subsequent appearance before the proper

court at the proper time. Hence the emphasis is on the screening device. The accused may be discharged even before trial, for the screening procedure is the most complete.¹⁶

In Russia bail is one of the mechanisms applied by the person conducting the investigation, procurator or court where there exists a sufficient ground for supposing that an accused will hide from an inquiry, preliminary investigation, or court, or that will be hide the establishment of the truth in a criminal case or that he will engage in criminal activity, and also in order to secure the execution of judgment.¹⁷

When bail is chosen in a specific case it consists of money or valuable deposited with a court by an accused, suspect or other person or organization to secure the appearance of the accused or suspect when summoned by investigator, procurator or court as the case may be.

In Russia the question of bail is seen not as a matter of right of the accused or the suspect but as a device of restraint to ensure that the accused is at hand for the administration of justice.

In Ethiopia, the law of bail which exists in the criminal procedure code is transplanted from Indian.¹⁸ However, it is similar to what exists in England. As will be explained later at great length, it extends an opportunity of provisional pretrial liberty to the defendants excepting those charged with capital offences. In general, bail in Ethiopia is a matter of the discretion of the courts. There are different approaches of bail system in traditional and modern Ethiopia.

I. Customary- bail in Ethiopia has an old history. We can see the way justice was rendered in traditional Ethiopia.

Under the dominant customary law any person had the power to arrest a suspect or lawbreaker ordering him to submit to custody in the name of the Emperor or some to the royal personage. If the suspect ignored the injunction to stop he could be made to appear by force with the help of

the by standers who had a social obligation to assist in such a situation. The person against whom this oral injection was issued was further obliged to accompany his accuser before whatever formal or informal body the accuser wished to submit the dispute to¹⁹ Following the suspect's submission to the legal process there were three types of restraints employed to ensure his continued attendance at the proceedings. These were

1. Ambulatory custody- the Amharic term for "Kuragna"
2. Conditional release to Sureties -bail
3. Fixed location detention in public facilities .²⁰

Ambulatory custody refers to the practice of physically linking the accused and his accuser by knotting together one corner of each of their clothes referred by the Amharic term "SHEMAS" (NETELA). The pair of their clothes so joined was under an obligation not to break the knots unless ordered so by a judge. Sometimes instead of knotting their SHEMAS the accuser's right wrist was chained to the accused until he produced acceptable sureties for his conditional release on personal guarantee was regarded as the normal practice.

The surety was liable to criminal penalties if the accused absconded sureties were drawn from the accused's circle of kinship and friends and absconding was said to have been rare. This friend will become a surety in a case of murder through rendering himself thereby liable to suffer death, or to pay the price of blood to the relative of the victim. This was how bail was practiced in traditional Ethiopia.²¹

II. Modern: - In modern Ethiopia, conditional release on bail is regulated by the Criminal Procedure Code of 1961. The provisions dealing with bail in the code originated from Indian. It departs in many respects from what existed in the customary law. Now there is no release on bail for the accused if the offence he is charged with is a capital offence. In addition to the sureties do not suffer criminal punishment if the person released on bail absconds. The sureties' liability in such a case is limited to the sum of

money they promise to pay in case the accused absconds; where the accused absconds the sureties forfeit the bail amount.²²

1.2 DEFINITIONS OF RAPE

Rape is one of the most serious crimes, which may happen in every day life of a woman. It is considered against the fundamental rights such as the right to liberty, privacy, dignity and life. Rape is unlawful sexual intercourse with another without consent. Most forms of rape are executed with force or threat. Rape can also be done through trick or deceit. This would include drugging a person for sexual submission.²³

Rape is defined by different scholars as: -

A crime committed without her consent through the use of fear, force or fraud, or it is unlawful sexual act between person's not married to each other through the use of force or it is "the unlawful carnal knowledge of a woman by a man, forcibly and against her will, or with out her consent."²⁴

According to Scholar Larry (the Latin rapere, to take by force) is defined in common law as "the carnal knowledge of female forcibly and against her will."²⁵ It is one of the most loathed, misunderstood and frightening crimes.

Under traditional common law definition, rape involves non-consensual sexual intercourse that a male performs against a female.

- A male forcing a female participant fellatio cunnilingus and in many states extended to anal intercourse these crimes are usually covered by sodomy statues which outlaw deviant sexual practice.²⁶

In the United States of America a typical rape provision states that: -

Rape by a male who has sexual intercourse with a female, who is not his wife is guilty of rape if:

- (a) He compels her to submit by force or by threat of imminent death, serious bodily injury extreme pain or kidnapping to be inflicted on any one.
- (b) He has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants, or other means for the purpose of preventing resistance: or

(c) The female is unconscious or

(d) The female is less than ten years old.²⁷

On the other hand under the Ethiopian criminal code, which states "whosoever compels a woman to submit to sexual intercourse outside wedlock, whether by the use of violence or grave intimidation, or after having rendered her unconscious or incapable of resistance..."²⁸ is considered to have committed rape.

Sexual Intercourse includes any sexual penetration, however slight.²⁹ The exclusion of wives from the crime of rape rested on several out dated legal fictions.³⁰

According to Encyclopedia Encarta "Rape is sexual intercourse against a person will. Most experts believe the primary cause of rape is an aggressive desire to dominate the victim rather than an attempt to achieve sexual fulfillment. They consider rape an act of violence rather than principally a sexual encounter."³¹

1.2.1 HISTORICAL PERSPECTIVE OF RAPE

Considering the act of rape as a crime is not a recent phenomenon. It has been a recognized crime throughout history.

In early civilization rape was common. Men staked claim of ownership on women by forcibly abducting and raping them. This practice led to male's solidification of power and their domination over women. Under Babylonian and Hebraic law, the rape of a virgin was a crime punishable by death³² However, if the victim was married, then both she and her attacker were considered equally to blame, and unless her husband intervened, both were put to death.³³

In some ancient societies, men obtained wives through the practice of bride capture. In the custom, a man would kidnap a woman and force her to have sex, and then he would marry her. In these societies what we would now call rape was socially acceptable, especially in times of war. In some cases bride capture was celebrated as heroic. For example, Romulus the legendary

founder of Rome is credited with populating that city by capturing the women from a neighboring group of people known as the sabines.³⁴

Other ancient societies considered rape as punishable offence. However, many of these societies punished the women raped, as well as the rapist. For instance under the ancient Babylonian code of Hammurabi, a married woman who was raped was considered to have committed adultery.³⁵

In addition to some ancient societies women were treated as a form of property and rape was defined as an offense against the property owners. The woman's father or husband not against the woman herself. For example, the old testament books of Deuteronomy, which delineates ancient Hebrew law, provides that if an unmarried virgin is raped the offender must pay the woman's father 50 shekels. This law reflects the belief that a rapist could atone for his by marrying the victim such laws indicate that the society did not view the injury done to the woman as the essence of the offense of rape.³⁶

Rape in common law

Rape was a sexual intercourse of a woman by men forcibly and against her will. However, because the common law treated wives as property of their husbands, a woman's husband could not be found guilty of raping her, regardless of whether he used force against her to undergo sex. As a result of the wedding contract wives could not legally refuse to have sex with their husbands. Therefore, the law considered marital rape non punishable.³⁷

In addition to creating complete immunity for husbands, English law also contained a number of legal and procedural requirements that made the prosecution of rape difficult. Under the utmost resistance doctrine, men could demonstrate that she had physically attempted fight the rape but had been over powered. A woman who was not physically bruised had little hope of proving a case of rape. If a woman did not promptly complain of a rape, under the fresh complaint rule her case could not be the theory that a delayed report was more likely to be fabricated³⁸

Under English common law, certain rules of evidence also contributed to the escape of charges of rape. Evidentiary rules governed what information was available to the jury during a trial as well as the weight the jury should assign to the information. Special rules made it difficult to achieve convictions. Under these rules, a woman who reported a rape could expect to be questioned in great detail about her sex life. For example, the victim could be extensively cross-examined by the accused rapist's attorney to show that

