



**PUBLIC DEFENDERS IN ETHIOPIA**

**(THE RIGHT TO LEGAL COUNSEL)**

**The case of federal courts in Addis Ababa**

**A THESIS SUBMITTED TO CENTER FOR HUMAN RIGHTS STUDIES OF ADDIS  
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## DECLARATION

I declare that this thesis is my original work. I certify that all the materials in this thesis that is not my own has been duly acknowledged. No materials are included for which a degree has been previous conferred upon me.

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# Chapter one

## Introduction

### 1.1 Background of the study

According to the United Nations organization on human rights declaration all human rights and fundamental freedoms are universal, indivisible, interdependent and interrelated. Human rights should be promoted and implemented in a fair and equitable manner. The prime responsibility and duty to promote and protect human rights and fundamental freedoms lie with the State. Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms. This is done by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required. Based on the this underlying principle the laws of most nations recognize the equal status of all people before the law, the presumption of innocence until proven guilty before a criminal bench and the right to legal representation (legal assistance) free of charge from the government budget when some least criteria are satisfied. There are a lot of rights related with the fair trial of the defendants but the paper will focus with the right to legal counsel or otherwise similarly termed as legal assistance. The writer use this words interchangeably in this paper.

Legal assistance refers to representation by attorney or other person without cost or at substantially reduced cost to an individual in need of such representation in criminal or civil legal proceeding. States have the obligation to observe the legal assistance in a broader way because; there is no equality of people before the law without legal assistance because it is the backbone of conducting fair trial. Compared with the state public prosecutor immense resource and knowledge, the accused person cannot present his case properly or s/he can not present his right to bail or effectively defend with evidence without legal assistance. The other rationale for state obligation to provide free legal assistance is to ensure the principle of equal treatment by the court. The equal treatment by court is related with the opposing parties in legal action i.e. the public prosecutor and the accused person. The court will give to both parties an equal opportunity to prepare their case.

Legal assistance in criminal case is provided through Public defenders. Public defenders are state appointed lawyers who give legal assistance for those who cannot pay for their own lawyer. According to international human rights law assignment of legal assistance bases two conditions: the first one where the accused/suspect financial means are insufficient to permit legal representative of his/her own from the market and the second is especially, in criminal matter where the interest of justice requires the assignment of the legal assistance.

When we come to the Ethiopian legal systems the right to legal assistance emanates first from the federal democratic republic of Ethiopia constitution. The constitution under article 20(5) under the title of the Rights of Persons Accused it states 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>>. This constitutional right is only for criminal cases not civil one. Furthermore the same right is also guaranteed by ICCPR under article 14(3)(d) which states that the right of a person “to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.” This hold true of the protection of the right to legal assistance under the African charter on human and people’s rights under article 7(1) (c). However the rights internationally are broad to cover both for civil and criminal cases.

Thus even if it was mentioned in our constitution to have legal counsel at state expense when the accused person do not have sufficient income to pay and if miscarriage of justice would result, there is no clear procedure to identify the one who is entitled and implement the rights to the accused. There is no detail procedure that shows us how governments fulfill this international obligation. For instance questions like how can we single out the accused who cannot afford to pay, which crimes are entitled to the right for legal assistance, what is the legal stage of proceeding to commence the right, how can we ensure the independence of the public defenders in light of its funder who the same party that sue the defendant, what are the criteria to recruit the public defenders and what training and capacity building are offered to them,

The writer from preliminary observation and personal experience has identified that there is some occasion when person with sufficient income to pay use the free legal assistance, poor quality of the legal counsel service, poor trust and privilege of the secret information of the

defendants, illegal request of monetary payment by the public defender, false promise by public defenders to defendants through corrupt relation with federal court judges, poor analysis of the factual and legal case in order to win the case for the defendant, low incentive to the public defenders like salary and other provision, absence of the service at the pretrial stage like the investigation at the police station and weak communication of the public defenders and the defendant. One can understand that from court proceeding due to poor legal literacy defendant are left with a confused sometimes very biased position compared to the public prosecutor. This is due the incompetence of the public defenders and above all the non-existence of it at criminal trial to defendant who by any means did not have the means to employ their own lawyer to defend themselves. Even though the constitution has mandated generally that the right to free legal counsel to be guaranteed, there is a need for further legislation on the organization and procedure of the service delivery, explore the challenges of the implementation of the rights and explicitly grant the manner of selection and effective defense to the defendant in need of it. This is the rationale for the writer to dwell on the subject matter particularly on the exploring the implementations, procedure, challenges and recommendation of the right to free legal assistance in federal courts in Ethiopia to criminal defendants in line with international human right principle and covenants. It particularly explores the efficient implementation of the right to legal counsel in order to attain a free, confidential, independent, impartial (non-discriminatory) free assistance to indigent defendants.

## **1.2 Statement of the problem**

The major problem seen from broad perspective is to answer the status of access to justice, legal aid services and particularly the right to legal counsel to the poor in Ethiopia federal court. The writer based the problem of the paper as emanating from the basic principles of human right as universal, indivisible, equal and indiscriminate, inclusivity and accountability and rule of law. It raises the fundamental question of how can citizens exercise the right to fair and equal trial without the knowledge of what the law says on the issues before the court.

Collected information indicates, Ethiopia is a country where 38.9 per cent of the population lives below the national poverty lines, the vast majority of the population cannot afford the services of a lawyer.<sup>1</sup> In addition the scarcity of lawyers also puts legal advice and counsel well beyond the

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<sup>1</sup> World Bank data: <http://data.worldbank.org/country/ethiopia>

reach of most. For instance data show that when Ethiopia was with a population of some 81 million has only one lawyer for every 20,250 people, thus with minimal legal aid service in many criminal cases and understaffing in the office of the defense council.<sup>2</sup>.

With this theoretical background we will come to the stipulations of the FDRE constitution and the legal ground. In Ethiopia at the federal high court level of it is possible to have public defender for those who cannot pay inline with the FDRE 1995 constitution article 20(5). According to this provision first the accused persons have the right to be represented by legal counsel of their choice secondly the accused is entitled to have free public defender to be assigned by state fund after ascertaining that s/he does not have sufficient means to pay for it and miscarriage of justice will result.

The FDRE constitution have one third of its content on human and democratic rights, however, when the need arise these right have legal limit and restriction. It would be difficult for the any person including the accused to benefit from human rights listed out under constitution without the assistance of a legal counsel especially to defendants in criminal trial. The FDRE constitution in order to rectify this it is devised the constitutional remedy, which is an obligation of the state to cover the expense of legal representation to the poor thereby prevent the result of any miscarriage of justice and inequality.

Apparently, the obligation of the state to cover the expense depends on two conditions. First, the accused should be one that doesn't have sufficient means to pay. Second, for the person charged for serious crimes that would punish him by more than ten years in prison. The existing practice, as observed in the Federal High Court criminal bench trials show as that the President of the High Court determines whether the accused needed a public defender after the accused present the testimony of his or her poorness i.e. inability to pay for lawyer in written form.

Furthermore the public defenders cannot go and give legal assistance in the police station to suspect. Even though the criminal trial essentially commence from the police investigation and the suspect is in need of the help of the service of the public defenders particularly when police carries out the duty of interrogation under article 35 and 80 there is a clear gap in the implementation of the right to legal counsel of the defendant. This is may be because the number

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<sup>2</sup> Access to legal aid in criminal justice systems in Africa, UN Report 2011

of public defender is minimum compared to number of case that needs assistance and insufficient budget from the state. However the question that needs answer is how can a defendant who was not effectively represented at the police interrogation and pretrial stage is said to be defended at the trial stage? Does the pretrial stage have an effect of miscarriage of justice effect? Can federal courts fully implement the right to free legal counsel without any protection at police interrogation level? What is the practice in this regard? This study will in light of international human rights system will explore procedure, scope and practical challenges to full implementation of the right to free public counsel in federal court to defendant.

Particularly the writer had identified that federal courts have no procedures by which to determine whether the accused person doesn't have sufficient income and thus deserves to get public defender at state expense. As a result, it is possible that the accused lacking sufficient means may have been victims of possible miscarriage of justice. In addition the arbitrary procedure raises questions like how is not possible that an accused who is to be sentenced less than ten years will not be a victim of miscarriage of justice? Is there no crime that lies at the federal first instance that needs the help of public defenders? Will there not be a miscarriage of justice and poor income at the federal first instance level? When is a miscarriage of justice said to be resulted? When is a defendant to be qualified without sufficient income to recruit a lawyer for him/her? What challenges of the public defenders in Ethiopia? Is the provision and service of public defenders independent? What are the steps forward for a comprehensive implementation of the right to free legal counsel of defendants in criminal trial of federal courts?

## **1.3 Objectives**

### **1.3.1 General Objective**

This study aims to explore how the federal courts of Ethiopia implement the right to counsel and representation by a public defender at state expense for an indigent accused/suspected person to protect miscarriage of justice, inequality and enhance good governance and rule of law.

### **1.3.2 Specific Objectives**

- To describe the meaning, scope, procedure and practical implementation of the right to a free public defenders to the poor in federal courts in Ethiopia.

