

Protection of Accused Persons with Hearing and Speech Disabilities under the Ethiopian Criminal Justice System

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Abstract

Human rights are protected by all human beings by birth without any discrimination on any grounds. Despite this, equal application of the national, regional, and international human rights and fundamental freedoms standards have been hardly observed to persons with disabilities in general and accused persons with hearing and speech disabilities (PHSDs) in particular. Since the criminal justice system operates by the vehicle of oral communication, suspects or accused PHSDs require special attention to ensure equal enjoyment of their due process rights. The purpose of this study is therefore to examine the normative and practical mechanisms the Ethiopian criminal justice system put in place to meet the appealing interests of PHSDs. The findings of the study indicate criminally suspected and accused PHSDs hardly exercise their due process rights in the criminal justice system of Ethiopia. The attributing factors for this emanate from failure of the legal frameworks to outline effective enforcement schemes, poor commitment of law enforcing bodies to carry out their mandate in line with the ascription of laws, and personal factors such as illiteracy. With the aggregate effects of these circumstances, arrested PHSDs do not effectively enjoy the rights incorporated in the Miranda Warnings. Accused PHSDs cannot also exercise the rights safeguarded to accused persons on an equal basis with others. This empirical study, inter alia, examines the rights of suspected PHSDs from investigation to conviction by assessing the normative protections and practices by employing a qualitative research methodology.

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Introduction

Human rights are universal, indivisible, interdependent, and interrelated, possessed by all human beings irrespective of social,

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economic, political, or any other grounds.¹⁵⁶ This conceptual underpinning of the notion of human rights uphold the inherent dignity and equal worth of every human being (Chapman and Carbonetti 2011:684). To this end, the general human rights normative frameworks articulate minimum conditions to ensure a dignified life for all human beings (Ibid). The mere articulation of these minimum conditions, however, does not warrant the equal and inclusive enjoyment of every human right and fundamental freedom by all. The adoption of enabling normative frameworks at both international and national levels may be necessary to address particular barriers to the full and equal enjoyment of these rights by certain groups as a result of their vulnerability stemming from age, sex, disability, or other factors.¹⁵⁷ Accordingly, persons with disabilities require special enabling protections to fully and effectively enjoy the inherent rights and fundamental freedoms on an equal basis with other members of society.¹⁵⁸ With this conviction, the international community, under the umbrella of the UN, came up with an agreement to adopt the Convention on the Rights of Persons with Disabilities (CRPD) in December 2006.¹⁵⁹ The Convention is comprehensive and, as a result, set forth basic human rights and fundamental freedoms of persons with disabilities. As will be discussed in the subsequent sections, the Convention has incorporated relevant provisions to accused persons with disabilities in general, and accused persons with hearing and speech disabilities in particular.

Apart from the CRPD, Ethiopia does not have a specific legislation that exclusively covers the various concerns of persons with disabilities. More specific to arrested and accused PHSDs, the criminal justice system is far-off in encapsulating explicit and sufficient legal protection that enables to fully and effectively exercise their due process rights at different steps of criminal proceedings. Consequently, persons with such disabilities face difficulty in exercising their national, regional, and international human rights, guaranteed to all human beings.

The main objective of this empirical study is therefore to appraise the Ethiopian criminal justice system concerning the rights of accused persons with hearing and speech disabilities. To this end, the study looks into the available normative protections under the Ethiopian Criminal

¹⁵⁶ Vienna Declaration and Programme of Action, Adopted by World Conference on Human Rights, A/CONF.157/23, 12 JULY 1993, 14-25 JUNE 1993, Part I Para. 5. Even before this Declaration, the African Charter on Human and Peoples Rights plainly states that civil and political rights cannot be dissociated from economic, social, and cultural rights in their conception as well as universality. See the preamble of the African Charter on Human and Peoples Rights, adopted in 1981 and entered into force in 1986.

¹⁵⁷ The Convention on the Rights of Persons with Disabilities UNGA Res. 61/106, U.N. Doc. A/RES/61/106, 13 December 2006 (referred to as CRPD), Article 4(1). This stipulation of the Convention outlines the general obligations of State parties to comply with the obligations incorporated under the Convention and includes taking legislative and administrative measures for the implementation of the rights recognized in the Convention.

¹⁵⁸ Ibid, Para. (W) of the preamble and Article 9.

¹⁵⁹ Ibid, Para. (Y) of the preamble.

justice system and the extent of the enforcement of such protection from interrogation to the conviction of accused PHSDs. More to that, it examines the various barriers accused PHSDs experience in all these processes.

Methodology of the Study

Qualitative research method was employed in the undertaking of this study. Data was collated using a combination of key informant interviews and document analysis of qualitative data collection tools. Key informant interviewees were carefully chosen based on their knowledge, role, and position concerning the theme of the study using purposive sampling and snowballing techniques. Semi-structured interview questions were presented to various actors of the Federal and Amhara Regional State (referred to as ANRS) criminal justice system. The empirical data gathered from the key informant interviews was complemented by desk reviews and textual analyses of international, regional, and national normative standards and other secondary sources that addressed the due process rights of arrested and accused PHSDs. The data collated was then categorized based on different themes and these themes were analyzed and interpreted by using the thematic content analysis technique. The qualitative research method along with the adopted data collection tools and data analysis technique has benefited to capture, interpret, and understand the due process rights of arrested and accused PHSDs in Ethiopia.

Persons Falling within the Meaning of PHSDs

The term disability is a complex, dynamic, multidimensional, and contested subject matter (WHO 2011:3). For this reason, there is no single universally agreed definition of the term 'disability'.¹⁶⁰ However, this does not mean there are no widely accepted definitions. Concerning this, the World Health Organization (WHO) defines disability "*as an impairment which causes some level of dis-ability to function in a normal way*".¹⁶¹ By this definition, for example, an injury sustained on the ears due to different factors is an 'impairment' and the inability to hear ordinarily is 'disability'.¹⁶² Thus, 'disability' is fundamentally an outcome of a certain impairment.