1. She had consented to sexual intercourse with the defendant (accused/rapist) on that or another occasion.
2. She had consented to sexual intercourse with another man or men or,
3. She did not have a good reputation for chastity

Although it was difficult to obtain a conviction under the common law, the punishment for rape was severe when prosecution was successful. During most eras English law treated rape as a capital offense punishable by capital punishment.³⁹

The English common law served as the model for criminal law in the United States, including rape law. However U.S. law added to the protections against false accusations of rape. For example many states instituted a special corroboration rule for rape prosecutions. This rule provided that in the absence of corroborating physical evidence (such as semen or bruise) or the testimony of a witness, a rape victim's testimony was insufficient evidence on which to convict a defendant.⁴⁰

Thus, in English law, the requirement assumed that the primary objective of the law was to protect men from false accusations rather than to protect women from crime of rape.⁴¹

At common law the crime of rape consists in having carnal knowledge of a woman without her consent⁴². Although the offence is usually followed by violence, it has been decided that rape can be committed without the use of any violence. The essential point being that the woman's free and conscious permission has not been obtained.⁴³ This

crime seems to have been originally punishable by death (the punishment was later varied to mutilation) and then was reduced to a trespass punishable with only two years imprisonment but soon afterwards it was again made a capital felony. Subsequent statutory modifications have been replaced by the sexual offences Act, 1956, S.I (1) which makes the crime a felony punishable with imprisonment for life.

The history of these offences shows a steady course of judicial and statutory enlargement, which may be summarized as follows. The ancient law began with the concept of carnal knowledge effected by direct and overpowering physical force beating down victim's resistance in such situation there was clearly no consent by the woman and this came later to be regarded as the gist of the offence.⁴⁴

So as to cover the case of the woman yielding (but not consenting) when she faced with threats of such bodily injury to, as she dared not resist. It was also realized that there could be a different situation where the woman's consent was not negative, but it was in fact vitiated by intimidation, that is to say, where she had, as it were been faced with a decision between the evils and had chosen that one which seemed to her to be the lesser.⁴⁵

This differentiation was given statutory recognition by the criminal law amendment act 1885, c 69, now repealed and replaced by sect.2 of the act of 1956. In any particular case it may be difficult to for cast the evidence given to the court but obviated by the provisions as to alternative verdicts set out in part one of the second schedule of the Act, so that incase of doubt the better course would be charge rape under section I with regarded to deceit the Act of 1956 (repealing and replacing provision of the Act of 1885) by sec. I (2) stated that rape for a man to obtain intercourse with a woman who has a husband and by sect.8 an offence punishable with two years imprisonment to procure a woman by false pretences to have unlawful sexual intercourse.⁴⁶

1.3. DEFINITION OF CORRUPTION

According to Encyclopedia and working definition used by the World Bank, Transparency International "corruption is the abuse of public power for benefit (or profit). Another widely used description is that corruption is a transaction between private and public sector actors through which collective goods are illegitimately converted into private - regarding pay offs".⁴⁷ This point is also emphasized by Rose -Ackerman, who says, corruption exists at the interface of the public and private sectors' (Rose-Ackerman 1978) and stressed by researchers who point to the Weberian distinction between public and private the foundation of non- corrupt politics and administration.⁴⁸

According to Colin Nye's classical definition, corruption is "behavior that deviates from formal duties of a public role (elective or appointive) because of private regarding (personal, close family, private clique) wealth or status gains." ⁴⁹

Updated version with the same elements is the definition by Mushtaq Khan, who says "corruption is behavior that deviates from the formal rules of conduct governing action of some one in a position of public authority because of private - regarding motives such as wealth, power and where economic opportunities are few, corruption occurs when political power is used to pursue wealth."⁵⁰

Many states codified in their criminal codes that corruption is a crime. Corruption based on the political, social and economic hazards defined variously. Some of the definitions given to corruption are the following: -

- "An act done with intent to give advantage in consistent with official duty and the rights of others". ⁵¹
- The act of official or fiduciary person who unlawfully and wrongfully uses his status or character to procure some benefits for himself or for another person contrary to duty and the right of others.⁵²

- Corruption involves the dishonest or preferential use of power or position, which has the result of one person or organization being advantaged over another.⁵³
- According to oxford dictionary corruption is a crime that does not protect public interest, breach of trust or untrustworthiness based on these imbalances justice.⁵⁴
- According to Kato corruption is an act which violates the laws,. Rules or regulation for private interest.⁵⁵
- According to the Ethiopian Criminal Code Articles 407-419 the following acts are considered as corruption. Such as abuse of power, untrustworthiness, mal management, negligence and delay of work, in hospitalization of the client etc.⁵⁶
- According to articles 427-431 the following acts considered as corruption.
 - Bribe
 - Using other powers
 - Dictatorship etc.⁵⁷
- Corruption ranges from the broad terms of "misuse of public power and moral decay to strict legal definition of corruption as an act of bribery involving a public servant and a transfer of tangible resources.⁵⁸

1.3.1. Historical perspective of Corruption in Ethiopia in short

When we look back to the development of corruption in retrospect, we would see that there were times when bribery and nepotism were not considered to be serious corruption offences. In the old days, bribery was considered to be a "motivational" factor, not an offence. Mostly things have changed through time and people began to call a spade and deal with it seriously.⁵⁹

Corruption is a complex and a unique offence due to the following factors:-

(1) Application: - unlike other offences corruption is committed intentionally so that the offender is try to avoid any evidence which indicates that the offence is committed and it is hard to investigate that corruption is committed but other offences can easily investigate because the offenders committed the crime emotionally like rape, stealing etc.

(2) Scope: - Corruption is an offence committed by against individual, families, state and society except rape whereas other ordinarily offences are committed only against individuals and families.

(3) Offenders: - Corruption is an offence committed by high officials, whereas other ordinarily offences are committed by lower persons and incase of corruption both the offenders and the person who participate in the offence have mutual benefit so that they help for the investigation unlike other habitual offences so that in effect it makes the offence complex. ⁶⁰

1.4 The Purpose of Bail right

One of the main purposes of bail right is to emphasis on the proper enforcement of fundamental human rights principles such as the right to personal liberty and presumption of innocence. The fundamental principle system of justice is that a person should not be deprived of his liberty except for a distinct breach of law. If there is no substantial risk of the accused fleeing the court of justice, there is no reason why he should be imprisoned during the period of his trial. ⁶¹

As a result, maintaining the right to bail serves to prevent the infliction of punishment prior to conviction. Secondly, it also helps to protect the accused's right of presumption of innocence. Thirdly, it enables the accused to prepare his defense by providing him with ample opportunities to meet his lawyer and gather evidence.

Bail is important to prevent the punishment of innocent persons. That is why, the pretrial releases on bail are emphasizes on the importance of

fundamental rights of persons. The right to bail is constitutional right and this right is the principle that can be denied only in exceptional situations.

The accused is presumed to be innocent until the decision of court. It is practically possible that an accused become not guilty. Hence in order to prevent this problem the right to bail is the best solution.

In general, the right to bail focuses on the importance of the presumption of innocence and disproves the imposition of punishment prior to trial and conviction and also it gives the accused the opportunity to prepare his defense.

Different laws recognize the right to bail of an accused person. For instance, according to Article 19(6) of the FDRE constitution an accused person has the right to be released on bail and as the writer mentioned that the right to bail is the fundamental right of individuals.

According to Article 11(1) of the universal declaration of human rights any accused person is presumed to be innocent until proved guilty by court. Therefore, according to this provision an accused has the right to be presumed innocent and the court should respect the accused's right to be released on bail.