- To explore the role of public defenders, Judges and police officers in the implementation of the rights to free legal counsel by state expense in particular and the protection of human rights in general.
- To explore the criteria for assignment of public defenders at state expense at federal courts in Ethiopia and compare with state obligations internationally.
- Identify the challenge and suggest recommendation for the effective organization of the public defender office and implementation of the right to free legal counsel in Ethiopia.

### **1.5 Research Questions.**

Based on the objectives above, the paper aims to answer the following research questions on the right to a free public defenders to defendants in criminal benches of the federal courts in Ethiopia:-

- Does Ethiopia have an effective system of legal assistance in criminal cases especially at federal courts in light of international human right standards?
- What is the scope of the rights of the indigent accused person to free legal counsel as protected under the FDRE constitution and practiced at federal judiciary and police institutions?
- What are the mechanisms to assign public defenders to defendants under trial in federal criminal benches?
- How are quality of service and uniformity in provision to be achieved, compared to the standard of a professional lawyer in the free market? What is the public defenders professional standard that is established and maintained?
- Is the work of public defenders independent from intervention or/ and perceived bias?
- What are the challenges to overcome by public defenders and the step forward?

### **1.6 Research Methodology**

#### **1.6.1 Study area, population and sampling**

The study area is mainly federal courts criminal benches in Addis Abeba. There are around 10 federal high and first instance courts division in each sub city in Addis Abeba. These courts have one or more than one criminal benches. Thus due to the difficulty to include all benches in each division at the 10 sub city, only one criminal bench is selected in each of the ten first and criminal benches in Addis Abeba. Accordingly one judge, one public prosecutor, one police and

one defendant in each of the ten divisions of federal high and first instance courts who have an ample knowledge about the practice of the right to free legal counsel to accused/suspected person are selected as participants. In other words a total of 40 participants are selected through purposeful and snowball sampling technique among the study population mainly based on experience and professional connection to the issues and research question of the study.

### **1.6.2 Source of data**

The will use both primary and secondary sources of data. The primary sources of data includes professional who are directly engaged the practice of public defense to defendants like judges, public prosecutors, police and defendants who are using the help of a public defender. On the other hand the secondary data source includes court rulings, police investigation report, official documents and literature review on the right to free legal counsel.

### **1.6.3 Methods of data collection**

#### **1.6.3.1 Key informant interview**

The writer through the design of a semi structured questions in the form of oral interview will conduct interview with professionals engaged in the monitoring, permission and delivery of the right to legal counsel to indigent defendants in federal courts. Accordingly the writer will conduct an exploratory interview with 40 participants in the study area who are selected purposively based on their level of engagement on the issues at hand. An additional interview with an official in the public defender's office will also be included in order to assess difficulties in the administration and structure of public defenders in Ethiopia.

#### **1.6.3.2 Focus group discussion**

The writer will also conduct a FGD sized with six professional wh0 are directly engaged on the right to free legal counsel in particular and fair trial rights for accused in general. Participants for the FGD are selected based on snowball sampling techniques considering experience, positions and participation on the research questions above. This method is used in order to gather expertise feedback on the constitutional rights and practical suggestions on the implementation of the rights in line with international standards. The writer role is limited to facilitation and moderator to a smooth FGD session.

### **1.6.3.3 Document analysis**

The writer will also conduct document analysis in order to triangulate and cross check data obtained through interview and FGD. This will guarantee to identify the major factors and variables that impacted the implementation of the right to free legal counsel to defendants in Ethiopia. This method used the data in federal courts rulings, police criminal investigation reports, procedural rules in the access to public defenders, law journals, case law, constitutional deliberations, books, government reports and other relevant and reliable materials are used.

### **1.6.3.4 Observation**

The writer of the paper beside the above methods will also employ observation of active court trial and cases involving public defenders and indigent defendants at federal courts. This will help to compare and apprehend the implementation of the right to free legal counsel to accused. This observation as a case of trial notes will help to compare the effectiveness and professional quality of public defenders as compared with the lawyer in the free market.

### **1.6.4 Method of data analysis and interpretation**

The writer, as illustrated above, after identifying the sample population and all data will analyze and interpret in order to create meaningful report. The writer through a thematic triangulation and organization of the primary and secondary data will give a meaning to the scope, procedure, independence, and organizational problems and way forward on the right to a free legal counsel in federal courts in Ethiopia.

## **1.7 Significance of the Study**

The study termed as public defenders in Ethiopia will contribute in the protection and implementation of the right to equality, fair trial, rule of law and good governance in Ethiopia. The study with a focus on human rights based its assumptions on the need for independent public defenders to the poor as a quest for access to justice, equality, rule of law and fair trial rights to all defendants. The writer believed that the study will be an additional contribution to similar work but with a different perspective, a baseline for further research on the questions and will recommend to the concerned parties that a free right to legal counsel in criminal cases to the poor is a fundamental pillar to criminal justice system and the full implementation of international human rights treaty obligations of state.

### **1.8 Scope and Limitations of the Study**

This study shall limit itself to the practice in the Federal criminal court in Addis Abeba, Ethiopia. Even though the legal assistance should be both for civil and criminal issues, the paper will limit itself to criminal free legal assistance that is provided by state public defender's office only not other private institutions and <<Pro-bono>> services of professional lawyers in market which is mandated by professional conduct rules. On the other hand the writer will expect financial, short time for submission and unwillingness of participant to give data as limitation the study.

### **1.9 Ethical Consideration**

The writer will respect the willingness of the participant to engage in the research and to this extent the objective of the study will be will explained beforehand, the writer will respect the right to privacy by covering up the identity of the participant when requested through the use of words like key interview informant and FGD participant.

### **1.10 Structure of the Study**

The paper will have four chapters. The first one an introductory part with the proposal which lays down the statement of the problem, research questions, objective and other fundamental design of the research methodology. The second chapter of the paper is about the literature review that describes international human rights standards, definition of the concepts and theories and similar findings of other work done in Ethiopian and other countries on the free right to legal counsel. The third chapter deals with the practical issues of the study The last part which chapter four will finally the study by pinpointing the way forward for an effective and efficient work of public defenders for defendants in Ethiopia.

## Chapter Two

### The Right to Public Defender: - conceptual analysis and comparative Experiences

#### 2.1 The A glimpse to rights of the accused/ suspect at different critical criminal stages

In the process of administering Justice in cases of criminal charges, there are various stages through which the person who alleged to have committed the crime passes. These stages are handled by various institutions established to deal with the prevention, investigation, trial and conviction and lastly punishment of criminals.

It is in this respect that the rights of the suspect/accused in the various stages come into the picture. The question here is then, what rights does the suspect/accused have in the pre-trial and trial stages? What is the nature of these rights? These rights include: the right not to be arbitrarily arrested without evidenced by the fact that there is a provision in the Criminal Procedure Code of Ethiopia of 1960, for example, making arrest without a court warrant<sup>3</sup> ( a possibility to be resorted to in enumerated circumstances, the right to be informed of the reason for arrest<sup>4</sup>, the right to be brought before a judicial body promptly (within forty eight hours of arrest<sup>5</sup>) the right to be tried within a reasonable period of time (speedy trial<sup>6</sup>), the right to be released pending trial (bail<sup>7</sup>) the right to obtain legal assistance if necessary<sup>8</sup>, the right to challenge illegality of one's arrest (habeas corpus<sup>9</sup>)

The next question to be raised is:- at what stage are these rights significant? Thus, the main factor to be considered here is, to which institutions do these rights serve as constraints. In other words, which institutions are more likely to infringe the civil liberties, out of the desire to accomplish their official duties and, maybe sometimes due to the abuse of the power conferred on them. The institutions which take part in the pre-trial procedure are mainly the Police, Prosecutor and the Courts. So we have these institutions vis-a-vis the rights, freedoms and liberties of individuals (suspect/accused).

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<sup>3</sup>Criminal Procedure Code Of The Empire Of Ethiopia, 1961, Article 49 and 51

<sup>4</sup>Ibid, art 56(2) and The Constitution of the Federal Democratic Republic of Ethiopia, 1994, Art. 19(1)

<sup>5</sup> Ibid Art 29(1) and The Constitution of the Federal Democratic Republic of Ethiopia, 1994, Art. 19(2)

<sup>6</sup>The Constitution of the Federal Democratic Republic of Ethiopia, 1994, Art. 20(1)

<sup>7</sup>Criminal Procedure Code Of The Empire Of Ethiopia, 1961, Article 63 and FDRE constitution Art.19(6)

<sup>8</sup>FDRE constitution, Art. 20(5)

<sup>9</sup>Criminal Procedure Code Of The Empire Of Ethiopia, 1961, Article 77

Most of these rights are protected against measures that could be taken by some entity that has the power to prevent a person from moving as he is entitled to. For instance the right to be released on Bail is enforced by the decision of the court of course with the participation of the Public Prosecutor or the investigating police Officer. The right to free legal counsel and Habeas Corpus comes into play in the presence of the detaining body and the Court.

Thus among the critical points in the criminal administration for the accused/suspect is the stage where the police have a significant role. But here one needs to note that; the Public Prosecutors, as representatives of the public interest. Which was detrimentally affected by the crime which the accused is alleged to have committed, may play a negative role with respect to the rights of the accused. Similarly the Courts might, though not in a direct manner, become instruments of infringement of the accused's rights in situations where the accused is seeking the granting of those protections by the courts.

