

The Right to State Funded Legal Counsel in Criminal Proceedings in Ethiopia; the Need for a Reform on the Law and Practice

Mulugeta Akalu*

School of Law; Wolayta Sodo University PO.box, 138, wolayta, Ethiopia
Corresponding Author: Mulugeta Akalu

ABSTRACT: It is a firmly established principle of any civilized legal system that accused defendants be guaranteed the right to fair trial before they are put to any punishment. Nevertheless, defendants are so ignorant of the law and court trials, that they may not argue effectively on equal footing with the prosecutor. This requires us to let them find their own legal counsel. However, not all accused defendants are capable of buying lawyers. One of the measures applied by jurisdictions to minimize this problem is providing state funded legal counsel for the indigents. Ethiopia had one of the oldest laws which contain such right as the 1955 amendment constitution provided for the right to any indigent defendants. Despite being the earliest country to recognize this right, the current situation is fraught with a lot of problems. Firstly, the current legal provisions on the right are insufficient, incomplete, vague, ineffective and open to diverse interpretation. Secondly, even those provisions are not getting the slightest implementation. Thirdly, government officials do not give emphasis for the right since they don't allocate enough fund. Finally, judges are not fully aware of the concept and relevance of the right. This article argued that a paradigm shift is required to realize the effective implementation of the right to state funded legal counsel for indigent defendants by making a reform on the law. In addition to improving the law, successive trainings of the court personnel and other executive organs need to be conducted.

Keywords: Ethiopia Fair trial Indigent defendants Legal counsel Right Reform

Date of Submission: 16-05-2017

Date of acceptance: 08-08-2017

I. INTRODUCTION

In Ammeya correction center, one of the prison centers located in Southern Ethiopia, Mekuria Mamo a young man of twenty five, farmer and father of two daughters, is convicted for being suspected of killing Mr. Abayneh Mamo. After Konta district high court passed a guilty verdict and decided death penalty on him, Mekuria Mamo looks desperate and helpless as he is waiting for the execution of the death penalty verdict decided up on him. The sorrow and havoc he is experiencing can be easily seen on his face. The charge of the public prosecutor reads that the accused took the victim to the nearby forest to sell him a timber. When they reach deep inside the jungle, the accused beat him from the back and as he fell he again beat him on his head for a second time and following his death the accused took twelve thousand dollars from the pocket of the dead and finally tied him with a rope and pulled him to bury him in a nearby deep hole. The charge of the prosecutor requested for death penalty for a crime of aggravated homicide for the horrific and merciless killing of a human being and his act of hiding the body[1]. In the hearing procedure, the Konta district court didn't appoint a legal counselor for the accused though the working constitution entitles suspects accused of crime the right to court appointed legal counsel if miscarriage of justice could happen, nor the desperately poor accused requested for counsel as he didn't know anything about it. From the contents of the file one can easily understand that the procedures followed by the public prosecutor and the court are not based on the appropriate rules and principles of procedural and evidence laws. Not only are the evidences of the prosecutor contradictory to each other but also insufficient to prove beyond doubt the commission of the alleged crime. Two of the witnesses of the prosecutor who were detained prison mates of the accused only told the court what they claim have heard from the accused himself in prison telling them that he killed the victim and shifted the body to a very distant place[1]. The other witness is the accused's 6 year daughter testimony alleged to have been given to the police and recorded by the police saying that she saw her father in the jungle killing the victim and burying him in the nearby gorge[1]. The girl was said to have been gone with her father to the jungle to collect some firewood[1]. Another witness is a hearsay witness who appeared to the court and said he heard accused's wife telling to the police what she saw. He says that he heard accused's wife telling the investigating police how her husband took

the victim to the jungle against her opposition and threatened to kill her and took him to the forest and kill him[1]. There were defense witnesses alleged to have been called by the accused though it doesn't seem the accused himself called them. They were the father, mother and wife of the accused. When they were asked by the court why they come to the court, each one of them responded that they don't know anything except that they appeared to court because of the summon of the court[1]. The court passed a guilty verdict and imposed death penalty contending that the charge was proved beyond reasonable doubt by the prosecutor[1]. The accused was punished in a procedure which is completely unfair and unjust.

Even though any state has the mandate to try and punish its offenders, this responsibility should not be undertaken arbitrarily disregarding acceptable procedural formalities. A fair trial is the one which is based on *due process of law* and *equality before the law* principles[2]. Among the various rights essential to implement a fair trial is the right of the defendants to be represented by a legal counsel[2]. Fair trial principle in a criminal trial can be accurately implemented when both the prosecutor and the accused are given equal opportunity to participate in the process. Without counsel, the defendant forfeits the ability to challenge meaningfully myriad issues, and the system receives none of the benefits of a truly adversarial challenge[3]. Always the state is represented by well-staffed, well-resourced and well-educated personnel whereas the defendant is mostly ignorant of the law and procedure. If the layman defendant who is a stranger to the law is forced to stand trial himself opposite to the public prosecution, the result will be a complete imbalance letting the accused undefended[4]. In a case between *Powell v Alabama*, the Supreme court of US America stressed on the necessity of legal counsel as follows.