In the same vein, The CRPD pursues the approach of the World Health Organization in explicating the meaning of disability. The Convention

¹⁶⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 5: Persons with Disabilities, 9 December 1994, E/1995/22, Para. 3.

¹⁶¹ The World Health Organization definitions of disability, available at: <http://thechp.syr.edu> > WHO_DEFINITIONS

¹⁶² Ibid.

identifies various dimension of impairments that are consequential to the disability of a person. As it is set forth under Article 1 of the Convention, persons with disabilities include “*those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others*” (CRPD 2006: Article 1). This inclusionary convention stipulates the importance of the cumulative fulfillment of three requisites for a person to be taken as a person with a disability. These are (1) the presence of any physical, mental, intellectual, or sensory impairments, (2) long-term impairments and (3) the circumstance of the interaction with various barriers that hinder the full and effective participation in a society. The profound point from the above definition of the Convention is the articulation of disability as an interaction of a person with impairment and various barriers. This articulation avers disability as an interaction means and not an attribute of the person (WHO 2011:4).

Ethiopia has not yet enacted a comprehensive national disability law. This creates a legal deficit to have an applicable definition to all contexts of disability in the country. The Rights of Employment of Persons with Disabilities Proclamation No. 568/2008 (Employment Proclamation of Persons with Disabilities) is the only exclusive disability-focused bill in the country that provides a definition closely related to the foregoing definitions of WHO and the CRPD. It defines a person with a disability as an individual whose equal employment right is reduced as a result of his/her physical, mental or sensory impairments with social, economic, and cultural discrimination.¹⁶³ Since the purpose of this definition is to articulate the meaning of disability concerning employment rights of persons with disabilities, it is hardly applicable to the multidimensional aspects of disability. Hence, the definition set out in the CRPD fills this vacuum since Ethiopia has ratified the Convention and thereby made it an integral part of the law of the country.¹⁶⁴ In sum, the above definitions are informative to understand persons with disabilities and their eligibility to the protections enunciated under international and national disability normative frameworks.

The above general definitions of persons with disabilities somehow hint at the meaning of PHSDs. WHO defines ‘hearing loss’ as the loss of a normal hearing threshold whether it is mild, moderate, moderately severe, severe, or profound, and can affect one or both ears.¹⁶⁵ By this definition, the duration of the hearing loss is not taken into account. Consequently, the loss of hearing in light of this definition may not meet the CRPD definition of disability unless such loss is for a long-term and

¹⁶³ The Right to Employment of Persons with Disability Proclamation No. 568/2008, Article 2(1)

¹⁶⁴ Federal Democratic Republic of Ethiopia (FDRE) Constitution, Article 9(4); and the Convention on the Rights of Persons with Disability Ratification Proclamation No. 676/2010, Article 2.

¹⁶⁵ Deafness and Hearing Loss, available at: <https://www.who.int/health-topics/hearing-loss#tab=tab>

diminishes the full and effective participation of a person in society on an equal basis with others.

Apart from the above, there are some definitions sketched in relation with the effect of the due process rights of PHSDs. Relating to this, some define a 'deaf person' as one who *"cannot understand the proceedings and is incapable of presenting or assisting in the presentation of his defense"* (Wood 1987:167). This definition emphasizes the inability of persons with hearing disabilities to understand and handle their cases in the right manner. On the other hand, deafness is defined as a disability when a person cannot hear and understand speech, with or without amplification (Smith 1994:87). Compared to the foregoing, this one is a well-expounded definition of hearing disability and presupposes a means through which the disability can be rectified. The limitation of this definition is its exclusion of hard-of-hearing persons, i.e. persons whose sense of hearing is impaired and the impairment can be corrected by using amplification (Simon 1994:161). Unlike deaf persons, hard-of-hearing persons have some hearing ability. However, this does not mean persons who are hard-of-hearing are not protected by the CRPD. As enshrined in the inclusionary provision, a disability need not be total or long lasting to enjoy the protection guaranteed by the Convention. The pertinent factor to be looked into is the existence of an impairment, which with other barriers affect the full and effective participation of an individual in a society on an equal basis. Any person, therefore, who has a difficulty to interact and as a result cannot fully and effectively participate in the society, enjoys the rights prescribed in the Convention regardless of the severity of his/her disability. Following the above definitions, PHSDs, for this article, refers to persons who have a long-term hearing and/or hearing and speech impairments, which together with other barriers impede their full and effective participation in a society on an equal basis.

Legal Safeguards of Criminal Suspects with Hearing and Speech Disabilities

The general legal protections of criminal suspects are recognized under the various international human rights instruments, the FDRE Constitution, and subsidiary bills of Ethiopia. The machinery of the criminal justice system of the country is, therefore, required to enforce all legal protections to suspects of PHSDs on an equal basis.¹⁶⁶ Otherwise, the final conviction passed by a court of law against such person will be unjust and discriminatory thereby infringing the international obligations and the dictum of the Constitution and subsidiary legislations of the country. The protections are guaranteed from the time of arrest to

¹⁶⁶ Universal Declaration of Human Rights (UDHR), (10 December 1948), 217 A (III), Para. 1 of the preamble and Article 1, and CRPD Article 4(1), 5(1), and 13.

the final ruling of the competent court. This part of the article therefore assesses the legal safeguards endorsed by the Ethiopian criminal justice system to PHSDs.