Thus the determination of the stage which may be deemed as that where the rights of the suspect/accused are significant is the pre-trial stage. It is at this stage that problems are seen in relation to police powers and procedures in the investigation of offenses, the conduct of prosecution and the requirements of pre-trial hearing. It is at this stage that "... *The fundamental question of the preservation of essential human dignity is at issue*<sup>10</sup>,"

The rights of the suspect/accused in pre-trial proceedings including the ones mentioned above are essential for a healthy and democratic society. Thus in order for this right to be respected among others a professional lawyer/a public defender is essential for both poor and rich. The respect of all these rights depends on the quality and availability of a professional lawyer. The right to legal counsel/public defenders is essential mainly because it embodies the elements of those other rights. They if the accused/suspect succeeds in obtaining qualified legal counsel, his right to get free fair trial is guaranteed.

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<sup>10</sup>J.A.Coutts, THE ACCUSED (A Comparative Study), (2nd ed. 1966), published by Westminster university London 1996, pp 103-105

In general core essence of the right to public defenders is the promotion of basic human and democratic rights. We shall in the next section analyze the essence of the right to a public defender in the broader sense as well as its practical application in other states.

## **2.2 What Is the Right To legal counsel/ Public Defenders?**

The right to legal counsel or public defender should be seen from the broad perspective of the right to a legal aid. According to Black's Law Dictionary legal aid is defined as <<free or inexpensive legal services provided to those who cannot afford to pay full price by especially established organizations<sup>11</sup>. >> The right to legal aid is the provision of the services of legal nature free of charge or at a discount to those who cannot afford such services. The right to legal aid can be provided by private or/and public actors. The rationale of the right lays in social policy of maintaining functioning justice system based on equality and on the other hand human rights perspectives analyzes it from fair trial, equality and due process of law. Thus based on this principle the right to public defender or Right to state sponsored counsel is a criminal defendant's constitutional right to representation by a court appointed lawyer if the defendant cannot afford to hire one."<sup>12</sup> It is a right to be represented by one who possesses legal knowledge and legal skill and is licensed to provide legal services which include but are not limited to preparing of legal documents, preparing or expressing legal opinion, providing legal consultation or advice, representing another in judicial, quasi-judicial and administrative proceedings or other formal dispute resolution proceedings. A public defender is an officer of the court who is bound to work for the advancement of justice while faithfully protecting the rightful interest of his clients. Public defender is a government appointed attorney who is a representative of poor accuse/suspected person. The right to legal counsel can be either privately retained legal counsel or the right to free legal counsel/public defender at the state cost. What are the justifications for the right to public defenders which is the focus of this paper? This will be discussed in the next paragraph.

One of the most troubling issues in the administration of the criminal justice system is the case of suspects/accused. Because crimes are public matters, the state establishes different institutions to deal with them. Accordingly, police, prosecution offices, courts and jails are found everywhere

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<sup>11</sup>*Black's Law Dictionary*, Seventh Edition, West Group, St. Paul, Minnesota, (1999).

<sup>12</sup> Blacks Law Ibid

and all these are run by public money. In all criminal cases there are two parties, i.e., the state and the suspect/accused. Relative to its economic might the state tries its best to equip these institutions with professionals. The suspects/accused are on the other hand – in most cases, – individuals who do not have the professional capability to defend their cases, nor do they have the financial resource to employ other professionals, such as lawyers.

The formal state law is sophisticated, complex, and intricate so much so that it is not well understood even by educated individuals - except lawyers- let alone illiterate individuals. So, it goes without saying that in criminal cases, the suspect/accused is disproportionately less armed compared with the state. Nonetheless, at present, so many international and regional human rights instruments as well as many state constitutions guarantee different rights that may help to ameliorate this imbalance or inequality of arms. Suffice to mention that the right to: equality, fair trial, due process of law, among others, are pervasive in all such instruments. The right to defense counsel/public defenders is no less pervasive.

Under almost all laws, it appears that the state is the duty bearer. Nonetheless, the implementation of the right is fraught with difficulties as the state has failed to establish institutions that match with its agencies of the criminal justice system, as a result of which indigent suspects/accused are disadvantaged. Best practices of different countries show that there are different institutions that are engaged in providing free legal services to the indigent and these are *among others* : public defender offices, legal aid centers, bar associations, women associations etc.

## **2.3 International Experiences**

### **2.3.1 The South Africa Experience**

“The South African experience is valuable because the country has established one of the most sophisticated legal aid schemes in the developing world. ...The South African experience followed an evolutionary approach to legal aid delivery that went from pro bono to judiciary to salaried lawyers. Started during the Apartheid time the legal aid service was limited to civil cases after serious straggle of activists it began to include criminal cases, then with the introduction democratic constitution in 1994 the demand for legal aid in criminal cases escalated

out of control these; forced the state to consider other mode of delivery of the service including salaried lawyers, law clinics, public defenders qualified lawyers..etc”<sup>13</sup>

The Legal Aid Act of 1969 (as amended in 1971, 1972, 1989, 1991 and 1996) established a Legal Aid Board, which is mandated to “render or make available legal aid to indigent persons and to provide legal representation at state expense as contemplated in the Constitution as well as to provide ...legal representation at state expense ...where substantial injustice would otherwise result.”<sup>14</sup> The Board, though accountable to the Ministry of Justice, has its own legal personality. Finances of the board consist of: money appropriated by the Parliament in order to enable the board to perform its functions and moneys received from any other source.<sup>15</sup>

The South African state funded justice centers provide a full range of legal and paralegal services to indigent clients ...and the board has set up a network of fifty-eight justice centers and forty-one satellite offices...The board now estimates that it defends sixty to seventy five percent of all criminal cases in the regional courts, and ninety percent of all criminal cases in the high courts.”<sup>16</sup> Courts can direct cases to the Board for evaluation.<sup>17</sup>

The South African experience is known as a holistic approach, which means that “The maximum is made not only of the public sector legal aid bodies such as national legal aid board or council, but also of legal services providers in the private sector, such as bar associations, public interest law firms, law clinics and paralegal advice offices.”<sup>18</sup> Over all, eleven different approaches are used to provide legal aid and these are: Pro bono legal aid work, state funded judiciary ex-officio or referrals to private lawyers, state funded public defenders, state funded legal aid interns in rural law firms, state funded law clinics, impact litigation, cooperation agreements, public interest law firms, university legal aid clinics, street law type clinics, and paralegal advice offices. Judiciary was the main means of providing legal aid before the introduction of the new

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<sup>13</sup> David McQuoid Mason, Holistic Approach to the Delivery of Legal Services – The South African Experience, in *Legal Aid – International Experience and Promising Practices for Aid Providers*, Paul Dalton and HatlaThelle, (Eds.), The Danish Institute for Human Rights, (2010) , at p. 136.

<sup>14</sup> Art. 2 &3 dA of the Legal Aid Act.

<sup>15</sup> Ibid, Arts.2, 4/1, a-g, and 9/1, a & b, respectively.

<sup>16</sup> McQuoid, *supra* Note 13, at pp.137-138.

<sup>17</sup> Per Art.3 of the Act, courts before deciding that an indigent accused shall be represented by a counsel at state expense, shall take into account, inter alia: the personal circumstances of the person, the nature and gravity of the charge and send the case to the board that will evaluate and report back its findings.

<sup>18</sup> McQuoid, *supra* note 13, .at p.135.

constitution that made it mandatory to provide the service at state expense. This system is also found to be expensive and now used in exceptional cases only. The state funded public defenders system employs legally qualified persons to represent the indigent and it is proved to be less expensive and successful. Other approaches, such as impact litigation, cooperation agreements, and public interest law firms are used in those places where the board has no branch offices, in cases of conflict of interest or in case the issue to be litigated demands expertise.<sup>19</sup>

### 2.3.2 The USA Experience

American jurisprudence has recognized both the practical and logical nexus between legal representation and a fair trial/due process of law. In the US, the right of an indigent accused to an appointed counsel at public expense, was recognized as far back as 1853 and the court reasoned out that this is grounded in the “principles of civilized society<sup>20</sup>.” “It is generally understood,...that the drafters of the US Constitution did not intend to afford those charged with crimes an affirmative right to counsel, but rather the right to retained counsel at their own expense.”<sup>21</sup> The basic source for the right to counsel in this country is the Sixth Amendment that provides that “In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense.” Wayne R. LaFave, et al. have this to say about the evolutionary development of the right through interpretation by the judiciary:

Though the right to counsel at the accused’s expense was certain at the beginning, the right to an appointed counsel at public expense for the indigent was less certain....Nonetheless, the Court eventually came to interpret the Sixth Amendment as granting a right to representation by counsel to all defendants, with the state required to provide counsel where the defendant was indigent.<sup>22</sup>

The US Supreme Court has traveled a lot to reach the current position. It should, however, be noted from the outset that mere ‘general’ legal recognition of the right indifferent legal

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<sup>19</sup>*Ibid*, at pp. 139-162.

<sup>20</sup>Webb. V. Baird (6Ind.13), (1853) in National Legal Aid & Defender Association NLDA, History of Right to Counsel, available at: [www/M:\access to just docs\NLADA About NLADA - History of Right to Counsel.mht](http://www/M:\access to just docs\NLADA About NLADA - History of Right to Counsel.mht), (hereafter NLDA), last accessed on September, 9, 2018.