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. . . . 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[4].

Cognizant of the possible shortcoming of absence of legal counsel on the fairness of the trial procedure, almost all nations of the developed world have provided for the right of accused to be represented by a legal counsel as one of the fundamental human rights in their human rights and criminal procedure laws. As a leading human rights documents, international human rights instruments are also among the leading documents in addressing this right[5].

Nevertheless, not all accused defendants are capable of buying their own lawyers as there are extremely poor defendants everywhere. Neither could states afford to pay for each and every defendant's need of lawyer since they allege they have resource limitations to cover all the costs associated with the trial procedure. Hence, the issue of whether state funded legal counsel should be the right of every accused or not remains a contentious topic resulting in variation in different countries. While some countries recognize the right of every accused with a possibility of incarceration to state funded legal counsel[6], some nations restricted it to those who are accused of capital punishment[7]. Some countries such as Ethiopia, provide the right to have legal counsel of indigent defendants if the crime for which they are accused is a serious crime and if the absence of legal counsel could result in "miscarriage of justice." [8]

Despite having a constitutional provision for indigent defendants to a state-funded legal counselor, the Ethiopian reality remains unclear. Some courts appoint counselors only for capital crimes by taking the constitutional provision of "grave miscarriage of justice" workable only for capital crimes. Some courts appoint counselor for defendants accused of felony while others do not appoint state funded counselors even for capital punishments on the ground of lack of funds to do that[8].

With an intention to advocate for effective realization of the right to state funded legal counsel for indigent criminal defendants, this article will uncover the root causes of the problem of representation and make possible suggestion that could help for improvement. Part I of this article will discuss the right to state funded legal counsel of criminal defendants in general. In this part, the philosophical foundation of state funded legal counsel, the treatment of state funded legal counsel in different jurisdictions, the status of right to state funded legal counsel in international human rights instruments and the legal status of state funded legal counsel under the current Ethiopian laws will be explored. Part II of the article will cover the authors view of the need for a change on the existing Ethiopian reality in relation to the right to state funded legal counselor.

Part I. The Right to State Funded Legal Counsel in Criminal Proceedings

A. Philosophical Foundation of The Right

In our modern world everyone is equal before the law either poor or reach, male or female, young or old, black or white. In a fair trial, defendants who are under the custody of the law should be given the chance to present their argument to the court in equal footing with the prosecutor before they are convicted. It is the very nature of criminal procedure that prosecution by the State of the accused may result in an imbalance between the defendant and the prosecutor in terms of rights and interests. Hence, any accused must be guaranteed certain legal rights if they are to be able to protect their legitimate rights and interests. It is a fundamental principle of

any civilized society that an accused person is entitled to a fair trial. For instance, American jurisprudence have recognized both the practical and logical *nexus* between legal representation and a fair trial[9]. The guarantee of the accused's rights in general and the guarantee of the right to defense counsel in particular must be based upon a fair balance between the parties involved in criminal procedure. Needless to say, the right to defense counsel is based on the interconnected theories of *due process of law* and *right to a fair trial*. In our modern trial procedure, the principle of due process of law is the most important mechanism to effectively protect human rights. Due process is a dynamic concept, one that is determined by the "common and fundamental ideas of fairness and right." [10] In *Betts v. Brady*, the Supreme Court of US America found that the guarantee of the right to counsel found in the Sixth Amendment could be held to apply to the states through the Fourteenth Amendment, which says that no person shall be deprived of his liberty without the due process of law [10]. In a trial procedure that is firmly founded up on due process model, a person may be found guilty only if the facts are clearly proved according to the law by a competent tribunal [11]. Obviously due process of law is always accompanied by and attached to the principle of the right to a fair trial [11].

The right to a fair trial is a norm of international human rights law and various domestic laws designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person [12]. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR),¹ which provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law [13].

It is almost impossible to set out exhaustive guidelines for determining whether a trial is fair or not, but fairness is the most fundamental requirement in any modern criminal law procedure [13]. It is an issue to be decided by the trial judge on the facts of each case, having regard to the particular circumstances of each individual case [13]. To determine what constitutes a fair trial for purposes of criminal justice, one should consider dignity, freedom and equality as the foundational values. An important aim of the right to a fair criminal trial is to ensure that innocent people are not wrongly convicted, to minimize the adverse effects that a wrong conviction has on the liberty, dignity and interests of the accused [13]. The principle of the right to a fair trial is considered as a tool to protect the rights and interests of each individual against State arbitrariness and autocracy. A scholar called Cherif suggested that fairness can be realized if two aspects are fulfilled namely; Equality of arms and adversarial procedures [14]. Equality of arms exists when the two sides are given reasonable opportunity to present their case in a manner that will not place them at substantial disadvantage against their opponents [15].

Courts in various civilized nations stressed that laymen defendants be represented by a legal counsel so that they could be given the chance to defend their case adequately before they are convicted so that the trial will be judged a fair trial. One of those remarks is suggested by an American supreme court judge as follows.