Legal Protections of Arrested PHSDs during Police Interrogation

An arrested person has a range of rights protected under the Ethiopian criminal justice system. These rights include:

- the right to be informed promptly, in a language they understand, of the reasons for their arrest and any charge against them;¹⁶⁷
- the right to remain silent, and upon arrest, to be informed promptly, in a language they understand that any statement they make may be used as evidence against them in court;¹⁶⁸
- the right to be brought before a court within 48 hours of their arrest;¹⁶⁹
- the right to petition the court to order their physical release where the arresting police officer or the law enforcer fails to bring them before a court within the time mentioned above and to provide reasons for their arrest;¹⁷⁰
- the right not to be compelled to make confessions or admissions which could be used in evidence against them and any evidence obtained under coercion to be inadmissible;¹⁷¹ and
- the right to be released on bail save exceptional circumstances prescribed by law.¹⁷²

These rights, embedded in the Miranda Warnings, fundamentally necessitate the intelligibility of language. Due to the nature of their impairment, arrested PHSDs may face a language barrier that reduces their enjoyment of the right incorporated in the Miranda Warnings.

After arresting a criminal suspect, the first task of an investigating police officer is to interrogate such a suspect.¹⁷³ The rights of a suspect in the course of a police interrogation are widely known as the Miranda Warnings after the verdict of the prominent *Miranda Vs. Arizona* case by

¹⁶⁷ FDRE Constitution Article 19(1).

¹⁶⁸ Ibid, Article 19(2).

¹⁶⁹ Ibid, Article 19(3).

¹⁷⁰ Ibid, Article 19(4).

¹⁷¹ Ibid, Article 19(5).

¹⁷² Ibid, Article 19(6).

¹⁷³ Criminal Procedure of Ethiopia, a Proclamation to provide for the Criminal Procedure of Ethiopia, Proclamation No. 1, 1962, Article 27, (referred as CrPC).

the Supreme Court of the United States (Wood 1987:171).¹⁷⁴ Miranda Warnings are essential procedural safeguards of a suspect from self-incrimination during interrogation. These warnings are hardly encompassed in an articulated manner by the international bill of rights. The only conspicuous protection about these warnings is the one set forth under Article 9(2) of the International Covenant on the Civil and Political Rights (ICCPR), which guarantees for any arrested person the right to be informed, at the time of arrest, of the reasons for his/her arrest.¹⁷⁵ Unlike this limited recognition of the Miranda Warnings by the ICCPR, the Ethiopian criminal justice system, besides the verbatim recognition of the above right protected by ICCPR, embraces the right of arrested persons to remain silent and be informed promptly, in a language they understand, that any statement they make may be used as evidence against them in court.¹⁷⁶ This right is particularly relevant for an arrested person to refrain from making any statement of a prejudicial upshot to his defense.

It is worthwhile to emphasize the phrase "*in a language, they understand*" with regards to protection and proper administration of the Miranda Warnings to arrested PHSDs. Besides the aforementioned Constitutional right, Article 27(4) of the Ethiopian Criminal Procedure Code embraced the right to be communicated the Miranda Warnings in a language the arrested person understands in a well-tailored way. The provision stipulates that "*where the arrested person is unable to properly understand the language in which his answers are to be recorded, he shall be supplied with a competent interpreter, who shall certify the correctness of all questions and answers.*"¹⁷⁷ However, neither of the law is clear whether the term 'language' includes sign language.

The FDRE Constitution is devoid of any explicit recognition to the Ethiopian sign language. This avows the trifling attention it has given to the general concerns of PHSDs. In this regard, the constitutions of South

¹⁷⁴ By this ruling, the Supreme Court assured criminal suspects the right to be warned effectively of their constitutional rights before in-custody interrogation. Under the criminal justice system of the United States, a law enforcing police officer has to present the Miranda Warnings to a suspect as follows; (1) You have the right to remain silent. Do you understand this? (2) Anything you say can and will be used against you in Court. Do you understand this? (3) You are not being promised anything to talk to us and no threats are or will be made against you. Do you understand this? (4) You have the right to talk to a lawyer and have him present now or at any time during any questioning. If you proceed to answer any questions without a lawyer the questioning will stop if you should change your mind and request the presence of a lawyer. Do you understand this? (5) If you cannot afford a lawyer, one will be furnished, without charge, before any questioning, if you so desire. Do you understand this? (6) Do you understand each of the rights I have explained to you? (7) Understanding each of these rights, are you willing to talk to us without a lawyer? I have elected of my own free will without any force, threats, or promises to answer verbally all questions asked.

¹⁷⁵ ICCPR, Article 9(2).

¹⁷⁶ FDRE Constitution Article 19(1)(2); CRPC Article 27(2).

¹⁷⁷ Criminal Procedure of Ethiopia, Proclamation No. 1, 1962, Article 27(4).

Africa,¹⁷⁸ Uganda,¹⁷⁹ and Kenya¹⁸⁰ can be positively taken for unequivocally stating their respective national sign language. The obscurity of the FDRE Constitution on the scope of the notion of language whether it encompasses sign language or otherwise has somehow triggered the present poor national normative standards relating to the effective protection of arrested and accused PHSDs in the country.¹⁸¹ However, the advent of the CRPD has resolved this elusiveness of the Constitution by plainly underlining language as encompassing spoken and other forms of non-spoken languages such as sign language.¹⁸² Therefore, by the operation of the Convention, PHSD suspects are guaranteed access to competent interpreters to exercise their due process rights protected by the Miranda Warnings. However, often, the right to get an interpreter is associated with a circumstance whereby the suspect speaks a language different from the one used for interrogation.¹⁸³

Investigating police officers may administer the Miranda Warnings to suspects of PHSDs by employing various communication means, mainly through writing, lip-reading, or sign language (Wood 1987:122). However, the most preferred and effective method of visual communication for such suspects is sign language (Ibid:167). This is because it gives, to such suspects, a complete and simultaneous translation of the discussion provided that the interpreter is competent enough and well-versed with the legal terminologies (Ibid). This seems the reason why the CRPD and its monitoring Committee significantly promote sign language to ensure the integration of the PHSDs in the community and enjoy their human rights and freedoms.¹⁸⁴

Some criminal jurisdictions in the United States provide the right to have interpreters to suspects with hearing disabilities in plain legal

¹⁷⁸ See Republic of South African Constitution (1996), Article 6(5)(A)(III).