<sup>21</sup>John D. King, Beyond “Life and Liberty”: The Evolving Right to Counsel, *Harvard Civil Rights – Civil Liberties Law Review*, Vol. 48, p.8, (2013)

<sup>22</sup> Wayne R. LaFave, Jerold H. Israel, Nancy J. King, and Orin S. Kerr, (hereafter LaFave *et. al.* ) *Criminal Procedure*, Database updated November 2011 WestlawNext, Thomas Reuters, 2012 at Sec.11.1(a). Soft copy in file with the writer.

instruments did not solve the legal issues that cropped up thereafter. Some of the major issues are *among others*: the proceedings at which the right can be exercised, self-representation *–pro se–*, replacement of a state appointed counsel in case of conflict of interest or professional incompetence. Successive judicial interpretations have attempted to give suitable solutions to all these issues and these are discussed below in a very general manner.

Some landmark decisions of the Supreme Court show that the right to defense counsel is grounded in different well known constitutional guarantees such as the principles of due process /fair hearing and equality. Accordingly,

A constitutional right to appointed counsel could be derived...from the due process right to a fair hearing....The right to be heard would be, in many cases, of little value if it did not comprehend the right to be heard by counsel...The indigent defendant... was as much entitled to a fair hearing as the more affluent defendant who could afford to retain a lawyer. The state accordingly had a due process obligation to provide the indigent defendant with a lawyer where counsel's assistance would be necessary to achieve a fair hearing.<sup>23</sup>

With regard to the right to equality, one court noted that

...A state can no more discriminate against those on account of poverty than on account of religion, race, or color since the ability to pay costs in advance bears no relationship to defendant's guilt or innocence...There can be no equal justice where the kind of trial a man gets depends on the amount of money he has"<sup>24</sup>

As far as the time when the right to counsel can be asserted/exercised is concerned, a court in US held that

The Sixth Amendment right to appointed counsel applies only to "critical stages" in the criminal prosecution at pretrial proceeding such as some pretrial identification procedures...and when subjected to police or prosecutor efforts to elicit inculpatory statements." It appears that there is general consensus that the right can be exercised during defendant's first appearance before a magistrate and when the person is taken into custody and that the police shall inform the arrested person of his right to appointed

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<sup>23</sup> *Ibid.*

<sup>24</sup> Griffin v. Illinois, 351 U. S. 12, 76 S. Ct. 585, 100 L.Ed. 891 (1956).

counsel if indigent, and if the person requests or advises the officer that he or she cannot afford counsel to immediately and effectively place the defendant in communication with the office of public defender.<sup>25</sup>

Even though the USA have a long history of providing free legal service as well as the means to do it, the performance of the service providing agencies are found to be much below the standard. According to one writer who wrote on the situation in US,

Nobody observing the current state of indigent defense representation in the country today could credibly say that the system is functioning well. Even in that universe of cases requiring court –appointed counsel, the system has utterly failed to provide a robust and zealous defense counsel for those accused of crime.....<sup>26</sup>

### **2.3.3 The England Experience**

Until the mid-Eighteenth Century the England common law did not recognize the right to counsel and the right to representation at one's own expense was allowed for those charged with less serious crimes not punishable by death. "The prohibition on defense counsel in serious cases was defended as necessary to the maintenance of order and social peace, because the risks of acquittal would be too great if the defendant charged with a serious crime were entitled to counsel..."<sup>27</sup> however this attitudes changed as counsel came to be seen as an important safeguard against tyranny. Further from time to time the capacities of the public prosecutor became powerful so that the need for defense counsel was increased. Until 1695 an accused person in England was entitled to have neither representation by retained counsel nor by government appointed counsel. In that year an exception was made in respect to felony cases. Although the right to counsel was recognized, it was not extended to the indigent defendants unable to retained private lawyer by themselves. However during the second half of 20<sup>th</sup> century, the right to legal counsel was extended in scope and application. The service is directed by Public Defender Service Office and lawyers employed directly by the legal services commission to provide advice in police stations and representation in Magistrate and Crown courts in Wales and England. The majority of state funded criminal defense work however is

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<sup>25</sup> For details, see LaFave, *et. al. supra* Note 1, Sec. 11.2 (b).

<sup>26</sup> King, *supra* Note 21, at pp.42, 43.

<sup>27</sup> John D. King, Beyond "Life and Liberty": The Evolving Right to Counsel, *Harvard Civil Rights – Civil Liberties Law Review*, Vol. 48, p.8, (2013)

provided by private lawyers contracted to Legal Services Commission and paid on each case under the Legal Aid Scheme.

In England, the accused must be informed of or advised his/her right to counsel at the time of arrest. Where the police fail to inform the accused/ suspect his/her right to legal counsel and gave his/her statement without the presence of a lawyer, the confession is inadmissible in the trial courts.<sup>28</sup> In England the right to be represented either by retained or court appointed counsel extends to arrested persons in police stations to arrested person ii. The Magistrate courts iii. Crown courts and iv<sup>th</sup> the Appellate courts.<sup>29</sup> Further anyone who needs free legal assistance should prove her/his indigence. The court determines the eligibility of the accused person to have government defense counsel according to the Legal Aid Act Of 1988. There are two set of criteria for eligibility of the service i.e. the merit test (the interest of justice) and Means Test (the accused financial capacity). That is to say that the merit test provides that an accused whose indigence is recognized has right to be represented by a legal counsel, if the interest of justice requires doing so. On the other hand the means test provides that no accused person can have assistance of an assigned legal counsel unless he/she proves that he/she cannot hire a retained lawyer at his/her expense. The two requirements are interdependent that is to say even if the accused is financially unable to hire lawyer by himself/herself, assigned counsel will not be provided unless the interest of justice requires to do so. Similarly if the accused is able to retain a lawyer, legal counsel will not be provided even if the interest of justice requires.<sup>30</sup>

#### **2.4 The right to a public defender under the International Human Rights Regime.**

The right to defense counsel is enshrined in the different international and regional human rights instruments to which Ethiopia is a party in addition to the national constitution and other substantive and procedural laws of the country which will be discussed in the next chapter. The Universal Declaration of Human Rights (UDHR) under article 11 states that << everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantee necessary for his defense>>.22 In

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<sup>28</sup> A step by step guide to legal Aid, available at [www.thlc.co.uk/resources](http://www.thlc.co.uk/resources) (last visited on 2 April 2018)

<sup>29</sup> Ibid

<sup>30</sup> Ibid

this provision the phrase << all the guarantee necessary for his defense” indicates somewhat that the right to defense counsel is also a precondition.

The International Convention on Civil and Political Rights provides that:-

In the determination of any charge against him, everyone shall be entitled to the following guarantees, in full equalities.... d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he doesn't have legal assistance, of his right to and to have legal assistance assigned to him, in any case where the interest of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.<sup>31</sup> Furthermore the African Charter on Human and Peoples' Rights, 1987 also provides that “Every individual shall have the right to have his cause heard. This comprises: the right to defense, including the right to be defended by counsel of his choice.”<sup>32</sup> Furthermore, the United Nations has issued different instruments that provide in addition to the right to free legal assistance at state expense that: the right shall be asserted and exercised at all proceedings, the state shall ensure the provision of sufficient funding and other resources for legal services to the poor, and that interviews between the prisoner and his legal adviser may be within sight but not

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<sup>31</sup>Art. 14(3).

<sup>32</sup>Art.7(1)(c). In addition to the Charter, the African Commission on Human and Peoples' Rights has issued some Resolutions pertaining to fair trial and these are, *inter alia*: ACHR Resolution on the Right to Recourse and Fair Trial, Tunis, Tunisia, 1992, ACHPR Resolution on the Right to a Fair Trial and Legal Assistance in Africa, Kigali, Rwanda, 1999 and ACHPR Principles and Guidelines on the Right to A Fair Trial and Legal Assistance in Africa, 2001.

## CHAPTER THREE

### THE RIGHT TO PUBLIC DEFENDERS: Ethiopian Experience

#### 3.1 Historical Foundation of the Right to a Public Defender in Ethiopia.

The Ethiopia, constitutional recognition of the right to defense counsel goes to ,1955, when Ethiopia enacted its Revised Constitution. The revised constitution was promulgated . Article 52 of Revised constitution of 1955 “In all criminal prosecutions, the accused, duly submitting to the court shall have the right to have the assistance of counsel, who if the accused is unable to obtain the same by his own efforts or through his own funds, shall be assigned and provided to the accused by the court.<sup>33</sup>” The imperial regime through enacting the 1961 Criminal Procedure Code, which is still applicable, reinforced the right. The Criminal Procedure Code of Ethiopia, Proc. No.185 of 1961 under Article 61, provides that, “Any person detained on arrest or on remand shall be permitted forthwith to call and interview his advocate and shall, if he so requests, be provided with the means to write<sup>34</sup>.”

Similarly during the Derg regime,(1974-91) the Constitution of the Peoples’ Democratic Republic of Ethiopia, Proclamation No.1 of 1987 had also provided under article 45(3) that “Any accused person has the right to defend himself or appoint a defence counsel. Where a person is charged with a serious offence and his inability to appoint a defense counsel is established , the state shall appoint one for him free of charge, as determined by law.<sup>35</sup>”

The 1995 Constitution has a number of provisions that are aimed at protecting the rights of suspects/accused. The most prominent one pertaining to the subject at hand is Art.20 (5) wherein it is provided 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.”

