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THE RIGHT TO REPRESENTATION BY CRIMINAL DEFENSE COUNSEL IN ETHIOPIA: A CRITICAL ANALYSIS

ABSTRACT. This paper explores and critically reflects on the legal foundations and the practice of criminal defense in Ethiopia within the overall due process framework of a fair criminal trial. A brief review of Ethiopian constitutional history shows that the right to representation by legal counsel has been one of the fundamental due process rights granted to accused persons in criminal proceedings. The constitutional right to counsel is, however, not specified by detailed legal provisions. A logical consequence of this is that the enjoyment of this right is fraught with legal and practical problems. While the legal problems, among other things, include obscurity regarding the scope and content of the right, the practical problems include absence of public defense offices at district levels where the vast majority of criminal proceedings take place. Consequently, accused persons appear during trials without the aid of legal counsel; they are in fact deprived of their due process rights and marginalized. This has a number of legal ramifications both to the accused and the criminal justice system. In sum, the constitutional provision of the right to criminal defense counsel is undelivered and remains a hollow promise. It is therefore difficult to uphold the constitutional norms which underlie criminal trial process such as procedural justice, as well as the legitimacy of the government. The justice sectors are responsible to ensuring due process and equal protection. Substantial justice reforms are needed at all levels.

I INTRODUCTION

The right to representation by a legal counsel is one of the fundamental rights of criminal suspects and accused persons. It is guaranteed as a universal due process right under international human rights treaties. It is also subject to constitutional and other legislative protections around the world. In Ethiopia, the right to a defense counsel is clearly recognized under Article 20 sub-article 5 of the

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Constitution of Federal Democratic Republic of Ethiopia (FDRE). The provision states that ‘accused persons have the right to be represented by a 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’. There are also other subsidiary legislations that provide for the right to representation by a legal counsel.

The legal rationale and the practical advantage of the right to the accused is hardly controversial. Particularly, in adversarial criminal justice systems where control of the criminal proceedings is primarily in favor of the prosecuting power of the government, the recognition and full enjoyment of this right is essential. Since the Ethiopian criminal procedure is adversarial in its nature,¹ the recognition and proper protection of the right to criminal defense counsel is imperative. There is no doubt that the protection of such fundamental due process rights reduces the possibility of procedural injustices and enhances the prospects of a fair criminal proceeding. The scope and content of the right to counsel as well as the accessibility of criminal defense services, particularly for indigent defendants, that are proposed in the constitutional and other legislative measures need to be clear, comprehensive and effective.

This paper explores and critically reflects on the current state of indigent legal defense services in the Ethiopian criminal justice system. More specifically, it analyzes the legal foundations and the practical challenges of criminal defense services in Ethiopia. The paper attempts to identify and describe systemic problems in indigent legal defense in Ethiopia, highlighting the social prejudices emanating from the inadequacy in the criminal justice system and makes recommendations in addressing the problem. Accordingly, the paper focuses on a number of key issues pertaining to the due process right to representation by legal counsel in Ethiopia.

Instead of primarily focusing on the specific principles of the right to representation by legal counsel as embodied in the Ethiopian criminal justice system and the myriad of issues pertaining to it, however, the paper addresses the significance of the right to counsel within the procedural justice framework of a fair criminal trial. It sheds light on the vagueness and unfairness of the scope and content of the right to counsel in Ethiopia. Thereafter, the constitutional and

¹ Dolores A. Donovan, ‘Leveling the Playing Field: The Judicial Duty to Protect and Enforce the Constitutional Rights of Accused Persons Unrepresented by Counsel’, *Ethiopian Law Review*, 1 (2002), 38.

legal foundations of the right to legal counsel, procedural justice, the criminal justice policy, and a relevant court decision will be analyzed. The impact and ramifications of criminal proceedings where the accused is not represented by (effective) counsel is also discussed. Finally, the paper addresses the limitations of *pro se* criminal proceedings as common practice in the Ethiopian criminal justice system.

II FAIRNESS AND THE SIGNIFICANCE OF THE RIGHT TO COUNSEL IN THE ADMINISTRATION OF CRIMINAL JUSTICE

Fairness is one of the essential qualities of criminal justice administration. Fairness is not only the means of, but also the benchmark by which criminal justice processes can be legitimized.² The right to fair administration of justice is a basic principle of rule of law in a democratic society.³ The non-observance of this right, no doubt, undermines all other human rights and, a judge cannot reach a substantively fair decision if there has been a gross violation of the right.⁴

The right to a fair trial upholds a series of individual due process rights ensuring the proper administration of justice from the moment of suspicion to the execution of sentence. This includes the right to effective access to justice, the equality of arms, fair composition of an independent court, public hearing, and judgement pronounced publicly within a reasonable time and a number of other rights recognized both at the international level and in domestic laws including the national constitution.⁵

Some scholars categorize the requirements of a fair trial in criminal proceedings into four general categories. These procedural justice categories relate to the character of the court, the public nature of the

² Sarah Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Oxford and Portland, 2007), p. xix.

³ Piero Leanza and Ondrej Pridal, 'The Right to Fair Trial', in *The Right to a Fair Trial: Article 6 of the European Convention on Human Rights*, European Monographs, 87 (Alphen aan den Rijn, 2014), p. 7.

⁴ Piero Leanza and Ondrej Pridal, *supra* note 3.

⁵ *Ibid.*

hearing, the rights of the accused in the conduct of his defense and, finally, a miscellany of other single rules.⁶

The right to legal assistance is in the third category, i.e., within the category of the rights of the accused in the conduct of his defense.⁷ This signifies that the right to counsel is one of the constitutional guarantees for, and an essential component of a fair trial.⁸ Fair and impartial administration of criminal justice requires that a defendant should not stand alone to face the power which the government may bring to bear in a criminal case.⁹ It is generally understood that an accused person cannot be ensured a fair trial unless he/she is represented by a lawyer.¹⁰ Hence, a trial without a counsel is fundamentally unfair.¹¹ It is, therefore, vital for any criminal justice systems to have effective representation of criminal suspects and accused persons by legal counsel as one of its core components alongside its other machinery such as prosecution, adjudication, and corrections to operate fairly and effectively.

A trial without the assistance of a criminal defense counsel often results in a number of complicated and serious ramifications both for an individual/his family and the criminal justice system. Initially, it impedes the ability of the accused to assert the rights she/he may have to establish her/his innocence or to raise mitigating circumstances if he/she is found guilty; and hence, this puts at risk the right to be heard. It also amounts to a violation of equal protection under the law; and moreover, it circumvents the adversarial criminal justice system. All these legal challenges illustrate that the right to a counsel is an important safeguard of a fair trial. It is not a luxury, but rather it is a matter of necessity, in criminal proceedings.¹² In a nutshell, the criminal defense lawyer representing the accused plays a critical role in criminal procedure. It is the primary structural guarantee of fair-

⁶ Harris, David, 'The Right to a Fair Trial in Criminal Proceedings as a Human Right', *The International and Comparative Law Quarterly*, 16/2 (1967), 354.

⁷ Harris, David, *supra* note 6, p. 354.

⁸ John B. Taylor, *The Right to Counsel and Privilege against Self-Incrimination: Rights and Liberties under the Law*, (ABC-CLIO, Oxford, 2004), p. 14.

⁹ Jim Thompson, 'Student Counsel. New Aid for Indigent Criminal Defendants', 50/1 (1959), 44.

¹⁰ Joel Samaha, *Criminal Procedure*, 8th edn (Belmont, 2012), p. 409.

¹¹ John B. Taylor, *supra* note 8, p. 57.

¹² Joel Samaha, *supra* note 10, p. 410.

ness in the justice sectors, as well as the single most important source of validation for an individual conviction.¹³

However, it has to be noted that the provision of effective defense lawyer for criminal suspects and the accused alone cannot cure all sorts of injustices in the criminal justice system; it is not the only panacea for the wide variety of systemic injustices in the criminal justice system. The presence or absence of a criminal defense counsel is just one piece of a much larger puzzle of systemic dysfunction.¹⁴ Generally speaking, the essence of the argument can be summarized in the following observation by Natapoff¹⁵:

The presence of counsel advances but cannot guarantee fair trials. More fundamentally, a lawyer in an individual case will often be powerless to address a wide variety of systemic injustices. A defendant may be the victim of overbroad laws, racial selectivity in policing, prosecutorial overcharging, judicial hostility to defendants, or harsh mandatory punishments and collateral consequences, none of which his lawyer can meaningfully do anything about.

There are multiple factors that can contribute to the criminal justice system's inability to do justice. These might include both the substantive rules, as well as irregularities, and limitations surrounding the enforcement of procedural laws.¹⁶

Some of the unfair results in the criminal justice system stem from the substantive criminal law itself. This is the case because all legitimate criminal justice practices and processes emanate from the law.¹⁷ Substantive injustice can occur as a result of discrimination or partiality in the definition of what is punished and what is not.¹⁸ This happens when the legislature deliberately chooses to depart from the goal of punishing people according to what they deserve. They are injustices by design and are therefore not irregular, or unpredictable.¹⁹ The substantive injustices are the most important and the most dangerous unfairness

¹³ Alexandra Natapoff, 'Gideon Skepticism', *Washington and Lee Law Review*, 70/2 (2013), 1049.

¹⁴ Alexandra Natapoff, *supra* note 13.

¹⁵ *Ibid.*

¹⁶ Matthew Robinson and Marian Williams, 'The Myth of a Fair Criminal Justice System', *Justice Policy Journal*, 6/1 (2009), 2.

¹⁷ Matthew Robinson and Marian Williams, *supra* note 16.

¹⁸ George P. Fletcher, *Basic Concepts of Criminal Law* (New York and Oxford, 1998), p. 210.