In general, in criminal cases, the interests of society and the individual concerned should be respected as much as possible. On the one hand the communities need to have control over the accused and on the other hand the accused demands for the respect of his liberty. Therefore, a system is required to strike a balance between these two interests by the system of bail. In short, the purpose of bail is balancing the demands of the accused and the community.

1.5 The Requirements of Bail Right

According to the criminal procedure code, a case begins either in an arrest with warrant or arrest without warrant, "on the spot" by police officer or

private citizen when the offence is flagrant, or else by the filling of an information with police station.⁶²

Bail can be granted or refused by court. When the person arrested or in the custody, apply for the granting of bail to the court. The court demands the police officer and the public prosecutor for comments and recommendations on the application of bail. This enables the judge to fairly decide whether bail be granted or refused and what exactly are the terms on which the grant of bail be based.

Before the court grants or refuses bail, it has to take into considerations some requirements. At this stage of the consideration of bail, what the court is normally required to consider are:

- i. The nature and seriousness of the accusation,
- ii. Severity of the offences
- iii. Nature of the evidence collected and character and behavior of the accused
- iv. Chance of the accused absconding and not being available during the trial
- v. Possibility of repetition of such crime
- vi. Chances of the accused of tampering with the evidence and witnesses,
- vii. Last but not least, larger interest of the accused and the state. so that the courts in order to grant refuses bail should take into consideration these requirements.⁶³

when the offence for which the applicant is being prosecuted is bailable, the court will decide to release the applicant on bail. But if it is not, the applicant will be denied bail. The court will decide to release the applicant on bail. But if the offence is bailable further considerations as specified under article 67 of the Criminal Procedure Code and the court will decide the question of granting of bail in the light of those further considerations.

Therefore, whenever an application for bail is made to a court the first question that has to be decided is whether the offence for which the applicant is being prosecuted or to be prosecuted is bailable or non-bailable. An offence is bailable according to Article 63 (1) of the criminal procedure code "Whoever has been arrested may be released on bail where the offence with which he is charged does not carry the death penalty or rigorous imprisonment for fifteen years or more and where there is no possibility of the person in respect of whom the offence was committed dying". So that the offence which he is charged is bailable.

A contrario reading of this provision tell as that if the applicant is charged with an offence punishable with death, or fifteen years or above imprisonment and the victim is dead or dying, the accused shall not be released on bail because the offence for the commission of which he is charged is non-bailable.

In order for a court to refuse release on bail according to article 63 (1) the cumulative conditions of punishment and state of the victim must be satisfied. The presence of one of the conditions alone is not enough so that even if the offence is punishable with more than fifteen years unless a victim is dead or dying, the offence can not be non-bailable.

In considering bail application, the court is faced with difficult questions such as how to determine the offence is bailable or not by seeing the charge or required to go in search of prima facie evidence to support its decision on the matter. It is controversial because how it is sufficient by looking only the charge and the court denying or allowing bail right of the accused.

For the application of bail, the other requirement is that under article 63 (1) of Criminal procedure code, the court has to look the evidence on the prosecution, whether the accused had committed an offence punishable with fifteen years or above imprisonment or death and the victim is dead or dying the court without satisfied with the evidence it should not conclude

the offence is non-bailable otherwise the court violates the accused right of presumption of innocence.

Decision of bail application under article 63 (1) of the criminal procedure code by reading the charge is an easy task. It needs the court to get further evidence whether the offence for which the accused committed is bailable or non-bailable.

Therefore, according to article 63 (1) of the criminal procedure code an offence can be non-bailable or bailable in Ethiopia. As I mentioned above if an offence does not fall under Article 63(1) of the criminal procedure code it can be said that the offence is bailable.

Denying of Bail

Though bail is a rule and it has exceptions, where the accused is involved in offences which are grave, serious and heinous, it is the exception and not the rule which is attached.⁶⁴

When bail is denied, it is a restriction on personal liberty of the individual whose right is recognized by the constitution and such denial might be rare.⁶⁵

Besides to a contrario reading of Article 63 bail may be denied by article 67 of the criminal procedure code. Accordingly, an application for bail shall not be allowed where:

- (a) The applicant is of such nature that it is unlikely that he will comply with the conditions laid down in the bail bond that is the impossibility of the accused complying with the conditions in the bail bond for instance, if he/she does not appear when the court requires him/her.
- (b) If the applicant is set at liberty is likely to commit other offences that is the possibility of the accused to commit other offences. For instance when the accused is habitual offender, may commit another offences.
- (c) The applicant is likely to interfere with witness or tamper with the evidence that means the possibility of the accused tampering with the prosecution evidence. For instance when the accused is rich or

influential man may tamper with witness by using his money or by his power. Therefore, the fulfillment of one of these conditions are enough to deny bail right.

Appeal

When bail has been denied by a court as the writer described above, the accused has the right to go to appeal in the appellate court within 20 days of the decision of the lower court.

The application of appeal must be in writing and has to mention the reason why bail should be allowed. According to Article 75 of the criminal procedure code, the appellate court either dismisses the application or allows bail even if the decision remains to be final.

Allowing of Bail

Courts grant bail when there is no reasonable ground to believe that the accused is guilty of an offence punishable with death or life imprisonment.⁶⁶ The courts have discretionary power on bail and its amount by looking in to the guidelines under Article 69 of the Criminal Procedure Code. Courts have full discretionary power to deny or grant bail depend on the reliability of the accused to appear before the court and his conduct.

The discretion power of the court to admit bail is not arbitrary, but it is judicial and is governed by established principles.⁶⁷

When the courts using their discretionary power they should regard the fundamental rights of the accused like the presumption of innocence, the right to individual liberty and the likes.

Courts have to care not to violate the fundamental rights of the accused, for instance if there is no sufficient evidence that the accused might to abscond to or to commit other offences or tamper with witnesses, the court should released the accused on bail.

Therefore, the courts with due regard to the circumstances of each of the case are required to respect the accused fundamental rights and should allow the accused to get bail.

Reconsideration or Cancellation of bail

As the case may be, the court can reconsider or cancel the bail bond when new facts appear after the accused was released on bail.

For instance, where the accused was released on insufficient sureties as a result of mistake, fraud or otherwise, when the guarantor requests the court that the accused is going to be abscond or otherwise, the court shall issue arrest warrant for the accused and require him for additional or sufficient sureties after his arrest.

In general bail is the balance between the interests of the individual and the society. Bail is totally the discretionary power of courts in bailable offenses. So that courts can grant or deny bail based on the requirements laid down in the law. Hence the courts can grant bail on bailable offences and can deny bail on non-bailable offences and finally the courts can see it's own decision in appeal or by reconsidering or canceling of bail based on certain situation.

CHAPTER TWO

2. THE GENERAL OVERVIEW OF RAPE AND CORRUPTION

2.1. ESSENTIAL ELEMENTS OF RAPE

In many legal systems, the conviction of rape depends on the existence of three elements: force (without consent), sexual intercourse and intention of the accused.¹

2.1.1. FORCE

One of the elements of rape is force. It is essential to prove the attack was forced and that the victim did not give her consent. In a sense, the burden of proof is on the victim to show that her character is beyond question and that she is no way encouraged, enticed, or misled the accused rapist. Hence rape exists in lack of consent i.e. by force.²

In other words, rape represents the actual resistance of the victim against the act of unlawful sexual intercourse of the accused ³ Lack of consent includes the unlawful sexual intercourse forcefully with the woman who is in a state of unconsciousness because she was intoxicated, drugged or slept.⁴

As we earlier said rape is the unlawful sexual intercourse of a woman by a man without her consent. This implies there is an existence of force and force is the essential element of the offense of rape.⁵

The term force may be actual physical force or constructive force, means not actual force but it can be threaten or violence. The existence of force can be implied in case where rape is committed on a woman who cannot give her consent. This means that the mere forceful penetration of the sexual organ is sufficient even if there is no resistance in case of incapacity.⁶

2.1.2. SEXUAL INTERCOURSE

Sexual intercourse is the other essential element of an offense of rape. It is an actual penetration of the female sex organ by the male sex organ.

