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**Addis Ababa University College of Law & Governance Studies**

**School of Law**

**Post Graduate Program, Human Rights Law Stream**

**The Right to Legal Counsel in Ethiopia: *A Case Analysis in Oromia***

**Submitted for Partial Fulfillment of the Requirement for LLM Degree in  
Human Rights Law**

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**August 2016**

**Addis Ababa**

## Declaration

I, Desalegn Gemechu, hereby declare that “The Right to Legal Counsel in Ethiopia, a Case Analysis in Oromia” is my own original work which has not been presented for any degree or other purpose in any university and, all sources used have been duly acknowledged and cited.

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## **Acknowledgements**

First of all, I thank the almighty God who has helped me in many problems I faced in writing of this paper. Once again, may his name be blessed forever.

I would like to express my deepest gratitude to my advisor Mr. Simeneh Kiros for his scholarly advice and valuable comments without which this paper could not be realized. I also thank my friends Yosef Abera, Gutu Oljira, Nagaro Getahun, Nagaro Gerba, and all my colleagues who helped me in the due course of the works of this paper. Lastly but not least, I thank all persons in different offices who cooperated with me to be interviewed and supplied me with different data I sought in writing of this paper. Thank you all! God Bless You Guise!!!!

## **Abstract**

*The right to legal counsel in criminal justice proceedings is recognized under the FDRE constitution (Art. 20 (5)) and the revised constitution of Oromiya National Regional State (Art 20 (5)). This right is also recognized under international bill of rights such as ICCPR (Art. 14 (3) (D)). The rationale behind granting this right is that, when a state and a criminal defendant confront at criminal justice proceedings, there exists certainly an inequality of arms. Because the state is powerful, as it has necessary resources, trained man power and sufficient finance to deal with the issue. But when most criminal defendants are seen relatively, they are weak, as they are ignorant of the science of the law and their rights, have no competitive resources when brought before a tribunal that has power to take their life or liberty.*

*Moreover, disparity is observed among jurisdictions in recognition and implementation of the right to legal counsel in criminal charge. The source of this disparity is that some objective and subjective aspects of the right are stated in general terms hence exposed to interpretation. Issues as to the types of persons who need be represented by legal counsel, the types of crimes which call for the participation of legal counsel, and the stage of the criminal justice proceedings at which the right to legal counsel starts to operate need interpretation.*

*When the way these points are interpreted and implemented in Ethiopia in general and in Oromia National Regional state in particular are analyzed, using as a bench mark the international standards and recognized good practices of certain jurisdiction, the state's provision of legal counsel for the indigent criminal defendants is narrowly defined to specific criminal cases leaving out many serious crimes out of the scope of the state's legal aid system. It is also incomplete in practice which doesn't cover all chains of criminal justice process. As a result, it is not strong enough to screen out the innocent from the real perpetrator and to protect the right to a fair trial of the accused.*

***Key words /phrases/***

***FDRE constitution, Oromia, criminal defendant, legal counsel, criminal justice proceedings***

## Acronyms

ABA	American Bar Association
PRI	Prison Reform International
CPC	Criminal Procedure Code
CPTC	Committee for the Prevention of Torture
DCPC	Draft Criminal Procedure Code
ECBA	European Criminal Bar Association
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FDRE	Federal Democratic Republic of Ethiopia
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic Social and Cultural Rights
RPE	Rules of Procedure and Evidence
RTD	Real Time Dispatch
SCPT	Sub Committee on Prevention of Torture
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Committee
USA	United States of America

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# Chapter One

## General Background of the Study

### 1.1 Introduction

The right to legal counsel in criminal charge is recognized under FDRE constitution<sup>1</sup> and the revised constitution of Oromia National Regional State which is a verbatim copy of the corresponding article of the federal constitution.<sup>2</sup> This right has also been recognized under international bill of rights such as ICCPR<sup>3</sup> and the regional human rights instruments such as African Charter on Human and People's Rights.<sup>4</sup> The rationale behind granting this right is that, when a state and an accused person confront at a criminal justice proceedings, the state is comparatively more powerful than the suspect/accused, as it has sufficient finance, trained man power such as the police, and a public prosecutor who is trained with science of the law. But the accused person is mostly weak, as he is ignorant of the science of the law and his rights, hence is at most risk.<sup>5</sup> Therefore to compensate this ignorance of the accused person and balance their bargaining power with the state, the FDRE constitution has recognized the right to be represented by legal counsel in criminal charge. This fact has been stated by Mr. Justice Sutherland<sup>6</sup> as follows:

In criminal trial, even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with

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<sup>1</sup> The Federal Democratic Republic of Ethiopian (FDRE) Constitution, Art 20 (5).

<sup>2</sup> The Revised Constitution of Oromia National Regional State, Proclamation No. 46/2001, Art 20 (5).

<sup>3</sup> International Convention on Civil and Political Rights (ICCPR), Art 14 (3) (d).

<sup>4</sup> African (Banjul) Charter on Human and Peoples' Rights, Art 7 (1) (c).

<sup>5</sup> Hatla Thelle, Paul Dalton, and Klaus Slavensky (2010), *Human Rights to Legal Aid*, Danish Institute for Human Rights, Denmark, at 15.

<sup>6</sup> Justice George Sutherland (1862-1942), was Chief justice of the U.S. Supreme Court, a remarkable man in U.S. and before joining the Court, he was a renowned attorney, legal scholar and sage politician, having served in the Utah State Senate, U.S. Congress, and U.S. Senate. No past or present Utahn has done more for his state or country, or accomplished more as a lawyer than he did. (See Andrew M. Morse (2013), *The New Respect for Justice George Sutherland*, 25 Utah Bar Journal No 5, at 18).

crimes, he is incapable, generally, of determining for himself whether the indictment is just or unjust. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent, irrelevant or inadmissible evidence. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one.<sup>7</sup>

This can be observed from criminal trials where accused persons are tried unrepresented. Many of them (especially illiterate persons) leaving alone arguing for their fair trial rights, they suffer to stand properly. When a trial judge puts some question to them, for instance the existence of mitigating grounds of sentence; they assert some irrelevant facts which do not serve any purpose.<sup>8</sup> For this reason, they need a guiding hand of counsel at every step in the proceedings. Without it, they are at a risk of violation of their fair trial rights and undue conviction as they do not know how to protect themselves from the charge and establish their innocence.<sup>9</sup>

According to the FDRE constitution the right to legal counsel has two parts. The first one is the right to privately retained legal counsel. Accordingly accused persons have the right to be represented by legal counsel of their choice at their own cost. The second part of the right is the right to free legal counsel where the accused cannot afford to hire legal counsel of his own. This means the right to be represented by legal counsel in criminal justice proceedings is not reserved for the wealthy one alone. The constitution clearly extended the right to the indigent people as well.<sup>10</sup> Because, if not, a great injustice would result as a vast majority of the people who are arrested and charged on account of suspicion of commission of crime are indigent and cannot afford to pay market fee of a lawyer. This makes justice a luxurious commodity which is

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<sup>7</sup> David Harris (1967), *The Right to Fair Trial in Criminal Proceedings as Human Right*, 16 International and Comparative Law Quarterly, No. 2, at 364.

<sup>8</sup> *Abdella Kemal v. Public Prosecutor* (Wolmera Woreda Court, Burayu Division Bench, C. F. No. 47788) “The accused was indicted of illegal seizure of urban land and undertaking unlawful construction. Eventually the court convicted him and asked as to the existence of mitigating ground of sentence. The accused stated as a mitigating ground that the money with which he constructed the house was sent from abroad by his wife who is working there. This is completely irrelevant to the question asked

<sup>9</sup> G.S. Prentzas (2007), *Gideon v. Wainwright, The Right to Free Legal Counsel*, Great Supreme Court Decisions, Chelsea House Infobase Publishing, New York, at 37.

<sup>10</sup> FDRE Const. Art 20 (5).

available to the rich minority, to the exclusion of the poor majority and creates a situation where, in practice, laws and rights do not exist for the poor and other vulnerable groups.<sup>11</sup> Therefore, to ensure equality of justice among equally situated, the discriminating effect of poverty should be minimized if not possible to completely avoid. Otherwise the justice provided by the state would be proportional to the amount of money one has, which is clear injustice.<sup>12</sup>

Therefore, this paper is dealing with the second part of the right which is the right to free legal counsel in which the role of the state is vital over privately retained lawyer. For instance the UN Human Rights Committee has declared that, the state is not held responsible for shortcomings of the privately retained lawyer.<sup>13</sup> Therefore, when referring to the right to legal counsel in this paper, it is in a sense of the right to free legal counsel.

## 1.2 Statement of the Problem

As stated above, in the due course of operation of criminal justice proceedings, there exists clearly a great inequality of arms between the parties to the proceeding. Because the state who is at one side of the litigation is represented by the prosecution, such as, the police which is trained with science of crime investigation and the public prosecutor who has knowledge of the constitution, criminal law and other laws, know how to prosecute perpetrators, and uses budget from public treasury. But the suspect/accused is comparatively in a very disadvantaged position as he has no or little knowledge of science of the law and his rights, has no competitive resources. Under such situation it is clear that the suspect/accused would lose the litigation. This scenario can be resembled to a struggle between a very strong and a very weak person the end result of which can easily be predicted. It can also be illustrated by an example of a foot ball match which is plaid on inclined field in which the state represents the party who is playing from the upper side of the field and the suspect/accused from the lower side of the same. In such

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<sup>11</sup> Hussein Ahmed ( 2013), *Indigent's Right to State Funded Legal Aid in Ethiopia*, 2 International Human Rights L. Rev. No. 1 at 120.

<sup>12</sup> G.S. Prentzas, *supra* note 9, at 47.

<sup>13</sup> *Rastorguev v. Poland* (UNHRC, Communication No. 1517/2006), found at <http://www.bayefsky.com/pdf/poland-t5-iccpr-1517-2006> accessed on 10 March 2015.

situation, it is easy for the state party to count as many goals as it needed assisted by earth gravity, and win the match without much cost.

To minimize the above mentioned sources of potential danger to the rights of the suspect/accused, the FDRE constitution has devised a tool to safeguard the rights of the suspect/accused against the stronger power of state, by recognizing the right to fair trial in general and the right to legal counsel in particular, of the criminal defendant. As stated above, the right to legal counsel has two components. These are the right to be represented by legal counsel of one's choice at one's cost and the right to free legal counsel at the state's cost. Article 20 (5) of the constitution reads as:

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 means accused persons to be eligible for the appointment of free legal counsel, first should lack means to hire their own lawyer and second, should be believed that miscarriage of justice would result if the accused is tried unrepresented.

The right to legal counsel is also recognized under article 20 (5) of the Revised Constitution of the National Regional State of Oromia proclamation No.46/2001. This provision is a verbatim copy of the corresponding article of the federal constitution mentioned above. Any accused person, to be eligible for free legal counsel should fulfill the two criteria put by the federal constitution just discussed. Here, what needs consideration is that, the two pre conditions under both the FDRE constitution and the revised constitution of Oromia are general and need interpretation. By virtue of these preconditions disparity is observed even between the federal government and the state of Oromia. For instance there is no as such specific law which defines the sorts of crimes for which the interests of justice require the appointment of legal counsel for the indigent at federal level, whereas in Oromia, the law provides the appointment of legal counsel for a person charged with a crime punishable with not less than 5 years rigorous imprisonment.<sup>14</sup>

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<sup>14</sup> Proclamation to Provide for the Re-establishment of Oromia National Regional State Courts, Proc No. 141/2008, *Megeleta Oromia*, Art 17 (2).

Likewise the right to free legal counsel is preceded by two pre conditions under the ICCPR. These are the means criterion and the interest of justice requirement criterion.<sup>15</sup> At international level, one of the sources of variation across the states parties to the convention in relation to recognition and implementation of the right to legal counsel is that, these preconditions (especially the second one) are general in nature and are open for interpretation. For instance regarding the means criterion as the economic status of states and the fee for lawyers varies across nations, it creates variation among them. Moreover regarding the second criterion, it is not clear as to for what categories of crimes do the interest of justice require the appointment of free legal counsel. Is it felony or misdemeanor/petty offences? At what stage of the criminal proceeding does the right start to operate? These and some other complementary issues are open for interpretation and the discretion power is given to states parties to the convention.

By virtue of this provision some states such as Germany provide free legal counsel for persons suspected/ accused of crimes punishable with imprisonment of not less than one year.<sup>16</sup> Some others such as Republic of Indonesia provide free legal counsel for persons accused of crimes punishable with not less than five years of rigorous imprisonment.<sup>17</sup> Moreover some countries such as Canada and UK provide free legal counsel starting from the time of arrest.<sup>18</sup> Still some others such as Ireland provide at the trial /hearing stage of the proceeding.<sup>19</sup>

When we see the law and practice in the state of Oromia in relation to the above mentioned issues, according to Art 17 (2) of the proclamation No. 141/2008 (Oromia Courts Reestablishment Proclamation), a person to be eligible for free legal counsel, the crime with which he is charged should be punishable with not less than 5 years of rigorous imprisonment. Regarding the stage of the proceeding at which counsel is assigned to the accused, there is no

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<sup>15</sup> ICCPR, Art 14 (3) (d).

<sup>16</sup> See *German Law and the German Legal System, A list of some important things to be aware of*, found at <<http://www.howtogermany.com/pages/legal.html>> accessed on 20 may 2015.

<sup>17</sup> Law of Republic of Indonesia, No. 8 Year 1981, Concerning the Law of Criminal Procedure, Art 56 (1).

<sup>18</sup> Elena Burmitskaya (2007), *World's models of legal aid for criminal cases, what can Russia borrow?* Lambert Academic Publishing, at 29.