¹⁹ George P. Fletcher, *supra* note 18.

because they result in an innocent bias. The effects of such entrenched bias is widespread, and cannot be easily rooted out, just as in other forms of unfairness such as police brutality, or corruption, prosecutorial misconduct, bribery, and so forth.²⁰

Injustices might also result from errors in the implementation of the law, and/or other types of structural limitations in the system itself. Potential bias, bribery, corruption, and institutional inaccessibility in the administration of justice as well as the absence of willingness on the part of the administration of justice may also play a part in causing injustices. The lawyers might make mistakes which cause a result that is unfair.²¹ Furthermore, limitations on resources for investigating crimes and prosecuting offenders; the participants' imperfect knowledge and talent; and as well the system's institutionalized reliance seeking judicial truth on fallible observation and memory of witnesses (who may forget, lie, misidentify suspects, or disappear or who are never identified) may all cause an unfair result.²²

One might hope for perfect substantive justice but seeking an ideal procedural justice is impossible. A perfect procedural justice would imply the total avoidance of mistakes. This is a dangerous illusion. Courts will always make mistakes even if the rules of procedure are designed to seek the truth as well as to protect the dignity and the rights of the accused. Procedural justice is not always attainable; it is always subject to improvement.²³

The following section examines the legal foundations of the right to criminal defense counsel as it has been recognized in Ethiopia with a view to testing whether the due process right is reasonably a primary guarantor of fairness of criminal justice process or whether it is a hollow promise.

III THE LEGAL FRAMEWORK OF THE RIGHT TO A DEFENSE COUNSEL

3.1 *The Historical Context*

The right to legal counsel has historically been the subject of protection under both the Constitution and other laws in Ethiopia. In the

²⁰ Matthew Robinson and Marian Williams, *supra* note 16, p. 14.

²¹ Matthew Robinson and Marian Williams, *supra* note 20.

²² *Ibid.*

²³ George P. Fletcher, *supra* note 18.

constitutional history of the country, the last three constitutions, ratified by the successive regimes that ruled or have been ruling Ethiopia, recognized the right to criminal defense counsel as one of the fundamental rights and freedoms of individuals. These constitutions are the 1955 Imperial Ethiopian Constitution; the 1987 Constitution of the People's Democratic Republic of Ethiopia and the 1995 Constitution of the FDRE.

It was the 1955 Ethiopian Constitution that recognized the right to counsel for the first time in the legal and constitutional history of Ethiopia. Article 52 of this constitution provided for the right along with other fair trial guarantees. This provision reads: 'in all criminal prosecution the accused, duly submitting to the court, shall have the right to speedy trial and to be confronted with the witnesses against him, to have compulsory processes, in accordance with the law, for obtaining witnesses in his favor at the expense of the government and to have assistance of counsel for his defense who, if the accused is unable to obtain the same by his own funds, shall be assigned and provided to the accused by the court'.²⁴ The right to criminal defense counsel at state expense under this provision was available to anyone prosecuted regardless of the gravity of the crime.

In a similar vein, the 1987 constitution of the socialist government of Ethiopia had also recognized the right to defense counsel under Article 45 in sub-article 2. The provision clearly envisaged that 'any accused person has the right to defend himself or appoint a defense counsel. Where a person is charged with a serious offense and his inability to appoint a defense counsel is established, the state shall appoint one for free of charge, as determined by law'.²⁵ Unlike its predecessor, however, this constitution had limited the right to a criminal defense lawyer only to those individuals charged with a serious offense. Therefore, this provision marked the introduction of additional requirements. The gravity of the offense with which accused persons are charged is added to the eligibility requirement for obtaining the assistance of a publicly funded legal counsel. The only requirement under the previous constitution was proof of indigence.

The current constitution of the FDRE also explicitly recognized the right to criminal defense counsel. The pertinent constitutional provision that provides for the right to counsel is article 20 sub-article 5. It states that 'accused persons have the right to be represented by a legal counsel of their choice, and, if they do not have sufficient means

²⁴ The 1955 Revised Constitution of the Empire of Ethiopia.

²⁵ The 1987 Constitution of the People's Democratic Republic of Ethiopia.

to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense.²⁶ The constitutions of the national regional governments/member states in the Ethiopian federation contain nearly the same provisions.²⁷

The constitutional right to criminal defense counsel under all three constitutions is fundamentally similar. They are all stated in a general manner. In principle, formally stated fundamental rights and freedoms incorporated under constitutions need implementation rules to be fully respected and enjoyed. However, there has never been any such law that clearly details the content of the right to criminal defense counsel and other procedural aspects associated with the full enjoyment of the right.

Apart from the provision of the constitution, at this particular moment, there are some subsidiary legislations, and a non-binding policy document that reiterate what has been enshrined in the constitution in a similar fashion. These are the 2011 Criminal Justice Policy of the FDRE, the 1961 Criminal Procedure Code of Ethiopia, Defense Forces Proclamation No. 27/1996 (as amended by Proclamation No. 343/2003), and Proclamation to Provide for the Re-Establishment of Oromia Courts No. 141/2008.

The 2011 Criminal Justice Policy of the FDRE, the first ever policy in the history of the country's criminal justice administration, states more generally that the criminal justice sectors, particularly the Investigative Police Officers, the Public Prosecutors, and the Courts, are responsible for ensuring that persons charged with crime are represented by criminal defense lawyer.²⁸ This policy was framed to ensure that the accused is equally represented in the criminal proceeding.

Among the subsidiary legislations that incorporate provisions dealing with the right to a criminal defense lawyer, the 1961 Ethiopian Criminal Procedure Code is the main one. According to Article 61 of this Code, 'any person detained on arrest or on remand shall be permitted forthwith to call and interview his advocate and shall, if he so requests, be provided with the means to write'.²⁹ Article 17 sub-article 2 of the Proclamation to Provide for the Re-establishment of

²⁶ Constitution of the Federal Democratic Republic of Ethiopia (FDRE) Proclamation No. 1/1995.

²⁷ Hussein, Ahmed Tura, 'Indigent's Right to State Funded Legal Aid in Ethiopia', *International Human Rights Law Review*, 2/1 (2013), 131.

²⁸ The 2011 Criminal Justice Policy of the FDRE, Section 4.7.

²⁹ The 1961 Ethiopian Criminal Procedure Code.

Oromia Courts No. 141/2008 and Article 34 sub-article 1 of Defense Forces Proclamation No. 27/1996 (as amended by Proclamation No. 343/2003) are also among the legal frameworks for the right to counsel in Ethiopia. The former states that ‘every party to a proceeding has the right to a counsel. The court shall assign a defense counsel to an individual who is accused of a crime punishable with a rigorous imprisonment not less than five years’.³⁰ The latter law is almost the same as the former. It declares that ‘the State shall provide a defense counsel to a person charged with an offense punishable with imprisonment of not less than five years and is unable to retain a counsel’.³¹

The protections of the right to criminal defense counsel, as provided in the policy document and the subsidiary legislations, appear to be as sweeping as the constitutional protections guaranteed under the three successive constitutions discussed earlier. Such laws are supposed to provide detailed implementation rules. However, they failed to effectively address one of the chronic legal problems with regard to the right to defense counsel in Ethiopia, i.e., the lack of detailed rules of implementation of the constitutional protection of the right to counsel. This legal problem is the source of all other legal challenges and obscurities surrounding the right to counsel in Ethiopia. This will be discussed later, following the brief survey of the nature of the right to criminal defense lawyer as recognized in the FDRE Constitution and other pertinent laws that are currently in force.

3.2 *A Negative or a Positive Right?*

Article 20 sub-article 5 of the 1995 FDRE constitution has two parts. The first part of the provision provides for the right to privately retain criminal defense counsel by those with their own resources. The second part provides for the right of indigents to be represented by public defenders. Those who privately procure a legal counsel at their own expense have a negative right while those who are too poor to hire a private lawyer have a positive right to representation by legal counsel at state expense. Thus, the right to representation by legal counsel, as provided in the FDRE Constitution, is either a negative right or a qualified positive right in its nature depending on the

³⁰ The Proclamation to Provide for the Re-establishment of Oromia Courts No. 141/2008.

³¹ Defense Forces Amendment Proclamation No.343/2003.

financial status of the accused or criminal suspect. The provision treats accused persons with an adequate resource to pay for the services of a lawyer differently from those who do not have sufficient financial means to pay for services of a legal counsel.

Primarily, as it is clearly stated in the first part of this constitutional provision, any accused person who has adequate resources to retain private attorney for his criminal case has an uncircumscribed right to hire a legal counsel of his choice to assist him/her in his/her defense. This is an unlimited and unqualified right to privately retained legal counsel. Accused persons therefore have the liberty to put up the best private defense he/she can arrange. The right is a negative right in the sense that the state cannot interfere with this right as long as the accused is financially capable of, and is willing to, hire a legal counsel of his choice.

There are, however, some practical impediments for the criminal suspects and/or accused persons who can retain a counsel of their own choice. The first such impediment is related to government intimidation of criminal defense lawyers who represent criminal suspects or accused persons whom the state prosecutes on political grounds. The unavailability of private attorneys in many districts is another serious problem in this regard.

Secondly, as enshrined under the second part of Article 20 sub-article 5 of the FDRE Constitution, where an accused person does not have sufficient means to procure legal counsel of his choice, there is a redress for such personal misfortune. Such accused persons shall be provided with legal representation at state expense; the fact that an accused is indigent calls for a public redress. However, it has to be noted that there is another qualification to this. An indigent accused with no sufficient means shall be provided with legal representation only if the judge is satisfied that *pro se* criminal proceedings would result in miscarriage of justice.³²

There are two tests for the right to publicly supported defense. The first of the two tests is what is known as the 'means test' and the second test is related to 'the requirement of a miscarriage of justice'. To pass the means test, indigence has to first be proven, and also to pass the requirement of justice test, courts must be satisfied that criminal proceedings without the aid of legal counsel would result in a miscarriage of justice in that particular case. The state will have the duty to provide legal representation at its expense in criminal pro-

³² Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, Article 20 Sub-Article 5.

ceedings in which these requirements are fulfilled. Therefore, the right to representation by legal counsel is a positive right.