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. . . . 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 [3]

In *Gideon v Wainwright* Justice Hugo Black pointed out, as follows, that legal representation is necessity not a luxury.

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries [6]

In any adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him [6]. In contrast to law enforcement officials, who are familiar with criminal procedure, "the idiosyncrasies of juries," and personnel of both the police department and the courts, the accused is usually an inexperienced layman who cannot effectively assert his procedural and substantive rights [6].

Treschel explained the need for legal counsel in his own way as follows, "*the assistance of counsel is the key which opens the door to all the rights and possibilities of defence in the substantive sense of the term. It is clear that the law – substantive as well as procedural - is a rather complicated matter, which is often unintelligible to the layperson [16].*

In addition to protecting the due process interests in reliability and fairness, the numerous functions of counsel ensure that the defendant will be able to exercise any other rights he might have," including his right to confrontation and meaningful cross-examination," his right to be convicted only on evidence independently

gathered and proven by the prosecutor," and his right to the necessary tools for his defense[9]. In the case of Africa, state funded legal counsel must be considered as a necessity, given the origination of the criminal justice system and the context of operation, characterized by low levels of literacy, high incidences of poverty and a sizeable distance between the criminal justice system and its users[17].

B. The Right Under International Legal Instruments

International human rights instruments in their effort to adequately implement the right to fair trial of defendants have addressed the right to legal counsel and other related rights in different conventions and protocols. The ultimate objective of these provisions is to guarantee the right of access to justice of accused by enabling fair trial based on the equal opportunity for both prosecution and the defendant. The following are some of the most important provisions on the right to legal representation of the indigents.

The earliest human rights instrument to address the right to legal counsel is the Universal Declaration of Human Rights (UDHR) even though not a legally binding instrument, it has been used when interpreting other international human rights instruments and many of its provisions are considered to form part of international customary law. The UDHR says that everyone charged with a penal offence should be granted "all the guarantees necessary for his defence"[18]. However, the UDHR does not define what does it mean by "all the guarantees necessary for his defence", thus offering little guidance on the role of legal counsel in criminal justice[19].

The other important international document that addressed the right to legal representation is the International Covenant on civil and political rights. Among the various provisions, article 14(3) of the document provided for right of the accused to be "tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it"[20]. States are free to determine cases where the interest of justice is at stake and those defendants who do not have sufficient means to hire their lawyers. But the absence of objective standard to determine the interest of justice may leave states to ignore their obligations. The UN Human Rights Committee provided some guidance regarding the scope of state discretion and the criteria that states use: "The gravity of the offence is important in deciding whether counsel should be assigned 'in the interest of justice'". Nonetheless, this statement does not specify offences that need the state to appointed free legal counsel . However, the comment made it clear that at minimum the state is obliged to ensure that in capital offence cases the accused "must be effectively assisted by a lawyer at all stages of the proceedings[21].

C. The Right in Some Selected Jurisdictions

If one look in to the American criminal justice system he will understand that the right to legal representation in general and to state funded legal counsel is not a one-time shortcut development. Indeed, the right to legal counsel in American criminal justice system is an evolving concept that had passed different stages before it acquired its current status. Originally, the right to counsel in common law was limited to misdemeanors and only one felony, treason. The prohibition on defense counsel in serious cases was deemed necessary to the maintenance of order and social peace, as the risks of acquittal ,it was believed, would be too great if the defendant charged with a serious crime were entitled to counsel. Even in those instances where the accused was entitled to counsel, his attorney was permitted only to advise him on "matters of law," not on "matters of fact.[22]" It was only after the sixth amendment of the US constitution that the right of legal counsel acquired constitutional guarantee for the first time. The constitutional guarantee of right to counsel which was intended to overrule English common law tradition provides that "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him. . . and to have the assistance of counsel for his defence[23]. However, it was for the first time in 1932 in a case between *Powell v Alabama* that the supreme court of United States provided for the right of the indigents to state appointed legal counsel[24]. Nevertheless, the court failed to delimit the scope of the right as regards the seriousness of the crimes. Since Powell was charged with capital offense, the ruling of the supreme court ended on setting a precedent on American courts to appoint state funded counsel only for defendants charged with capital punishments. The Supreme court reversed the three decades precedent by a landmark decision in a case between *Gideon v wainwright* and set a new rule effectively requiring all courts in the United States to supply counsel for indigent defendants charged with felonies. Although the Court on Gideon again left open the clear-cut boundaries of the right, it held that state funded counsel must be appointed for any indigent defendant facing a serious criminal charge if the principle of fairness is to be effectively implemented. The scope of the right of the indigents to state appointed legal counsel was further expanded in a case *Argersinger v. Hamlin* in 1972 when the court declared that that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as

petty, misdemeanor or felony, unless he was represented by counsel at his trial[25]. The court reasoned its decision as

"The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more."[25]

Since *Argersinger v Hamlin*, the US criminal justice system has not shown any major change regarding the scope of the right to state appointed counsel of indigent defendants. The existing system allows indigent defendants the right to a state funded legal counsel if the crime for which they are accused holds a potential incarceration. Some commentators criticize the existing system as insufficient and unable to realize the due process principle on the ground that even punishments which are not punishable by means of incarceration do have severe consequences on the defendants since they have collateral effects on their latter lives and strongly suggested that all indigent defendants accused of crime should be guaranteed unqualified right to state funded legal counsel without any precondition[3].