<sup>19</sup> Gary O'Sullivan (2010), *The Pre-charge Stage of the Criminal Process: Are the Rights of the Public adequately protected?* found at < [http://corkonlinelawreview.com/editions/2008/2008\\_COLR\\_100.pdf](http://corkonlinelawreview.com/editions/2008/2008_COLR_100.pdf)> accessed on 25 March 2015.

clear law. But practice shows that in Oromia courts assign a lawyer for those qualified as per the law, at trial (hearing) stage of the proceeding.<sup>20</sup>

Therefore the problems with the law and practice of the region in relation to the right to free legal counsel which is the objective of this paper is (1) The approach of the region to interpret the interest of justice criterion i. e. crime which is punishable with not less than five years of rigorous imprisonment is not in conformity with international standards. Because persons accused of crimes which are punishable with less than five years of rigorous imprisonment are facing unfair trial and undue convictions which they would not, had they been provided by this protective tool devised by the constitution. This approach is not compatible with international practices such as case laws of UN Human Rights Committee and other regional Human rights documents. For instance, the European Court of Human Rights has declared the existence of violation of the right to legal counsel for all complaints lodged against member states to the European Convention on Human Rights that do not provide free legal counsel for all sorts of crimes and recommended that free legal counsel should be provided for all crimes that are punishable by a term of imprisonment. The UN Human Rights Committee has accepted this case law as the UN standard for the right to free legal counsel which is recognized under article 6 (3) (C) of the European Convention on Human Rights is a verbatim copy of the ICCPR.<sup>21</sup> Therefore had the case of Oromia been taken to the UN Human Rights Committee, it would have been declared as violation of the right to legal counsel of indigent criminal defendants.

(2) The other point of problem in the region is, even those who are qualified for free legal counsel including those who are charged with capital crimes are provided with a lawyer at the hearing/trial stage of the proceedings. There is no legal assistance at pre trial stage of the proceedings to the criminal suspect. For instance, there is no legal assistance at the police station or during police interrogations for the suspects. When arrested persons are taken to the police

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<sup>20</sup> *Gizachew Wayesa, Solomon Gichillo, & Abdurhaman Borgicho v. Public Prosecutor*, (East Wollega Zone High Court, C. F. No. 23202), “The defendants were charged with capital crime and lastly the first two defendants were sentenced with death penalty. They were assigned with lawyer for the first time on the date of hearing one month after their arrest.

<sup>21</sup> Marion Isobel (2013), *The Right to Legal Aid, Arrest Rights Brief No. 3*, (A Legal Brief Prepared by the Open Society Justice Initiative to Assist Legal Practitioners to Litigate the Right of Arrested or Detained Persons to Free Legal Aid,) Open Society Justice Initiative, at 4, found at <<http://www.justiceinitiative.org>> accessed on 12 March 2015.

station, they are immediately interrogated by the police and their words are recorded without any form of legal assistance given to them. As soon as securing confessions, the police take them to the nearest court to make their confessions be recorded pursuant to article 35 of the CPC. Later on, their confessions are used as evidence against them.<sup>22</sup> But at this stage due to many reasons the suspects are under a strong need of legal assistance. Because, in one hand, they are under the tension and fear of the alleged crime committed and the scene of the arrest. In the other, they fear the police and some abusive words by the same, and every arrangement they might see at the police station such as the weapon of the police. Under such situation the suspects can confess to the court crime which actually they did not commit. Therefore providing legal counsel (preliminary legal assistance) on time, starting from the time of interrogations by the police, highly averts such danger. The existence of legal counsel during the interrogations by the police also impedes the police from torturing the suspect. Therefore due to the absence of legal assistance at pre-trial stage within Oromia, a person suspected of crime and arrested by the police within the region is exposed to such problems and violations of rights.

(3) The other problem in relation to the provision of free legal assistance is when preliminary inquiry is conducted as per article 80 of the CPC of Ethiopia. Preliminary inquiry is a special procedure provided by the law in relation to some serious crimes such as homicide and aggravated robbery. The preliminary inquiry is conducted before the first instance courts of the region where there is no lawyer and no practice of assignment of a lawyer to the suspect. This time the suspect gives his statements without assistance of a lawyer. But as per article 91 of the CPC, all the words of the suspect that has been given during preliminary inquiry is sent to the high court of the region that has jurisdiction to entertain the case and may be used as evidence against them at their trial. But the UN Human Rights Committee has declared that the use of the confessions and words of the suspect/accused as evidence against them which is solicited without the suspect getting legal assistance, constitutes a violation of the right to legal assistance under ICCPR.<sup>23</sup>

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<sup>22</sup> Ethiopian Criminal Procedure Code (CPC), Proclamation No. 185/1961, Art 27.

<sup>23</sup> *Butovenko v. Ukraine*, (UNHRC, 1412/2005, 19 July 2011) found at

<<http://www.opil.ouplaw.com/view/10.1093/law:ihrl/175unhrc11.case.1/law-ihrl>> accessed on 20 April 2015, “The complainant was arrested on suspicion of having murdered two persons in 1999. Shortly thereafter, he was interrogated by police officers in the absence of a lawyer and without having been informed of his rights. He was

(4) The other point of problem is according to the principle of equality of arms,<sup>24</sup> the prosecution and the defense sectors should get equal recognition and treatment by a state in all aspects. Institutional inequality observed between these two sectors has a great impact on the right to a fair trial of the accused. In Oromia the prosecution sector is established independently and has its own budget. But the public defender office is affiliated to courts. It has also no independent budget.<sup>25</sup> This can create many problems to provide quality legal counseling service to the indigents due to work load of courts as they have many tasks to be performed in administration of justice.

### 1.3 Research Questions

This study tries to answer the following questions

- What is the scope of the right to legal counsel under the FDRE constitution? What sorts of crimes does the right to legal counsel cover under it?
- To what kinds of persons does the right to legal counsel operate under FDRE constitution?
- At what stage of the criminal proceedings does the right to legal counsel start to operate?
- Is the provision of legal counsel (public defense service) within the state of Oromia conforming to the international standards of the right to legal counsel? What are the possible effects of its inconformity up on the right to a fair trial of the suspect/ accused?
- What are the possible effects of the absence of legal assistance to the suspect at pre trial stage of the criminal justice proceedings in Oromia?
- Are the eligibility criteria for free legal counsel in Oromia conforming to the international standards? How should the phrases “... miscarriage of justice would result,” in FDRE constitution be interpreted? What are the benchmarks to interpret these phrase?

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convicted on counts of robbery and murder and sentenced to life imprisonment. The Committee found a violation of Art 9 (1) and 14 (3) (d) of the ICCPR.

<sup>24</sup> J.P.W. Temminck Tuinstra (2009), *Defense Counsel in International Criminal Law*, Amsterdam Center for International Law (ACIL), Netherlands, found at <<http://www.dare.uva.nl/document/122661>> accessed on 12 March 2015, at 146.

<sup>25</sup> Oromia Courts Reestablishment Proclamation No. 141/2008, Art 17 (2).

- Is the free legal counsel (public defense) service currently being provided within Oromia effective enough so as to protect the right to fair trial of the people?
- What are the determinant factors to the full enjoyment of the right to legal counsel? What is the extent of each of these factors in Oromia?
- What are the possible effects of the absence of independent public defender office within the region, up on the provision of quality and effective public defense service? What should be done to alleviate the problem?

This short study tries to answer the above main questions and other complimentary ones, to reveal the manner of recognition and implementation of the right to legal counsel in state of Oromia.

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

The scope of the study in relation to thematic area is that, it is confined to the right to legal counsel of a person suspected/accused of crime excluding other similar rights such as the right to legal aid in criminal justice proceedings which is wider and which, the right to legal counsel is only part of it. Time wise it is confined to the duration of time the suspect is arrested up to the last remedy available to the accused to establish his innocence.

Concerning spatial scope it is delimited to the laws and practices within the National Regional State of Oromia vis-à-vis the right to legal counsel. The considered laws include international and regional treaties to which Ethiopia is party, federal laws such as the FDRE Constitution and the CPC which are applicable to the region are dealt with.

Regarding the constraints, in addition to the time and finance constraint, the absence of organized data in the stakeholder sectors of the criminal justice administration and the reluctance of the officials to be interviewed as well as the bureaucracy to consult official documents are the main constraints I faced in due course of this work.

## **1.5 Research Methodology and Data Sources**

To answer the above stated research questions, qualitative research methodology is used. To this end three main tasks are thoroughly performed. The first one is exploring international as well as regional human rights instruments such as treaty laws to which Ethiopia is party, case laws of UN Human Rights Committee and some regional human rights organizations, and recognized good practices of some jurisdictions, to reveal the way some subjective as well as objective aspects of the right to legal counsel, which is stated in general terms under the FDRE constitution, is interpreted and implemented at these levels.

The second task is discussing all relevant laws and practices in state of Oromia in relation to the right to legal counsel. To this end in addition to discussing different laws of the region, data is collected from different stakeholder sectors of the region such as Oromia Supreme Court, Oromia Justice Bureau, high courts and first instance courts as well as, offices of public prosecutors of the region found at different levels, through interviews with their officials and consultation of official documents. Moreover interview is made with public prosecutors currently working on different zones of the region (more than seven zones), judges, public defender lawyers, and the police on different points of the study. Personal experience of the writer is also used as data source, as the writer served as a public prosecutor in the region for two years (2008-2009). Data collected by visiting police stations and observation of trials is also implemented. Cases decided by courts found at different levels of the region which are considered to have potential to show the ongoing practice in the region to this effect are also analyzed.

The third task is comparing the results of the first and the second tasks and determining the conformity or otherwise of the recognition and implementation of the right to legal counsel in state of Oromia to that of international standards, along with their possible effects up on the right to fair trial of the criminal defendant and the state.

## **1.6 Objectives of the Study**

The main objective of this study is to show the conformity or otherwise of the Oromia criminal justice administration to international standards, in relation to the provision of free legal counsel to the indigent and its possible effects up on their right to fair trial. Indeed the vast majority of the people who come in contact with the criminal justice administration within the region are indigent and ignorant of the rights they have under the law. It is to compensate this ignorance of the people that the FDRE constitution and the constitution of the state of Oromia provided them with the right to legal counsel. Therefore when the state fails to provide effective and quality legal counseling service, the violation of the rights of the people at different stage of the criminal justice proceeding is inevitable.

Therefore this study endeavors to bring to the plain view the existing legal as well as practical gaps that exists in Oromia in relation to recognition and implementation of the right to legal counsel there by call the attention of the government of Oromia to this issue, to give proper attention to the problem and find solutions by formulating effective and quality public defense policy. The study also proposed some solutions which the writer believes can rectify the discovered problems.

## **1.7 Significance of the Study**

The aim of this study is to determine the inconformity of the recognition and implementation of the constitutional right, the right to legal counsel of the indigent, in state of Oromia to the international standards of recognition and implementation of the right. It also outlines the possible effects of this inconformity to the state in general and to the individual criminal defendant in particular.

Ineffective legal aid in criminal justice administration costs the state in two ways. In one hand, it increases the cost of criminal justice administration and on the other it reduces production. When a functioning legal aid system is put in place, it reduces the length of time suspects are held in police stations and detention centers, it reduces the no of prison population, prison overcrowding and case backlogs in courts, thereby reducing the no of justice machinery

needed.<sup>26</sup> This in turn reduces the cost of criminal justice administration as the state needs huge finance to provide these large no of detainees and prisoners with basic necessities and also pay the justice machineries needed in such case. Effective legal counseling service also increases productivity as those people who are unduly held in custody are production forces for the state. It also increases the confidence of the people in the criminal justice administration system of the state. Therefore the significance of the study is vital for the state to call the attention of the policy makers of the region to see the existing legal gaps as well as practical problems in relation to the implementation of the right to legal counsel and its effects to the state as stated above.

The study is also significant for individual persons by elaborating the role of the defense lawyer in protecting the rights of the accused in criminal proceedings and the rights they have under the constitution to get free legal counsel at state cost when they cannot afford to hire one. Undue arrest, detention, and conviction has a catastrophic effect up on the entire life of a person. The person's psychology, health, family, career, economy, and social life might be exposed to danger and be hurt as a result. These potential dangers to the criminal suspect/accused can be avoided or significantly minimized by having legal counsel in all stages of the criminal justice proceedings. This study therefore tries to bring this fact to the attention of individual persons and encourage them to claim for their rights.

## **1.8 Structure and Contents of the Paper**

The paper is divided in to four chapters. The first chapter outlines the general framework within which the study is conducted. General background, scope, limitations, significance and methodologies of the study are some of the content of the chapter. The second chapter deals with the significance, legal background and scope of the right to free legal counsel. The third chapter presents different determinant factors and some further practices that undermine the full enjoyment of the right to legal counsel in the state of Oromia. The fourth and the last chapter presents the conclusion of the study and the recommendations proposed by the writer to rectify the problems discovered by the same.

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<sup>26</sup> UN Principles and Guidelines on Access to Legal Aid in Criminal Justice System, Introduction at Para. 3.