Therefore, in Ethiopia, the right to mount a defense through the aid of legal counsel should not be a commodity available only for those with adequate resources to pay for the services of a lawyer; individuals with personal misfortune of indigence can also mount a defense through the use of a publicly funded legal counsel on their side.

The FDRE constitutional provision providing for the right to representation by legal counsel, particularly the second part which deals with an indigent accused's right, is characterized by obscurity; it lacks clarity in some respects.³³ The provision is vague, ambiguous and open to interpretation. Consequently, there are a number of unsettled questions and issues surrounding the right. These are:

- (1) Does the right arise promptly upon an encounter with the criminal justice system? Is it available only upon request by the accused? In other words, how are the initial contact and subsequent relationships between the accused and the legal counsel, particularly the publicly funded legal counsel, established?
- (2) When can one say that the accused does not have sufficient means to pay for representation by legal counsel of their choice? Who determines whether the accused has insufficient means? What is the practice?
- (3) What constitutes 'miscarriage of justice'? Who determines that 'miscarriage of justice' would result if criminal proceedings are pursued pro se? What factors are, or should be, taken in to consideration when determining this?
- (4) What does the phrase 'to be provided with legal representation at state expense' imply? Does this mean that the state has to provide lawyers? If so, does this requirement oblige the government to establish and organize the office of defense lawyers? Can the state discharge its duty by providing the accused with sufficient means to hire their own attorneys?
- (5) At what stage of the criminal proceeding is access to and representation by legal counsel available? Is the criminal suspect entitled to legal counsel during the pre-trial stage? Is the right still available during post-conviction criminal proceedings?

Coupled with some other practical challenges to be discussed later in this paper, these problems profoundly impair the full enjoyment of

³³ Hussein, Ahmed Tura, *supra* note 27.

the right to representation by a legal counsel. These issues are of paramount importance for the legitimacy and efficacy of the criminal justice system; and they should be specifically and meticulously addressed if one really believes that this constitutional provision can act as a remedy for the politics of crime that ignores the interests of criminal suspects and accused persons. There is, however, no separate legislation enacted or in sight that is aimed at settling these issues. Hence, an extended and detailed examination of and reflections on these questions and issues is necessary.

3.3 Establishing Initial Contact Between an Accused and the Legal Counsel

There is less probability that an accused person will request access to or representation by legal counsel unless he/she is aware of the fact that he/she has the right to legal counsel. Even when the accused is aware of his/her right to representation by legal counsel, he/she might be reluctant, or ignorant in asking to be provided with or to retain legal counsel unless he/she has prior knowledge of the nature of criminal justice proceedings and the significance of the right thereof. Many people are not aware that having a lawyer can make a difference in outcomes of legal proceedings. Most accused do not request legal assistance due to lack of a culture of counsel in the country. Therefore, the line of argument that claims an accused is entitled to legal counsel only if he/she has requested this is hardly convincing. It would be implausible to expect an accused to be proactive in this regard since many of those who have contact with the criminal justice system are unaware of the significance of the right.

Despite this, however, there is no clear rule that requires police and judicial authorities in Ethiopia to inform an accused of the right to representation by a legal counsel during arrest and at the pre-trial stage. The police and courts are legally required to inform the criminal suspect, or a person accused of a crime, in only two aspects of due process rights. Firstly, the individual has the right to be informed that he/she has the right not to answer questions and that any statement he/she may make may be used as evidence against him/her in court.³⁴ Secondly, he/she has the right to be informed of the rea-

³⁴ The 1961 Ethiopian Criminal Procedure Code, Article 27 & Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, Articles 19 & 20.

sons for his/her arrest and of any charge against him/her.³⁵ The practice in Ethiopia is such that the accused will only be informed of his/her right to representation by legal counsel when he/she is brought before a court for trial. This limitation jeopardizes the ability to prepare and present his/her defense due to inadequate time.

Thus, the paper argues that it is necessary to have an institutionalized procedural mechanism that is set in motion once the person apprehended reaches the first critical stage of the criminal proceeding through which initial contact with legal counsels is established. To this end, it is essential to have a referral system between the police and/or the public prosecutor, on one hand, and the office of defense lawyers on the other. Putting in place a legally established mechanism of linking the person in conflict with the law with the legal counsel is vital. This line of argument is based on another underlying argument that the right to representation by a legal counsel, whether at one's own expense or at state expense, should be available to an accused at the earliest possible stage that is critical enough to impact the outcome of the proceeding. Cognizant of this, the 2011 Criminal Justice Policy of the FDRE has stipulated that any future legislative enactment on the matter should incorporate a legal provision that imposes the duty to inform criminal suspects of their right to representation by legal counsel either at their own expense or at the expense of the state.³⁶

3.4 *Eligibility to Obtain Legal Assistance at State Expense*

Criminal suspects or persons accused of a crime have the right to criminal defense counsel at state expense if two conditions are met. First, if they do not have sufficient means to pay for legal assistance, and second when the interests of justice so require. The first is known as means test while the latter is known as merits test. These two conditions are set both under domestic laws in many countries and international agreements. To cater for the circumstances in which the interests of justice and/or financial means can be taken into account, legislation should establish how eligibility is to be determined, and by whom, or should require the legal aid body to regulate the mechanisms by which eligibility is to be determined in a clear, transparent and consistent way.³⁷ The following section focuses on the law and practice in Ethiopia in this respect.

³⁵ *Supra* note 34.

³⁶ The 2011 Criminal Justice Policy of the FDRE, 4.7.

³⁷ United Nations Office on Drug and Crime, *Early Access to Legal Aid in Criminal Justice Processes: A Handbook for Policymakers and Practitioners*, Criminal Justice Handbook Series (Vienna, 2014), p. 68.

3.4.1 *The Use of Means Test in Assessing Poverty*

Proof of poverty of an accused is one of the essential requirements that must be established for an indigent accused to be eligible for legal assistance at state expense. Therefore, there has to be an assessment as to whether the criminal suspect and accused has the necessary means to pay for the services of a legal counsel. An accused is expected to adduce necessary evidence for this purpose. He/she bears the burden of proof. This is known as the ‘means test’ and it is commonly employed in many countries. This requirement is clearly enshrined under Article 20 sub-article 5 of the FDRE Constitution. The phrase “if they [accused persons] do not have sufficient means to pay for it [legal service]” in this provision is indicative of this requirement.³⁸ This test is needed “to ensure that those who cannot afford legal services are provided with them when the interests of justice so require and that those who have the means should contribute towards their legal costs in whole or in part”.³⁹

The means test generally incorporates an assessment of a myriad of factors. These factors vary from country to country and in most cases include assessment of income, expense, assets, and liabilities. Countries usually set financial threshold. For instance, “the financial limitation for qualification for legal aid is set at US\$ 50 per month in Ghana and at 5,000 naira per month (or US\$ 43) in Nigeria”.⁴⁰

Moreover, procedural aspects of the means test, particularly, the way the veracity of these factors is established also varies across jurisdictions. Some countries require a declaration by an accused under oath, and others rely on the testimony of witnesses. In Zimbabwe, for instance, applicants for legal assistance ‘are asked to fill in declaration forms that show, among other things, employment history, banking accounts, assets held and ownership of immovable and movable assets. The declaration is done under oath’.⁴¹ The veracity of the evidence of poverty produced can be proved by the testimony of witnesses as is the case in Iran.⁴²

³⁸ Constitution of the Federal Democratic Republic of Ethiopia, Article 20 Sub-Article 5.

³⁹ United Nations Office on Drug and Crime, *Access to Legal Aid in Criminal Justice Systems in Africa: Survey Report* (Vienna, 2011), p. 19.

⁴⁰ United Nations Office on Drug and Crime, *supra* note 39, p. 20.

⁴¹ United Nations Office on Drug and Crime, *supra* note 39.

⁴² Sahar Maranlou, *Access to Justice in Iran: Women, Perceptions, and Reality* (New York, 2015), p. 97.

In Ethiopia, despite the recognition of the means test as a mechanism by which those who can procure legal counsel on their own are filtered from those who cannot, there is no law that provides detailed rules regarding the list of criteria used to assess whether an accused is truly indigent. Furthermore, the procedural aspects of the means test are also not governed. There are no procedural rules on how the veracity of the evidence adduced by an accused is established. Even the consequences of false claims in this regard are not explicitly addressed. The lack of detailed substantive and procedural rules in this regard means that there is no guarantee against arbitrariness in the determination of eligibility. The lack of consistent standards of the means test can cause conflicting decisions by courts in similar situations.

It is also worth noting that there are some commentators who are critical of the need for the means test. In other words, there is an argument for removal of the test from eligibility requirement for obtaining legal assistance. The critics argue ‘where the majority of the population falls below the poverty line, it is questionable what purpose a means test can serve to assist those who nonetheless need it to access legal aid’.⁴³ Arguably, ‘it would make little sense to apply means testing in a country like Zambia, where the large majority of the population is without means to pay for any type of legal services. Introducing any kind of means testing would create further obstacles for people to have access to justice and legal services’.⁴⁴

In the Ethiopian context such critique appears to be cogent and appealing since a significant portion of the Ethiopian population is poor. But this line of argument should be approached with due care. With such cautionary note, Dessalegn⁴⁵ wrote:

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.

⁴³ United Nations Office on Drug and Crime, *supra* note 39, p. 20.