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<sup>33</sup>The Revised Constitution of Ethiopia, Proclamation No. 149 of 1955

<sup>34</sup> The Criminal Procedure Code of Ethiopia, Proc. No.185 of 1961

<sup>35</sup>The Constitution of the Peoples’ Democratic Republic of Ethiopia, Proclamation No.1 of 1987

In addition Article 21 (2) of the Constitution provides that “All persons shall have the opportunity to communicate with and to be visited by ....their legal counsel.”

It should also be noted here that “the Constitution is the supreme law of the land and that all international agreements ratified by Ethiopia are an integral part of the law of the land.”<sup>36</sup> Ethiopia, being a party to the International Convention on Civil and Political Rights (ICCPR) as well as the African Charter on Human and Peoples’ Rights,(ACHPR) it follows that these two instruments are equally applicable with the Constitution and other subsidiary laws of the country.

However it appears that the Constitution granted the right to those who are accused of committing a crime, and who are charged by the prosecutor, the above quoted rights under sub-Article (5) Article 20 “Rights of Persons Accused.”

On the other hand the immediately preceding article, Art.19. is suggesting the accused is entitled “Right of Persons Arrested” does not carry a similar provision/guarantee. Whether this is a slip of the pen or a deliberate omission is not known. Thus, a strict interpretation of these two articles can lead to an illogical conclusion that the right to counsel is denied to those who are in police custody and they have to wait till they are charged in order for them to exercise the right. Put differently, the right can be exercised at trial only.

On the other hand, it may be argued that Art.21(2) has provided opportunity to the accused the right to communicate with one’s legal counsel to those persons held in custody and convicted prisoners.” Thus, those who are arrested and in police custody or in remand prisons can exercise the right and the above noted conclusion may apply. one wonders why such an open ended right is not provided under Art.19, which is the proper place to provide the right for those who are arrested but not yet charged. Moreover, if this sub-article is to be interpreted as guaranteeing the right to those who are accused, this will be superfluous or redundant when read in light of Art.20(5).<sup>37</sup> It is hoped that this problem will be solved in the future through constitutional interpretation.

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<sup>36</sup>Ibid, Art.9(1&4).

<sup>37</sup>Note that though Art.21 is entitled as “The Rights of Persons in Custody and Convicted Prisoners”, sub 2 provides that this is the right of “All persons” and that unlike the other articles that guarantee different rights mandatorily, the sub article— provides for “opportunities”. The Amharic version clearly provides the right not to ‘all’, but to those persons held in custody and convicted persons.

The 1961 Criminal Procedure Code though enacted six years after the Revised Constitution of 1955, its scope was limited to the right of counsel to those who are detained or under arrest, but not yet charged. The Constitution on the other hand guarantees the right to those accused of committing a crime - those charged for the same,- for its subjects were those accused but not others.<sup>38</sup> One wonders again why the exercise of the right should be limited to a particular criminal proceeding. Art. 61 of the Criminal Procedure Code is the only relevant provision that can be cited. As shown above provision has limited the right to those who are ‘detained on arrest or on remand’, meaning that those who are accused cannot assert the right at trial and thereafter. This would be unjust, for the assistance of a legal counsel is equally needed at this stage and in practice this right is exercised at trial than any other proceedings. It is hoped that the forthcoming amendment of the Criminal Procedure Code will do away with this unnecessary restriction.

It is noted above that the right to counsel is a fundamental right to exercise all other rights guaranteed to a suspect/accused, for let alone the indigent and the uneducated even the affluent and educated cannot understand the law and defend their rights at different criminal proceedings. It, therefore, follows that the right should be available to all and at all stages of the criminal proceedings.

Nonetheless, it appears that the resource required to run a public defender office - that is financed by public money – has forced some jurisdictions to limit the scope of its exercise. The U.S. experience shows that such assistance shall be given at ‘critical stages’ in criminal prosecution.<sup>39</sup> These critical stages are *inter alia* “those instances which will have adverse consequences as to the disposition of the charge which could have been avoided or mitigated if defendant had been represented by counsel.”<sup>40</sup> One of these stages is the time when an arrested person is taken into custody by the police and the trial stage and thereafter up to appeal.

Thus, an arrested person should give her testimony – whether by way of admission or denial – freely/without any coercion and the police have to gather evidence that incriminates a suspect through other means. In addition to this, the police is also required by law to inform a suspect

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<sup>38</sup>See Arts. 61 and 52 respectively of these laws excerpted above.

<sup>39</sup>LaFave, et.al, *supra* Note 23, Sec.11.2(b).

<sup>40</sup>*Ibid.*

right after arrest and during interrogation that she has the right to remain silent, any statement she makes shall be used in evidence and be recorded and that she has also a right to legal counsel and if indigent she has the right to free legal service. Any interrogation done in the absence of this right to the suspect will be avoided through ‘the exclusionary rule’ wherein evidences gained through the third degree are not admissible in a court of law.

Ethiopian laws again leave much to be desired when it comes to the duty of the police to caution an arrested person as well as the application of the exclusionary rule. To begin with, Ethiopia has not yet enacted an evidence law and any discussion pertaining to exclusion remains to be academic. The duty of the police to caution arrestees is, however, given due recognition albeit with some limitations. Article 27 of the Criminal Procedure Code provides among others that, “[A person under interrogation] shall not be compelled to answer and shall be informed that he has the right not to answer and that any statement he may make may be used in evidence, and any statement which may be made shall be recorded.” This guarantee is commendable though there may be other loopholes that may reduce this right to being a hollow right. Thus, one may ask what happens if an interrogating police officer fails to discharge this duty? Will the statements be invalidated? What if he uses the third degree?

The major loophole under Ethiopian laws seems to be their silence on the duty of the police officer to inform a suspect that she has the right to retain or be assigned a counsel and that any statement given without such assistance will not be against Given the fact that most suspects are ignorant of the presence of such rights under the law, it is unlikely that they will assert it during interrogation. The presence of a threat or actual enforcement of the third degree which is the rule than the exception may compel them to admit guilt, though they may be innocent.<sup>41</sup>

Fisher has noted back in 1966 that “The administration of criminal justice in Ethiopia is marred by the frequent claims that convictions are based upon coerced confessions. The present system for adjudicating such claims and for deterring the practices which generate them is inadequate.”<sup>42</sup> Interestingly enough, the situation has not improved even fifty years (until now) after this assertion was made by Professor Fisher. A student researcher has found among

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<sup>41</sup>For further details on this issue as well as the impotence of the exclusionary rule, see Stanley Z. Fisher, Involuntary Confession and Article 35, Criminal Procedure Code, *Journal of Ethiopian Law*, Vol.III, No.I, (1966), p.330-338.

<sup>42</sup>*Ibid*, at p.338.

othersthat: interrogating police officers do not tell suspects about their rights, denial of police records of admission of guilt at trial are frequent and cause delays in trial, the common practice in police stations is to call inmates to witness admission after subduing the suspect and interrogations are held without the presence of anyone except the suspect and the interrogator.<sup>43</sup> Moreover, the right to be visited by one's counsel and have free consultation is dispensed with in practice.<sup>44</sup>

At least two pre-trial proceedings attract our attention and these are: the first court to which a suspect should be brought after arrest and preliminary inquiry. The former normally decides on the right to bail and the latter is required to record testimonies of prosecution witnesses before trial, in case when a suspect is to be charged for homicide or robbery. Though it may be argued that per Art.61 of the Criminal Procedure Code an arrested person has the right to call her counsel, the relevant articles, , on the procedures at the first court of appearance, i.e., Arts.29 &59, are silent on this matter. In the case of preliminary inquiry, the law, though it says nothing about the right to counsel, provides among others that the court has the duty to inform the suspect he/she has the right to remain silent, or make statements voluntarily and these will be read to her and also signed by her, recorded and be put on trial.<sup>45</sup> Since the latter proceeding applies to those who are suspected of committing any one of the above two crimes, its importance in the overall discussion is minimal. Nonetheless, these two proceedings are critical in determining the guilt or innocence of an accused at trial as a result of which, the rights of an unrepresented suspect/accused can be jeopardized. The silence of the law on the right to representation at all proceedings can be taken as a cause for this predicament.

The trial is the most important proceeding in the determination of guilt or innocence as well as types of punishment when an accused is found liable as charged. An accused pleads guilty or not guilty, examines and cross examines her witnesses or prosecution witnesses. It is at this stage that she raises her defenses, if any.

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<sup>43</sup>See Dereje Ethicha, *The Right of the Accused to Defense Counsel under Ethiopian Law*, (hereafter Dereje), (Senior Thesis, unpublished, Faculty of Law, Addis Ababa University, 1996), at pp.25-30.

<sup>44</sup>Ibid, at pp.30-34.

<sup>45</sup> See, Arts.80 ff.

That part of the Criminal Procedure Code that deals with trial says nothing about the right of an accused to counsel.<sup>46</sup> Given the importance of this proceeding, it would have been preferable if the Code had imposed on the judges the duty to inform an accused of her right to counsel and even the possibility of having an assigned counsel if she is indigent. In the absence of such a stipulation, it appears that in those instances where the term ‘counsel/advocate’ is mentioned it is intended to those who can afford to have one out of their own resources. The challenges of the criminal trial can be posed by the counsel of an affluent accused, but not an illiterate and indigent accused and the Ethiopian criminal justice system has failed to draw from this wisdom.