¹⁷⁹ Republic of Ugandan Constitution (1995), XXIV(III).

¹⁸⁰ Kenyan Constitution (2010), Article 6(3)(B) and Article 54(1)(D). The Kenyan Constitution further endorsed the Kenyan Sign Language as one of the official languages of the parliament. See Article 120 of the Kenyan Constitution.

¹⁸¹ Interview with Amare Taye, director of the Ethiopian National Association of the Deaf (referred to as ENAD), on December 17/2021. According to him, the non-recognition of the Ethiopian sign language by the Constitution has contributed to the overall poor living standard including their right to access to justice of the PHSDs. Further, concerned with this weak normative recognition, the CRPD Committee recommended Ethiopia to adopt sign language as one of the official languages of the country. See, Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Ethiopia, (4 November 2016), 108 of 1996, paras. 47-48.

¹⁸² CRPD, Article 2.

¹⁸³ For example, see UN Human Rights Committee (HRC), General comment no. 32, Article 14, Right to equality before courts and tribunals and to a fair trial, 23 August 2007, CCPR/C/GC/32, Paras. 41-44,

¹⁸⁴ See, for instance, CRPD Articles 9(2)(E), 21 (e), 24(3)(B) and 30(4). See also Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Ethiopia, (4 November 2016), Para. 47-48, Available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrCAqhKb7yhs2gZdYXWBKA18z%2FSv%2F6lkjDqI9zs5hd5%2BUAXK5vbPAJ7j6jyrAv5vGf3%2BKDAISC4b6HZ89os5fSRy3geaPEuCRLunudv%2BuislMknxs7omG>.

stipulations during arrest and subsequent interrogation and some others exclude evidence obtained from such suspects in the absence of sign language interpreters (Wood 1987:172). In the same vein, the Canadian Constitution guarantees accessibility of interpreters to persons with hearing disabilities (Pye 1982:227). Conversely, police stations in Ethiopia have not been equipped with sign language interpreters.¹⁸⁵ Most of the interrogations of PHSD suspects, as a result, have been administered by employing nonprofessional interpreters, i.e. relatives or friends.¹⁸⁶ Such way of interrogation would compromise the due process rights of PHSD suspects that might expose them to unjust and prejudicial convictions.

Apart from the legal protection, courts in the United States play vibrant roles in the proper enforcement of the Miranda Warnings to suspects with hearing disabilities. In this regard, jurisprudential precedents portray that courts reject confessions made by such suspects, if the Miranda Warnings are administered without sign language interpreters or if the suspect did not understand the Miranda Warnings properly. On the other hand, the Ethiopian criminal justice system does not have a clear answer to a confession obtained by disregarding the proper communication of the Miranda Warnings. The FDRE Constitution outlaws coercion of an arrested person to make a confession that could be used against him.¹⁸⁷ This is the only circumstance whereby the exclusion of evidence is explicitly stipulated under the Ethiopian criminal justice system. As a result, lawyers may argue that all evidence obtained during investigation in the exclusion of coercion is admissible. In line of this argument, evidence obtained from a suspect, including PHSD, would be admissible even if the Miranda Warnings are not duly administered. This would amount to the admission of self-incriminatory statements of the suspect. However, the application of Miranda Warnings in line with this argument would make it meaningless and defeat its purpose. The Miranda Warnings are protected by the Constitution. It is, therefore, important to administer it in light of the Constitution. If the Warnings are not communicated as provided by the Constitution, the administration of the Warnings would violate the Constitution. Hence, the conduct and evidence obtained from the suspect, by contravening the Constitution, which is the supreme law of the land, would be null and void.¹⁸⁸ Since courts are mandated to respect and enforce the Constitution,¹⁸⁹ they have to reject any involuntary confession or evidence gathered from PHSD suspects whose Constitutional rights of the Miranda Warnings are

¹⁸⁵ Interview with Mengistu Tadelde, the public prosecutor of Ministry of Justice at Arada Branch, and Tadele Yibeltal, the public prosecutor of the ANRS justice Bureau at the Southern Wollo Zone Division, on December 16/2021.

¹⁸⁶ Interview with Mengistu Tadele, the public prosecutor of Ministry of Justice at Arada Branch, and Dejene Bitew, the public prosecutor of Ministry of Justice at Kolfe Keraniwo Sub-City branch. However, there are some instances whereby investigating police officers request the cooperation of interpreters from ENAD.

¹⁸⁷ FDRE Constitution, Article 19(5), See also ICCPR Article 14(3)(g).

¹⁸⁸ FDRE Constitution, Article 9(1).

¹⁸⁹ Ibid, Article 13(1).

violated. This should be a guiding principle for the proper enjoyment of these constitutionally protected rights. Moreover, this would play an essential role in serving the purpose of the Warnings and thereby circumvents any involuntary self-incrimination.

To play the aforementioned mandate, courts have to get accurate evidence that depicts the proper administration of the Miranda Warnings, particularly to suspects with hearing and speech disabilities during interrogation. To this end, the interrogation of a suspect with hearing and speech disability has to be video and audiotaped to ensure the validity of police records regarding police interviews, suspect statements, confessions, and the administration of the Miranda rights waiver (Wood 1987:131). Needless to say, these are essential instruments to courts to check police officers are applying the Miranda Warnings according to the inscription of the law. Such records would also make investigating police officers alert to conduct the Miranda Warnings based on the dictation of the law. They also benefit the suspects to challenge the admissibility of a statement they made during interrogation by invoking any failure of the police in the presentation of the Warnings and would assist courts to decide whether the Miranda Warnings were properly administered.