## **Chapter Two**

### **The Right to Legal Counsel**

#### **2.1 Definition of legal counsel**

The phrase 'legal counsel' under the FDRE constitution is denoted and defined differently by different scholars and jurisdictions. These include legal counsel, attorney at law, practice of law (legal practitioner), lawyer and advocate are some. Even if there is a slight difference in their definition from jurisdiction to jurisdiction and among scholars, all agree that legal counsel is anyone who possess legal knowledge and legal skill and is licensed to provide legal services which include but not limited to, preparing of legal documents, preparing or expressing legal opinions, providing legal consultation or advice, representing another in judicial, quasi judicial, and administrative proceedings or other formal dispute resolution proceedings.<sup>27</sup> It is also referred to as 'an officer of the court who is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients'.<sup>28</sup>

#### **2.2 Justifications of the Right to Legal counsel**

Criminal justice administration is the most potential area where protected rights of the people are violated. The reason is, when the criminal justice is set in motion, two parties are confronting each other with two competing interests. The first one is a state who has responsibility to protect the people from dangers of crime by prosecuting perpetrators. The second is the criminal defendant who has fundamental rights and freedoms that emanate from the nature of humanity, hence, deserve due respect. When these parties are confronting at a criminal justice proceedings, there exists certainly an inequality of arms. Because state is powerful, as it has necessary resources, trained man power and sufficient finance to deal with the issue. But a

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<sup>27</sup> Rules of the Supreme Court of Arizona, Rule 31, Regulation of the Practice of Law, issued July 3 2003. See also Article 2 (2), (12) of Proclamation No 182/2013 of Oromia; article 2 (2-3) of Proc. No 199/2000 of Ethiopia (Federal courts advocates licensing and administration proclamation).

<sup>28</sup> Deborah M. Hussey Freeland (2012), *What is a Lawyer a Reconstruction of a Lawyer as an Officer of a Court*, 31 Saint Louis L. Rev. No. 425, at 458.

criminal defendant is very weak, as he/she is ignorant of science of the law and his rights, has no competitive resources when brought before a tribunal that has power to take his life or liberty.

It is to mitigate this inequality of arms of the criminal defendant with a state that the FDRE constitution and the Revised Constitution of Oromia recognized the right to legal counsel. This right is also recognized under ICCPR. Under all these legal documents this right has two parts. These are the right to privately retained legal counsel and the right to free legal counsel at state cost.

The other justification of the right to legal counsel in criminal justice proceedings is a nature of criminal sanction. At international level there are two approaches being followed to define the right to legal assistance which is recognized under ICCPR. The first one is the approach which was being followed at the beginning, or the old approach. Accordingly, the right to legal assistance which is recognized under ICCPR is nothing but 'state provision of legal representation in court in criminal cases' or 'state appointed legal counsel'. The justification stated by proponents of this argument is that, since ICCPR explicitly says "any person charged with criminal offence..." the scope of the right should not be widened to encompass other sorts of legal proceedings. But nowadays recent human rights documents and scholars are broadening the scope of the right, to include not only representation of the accused at criminal trials but also in all sorts of legal proceedings. According to this approach, the right to free legal assistance includes provision of legal aid to the needy in all criminal, civil, family, administrative and other areas of legal proceedings. The main justification forwarded by supporters of this argument is that, since the aim of the convention is providing justice and avoiding injustice, and injustice is done not only in criminal proceedings but also in civil and administrative proceedings as well, states are under treaty obligation to provide legal assistance in all legal proceedings that might otherwise result in injustice.<sup>29</sup>

As to the writer of the paper, concerning the need for legal assistance in both criminal justice proceedings and civil justice proceedings, that of criminal justice proceedings has decisive effect up on the person concerned. This is in one hand, to balance the inequality of bargaining power of the parties involved as stated above and in the other, the painfulness of the outcome of the

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<sup>29</sup> Lilongwe Declaration on Accessing Legal Aid in Criminal Justice System in Africa, Para. 1.

criminal justice proceedings, i.e. loss of life or liberty of a person which cannot be measured in pecuniary value unlike that of civil justice proceedings. Therefore the need for legal aid in criminal justice proceedings is more justifiable than that of the civil justice proceedings.

The other justification for free legal counsel is, to avoid or minimize the adverse effect of poverty on the administration of criminal justice administration. According to Art 25 of the FDRE constitution all persons are equal before the law and are entitled to equal protection of the law without discrimination on any ground. By virtue of this provision the state is mandated to provide justice equally to all, without discrimination on any ground.<sup>30</sup> But poverty creates inequality between equals based on economic ground. This occurs when two individuals, one who can hire legal counsel and the other cannot, due to his poverty, are suspected/accused with the same or identical crimes. In such case, the one who is assisted by legal counsel can receive quality justice in all the stages of the proceedings and eventually can even be acquitted as the lawyer protects his interests in all directions. But the indigent who deserve the same justice might suffer violation of his rights at different stages of the proceedings and lastly be convicted due to non representation. Therefore the right to free legal counsel to the indigent serves to minimize such discriminating effects of poverty on the criminal justice administration.

The other justification is the right to fair trial principles. The right to a fair trial is a norm of international human rights law, designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty.<sup>31</sup> In fact the phrase 'fair trial' is not found in the FDRE constitution. But the main elements of fair trial principles are recognized under it in general manner.<sup>32</sup> This right is of little or no avail unless the defendant is represented by legal counsel as these principles are beyond the knowledge of lay man criminal defendant to be fully enjoyed.<sup>33</sup>

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<sup>30</sup> FDRE Const. Art 25.

<sup>31</sup> Jelena Pejic and Vanessa Lesnie (2000), *What is a Fair Trial? A Basic Guide to Legal Standards and Practice*, Lawyers Committee for Human Rights, Washington DC, at 7, found at < <http://www.lchr.org>> accessed on 3 March 2015.

<sup>32</sup> FDRE Const, Art 20.

<sup>33</sup> Jelena Pejic and Vanessa Lesnie, *Supra* note 31, at 7.

The other justification to the right to free legal counsel is the right to due process of law (by the law of the land).<sup>34</sup> The due process principle states that, no person shall be deprived of life, liberty or property without due process of law. This principle imposes procedural limitations on a state's power to take away protected entitlements except via due process of law.<sup>35</sup> Accordingly, state is under obligation among other things, to provide free legal counsel to take any action limiting the protected rights of indigent criminal defendants. Even if this principle is mainly of common law legal traditions,<sup>36</sup> nowadays it constitutes internationally accepted modern criminal law principle. Indeed one cannot find the phrase 'due process of law' under the FDRE constitution. But its principles are recognized under it as the constitution declares the inviolability and inalienability of human rights and freedoms emanating from the nature of mankind.<sup>37</sup> Many of the constitutional rights relating to the administration of criminal justice system emanates from the recognition of the natural rights of the person such as the right to life, liberty, and security of the person. Although Article 17 of the Constitution deals with the right to liberty, it is also a restatement of the due process of law. It provides that "... [n]o one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law". It further provides that "[n]o person may be subjected to arbitrary arrest, and no person may be detained without a charge or conviction against him."<sup>38</sup> Therefore to limit or take away these inviolable and inalienable rights of the people, the state is duty bound to move through proper procedure of the law one of which is providing them with legal counsel to shield them from unfair limitation of these basic rights.

The other justification is the adversarial nature of the criminal justice proceedings. In fact this also is the character of a common law legal system. But it is also applicable to Ethiopian criminal justice proceeding, as the character of Ethiopian criminal justice proceeding has both the inquisitorial and adversarial character. Accordingly, it is believed that truth will emerge out

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<sup>34</sup> Lowell J. Howe, (1930), *The Meaning of Due Process of Law Prior to the Adoption of the Fourteenth Amendment*, 18 Cal. L. Rev. No.6, at 583.

<sup>35</sup> Brandon L. Garrett (2012), *Habeas Corpus and Due Process*, 98 Cornell L. Rev. No. 47, at 63.

<sup>36</sup> IV<sup>th</sup> amendment of the Us constitution. It reads ' no state shall take any citizen's life, liberty, or property without due process of the law'

<sup>37</sup> FDRE Constitution Art 10.

<sup>38</sup> Simeneh Kiros Assefa,(2012), *The Principles of the Presumption of Innocence and its Challenges in the Ethiopian Criminal Process*, 6 Mizan L. Rev. No. 2, at 277.

of the struggle between the two contesting parties presenting their case to an impartial tribunal. The system depends much on the ability of the parties to present their side of the case. To the extent that one side is handicapped by inadequate advocacy the system itself is undermined. Each party to the litigation should do his best to establish a case of his side and destroy the case his opponent is trying to establish.<sup>39</sup> This can hardly be realized without the defendant being assisted by legal counsel.

### **2.3 Significance of the Right to Legal Counsel**

The right to legal counsel has several uses both for the state and the individual criminal defendant. The first and the direct beneficiary of the right is the individual criminal defendant. The defense lawyer plays a critical role in protecting the rights of the criminal defendant in each stage of the proceeding. This includes but not limited to, for instance, in case the arresting authorities fail to produce the arrestee before a court within 48 hours of his arrest<sup>40</sup> or a person is unduly arrested based on false accusations. This time if the suspect has a legal counsel, he can help the suspect be released by convincing the arresting organs that the ground of the arrest is erroneous or by lodging petition of habeas corpus to a competent court of law. The other critical stage of criminal justice proceeding which calls for the assistance of a counsel is the stage of bail/remand hearing. Sometimes the suspect might be denied bail right despite the fact that the crime with which he is suspected is bailable. This time if the suspect/accused is represented by legal counsel he can litigate and convince the police/court that the crime with which the person is suspected is bailable. In case the suspect is remanded, the manner of the detention might be inhuman. This means the detention center might lack the necessary facilities which can be dangerous to the health and wellbeing of the detainee or the detainee might face torture. In such cases, if the detainee has legal counsel, he can lodge petition to the competent court to order the detaining authorities to improve the detention center facilities or/and stop the torture.

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<sup>39</sup> Dereje Iticha (1996), *The Right of the Accused to the Defense Counsel under Ethiopian Law*, A Paper Submitted in Partial Fulfillment of the Requirements for the LLB Degree at the Law Faculty of Addis Ababa University, at 1, (unpublished).

<sup>40</sup> FDRE Const. Art 19 (3).

At the trial/hearing stage the defense lawyer plays several roles some of which are:

- advising the defendant of his or her rights and explaining to him/her what to expect at different stages of the proceeding.
- investigating all the facts and evidences related to the case and lining up witnesses and experts for a defense.
- cross-examining prosecution witnesses, objecting to improper questions and evidence, and presenting all relevant legal defenses on behalf of the defendant.
- ensuring that the defendant's constitutional rights are not violated by law enforcement officials or during court proceedings.<sup>41</sup>

In case of guilty verdict, the participation of a lawyer makes a great deference in sentencing of the accused. The lawyer helps to mitigate the quantum of punishment by raising all the available mitigating grounds. This rescues the defendant from suffering improper punishment. On the other hand, the accused might have been convicted on ill founded indictment, i. e. improper charge or inadmissible evidence, or the amount of punishment imposed by the trial court might be unfair. This time the lawyer plays a critical role in appealing the conviction and/or the sentence to the appellate court by preparing a memorandum of appeal. In general a defendant who is assisted by an effective lawyer is in a better position with regards to the enforcement of his fair trial rights at each stage of the proceeding.<sup>42</sup> Today because of a right to legal representation in criminal trials, countless thousands of people are represented and defended around the world, where they would not have been otherwise.<sup>43</sup>

The second beneficiary from the right to legal counsel is a state. Because ineffective criminal justice administration, costs a state in two ways. It increases the cost of criminal justice administration and it reduces production. When a functioning legal aid system is in place, it reduces the length of time suspects are held in police stations and detention centers; it reduces the number of prison population, prison overcrowding, and case backlogs in the courts, thereby

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<sup>41</sup> Prentzas, *supra* note 9, at 94.

<sup>42</sup> Thelle, Dalton, and Slavensky, *supra* note 5, at 15.

<sup>43</sup> *Ibid.*

reducing the number of justice machinery needed.<sup>44</sup> This in turn reduces the cost of criminal justice administration as the state needs huge capital to provide this large number of detainees and prisoners with basic necessities and also pays the justice machineries needed in such case. This in turn increases productivity as these people who are unduly held in custody are production forces for the state. Functioning legal aid system also increases the confidence of the people in the criminal justice administration system of the state there by enhances political stability.

## **2.4 General Overview of the Right to Legal Counsel under FDRE Laws**

We can establish the right to legal counsel under FDRE constitution in two different ways. The first one is that, it is explicitly recognized under article 20 (5) and article 21 (2)<sup>45</sup> of the FDRE constitution.

Second, Ethiopia has ratified the international bill of rights such as ICCPR under which the right to legal counsel is recognized (Art. 14 (3) (d). According to Art 9 (4) of the constitution, all international treaties ratified by Ethiopia constitute the integral part of the law of the land.<sup>46</sup> Accordingly the right to legal counsel as it is stated under the ICCPR constitutes the integral part of the laws of Ethiopia.

Concerning the manner of interpretation, the constitution has adopted the standard of interpretation of rights recognized under chapter three of the constitution. Article 13 (2) of the constitution reads as: “The fundamental rights and freedoms specified in chapter three of the constitution shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia”.

The other law which recognized the right to legal counsel in Ethiopia is the 1961 criminal procedure code of Ethiopia. Article 61 of the code reads as: “Any person detained on arrest or on

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<sup>44</sup> UN Principles and Guidelines, introduction at para. 3.

<sup>45</sup> Article 21 (2) of the constitution reads as ' All persons shall have the opportunity to communicate with, and to be visited by, their spouses or partners, close relatives, friends, religious councilors, medical doctors and their legal counsel.

<sup>46</sup> FDRE Const. Art 9 (4), “By virtue of this article one can claim rights and litigate in courts, under international treaties ratified by Ethiopia irrespective of the fact that they are published in official gazetas.

remand shall be permitted forthwith to call and interview his advocate and shall, if he so requests, be provided with the means to write.” But the right to free legal counsel is not explicitly recognized under the code.