In case of a virgin the slightest penetration of the male organ on the private parts of the female is called sexual intercourse.⁷

2.1.3. INTENTION

The third element of rape is the intention of the accused to rape the victim with out her /his consent.

2.2. TYPES OF RAPE

There are different types of rape. Some of them are the followings: ⁸

2.2.1. Marital Rape

Refers to when a married husband did forcefully sexual intercourse with his wife. Traditionally, a legally married husband could not be charged with raping his wife; this was referred to as the marital exemption. The origin of this legal doctrine can be traced to the sixteenth century pronouncement of Mathew hale, England's chief justice.⁹

But the husband cannot be guilty of rape committed by himself upon his lawful wife, for in their mutual matrimonial consent and contract the wife has given up her in this kind into the husband, which she cannot retract.¹⁰

However, research indicates that many women are raped each year by their husbands as part of an over all pattern of spousal abuse, and they deserved protection of the law. In 1980 only three countries laws recognized marital rape as a crime.¹¹

The marital exemption is not unique to USA, courts also been abolished in Canada, Israel, Scotland and Newzeland. ¹²

However, marital rape is now recognized, though most states do not give the same legal protection as they would non-married couples and courts do recognize marital rape.¹³ But in Ethiopia marital rape is not applicable due to the definition of rape in the criminal code, so marital rape is not consider in Ethiopia laws. ¹⁴

Rape of person's spouses is called marital rape or spouse rape.

The English common law and the traditional U.S and Canadian law did not recognize rape within a marriage as a crime. As recently as the 1960s the American Law Institute recommended retaining the historical legal doctrine that a man cannot rape his wife. The organization based this recommendation on the theory that it was inappropriate for the law to invade marital privacy.¹⁵

However, as a result of changing attitudes about domestic violence, many states abandoned this doctrine and began to allow prosecutions for marital rape, especially if it is committed by force.¹⁶

2.2.2 Forcible Rape

Forcible rape is "unlawful carnal knowledge of a woman against her will."¹⁷ The traditional rule is that a successful prosecution for forcible rape requires proof that the female did not consent to the intercourse and that the sexual act was "by force" or "against her will." Failing to show force, a forcible rape conviction is inappropriate.¹⁸

Generally speaking, no consensual intercourse is forcible if the male uses or threatens to use force likely to cause serious bodily harm to the female or possessing a third person.¹⁹

Intercourse secured by a non physical threat, such as if the victim acts as the superior power position of the other party, does not constitute forcible rape thus, it is not "forcible rape" for an adult guardian to threaten to recommit a 14 years old girl to a juvenile detention facility if she does not submit to his advances or for a high school principal to threaten not to allow a senior graduate unless she has sex with him.²⁰ Sexual intercourse carried out against a person's will by the use or threat of physical force is sometimes referred to as forcible rape.²¹ Historically, a person could only be charged with rape if force was used to subdue the victim. Most states retain use of force as part of their definition of rape or at the least, of the most serious form of rape. However some states modified this traditional requirement. For example, in 1992 a New Jersey court found that the requirement

of force was satisfied by the act of sexual penetration it self, without any additional force or threat of force.²²

In Canada, the federal criminal court prohibits various types of sexual assault. Sexual assault with weapon or that causes bodily harm to the victim. More severely aggravated sexual assaults are the most serious form of rape in Canada. A person commits aggravated sexual assault if he or she wounds, maims, disfigures, or endangers the life of another person. ²³

In order for forcible rape charge to be up held on the basis of 'threat of force' as distinguished from actual force it is not ordinarily enough for the prosecution to show simply, the female's serious bodily injury if she resisted. ²⁴ But there must be apprehension for her safety and threat must be required for forcible rape. Thus, no forcible rape occurs if a female accedes to intercourse with a male simply" Because he is bigger than she is and she is afraid of him" ²⁵

However, a forcible rape prosecution is appropriate even if the females fear are unreasonable, if the male " Knowingly takes advantages of that fear in order to accomplish sexual intercourse" .for example, if fearful female has intercourse with male after telling him, "I know that you are going to kill me unless I cooperate " In this case a forcible rape conviction would be allowed, even if the male never intended to seriously injure her, and even if the females fear unreasonable under the circumstances.²⁶

2.2.3. Statutory Rape

The term statutory rape refers to sexual relation between an underage minor female and adult male. Although the sex is not forced or coerced, the law says that young girls are incapable of giving informed consent. So the act is legally considered non consensual. Typically states law will define an age of a girl above that there can be no criminal prosecution for sexual relations.²⁷

Although each state is different most evaluate the age differences between the parties to determine whether an offense has taken place. For example, Indian law mandates prosecution of men whose ages are 21, made

sex with a 14 year girl, are accused of rape.²⁸ In some states defendants can claim they mistakenly assumed their victims were above the age of consent where as in other "mistake of age" defenses are ignored.²⁹ A recent American Bar Association (ABA) survey found that prosecution is often difficult in statutory rape cases because the young victims are reluctant to testify. Often parents have given their blessing to the relationship, and juries are reluctant to convict men involved in consensual sex even with young teenaged girls.³⁰

Most states consider the sexual intercourse of females below the age of consent as a protection to young unmarried girls.³¹

In addition to the above definitions statutory rape occurs when a person has sexual intercourse with an under age minor. It is irrelevant whether or not the minor consented since it is presumed that a minor does not possess the mental capacity to give consent.³²

Besides the above types of rape, there are other types of rapes such as individual gang, forced rape between victims and rape involving the insertion of objects into the victim's.³³

2.2.4 Forced Rape between Victims

This is a kind of rape after having committed gang rape (raping in group), the attackers would force members of the same family to have incestuous sexual relations with each other. Between mother and son, father and daughter, brother and sister, aunt and uncle. Families were also forced to watch the gang rape of one of their member, usually the mother or sisters.³⁴ They were then made to dance naked, to applaud, and to sing, while they were raped. Likewise, sons were forced to hold their mother or sister to prevent them struggling while they were raped.³⁵

2.3. CAUSES OF RAPE

Rape is a serious offense and it has its own causes. There are factors considered as causes of rape, such as biological, physiological and social.³⁶

It is clear that this act of violence linked to the persistence of unequal gender relations and particularly to the way woman's bodies are regarded and other reasons and political, socio - economic and physiological and socio - cultural reasons.³⁷

2.3.1. Biological Factor

According to the biological aspects of the male sexual has its own contribution. And they need to satisfy their sexual urges by making rape. In more primitive times, forcible sexual contact may have helped spread genes and maximize offspring. Some believe that this prehistoric drives remain males still have a natural sexual drive that encourages them to have intimate relations with as many women as possible.³⁸ The evolutionary view is that the sexual urge corresponds to the unconscious need to preserve the species by spreading one's genes as widely as possible. Men who are aggressive will have a reproductive edge over their more passive peers. In contrast women are more eager and want stable partners who seem willing to make a long-term commitment to child caring. This difference produces sexual tension that causes men to do rape.³⁹

In addition to that even if rape is a violent act, it has sexual motivation for instance older rapists tend to harm their victims where as younger rapists may be seeking sexual gratification and may have less harm to their victims.⁴⁰

2.3.2 Social Factor

In contrast to the biological view some researchers argue that rape is a function of modern male socialization and also rape is an act of social violence.⁴¹According to Dina Russell "rape is actually not a deviant act but one that conforms to the quality regarded as masculine in U.S society."⁴²she said that men are thought to dominate at the same time that they are led to believe that women want to be dominated. She believes that men are socialized to be the aggressors and expect to be sexually active with many women.⁴³ similarly; sexually aggressive women frighten some men and cause them to doubt their own husband. ⁴⁴Sexual insecurity may lead some

men to commit rape to bolster their self-image and masculine identity. However, in the long term, gender equality will reduce rape rates because there will be improved social climate toward women⁴⁵