⁴⁴ *Ibid.*

⁴⁵ Desalegn Gemechu Negeri, ‘The Right to Legal Counsel in Ethiopia: A Case Analysis in Oromia’, LL.M Thesis, Addis Ababa University, Addis Ababa, 2016, p. 30.

3.4.2 *Evaluating the Miscarriage of Justice: Definition and Determination*

The potential for miscarriage of justice is one of the two requirements that must be fulfilled for an indigent to be provided a legal counsel at state expense. Two issues are pertinent in analyzing this requirement. One is related to the meaning of the phrase ‘miscarriage of justice’ and the other is related to who determines whether a miscarriage of justice would result if criminal proceedings are pursued *pro se*.

The term miscarriage of justice is not defined anywhere under the constitution, the criminal procedure or other legislations in Ethiopia,⁴⁶ and consequently, it is subject to interpretations. Some consider the fact that this requirement is vague as somewhat deplorable. On the other hand, others deem it something that deserves praise. For instance, Muradu Abdo seems to support the fact that the requirement of assessing a miscarriage of justice is open to interpretation. As provided in Hussein,⁴⁷ Murado wrote:

In some sense, the elasticity of the term miscarriage of justice in the Constitution is commendable since it leaves room for Ethiopian judges to see the circumstances of each case and allows them to broaden the scope of the right progressively. The concept of miscarriage of justice in the constitution does not commit itself to any concrete situation. It seems that the words miscarriage of justice may apply, depending on the situation, even to a person who is accused of an offense entailing a loss of liberty for any length of period.

Contrary to this line of argument, and with disregard to other factors that might affect the outcome of any case, such as an accused’s personal and social background as well as complexity of the case, there is a propensity among judges, public prosecutors and legislatures, to define what constitutes miscarriage of justice based only on the potential sentence, in terms of imprisonment, that the criminal offence carries.

In fact, some writers have endorsed the practice of heavily relying on the gravity of the charge when determining if a miscarriage of justice could happen. One among such writers is Hussein A. Tura. According to Hussein,⁴⁸ ‘to determine the meaning of miscarriage of justice in Ethiopia lessons may be drawn from the Center for Civil and Political Rights’ (CCPR’s) jurisprudence. In explaining circum-

⁴⁶ Hussein Ahmed Tura, *supra* note 27, p. 132.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

stances requiring legal assistance, the CCPR has indicated the importance of the gravity of charges and the need for objective assessment of the chances of success of an appeal determining the assignment of free legal counsel'. One can also argue that Muradu Abdo also lent support to this practice while cautioning against an expansive construction of the requirement of assessing a miscarriage of justice under the constitution. He unequivocally stated, as seen from Hussein,⁴⁹ that 'an ambitious construction of the clause would be unreasonable. If construed liberally, in the Ethiopian context, the term miscarriage of justice would probably require the state to hire a counsel for an indigent person charged with almost every type of offense and at all stages of criminal proceedings'.

This view appears to have been accepted by legislatures. There are legislations endorsing this view, i.e., setting the minimum sentence that the offense with which an accused is charged carries in order for him/her to be eligible for representation by legal counsel at state expense. These legislations are: Article 17 sub-article 2 of the Proclamation to provide for the Re-Establishment of Oromia Courts No. 141/2008 and Article 34 sub-article 1 of Defense Forces Proclamation No. 27/1996 (as amended by Proclamation No. 343/2003). These two legislations have substituted the requirement of assessing miscarriage justice, provided under the constitution, by a minimum sentence that the offense with which an accused is charged carries. Accordingly, as it has been provided under both legislations, the offense with which an indigent person is charged should carry a minimum of 5 years imprisonment for the indigent accused to be represented by a legal counsel provided at state expense.

These laws have thereby removed the discretion that is inherent in the constitutional provision. Now, therefore, regarding criminal proceedings governed by the two proclamations, anyone who has the mandate to assess whether an accused deserves to be provided legal assistance at state expense does not resort to the subjective assessment of whether miscarriage of justice would result if proceedings are pursued *pro se*, rather he/she has to look at the minimum years of imprisonment that the offence with which an accused is charged carries.

Both the practice and the legislations that rely on the minimum years of imprisonment to which an accused might be subjected as the sole factor to be taken into consideration while assessing whether an indigent accused deserves to be represented by a legal counsel pro-

⁴⁹ *Ibid.*

vided at state expense are criticized by many on numerous grounds. One line of criticism suggests that any assessment of the requirement should take into account not only the potential years of imprisonment to which an accused might be subjected, but also the complexity of the case and the personal and the social background of the accused. Milki⁵⁰ argued that ‘to satisfy the interests of justice standard, it would not be sound that a person should face serious charges such as capital punishment and life imprisonment’. Even if the crime with which an accused is charged is not a serious crime carrying a minimum of 5 years imprisonment, miscarriage of justice might result where an accused cannot defend himself due to ignorance of the law.⁵¹ These criticisms are informed by well-established practice in other jurisdictions. The European Court of Human Rights (ECtHR), for instance, takes into account three factors to determine whether the requirement of miscarriage of justice necessitates the provision of publicly funded legal counsel. These are the seriousness of the offense and the severity of the potential sentence; the complexity of the case; and the social and personal situation of the defendant.⁵² It is necessary to take all the factors into account. But it has to be noted that the existence of anyone of these factors does suffice to justify the need for provision of free legal aid services.⁵³

Moreover, the above legislations, and the practice have utterly disregarded individuals suspected of or accused of committing crimes that do not lead to a sentence of imprisonment in the event of conviction. The two legislations and the practice of the courts are based on an erroneous underlying assumption that miscarriage of justice would only result if a person is subjected to imprisonment for a prolonged period of time.

The constitutionality of such laws is also questionable. On one hand, they narrow down discretion that is provided under the constitution without sufficient legal justification. On the other hand, the setting of a 5 years sentence as the standard for entitlement to representation by legal counsel at state expense is simply arbitrary. Such

⁵⁰ Milkii MekuriaYadessa, ‘The Right to Counsel of Children in Conflict with the Law: Case Study in Adama’, *Oromia Law Journal*, 5/1 (2016), 128.

⁵¹ Girmay Assefa, ‘The Role and Practical Application of Public Defender and the Rights of Accused Person in Ethiopia the Case of Addis Ababa City’, LL.B Thesis, St. Mary’s University, Addis Ababa, 2013, p. 9.

⁵² Open Society Justice Initiative, ‘Legal Aid in Europe: Minimum Requirements under International Law’, 2015, p. 4.

⁵³ Open Society Justice Initiative, *supra* note 52.

laws not only generate disparity in sentencing but also discriminate amongst accused persons without any outlined objective criteria.

Regarding the authority that has a mandate to determine whether a miscarriage of justice would result if criminal proceedings are pursued *pro se*, both the aforementioned legislations and practice conventionally mandate judges. According to the Proclamation to Provide for the Re-establishment of Oromia Courts No. 141/2008, the power to assign legal counsel for an accused is bestowed upon courts.⁵⁴ So, it is the judge/courts that make an assessment as to whether an accused deserves publicly funded legal assistance. Because there is no specific procedure by which the case of a criminal suspect is brought before a court of law for the determination of the same during pre-trial stage, the court can only assess this after a charge is framed against an accused.

This legal practice is not only in line with, but is also an endorsement and legitimization of, the stance that the right is available to an indigent accused only at the trial stage. It appears to have tacitly excluded the possibility of representation by legal counsel at state expense before the trial stage. Therefore, from the practical point of view, whether an accused is entitled to representation by a legal counsel at state expense before trial is not an issue at all. Consequently, an accused and/or his counsel will not get ample time to prepare a defense.

3.5 *Models of Legal Representation at State Expense*

It has to be noted here that ‘the right to a publicly supported defense is not the same as the right to a public defender’.⁵⁵ A public defender is only one model of providing an indigent accused with legal assistance at state expense. There are various alternative ways of publicly providing legal assistance to the poor. Lomasky,⁵⁶ for instance, suggested two ways of publicly providing eligible accused with legal assistance. These are the direct provision of lawyers to those in need and affording them enhanced purchasing power.⁵⁷

⁵⁴ The Proclamation to Provide for the Re-establishment of Oromia Courts No. 141/2008, Article 17 Sub-Article 2.

⁵⁵ Loren E. Lomasky, ‘Aid Without Egalitarianism: Assisting Indigent Defendants’, in *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law*, ed. by William C. Hefferman and John Kleinig, Practical and Professional Ethics (New York and Oxford, 2000), p. 95.

⁵⁶ Loren E. Lomasky, *supra* note 55.

⁵⁷ *Ibid.*

One way this can be achieved is by giving them lawyers. But another way of meeting this need is to provide them means adequate to hire their own attorneys. Similar alternative modes of provision characterize many social welfare programs. The state can directly provide schools to children, or it can give families cash/education vouchers; for the most part, it provides schools. The state can directly provide food to the poor, or it can give them cash/food stamps; for the most part, it provides cash and food stamps.⁵⁸

Schulhofer and Friedman⁵⁹ have also proposed a voucher system. As per this system, each accused person would be given a receipt, or voucher, which would permit him to select his own attorney. The attorney would handle the case and then submit the voucher to the appropriate government agency in order to be paid, either for the number of hours worked or on a set fee per case.⁶⁰

Different countries employ various models of providing indigents with legal representation at state expense. The most common models are the public defender model (a system that provides legal representation through the establishment of a government agency staffed by full-time lawyers), the *judicare* model (a system whereby the public purse pays private practitioners to defend indigent persons charged with serious offenses), and the contracting model (the government enters into a contract with a law firm or an individual attorney to provide legal assistance in a certain number of cases for a fixed fee per case).⁶¹ In the United States of America, for instance, three main ways of providing counsel to indigent defendants are in place. These are:

the assigned counsel system, in which a court appoints a private attorney to represent the accused; the contract counsel system, in which an attorney, a nonprofit organization, or a private law firm contracts with a local government to provide legal services to indigent defendants for a specified dollar amount; and public defender programs, which are public or private nonprofit organizations with full-time or part-time salaried staff.⁶²

⁵⁸ *Ibid.*

⁵⁹ Stephen J. Schulhofer and David D. Friedman, 'Reforming Indigent Defense How Free Market Principles Can Help to Fix a Broken System', *CATO Institute Policy Analysis*, 666 (2010), 3.