Other legislation which recognized the right to legal counsel at federal level is the Federal Courts Proclamation No. 25/1996. Article 16 (2) (j) of the proclamation states: “The president of the federal supreme court shall organize the public defense office”. But there is no independent organized office of public defense and promulgated specific law to this effect yet within the country. The right to legal counsel is also recognized under the draft criminal procedure law of the country which is prospective to be proclaimed and replace the old one in force. It reads as: “Any one arrested or detained on suspension of crime has the right to consult and get advice from any consultant of his choice at any level of the criminal justice process or has the right to be represented by a lawyer of his choice at any level of the trial to defend himself from the criminal charge. If the accused person cannot afford to hire his own lawyer and it is believed that this will cause the distortion of justice, a lawyer will be assigned for him from the state.”<sup>47</sup>

The other federal law which recognized the right to free legal counsel is Defense Forces Proclamation. Article 34 (2) of the proclamation states that: “The state shall provide a defense counsel to a person (who renders military service in the national defense forces on a permanent basis) charged with an offence punishable with imprisonment of not less than five years and is unable to retain a counsel”.<sup>48</sup>

But in regular federal courts there is no specific provision of a law to define what constitutes “miscarriage of Justice”. According to the information the writer has secured from interview with a prosecutor at federal court, if a person is charged with serious crime and, he/she cannot afford to hire his/her own lawyer, the courts assign one to represent him at trial. There is no provision of a law which defines what constitutes serious crime. The discretion to assign or deny a lawyer to the indigent is exercised by trial judges.<sup>49</sup>

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<sup>47</sup> The Draft Criminal Procedure Code of Ethiopia, Art 16.(this draft criminal procedure code is prepared 10 years ago, intended to replace the 1961 criminal procedure code of Ethiopia, but not yet proclaimed for unknown reason)

<sup>48</sup> Defense Force Proclamation No.27/1996, Art 34 (1).

<sup>49</sup> Interview with Demoz Amhan, a federal public prosecutor as to the ongoing practice in relation to the assignment of legal counsel to the indigent criminal defendants in federal courts.

### **2.4.1 The Right to Legal Counsel under the Laws of State of Oromia**

Under Oromia National Regional State the right to legal counsel is recognized by two legislations. The first one is Art. 20 (5) and Art 21 (2) of the Revised Constitution of the National Regional State of Oromia, Proclamation No. 46/2001. This is a verbatim copy of the corresponding articles of the FDRE constitution discussed above. The other legislation is the Oromia Courts Reestablishment Proclamation No. 141/2008. This is the implementing law of the right to legal counsel which is recognized under the constitution. It reads as:

- 1, Every person has the right to be represented by a lawyer.
- 2, For anyone who cannot afford to hire a defense lawyer and who is charged with a crime punishable with not less than five years rigorous imprisonment, the court will assign a defense lawyer at state expense.<sup>50</sup>

The detail of the manner of recognition and implementation of this right which is the objective of this paper is dealt with under the following sections.

### **2.5 Scope of the Right to Free Legal Counsel**

As stated earlier all criminal defendants are not eligible to free legal counsel. It is only those who fulfill the criteria set by the constitution that can claim for the assignment of free legal counsel. The same is true under ICCPR. Both have provided two preconditions to be eligible for free legal counsel. These are the ‘means test’ and the ‘interest of justice requirement test’. The ways these two tests are interpreted and implemented in state of Oromia, along with their possible effects, are discussed in sections 2.5.1 and 2.5.2, in comparison with the international standards.

#### **2.5.1 Means Test (financial criterion)**

The first and the main criteria to be eligible for the right to free legal counsel under both the FDRE constitution and ICCPR is lack of means by the suspect/accused to hire private lawyer.

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<sup>50</sup> Oromia Courts Reestablishment Proclamation, No. 141/2008, Art 17(2).

The rationale behind granting this right is to minimize the discriminating effects of poverty upon the criminal justice administration.<sup>51</sup> According to FDRE constitution all persons are equal before the law and deserve equal protection of the law.<sup>52</sup> But poverty creates inequality before the law between equally situated persons. This occurs when two individuals, one who can afford to pay for private lawyer and the other cannot on account of indigence, are suspected/accused of the same or identical crimes; the one who is represented by a lawyer gets quality justice at every stage of the proceeding because of the assistance he gets from the lawyer. But the other who doesn't get the legal assistance might suffer unjust proceeding as he cannot protect his interest himself in the proceedings due to his ignorance of the law. This can go to the extent that the one who is assisted by a lawyer can be acquitted while the other who deserves the same justice is convicted due to the difference created by the participation of a lawyer in one of the proceedings. This creates a situation whereby the kind of trial a man gets depends on the amount of money he has and<sup>53</sup> justice a luxurious commodity which is available to the rich minority, to the exclusion of the poor majority. It also amounts to a situation where, in practice, laws and rights do not exist for the poor and other vulnerable groups. But fair justice is the major concern of any democratic system and cannot be taken for granted.<sup>54</sup>

For instance, in *Pakelli v. Germany* (case law of ECtHR), the complainant was a German national who complained to the court the denial of the state of Germany to assign him defense lawyer as the complainant could not hire his own lawyer due to his financial hardship. The government contested the poverty of the complainant. The court declared the violation of Art 6 (3) (C) of the ECHR.<sup>55</sup>

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<sup>51</sup> ICCPR Art 2.

<sup>52</sup> FDRE Const. Art 25.

<sup>53</sup> Yale Kamisar, Wayne R. Lafave, Jerold H. Israel (1994), *Modern Criminal Procedure, Case comments and Questions*, America's case book series, west publishing co. 8<sup>th</sup> ed. at 83.

<sup>54</sup> Hussein, *supra* note 11, at 120.

<sup>55</sup> *Pakelli v. Germany*, (ECtHR A/4 Judgment of 28 May 1983) found at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=0> accessed on 7 March 2015 "The applicant complained of the refusal of the federal court, in proceedings concerning an appeal on points of law, to appoint a legal aid lawyer for the hearings before that court. The government contested, inter alia, the fact that the applicant was unable to pay for his legal assistance. The court held that although it was impossible to prove "beyond all doubt" that the applicant was indigent at the relevant time, his statement of income supplied to the domestic courts, showed "some indications" of his financial hardship. According to the court, as long as there were no clear indications to the

Here there are two competing issues. The first one is the right of the indigent person to get free legal counsel at state cost. The second is a duty not to waste public finance by providing legal counsel freely to those who are not qualified. Because, if the state provides free legal counsel to all criminal defendants including for those who can hire one by themselves, it amounts to wastage of public finance. Moreover when each and every criminal defendant requires to be defended by public defender lawyer irrespective of the depth of his pocket, a case load of the public defender lawyer would increase thereby decreasing the quality of representation to those who actually deserve the service.

When we see the case of Oromia from this point of view, the screening practice in place is too weak to identify qualified defendants for the right to free legal counsel. According to the data collected from the interview with the public prosecutors and the experience of the writer, when persons who are accused of crimes punishable with not less than 5 years of rigorous imprisonment are put for trial, the trial judge asks them whether they afford to hire their own lawyer or they need assignment of one on the trial bench.<sup>56</sup> Then most defendants respond to the court that they need assigned lawyer including those who are not actually indigent. Then the court assigns them one without ascertaining their eligibility or otherwise for the assignment. Currently there are only 26 public defender lawyers in Oromia.<sup>57</sup> But the region is divided to 20 administrative zones. This means almost 1 public defender lawyer at a zone. Therefore it is not difficult to imagine the impact the weak screening practice can cause up on this single lawyer and how much it reduces the quality of service for those who actually deserve it. Defending all indigent criminal defendants in one zone by one public defender lawyer is equivalent to denying the right. The reason why the people opt for the assigned public defender lawyer over their privately retained one seems, in one hand, to avoid expenditure and, in the other, due to their ignorance about the role of the defense lawyer in protecting their right in criminal justice proceedings. On this point one can identify two factors that undermine the right to legal counsel of the indigent in the region. These are insufficiency of the number of public defender lawyers and the weak screening practice in place.

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contrary, the first of the two conditions contained in article 6 (3) (c), the means test was satisfied and there was a violation of article 6 (3) (c) of the ECHR.”

<sup>56</sup> This practice is at high courts level. There is no practice of assigning defense lawyer for indigent defendants at first instance courts even if they are qualified under the relevant law.

<sup>57</sup> Data from Oromia Supreme Court Human Resource Management Directorate.

## 2.5.2 Merits Test (the interest of justice criterion)

The second eligibility criterion set by the constitution for free legal counsel in criminal justice proceedings is “...the interest of justice” requirement. This is the main source of disparity across member states to ICCPR in terms of recognition and implementation of the right to legal counsel. The questions which need answer here are, when does the interest of justice require the appointment of free legal counsel? What is the yard stick to measure the interest of justice requirement? What sorts of crimes call for the assignment of a lawyer?

Neither the FDRE constitution nor the ICCPR defined the phrase ‘the interest of justice’. But when we see some international practices on this point, for instance the HCtHR has identified three factors that should be taken in to account in determining the interest of justice criterion. These are the seriousness of the offence and the severity of the potential sentence, the complexity of the case, and the social and personal situation of the defendant. Based on these argument, the ECtHR has ruled that, where deprivation of liberty is at stake, the interest of justice mandate legal representation.<sup>58</sup>

The UN human rights Committee also has recently issued principle and guidelines on access to legal aid in criminal justice System. Principle 3 of the document reads:

States should ensure that anyone who is arrested, detained or prosecuted for a crime punishable by a term of imprisonment or the death penalty receives legal assistance and that the legal assistance is free of charge, if the person cannot afford it, at all stages of the criminal justice process, including post-trial proceedings.<sup>59</sup>

In *p. Taylor v. Jamaica*<sup>60</sup> and *Pinto v. Trinidad & Tobago*<sup>61</sup> also, the UN Human Rights Committee held that defendants in cases involving the death penalty have a right to legal

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<sup>58</sup> Adam Stapleton and Brenda Brainch (2011), *Hand Book on Improving Access to legal Aid in Africa*, Criminal Justice Handbook Series, United Nations Office of Drug and Crime, New York, at 56.

<sup>59</sup> UN Principles and Guidelines, Principle 3.

<sup>60</sup> *P. Taylor v. Jamaica*, (HRC communication No. 707/1996, 18 July 1997, para. 8.2.) found at

< <http://www.hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=0>> accessed on 14 March 2015.

representation at all stages of the proceedings when they fail to afford to hire defense lawyer by themselves.<sup>62</sup> To mention some good national practice, for instance, in USA before the case of *Gedion v. Wainwright* (prosecutor in Florida)<sup>63</sup> persons accused of lesser crimes were not represented by free legal counsel. But in 1963 the supreme court of USA decided on the appeal of Clarence Earl Gideon who was charged with the crime of breaking in to someone's home and taking money, convicted and sentenced with five years of rigorous imprisonment without getting legal counsel. Gideon appealed to the US Supreme Court that he had been denied due process right which is granted under the XIV<sup>th</sup> amendment of the U S Constitution, at his trial in the state of Florida. The Fourteenth Amendment to the U S Constitution, he noted, guarantees that no state shall take any citizen's "life, liberty, or property without due process of the law".<sup>64</sup> The court reversed Gideon's conviction, granting him a fresh trial with the assistance of legal counsel. In the second trial Gideon was acquitted after he has got the assistance of legal counsel. This served as a turning point in the history of USA and since then persons suspected/accused of a crime punishable with not less than six months imprisonment were granted free legal counsel save petty offences which do not involve complex issues and serious consequences to the view of the screening organ.<sup>65</sup>

In general it is apparent that according to international standards and recognized good practices, the interest of justice require assignment of free legal counsel for indigent who is suspected/accused of a crime which is punishable with a term of imprisonment or death penalty at all stages of the criminal justice proceedings, including post-trial proceedings.<sup>66</sup>

When we see the case of Oromia from this point of view, according to article 17 (2) of the proclamation No. 141/2008, a person to be eligible for court appointed legal counsel two preconditions should be cumulatively fulfilled. These are:

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<sup>61</sup> *Pinto v. Trinidad & Tobago*, (HRC Communication No. 232/1987, adopted 22 July 1990, para. 12.5), found at

< <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=0>> accessed on 14 March 2015.

<sup>62</sup> Thelle, Dalton and Slavensky, *supra* note 5, at 213.

<sup>63</sup> *Gedion v. Wainwright*, (372 U.S. 342 (1963), Great Suprem Court Decisions, found at <<http://www.landmarkcases.org>> accessed on 23 April 2015.

<sup>64</sup> The Constitution of the United States of America, IV<sup>th</sup> Amendment.

<sup>65</sup> Kamisar, Lafave, and Israel, *supra* note 53, at 75.

<sup>66</sup> UN Principles and Guidelines, Guideline 3.

1, The, person should be a one who lack means to hire a lawyer by himself

2, The crime with which the person is charged should be punishable with not less than five years of rigorous imprisonment.<sup>67</sup> This proclamation excluded from the scope of court appointed legal counsel all crimes punishable with less than five years of rigorous imprisonment. The main question here is what is justification? Why five years? Why not six years or four years or any other number?

This proclamation made unfairness official or legal in relation to crimes that are punishable with less than 5 years rigorous imprisonment as a criminal trial conducted in the absence of the defense lawyer in the side of the accused is clearly unfair. It is not in line with the above stated principle used at international level to decide the interest of justice criterion. Accordingly imprisonment sentence for whatever duration is sever and calls for the participation of defense lawyer as it is imposed against the right to liberty of the accused. Moreover there is no theory or principle of criminal law which separates crimes punishable with five years and above and below five years rigorous imprisonment. It is quite unreasonable and unjustifiable to think that all crimes punishable with five years and above rigorous imprisonment are serious while those punishable with less than five years rigorous imprisonment are not.