Besides that men learn to commit rapes much as they learn any other behavior. For example sexual aggression may be learned through interaction with peers who articulate attitudes supportive of sexual violence. Watching violent or pornographic films featuring women who are beaten, raped or tortured has been linked to sexually aggressive behavior in men.⁴⁶

2.3.3 Psychological Factor

The other factor for the cause of rape is psychological factor in which the rapists suffer from some types of personality disorder or mental illness.⁴⁷ Research shows that a significant percentage of incarcerated rapists exhibit psychotic tendencies, and many others have hostile, sadistic feelings towards women.⁴⁸

2.4. CONSEQUENCES OF RAPE

The sexual violence like rape has severely harmed not only the victims themselves, but also their families and communities. The victims may have physical (biological), moral (psychological), social and economical problems.⁴⁹

2.4.1. Health Problems

In general by nature women are biologically sensitive. A woman who is victimized by rape suffers a lot of biological problems. Such as infections of ultras, soiling of her vaginal part, and other parts of her body due to rape. A research sample in democratic republic of Congo shows that majority of the victim suffer physical or biological problems like sexually transmitted disease, infections, painful urinating, vaginal infections, sterility, infected HIV/ AIDS etc.⁵⁰

2.4.2 Physiological Problem

The victim is not harmed only physically but also psychologically, that means after the act of rape, the victim has got stress, tension discouraging inferiority, and hopelessness so that she is physically hurted.⁵¹

The research sample report the majority of the victims were suffering from behavior problems. The most frequently cited where latent fear and shame but also self-loathing, excessive sweating, insomnia, nightmares, memory loss, aggression, anxiety, sense of dread and withdrawal in to themselves.⁵²

Many victims blamed themselves for what happened to them. This feeling was made worse by their experience of being stigmatized and ostracized by their families and their communities, and because of this stigmatized their husband's left the victims by divorce.⁵³

2.4.3 Economical Problem

In addition to the participation of women in social work, they are also active in the formal economy, through selling goods locally for everyday consumption including basic essentials such as cassava, fish, vegetables, palm oil, salt soap and charcoal. However, sexual violence like rape has led to a lowering of woman's productivity and therefore the impoverishment of communities. Rape is always accomplished by pillage, leaving women completely stripped of the fruits of their labor and of their means of production.⁵⁴

2.4.4 Social Problem

Women play a great role in a society such as caring of their family especially theirs children, and greatly participate in house work etc. Unfortunately these women are victimized by men. Then the society stigmatized and ostracized the victims so that they might be migrate another place by despairing theirs families, theirs children, and theirs husband.⁵⁵

Sexual violence like has contributed in large measure to the erosion of the social fabric of communities because the victims are the active members

of the female population in the society, in a house, a community work and they have a great participation in the community but if they are victimized their participation is reduced.⁵⁶

For instance, women provide their families every day needs and they are also a means of income to their families ⁵⁷. But due to women rape loosing giving these services. So that social crisis comes to the victim's family and society.⁵⁸

2.5. TYPES OF CORRUPTION

There are two types of corruption

(I) Grand corruption

(II) Petty corruption ⁵⁹

2.5.1. Grand Corruption

As the name itself implies it is a type of corruption committed by government officials on the resources of the country for private interest.⁶⁰

This includes the purchase of ship, Airplane and the huge machines, construction electrical, telecommunication and drainage machines, and also in construction of roads, and in supplies of medicines, and medical equipments, in contract of investment etc.⁶¹

2.5.2. Petty Corruption

It is a type of corruption, which is happened in case of service giving by government. It includes unfair income tax assessment, in case of auction and forgery in educational and medical document.⁶²

In addition to the above there are also other types of corruption

2.5.3 Corruption Crimes Committed by Public Servants

Abuse of power, acceptance of undue advantages, misadministration, unlawful disposal of objects in charge, appropriation and misappropriation in the discharging of duties, traffic in official influence, illegal collection (e.g. taxes) or disbursement, under delay of matters mistaking things of value without or with inadequate consideration, granting and certifying license improperly and possession of unexplained property fall under the category

of " Corruption crimes committed by public servants in breach of trust and good faith."⁶³

2.5.4 Crimes of Corruption against Public Office

Soliciting of corrupt practices, giving things of value without or with inadequate consideration, acting as a go between, using pretended authority and traffic in private influence come under the section. "Crimes against public office by third parties."⁶⁴

2.6. CAUSES OF CORRUPTION

As many scholars and experts would agree, corruption is not a social phenomenon that can be explained by a simple cause, effect model. It is a complicated issue, often the result of many contingent circumstances. Which produce varied and wide ranging effects without limiting the generality of this argument, however, one can cite numerous factors that are widely believed to be the major causes of corruption in Ethiopia.⁶⁵

According to the expert analysis of the civil service reform program and some other sources, poor governance, lack of citizen participation, lack of clear regulation and authorization, low level of institutional control, extreme poverty and inequity, harmful cultural practices and centralization of authority and resources are the major causes of the corruption in Ethiopia.⁶⁶

Besides that the family and ethnic loyalties and obligation, blurred distinction between private and public interest, legal and judicial system, over regulated bureaucracy, deterioration of acceptable moral and ethical values, unsound policies and inefficient civil service system have also been cited by some scholars and researchers as the primary causes of corruption in Ethiopia.⁶⁷

2.7. Consequences of Corruption

During the Imperial and the Derg Regimes, corruption is said to have resulted in the legitimacy of the governments and weakening their structures, reducing productivity, hindering development, worsening poverty, marginalizing the poor, creating social unrest and finally speeding up their downfall.⁶⁸

Unfortunately, it has continued to pose threat to the country's development and democratization processes. Currently, corruption is believed to be one of the major factors that significantly contribute to the reduction of government revenue. It can also negatively affect the ongoing poverty reduction programme.⁶⁹

2.8. Similarity Between Crimes of Rape and Corruption

Both offences of corruption and rape are against public interest and public morality because these offences are against the economic social, and cultural policies of a country and they have also negative impacts on social, economical and political perspectives and considered as grave offences.⁷⁰

2.9 Difference Between Crimes of Rape and Corruption

Corruption is an offence, which has a grave punishment, high awareness of a society about the graveness of corruption transmitted through mass media, public organization etc and also all members of the society are participated for the struggle against corruption, and finally bail is denied for those who committed, and offence of corruption punishable for more than 10 years.⁷¹

Therefore, the above points show how the government gives a great emphasis on corruption and so it has a major contribution for the reduction of offence of corruption.

On the other hand rape is an offence which courts give simple punishment, less awareness of the society as to rape is a grave offence, limited members

of the society are participated for the reduction of rape and bail is allowed for those who committed an offence of rape on children and girls.

Therefore, this shows that the government gives less attention on offence of rape so that nowadays rape is increasing throughout the country and it has negative impacts on the daily life of women and children. (see Annex 1)

CHAPTER THREE

3. COMPARING BAIL RIGHT TO THE CRIMES OF RAPE AND CORRUPTION

3.1. Comparing the right to Bail in Connection with Rape and Corruption

Both rape and corruption are very serious crimes. The substantive aspect of rape has been clearly set out in the Criminal Code of Ethiopia expresses the manner under which this offence is committed and what remedial measures would follow in cases where this provision is contravened.¹ In Ethiopian legal system the term corruption was not defined until the enactment of proclamation No. 236/2001 under this proclamation corruption offences defined for the first time.²

In this paper the writer focuses on the right to bail on offences of rape and corruption. The two crimes have a lot of difference but the similarity of them is that both crimes are committed by limited persons i.e. rape is mostly committed by men and corruption is committed by a public servant. Hence both crimes are similar because they are committed by limited persons.