However, the existing practice exhibits that the interrogation of any suspect including a suspect with hearing and speech disability is not under video and audio taping.¹⁹⁰ Consequently, the chance of being an area of contention is very high. Generally, the rights contemplated in the Miranda Warnings are very critical rights that can determine the outcome of the prosecution. As a result, the Warnings have to be applied to suspects in the fullest sense to guarantee uncorrupted criminal prosecutions. Therefore, particular attention needs to be provided in fulfilling the appropriate facilities for lawful administration of the Warnings to PHSD suspects.

Besides communicating the Miranda Warnings, the presence of a lawyer with the suspected PHSD during the administration of the Warnings underpins the reliability of police interrogation. Nonetheless, the Miranda Warnings protected under the ICCPR and national laws of Ethiopia do not take into account the right of suspects, including PHSDs, to claim the presence of a lawyer during interrogation. Such legal lacuna could expose to undue manipulation of statements of suspects with hearing disabilities by interrogating police officers. Hence, the presence of lawyers, particularly in the course of the administration of Miranda

¹⁹⁰ Interview with Abere Reta, a public prosecutor in the Ministry of Justice at Gulele Branch, on November 30, 2019; a telephone interview with Adane Bezabih, a public prosecutor in the ANRS Justice Bureau in Bahir Dar main office, on December 3, 2019; interview with Dagnachew Mekonen, attorney and former public prosecutor of the Ministry of Justice, on December 21/2021.

Warnings to PHSD suspects, is relevant to ensure the effective observance of their constitutionally guaranteed rights.¹⁹¹

Seemingly with this conviction, the Special Rapporteur on the rights of persons with disabilities adopted the International Principles and Guidelines on Access to Justice for Persons with Disabilities, which laid down duty on States to ensure free or affordable timely legal assistance to all persons with disabilities in all legal procedures and proceedings.¹⁹² The objective of this protection is to safeguard the equal participation of persons with disabilities in any legal proceedings.¹⁹³ Albeit this, it serves an instrumental part in the development of international and national normative frameworks thereby addressing the existing shortfalls in relation to the proceeding of interrogation of suspected persons with disabilities in general and PHSDs in particular.

Rights of Accused PHSDs

Ensuing the completion of a criminal investigation by police detectives, the file will be transferred to the appropriate public prosecution office.¹⁹⁴ Receiving the investigation file, one of the possible measures the public prosecutor would take is to accuse or prosecute the suspect by preparing the appropriate charge/charges.¹⁹⁵ Prosecution then requires the active participation of the defendant to defend the charge brought against him/her. With this regard, the defendant has the right to understand the charge of the public prosecutor,¹⁹⁶ to raise any objection he/she may have to the charge,¹⁹⁷ to state on his/her plea of guilty,¹⁹⁸ to cross-examine witnesses produced by the public prosecutor and produce witnesses in his/her favor and examine them,¹⁹⁹ and to open his/her case and state his/her defense.²⁰⁰ All these rights can only be enforced using the means of language. Thus, accused PHSDs cannot exercise these rights properly

¹⁹¹ Interview with Desalegn Workineh, the Federal Supreme Court Public Defenders Office Directorate director of the Crimes Committed on National Security and Transboundary Crimes; interview with Gutema Mitiku, the Federal Supreme Court Public Defenders Office Directorate director of Crimes Committed against Life and Property, on December 18/2021; interview with Abdurahman Kiyar, judge of the Federal First Instance Court Arada branch in the criminal Bench, on December 17/2021.

¹⁹² International Principles and Guidelines on Access to Justice for Persons with Disabilities, (2020), Principle 6, Available at: <https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2020/10/Access-to-Justice-EN.pdf>. These principles and guidelines have enjoyed the endorsement of the International Disability Alliance, the International Commission of Jurists, and the United Nations Development Program.

¹⁹³ Ibid.

¹⁹⁴ Ethiopian Criminal Procedure Proclamation at note 29, Article 37(2).

¹⁹⁵ Ibid, Article 38(1).

¹⁹⁶ Ibid, Article 129

¹⁹⁷ Ibid, Article 130.

¹⁹⁸ Ibid, Article 132.

¹⁹⁹ FDRE Constitution Article 20(4) and the Ethiopian Criminal Procedure Proclamation, Article 137(3).

²⁰⁰ Ethiopian Criminal Procedure Proclamation, Article 142.

and defend accusations lodged against them unless their right to access to justice in the fullest sense is observed.

To enable an accused person to effectively exercise the aforementioned rights, a range of legal protections are recognized under international human rights conventions, to which Ethiopia is a State party, and national laws of the country. Among these protections, which have particular importance to accused PHSDs, are the presumption of innocence until proven guilty,²⁰¹ the right to have legal representation,²⁰² and free assistance of an interpreter,²⁰³ as will be discussed in detail in the following sections.

The Notion of Presumption of Innocence

Accused persons are presumed innocent until proven guilty according to the law.²⁰⁴ By this procedural safeguard, the public prosecutor assumes the obligation to produce admissible evidence and prove each element of the crime that the accused is charged with (Assefa 2018). Crime is a commission or omission of a certain act against the prescription of criminal law (Lammond 2007:609).²⁰⁵ The cumulative fulfillment of three elements is imperative to label a certain commission or omission as an act of crime under the Ethiopian criminal justice system. These are (1) the legal stipulation of a commission or omission of an act as a crime (legal ingredient), (2) the commission or omission of such act (material ingredient), and (3) the intentional or in some cases negligent commission or omission of a criminal act (moral ingredient).²⁰⁶

Relating to the moral element, no one is punishable for an act should such act be performed or occurred without there being any guilt on his/her part, or is caused by force majeure, or occurred by accident.²⁰⁷ Nor can he/she be convicted for what he/she neither knew of nor for what goes beyond what he/she intended either directly or as a possibility.²⁰⁸ The intention component of an act of a crime is said to have existed provided that a person performs an unlawful and punishable act with full knowledge and intend to achieve a given result for being aware that his actions may cause illegal and punishable consequences, commits the act regardless.²⁰⁹ Therefore, it is worthwhile to bear in mind that a person would be liable only if he/she committed the act being in a healthy

²⁰¹ FDRE Constitution Article 20(3), UN General Assembly, Universal Declaration of Human Rights (UDHR), (10 December 1948), 217 A (III), Article 11(1), and ICCPR, Article 14(2).