The other country chosen for examination is South Africa since as an African country with better legal system development is believed to help countries such as Ethiopia which yet has to pass various challenges. Similar to the American system, the right to state funded legal representation has been a developing concept with gradual improvement. South Africa has passed through an evolution in implementing the right to counsel, from the right to be represented by one's hired counsel, to be represented by counsel at state expense when facing the death penalty, and finally, as envisioned by *Khanyile* and the 1996 Constitution, to be represented by counsel at state expense if "substantial injustice" would otherwise result[26]. Until 1819 a person brought before a court on a criminal charge was not able as a right to demand representation by an attorney or advocate.[28] In 1819 however, Lord Charles Somerest for the first time proclaimed the right of the defendants accused of serious crimes could employ legal attorney to defend for them. However, the right of the indigents to get legal assistance was not addressed by him. In *S v Heyman* the right to counsel expanded to cover any defendant who can hire attorney[27]. The South African statutory law for the first time recognized the right to representation of defendants in 1917[28] criminal procedure act by providing "every person charged with an offense is entitled to make his defense at his trial and to have the witnesses examined or cross-examined by his counsel, if the trial is before a superior court, or by his counsel (if any), or his attorney or law agent, if the trial is before an inferior court" and again in 1977 by providing as.

An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question[28].

The statutory status of the right of the indigents to get state funded legal representation however remained unnoticed until South Africa signed the International covenant on civil and political rights and adopted the provisional constitution of the 1993. Some South African scholars such as Steyler argued that the principle of equality before the law which south Africa has embraced for the long time in its adversarial system of procedures and in its earliest constitutions cannot be implemented unless the right to legal assistance is equally accessible to all accused persons[30]. Equal accessibility, in turn, requires the appointment of counsel for indigent defendants who otherwise would have no legal assistance[30]. His conclusion is that since legal representation is a necessity in modern court proceedings, denying indigent accused the same access to a help of defense lawyer which is enjoyed by a wealthy person, violates the principle of equality before the law[30]. Until very recently, however, South African courts were inclined to disagree with this proposition[31]. South African courts for a long time interpreted the right to legal representation as a negative right: a court cannot place obstacles in the way of a criminal defendant seeking legal representation, but a court need not remove obstacles that are not of its own creation and they ignored the right to state funded counsel of the poor[32].

It was after a landmark case of *Khanyile in S v Khanyile and other* that the judicial system of South Africa began to recognize the right of the indigents to state funded legal representation[32]. Justice Didcott in justifying the need for state funded legal counsel for the indigents based his verdict based on the principle of fairness embedded in south African criminal justice system[32]. He explained his reason as follows;

And if a lawyer's participation is deemed essential to the fair trial of somebody who has one either at hand or in mind, why should it be thought inessential to the fair trial of a man with nobody to whom to turn because he cannot afford the expense? The result of no lawyer is the same in both situations, after all, the layman being left to defend himself. And his handicap then is just the same, whether he is a wealthy layman denied an opportunity that he wanted to employ a lawyer whom he could have found or a poor one who never sought the opportunity because it was doomed from the start to prove futile. The answer to each question, I roundly suggest, is that there really is none[32].

Didcotts intention to fully embrace the America *Gideon* system of providing state funded legal counsel for every defendant with a potential punishment of incarceration was regarded impossible by Didcott himself due to resource limitations of South Africa[32]. He therefore proposed a balancing test consisting of three

factors that will oblige the court to appoint state funded counsel; Viz; the complexity of the case, the capacity of the defendant and the gravity of the charge.[32]. The 1996 South African constitution recognized the right to state funded legal counsel of indigents and to be informed of this right[33]. The Constitution too incorporated Didcotts balancing test of "substantial injustice". But it will be up to the courts to determine how to draw that line.[33] The problem however is that the fundamental constitutional rights understanding of the South African courts is very low because of which South African courts incline to interpret the right to state funded legal counsel provision narrowly[33]. The framework relies too heavily on judicial discretion, which, given the large number of judges involved, affects uniformity or equality[33].

Now therefore, a lot of South African scholars are urging their government to guarantee a universal right to state funded legal counsel for every accused defendant. Their justifications are that south African courts have failed to apply consistently the substantial injustice test and due to the increase in South African legal aid board, the feasibility concern is over and at last guaranteeing the constitutional right to legal counsel to everybody improves the goal of equality[26].