For indigents who are charged with a crime punishable with less than five years of rigorous imprisonment, there is no mechanism that shields them from the powerful arms of the state and erroneous conviction, since the law has neglected the tool which is devised by the FDRE constitution and international bill of rights. By virtue of this law all indigent criminal defendants tried at first instance courts of the region are being tried unrepresented. In such situation it is not difficult to imagine the violation of the rights of the indigent defendants that occur at different stages of the criminal justice process at these courts. Therefore article 17 (2) of the proclamation No. 141/2008 of Oromia is a clear de jure violation of the right to legal counsel and the right to a fair trial of the accused in relation to those crimes punishable with less than five years of rigorous imprisonment.

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<sup>67</sup> Oromia Courts Reestablishment Proclamation No. 141/2008, Art 17 (2).

This law stands against the intention of the FDRE constitution. The intention of the constitution is to avoid the discriminating effect of poverty up on the criminal justice administration, as poverty creates inequality between equals. It creates discrimination between the people based on their wealth. But according to article 25 of the FDRE constitution, all persons are equal before the law and deserve equal protections of the law without any distinctions based on any ground. But in Oromia, by virtue of this law if two persons, rich and poor are accused with the same or identical crimes that is punishable with less than five years of rigorous imprisonment, they would get unequal justice. This is so because the rich one can hire a lawyer and defend himself against violation of his rights in the course of the proceedings while the poor one who cannot hire a lawyer is exposed to many violations of his rights at different stages of the criminal justice process. The constitution sought the intervention of the state to avoid such discriminating effect of poverty and this is impeded by this law.

The possible defense that would be raised by the government is resource limitation. But this cannot justify the violation of the right to legal counsel of the indigent. Because, unlike the socio economic rights (ICESCR) resource limitation is not acceptable defense for the failure of a state to fulfill the treaty obligation in case of the right to legal assistance in criminal justice process. This can be justified from two angles of view. The first one is that ensuring the right to legal assistance is not as costly as socio economic rights which require huge investment by the state. For instance, according to the report of the United Nations Office of Drugs and Crime, a public defender scheme was established in Georgia in 2007. The cost of the public defender service, which provides criminal defense services at all stages of the criminal justice process, was \$1.8 million in 2012 in Georgia. This is equivalent to \$0.40 per head of population.<sup>68</sup> This cost is insignificant when compared with its benefits.<sup>69</sup> On the other hand when effective legal aid system is put in practice, it supports national economy in two ways. In one hand it reduces the cost of criminal justice administration by reducing the number of justice machineries and the

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<sup>68</sup> United Nations Office of Drugs and Crime (2014), *Early access to legal aid in criminal justice processes*, (a handbook for policymakers and practitioners, criminal justice handbook series), New York, at 36, found at <<http://www.hdl.handle.net/11204/3821>> accessed on 10 March 2015.

<sup>69</sup> UN Principles and Guidelines, Introduction at Para. 3.

number of pretrial detainees and convicted prisoners. It also increases productivity as those who are rescued from undue detention and imprisonment are production forces for the state.

## **2.6 The Need for Legal Assistance at Pre Trial Stage of Criminal Justice Proceedings**

The other point which is exposed for interpretation is the stage of the criminal justice proceeding at which the right to legal counsel starts to operate. This is not clear from the wordings of neither the FDRE constitution nor the ICCPR. The main question here is, at what stage of the criminal justice proceeding does the right to legal counsel start to operate to serve its purpose?

It is obvious that due to many reasons the pre trial stage of the criminal justice proceedings is a critical stage at which the suspect is in a vulnerable position. The risks posed to the suspect at this stage are, ill treatment such as torture, undue pressure to secure confessions, failure of the authorities to produce the suspect before court of law within 48 hours of his arrest, and poor detention center facilities are some.<sup>70</sup>

Even if it is not clearly provided by the FDRE constitution and the ICCPR, the UN Human Rights Committee, Inter-American Commission on Human Rights and European Court of Human Rights have all recognized that the right to a fair trial requires access to a lawyer during each event at pre trial stage of the proceedings such as detention, interrogations and preliminary investigations. This basic right also finds a range of support in resolutions of the UN human rights committee and the African Commission on Human and Peoples' Rights.<sup>71</sup> Especially the UN human rights committee has consistently held that people accused of criminal offences must be effectively assisted by a lawyer at all stages of criminal proceedings and, a failure to allow access to a lawyer during the initial period of detention and during any interrogations will breach both article 14(3) (b) and (d) of the ICCPR.<sup>72</sup>

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<sup>70</sup> Isobel, *supra* note 21, at 5.

<sup>71</sup> Stapleton and Brainch, *supra* note 58, at 48.

<sup>72</sup> Marion Isobel (2013), *International Standards on Criminal Defense Rights*: UN Human Rights Committee decisions, Open Society Justice Initiative, at 26, found at <<http://www.justiceinitiative.org>> accessed on 5 March 2015.

Among the pre trial stage proceedings at which the suspect needs legal assistance, the time of police interrogations is the critical one. Because the first time the suspect is taken to police station, he/she would be in a great fear and tension for a number of reasons. In one hand the memory of the events during the alleged crime committed and that of the scene of the arrest puts the suspect in an unsettled mind and confusion. Second everything the suspect finds in the police station such as the weapon held by the police, the uniforms of the police, and any other arrangement that the suspect finds, puts him in a great fear. Added to this the suspect has no or little knowledge about his rights and the extent of the legal powers of the police. Under such situation the temptation to say what the interrogators want in the belief that this will mean he/she is released can be overwhelming. This could lead to false confessions and miscarriages of justice.<sup>73</sup>

The other justification for the need for legal assistance during police interrogations is that, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. The fact that police interrogations are conducted in camera exposes the suspect to such danger. According to the UN Subcommittee on Prevention of Torture, the presence of a lawyer during police interrogations may restrain them from resorting to ill-treatment or other abuses.<sup>74</sup> Therefore the presence of legal counsel during police interrogations shields the suspect from such potential violation of rights.

The other event which calls for the assistance of legal counsel at pre trial stage of the criminal justice proceedings is a bail/remand hearing. The right to bail is a basic element of a fair trial right. The suspect might be denied bail despite the fact that the crime with which he is suspected is bailable. Access to legal assistance during such time therefore enables the suspects to challenge the lawfulness and length of their pre-trial detention.<sup>75</sup>

When we see the case of Oromia from this point of view, according to the data collected through the interview with public prosecutors serving at different zones of the region and personal experience of the writer, there is no any system in place to provide legal assistance to the indigent criminal suspects/accuseds at pretrial stage of the criminal justice proceedings. In

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<sup>73</sup> Ibid.

<sup>74</sup> Isobel, *supra* note 72, at 8.

<sup>75</sup> Ibid, at 10.

the region when the suspect is arrested and taken to the police station, irrespective of the nature of the crime with which he/she is suspected, the police continue interrogations immediately after the arrival of the arrestee at police station without the suspect getting any sort of legal assistance. This is done so as to secure confession before the suspect is merged to other detainees found at the station or detention center. The police also persuade the suspects that it is better for them to admit the crime with which they are suspected. Otherwise they do have adequate evidence and if the crime is proved by this evidence, the punishment would be serious.<sup>76</sup> As a result, they tend to admit whatever they are asked by the police. It is for this reason that most suspects admit the crime with which they are suspected during police interrogations and at courts pursuant to article 27 and article 35 of the CPC of Ethiopia respectively, but later on deny the charge when they are put to trial.

There is also a high possibility of use of physical force against the suspects as the investigation is conducted in camera. Abusive words and rebuking the suspects are normal. It is ordinary to hear suspected persons' complaint to courts that they are tortured by the police. Under such pressure the police secure confessions of the suspect pursuant to article 27 of the CPC of Ethiopia. Then, to secure the admissibility of the confessions, the police take the suspects to the nearest court to make their confessions be recorded pursuant to article 35 of the CPC of Ethiopia. The police prior to taking the suspects to the court, inform and warn them to repeat before the court what they have said at police station. In fact the court informs the rights of the suspects including, the right to remain silent and the right to deny the crime before recording the confessions. But still the suspect cannot be free from the influence of the police as the confessions at the court also is recorded mostly at the presence of the police and, as the suspect is taken back to the police station after the record. This time even if the suspect has the right to deny the crime before the court, the fear that they would face torture if they change their words which they had given at the police station makes them falsely confess.

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<sup>76</sup> The writer has interviewed the crime investigator police at Haru Woreda of West Wollega Zone and that of Gimbie Woreda of the same zone, as to the reason why this is done and both responded that when the suspect is merged to other detainees already at the police station and stays with them, he/she gets advice to evasively deny every question of the police and secures confidence to deny the crime with which he/she is suspected. The writer also had been serving as a public prosecutor in the region for two years (from 2008-2009) hence had exposure of the practice in the region. He also has attended police interrogations at different police stations.

For instance in criminal case *Girma Taera & Dagitu Bayana v. Public Prosecutor*, the first defendant was confessed of committing homicide crime at Haru woreda police station and Haru Woreda first instance court on the date of his arrest immediately after his arrival at police station. But later on after some three weeks evidence was discovered that the true perpetrator of the crime is his wife (the second defendant) who was with him at the time of the conflict between the defendants and the victim of the crime.<sup>77</sup> In this case had he got preliminary legal aid during this time he would have not confessed a crime which he actually have not committed. Later on the West Wollega Zone Public Prosecutor charged the true perpetrator of the crime (the second defendant) under article 540 of the criminal code. The West Wollega Zone High Court eventually sentenced her with 15 years of rigorous imprisonment. This case is a good indicator of the risk involved in relying on confessions of the criminal defendants.

In general, there is no any form of legal aid available to indigent criminal suspects at pre trial stage of the criminal justice proceedings in Oromia. This is true irrespective of the nature of the crime with which they are suspected including capital offences. Confessions of the suspects are taken without the suspects getting legal assistance. These confessions are used as evidence at their trial to convict them. The ongoing practice shows that in Oromia (especially in RTD<sup>78</sup> cases) courts highly depend up on the confessions to convict the accuseds.<sup>79</sup> This practice leads to convicting and punishing of innocents such as Girma Taera which is against the criminal policy of the country.<sup>80</sup> Had the fact not been discovered before trial, this innocent person would

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<sup>77</sup> *Girma Taera and Dagitu Bayana v. Public prosecutor*, (West Wollega Zone High Court, C. F. No. 02001) “The first defendant was initially confessed that he has committed a murder crime with which he was suspected at Haru woreda police Station and at Haru Woreda Court. But later on independent evidence was found which proved that the actual perpetrator of the crime was not him but his wife who was with him at the time of the conflict between the victim and the family of the defendants. The writer has interviewed Girma the reason why he confessed a crime which he did not commit and he responded that he was not in a normal mind and he was not knowing what is actually going on due to a situation what he had seen at the scene of the alleged crime committed and due to the fear of the police that he might be punished by them.

<sup>78</sup> See Ministry of Justice & Region Justice Bureaus (Justice Sectors) (2010), *Justice in a Changed Management, Employees and Institutions, (Five Years (2010/11-2014/15) Strategic Plan)*, at 12.

<sup>79</sup> *Umar Yasin v. Public Prosecutor*, (Haru Woreda court, C. F. No. 16868) “In this case the suspect was convicted and sentenced with 1 year and six months rigorous imprisonment solely based on his confession which is secured without the accused assigned with legal counsel or getting any form of legal assistance”.

<sup>80</sup> The objective of criminal law of Ethiopia is inter alia, prevention of crimes by giving due notice of the crime and penalties prescribed by law and should it be ineffective, by providing for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others, or by providing for their reform and measures to prevent the commission of further crimes.

have suffered a punishment of 15 years of rigorous imprisonment which is against international known criminal law principle saying “it is preferable for a guilty person to go unpunished than an innocent person be convicted”.<sup>81</sup> This risk to the innocent person can be avoided or minimized by providing a legal counsel or other forms of legal assistance to the suspects whose task can be stabilizing the suspects and inform their rights such as the right to remain silent, the risk and benefits of confession, the right to security of person, and the duty of the public prosecutor to prove the case beyond reasonable doubt, before interrogations by the police and at pretrial hearings.

## **2.7 The Role of Defense Counsel in Ensuring Fair Trial (hearing)**

The hearing stage of the proceeding is a critical stage as the guilt or innocence of the accused is decided at this stage. There are series of rights of the accused implemented at this stage which necessitates the assistance of legal counsel. These include a right to presumption of innocent until proved guilty, admitting or denying the charge, a right to remain silent, a right to be released on bail pending trial, a right to cross examine prosecution witnesses, a right to adduce evidence to defend oneself, a right to speedy trial, and in case of conviction, presenting mitigating grounds of punishment.<sup>82</sup> This rights and privileges to the accused are beyond knowledge of lay man defendant to be enjoyed. Therefore if the proceeding is wanted to be fair and reasonable, the participation of defense counsel is necessary.

A Commonwealth Human Rights Initiative stated this fact as follows:

A procedure which does not make legal services available to an accused person who is too poor to afford a lawyer and who would therefore have to go through the trial without legal assistance, cannot possibly be regarded as reasonable, fair and just. Thus, the state is obliged to provide free legal

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<sup>81</sup> Janet Hope (1995), *A Constitutional Right to A Fair Trial: Implications for the Reform of the Australian Criminal Justice System*, (A paper submitted in partial fulfillment of the requirements of the Bachelor of Laws with Honors Degree), Australian National University, at 1.

<sup>82</sup> Isobel, *supra* note 21, at 37.

aid to a defendant who is indigent or otherwise disabled from securing legal assistance.<sup>83</sup>

The principle of equality of arms is also ensured at trial stage if and only if the accused is represented by a lawyer. “In criminal proceedings, the principle of equality of arms imposes procedural equality between the accused and the prosecution. Accordingly, the prosecution and the defendant shall be allowed equal time to present their case, their witnesses shall be given equal treatment in all procedural matters”.<sup>84</sup> This can in no means be realized in the absence of a defense lawyer in the side of the defendant.