### **3.2 The Right to a Public Defender in Federal Courts in Ethiopia: - Practice**

This section mainly aims at showing the constitutional and legal framework that governs the right to a public defender. In this section the writer will test whether the letter of the constitution and other laws are actually implemented in the true sense.

It is noted above that the most crucial issue in any discourse pertaining to the right to defense counsel is the issue of an indigent suspect/accused. It is presumed that an affluent suspect/accused can buy the services of top notch defense lawyers that match or even exceed the quality of the prosecution the police, or other legal professionals if the need to hire investigators arises. Though all suspects/accused may not necessarily be that rich, most of them are in a better position to defend their cases compared to an indigent and unrepresented suspect/accused. Moreover, unlike in civil cases wherein a litigant may utmost lose her right to property, in criminal cases it is a suspect/accused’s life or liberty that at stake. Accordingly, legal systems almost everywhere require among others that an accused should be presumed innocent till proven guilty by a court of law, and the prosecution has to prove a charge beyond any shadow of doubt or reasonable doubt.

The indigent is mentioned as a subject in the constitutions alone but not in the other subsidiary laws. As shown above, the 1955 Revised Constitution had provided the right to free counsel to all indigents in an unconditional manner, while the 1987 Constitution had provided the same to

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<sup>46</sup>Ibid, Arts. 123 ff. Note that this right is mentioned incidentally in quite a few occasions, - such as under Art.127(1). Wherein it is provided that “The accused shall appear personally to be informed of the charge and defend himself. When he is assisted by an advocate the advocate shall appear with him, and Art.136(3) which provides that “[Prosecution witnesses] shall be examined in chief by the public prosecutor, cross-examined by the accused or his advocate...”. See also Art.139 on re-examination.

those who are charged of committing serious crimes alone. The 1995 and current Constitution provides the same right to all indigents, but only when “miscarriage of justice would result.” Though this constitutional guarantee is commendable, it is not clear why it is provided in such a conditional manner. In the absence of a clear guideline, it appears that courts have to wrestle with the issue every time when an indigent appears at trial and this will inevitably lead to delayed justice. It should also be noted that the seriousness of the crime for which one is charged is not necessarily the only criterion with which one can measure that miscarriage of justice will result or not. It, follows then that the court in order to determine whether ‘miscarriage of justice’, has occurred must measure the intricacy or complexity of the case at bar and be convinced that the issues demand knowledge or skill in law which an ordinary citizen cannot acquire. Whatever the case, the criterion should be provided by law in the absence of which, there will be a continuous flow of cases pertaining to the issue at hand.

Before going to see the current practice of the federal courts, let us recap the historical background of the right to public defenders. In 1965 Ethiopian courts assigned private practitioners to represent indigent accused, for there was no public defense office.<sup>47</sup> Thus, courts assigned those who happened to be at court or even those who were not there. Such an unsystematic method led to a disproportionate load of cases among practitioners, and this has given rise to suspicion on the part of some lawyers that such an assignment is being used by some judges as a means of retribution on lawyers against whom they have grievance....An advocate assigned to defend an indigent accused refuses to take up the case, at his peril,<sup>48</sup> unless he gives reasons that satisfy the court.<sup>49</sup>

In addition to the above there was no any standard by which courts used to order the appointment of counsel for the indigent and this was dependent on the whim of the judge, though the general

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<sup>47</sup> It will be interesting to note that Eritrea - before its secession from Ethiopia in 1991- had a law that provided a comprehensive right to appointed counsel at state expense. See, Eritrean Poor Persons’ Defense Act, 1958, fully excerpted in *Ibid*, at pp.265-266.

<sup>48</sup>A court at the time had the power to order forthwith the suspension of a practicing advocate for a period not exceeding one month or subject him to a fine not exceeding two hundred and fifty Ethiopian dollars or may both order such suspension and subject him to such fine, if during the course of any proceedings ...a court considers that the conduct of an advocate...shows disrespect for the court or is such as to suggest that such advocate is not of character suitable for the administration of justice, per Art.9 of Neg. Gaz., Year 11, No.11, 18<sup>th</sup> July 1952.

<sup>49</sup>See, Worku Tafara, Indigent Defendant’s Right Counsel in High Court Trials in Addis Ababa (unpublished , 1965), in Stanley Z. Fisher, *Ethiopian Criminal Procedure, A Source Book*, (hereafter, Fisher (1969), Oxford University Press, Addis Ababa, (1969), pp.261-265.

consensus among judges was that the seriousness of the crime for which one is charged determined the right. Because of lack of a standard or rule on indigence, courts allowed or denied the right to counsel by simply looking at the attire or general disposition of the accused at trial. “In most cases, an accused first learns in prison from convicts is his right to counsel...”<sup>50</sup>

Let us now come to see the practice just going down to thirty years after 1965. Under Ethiopian law, a trial begins business, among others, by reading the charge brought against an accused and asking her whether she has any objection/s as well as whether she pleads guilty or not guilty.<sup>51</sup> The practice in 1996 was that courts used to appoint counsel from the public defender office, mostly after inquiring into the indigence of an accused. This is done usually upon entering a guilty plea. Courts also used to assign private practitioners who happened to be in the courtroom, who consulted with the accused for some time – very briefly of course – and in most cases the accused pleaded not guilty [probably to buy time.] Indigence is proved either through an oath or the production of a letter to this effect issued by one’s local administration – Kebele.<sup>52</sup>

It appears that there was no single standard by which courts assigned counsels to an indigent. Accordingly, the Federal Supreme Court in Addis Ababa assigns counsel to all indigent accused, for those criminal cases that fall under its jurisdiction are serious by nature. On the other hand the Oromiya High Court appoints counsel for those charged with offences which carry a penalty for more than five years of imprisonment. The South Ethiopian Regional Administration courts assign private advocates for those accused charged with crimes that carry a maximum of death penalty. This system is utilized in the Amhara regional state courts. In this region a private advocate is assigned to those persons who are charged with crime which they traditionally take as serious punishment such as first and second degree homicide, and aggravated robbery.<sup>53</sup>

With regard to the standard of service provided by public defenders, at that time the findings are lamentable/ distressing to say the least. Accordingly, at the federal courts as well as regional states, public defender offices are annexed to and accountable to courts, and counsels usually carry huge loads of work. Counsels were low paid, didn’t have formal training, they didn’t visit accused at prisons due to lack of transport allowance, and usually meet them during trial, and the

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<sup>50</sup>Fisher (1969), *supra* Note 45, at pp. 269-270.

<sup>51</sup>See Arts.129 & 132 of the Criminal Procedure Code.

<sup>52</sup>See, Dereje Ethicha, *supra* Note 47 ,at pp. 36-53.

<sup>53</sup>See, Dereje, *supra* Note 47,at pp. 36-53.

offices could not attract and retain qualified personnel. Courts also assign cases to private lawyers who happen to be in court, and there are instances wherein some of them end up carrying a disproportionate load.<sup>54</sup>

Another interesting finding of the researcher shows that on appeal, convicts were not interested in being represented by their trial counsel, for they suspect that it is the latter's incompetence that led to conviction. Accordingly the trial counsel simply advises whether there is any issue warranting an appeal and the convict continues to defend her case without a legal counsel.<sup>55</sup>

Turning to the current practice of federal courts.(Addis Ababa) , structured questionnaires were distributed to the personnel of the different agencies of the criminal justice system in Addis Ababa in order to assess how the right to public defender is practiced on the ground.

Semi-structured, open ended interviews and focus group discussion were held with pertinent personnel of the criminal justice institutions including courts, police, the attorney general and prisoners. In the following the outcomes of this data collection will be explained.

Though the police officers know that they have professional obligation to inform the suspect he/she has the right to remain silent and to call his legal councilor 80% of suspects respond they don't want to call legal councilor or they don't have money to pay for the legal councilor. Instead of this the suspect asks one of their relatives to be with them during interrogation. Such frequent practice has frustrated the majority police officers to ignore such rights of the suspect. This lead to the practice shows that suspects are informing about their right in the great majority of cases - 80% out of total interviewed.

Interestingly enough, it is only in 30% of the cases that suspects are told about the right soon after their arrest, while in 40% out of the 80% cases they are told during interrogation. As shown above, in practice, interrogations are conducted without the presence of counsel, or for that matter anyone except the suspect and the interrogator and such a practice is fraught with third degree. It is also inferable from the police responses that it is only 20% of suspects who invoke their rights, while 70% of them don't invoke it at all due to ignorance or lack of mean. Whether a suspect is told about the right by the interrogator or she is aware of the right, the absence of an

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<sup>54</sup>See, Dereje, supra Note 47,at pp. 36-53.

<sup>55</sup>See, Dereje, supra Note 47,at pp. 36-53.

evidence rule of exclusion and more particularly the fact that a counsel is not allowed to witness and advise a client in practice, put the right of a suspect to voluntary confession or the right to remain silent under threat of third degree.

The above conclusion is buttressed by prosecutors' responses which indicate 70% out of all interviewed prosecutors; they don't check whether an accused is represented by counsel during interrogation.