D. The Right Under Ethiopian Legal Framework

The right to state funded legal counsel of criminal defendants was for the first time incorporated implicitly in the Ethiopian first ever constitution of the 1931. This constitution incorporated the due process of law principle even though the right to counsel clause was not specifically provided[34]. We have seen above that US American courts have been implementing the right to legal counsel of criminal defendants by interpreting the due process provision of the sixth amendment[6]. Hence, there is no reason for Ethiopian courts not to interpret due process clause likewise. But one may argue that the due process clause of the 1931 constitution is unsatisfactory since Ethiopian courts with least exposure for human rights concepts may not have the awareness to think of due process to include the right to legal counsel. As Ethiopia is a civil law country, judges need a clearly provided legal provision to act up on. On this situation there is very less room for courts to interpret due process clause as to include the right to legal representation of the defendant at the cost of the state. Recognizing the gap, it seems that the 1955 revised constitution had tried to fill the gaps of the 1931 constitution by being more explicit and specific. Article 52 of this revised constitution provided that *where an accused is unable to defend himself or cannot hire a lawyer, the court shall appoint a lawyer pursuant to a law to be issued*[35]. It is surprising that the constitution provided for unqualified right of defendants to a state funded legal counsel. The only requirement being inability to defend himself or hire a lawyer.

The law which was enacted based on this constitutional mandate was the criminal procedure code of the 1965. However, the code was not as detailed as it should be to enable courts implement the right to state funded legal counsel properly. The only articles that provided for legal counsel are articles 127 and 61 of the said criminal procedure code. Article 127 stated that; when an accused is assisted by an advocate, the advocate shall appear with him. and article 61 says any person detained on arrest or remand shall be permitted forthwith to call and interview his advocate. However these two articles of the 1965 criminal procedure code left many issues unanswered. The code even failed to replicate the provision of the revised constitution that oblige the state to appoint state funded legal counsel to indigent defendants let alone to provide detailed procedure on how to appoint counsel for the indigents. After the overthrow of the imperial regime, the socialist Dergue government adopted a new constitution. This constitution which was adopted in 1987 provided for the indigents who are charged with serious crime the right to legal counsel. However, the constitution failed to delimit serious crimes from others. Hence, the 1987 constitution even confused and complicated things more than curb it. The latest and the currently working constitution that addressed the issue of state funded legal counsel is the 1995 federal constitution of the country. This constitution provided *accused persons the right to be represented by legal counsel of their choice, and if they do not have sufficient means to pay for it and miscarriage of justice would result to be provided with legal representation at state expense*[8].

This provision is yet far from satisfaction to enable courts implement the principle of fairness adequately. One challenge faced by the courts is that the constitution does not specify at what stages of the proceedings defendants are allowed to be appointed legal counsel. As a matter of principle, the question of appointment of a defense counsel for indigent defendants begins with the filing and reading out of the charge to the accused even if there is no legal rule which prevents courts from appointing right from the first stage[36]. Reality tells us that defendants are prone to violation of their human rights at the earliest stages when they are under police custody. If indigent defendants are not provided for a counsel at this stage, they may be forced to speak out confessions that may incriminate themselves at the later stages of the proceedings. Hence, the constitution should have provided the right of the defendants to get court appointed counsel at all stages of the proceedings starting from the initial stage or else a detailed legislation that could guarantee these rights supplementing the constitutional provision should have been enacted. The other point of contention on this constitutional provision is the balancing test inserted as a precondition to appoint legal counsel for the poor defendant. Based on this provision the court shall appoint counsel only if miscarriage of justice could occur.

The difficulty with this phrase is that it is not clear when miscarriage of justice happens. Neither the constitution nor any subsidiary legislation have tried to define the term. Other jurisdictions such as the South African system have made criteria to determine the possibility of miscarriage of justice if the defendant defends himself unrepresented by taking in to consideration the complexity of the case, the capacity of the defendant and the gravity of the charge even though this test is not by itself free from criticism[32]. The lack of clarification of miscarriage of justice by the relevant laws of the country had made it difficult for our courts to determine what types of cases qualify for free legal assistance through state appointed legal counsel.[37] However, two specific legislations though not having nationwide applicability have highlighted on the interpretation of the phrase. The first one is the defense forces proclamation which stated that "the state shall provide a defense counsel to a military member charged with an offence punishable with imprisonment of not less than five years and is unable to get counsel[38]. The second is the proclamation to provide for the re-establishment of Oromiya courts which provided that the court shall assign a defense counsel to an individual who is accused of a crime punishable with rigorous imprisonment not less than five years [39]. Despite their clarity however, these laws remain inapplicable throughout the country as they are addressed to limited section of the society.

On the other hand, some scholars argued in favor of the provision for its pragmatic nature which recognizes the reality. In this way Muradu reckons as follows to give his support to the way the constitution address the right to legal counsel;

It seems to be a realistic construction in the light of the acute shortage of resource in the country. 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 offence and at all stages of criminal proceedings. 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 offence entailing a loss of liberty for any length of period[36].

This argument of pragmatism however, failed to hold sway as the uncertainty of the law has resulted in a chaotic practical situation. Muradu himself has admitted that federal judges appoint free legal counsel to defendants only accused of very serious crimes such as crimes of homicide, terrorism and corruption[36].