When we see the case of Oromia from this angle of view, the system in place to provide legal counsel to the indigent criminal defendants is not full and effective enough to ensure the right to fair trial of the accused. It doesn't cover all crimes, and all the chains of the criminal justice proceedings as discussed above under section 2.5 and 2.6. For instance all indigent defendants tried at the first instance courts of the region are tried unrepresented as there is no practice of assigning legal counsel to indigent defendants at this level. As a result, for instance when they are asked by a trial judges to cross examine prosecution witnesses, they respond either they do not have question or they ask irrelevant questions. Even defense service which is in place at zonal level is not strong enough to give effective representation that can fully protect the right to fair hearing of the indigent defendants. This is because of the insufficiency of the no of public defender lawyers in the region. In most zones there is only one public defender lawyer.<sup>85</sup> This increases the case load of a lawyer as discussed under section 2.5.1 above. Representing all indigent defendants tried in one zone by a single public defender lawyer is really a nominal. It is easy to imagine how difficult it is for a single person to have time with each of his clients found in one zone to render effective representation. This can boldly be said almost none representation.

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<sup>83</sup> Navaz Kotwal (ed.) (2010), *Fair Trial Manual*, (A Hand Book for Judges and Magistrates), Common Wealth Human Rights Initiative, at 96.

<sup>84</sup> Isobel, *supra* note 21, at 37.

<sup>85</sup> According to the data collected from Oromia Supreme Court Human Resource Management Directorate, Currently there are only 26 public defender lawyers in Oromia. But the region has 20 administrative zones. This means, there is almost one public defender lawyer at a zone. For instance there is only one public defender lawyer at West Wollega Zone.

## **2.8 The Need for Legal Counsel to appeal and at Appeal Proceedings**

Conviction or acquittal of the accused at trial court is not a final step to determine the fate of the accused in criminal justice proceedings. According to the FDRE constitution accused persons have the right to appeal against their conviction and/or the quantum of punishment imposed on them.<sup>86</sup> The rationale behind the right to appeal is to rectify the errors that might be committed by trial judges. A person might be convicted under wrong provision of the criminal law; the evidence which the trial court relied up on might be inadmissible, or the quantum of punishment imposed might be unfair. To solve such potential problems, the FDRE constitution recognized the right to appeal. But the right to appeal to serve its purpose, a memorandum of appeal should be prepared carefully stating the grounds of appeal or points on which the judgments of the trial court are disputed. The appellant also need to convince the appellate court by oral litigation to consider the errors of the trial court. Otherwise it will be dismissed on account of lack of merits. It is this basic fact which necessitates the assistance of legal counsel to appeal the judgments of trial courts and on appeal proceedings for the indigent criminal defendants.

When we see the case of Oromia from this point of view, there are a number of problems which encounter the convicts to appeal against their conviction and/or sentence. Especially those who are convicted at first instance courts are facing many problems. First, there is no legal aid at first instance courts to assist the indigents who cannot afford to pay for preparation of the memorandum of appeal. As a result they have no way out than serving unfair sentence despite the existence of apparent errors or sufficient grounds to reverse part or all of the judgments passed by trial judges. Because a fee for lawyers is beyond the ability of their pocket to avail themselves the benefit of the right to appeal. The writer has interviewed the paralegals and the lawyers found at West Wollega Zone High Court to this effect and the result showed that they require of their client 500 birr and above to prepare a memorandum of appeal based on the content of the document or the issue involved. This is actually difficult for a laborer and a peasant to afford.

The need to appeal against the judgments of state first instance courts is high in Ethiopian context. Because the probability of the erroneous judgments is high at these courts as the judges

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<sup>86</sup> FDRE Const. Art 20 (6); See also ICCPR Art 14 (5); Eth. CPC Art 185.

serving at this level are not as such qualified by legal knowledge. The criminal jurisdiction of state first instance courts is also under question under the FDRE constitution. This means according to the FDRE constitution, the issue of crime is a federal matter and its jurisdiction is of federal courts.<sup>87</sup> The state courts are exercising jurisdiction over criminal cases by delegation.<sup>88</sup> Under the constitution the state first instance courts have no delegation power of federal courts. The reason why the FDRE constitution refrained to entrust the power of adjudication of criminal cases to the state first instance courts seems that the constitution suspected the competence of the judges serving at this level to protect the right to fair trial of criminal defendants. But contrary to this, the state first instance courts are exercising jurisdiction over criminal matters. For example, in a criminal case *Diriba Tahina v. Public Prosecutor*,<sup>89</sup> the defendant was accused of violating article 555 (B) of the Criminal Code and committing a grave willful injury against a person. The Court convicted him under the same article of the criminal law and sentenced him with a rigorous imprisonment of 2 years and 9 months. The adduced evidence from eye witnesses and expert evidence from Gimbi Adventist Hospital shows that the victim has suffered a slight bone displacement at the joint of his left hand and a 4 cm wide bite on his ear. The victim attended medical treatment for a single day and returned back to his home. The expert evidence from the hospital did not show that the victim has suffered permanent injury that can cause permanent health problem. The hospital did not prescribe rest from work even for a single day.

When we see this case, the crime established by evidence in no means constitute grave willful injury stated under article 555 of the criminal Code. Rather it constitutes a lesser crime stated under article 556 (1) of the criminal code which is punishable only up to one year simple imprisonment. In this case even if the public prosecutor charged the accused under article 555 (B) of the criminal code, the court should have changed the article to the one proved by evidence and convicted the accused under the same, pursuant to article 113 (2) of the CPC. This time the convict is serving his sentence at West Wollega Zone Prison Institution. This case is clearly appealable. But the convict did not appeal as he doesn't know the error involved in his conviction. Had the person been represented by legal counsel he would have appealed and rescued the convict from serving unfair sentence.

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<sup>87</sup> FDRE Const. Art 55 ( 5 ); 80.

<sup>88</sup> FDRE Const. Art. 80 (2).

<sup>89</sup> *Diriba Taina v. Public Prosecutor*, (Gimbi Woreda Court, C. F. No. 17151/06).

The other thing which necessitates the assistance of legal counsel to appeal against his/her convictions and/or sentence is that from the time of conviction onwards the convict remains under the custody of the police. He/she cannot move about freely to obtain a legal profession to prepare a memorandum of appeal. Their fate falls in the hands of their relatives and friends. For a person who doesn't have friend or relative, it is difficult to appeal the judgments of the trial courts. If the person has legal counsel this problem would be avoided as the counsel assists him with all these problems.

## Chapter Three

### **Analysis of the Main Determinant Factors and Some Practices that Undermine the Right to Legal Counsel in State of Oromia**

#### **3.1 The Extent of the Main Determinant Factors to the Full Implementation of the Right to Legal Counsel in State of Oromia**

##### **3.1.1 Introduction**

It is one thing to have an elaborate fair trial rights in a statute, but it is quite another thing to effectively apply and protect that right in practice.<sup>90</sup> Unless the rights recognized under statutes are functional and effective in practice, it is equivalent to denial of that right.<sup>91</sup> In case of the right to legal counsel to the indigent also in a number of cases, the UN Human Rights Committee has held that the obligation of the state party to the convention is not met simply by providing a defendant with legal representation. Such representation must also be effective in practice.<sup>92</sup> Recognizing the right to legal counsel in legislations is not enough to ensure the right in daily practice, for the right is underpinned by different limiting factors. These includes but not limited to:

##### **3.1.2 Independence of the Public Defender Office**

Among different factors which determine the quality and effectiveness of legal counseling to the indigent, one is the type of legal aid delivering mechanism adhered to by the state party. There are sorts of legal aid delivery models in practice in the world. These include public defenders, private lawyers, and contract lawyers, bar associations, paralegals, university law clinics pro bono services and others. Whatever model is chosen, it should be structured and funded in a way that preserve its independence and commitment to those populations most in

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<sup>90</sup> Masha Fedorova, Sten Verhoeven, Jan Wouters (2009), *Safeguarding the Rights of Suspects and Accused Persons in International Criminal Proceedings*, Working Paper No. 27, Leuven University, at 11.

<sup>91</sup> Prentzas, *supra* note 9, at 95.

<sup>92</sup> Thelle, Dalton, and Slavensky, *supra* note 5, at 214.

need.<sup>93</sup> Moreover states are mandated under, regional and international human rights instruments to establish an independent national legal aid institution accountable to parliament and protected from executive interference, to ensure the provision of legal aid to all categories of claimants.<sup>94</sup> Among different models in practice the widely practiced are:

**Public Defender Office Model:** Many states and countries have established government agency, which is independent from the executive interference and accountable to the parliament of the country, known as public defender office. Public defender office is funded directly by the parliament and is accountable to the same. Many criminal law experts believe that the public defender model is the most effective one.<sup>95</sup> In this model, the state employs and pays lawyers to provide legal aid services to the indigent and the vulnerable group of the society.<sup>96</sup>

**Judi care (US) or ex-officio (Europe) Model:** In this model private lawyers make an agreement with government on case by case bases, to represent accused persons for a set fee.<sup>97</sup>

**Contracting Model:** In this model the government contracts a lawyer, a group of lawyers or a nongovernmental organization to provide legal aid services in general for a set fee.<sup>98</sup>

**Mixed delivery Model:** In this model the state employs a mixture of various service delivery models, for instance, public defenders complemented by private contracts with lawyers and/or non-governmental organizations<sup>99</sup>

When we see the case of Oromia from this point of view, there is no independent public defender office charged with the task of providing legal aid in general. This office is affiliated to the courts of the region which have many tasks in administration of justice.<sup>100</sup> It is obvious that when many tasks are merged and performed by one organ or person, it is cost effective. But it should be known that cost is reduced at the expense of quality and effectiveness of ultimate

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<sup>93</sup> The Lilongwe Declaration, parag. 6.

<sup>94</sup> Stapleton and Brainch, *supra* note 58, at 12.

<sup>95</sup> G.S. Prentzas, *supra* note 9, at 95.

<sup>96</sup> United Nations Office of Drug and Crime (2011), *Access to Legal Aid in Criminal Justice System in Africa* (Survey Report), English Publishing and Library Section, New York, at 10.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> Oromia Courts Reestablishment Proclamation No. 141/2008, Art 17 (2).

result. The courts are often overloaded and these additional responsibilities create an extra load.<sup>101</sup> Had an independent sector been established many gaps and shortcomings which are seen today due to this work load in courts would have been eliminated. Specialization is also a good strategy of quality assurance in every work.

The other justification for the establishment of an independent public defender office is the need to assure the independence of the public defense from unwarranted influence of the judiciary. Public defense should be independent not only from the executive branch but also from the judiciary and its machinery. For instance when the public defense sector is not independent from the judiciary the public defender cannot order on the budget of the sector as the circumstances warrant to provide better defense service. It needs to convince the administration of the court to allow the needed finance. This hinders the sector from having its own plans and execute accordingly. For instance the office might need finance to conduct independent investigations to secure different evidences including expert evidences such as the DNA diagnosis, to defend its clients. This also necessitates independent staff and logistics. Absence of both institutional and professional independence therefore highly determines the quality of representation.

The principle of equality of arms and equality before the law also justifies the establishment of independent public defense office. Because its counterpart the public prosecution sector of Oromia is independently organized and also has its own budget which enables it prepare its own plans and perform accordingly without interference of the judiciary. But the public defense sector is not exercising such freedom as it is both institutionally and budget wise affiliated to the courts of the region.

### **3.1.3 Confidentiality of Lawyer-Client Communication**

The other determinant factor to the provision of quality legal representation is the confidentiality of lawyer-client communication. Persons held in custody and convicted prisoners have the right to communicate with their lawyer FDRE constitution.<sup>102</sup> This is to help them in preparation of their defense and appeals in case of conviction. Because, a lawyers' ability to

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<sup>101</sup> Hussein, *supra* note 11, at 128.

<sup>102</sup> FDRE Const, Art 21 (2).

effectively provide legal assistance is dependent upon the circumstances in which they can meet or communicate with their clients. Unless there is a confidential and sufficient communication between them, the suspect cannot feel free to tell every fact involved in the crime charged and the lawyer also cannot raise and discuss with his client every point of possible defense.<sup>103</sup> It is from appreciation of this right that under general jurisprudence of evidence law a lawyer-client communication is privileged (not disclosed at courts) hence inadmissible even if it is relevant to the fact in issue to protect the confidentiality of the lawyer-client communication.<sup>104</sup> The Human rights Committee, in general comment No. 32 stated that counsels should be able to meet their clients in private and communicate with them in conditions that fully respect the confidentiality of their communications.<sup>105</sup> Because even if the right to legal counsel is recognized under statutes, as long as there is no conducive environment that ensures confidential communication, the right cannot serve its purpose. Therefore to ensure confidential communications, private meeting places should be available in detention centers, jails, prisons, courthouses, and other places where defendants can communicate with their counsel.<sup>106</sup>

When we see the case of Oromia from this point of view, most police stations and detention centers are not established taking in to consideration this issue, i. e. in a way that ensure confidentiality of lawyer-client communication. According to the two years work experience of the writer in public prosecution office of the region and the interview conducted with public prosecutors working in the selected zones mentioned before, in all police stations and detention centers found in the zones they are currently working in and worked before, there are no special confidential places which make detainees communicate freely with their lawyers. This constitutes de facto denial of the right to legal counsel.

The practice of assigning public defender lawyer to indigent defendants on the date of trial on trial bench also violates the confidential communication rule. The lawyer and the defendant are required to communicate for few minutes which don't exceed 5, there on the trial bench.