⁶⁰ Stephen J. Schulhofer and David D. Friedman, *supra* note 59.

⁶¹ Penal Reform International and Bluhm Legal Clinic of the Northwestern University School of Law, *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality*, (Illinois, 2007), p. 59.

⁶² Penal Reform International and Bluhm Legal Clinic of the Northwestern University School of Law, *supra* note 61.

Each system has its own merits and demerits. At this point, the paper will not delve into a detail examination of the respective merits and demerits of each model and will not evaluate which system befits in the Ethiopian context, rather the paper tries to identify and reflect upon the model being employed in the country currently.

The provisions providing for the right to counsel in Ethiopia, both under the constitution and the other legislations, have not explicitly prescribed how the legal representation at state expense is to be provided, apart from obliging the government to provide eligible accused persons with legal representation at state expense. In other words, no specific model of legal assistance to the indigent is envisioned. Therefore, it is open to adopting and employing any kind of innovative way of providing legal counsel to the poor at state expense. Despite this possibility, however, it has to be noted that it is the public defender model that is currently being employed in Ethiopia as a conventional and standard mode of publicly providing legal assistance to the poor. The use of this model has a legal base. The reading of Article 16 sub-article 2 (j) of the Federal Courts Proclamation No. 25/96 supports this view. This provision imposes the duty to establish an office of public defense on the President of the Federal Supreme Court.⁶³ Similar provisions are found under laws by which the courts of the member states in Ethiopian Federation are established. Article 8 of the Revised Southern Nations, Nationalities and Peoples Regional Courts Proclamation No. 43/2002 can be mentioned. These laws imply that the Office of Public Defense is an agency of the judiciary in Ethiopia. As a result, the Office is under formal control of the judiciary. Moreover, this is tantamount to tacit recognition that indigent defense in criminal proceedings is one the responsibilities of the judiciary.

Like the legal provisions providing the right to counsel, the legal provisions that call for the establishment of an office of public defense are so sweeping that there is a myriad of obscure issues with respect to the organizational aspects of the public defense office. Among others, public defense office's lack of structural and financial independence from the government and the courts; lack of national standards for public defender caseloads, etc. are the pertinent problems surrounding the public defense office in Ethiopia. It is beyond the scope of this paper to provide a thorough assessment of the institutional arrangements for organizing, funding and operating the office of public defense.

⁶³ Federal Courts Proclamation No. 25/96, Article 16 Sub-Article 2 (J).

3.6 *Scope of the Right to Criminal Defense Counsel*

Another critical issue that is worth assessing is whether the right to counsel in Ethiopia is available at all stages of criminal justice processes. The law in this respect seems to be equivocal.⁶⁴ Part of the explanation for this is due to the fact, under the FDRE Constitution, the right to counsel is listed as one of the rights of persons accused.⁶⁵ On the other hand, one cannot find the right to counsel under Article 19 of the FDRE Constitution which states the rights of persons arrested. It is essential to note that the Constitution distinguishes between persons arrested, and persons accused. Though a clear definition is not provided for these terms under the constitution, one can infer from the bundle of rights bestowed by the constitution upon persons accused that the term persons accused refers to those individuals against whom public prosecutor has instituted a criminal charge.⁶⁶ The logical deduction from this is, one can argue, that the right to counsel in Ethiopia is available only for individuals against whom a criminal charge is filed. In other words, the right is available only at the stage of a trial.

The Constitution is silent as to whether accused persons have the right to representation by legal counsel during pre-trial and post-conviction stages of the criminal justice process. Despite this, however, the 2011 Ethiopian Criminal Justice Policy enshrines that individuals who have come into encounter with criminal justice system have the right to counsel at all stage of the criminal justice process.⁶⁷ Likewise, the 1961 Criminal Procedure Code of Ethiopia also recognizes the right to counsel during the pre-trial stage.⁶⁸ In spite of the policy statement and the provision of the criminal procedure, the practice is attuned with the constitution. One cannot find legal counsels both during pre-trial and post-conviction stages.⁶⁹

Most of the international human rights conventions and declarations are clear in this respect. It does suffice to mention the International Convention on Civil and Political Rights (ICCPR), and the Lilongwe Declaration among the legal frameworks at the international level. According to the general reading of the ICCPR, the right

⁶⁴ Hussein Ahmed Tura, *supra* note 27.

⁶⁵ Constitution of the Federal Democratic Republic of Ethiopia, Article 20.

⁶⁶ *Supra* note 65.

⁶⁷ The 2011 Criminal Justice Policy of the FDRE, Section 4.7.

⁶⁸ The 1961 Ethiopian Criminal Procedure Code, Article 61.

⁶⁹ Desalegn Gemechu Negeri, *Supra* note 45, p. 14.

to counsel applies to all stages of criminal proceedings including the preliminary investigation and pre-trial detention.⁷⁰ The Lilongwe Declaration also highlights the importance of ‘providing legal aid at all stages of the criminal justice processes.’⁷¹ This includes investigation, arrest, pretrial detention and bail hearings, in addition to trial and appeal processes.⁷²

While attempting to find a solution for the constitutional disregard of the right to counsel during pre-trial and post-conviction stages of criminal proceedings, some commentators and writers have suggested that the constitutional provision that provides for the right to counsel has to be read in line with these international human rights conventions and declarations.⁷³ Such policy recommendations for criminal justice reform are cogent for two reasons. Firstly, international conventions and declarations ratified by the country are an integral part of the law of the land by virtue of Article 9 sub-article 4 of the Constitution of the Federal Democratic Republic of Ethiopia,⁷⁴ albeit, their place in the hierarchy of Ethiopian laws is a subject of debate among writers and commentators on the matter. Consequently, one has to be heedful of international agreements in examining the stages at which the right to representation by legal counsel is available. Secondly, article 13 sub-article 2 of the Constitution of the Federal Democratic Republic of Ethiopia⁷⁵ states that ‘the fundamental rights and freedoms specified in this Chapter [Chapter 3] 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’. This article calls for resort to the international agreements as an interpretation guide whenever there is a need for interpretation of the fundamental rights and freedoms stated in the FDRE Constitution. This helps to remedy the obscurity in the constitutional provision.

Moreover, the relationship between the accused person and his defense lawyer; the legal services that the criminal defense counsel provides to the accused; the criminal defendant’s interest in presenting and controlling the defense; a possibility of waiver of the right

⁷⁰ Milkii Mekuria Yadessa, *supra* note 50, p. 122.

⁷¹ United Nations Office on Drug and Crime, *supra* note 37.

⁷² *Ibid.*

⁷³ Hussein Ahmed Tura, *supra* note 27, p. 132.

⁷⁴ Constitution of the Federal Democratic Republic of Ethiopia.

⁷⁵ *Ibid.*

and self-representation and request for change of a counsel are left unaddressed completely.

The right to a criminal defense lawyer as provided in the various Ethiopian laws discussed above lack any meaningful content. The governing legal provisions are characterized by vagueness, inconsistency, uncertainties, and lacuna. Worst of all, there are no detailed rules legislated to implement the due process right. This manifests that the right has no practical meaning, upholding procedural justice. Hence, the legal provisions in the FDRE Constitution and other subsidiary legislations that provide for the right are merely a hollow promise. It is only superficially compatible with international standards and the practices and norms of other countries. This paper, therefore, argues that the right to criminal defense counsel in Ethiopia is no more than a rhetoric. The right is no more than a legal fiction, even an incomplete one.

This is a clear indication of the fact that the country has hitherto failed to continually reform the justice sector in order to put in place a comprehensive legal framework that addresses most of the unsettled issues discussed in previous paragraphs. The absence of a detailed legal framework that serves as a foundation for delivering effective legal representation for the indigent is not acceptable by any standard. Thus, it is no wonder that criminal justice proceedings in Ethiopia are fraught with numerous ramifications that prejudice the rights of criminal suspects and the accused. Such ramifications and possible explanations for this state of affair, i.e., failure to put effective criminal defense system and administration in place, are provided in the subsequent sections.

IV RAMIFICATIONS OF CRIMINAL PROCEEDINGS WITHOUT THE AID OF LEGAL COUNSEL

4.1 *Impedes the Right to be Heard*

Primarily, a criminal defense counsel is vital for the protection of the accused person's right to be heard. Without a counsel, the accused cannot properly and adequately assert his rights, seeking justice as fairness. According to Schaefer,⁷⁶ 'of all the rights that an accused person has, the right to be represented by a counsel is by far the most pervasive, for it affects his ability to assert any other right he might

⁷⁶ Walter V. Schaefer, 'Federalism and State Criminal Procedure', *Harvard Law Review*, 70/1 (1956), 8.

have'. He further contends that 'procedural laws are designed for those who know the rules, and they can become a source of entrapment to those who do not. Substantive criminal law also presents difficulties to the uninitiated. The elements that constitute a particular offense and the circumstances under which a single charge may include lesser offenses are not widely known outside the legal profession'.⁷⁷

Moreover, as Kamisar *et al*⁷⁸ wrote:

A layman charged with the commission of a criminal offense is only vaguely aware of the right to demand the nature of the accusation against him; if apprised of it, he cannot comprehend its full meaning. He does not know that he has a constitutional right to confront his accuser, and, if he is aware of his right, he lacks the expert skill to cross-examine properly. The right to compulsory process, to a speedy public trial and against self-incrimination is of little practical value to a defendant who is denied the effective assistance of counsel.