In addition to the above elaborated domestic laws, Ethiopia is also the signatory of various international conventions that indirectly or directly address the issue of state funded legal counsel of defendants. Article 9(4) of the constitution of Ethiopia provided that all international agreements signed and ratified by Ethiopia shall be the integral parts of the laws of the land[36]. Furthermore, article 13 (2) of the same constitution provided that human rights parts of the constitution shall be interpreted in accordance with the international human rights documents to which Ethiopia is a party[35]. The constitutional provision of the right to state funded legal counsel is however the verbatim copy of those which exist in international human rights documents. Unfortunately however, the ICCPR jurisprudence is not developed as to give a detailed explanation on how to interpret the phrase miscarriage of justice. The absence of objective standard to determine the interest of justice may leave states to ignore their obligations. The only trial to give guidance was made by UN Human Rights Committee regarding the scope of state discretion and the criteria that states use: "The gravity of the offence is important in deciding whether counsel should be assigned 'in the interest of justice'". The comment made it clear that at minimum the state is obliged to ensure that in capital offence cases the accused "must be assisted by a lawyer at all stages of the proceedings. Nonetheless, this statement does not specify offences that need the state to appointed free legal counsel.

Part II. The Need For A Reform On The Ethiopian Laws and Practice

A. The Practice In Ethiopian Courts

Even though there is no nationwide empirical data that can show us the exact percentage of unrepresented criminal defendants, it can be seen from decided cases and interviews that the majority of the criminal defendants in Ethiopia got convicted without the help of legal counsel. In fact, there is no uniformity among the courts in appointing legal counsel for the defendants. Some courts appoint legal counsel for criminal defendants accused of serious crimes such as treason, homicide and corruption only. Other courts, especially those in remote areas, do not appoint legal counsel to criminal defendants no matter how poor the defendant is and despite the seriousness and complexity of the crime for which the defendant is accused. It is very common in Ethiopian courts to see numerous criminal defendants convicted of capital punishment or life imprisonment without any legal representation.

On those limited situations where legal counsel is appointed, courts appoint only after the charge is read to the defendant after the main trial procedure has began. The absence of any legal provision that entitles the criminal defendant the right to representation at the arrest stage of the criminal procedure has contributed to

the problem. The arrest stage is the most sensitive stage for defendants since they may speak self-incriminatory statements to the police and since the police may coerce them to speaking up on pressure using their fragile and layman situation. Most judges never notify the indigent criminal defendants of their constitutional rights to state funded legal counsel. The irony is that most criminal defendants are not aware of this right and not in a position to raise it before the court. They even don't have the slightest idea about court appointed legal counsel since they don't have a reason to believe that the one who charges them to punish them will appoint counsel to deter its own activities. Giving the right to state funded legal counsel without giving the right to be informed of the same is like giving the porridge and denying the spoon.

According to the constitution, the right of the indigents to state funded legal counsel is applicable only if miscarriage of justice would happen. But the difficulty of uniform interpretation of the clause has created problems on its implementation. Different courts interpret the "miscarriage of justice" clause quite differently. In some courts, the clause is applicable only for very serious charges such as capital offences. Some courts understood it as it depends up on the complexity of the charge, the graveness of the offence and the capacity of the defendant. Based on this criteria even a petty offence may qualify for the right to state appointed legal counsel. For others, the graveness of the offence is taken to mean those offences punishable for at least five years rigorous imprisonment.

Despite a constitutional provision for state funded legal counsel, in practice most courts are not allocated the funds needed for that purpose. Both the federal government and regional states allocate a very limited amount of fund for only some selected courts. Due to unavailability of the necessary funds for that purpose, most courts even do not have public defender's office. The problem is not however completely attributable to lack of sufficient funds since many courts that have enough money have failed to implement the right to court appointed representation only because of lack of willingness on the part of the judges. And the failure of the executive body to allocate sufficient funds for public defender's office of the courts is not really from acute financial shortage but from lack of readiness to support the indigent criminal defendants.

The overall result of the above factors is mass imprisonment of poor criminal suspects without getting the chance to present their case and to defend themselves. The right to equality and the right to fair trial through due process of law that Ethiopia has aspired to implement are impossible without giving adequate opportunity for the poor to defend their case.

B. The Need To Make Reform On The Law And Practice

Most of the problems that I discussed earlier are so multifaceted and deep rooted that there is no easy solution. The problem of non implementation of the constitutional provision on the right of the indigents to state funded legal counsel could not be fully solved by making some changes and/or additions on the provisions of the existing law since failures are not attributable solely to legal gaps. Nevertheless, having complete, detailed and well-designed legal provisions could help as a spring board to guide and enable the courts avoid confusion and follow the right way.

The author of this article believes that one important factor for the poor implementation of the right to state funded legal counsel of indigent criminal defendants in Ethiopia is the inadequacy of the law itself. The law is so ill designed that defendants could not benefit from the provisions of the law. One of the gaps of the law is its silence regarding the stage whereby legal counsel can be requested from the court. Neither the constitution nor procedural laws provided the stage for appointing legal counsel[35]. The fact that the constitutional provision dealing with the right to legal counsel is included under the title of "the rights of accused person"[36]. leads one to conclude that no right to legal counsel can be claimed before the charges are read to him by the court. But scholars agree that criminal defendants must be entitled to legal counsel starting from the initial stage during their first confrontation with the law enforcement bodies since criminal defendants are mostly abused and tortured at this stage. Hence, the constitution or at least the procedural law should be amended so as to include the right of the indigent criminal defendants to state appointed legal counsel at the earliest time possible.