²⁰² FDRE Constitution Article 20(5) and ICCPR Article 14(3)(B) and (D).

²⁰³ FDRE Constitution Article 20(7) and ICCPR Article 14(3)(F).

²⁰⁴ FDRE Constitution Article 20(3).

²⁰⁵ see also Article 23(1) of CRC.

²⁰⁶ FDRE Criminal Code, Proclamation No 414/2004, Federal Negarit Gazeta, Year 9, May 2005 (referred as FDRE Criminal Code), Article 23(2).

²⁰⁷ Ibid, Article 57(2).

²⁰⁸ Ibid, Article 58(3).

²⁰⁹ Ibid, Article 58(1).

mental condition.²¹⁰ The Mens Rea is, therefore, a significant element of a crime that is not simply substantiated compared to the legal and material elements. Since the public prosecutor is legally burdened to prove each ingredient of a crime, he/she has to be cognizant enough of the mental condition and cognitive capacity of an accused person ahead of any prosecution.

Various factors affect the cogent mental condition and thereby determine the responsibility of a person for the criminal act he/she is accused of. About this, an individual is not responsible for his/her act under the law due to:

age, illness, abnormal delay in his (sic) development, deterioration of his mental faculties,... a derangement or an abnormal or deficient condition or any other similar biological cause, was incapable at the time of his act, of understanding the nature or consequences of his act, or of regulating his conduct according to such understanding.²¹¹

The issue of 'responsibility' is an important point, which appeals to greater attention regarding accused PHSDs. Studies indicate that persons with 'profound' hearing disabilities are more susceptible to mental disorders than their peers, which may lead them to conduct criminal acts (Harry and Dietz 1985). This problem exacerbates among pre-lingual deaf persons (Ibid:94). In another but related study, it has been found that persons with hearing disabilities suffer from isolation, aggressiveness, and distress, thus, being prone to drug and alcohol use, which make them more susceptible to commit crimes than others (Tituts et al. 2008).

Ostensibly taking into account this scientific finding, the FDRE Revised Criminal Law under Article 51(1) explicitly stipulates that:

When there is a doubt as to the responsibility of the accused person, whether absolute or partial, the Court shall obtain expert evidence and may order an inquiry to be made as to the character, antecedents, and circumstances of the accused person. Such evidence shall be obtained particularly when the accused person shows signs of a deranged mind or epilepsy, is deaf and dumb or is suffering from chronic intoxication due to alcohol or due to drugs.

This proviso of the Criminal code accentuates the duty of a court to request the support of an expert when it is in doubt regarding the level of responsibility of any accused person. Whereas, a court is necessarily required to order the diagnosis of the mental state of accused PHSDs by

²¹⁰ Ibid, Article 48(1).

²¹¹ Ibid, Article 48(2).

the appropriate expert. The expert evidence hence shall explain “*the present condition of the accused person and its effect upon his faculties of judgment*”.²¹² Additionally, it shall “*afford guidance to the Court as to the expediency and the nature of medical treatment or safety measures*”.²¹³ Courts then render decisions, which they think are appropriate based on the scientific finding of the expert.

Despite this legal requisite, the practice on the ground is divergent. The case between Azmeraw Fenta Vs. the ANRS General Attorney is one example when the court with the first instance jurisdiction failed to order the diagnosis of an accused PHSD by disregarding the dictation of the Criminal Code.²¹⁴ The case was lodged at the South Gonder High Court and, the defendant, accused of committing first-degree homicide against his uncle, was a PHSD. Taking into consideration the illiteracy of the defendant to sign language, the court requested the local education office for a sign language facility in the administration of the Zone in order to suspend the proceeding and facilitate sign language communication for the accused to ensure his right to defend himself. The reply of the office, however, was in the negative. Notwithstanding this fact, the court proceeded with the prosecution, without the plea of guilty of the defendant. After hearing the testimony of the witnesses of the public prosecutor and noting the failure of the defendant to come up with evidence to refute this testimony, the court convicted and sentenced him to 18 years of rigorous imprisonment. The court rendered this decision without proving the responsibility of the defendant with the legally required evidence. Thus, this decision of the court went against the notion of presumption of innocence, which is a constitutionally protected right to accused persons. Yet, the ANRS Supreme Court by its appellate jurisdiction overruled the conviction and sentence rendered by the High Court and absolved the defendant until he gets trained in sign language and is capable of exercising the rights protected to accused persons. The Supreme Court, however, silently passed the legal requirement of the medical examination of the defendant despite the proposition of the public prosecutor to this effect.

In this case, the defendant was proscribed from exercising his procedural rights starting from interrogation to conviction. Accordingly, his right to be warned of the Miranda Warnings during police interrogation, to raise preliminary objections against the charge filed by the public prosecutor, to cross-examine and refute evidence brought against him, to produce evidence and rebut adversarial evidence upon which he was convicted, to present mitigating circumstances before the sentence was passed by the High court and many other of his rights were undermined.

²¹² FDRE Criminal Code Article 51(2).

²¹³ Ibid.

²¹⁴ Azmeraw Fenta vs. ANRS General Attorney Sup. C. Cr. File No. 21948/2011.