Thus rape is not only a crime against women and children it is a crime against the entire society. Therefore, rape is the most serious crime. It is a crime against the basic human rights such as the right to life, security of person and liberty.³ Many feminists and psychiatrists said that rape is not only a sexual offence but also an act of aggression aimed at disgracing and humiliating women.⁴

On the other hand, according to the Revised Anti-Corruption Special procedure and Rules of Evidence proclamation no. 434/2005, bail, be denied for those who are committed for a corruption offense punishable with more than 10 years imprisonment.⁵ Besides that corruption is committed by persons who have financially strong so it is better to deny their right. But in case of rape, the law does not clearly prevent the accused to be out of custody on bail. Because Ethiopian Criminal procedure Code

states in a conterario reading that “Whosoever has been arrested may be released on bail where the offence who is charged does not carry the death penalty or rigorous imprisonment for 15 years or more and where there is no possibility of the person in respect of whom the offence was committed dying”⁶ But there is a big debate whether these requirements are cumulative or alternative. In practice the courts usually see the requirements cumulatively and so that they allow bail to the rapists due to the absence of death even though he committed a crime of a 15 or more years imprisonment and others argue that Art 63 is alternative because if one of the elements of the article i.e. 15 or more years punishment is fulfilled, they said that it is justifiable to deny bail right of the accused.

However, courts have a discretionary power in the issue of bail except in case of non-bailable offences, in respect of bailable offences one can safely say that bail is totally a matter of discretion of the courts. So why not court deny the right to bail of the accused of rape because still the rapists may not appear for the court of law, likely to commit an offence and interfere with witnesses or tamper with the evidence”⁷

Despite that our courts usually give the right to bail to the accused of rape because they believe that Article 63 of the Criminal procedure Code is cumulative. Hence, it is only when these requirements are fulfilled that bail should be denied otherwise they grant bail to the accused of rape. And the opponents argue that Art 63 should be interpreted alternatively because the requirements are connected by “or” and the word “or” is a conjunction of alternative rather than cumulative and also for equal distribution of justice i.e. like the accused, the victim has the right to access justice. And for the favor of the victim, it should be interpreted alternatively and if so the bail right of the accused of rape should be denied.

But there is also another question arising from, these opponents that argues the need for rape to be explicitly made non bailable offence under the criminal procedure code.⁸ Because like corruption or even more than

corruption, rape is a serious crime and the number of victims of rape is increasing alarmingly. (See Annex -1).

And also in case of rape other problems arise such as the transmission of sexual transmitted diseases (STD) HIV/AIDS, or rape also results in the grave body injury or death of the victim so that the accused will be charged for concurrent offences of the relevant provisions of the Criminal Code. Hence under such circumstances the accused of rape has not only committed a crime of rape but also the above concurrent offences so that why the courts grant bail to the accused of rape is questionable.⁹

However the courts are not deny bail right of the accused of rape even if he committed concurrent offences, the courts are not taking into consideration the aggravated punishment i.e. 15 or more than 15 years, the court should deny bail right of the accused of rape.

Therefore, the lawmaker of the country has a duty to amend the Criminal procedure Code by stating clearly denying bail to the accused that raped children and girls. And the law needs to taking into consideration at national level those acts of sexual violence like rape in women in Ethiopia are exposed to both private and public spheres and also in urban and rural communities. So that at least by denying bail right of the accused we can reduce the sexual violence of children and women and also the law maker should amend article 63(1) of the Criminal procedure Code in an alternative manner.

Crimes like rape should be considered as violent acts that women need to be protected from it in order to enjoy their basic rights guaranteed under the constitution. The penalties provided for such acts of violence also need to be severe.¹⁰

According to the Criminal procedure Code bail right should be denied to those accused of the crime of rape, given particularly the rate of disappearance of such offences are increasing. And more often than not, the amount of bail requested by courts in connection with rape is very low.¹¹

Therefore, the courts should take into consideration the amount of money because if the amount is less, the accused might disappear forever and the judgment cannot be executed. And those offenders who are able to secured the amount of money usually disappear; especially if they know the seriousness of the punishment against them even if they do not disappear they continue to terrorize their victims and their families by telling them that they are still around and are waiting for the right opportunity to harm their victims again. This is especially traumatic where the victims are little girls. As reports from the different parts of the country indicate crimes of rape committed on young girls have increased alarmingly. (See Annex - 1). These all indicate that rape is one of the most heinous and shocking crimes against human conscience and morality. The main objectives of this paper is to see the consequences of rape and to find the problems of victims of rape and denying right to bail of rapists who committed a crime of rape on children and girls.¹²

3.2. Practical cases of corruption and Rape in connection with bail rights

3.2.1. Practical Case of Corruption with Bail right

Corruption is a serious offence because it is against the economy of the country. Hence a government uses different methods of preventing corruption through out the country. Once of these methods is penalizing by grave punishment and denying bail right of the accused of corruption who committed the crime with punishable more than 10 years.¹³

So now it is better to see court case in crime of corruption in connection with bail right of the accused as follows.

The accused were employees of Ethiopian Airlines and they were working in different positions, some of them were drives, porters, security men etc. Their average ages were 35 years old. The accused were charged stealing the Airlines passengers' properties like mobiles, accessories, chargers and medicines when the plane landed for transit. If this time the Airlines compensated the passengers in amount equal to 65,672 USD. And the

public prosecutor charged the employees under article 413(2) of the Criminal Code and According to Article 4(1) of the revised Anti-corruption special procedure and Rules of Evidence pro.no.432/2005, which state that if a person commits a crime of corruption punishable for more than 10 years, he/she be denied bail. Hence accused were charged on amount equal to 65,675 USD. So the court denied their bail right through the accused requested the court to granted their bail right.¹⁴

In the above case we can observe that how corruption is a serious offence because it denies constitutional rights of bail and it's committed by persons who have a financial strong so it is better to deny their bail right because they might disappear when the court required them. But why not like corruption, the government takes into consideration in its policy by preventing and reducing rape, which is the more evil than corruption.

3.2.2. Practical cases of rape in connection with bail right

There are many practical cases in which young girls and children are the victims of rape daily in a cruel manner. For instance the following is a recent case of a little girl's life tragedy caused by rape.

The suspect was 32 years old man who used to work as a daily laborer in the funeral place and he was a guard of 'tej bete' when he raped 13 years old little girl. She was a grade three clever student and she was helping her family such as by assisting her siblings lessons and she was cooking, washing her family clothes and also she was helping her mother in market place by retailing and selling goods.

The suspect committed the crime of rape on the little girl after threatening to beat her and unfortunately passed away. Even members of the society are shocked by the crime especially her family and the suspect had admitted the crime at police station and the police transferred the case to the public prosecutor then the public prosecutor charged the accused.¹⁵

From the above case we can observe that it is a typical example that how rape is a serious offence against women and children. So that it is not only the problem of women but also it is a problem of all society. Because women

are playing a great role in a society without them there is no family and community. So women are very important for the development of a society and a country.

In the above case the suspect committed not only a crime of rape but also a crime of homicide, bodily injury etc. so that he committed concurrent offences. Hence it shows that how the consequence of rape becomes dangerous to the victim.

Therefore, the government should give a great emphasis on the problem of children and women related with rape and it should denied bail right of the accused of rape.

Now a day's rape is not only committed on women but also committed on children and on men. So that it is the current problem of all members of a society though it is highly affecting women.

Rape specially affects children and women and now it is increasing alarmingly. Even though there is no exact numbers of the victims in rape due to the involuntary of victims to publicized their problems because the negative response of a society to ostracized them and also the feeling of fears, shame of the victim.¹⁶

The crime of rape, as the writer discussed causes physical, psychological, social and economical damages on the victim women. The cause of the crime may be culture, (The attitude of men as superior than women, hence she keeps her problems internally because the community will ostracizing if she publicized) poverty (Women if they do not have a means of income, as an alternative they became prostitute or house maid so that they are exposed to rape) and war (rape is one of the expression to revenge the opponent parties in war zone). So that the above causes contribute for the increase of rape.