The other gap witnessed on the law is about the duty of the court to tell the criminal defendant of his right to counsel. It is clear that in a country where most people are laymen, criminal defendants are not aware of their legal rights. If the full effect of the provision is to be realized, then unaware people must be informed of what the law entitled them. Hence, not only is the right to legal counsel mandatory but also courts should be duty bound to inform such rights. Under the South African constitution for example, the court is obliged to inform indigent criminal defendants of their right to state appointed legal counsel. Hence, Ethiopian procedural laws should be re-enacted incorporating provisions that impose a duty on courts to inform criminal defendants of their right to legal counsel if the right to counsel.

Either the Constitutional provision that incorporated the clause of "miscarriage of justice" should be amended if possible or at least some detailed provisions must be included in the criminal procedure law to enable courts avoid confusion and to realize uniformity of interpretation of the law. Different courts interpret the "miscarriage of justice" clause quite differently. In some courts, the clause is applicable only for very serious

charges such as capital offences[36]. Some courts understood it as it depends up on the complexity of the charge, the graveness of the offence and the capacity of the defendant. Based on this criteria even a petty offence may qualify for the right to state appointed legal counsel. For others, the graveness of the offence is taken to mean those offences punishable for at least five years rigorous imprisonment. This provisional uncertainty has helped courts to deny the right to legal counsel of most criminal defendants. In our current situation, most judges are influenced by the crime control model, which in doubtful cases, are inclined towards punishing the defendant than worrying for his human rights. Hence, the procedural law must be amended in such a way that clear and fast guidelines exist to enable courts decide what defendants are entitled to state appointed representation and what are not. The provisions must be reduced into purely quantifiable criteria.

The procedural law must also be modified to regulate the effect of failure of legal representation while one is entitled for such a right. Sometimes, courts may fail to implement the legal provision though the law is clear. As a matter of fact, some judges punish criminal defendants to death penalty even though the law is clear on the matter and there is no doubt about the right of the defendant to legal counsel[1]. Though the law is vivid as to the need for representation, it is silent on what will happen if the court refused illegally to appoint legal counsel for the poor. Both in South Africa and United States, failure by the court to appoint state funded legal counsel for the indigent against the law will result in a complete reversal by the appellate court of the lower court's decision if some unfair decision is passed based on a procedure that is conducted without the legal counsel[26]. The author of this article suggests similar provision in the Ethiopian criminal justice system so as to give strength for the law.

Even though reforming the law is one important condition for effective implementation of the right to state funded legal counsel, having written law may not by itself be a curative drug for all the problems affecting the right. Unless strong measures are taken by the executive to give life to the written provisions of the law, they may remain only of paper value without no implementation. The present situation in Ethiopian courts on the right to state funded legal counsel looks quite bleak. At first the state is not allocating sufficient funds needed to hire lawyers for the poor. Secondly, most of the courts do not have the public defender's office that can manage the requests of the accused defendants. Thirdly, judges are not given trainings on the need and relevance of the right to state funded legal counsel and their responsibility in the administration of roper justice. Fourthly, proper monitoring and evaluation mechanisms are not established to measure the effective implementation of the legal provisions on the right to state funded legal counsel. Hence, to realize effective realization of the right in addition to making legal reform the author of this article suggests the following reforms on the practice to be made by the courts and law enforcement organs.

One responsibility needed from the government is allocating sufficient funds necessary to implement the right. Providing the right to state funded legal counsel without allocating sufficient funds for it is like giving the porridge without the fork. Courts need to get sufficient money to be able to hire a qualified attorney for the accused. The government of Ethiopia should pay attention to this if authorities are really interested to see the realization of the right.

The other measure that the government should take is to give up to date and effective training for judges and law enforcement officials about the relevance of implementing the right. Ethiopian judges are not widely exposed for human rights and procedural rights of accused defendants. Most judges and prosecutors are influenced by the crime control model. To help them grasp the new principle, they need to be aware of the rights of the accused defendants in general and about the right to legal representation in particular.

Currently, the level of implementation of the right to representation in Ethiopia is one of the lowest. In addition to reforming the law and giving effective training to judges and law enforcement officials to guarantee the right to representation of the accused, further successive activities must be carried out until the full implementation of the right for every accused defendants become a well -developed culture of Ethiopian courts. Organized systematic follow up and monitoring of the courts and law enforcement organs in order to measure the level of implementation of the right and to know the reasons for the failure of implementation and those responsible for the weakness is an important solution to improve the existing situation.