In another related case, a PHSD, who was suspected of committing bodily injury, was charged before Dera Woreda court of South Gonder Zone of ANRS. However, the accused, like the above case, was illiterate to sign language. Noting this fact, the Court provisionally released him before any proceeding by protecting the right of the public prosecutor to recommence the case provided that the accused is capable of using his safeguarded procedural rights.²¹⁵ These two cases hint the degree of challenges the justice machineries are facing to ensure criminal accountability of accused PHSDs that are illiterate in sign language.

The Right to Free or Affordable Legal Assistance

The other right, which requires greater attention in a criminal proceeding is access to legal representation. The right to free or affordable legal assistance is one of the essential components of access to justice to accused PHSDs.²¹⁶ The FDRE Constitution, concerning this right, vividly ascribes that “*accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense*”.²¹⁷ This stipulation, one can say, is the verbatim copy of ICCPR.²¹⁸

Both the ICCPR and the FDRE Constitution have primarily guaranteed accused persons the right to choose their legal representative. Exceptionally, however, an accused person has the right to obtain a State-appointed legal representative on the amassed satisfaction of two prerequisites, i.e. the financial incapacity of the accused to hire a legal representative, and the conviction of the court that miscarriage of justice would befall if the defendant keeps on the prosecution without legal assistance. With regards to the second precondition, the essence of the law is not aligned with the predominant practice of courts. In the practice of the Federal Courts, accused persons may be provided public defendants upon their request or by the direction of judges taking into account the severity of crimes or degree of punishment.²¹⁹ Given the limited communication opportunities, it is highly implausible for accused PHSDs to know and raise this protection compared to others. Hence, courts need to be proactive to intervene and ensure the provision of public defendants to accused PHSDs that are financially incapable.

On the other hand, the practice in several Regional States, in this respect, unveils that miscarriage of justice is thought to occur to defendants who

²¹⁵ Interview with Mengistu Tadele. He came across this case in 2010 while he was working as a public prosecutor at Dere Woreda of South Gonder Zone of Amhara Regional State Justice Bureau before he moved to his current office.

²¹⁶ International Principles and Guidelines on Access to Justice for Persons with Disabilities.

²¹⁷ FDRE Constitution Article 20(5).

²¹⁸ ICCPR, Article 14(3)(D).

²¹⁹ Interview with Desalegn Workineh and Gutema Mitiku.

are accused of crimes mostly punishable with life imprisonment or the death penalty. Courts of ANRS, for instance, enforce this protection to indigent accused persons who are charged with intentional homicide, aggravated robbery, or in some circumstances, grave terrorism crimes, which may be consequential for a rigorous sentence including a sentence for life or capital punishment.²²⁰ A study has also revealed the dominance of analogous practice in Benshangul Gumuz and the Tigray Regional States (ELA and EYLA 2015). But limiting the application of the right to access legal assistant only to certain crimes or degrees of punishments does not seem to fulfil the intention of the aforesaid laws. Had it been the case, the laws could have expressly stated the types of crimes or severity of penalty, which could lead to miscarriage of justice if the defendant fails to get legal assistance. Especially, the likelihood of befalling miscarriage of justice is very high to accused PHSDs irrespective of the nature of the crime or solemnity of the punishment caused by the criminal act they are charged with. To ensure the right to access justice by accused PHSDs, courts should set aside this practice and warrant legal representation at least to financially incapable accused persons in any criminal prosecution.

The Right to Interpreter

Since oral communication is the principal mode of litigation throughout the proceeding of prosecution, the right to an interpreter is an underlying right that needs maximum protection to accused PHSDs.²²¹ It is an essential component of the right to access justice for accused persons who are not familiar with the language of the prosecution, inter alia, to accused PHSDs. The Ethiopian criminal justice system safeguards this right to all accused persons who are not acquainted with the working language of the court.²²² More specifically, the recently enacted Federal Courts Proclamation No. 1234/2021 explicitly imposes a duty on Federal Courts to furnish expert sign language interpreters to accused PHSDs.²²³ Consequently, any criminal proceeding, which failed to take into account any of the rights of accused PHSDs can, in no way, be considered as fair and any failure in this regard with the justification of resource constraint

²²⁰ Personal observation of the author in his previous experience as a public prosecutor and from his current career as a legal attorney and legal counselor; telephone interview with Abraham Belete, judge of the ANRS Supreme Court, on December 19/2021; interview with Zemedkun Girma, the public prosecutor of the ANRS Justice Bureau North Shewa Branch, on December 19/2021, and Biyazn Mengiste, public defender of Bahir Dar High Court of the ANRS Supreme Court, on December 22/2021. Courts provide legal assistant to suspects who are indicted of committing serious offenses contained in the Criminal Code and in various criminal legislation, which impose severe punishment such as life imprisonment or death.

²²¹ See the Ethiopian Criminal Procedure Proclamation, Article 130 and FF.

²²² FDRE Constitution Article 20(7); Ethiopian Criminal Procedure Proclamation, Article 126(2); ICCPR Article 14(3)(F) and CRPD Articles 2, 9(2)(E), 21(B) and 24(3)(B) and (4).

²²³ Federal Courts Proclamation No. 1234/2021, FEDERAL Negarit Gazette of the Federal Democratic Republic of Ethiopia, 27th Year No.26, Addis Ababa 26th April 2021, Article 31(3).

is unacceptable.²²⁴ Further, such a proceeding is null and void since it failed to be conducted within the ascription of the Constitution.²²⁵

The normative protection of the right to access to sign language interpreters is required to be corroborated with the necessary measures to effectively enforce the right on the ground. However, there are various problems with the practical enforcement of this right to PHSDs. The first such problem stems from the weak implementation of legal protection by law enforcement bodies. For instance, in the above-mentioned case of Azemeraw Fenta Vs. the ANRS General Attorney, the law enforcing bodies, from the police to the court, was not concerned with the right of the defendant to defend the accusation he was charged with. In this respect, they kept on the proceeding knowing that the defendant was a PHSD without sign language skill and the defendant stayed as a spectator from investigation to conviction, without having any participation in the process. Failure of the investigating police officer and public prosecutor to take note of the importance of having the result of a medical examination to the mental health of the defendants before prosecution was another lacking element. On top of this, sign language illiteracy is a factor that significantly inhibits PHSDs not to enjoy their protected rights. With regards to this, the illiteracy of Azemeraw Fenta to sign language, besides the recklessness of the law enforcement bodies, contributed negatively to the enjoyment of his safeguarded rights.