According to panos Ethiopia, which is an NGO working in against rape, reported that 40-90% of the victims are under 15 years old. Even through it is difficult to show the exact number of the victims of rape in the country by

various reasons i.e. unsystematized way of data collection etc. we can see the numbers as follows.¹⁷

And according to the Addis Ababa city policy commission in its 1999 E.C report a crime of rape was committed each of sub cities as follows.¹⁸

1999			
Age	Sex	Quantity	Sub City
1-12 years	F	86	Addis Ketema
1-6 years	F	106	Bole, Yeka, Arada and Gulele
0-9 years	F	76	Kolfe and Kirkos
9-15 years	F	56	Nefas Seleke Lafeto and Lideta

From the above table we can understand that a crime of rape is committed at large on children and the majority of the victims are females and these victims are under age i.e. under 15 years old. And 90% of them are under 6 years old, 80% of them are under 12, 60% of them are under 9, and finally 40% of them are under 15% so the majority of the victims are under 15 and 80% rape affects physical, (i.e. injures in their parts of body like their productive parts, etc), psychological (fear, depression, blaming themselves, hating men, inferiority, loneliness and try to suicide etc.) and economical (women are active participate and they have a great contribute in the economy of a country) thus due to rape these women become dependent of men instead of going to school and using their knowledge to create an income for themselves and for theirs family. Besides that they contribute for the number of illiterate people in the country then the economy of the country becomes decreasing and this leads to poverty.¹⁹

According to the Federal First Instance court at Lideta 7th criminal Bench in 1997-1998 E.C, 1998-1999 E.C and 1999 and 2000 E.C the number of crimes increased by 170, 597 and 706 respectively. (See annex 1)

Therefore, the above report of the Federal First Instance Court we can observe that a crime of rape is increased. (See annex 1)

According to the FDRE constitution “Women have equal rights with men”²⁰ and also “The state shall enforce the right of women to eliminate the influence of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited.”²¹ and article 37 of the constitution and according to International Conventions of Women and Children states that women and children are equal to men and have the right to access justice. The government has a duty and responsibility to respect and protect women and children rights from harmful practices like rape.

Even though the criminal law is amended that the punishment of the rapists is grave, there is no a reduction of rape. Because of the implementation of the law by the court, the public prosecutor and the police which are very weak and also only a few victims make themselves in public but the majority of them hide themselves without reporting to the police due to fear or shame and also granting bail to the accused of rape has an input for the increasing of rape in the country. This crime nowadays is not only committed on women and children but also on men.²² so it shows that the scope of rape is not only on children and women but also on men.

Therefore, due to the above reasons rape is increased alarmingly in the country. Hence it needs the responsibility of each and every member of a society responsibility and duty for the campaign of struggling and reducing rape in the country. Especially courts should decided a serious punishment and deny bail right of the accused of rape on children and women. Because children and women are suffering physically, psychologically, socially and economically and they are also the future higher officials and leaders of the country thus we should respect and protect their best interest.

CASE ANALYSIS I

As mentioned earlier, some of the main reasons of the increasing of rape in Ethiopia are the delay of the investigation of rape by police; the public prosecutor not charged the accessed of rape by relevant provisions and the courts see only the interest of the accused rather than the victims. Therefore, it is better to see the problems of the law enforcement bodies in case analysis.

The accused was a 70 years old man who used to work as a guard in a certain kindergarten where he raped 10 little girls. All the little girls were students'. Six of the victims were four years old, one was three years old, two were five years old and one was seven years old. He committed the rape on different days by taking the girls to the school toilet. He raped some of them often threaten to beat them, while he ticked some of them by giving sweets.

The accused was charged on 10 counts of rape under article 589 of the criminal code, which provides that committing a forceful sexual intercourse on a child under 15 years of age is punishable by up to 15 years of rigorous imprisonment. The accused was convicted but he was only sentenced to six years and four month imprisonment. The reason given for the mitigation of the penalty was that, though the accused had been found guilty on all counts he was an old man who had health problems and was a man of low income. The court also stated in its judgment that, until the time the accused committed this crime he had good standing in a society.

The sentence was passed by the Federal first Instance court and currently, the case is pending at the federal high court on appeal. The prosecution lodged an appeal on the grounds that the sentence passed by the first Instance court was too light.²³

The court gave the above decision by looking into consideration the accused reformed his ways in the years that have passed since, or that he has stated his own family or has become employed in a responsible job, or has

understood the wrongful act he had committed and regrets it, etc. therefore, person who should have gotten 15 years for raping a child as young as three or four years old will end up serving two or three years. The insensitivity of the judges towards victims of sexual violence has been point of public discussion for many years now. Because courts use all kinds of reasons for the mitigation of penalties by reasoning out the convicted person bread winner of a family, a person of good standing in a society and has reformed so they allowed him bail right and give less penalty and they do not mind whether the victims are irreversible physically and psychologically damaged. Such injustice is not only limited to the courts but it is also observed in the prosecution of crimes. It contributes a lot to the offender being acquitted or getting the minimum penalty and released him on bail.

The courts in the country are congested with so many pending cases due to the fact that they are understaffed. The public prosecutors office is also congested due to lack of skilled manpower on the average, criminal cases could take up to four years or more before the public prosecutor files charges. By the time the case reaches the courts, the witnesses have forgotten what they testified at the police station; even the victims themselves forget important details witnesses usually go to the police station and read the testimony they had given years ago the that their testimony in court would match the one they had given at the police stations.²⁴

The delay usually results in the lack of key evidence to convict the offender, especially if relying on witness's testimony. Even witnesses might not be available at the time of hearing because they might have moved without forwarding addresses, which is very common in this country. So that the accused remain long time without conviction even if he is convicted afterwards, he usually ends up getting less than the maximum penalty because the crime was committed for a long time and he may brings behavioral charged so the court may punished him by less punishment.²⁵

But such in justice is also observed in public prosecutors. Though the public prosecutors have enough evidence to charge an accused person under the rape provision, it is not uncommon to see them file charges against an accused person under the rape provision, it is not uncommon to see them file charges under provisions of sexual out rages instead (crimes related to having sexual intercourse with minors without their consent) because courts apply minimum penalties. Sometimes, even if the prosecution files charges under the rape provision, the court will order the prosecutor to correct charges because the crime fits provisions of sexual out rages instead of those of rape though it is obvious from the evidence gathered by the prosecution that the crime is rape.²⁶

Sexual offenders in the country also go unpunished because they disappear once they have been released on bail. Because the maximum penalty such crimes carry is 25 years under the rape provision, the law does not prevent the accused from making it out of custody on bail. Under the Ethiopian Criminal Procedure Code, a person loses his right to post bail if the crime he is accused of carries a penalty of higher than 15 years imprisonment. Though bail could be denied if, under the circumstances, it is suspected that the offender might commit another crime while on bail, or might disappear, or might try to destroy evidence, courts hardly ever deny bail to persons accused of such crimes.

The bail issue regarding rape, however, might be solved by the new Criminal Code which has raised the maximum penalty for rape from 15 years to 25 years and is expected to be effective.

And more often than that, the amount of bail requested by courts for such crimes are very low. And those offenders who manage to post bail usually disappear; especially if they know that there is damaging evidence against them.²⁷

Case Analysis II

In the case between public prosecutor Vs the Tesfakidane AdGoye, the accused was charged on raped a 3 years old little girl under Article 627 (1) of the criminal code, which provides that committing a forceful sexual intercourse on child under 13 years of age is punishable by up to 25 years of rigorous imprisonment.