The often-quoted legal opinion of the U.S. Supreme Court Associate Justice George Sutherland in *Powel v. Alabama* in 1932, well summarizes the gist of the significance of the right to counsel in criminal proceedings and the consequences of its absence. In that case, Justice Sutherland, as cited in Taylor⁷⁹ wrote:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crimes, he is incapable, generally, of determining for himself whether the indictment is good or bad. 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 evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

It is unlikely that accused persons that act *pro se* will raise issues, both legal and factual, that should be introduced during trial. Further-

⁷⁷ Walter V. Schaefer, *supra* note 76.

⁷⁸ Yale Kamisar, Wayne LaFave, Jerold Israel, *et al*, *Basic Criminal Procedure: Cases, Comments, and Questions*, American Casebook Series, Thirteenth edition, (Eagan, Minnesota, 2008), p. 75.

⁷⁹ John B. Taylor, *supra* note 8, p. 75.

more, once they are convicted, taking appeal without assistance of a lawyer will be an uphill task for the person who has been already suffering from the indignities of arrest and other consequences of an encounter with the criminal justice system.

4.2 *Violation of Equality Guarantee*

In addition to imperiling the right to be heard, trial without the assistance of a counsel also constitutes a violation of equality guarantee. The state deprives the indigent of equal protection when it fails to furnish him/her with a legal counsel.⁸⁰ This deprivation is reflected in two different ways. On one hand, it can be seen from the perspective of equality of arms, and on the other hand, from the perspective of enjoyment of equal protection with those who can retain a lawyer.

The doctrine of equality of arms requires that a balance of fairness to be maintained between the parties in a criminal proceeding.⁸¹ It dictates that ‘everyone who is a party to the proceedings shall have an opportunity to present his case under conditions which do not place him at a disadvantage vis-à-vis his opponent’.⁸² In order to respect this principle, it is essential for an expert for the defense of the accused to appear to act as a counterbalance to the legal expertise of the prosecutor. The idea is that ‘when the state prosecutes, it does so from a position of relative strength, given its substantial material and intellectual resources’.⁸³ Hence, ‘unless there is provision for a defense lawyer to be at their side - indeed on their side - both to guide them through its intricacies and to some extent to counterbalance its power, defendants will almost inevitably be at a substantial disadvantage’.⁸⁴ In the absence of a defense lawyer to counterbalance the power that the state wields, ‘the result is that what is intended to be the presentation and examination of evidence constrained by rules that work to ensure a fair fact finding process tends to be a process that is unfairly and unconscionably one-sided’.⁸⁵

⁸⁰ Yale Kamisar, Wayne LaFave, Jerold Israel, *et al*, *supra* note 78.

⁸¹ Sarah Summers, *supra* note 2.

⁸² Sarah Summers, *supra* note 2, p. 105.

⁸³ John Kleinig, *Ethics and Criminal Justice: An Introduction* (Cambridge, 2008), p. 137.

⁸⁴ John Kleinig, *supra* note 83.

⁸⁵ *Ibid*.

The reality on the ground in Ethiopia is contrary to the ideal of equality of arms. It is an obvious truth that the accused and the state, as the two parties in a criminal trial proceeding, are not equal. The state is represented by public prosecutors who have the knowledge of the law and on the other hand the accused person, who is a lay person in the majority of cases, joins the contest to defend oneself *pro se* without any assistance. Defense lawyers are not assigned for all criminal proceedings that take place in district courts in the regional governments. Very few accused persons get the opportunity to be represented by a defense lawyers who are often only available at regional High Courts and Supreme Court levels in the criminal justice system. Even in these cases, it is not possible to claim that the few defense lawyers that we have in the system are on an equal footing with the public prosecutors. Their level of knowledge and experience is under serious question. They are usually accused of minimal level of competency, under qualification and ineffectiveness. Therefore, even in these few cases where the accused is represented by a counsel, one can hardly conclude that there is equality of arms between the public prosecutor and the accused.

Hence, one can safely conclude that the criminal proceedings in the Ethiopian criminal justice system are asymmetrical by their nature. It continues to be so, to the prejudice of the interests of justice unless a counsel represents the accused to even up the balance of power between the accused and the public prosecutor. In such asymmetrical circumstances, the criminal trial will be no different from a duel between the unequal. So, the realization of the noble ideal of equal protections guaranteed under constitutions and other laws is seriously jeopardized.⁸⁶ What makes things worst is not only the disparity in the level of knowledge of the technicalities of the criminal procedure and the substantive criminal law between the accused and the public prosecutor but also the problematic perception of the public prosecutors of their function. They rarely view themselves as a neutral and often seek the imposition of severe sanctions on the accused. This tendency exacerbates the extent of the problems the accused faces.

Additionally, the violation of equality guarantee inevitably results as obtaining assistance of a counsel depends on the financial position of the person charged. This occurs in situations where the law of the land allows both retained counsel and criminal defense counsel at state expense. 'Since indigence is constitutionally irrelevant, it would

⁸⁶ Joel Samaha, *supra* note 10.

seem that the defendant by reason of his poverty is deprived of a right available to those who can afford to exercise it'.⁸⁷ To tackle this problem, therefore, the state should furnish a counsel for the have-nots if it allows those who can afford to retain a lawyer.⁸⁸ There has to be a right to appointed counsel whenever there is a right to retained counsel.⁸⁹

The common practice in Ethiopia shows that the state is not providing a legal counsel for the indigent while allowing the 'haves' *de facto* the right to a retained private counsel. This is a clear case of violation of equality guarantee.

4.3 *Dangers to the Adversarial Criminal Justice System*

Apart from impeding the right to hearing and subjecting the indigent accused to appalling discriminatory practice, a criminal proceeding without the assistance of a counsel poses a threat to the viability of the adversarial criminal justice system itself. The modern notion of trial in adversarial criminal justice systems makes the representation of the accused by a legal counsel a necessity.

Trial is 'a stage on which to contest an accusation and to challenge a specific interpretation of the defendant's actions (and the relevant legal norms), because without this theatre of debate judgments will be less convincing'.⁹⁰ Challenge is the essence of the adversarial criminal justice system.⁹¹ As noted by Kamisar *et al* 'the survival of the adversarial criminal justice system and the values it advances depend upon a constant challenge, searching and questioning of official decisions and assertion of authority at all stages of the process'.⁹²

The accused cannot challenge his opponent unless she is assisted by a counsel. Hildebrandt contends that 'without the legal means to achieve some equality of arms the defendant cannot stage her challenge'.⁹³ Individuals who act *pro se* because they cannot afford a

⁸⁷ Walter V. Schaefer, *supra* note 76, p. 10.

⁸⁸ Walter V. Schaefer, *supra* note 76, p. 1.

⁸⁹ Charles Donahue, 'An Historical Argument for Right to Counsel during Police Interrogation', *The Yale Law Journal*, 73 (1964), 1007.

⁹⁰ Mireille Hildebrandt, 'Trial and "Fair Trial": From Peer to Subject to Citizen', in *The Trial on Trial: Judgment and Calling to Account*, ed. by Antony Duff and others, 3 vols (Oxford and Portland, 2006), II, p. 26.

⁹¹ Yale Kamisar, Wayne LaFave, Jerold Israel, *et al*, *supra* note 78.

⁹² *Ibid.*

⁹³ Mireille Hildebrandt, *Supra* note 90.

lawyer, and/or because the state failed to provide one for them, are generally incapable of providing the challenges that are indispensable to the satisfactory operation of the system,⁹⁴ and in so far as the financial status of the accused impedes vigorous and proper challenges that are the essence of the system itself, it constitutes a threat to the viability of the adversarial system.⁹⁵

V REMEDIES FOR THE DENIAL OF ASSISTANCE OF LEGAL COUNSEL

The worst of all the procedural justice issues in relation to the right to representation by a criminal defense lawyer in Ethiopia is the absence of expressly stated remedy for the non-observance of the right. Neither the constitution nor the subsidiary laws provide this. This is a natural consequence of the absence of a detailed legislation that governs the manifold issues discussed elsewhere in this paper.

The experience of other jurisdictions is that a fresh trial with the assistance of a counsel will be ordered in cases where there is failure to observe the constitutional duty to ensure the accused is represented by a criminal defense lawyer.⁹⁶ The Cassation Division of the Federal Supreme Court of Ethiopia in 2008 rendered a similar decision on the matter while exercising its cassation power.⁹⁷ In one specific case under file no. 37050, the court overruled the decisions of the lower courts on the ground that the accused was convicted and sentenced without being represented by criminal defense lawyer.⁹⁸ Now, all the courts in the country are expected to follow the footsteps of this court since the decision rendered by the Federal Supreme Court in the exercise of its cassation power is binding in the subordinate courts.⁹⁹

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ John B. Taylor, *supra* note 8, p. 57.

⁹⁷ FDRE Federal Supreme Court Cassation Division Judgements, (Research and Legal Assistance Department, 2011), Volume 11, pp. 160-62.

⁹⁸ FDRE Federal Supreme Court Cassation Division Judgements, *supra* note 97.

⁹⁹ Federal Courts Proclamation Re-amendment Proclamation No.454/2005, Article 2 Sub-Article 1 & 2.