A study conducted on access to justice of persons with disabilities in the Federal Courts unveiled the absence of sign language interpreters (Aschalew 2020:27). The Federal Supreme Court has two interpreters for Afan Oromo and English languages. The interpreters are not skilled to sign language and Bisrat Mulugeta, one of the interpreters, underlined the necessity of taking sign language training to bridge the communication barrier between judges and the accused and other PHSD clients of the Court.²²⁶ The Federal and Regional Courts are dependent upon the cooperation of sign language experts of ENAD and its regional branches when they encounter accused PHSDs.²²⁷ However, the key

²²⁴ UN Committee on the Rights of Persons with Disabilities (CRPD), Concluding Observations in relation to the initial report of Ethiopia 2016, CRPD/C/ETH/CO/R.1, available at: <https://digitallibrary.un.org/record/1310640?ln=en> The CRPD Committee following the Ethiopian initial report unequivocally concluded that *"the limitation in resources would always be there and therefore the excuse that the protection and rights of persons with disabilities, and their inclusion, could not be advanced because of lack of resources could no longer be accepted."* See also Communication No. 390/1990, Lubuto v. Zambia, U.N. Doc. CCPR/C/55/D/390/1990/Rev.1 (1995), available at: <http://hrlibrary.umn.edu/undocs/session55/vws390r1.htm>. In this case, the UN Human Rights Committee decided that *"a State cannot use its economic situation to justify violations of minimum human rights standards (including violations of fair trial rights)."*

²²⁵ FDRE Constitution Article 9(1).

²²⁶ Interview with Bisrat Mulugeta, interpreter of English Language speaking customers of the Federal Supreme Court, on December 22/2021. The same was reiterated by the director of the registrar of the Federal Supreme Court. Interview with Habte Fichila, director of the registrar of the Federal Supreme Court, on December 22/2021.

²²⁷ Interview with Amare Taye.

question is how many of the ENAD sign language experts are capable of understanding the legal jargon and are able to communicate with the accused. In sum, the basic challenge to the enforcement of the rights of accused PHSDs is the weak implementation of the rights protected by international and national laws.

Conclusion and Recommendations

Conclusion

According to the International Principles and Guidelines on Access to Justice for Persons with Disabilities, “everyone should, on an equal basis with others, enjoy the rights to equality before the law, to equal protection under the law, to a fair resolution of disputes, to meaningful participation and to be heard”.²²⁸ To this end, various efforts have been made in the international arena to ensure the observance of human rights and fundamental freedoms to persons with disabilities. The international community has realized the UN Convention on the rights of persons with disabilities in 2006 having the purpose of promoting, protecting, and ensuring the full and equal enjoyment of all human rights.²²⁹ Although Ethiopia is a member of the CRPD and thereby responsible to take normative and institutional steps in meeting the purpose of the Convention, the reality on the ground shows otherwise, particularly, to rights of suspected and accused PHSDs. There is a significant deficit in normative frameworks that address accused PHSDs.

Beyond and above the normative deficit of the country, the magnitude of challenges in the law enforcing institutions is insurmountable. Contrary to the inherent mandate of enforcing the legal protections to PHSDs, at times they become the cause of violation of the rights of such accused persons. Suspected and accused PHSDs have been experiencing violation of their due process rights by the recklessness of the law enforcing bodies, mainly, the police, public prosecutor, and courts. To the extreme case scenario, ordinary procedural safeguards, mainly the right to have a sign language interpreter and legal assistant, have been unheeded to accused PHSDs by courts. Generally, the criminal justice system of Ethiopia has to normatively and institutionally create suitable environment for suspected/accused PHSDs from the time of arrest to conviction.

Recommendations

To cater to the existing challenges of arrested/accused PHSDs, the following recommendations are suggested. First, it is necessary to enact a comprehensive legal framework for persons with disabilities and to

²²⁸ International Principles and Guidelines on Access to Justice for Persons with Disabilities.

²²⁹ CRPD, Article 1.

include in such law the rights of PHSDs or enact an exclusive law that explicitly protects the rights of PHSDs. Second, in addition to the normative framework, it is relevant to strengthen the law enforcement institutions through training on the rights of persons with disabilities in general and PHSDs in particular. This would enhance awareness about PHSDs and help to lessen the poor enforcement of the rights of PHSDs by law enforcing bodies. Moreover, equipping these institutions with qualified personnel would make them accessible to arrested/accused PHSDs. Particularly, it is vital to have qualified sign language interpreters. Further, courts have to take steps to meet reasonable accommodation to PHSDs emphasized by the CRPD. The national human rights institutions, such as the Human Rights Commission, have to follow up and monitor the enforcement of the procedural rights of suspected and accused PHSDs.

Third, a tangible measure is essential throughout the country to the reduction of sign language illiteracy of PHSDs. In this regard, the ministry of education has to take the initiative and work with regional education bureaus and other stakeholders. Fourth, it is vital to have at least one sign language training facility in the country, which provides training on legal jargon. An ordinary sign language interpreter may not have the capacity to communicate to PHSD unless he/she is acquainted with the meaning of the legal jargon. Hence, to effectively ensure access to justice of PHSDs, it is mandatory to train qualified sign language interpreters.

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