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<sup>103</sup> Isobel, *supra* note 21, at 10.

<sup>104</sup> Kahsay Debesu, & Andualem Eshetu, (2009), *Law of Evidence Teaching Material*, (Prepared under the Sponsorship of the Justice and Legal System Research Institute), at 152.

<sup>105</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

<sup>106</sup> L. Jonathan Ross (2002), *Ten Principles of a Public Defense Delivery System*, American Bar Association, Chicago, at 6.

Then they are asked to admit or deny the crime charged. For instance, in a criminal case *Girma Taera & Dagitu Bayana v. Public prosecutor*, the defendants were accused of aggravated homicide under Art 540 of the criminal code. They were assigned a public defender lawyer for the first time on the date of hearing on the trial bench.<sup>107</sup> Then the court asked them to admit or deny the charge against them, after they have consulted with the lawyer for few minutes there on the trial bench. In such situation it is apparent that the trial bench environment is not free enough to ensure the confidential communication which is vital in providing effective representation and defense.

#### **4.1.4 Adequate Time and Facilities to Prepare Defense**

Each and every work is performed within a time. The adequacy or otherwise of a time given to perform a work has implication up on the end result of the work. Likewise accused persons need adequate time and facilities for the preparation of their defense and to communicate with their lawyers. This right is recognized under article 14 (3) (b) of the ICCPR. This is an important element of the guarantee of a fair trial and an application of the principle of equality of arms. Adequate time and facilities include access to documents and other evidences, and timely notification of the charges. An accused should also be adequately notified about the date of a hearing in order to prepare his arguments and consult with his lawyer. When a state appoints a lawyer, the person should be informed about such arrangement in advance and have sufficient time to discuss all possible defenses.<sup>108</sup> The accused or/and his lawyer should be informed about the evidence which will be brought against him during the trial and should get enough time to conduct its own investigation in order to contest the charges.<sup>109</sup>

The UN principles on the role of lawyers states, ‘It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or

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<sup>107</sup> *Girma Taera & Dagitu Bayana v. Public Prosecutor*, (West Wollega Zone High Court, C. F. No. 02001). (This is a rule not exception. All indigent criminal defendants who are assigned with public defender lawyer are assigned on the date of trial on trial bench. Then they are required to communicate for few minutes there on the bench and subjected to answer the question of a judge to admit or deny the crime charged).

<sup>108</sup> Isobel, *Supra* note 21, at 21.

<sup>109</sup> Michail Wladimiroff (2000), *Rights of Suspects and Accused*, 1 Harvard International Law Journal, No.11 at 423.

control in sufficient time to enable them provide effective legal assistance to their clients'.<sup>110</sup> This includes a copy of confessions and other evidences obtained from the accused. A full and fair enforcement of this principle is a vital requirement for a fair trial. Without full or timely disclosure of the core materials, the defense counsel cannot carry out an in-depth investigation of the facts presented by the prosecution witnesses; can hardly cross-examine prosecution witnesses effectively, whether on the merits of the case or their credibility.<sup>111</sup> For example in *Aston Little v. Jamaica* the UN Human Rights Committee found a breach of article 14 (3) (b) on the ground that the accused was only permitted half an hour for consultation with counsel prior his trial.<sup>112</sup>

When we see the practice in Oromia from this point of view, according to the data collected from public prosecutors serving on zonal level of 7 zones of the region<sup>113</sup> and personal experience of the writer, on the date of trial a trial judge puts a question to the defendant set for trial, whether he/she can hire his/her own lawyer or needs court appointed one. At first instance courts this step is skipped over irrespective of eligibility of the defendant. For instance in a criminal case *Daniel Fite v. Public Prosecutor* at Ganji Woreda first instance court,<sup>114</sup> the accused was sentenced with 5 years and 2 months rigorous imprisonment, without getting legal counsel. Next, if the accused asserted that he cannot afford to hire his own lawyer, the court assigns for him a public defender lawyer at state cost and the accused meets for the first time his lawyer there on the trial bench. Then the court gives few minutes, as stated under section 4.3 above to consult with his lawyer.<sup>115</sup> Next the accused is asked to admit or deny the charge against him/her. If the accused denies the charge, the prosecution witnesses who are summoned

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<sup>110</sup> UN principles on the role of lawyers, principle 21.

<sup>111</sup> Wladimiroff, *Supra* note 109 at 25.

<sup>112</sup> *Aston Little v. Jamaica*, (UNHRC, UN Doc. CCPR/C/43/D/283/1988, at para. 84); found at < <http://www.bayefsky.com/pdf/Jamaika-t5-iccpr-283-1988> > accessed on 27 March 2015.

<sup>113</sup> The writer has interviewed public prosecutors serving on 7 zones of the region i. e. West Wollega Zone, East Wollegazone, Kelem Wollega Zone, Horo Guduru Wollega zone, West Showa Zone, North Showa Zone, and at Oromioia supreme court as to the time charge is served on to the accused and all of them responded that it is on the date of trial before the trial bench.

<sup>114</sup> *Daniel Fite v. Public Prosecutor*, (Ganji Woreda Court C. F. No. 09242) “In this case the accused is charged with a crime of grave willful injury under art 555 (b) of the criminal code and sentenced with 5 years and 2 months rigorous imprisonment. As per article 17 (2) of the proclamation No. 141/2008 of Oromia this person should have been assigned with free legal counsel. But the file says nothing about this issue as the case is decided at Woreda court where there is no practice of assigning free legal counsel for the indigent defendants.”

<sup>115</sup> Personal observation of trials and interview with the public prosecutors and public defender lawyers of selected zones.

in advance are called to be heard. This procedure is normal in all crimes including capital ones.<sup>116</sup>

This practice (assigning a defense lawyer on trial bench and continuing trial at the same time) violates the right to have adequate time and facilities for the preparation of defense.<sup>117</sup> If the accused is given enough time to communicate with his lawyer before his trial, he gets an opportunity to discuss about all available possible defense to challenge the charge. But, the time given by the trial judge to consult with the lawyer is too short to serve this purpose. This practice is also against the principle of the equality of arms between the prosecution and the defense. Because, the public prosecutor who is confronting the accused is making all necessary preparations and arrangements in advance and is equipped with all necessary things to win the case starting from the initial stage. Added to this, among other things, one of the prominent tasks of a defense lawyer is cross examining the prosecution witnesses to challenge the charge. But a lawyer who is introduced with the accused and the charge on trial bench in such unfavorable situation is not believed to effectively cross examine the prosecution witnesses. As a result the benefit of cross examination of adverse witnesses envisaged by the law is defeated.

#### **4.1.5 Competence of the Defense Lawyer**

To provide effective and quality representation, defense lawyers need to have adequate knowledge and skill in the area of criminal law, human rights and other related fields equally with their counterparts in criminal justice administration such as judges, prosecutors and the police. They should possess the necessary training and experience corresponding to the nature and seriousness of the case they handle.<sup>118</sup> States should ensure that all legal aid providers possess education, training, skills and experience commensurate with the nature of their work, including

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<sup>116</sup> *Gizachew Wayesa, Solomon Gichilo & Abdurhaman Borgicho v. Public prosecutor*, (East Wollega Zone High Court, C. F. No. 23202/2003. ‘In this case, the defendants were charged with capital crime and the first two of them were lastly sentenced with death penalty. But they were assigned with defense counsel on the date of their trial for the first time one month after their arrest’.

<sup>117</sup> ICCPR, Article 14 (3) (d).

<sup>118</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle 7.

the gravity of the offences.<sup>119</sup> Defense counsel should never be assigned a case that he/she lacks the experience or training to handle competently, and should be able to decline appointment if unable to provide ethical and high quality representation.<sup>120</sup> The principle of equality of arms also needs public defender lawyers possess training and experience which counter balance that of public prosecutors. Therefore it is a duty of a state to provide capacity building programs to public defender lawyers equally with the prosecution.

But when we see the case of Oromia from this point of view, there is no any practice of building the capacities of public defender lawyers. In relation to the other justice sector professionals there is a better practice in the region. An institution known as the Oromia Justice Sector Professionals Training and Legal Research Institute is established and training the other justice sector professionals such as, judges, public prosecutors, the police, and their supportive staff.<sup>121</sup> These professionals are getting regular training both before joining the sectors and on duty training. The issue and necessity of the public defender lawyers is excluded from this training program. This is an indication of a clear negligence of the state to the role of public defense service in ensuring fair trial which is a main feature of democratic society. This practice also constitutes a clear violation of the principle of equality of arms as the prosecution sector is equipped with all necessary and timely knowledge through such capacity building programs.

### **3.1.6 Sufficiency of the Number of Public Defender Lawyers**

It is clear that there is inverse relationship between workload and the quality of the expected result. This means when the worker is overloaded the quality decreases. Likewise when a defense lawyer is overloaded the representation would be under quality. Therefore, defense counsel's workload, including appointed and other works, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations. One strategy of controlling under quality representation due to high case load is setting national case

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<sup>119</sup> The UN Principles and Guidelines, Principle 12.

<sup>120</sup> Ross, *supra* note 106.

<sup>121</sup> The Oromia Justice Sector Professionals Training and Legal Research Institute has been established by Regulation No. 77/2007, and since 2007 the institute is training law graduates possessing LL.B, Degree for more than two years mandatorily before they join courts and justice bureau as judge and public prosecutor respectively. On duty training is also given in intervals of time according to the plans of their respective sector administration.

load limit by a law or rules of conduct beyond which the lawyer should decline additional appointment.<sup>122</sup>

But when we see the case of Oromia from this point of view, according to the data collected by the writer from stakeholder sectors of the region, currently there are only 26 public defender lawyers serving in the region.<sup>123</sup> When we compare this number with the demand, Oromia region is divided in to 20 administrative zones. This means there is almost one public defender lawyer at a zone. Needless to state the work load that the public defender lawyer is bearing under such small number. There is no set case load limit beyond which the public defender lawyer can decline to accept additional clients. The single lawyer at the post is responsible to represent all criminal defendants at that court. Under such situation the representation can boldly be said ceremonial.

When we see the number of other justice sector professionals in the region, currently there are 1800 public prosecutors,<sup>124</sup> 1505 judges<sup>125</sup> but only 26 public defender lawyers found in Oromia. In the same manner for instance, currently there is only one public defender lawyer found at west Wollega Zone high court. But there are 10 public prosecutors on the zonal level alone. This is a clear indication of a minimum emphasis the government gave to public defense sector. This contravenes the principle of equality of arms which requires the prosecution and the defense sector be given equal treatment by the state.<sup>126</sup> For instance in case of the prosecution sector, if a prosecutor who is handling certain case faces a force majeure which prohibits him from attending a trial, he will be substituted by other prosecutor. But this is not possible in case of public defender lawyer as there is no other lawyer to substitute. In case of complex cases also the public prosecutors at a post will come together and deliberate on how to win the litigation. One prosecutor will compliment the short comings of the other. But this is not possible in public defender lawyers as a result of insufficiency of the number of public defender lawyers.

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<sup>122</sup> Ross, *supra* note 106.

<sup>123</sup> Data collected from Oromia Supreme Court Human Resource Management Directorate.

<sup>124</sup> Data collected from Oromia Justice Bureau Human Resource Management Directorate.

<sup>125</sup> Data Collected from Oromia Supreme Court Human Resource Management Directorate.

<sup>126</sup> Isobel, *supra* note 21 at 15.

One can raise here the role of pro-bono service by advocates (the duty of advocates to render 50 hours of free advocacy service).<sup>127</sup> According to the data collected by the writer from the public prosecutors afore mentioned and advocates serving at East Wollega Zone and West Wollega zone, lawyers mostly render this free advocacy service at their office to different persons on different legal issues including civil matters and family matters etc. Because the law doesn't impose duty specifically in criminal matters. It is only seldom that judges call up on advocates to represent the indigent criminal defendants when the public defender lawyer at post fails to attend the trial and the judges consider the case is serious. The law state that ' the system by which free advocacy service is followed and reported shall be provided by the bureau and Oromia Supreme Court.<sup>128</sup> But there is no systematic way set by these sectors yet, which can make the advocates represent indigent criminal defendants regularly in a way that can avoid or minimize the problem of representation of indigent criminal defendants discussed by this paper.

The other strategy that can solve the problem of insufficiency of the no defense lawyers can be using the senior law students of recognized universities under supervision of senior lawyers or law school staff.<sup>129</sup> This strategy serves two purposes for the state. In one hand it helps the indigent get legal assistance and representation to defend themselves against criminal charge. In the other it gives practical lesson to the students how to defend themselves and others against criminal charge thereby produce defense lawyers for the future. But when the case of Oromia is seen from this point of view, the procedural law in force doesn't allow this potential resource to represent the indigent.

### **3.1.7 The Need for Especial Measure for Vulnerable Groups of the Society**

Certain groups of the society are vulnerable, hence need especial measure, in many area of life to make them enjoy their rights equally with other sectors of the society. This is true in case of the right to legal counsel also. Therefore, special measures should be taken to ensure meaningful access to legal aid for these groups such as women, children and groups with special needs such as the elderly, minorities, persons with disabilities, persons with mental illnesses,

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<sup>127</sup> Article 33 (4) (b) of proclamation No. 182/2013 (proclamation licensing and administration of Advocates and paralegals of Oromia National Regional State).

<sup>128</sup> Proclamation 182/2013 of Oromia, Art. 33 (5).