This amply proves that a great majority of accused face trial without counsel and this is not an attractive record. The prosecutors have indicated that apart from lack of resource or knowledge, accused lack of trust on counsels and their effort to circumvent the system are contributing factors that need to be taken into account in the future.

Private practitioners' responses show that in quite a few instances that they give pro bono services and it is the Federal Attorney General that assigns them these cases. Of those cases that they handled, they did not represent indigent during interrogation and it is rarely that they had opportunity to represent them soon after arrest. Most of the service was given during trial. This apparently shows that the most important proceeding, i.e., interrogation is conducted in the absence of a counsel which leaves an accused vulnerable to third degree. The practitioners' experience most notably the atmosphere of enmity, this is because the private practitioners give the pro bono service without any payment or with very less payment and accused's views that liability can be escaped through extra legal means are serious issues that may hamper future efforts.

According to the judges' responses, accused are represented in 25% of cases presented to them are represented by private lawyers. Those who can not pay for private lawyers the court appoint counsels from the Public Defender Office (office under Federal Supreme Court gives all sort of legal service to accused peoples without payment when ordered by judges) in a great majority of cases this shows that the Office is the major counsel provider at present though it is beset with its own problems, as to be shown later. Undoubtedly, the quality of *self*-representation is very low in at least half of the cases. All are in agreement that the seriousness of the crime should determine the exercise of the right. Their reasons are among others: in cases of serious crimes, the issues to be raised are complex, the penalties are severe, shortage of public defenders as a result of which if the right is extended to all, and those charged with serious crimes may not be

represented. At least one respondent opined that the contents of charges and the accused response to these should also be taken into account. Further they recommend that civil society organizations, universities and bar associations should help in improving the present condition, the Public Defenders' Office should improve its performance by all means, and private practitioners should be forced to represent the indigent.

Prisoners' responses did not help much in analyzing the situation, though it can be observed that though most of them were suspected/ charged for relatively minor crimes, none of them has been represented. However the researcher has observed that most of the prisoners accused of grave crimes are represented. This attempt to collect data from current prisoners is found to be frustrating, for almost all of them were unwilling, suspected that data is collected to hurt their case or generally had misgivings about the end result of the research.

By way of conclusion it will be interesting to note that all respondents in all categories are in agreement that the right to counsel should be recognized by law and that it should be exercised according to the letters of the law, although some concur with reservations.

### **3.3 Institutions Providing Free Legal Representation and Services**

The provision of legal aid in Ethiopia has a lot of actors and institutions both private and public. In the private sector provision of legal aid is among others spearheaded by civil societies institutions such as Ethiopian Women Lawyers Association, Ethiopian Bar Association, Federal Supreme Court Child Protection Project Office, advocacy Ethiopia, and other NGOs. The public sector for legal aid includes among other Federal Attorney General, The Ombudsman, Ethiopian Human Right Commission, The Federal Public Defender Office, Addis Ababa University Legal Aid Center, Addis Ababa city Justice Bureau to mention some.

Due to limitation in time and space the researcher will not see private institutions in the provision of legal services particularly for criminal cases. However with a view to collecting data from institutions that have a direct role in the exercise of the right to counsel, semi- structured and open ended interviews were held with the personnel of Federal Attorney General and The Federal Public Defender Office.

### 3.3.1 The Federal Public Defender Office

According to the information gathered from employees, the Public Defender Office was not established by legislation – proclamation or regulation. The office was originally established as a de facto institution back in 1993 when thousands of individuals were brought to justice for committing crimes such as genocide during the past military regime and there was a call to establish such an office. Accordingly it was established by seed money gained from certain Danish government’s institution in this country.<sup>56</sup> The only piece of legislation that says something about the office is the Federal Courts Proclamation No.25/1996 that provides that “...the President of the Federal Supreme Court shall organize the public defense office.”<sup>57</sup> It should be noted that the Supreme Court is not given the power to establish but, to ‘organize’ which may mean that its de facto existence is given recognition. The office does not have legal personality and it is accountable to the Supreme Court. Though none of its aims, goals and mandates are stated in any legal instrument, it is engaged in representing indigent accused, particularly those charged with crimes that are punishable with imprisonment for 15 years and above and when ordered by a court of law. Interviewees added that it had never represented an indigent upon its own initiation and never during interrogation.

Because it does not have legal personality, it does not have its own budget, but only that allotted by the Federal Supreme Court. This budget it’s not adequate it to pay attractive salaries to its farm out, some cases to private practitioners, who opened branch offices or have big income Wants to employ public defender with attractive salary This has resulted in brain drainage of its staff that frequently leaves in search of a better pay.

Interviewees are of the opinion that the future is bleak, for there is nothing to be seen at the end of tunnel.

Currently the office is running its works with 37 lawyers only which is too small when seen in light of its workload.

Interviewees suggest among others that the office should have an established legislation that can endow it with autonomy, and be accountable to the legislature. In their opinion, this will help it

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<sup>56</sup> Dereje, *supra* Note 47, at p.50.

<sup>57</sup>Federal Courts Proclamation No.25/1996 Art.16 (2)(j).

overcome the budgetary problem and employ capable professionals, outsource and network with private actors, open branch offices, etc. It is also suggested that mechanism of the office working with civil society organizations, law schools and bar associations should be encouraged to engage in an effective representation of the indigent.

When we come to see the work capacity of the Public defender office of the federal Supreme Court, it has given free attorney and legal aid services for 3526 criminally accused defendants in the first half of the 2010 EC budget year. This service is rendered in all criminal benches of federal courts accused in 2672 files of 3526 defendants as per the command of the court to be provided by a public defender. In addition to criminal representation before the court the office has prepared 1434 documents necessary for litigation process, 3010 consecutive oral litigation and provided counseling services 903 for accused both in the office and at the federal prison administration compound. It is also reported that since its establishment in 1987EC the office has rendered free legal aid and counseling services for more than 50457 defendants.<sup>58</sup>

The Federal Public Defender Office is not by any standard in a good shape. Its shortcomings noted in the 1996 research are still left untouched. Being the only organ set up to give effect to the right to counsel, it is a pity to note, that nothing is done to enable it discharge its noble objectives. Compared to the public prosecutor who is equipped to its teeth this office is left to side with minimal impact on the right to indigent accused.

### **3.3.2 Federal Attorney General**

Art.49 of the Federal Court Advocates' Code of Conduct, Council of Ministers Regulation No.57/1995 provides that "Any advocate shall render at least 50 hours of legal service, free of charge or upon minimum payment. The service shall be rendered to: persons who cannot afford to pay, charity organizations, civic organizations, and community institutions."The Attorney General thus assumes authority to see to it that advocates have actually rendered this service. Nonetheless, according to our anonymous interviewee from the Advocates' Administration Directorate, till 2000 EC, there were no much demands from the public seeking pro bono service, though the number swelled to 500 in 2005 EC of which, it was only ten individuals who came seeking service on criminal matters, However currently the service is known by most people in

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<sup>58</sup>Information from the Federal Supreme court website, [www.fsc.et](http://www.fsc.et) ( last assessed on May 1, 2018)

Addis Ababa. Moreover, the Federal Attorney General does not have any mechanism or guideline pertaining to the control and follow up of the services of advocates. The interviewee also told that there is no any mechanism put in place to check whether an applicant for service is really an indigent and the usual mechanism is to require the applicant to submit a letter to this effect from her respective local administration – Kebele. He further opined that as the Attorney General is in charge of prosecution; its role in assigning lawyers for pro bono service may give rise to conflict of interest.<sup>59</sup>

In General Attorney general role in assigning pro bono lawyers, it does not have the proper guideline to implement the right It is also doubtful whether it has the legal authority to force private practitioners discharge their obligation, for as far as the relevant laws are concerned, failure to give the service has no negative consequences. Given the apparent demand for such service, it is hoped that the Federal Attorney General will come up with to play its role in the realization of the right to counsel.

### **3.4 The Future of the Right to Public Defender in Ethiopia**

Though the current laws and the practice leave much to be desired by way of guaranteeing a comprehensive right to counsel, at least, two instruments throw light on the future prospect that may bode well for the future. These are the Criminal Justice Policy of the Federal Democratic Republic of Ethiopia, Megabit 2003 [2011 G.C.] and the Draft Criminal Procedure Code of the Federal Democratic Republic of Ethiopia, 2002 [2009/2010]. The former is a policy document that needs to be incorporated into the substantive as well as the procedural laws, while the latter, being a draft has no effect till its formal enactment by the legislature. Despite this, it may be hoped that the newly introduced concepts and remedies embodied in them may see the light of day sometime in the future. The Policy provides among others that:

- Accused shall have the right to counsel who shall have equal opportunity with the prosecution;
- Such individuals shall have the right to counsel at every stage of the proceedings, starting from arrest;

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<sup>59</sup>It helps to note that neither the Regulation mentioned above nor The Federal Courts Advocates' Licensing and Registration Proclamation No. 199/2000 provides that failure to provide pro bono service shall entail consequences. See, Art.15 (1) of the latter.