VI THE LIMITATIONS OF *PRO SE* CRIMINAL PROCEEDINGS AS COMMON PRACTICE IN THE ETHIOPIAN CRIMINAL JUSTICE SYSTEM

Government assigned criminal defense lawyers are not available at the level of the district courts in the regional governments. One can find public defenders only in High Courts and the Supreme Court. This shows that the number of government funded defense lawyers in the country is very minimal. For instance, in Oromia National Regional Government, where over thirty million people reside, defense lawyers are not assigned to all the district courts which are nearly two hundred in number. The number of private lawyers at district levels is very minimal and their knowledge of law and skills is also under serious question. Very few of the accused can afford retained lawyers as most of the accused are without sufficient means and most do not even understand the significance of having a lawyer on their side. Hence, thousands of accused indigents stand before courts of law for trial without the aid of a lawyer to face public prosecutors, who are empowered to deprive them of their basic liberties, and ultimately face punishments without adequately presenting their case or defending themselves. This is happening despite the fact the right to counsel is the subject of protection both in the constitution and other subsidiary laws and policies of the country as well as international human rights instruments to which Ethiopia is signatory as discussed earlier in this paper.

Consequently, the accused is a *de facto* silenced party in a trial in the Ethiopian criminal justice system. Punishments are imposed on the accused without, in the vast majority of cases, listening to the accused person's version of events as they unfolded, because of the disgustingly asymmetrical nature of the criminal proceedings. Trials are, hence, not principal sites of argument and fact finding. They do not have a fair chance of contestation. The decisions of the trial courts are nothing more than the restatement of the public prosecutor's charge plus the sentence. That is to say that court decisions are nothing different from a mere perfunctory recapitulation of the criminal charges.

The criminal trial has, therefore, become a mere instrument for the implementation of the criminal law favoring the government, where the accused is identified as a guilty person and subsequently sentenced to imprisonment. The ensuing result is that:

The alleged victim and the alleged offender serve only as means to an end. They do not necessarily need standing in the trial; since the trial only determines the punishment of offenders in the hope that this will prevent them and others from violating the law in the future. The alleged victim can be a witness if needed and the alleged offender will be the object of both the investigations of the court and punishment if he is convicted.¹⁰⁰

Generally speaking, criminal trial in Ethiopia is afoul of the modern understanding of trial. In its modern sense, criminal procedure gives the state the competence by which it can identify offenders and at the same time it limits the competence of the state in criminal matters. In other words, in a democratic constitutional state a fair trial is at the same instance constitutive for and restrictive of the exercise of the *ius puniendi*.¹⁰¹ This manifests that currently trial is seen as a means of identifying a defendant as an offender, and a means to protect defendants against abuse of state powers.¹⁰² In Ethiopia, however, once charged the accused is deemed as an object to be censored and there appears to be little restriction on the state's power to punish.

Given this reality, it would be difficult to assert that accused persons have genuine standing before the trial courts. The following paragraph from Hildebrandt aptly portrays the scenarios of the trial courts in Ethiopia. Accordingly, 'the only one with standing in the trial then is the public prosecutor, who will put forward his claim that the law has been violated by the defendant.'¹⁰³ Actually one wonders if there is any need to differentiate between the separate and independent roles of prosecutors and judges since both have a single and common goal: the implementation of criminal law.

The accused persons, therefore, appear before courts only to hear the sentences that the judge pronounces. This fact is *ictu oculi* evident from the observation of case dossiers of the majority of criminal proceedings. It is not uncommon to witness the accused failing to express themselves when they should vigorously defend themselves. At critical junctures such as where the accused is asked whether he/she has objections on the charge; whether he/she pleads guilty or not guilty; during cross examination and in invoking mitigating circumstances, the accused rarely speaks or at times makes unwise utter-

¹⁰⁰ Mireille Hildebrandt, *Supra* note 90.

¹⁰¹ Antony Duff and others, 'Introduction: Judgment and Calling to Account', in *The Trial on Trial: Volume 2: Judgment and Calling to Account*, ed. by Antony Duff and others (Oxford and Portland, 2006), pp. 1–14.

¹⁰² Antony Duff and others, *supra* note 101.

¹⁰³ Mireille Hildebrandt, *Supra* note 90.

ances because they do not understand the consequences thereof and, where they understand the consequences, they lack the requisite skill. The main point that this paper highlights and analyzes as a critical legal issue is that decisions are given at trials without listening to the accused. It appears that the judges are paying attention only to the versions of events presented by the public prosecutors.

The failure to enforce the constitutionally mandated due process right to criminal defense counsel has, without doubt, a number of complex and serious ramifications for the individuals who are charged for alleged crimes. Also, given the reality in Ethiopia, it is hardly possible to claim that the criminal trial proceedings are actually adversarial. This is bad for the criminal justice system itself as in such circumstances there will be high probability of wrongful convictions and/or punishment that are exaggerated. This might in turn result in public resentment about the performance of the criminal justice system itself.

To sum up, criminal proceedings without assistance of a counsel are unjust. As Kamisar *et al* noted ‘situations in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity. Not only individual rights are at stake as a consequence thereof but also it constitutes a threat to the criminal justice system itself.’¹⁰⁴

VII WHO IS RESPONSIBLE FOR THE EXTANT STATE OF AFFAIRS?

All the three branches of government, i.e., the judiciary, the legislature and the executive, are responsible for the failure of the criminal justice system to provide criminal defense counsel for criminal suspects and persons accused of crime. They have the obligation to ensure that the constitutional right to representation by criminal defense counsel is respected and enforced.¹⁰⁵

7.1 *The Judiciary*

The question that might be asked pertaining to this legal issue is whether there are measures that the judiciary could take to avert the current precarious state of affairs to which criminal suspects and/or persons accused of crime are being subjected to because of non-

¹⁰⁴ Yale Kamisar, Wayne LaFave, Jerold Israel, *et al*, *supra* note 78.

¹⁰⁵ Constitution of the Federal Democratic Republic of Ethiopia, Article 13.

representation by a criminal defense counsel. The paper argues that there are three possible measures that the courts and judges could take. The possible measures and their relative strength is presented as follows.

Primarily, the judiciary could establish public defender offices at all levels of courts. The Supreme Court is legally given the mandate to establish and organize public defense offices.¹⁰⁶ As discussed earlier, the decision to give the power to establish and organize public defense office to the Supreme Court is indicative of the fact that indigent defense is a judicial function. The judiciary could have included the money needed for expanding indigent services to district level whilst drawing up its budget.¹⁰⁷ There is a possibility that the legislature may refuse to approve such budget though the author does not remember an instance where this is requested and when the legislature has refused to approve a budget requested for this purpose. Even if the legislature refuses to approve such budget, it is possible to legally challenge that decision on the ground that the legislature's refusal to approve a budget for indigent services organized by the judiciary constitutes an impediment to judicial function.

Secondly, although the ultimate decision lies with the legislature, the judiciary could initiate the enactment of a detail bill that can give life and practical meaning to the constitutional right to criminal defense counsel by submitting draft law to the legislature. The judiciary has the mandate to initiate the enactment of a law under article 6 sub-article 2 of the Federal Democratic Republic of Ethiopia House of Peoples' Representatives Working Procedure and Members' Code of Conduct (Amendment) Proclamation No. 470/2005. There has never been any such effort from the side of the judiciary to date.

The third possible measure is the taking of a more active role by the judges to mitigate the unfairness of prosecuting unrepresented accused persons. 'Judges in a nation governed by a constitution which is the supreme law of the land have the duty of enforcing the individuals' rights provisions of that constitution in the course of their adjudication of disputes and that this duty falls especially upon judges sitting in criminal cases where accused has no lawyer'.¹⁰⁸ Accordingly, 'heightened judicial vigilance, and when appropriate, judicial intervention to assert and protect the constitutional rights of

¹⁰⁶ Federal Courts Proclamation No. 25/96, Article 16 Sub-Article 2 (J).

¹⁰⁷ Constitution of the Federal Democratic Republic of Ethiopia, Article 78 Sub-Article 6.

¹⁰⁸ Dolores A. Donovan, *supra* note 1, p. 28.

the accused are necessary, in the absence of lawyers for the accused, to protect and enforce the Ethiopian constitution and the rights of Ethiopian citizens under the constitution'.¹⁰⁹ This is informed by the constitutional duty of the judiciary to protect and enforce the constitutional rights of individuals as well as the competence of the courts to adjudicate case that arise under the constitution. In Ethiopia, the courts, alongside the executive and the legislature, have the responsibility and duty to respect and enforce the fundamental rights and freedoms incorporated in the constitution.¹¹⁰ Among such fundamental rights and freedoms is the right to representation by legal counsel in criminal proceedings.¹¹¹ Moreover, the courts have jurisdiction over cases arising under the Constitution.¹¹²

Some legal scholars have gone to the extent of suggesting that judges must simultaneously act as a neutral referee of criminal proceedings and an advocate for the accused to remedy the pervasive problem of unrepresented accused. For example, according to Dolores, 'In the absence of defense counsel, the judge must do more. The judge carries the additional burden of putting him or herself in the place of the accused and eliciting the facts that the accused, were he not illiterate and uneducated, were he to have the legal education of a lawyer, would seek to elicit on his own behalf.'¹¹³

It is further argued that the heightened judicial vigilance and intervention, where necessary, 'will have a formative impact on the attitudes of all concerned towards their rights and duties under Ethiopian constitution. They are also constitutive in that they contribute to the building of constitutionalism and the rule of law in Ethiopia'.¹¹⁴

However, such suggestion cannot be a panacea to solve the systemic problem of indigent defense in Ethiopia. Legal scholars argue that 'it is impractical to assume that judges would be able to protect the interest of defendants adequately. Given the limitations on the time, energy, and resources of judges, the judiciary is systematically incapable of devoting the sort of attention to developing and refining

¹⁰⁹ Dolores A. Donovan, *supra* note 1, p. 30.

¹¹⁰ Constitution of the Federal Democratic Republic of Ethiopia, Article 13 Sub-Article 1.

¹¹¹ Constitution of the Federal Democratic Republic of Ethiopia, Chapter 3.