<sup>129</sup> Thelle, Dalton, and Slavensky, *supra* note 5, at 32.

persons living with HIV/AIDS, etc. Such measures should address the special needs of those groups, including by being gender-sensitive and age-appropriate.<sup>130</sup> But when we see the case of Oromia, there is no especial measure in practice for such groups. The provision of legal counseling service discussed in this paper is conducted uniformly to all irrespective of the sex, age, and other status of the criminal defendant.<sup>131</sup>

## **3.2 Other Practices which Undermine the Right to Legal Counsel in State of Oromia**

### **3.2.1 Inconsistence Between the Law and Practice**

Criminal jurisdiction of first instance courts of the region is not restricted to crimes punishable with less than five years of rigorous imprisonment. Practice shows that they are exercising jurisdiction over criminal cases punishable above five years of rigorous imprisonment also. For instance according to regulation No. 155/2013, a person who unlawfully seizes the urban land of up to 200m<sup>2</sup> and undertakes unlawful construction on it, is punishable from seven years up to fifteen years of rigorous imprisonment and a fine of 40,000 up to 200,000 birr and first instance courts are exercising jurisdiction over it.<sup>132</sup> But, there is no practice of appointing legal counsel for the indigent defendants at these courts. This indicates the inconsistency between law and practice which amounts to a de facto violation of the right to legal counsel. Another confusion vis-à-vis application of the law is that, when a person is accused of concurrent crimes,<sup>133</sup> the punishment is assessed by adding up the individual punishments set for each constituent crime.<sup>134</sup> This time even if each constituent crime is out of the scope of the right to free legal counsel, when they are added up it might rise above 5 years of rigorous imprisonment.

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<sup>130</sup> UN Principles and Guidelines, Principle 9.

<sup>131</sup> Interview made with public prosecutors working on different zones of the region.

<sup>132</sup> *Abdela Kemal v. Public Prosecutor*, (Wolmera Woreda Court Burayu Division Bench, C. F. No. 47788/06). “In this case the defendant was accused of undertaking unlawful construction. The court punished him with five years and six months of rigorous imprisonment and a fine of 40,000 birr without getting legal assistance in the proceeding”. See also *supra* note 114.

<sup>133</sup> The Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No.414/2004 Art 60.

<sup>134</sup> *Ibid.* Art.184 (b).

Therefore the law is not clear whether it includes such crimes or not. Moreover such concurrent crimes are practically being entertained at fist instant courts.<sup>135</sup>

### **3.2.2 The Practice of Real time Dispatch (RTD)**

Real Time Dispatch (RTD) is a crime investigation and prosecution technique launched by government as strategic plan of 5 years in 2010 in relation to flagrant offences, aiming to speed up justice. Accordingly when a person is apprehended in flagrant offence, investigation and indictment is done immediately, mostly on the date of arrest.<sup>136</sup> In all RTD cases conviction is based on the confessions of the accused and the procedure of hearing defense witnesses is skipped over. In this proceeding what is appreciated is the shortness of the time in which the case is decided. But the danger it possesses to the right to fair trial of the accused is not considered properly. Here it is easy to see the influencing hand and the pressure from the prosecution to make the defendant confess. Then the person is convicted and sentenced in a short period of time, mostly within a period of one up to two days. In this process there is no provision of information about the legal rights of the accused; there is no legal assistance to the accused from any angle and there are no defense witnesses. The main justification for the RTD proceedings in the region is speeding up justice. A proverb “Justice delayed is justice denied” is widely heard. But it seems that the counter saying “Justice rushed is justice crushed” have been forgotten. Therefore, this RTD practice is a de facto violation of the right to legal counsel and the right to defense of the accused.

For instance in a criminal case *Umar Yasin v. Public Prosecutor*,<sup>137</sup> the defendant was apprehended, charged, and sentenced with one year and six months imprisonment within one day. In this case the defendant was not represented either with his own lawyer or by court appointed lawyer. The file says nothing about the right to legal counsel of the accused. According to the information the writer secured from prosecutors of selected zones, this is true in almost all RTD cases.

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<sup>135</sup> Interview with Zerhiun Jaleta a judge at Ganji Woreda Court of West Wollega zone.

<sup>136</sup> Ministry of Justice & Region Justice Bureaus (Justice Sectors), *supra* note 78.

<sup>137</sup> *Umar Yasin v. Public Prosecutor*, (Gimbi Woreda Court, C. F. No. 16868), “In almost all RTD cases conviction is based solely on the confession of the accused. Prosecution witnesses are not heard and the procedure of hearing defense witnesses is skipped over.

## Chapter Four

### Conclusion and Recommendations

#### 4.1 Conclusion

The FDRE constitution has recognized the dangers posed to the rights of the criminal defendant due to the imbalance of power that exists between the criminal defendant and the prosecution in criminal justice process. It has also prepared a safeguard tool to the criminal defendant from the powerful arms of the state. The main safeguard tool set for the criminal defendant the constitution, to protect his rights from violation by the powerful state in criminal justice proceedings is, the principles of a fair trial in general and the right to legal counsel in particular. According to the constitution, the right to legal counsel has two parts. These are the right to privately retained legal counsel by one's own cost and the right to free legal counsel of the indigent. There are two justifications for the right to legal counsel in the right to a fair trial. The first justification is the right to legal counsel by itself is an element of a fair trial principle. The second one is, all the other elements of a fair trial rights are beyond the knowledge of lay man criminal defendant hence need participation of legal practitioner in behalf of the accused.

As to the writer of this paper, in Oromia, the recognition and implementation of the constitutional right, the right to legal counsel of the indigent criminal defendants is not in line with the international standards and recognized good practices so as to screen out the real perpetrator from the innocent and to protect the right to fair trial of the accused in the criminal justice proceedings. There is a great legal as well as practical problem in terms of enjoyment of the right to legal counsel in its fullest extent. The applicable laws and the ongoing practice are not effective enough to screen out the innocent from the real perpetrator and to protect the right to a fair trial of the accused in criminal proceedings.

Generally one can see two types of violations of the constitutional right, the right to legal counsel of the indigent criminal defendants. These are de jure violation (violation by law) and de facto violation (violation by practice). The study found that there is no coherent and strong public defense policy in the region. The coverage of the state's legal aid system in criminal justice administration is narrowly defined to specific criminal cases leaving out many serious

crimes out of the scope of the state's legal aid service. Art 17 (2) of the Proclamation No 141/2008 of the region restricts the scope of the right to legal counsel to crimes punishable with five years and above rigorous imprisonment which is unreasonable and unjustifiable. The provision of legal counseling service for the indigent criminal defendants in place is incomplete in practice. It is not continuous throughout the chains of the criminal justice proceedings. Moreover, the practice in place left out the most critical stage of the criminal justice proceeding (the pre trial stage) at which the defendant is exposed to many violation of his rights and the stage which is decisive to make the whole proceeding fair. The system in place also doesn't provide any legal assistance for indigent convicts to appeal against their conviction and/or sentence.

The public defense service in place is only ceremonial which cannot serve the very purpose of the right. It is under quality and not strong enough to challenge the prosecution. Both institutionally and in criminal justice proceedings a clear inequality of arms is observed between the prosecution and defense sectors. As a result, it cannot, earn the confidence of the public, that it can rescue them from violation of their rights in the criminal justice process. One cannot rely on the public defense service in place that it can protect his/her rights in due course of criminal justice process.

Among the causes of the above mentioned drawbacks and shortcomings of the provision of the constitutional right, the right to legal counsel of the indigent criminal defendants, the less emphasis given by the state to the public defense sector is the vital one. Indeed the sector has been highly neglected by the state. It is not seen as necessary part of the criminal justice administration. Moreover the number of public defender lawyers in the region are too small when compared to the demand and to the number of other justice sector professionals. Use of senior law students of recognized universities would have reduced the problem of insufficiency of the number of public defender lawyers in the region. But the procedural law in force doesn't allow such potential resource.

Further factors that undermine the effective implementation of the right to legal counsel of the indigent criminal defendants in Oromia include, among other things, the absence of conducive environment and facilities to insure the confidential communication of the lawyer with their clients which is a necessary element of effective representation, shortness of the time

given to the public defender lawyers to consult with their clients and prepare defenses on trial bench, absence of capacity building programs for public defender lawyers, absence of especial measure for vulnerable group of the society and, ineffectiveness of the public defense delivery model adhered to by the state which is suffering from lack of both institutional and financial independence, as it is affiliated to the courts of the region, are some.

Generally, had strong and effective public defense system been put in practice in the region, the number of unlawful detentions, the number of remand population and the number of convicted prisoners within the region would have significantly been reduced, thereby reducing the costs of criminal justice administration significantly.

## **4.2 Recommendations**

As to the writer of the paper, the following measures can rectify the problems discussed above to meaningfully provide legal aid to the indigent criminal defendants in criminal justice proceedings in National Regional State of Oromia.

Adopting coherent and strong legal aid policy in the region. The public defense sector should be seen as the necessary part of criminal justice administration, and should be accorded due emphasis by the state in all aspects equally with other justice sectors. Article 17 (2) of proclamation No. 141/2008 of the region which narrowly defines the scope of the right to free legal counsel should be repealed. Legal aid should be available to the indigent criminal defendants suspected/charged with all crimes which are complex in nature, have potential to entail punishment by imprisonment and are considered to be beyond the ability of the defendant to be defended by him/herself. Discretion power should be given to the screening organ on case by case bases rather than limiting the right, to certain categories of crimes. Moreover it should be known that the interest of justice requires the assignment of legal counsel for all crimes that can entail imprisonment sentence for whatever length of time according to the international standards and recognized good practices. Especial emphasis should also be given to persons accused of capital offences. Because the most serious offences are capital offences and the most severe punishment is death penalty as it cannot be reversed once executed. Therefore a system should

be put in place which enables persons accused of capital offence to get legal assistance at all stages of the criminal justice proceedings including pre trial, trial, and post trial proceedings.

Preliminary legal aid should be available at police stations as early as deprivation of liberty and before any interrogations by the police or any law enforcement organ. It should also be accessible in all pretrial proceedings. Measures should be adopted to inform arrested persons as soon as they are taken to the police station or detention centers, of their rights under the law including the details of the right to legal counsel i. e. the role of legal counsel in ensuring fair trial and protecting the rights of the suspect/accused. To this effect different strategies can be used, such as preparing pamphlets which possess all the details of the rights of the suspect under the law. These pamphlets can be given to each arrestee as soon as they arrive at police station or detention centers. This can be complemented by different visual aids posted at different corners of police stations and detention centers. Moreover legal education to the general public through mass media also promotes the knowledge of the people about their rights in criminal justice proceedings. Therefore deferent programs dealing with the issue should be prepared and be transmitted through mass medias such as TV, radio and newspapers to raise the knowledge of the public about their legal rights when charged on account of suspicion of committing crime. Adopting legislation that automatically makes inadmissible, the confessions of the suspect solicited without providing him/her preliminary legal aid to restrain the police and the law enforcement organs from collecting unlawful confessions in violation of the rights of the suspect.

Legal assistance should be available to those who want to appeal against the judgments of the trial courts. This includes assisting in preparation of the memorandum of appeal and litigating on appeal proceedings. Police stations, detention centers, and prison institutions should ensure the rights of the convicts to communicate freely, confidentially and for ample period of time with their lawyer to discuss about the grounds of appeal and to prepare a memorandum of appeal. To this effect, all police stations, detention centers, and prison institutions should possess the necessary facilities to ensure the confidential communications of the inmates with their lawyer.

Measure should be adopted to make the public defense service accessible by all sectors of the society. Moreover especial attention should be given to vulnerable groups such as women, juvenile offenders and others to make the service accessible by taking into account their

respective needs so as to make them practically enjoy their rights in the criminal charges. Persons charged with criminal offences should be given enough time to consult with their lawyer and prepare their defense for the charge against them. To this effect measures should be adopted to serve the copy of the charge on to them before the date of trial.

Establishing independent public defender office which assumes the responsibility of provision of all sorts of legal aid. Ensuring its independence both from the executive and the judiciary branches of the state. This includes allocating independent and sufficient budget to it. This is the most strategic approach to provide quality and effective legal aid service including free legal counsel in criminal charge to the indigent. The public defender office should be equipped with all the necessary logistic and human resources so as to counter balance that of the prosecution sector. Moreover the number of public defender lawyers should be equal to that of the public prosecutors to ensure their equality of arms. Setting caseload limit by law or code of conduct as a strategy of quality assurance. A legal framework which enables senior law students represent the indigent criminal defendants at courts should be adopted. This reduces the problem of shortage of lawyers and helps to produce defense lawyers for the future. Ensuring strong administration of the public defender lawyers. This includes having quality code of conduct to this effect.

Public defender lawyers should get equal capacity building training opportunities equally with that of the public prosecutors. To this effect pre work and on duty trainings should be given to them. The job security, salary and other remunerations of public defender lawyers should be equal to that other criminal justice professionals to attract competent personnel to the post so as to provide quality public defense service.

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## Interviews

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- Interview with Ato Getu Wadajo a public prosecutor at North Shoa Zone conducted through telephone on 13 March 2015.
- Interview with Ato Mulisa Abdisa a Public prosecutor at Oromia Justice Bureau, conducted through telephone on 5 March 2015.
- Interview with Ato Negaro Garba a Public Prosecutor at West Wollega zone conducted at his office on 12 August 2014.
- Interview with Ato Negaro Getahun a defense lawyer at West Wolega Zone Conducted at his office on 14 August 2014.
- Interview with Ato Salamon Mitiku Crime investigator police at Gimbi Woreda of West wollega Zone Conducted through telephone on 23 March 2015.
- Interview with Ato Salamon Warku a public prosecutor at East Shoa Zone conducted through telephone on 19 March 2015.
- Interview with Ato Zarhiun Jaleta a judge at Ganji Woreda Court, through telephone on 11 May 2015.
- Interview with Demoz Aman a Public Prosecutor at federal courts, Conducted through telephone on 12 April 2015.
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