- The right to state appointed counsel can be exercised when it is proved that an arrestee/accused is proved to have no means to hire a counsel of her choice and justice may be miscarried if she is not represented.
- An independent public defender office shall be established in order to ensure the rights of accused.<sup>60</sup>

The Draft Criminal Procedure Code<sup>61</sup> likewise, provides among othersthat: an arrested person shall have the right to be represented at every stage of any proceeding by a counsel of her choice , if indigent and it is proved that this will lead to miscarriage of justice to have a counsel appointed by the state, the state shall devise a means to determine the manner by which private practitioners shall be appointed as defense counsels, as well as their fee, the investigating police has the ‘*right*’ to inform a person under interrogation that she has the right to be represented by a counsel of her choice or a counsel appointed by the state if she is indigent, or *her representation by her choice is believed to be an obstacle to the investigation or security* – italics are mine,- and the right to representation –either by a counsel of one’s choice or state appointed counsel can be availed during plea bargain. It should be noted here that the Draft unlike the policy, does not envisage the establishment of a public defender office, but establishing a system of co-opting private practitioners. Moreover, though ‘miscarriage of justice’ is a prerequisite to have a state appointed counsel it is not clear why a privately appointed counsel is not desired when it is believed that it will be an impediment/obstacle to the investigation or security. In the absence of a strong justification, this is tantamount to taking away what is given by one hand, by the other hand and this is very alarming, to say the least.

The Draft Procedure Code was expected to be enacted together with the Criminal Code, back in 2005. It is still at the draft stage for unknown reasons. Given its importance in the realization of the constitutional right to counsel, it is a pity to note that the system is left to work with an outdated law. The policy document needs to resonate throughout all relevant laws and it remains to be seen whether this will be so in the near future.

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<sup>60</sup>See Art.4.7 of the document. The documents are written in Amharic – the working language of Ethiopia and translations are mine.

<sup>61</sup> See Arts.16, 19, 21, 30, 31, 208 and 212.

## CHAPTER FOUR

### Conclusion and Recommendation

#### Conclusions

The implementation of the right to a public defender is crucial in ensuring access to justice, equality, due process of law and fair trial for the poor, the disempowered and vulnerable groups by keeping the incident of miscarriage of justice. However the implementation of the right to public defenders in Ethiopia is fraught with difficulties as the state has failed to establish institutions that match with its agencies of the criminal justice system, as a result of which indigent suspects/accused are disadvantaged.

The affluent has a full right under the law, while the indigent is given a qualified right under the Constitution.<sup>62</sup> Nonetheless, this does not resonate well in the procedure code, for right to counsel is provided during arrest but not at pre-trial, trial or appeal proceedings. The silence of the relevant law, on this particular issue has the potential to harm the right of the affluent, let alone the indigent. If it had been the intention of the legislature to grant the right at all proceedings, it would have been provided so.

The indigent in Ethiopia is of course accorded with the right to free representation, albeit in a qualified manner, i.e. when non-representation would result in ‘miscarriage of justice.’ The common qualification under other laws is ‘when the interests of justice so demands’. Whether the two qualifiers are the same or different may be a matter of opinion. It, however, helps to know that “in criminal cases, interest of justice should be determined by considering: the seriousness of the offence and the severity of the sentence.”<sup>63</sup> From the theoretical stand point, it may be said that the Ethiopian constitution gives wide latitude, for the seriousness of the crime does not matter and the service can be extended to anyone suspected of committing or charged with any offence and it remains to be seen whether courts may interpret the qualifier in this sense. As noted above, in almost all discourse pertaining to the right to counsel, it is the position of the indigent that always takes the center stage.

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<sup>62</sup>See FDRE constitution, Art.20 (5).

<sup>63</sup>The African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, (2001), Art.H (2).

The right to equality, due process, fair hearing, and access to justice, among others that are enshrined in the Constitution are made useless due to our failure to empower the marginalized indigent to make the best out of these rights. “While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its determination of justice.”<sup>64</sup>

## **Recommendation**

The finding of the paper established that beyond endeavors by the office of the public defenders, under the federal Supreme Court an additional mechanism of partnership between legal aid services center, Bar Association and other similar institutions is vital strategy. The office of public defenders has different challenges in terms of the extent/scope of the service they provide and types of cases they handle. The office is only mandated to see criminal not civil cases, in terms of scope of delegation in criminal cases the office give oral advice, prepare defense pleadings and represent the accused before the court. However due to limited human and other resources compared to the high numbers of unrepresented accused, there is inadequate quality and effectiveness of the services. This is expressed in terms of the minimum time given to meet the defendants, case overload due to understaffing, inadequate budget, lack of monitoring system for active litigation and representation or absence of standard and mechanism for quality assurance in the services, lack of information on the extent and types of service by the office, absence of objective criteria for eligibility of accessing the services of the offices. Thus the writer considering the challenges and gaps identified on the services of the public defenders forward the following recommendations:-

1. The Public defender’s office should be organized as independent office and through professional staffing of lawyers and others, allocating adequate budget, furnishing them with different facilities such as qualified offices, vehicles and other equipment.
2. The public defender’s office should enact or cause to be enacted the scope and set eligibility criteria for selecting beneficiaries of the services in order to avoid arbitrariness. It should

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<sup>64</sup>The Allen Report, Report of the Attorney General’s Committee on Poverty and the Administration of Federal Criminal Justice, 5-11 (1963) in Yale Kamisar, Wayne LaFare and Jerold H. Israel, *Modern Criminal Procedure*, Cases, Comments and Questions, West Publishing Co. St. Paul Minn. (1994), at p.65.

carry out promotional activities of the services and suspect/accused right at police, public prosecutor, courts and other gathering for better awareness. In addition the office should issue directive that guides the holistic provision of the public funded legal counsel together with other private legal aid centers, university and civil societies. The office if organized independently can coordinate similar activities provided by lawyers (pro bono services), university and others through a comprehensive policy on legal aid and legislations.

3. Nothing short of adopting the South African experience can be suggested, when we come to pointing the way forward. Because it is a holistic approach, it helps to bring together all stake holders and ease the burden of the state. Accordingly, though advocacy civil societies are almost wiped out of existence due to the enactment of Proclamation No.621/2009, that requires them that they shall raise 90% of their income from local sources,<sup>65</sup> among others, some means should be sought to coopt them in future endeavors if at all there are any left untouched. An amendment of this law will naturally go some way in realizing the right to counsel. The enactment of the Criminal Procedure Code and the realization of the Criminal Justice Policy with the necessary amendments will contribute a lot towards the realization of the right to defense counsel.<sup>66</sup>

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<sup>65</sup>See Kumlachew Dagne and Debebe Haile Gebriel, *Assessment of the Impact of Charities and Societies Regulatory Framework on Civil Society Organizations in Ethiopia*, Task Force on Enabling Environment for Civil Society Organizations in Ethiopia, (June, 2012).

<sup>66</sup>In case if the need to revise the Procedure Code arises, it is recommended that the African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, (2001), Art. H (2) can be adopted as a model, for it contains detailed standards on the right to the right to counsel.

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- Federal supreme court official website, [www.fsc.et](http://www.fsc.et) (last visited on 12 April 2018)
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## **Appendix I**

### **Semi structured interview question/Questionnaire /FGD/**

#### **I. For the Federal Police**

1. Have you ever informed a suspect that she has a right to counsel?
2. How often do you inform the suspect?
3. At what time do you inform them?
4. Does the type of crime for which one is suspected of, determine her right to counsel? If ‘Yes’, which crimes merit this right?
5. How often do arrestees invoke their right to counsel?
6. Can this be described in percentage?
7. What is/are the reason/s why suspects do not invoke the right?
8. Do you think that suspects should be given the right to counsel?

#### **II. For the Public Prosecutors**

1. Given your experience, how often are accused represented by counsel?
2. Who assigns counsels?
3. What percentage of accused is represented, in your view?
4. Do you check whether accused are represented by counsel during interrogation?
5. What are the reasons why accused are not represented?
6. What are the reasons why a prosecutor does not check whether a suspect is represented by counsel during interrogation?
7. Do you think that suspects/accused should have a right to counsel?

#### **For Attorney and Consultant at Law**

1. What is the percentage of cases in which you gave a pro bono service?
2. Who assigned you?
3. At what stage did you represent the accused?
4. What are the general impediments that face you while representing an indigent accused?
5. What solutions do you offer to solve the problem?

### **III. For Judges**

1. How often are accused represented in your respective courts?
2. How do you assign counsels?
3. How do you rate the quality of defense posed by an unrepresented accused compared to those who are represented?
4. Do you put questions to witnesses whenever you find that an accused is unrepresented?<sup>67</sup>
5. Does this create inconvenience on the court?
6. Should the seriousness of the crime against which one is charged determine her right to counsel? Why?
7. What are the solutions to the problem?

### **IV. Prisoners**

1. What was the crime for which you are accused or convicted?
2. Do/did you know that you have a right to representation?
3. Have you ever invoked your right to representation?
4. Have you ever been represented?
5. Were you helped by prison inmates in defending your respective case?

within the hearing of a police or institution official.<sup>68</sup>

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<sup>67</sup> All judges are in agreement that the reason behind putting questions to witnesses is that this helps them to reach at a correct judgment.

<sup>68</sup> UN Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, 1988, Adopted by General Assembly resolution 43/173 of 9 December 1988, Art.11 (1); and UN Basic Principles on the Role of Lawyers, 1990, Adopted by the Eighth United Nations Congress on the prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. See also UN Standard Minimum Rules for the Treatment of Prisoners, 1957, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 Jul