¹¹² Federal Courts Proclamation No. 25/96, Article 3 Sub-Article 1.

¹¹³ Dolores A. Donovan, *supra* note 1, p. 47.

¹¹⁴ *Ibid.*

the defense that an accused person deserves'.¹¹⁵ Moreover, there are ethical rules that put restrictions on the interactions between the accused and judges without which it would be difficult to effectively represent the interest of the accused.¹¹⁶ And also, 'the range and magnitude of the protection that defense counsel provides before, during, and after trial cannot possibly be achieved by judges serving as impartial finders of fact, nor should judges play such a role'.¹¹⁷ Consequently, heightened judicial vigilance and intervention is an inadequate substitute for actual representation of indigent clients.¹¹⁸

Despite the existence of a range of alternative measures that may be taken to address the problem of indigent criminal defense, the Ethiopian judiciary appears to be reluctant in assiduously paying attention to such an important due process rights issue. In the first place, in letting the current state of affairs prevail, the Ethiopian judiciary has colossally failed in discharging its constitutional responsibility. This manifests that the Ethiopian judiciary is not in a position to uphold and guarantee the inviolability of legal rules and procedure as well as a measure of judicial equality. As such it is thoroughly unsympathetic to the yearning of the clueless and indigent accused. And, instead of serving as the guarantor of fundamental liberty and rights, it is contributing to a miscarriage of justice. This is a clear manifestation of the fact that the Ethiopian judiciary has hitherto failed to be an institutional voice and a legal guardian for the poor.

Two major explanations can be provided for such a judicial fiasco. Primarily, this failure is associated with the fact that the Ethiopian judiciary sees itself more as a guardian of the law and order than upholder of impartial justice. It is nothing more than an instrument of the state that always wishes to punish. As a consequence, it is doing nothing to circumscribe the way the state exercises its *ius puniendi* to protect the rights of the accused.

Furthermore, the whole criminal justice system is practically influenced by a crime control perspective rather than a due process model. Packer sees the criminal control model as an assembly line or conveyor belt which, beginning with a presumption of guilt, moves the offender to workers at fixed stations who perform on each case to

¹¹⁵ Charles J. Ogletree, 'Constitutional Principles and Practical Solutions to Implement the Right to Counsel in South Africa', *Consultus*, (1995), p. 100.

¹¹⁶ Charles J. Ogletree, *supra* note 115.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

bring it one step closer to being a finished product, or a closed file.¹¹⁹ Nothing symbolizes this more than the functioning of the justice machineries in the Ethiopian criminal justice system. Practically, as a unit, all the justice machineries give more emphasis to the implementation of the criminal law rather than safeguarding of the due process rights of the accused. This is so partly because they view crime as an offence to the sovereign power of the state. It is sad that the courts in Ethiopia are nothing but one component of what Packer calls an assembly line or conveyor belt. Instead of policing a set of limits on the state, they are aiding the state to easily convict the accused.

7.2 The Legislature and the Executive

As discussed earlier, the judiciary is not the sole body that is responsible for the systemic failure. Both the executive and the legislature have an equal share of the blame for a discord between the legal recognition of the right to criminal defense counsel and the practice. By not coming up with a detailed legislation and not providing adequate fund to this effect, they have breached their constitutional duty of respecting and enforcing the fundamental rights and freedoms of individuals including the right to criminal defense lawyer. Particularly, the failure of the legislature is notable. It is colluding with the executive by choosing not to protect criminal suspects and persons accused of crime from the executive. Lack of resources, potential value conflicts with the goals of punishment and popular perception and the ideology and will of the political leadership account for the problem. But none are convincing. The lack of will on the part of the political leadership is the mother of all problems. To date the government has not manifested its commitment to the existence of institutional defenders that can be true adversaries of the state.

Had there been political will and commitment in this regard, organizing the Public Defense Office is one of the tasks that should have been started immediately following the enactment of the constitution back in 1995. Had the aim of the constitution and the new government established in Ethiopia after 1991 been the rebuilding of the country and restructuring of the state democratically, so as to undo the past problems and injustices as it has been stated in the

¹¹⁹ Herbert L. Packer, 'Two Models of the Criminal Process', *University of Pennsylvania Law Review*, 113/1 (1964), 11.

Transitional Period Charter of Ethiopia, one of the areas where the government should have aggressively embarked upon should have been the organizing and/or strengthening of public defense office. This could have altered the landscape of criminal defense that has been subjected to continuing neglect. The restructuring of the judiciary in general and the organizing and strengthening of the public defense office in particular should have been the core component of the democratic restructuring of the state. However, this has been neglected hitherto. Therefore, the system is beset by a core defect that should have been fixed long ago. The legislature and the executive branches of the government are to be blamed for these core defects.

Underfunding of the public defense office is a problem of commitment on the part of the politicians. There is no political incentive for the law enforcement organs to provide funds for the establishment and/or strengthening of public defense office. They have nothing to lose but have everything to gain as they can easily get the accused convicted.

In a nutshell, because of the systemic failure of all the three branches of the Ethiopian state, the right to a criminal defense lawyer has largely remained a formal and an ideal policy objective rather than being an immediately enforceable legal right.

VIII CONCLUSION

It is hardly possible to expect a fair process and outcome in criminal proceedings in the absence of legal counsel effectively representing the accused. In cases where the outcome and the judicial processes are not fair, it would be hardly possible to claim that justice has been served and maintained by the criminal justice system. Cognizant of this, the right to criminal defense counsel has formally been recognized at constitutional, legislative and policy level in Ethiopia, however, the enjoyment of this right by criminal suspects and the accused is not realized and expansive. The enjoyment of this right is impaired by a number of systemic problems. The first problem surrounding indigent defense in Ethiopia is the inadequacy and incompleteness of the legal framework. The provisions of the constitution and the subsidiary legislation are stated using general terms and as such, they are not detailed. Consequently, the provisions are not only inadequate and incomplete, but also fraught with vagueness and inconsistency. Hence, such provisions are nothing more than an ideal objective and empty promise.

Though it is imperative to rectify these problems with respect to the right to counsel, particularly by enacting a detailed legislation within comprehensive criminal justice reforms, the Ethiopian government has taken no concrete measures to ensure the existence of an effective representation of persons accused of a crime by legal counsel. The lack of detailed rules that govern the various aspects of the right to counsel has remained a chronic problem in the criminal justice system. This casts a cloud of doubt on the government's commitment.

The second problem is the judiciary's failure to recognize indigent defense as one of its constitutional mandates. This has a number of manifestations. The first such manifestation is the failure to establish and organize public defense office despite the fact that the judiciary is legally required to do so. Consequently, representation by legal counsel is not available at all stages of the criminal justice system; public defense offices are not available in District Courts. Likewise, one cannot find criminal defense lawyers in jails and prisons. Moreover, the judiciary has not organized public defense offices in the First Instance Courts. The result is that almost all accused persons whose trial takes place in the first instance courts enter the trial on their own. On top of this, it is difficult to hire private attorneys in the vicinities where the district courts are operating.

Thirdly, even for the few public defenders existing in the system, the task of effectively representing the accused is a troubling task. The courts do not usually give ample time to effectively prepare for the defense of the accused. Usually, they are appointed by the trial courts themselves later, when cases reach the trial phase. Furthermore, they do not have adequate resources and lack institutional independence from the court as they are part of it. These show that there is no parity between the office of the public and the prosecutors' office.

As a result, the ability of the accused to assert the rights she/he may have to establish her/his innocence or to raise mitigating circumstances in case he/she is found guilty is impeded and the right to be heard has also been imperiled. This results in a violation of equality guarantee; and places the adversarial criminal justice system at great risk.

In sum, the criminal justice system in Ethiopia is inattentive to the interests of criminal suspects and the accused. Criminal suspects and the accused are an easy prey and can easily be attacked. The criminal justice system in Ethiopia is a dystopia for the accused unaided by a defense lawyer.

It is necessary to change this precarious state of affairs through comprehensive justice reforms. This paper argues that there has to be a robust expansion of the right to representation by a counsel in all circumstances. Ethiopia needs to propose reforms and bring changes in many aspects of its criminal justice system. There has to be a change in scale/extent of the indigent defense services as well as changes in kind – there is a dire need for genuine defenders who can be true adversaries of the state in criminal proceedings rather than non-adversarial defenders or defenders for name's sake. For this purpose, the legislature has to come up with a comprehensive legislation and strict adherence and enforcement of such legislation is no less important. Accordingly, it is essential to take some concrete measures to rectify the problems surrounding indigent defense in Ethiopia.

First and foremost, establishing and organizing public defense offices in every court in the country is imperative upon the judiciary. This requires recognition of the fact that indigent criminal defense is a judicial function. Above all, it is necessary to enact a comprehensive legislation that addresses the gaps and obscurities in the existing legal provisions.

Moreover, it is vital that judges play an active role in the criminal proceedings where the accused is not aided by criminal defense lawyer. They need to exercise heightened judicial vigilance and intervene where there is a violation of the constitutional rights of the accused. Judges also need to give sufficient time to defense lawyers to properly and adequately prepare for the defense of the accused in cases where public defense lawyers are available.

It is also necessary to empower and enhance the knowledge, skill and ethical standards of the few public defense lawyers working in the High Courts and the Supreme Court. For this, the judiciary needs a continuous professional development program focused on indigent defense.

Finally, it is necessary to look for alternative mechanisms to complement the above-mentioned efforts. Collaborating with the law schools in the country with a view to channel the services expected from senior law students in the Clinical Legal Education Program and the externship programs towards indigent criminal defense is one such alternative mechanism that can help in addressing the problem. Likewise, encouraging the private advocates to contribute to indigent criminal defense as part of their *pro bono* responsibility can help to a certain degree. Working on paralegal training can also contribute to a certain extent towards addressing the problem.