The accused raped the victim on 17/6/2000-2/7/2000 E.C, four times mornings at 10:00 am at the victim's school and the accused was 55 years old and he was the director of the school. And the public prosecutor witnesses and medical certificate attested she was raped.²⁸

Therefore, from the above case the prosecutor argued that accused bail right should be denied because he committed a crime punishable by up to 25 years, he may be transferred HIV/AIDS, and he is also a foreigner so that after granting bail, he might not be appear in the next adjournment of the court. Hence the execution of the judgment of the court becomes impossible.

Unfortunately, the court granted bail to the accused by securing 10,000 Birr and the court ordered him to defend himself and the case is pending.

Though the public prosecutor appealed on the decision of the court in granting bail to the accused and it is pending, the court decision is not justifiable because according to Article 63 (1) of the Criminal Procedure Code if the accused committed a crime which penalized 15 years or more than 15 years, bail is denied.

And the case at hand the accused committed a crime of rape which penalized according to Article 627 (1) beyond 15 years, hence the court might denied bail right of the accused because it fulfills one of the elements of denying of bail under article 63(1) of the Criminal Procedure Code i.e. if the crime is penalized 15 years or more 15 years, it is reasonable to deny bail. Besides that for the favor of victim, raped child and to reduce the crime of rape, it is advisable to use the alternative approach of interpreting article 63 (1) of the criminal procedure code instead of the cumulative approach of interpreting article 63 (1) of the Criminal Procedure Code.

In addition to that if we allowed bail to the accused, he may go to abroad, or he may change his address or, he may change his name, etc. So that there are plenty of court cases which becomes suspended due to the non appearance of the accused after granting him bail and the reason is that he thought that if he guilty, he may be penalized more than 15 years, so it is a good chance for him to disappear after he granted bail. So finally the judgment is not executed because the accused is not going to appear at the same time the raped child girl is suffered with out getting justice forever.

Besides that the government is promised and committed it self for the protection of women and children rights under the provisions of FDRE Constitution consecutively²⁹, ³⁰ and also other provisions of the FDRE constitution “everyone has the right of access to justice”³¹ and also according to this constitution “All persons are equal in their sex, etc”³²and also according to the constitution “every one has the right to protection against bodily harm”.³³

So the government is responsible for the proper implementations of these Constitutional provisions and penalized those who commit against these provisions such as transferred Sexual transmitted diseases (STD,)

HIVDS, bodily harm and also denied bail right of those who committed crime of rape against the above constitutional of citizens.

Therefore, from the above provisions of the constitution, we understand that the government gives a great and special emphasize on the protection of the rights of women and children and it should be the active participants for the proper implementations of these women and children rights by organizing different women and children groups like NGO's who are working for the rights of women and children.

However, some judicial bodies, courts are not sometimes clearly interpret the law as a proper manner like in the case public prosecutor Vs Tesfakidane, the judge decided by allowing bail right to the accused who raped a 3 years old child which is unfair and shock decision from various reasons like he committed a crime of 15 year punishment, he made body injury extend to <fistula> the may transferred also HIV/AIDS, he may not be come back to the court because he is a foreigner etc. So that the court decision in this case is not reasonable because it is against the principle of equal distribution of justice. Hence, in the a above case the accused might deny his bail right and the writer of this paper will hope that the appellant court will dismissed the lower court decision of granting bail to the accused.

In general as we see from the research, the police report and from the practical cases one can observe and share how children, and women are suffer more from a crime of rape such as they are encountered with physical, psychological, economical and social problems and in other hand we are also looking a crime of corruption is a crime against the economy of the country and it has also a great contribution for the poverty of the country thus the government gives great attention to the crime of corruption and preventing it by denying bail right of those who committed corruption punishable with more than 10 years imprisonment.

However, an offence of rape like corruption even more than corruption is a serious offence, so why not the law maker denied bail right of those who committed an offence of rape on children and women. So it is the right time to deny bail right of the accused who committed a crime of rape because children and women are attacked by HIV/AIDS and other damages like physical, psychological, economical and social problems so to solve their problems it is advisable to punished the accused grave punishment and deny bail right of the accused who committed rape.

CONCLUSION AND RECOMMENDATION

To generalize, corruption offences are non bailable offences but in the case of rape the court grants to bail right which means it is bailable offense in practice. In this paper, I tried to discuss and emphasis the definition of rape and corruption I tried to compare and contrast the two crimes and also the impacts they have in the society.

On the basis of this research, rape is at this time a hot issue, and the consequence of this offense is not only physical and mental but also death. Because of this the society is raising plenty of questions like why the punishment should not be grave. Why bail right is permitted to the accused?. For this reasons the protection accorded to women is not still adequate. The women need to be protected from rape in order too enjoy theirs basic rights guaranteed under the FDRE constitution.

It is obvious that the existence of appropriate law by it self is not a guarantee for the protection of women from acts of violence like rape and denying of bail right of the accused of rape.

For instance the law should be amended in case the rape results in grave injury or death of the victim, for which the accused will be charged for concurrent offences under the relevant provisions of the criminal code.

However, most of the time in practice courts are not applying denial of bail and grave punishment of the rapists instead they grant bail and less punishment and the rapists after granting the bail they disappear and the execution of judgment becomes delayed. Therefore, for the purpose of execution of the judgment of the court and for justice to be served it is better to deny the rapists bail right.

A crime like corruption is denied bail right to those who committed the offence. Beside that rape is like corruption a very serious offence. Now

days it reflects its impacts in to the society, rape contributes for the alarming rate of HIV/AIDS in the country.

Therefore, like corrupting which is against the economy of the country, where as rape is against public economy due to discouragement of the productivity of the victim which has a negative impact on the economy of the country. But also its against the physical body and mental of victim i.e. like unnecessary pregnant, transmitted sexual disease like HIV/AIDS, festual and even death etc. It is also against the public morality of the victim family and the community. Bail rights should be denied to those accused of the crime of rape, given, particularly the rate of disappearance of such offenders.

Recommendations

These are the recommendations I forwarded from the research.

- ◆◆ When interpreting the Criminal Procedure Code of Art 63 sub article 1 the court needs to look at the article one by one as an alternative otherwise, if rape is seen as cumulative while the punishment is 15-25 years maximum the consequence is worse, the victim will be victimized more than the accused person who is released on bail. This is the main reason, which increases the number of rapist so the accused person needs to be denied bail. And the court can apply Art 63 as alternative to deny bail.
- ◆ When the accused is release on bail he will runaway or disappear. Because if he comes back the punishment will be high because there is a possibility of the accused will disappear before the final decision is given by the court. For this reason the court, according to the criminal procedure Art 67 bail shall be denied to the accused. Because if the court gives him bail right considering the crime the court needs to think about the consequence so the court has discretionary power apply Art 67 to deny bail. Other wise the judgment will not be executed.

◆◆ The law maker/legislative/ have to amend the criminal procedure code specially those articles which talks about bail right. Because when the law states that the victims are under the age of 13 the criminal law indicates that the punishment is 15 - 25 years, it also needs to clearly indicate that bail is denied to this kind of crime and its damage is high specially when it is statutory rape the law needs to be amended to decrease this kind of crime.

◆◆ Mass media, NGOs, women and children associations such as Ethiopian women lawyer associations, government offices like ministry of women affairs should participate in the reduction of rape but also the lawmakers, Judges public prosecutors, police needs to work hand in hand.

◆◆ The need for sensitizing the law enforcement agencies and courts should be given paramount importance. The investigation process should as far as possible comprises scientific findings and evidences gathered from searching for the crime scene.

In general, the police needs to work hand in hand with the society to gather evidence, which helps to the public prosecutor and court to process a lot fast.

Thus, the police, public prosecutor, the court and the law maker should work hand in hand to reduce crime of rape and denying bail right of the accused of rape on children and girls by applying the above mentioned recommendations.

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ANNEX

1. Federal first instance court years, 1 / 1 1 / 1997 E.C -30/ 10/2000 statistics on crime of rape, on the 7th criminal bench.

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Signed



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