II. CONCLUSION

Even though any state has the mandate to try and punish its offenders, this responsibility should not be undertaken arbitrarily by disregarding acceptable procedural formalities. Any modern state which has acceptable and fair criminal trial procedures should respect the widely accepted rights and privileges of accused defendant. A fair trial is the one which is based on *due process of law* and *equality before the law* principles. One of the various rights essential to implement a fair trial principle is the right to be represented by a legal counsel. Almost all states which have developed legal systems and international legal instruments have recognized this right considering its relevance. They have gone far to realize the implementation of the right to its maximum limit. Even though Ethiopia recognized the right to state funded legal counsel a century ago the reality observed in courts at the present time showed that little progress has been made. Yet numerous accused defendants are

suffering punishment without getting the chance to defend their case with the help of a legal counsel. The problems are emanated from different direction. Absence of complete and detailed legal provisions, lack of awareness by the judges and law enforcement officials on the right and lack of monitoring and evaluation mechanisms to measure the implementation level of the right are the causes for failure of effective implementation of the right. Making a change to the law by inserting some detailed provisions, training and awareness creation for the judges and law enforcement officials, and creating monitoring and evaluation strategies to measure their implementation levels are the solutions suggested to realize effective implementation of the right to state funded legal counsel for the indigent defendants in Ethiopian courts.

REFERENCES

- [1] Mekuria Mamo v Conta special district high court; file number 01639
- [2] Peter M. Bekker; the right to legal representation including effective assistance for an accused in the criminal justice system of South Africa 174-175
- [3] Fransis D Doucette; non appointment of counsel in indigent criminal cases; A case study 31 new Eng law review.445,496-499 (1997)
- [4] Powell,287 US at 49-50
- [5] Article 11(1) of UDHR, article 14(3) of ICCPR; article 6.3 (c) of ECHR, article 8 of ACHR, article 7.1© of ACHPR.
- [6] Gedeon v Wainwright, 372 US 344(1963)
- [7] Section 36(3)(c)c) of Concstitution of federal Republic of Nigeria
- [8] FDRE Constitution of Ethiopia 1995
- [9] John D. King beyond life and liberty; the evolving right to liberty. Harvard civil rights review vol. 48 page 8.
- [10] Betts v Brady 316 US at 473
- [11] Luong thi my quynh(2011); guarantee of the accused persons right to defense counsel. A comparative study of Vietnamese, German and American criminal procedure laws, page 22
- [12] Lawyers committee for human rights USA (2000); What is a fair trial? A basic guid to legal standards and practice
- [13] Article 14(3) and Article 16(1) of international convention of civil and political rights
- [14] M. Cherif Bassioni(1993); Human rights in the context of criminal justice; Identifying international procedure protection and equivalent protection in national constitutions 3 Duke. J. comp. & international law review 235 page 267-68
- [15] Salvatore Zappalata (2005) Human rights in international proceedings, Oxford p.3
- [16] Stephan Trechsel (2005); Human rights in criminal proceedings, Oxford p 245
- [17] UN Office on drug and crime (2011); Handbook on improving access to legal aid in Africa
- [18] UDHR; Article 11 (1) general assembly resolution December 10
- [19] Danish institute of Human rights(2011 access to justice and legal aid in east Africa p. 19
- [20] ICCPR article 14(3)(d)
- [21] Un human rights commettee, general comment number 32 article 14 equality before the courts
- [22] W. Beany (1995); the right to counsel in American courts; 8-14
- [23] US Constitution amendment VI
- [24] Powell, 287 US at 49-50
- [25] Arger Singer v Hamlin, 470 US 25,37(1972)
- [26] Loui Itoh; Why South Africa should embrace Gedeon; an analysis of the right to counsel and why it should be extended to all defendants. Journal of international law and politics Vol. 44 page 951-997
- [27] Wesse; History of Roman and Duch law; 376 et. seq voet 3.3 14 and 15
- [28] A. V Heyman 1966 4 SA 598 (A)
- [29] Nico Steyler (1989); Equality before the law and the right to legal representation 25 APR. J cum Just 66 page 68
- [30] Junifer L. Huber legal representation for indigent criminal defendants in South Africa; Possibilities under the 1994 constitution. Duke Journal of comparative and international law vol. 5
- [31] SV Mkize 1978(3) SA 1065
- [32] Kanhile 1983 SA at 810
- [33] South African Constitution Chapter 3 art.25 (3)(e)
- [34] Ethiopian Constitution of the 1931
- [35] Article 43 of the 1995 Revised Ethiopian Constitution
- [36] Muradu Abdo; The indigents right to defence counsel in Ethiopia. Human rights in criminal proceeding; Narrative and practical aspects. Human rights law series vol. III(2010) page 140- 157.

- [37] Hussein Ahmed et al. (2012); The extent and impact of unmet needs for state funded legal aid in Wolaita zonne page 29.
- [38] FDRE; defence forces proclamation no 27(1996) federal negarit gazzettee send ed. article 15(2)(3))
- [39] Proclamation to provide for the reestablishment of Oromya regional state courts ; proclamation number 141/2008 megeleta Oromya 16th year no.1

Mulugeta Akalu. "The Right to State Funded Legal Counsel in Criminal Proceedings in Ethiopia; the Need for a Reform on the Law and Practice." IOSR Journal Of Humanities And Social Science (IOSR-JHSS) 22.8 (2017): 01-11.