

The Right to Defense Counsel in Ethiopia: A Quest for Perfection

Tsehai Wada*

Abstract

The right to defense counsel is in short, an arrested or accused person's right to have a state appointed counsel when she cannot afford to hire one. Given its importance in administering an ideal criminal justice system, it is given recognition under major international human rights instruments as well as constitutions and subsidiary laws of many countries. Despite such wide recognition, its implementation is fraught with difficulties. Ethiopian laws, as well as regional and international human rights instruments to which Ethiopia is a party, also recognize this right. Nonetheless, the right is availed by quite a few individuals who came into conflict with the law. This piece attempts to show the legal framework that pertains to the right under discussion, canvass the practice starting from 1965 to date from different academic researches, analyze data collected as recently as 2015 and indicate the shortcomings of both the laws and the practice. In doing so, it discusses the laws and practices of different countries with a view to draw insight from their strengths. The paper identifies that the major hurdle in all these is the lack of a vibrant Public Defenders Office and counsels, among others, and suggests that this institution shall be invigorated, and the relevant laws shall be amended to give full effect to the right.

Key terms: defense counsel, arrestee, accused, public defender's office, human rights

Introduction

One of the most troubling issues in the administration of the criminal justice system is the case of suspects/accused individuals.¹ Because crimes are public matters, the state establishes different institutions to deal with them. Accordingly, police, prosecution offices, courts and jails are found everywhere and all these are run by public money. In all criminal cases there are two parties, i.e., the state and the suspect/accused. Relative to its economic might, the state tries its best to equip these institutions with professionals. The suspects/accused are on the other hand –

* Associate Professor, AAU, School of Law. Email address: tsehaiwada@gmail.com.

¹ Suspects/accused is here employed as a short form to refer to those arrested at police stations – arrestees - and those who are formally charged and awaiting their fate at trial, respectively.

in most cases,² – individuals who have neither the professional capability to defend their cases, nor the financial resource to employ professionals, such as lawyers.

The formal state law³ is sophisticated and complex so much so that it is not well comprehended even by educated individuals - except lawyers- let alone illetrate individuals. So, it goes without saying that in criminal cases, the suspect/accused is disproportionately less armed compared to the state. Nonetheless, at present, so many international and regional human rights instruments as well as many state constitutions guarantee different rights that may help to ameliorate this imbalance or inequality of arms. Suffice to mention that the right to: equality, fair trial, due process of law, *inter alia*, are pervasive in all such instruments. The right to defense counsel is no less pervasive.

Under international and regional legal instruments, the duty to implement the right to counsel is imposed on the state. Nonetheless, the implementation of the right is fraught with difficulties, for in so many places states have failed to establish or adequately resource the institutions that can be of help for the realization of the right. Such institutions usually do not match the agencies of the criminal justice system, as a result of which indigent suspects/accused are disadvantaged. Best practices of different countries show that there are different institutions that are engaged in providing free legal services to the indigent and these are *inter alia*: public defender offices, legal aid centers, bar associations, etc.

The right to defense counsel is enshrined in the different international and regional human rights instruments to which Ethiopia is a party as well as the national constitution and other substantive and procedural laws of the country. Nonetheless, both the law and the practice leave much to be desired as shall be discussed in the article. The article is thus divided into six parts that deal with: the theoretical framework on the right to defense counsel, the South African experience, the Ethiopian legal framework, the practice, general observations of the law and the practice and future prospects, respectively. It concludes by making some major recommendations that may help in ameliorating the laws and the practice.

1. Theoretical Framework

The right to defense counsel is a self-explanatory phrase that may not demand a technical definition. Suffice to mention that it is the right of an arrestee or accused who cannot afford to hire a lawyer.

² This is to indicate that corporate bodies can also be made liable for criminal acts, but this is an exceptional situation.

³ It is alleged that both the substantive and procedural laws of the informal justice system are known by the subjects of the laws. Since this article deals with the formal justice system only, this will not be covered here.

The International Covenant on Civil and Political Rights provides *inter alia* that,

In the determination of any charge against him, everyone shall be entitled to the following guarantees, in full equality.... d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he doesn't have legal assistance, of his right to and to have legal assistance assigned to him, in any case where the 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.⁴

The African Charter on Human and Peoples' Rights (1987), also provides that 'Every individual shall have the right to have his case heard. This comprises: the right to defense, including the right to be defended by counsel of his choice.'⁵ In addition to these, the United Nations has issued different instruments that deal with the right to defense counsel. All these instruments recognize and provide detailed methodologies by which the right to defense counsel can be realized.⁶

Given the fact that most of our laws have drawn from foreign legal systems, it seems appropriate to touch upon the laws and practices of some countries. It is hoped that knowledge about the laws and practices of other countries can help in identifying the strengths and shortcomings of our laws and to have a global view about the issue at hand. So, the following part deals with this.

A look at the literature on the historical developments of the right to counsel in major democracies evinces that,

[In England], the right to counsel began to appear at the time of formation of the adversarial system, which developed in the late Sixteenth and

⁴ The International Covenant on Civil and Political Rights (hereafter the ICCPR), Art.14 (3).

⁵ The African Charter on Human and Peoples' Rights (1987), (hereafter ACHPR) Art.7 (1) (c). In addition to the Charter, the African Commission on Human and Peoples's Rights (ACHPR) has issued some Resolutions pertaining to fair trial and these are, *inter alia*: ACHPR Resolution on the Right to Recourse and Fair Trial, Tunis, Tunisia, 1992; ACHPR Resolution on the Right to a Fair Trial and Legal Assistance in Africa, Kigali, Rwanda, 1999 and ACHPR Principles and Guidelines on the Right to A Fair Trial and Legal Assistance in Africa, 2001. See also The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, November 2004.

⁶ Details are left out due to space limitation. The most pertinent instruments are: United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, United Nations, New York, 2013. The Guideline lists a number of international legal instruments, including the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa that it intends to complement and the list is left out here; UN Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, 1988, Adopted by General Assembly Resolution 43/173 of 9 December 1988, Art.11 (1); and UN Basic Principles on the Role of Lawyers, 1990, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. See also UN Standard Minimum Rules for the Treatment of Prisoners, 1957, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. These instruments also provide *inter alia* that: the right to defense counsel shall be asserted and exercised at all proceedings, the state shall ensure the provision of sufficient funding and other resources for legal services to the poor, and that interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

Seventeenth Centuries.⁷ ... Since 1836 full assurance of the right to counsel has been granted not only in felony but also in misdemeanor trials'.⁸

In France, '[N]ot until 1808 did the Napoleonic Code of Criminal Procedure make it compulsory that the defendant should have a lawyer when tried in the Assize court. French law also required that an attorney represent the accused during the process of pretrial investigation. Soon after that, the accused in France was granted the right to the assistance of an advocate (attorney), and if he or she cannot afford one, then one is to be appointed'.⁹

The position of The European Court of Human Rights (ECtHR) is succinctly described by Open Society as follows:

Under the recent jurisprudence ... a person must have access to legal assistance when they are placed in custody or their position is significantly affected by the circumstances, which may even be before a formal arrest takes place. In particular, no one should be interrogated or required or invited to participate in investigative or procedural acts without the right of access to legal assistance. Suspects have the right to access the full range of services inherent in legal advice, such as discussion of the case, organization of the defence, collection of evidence, preparation for questioning, support to an accused in distress, and checking of the conditions of detention, from the moment the person's right to an attorney attaches.¹⁰

In US, for one, the source of the right to defense counsel is the Sixth Amendment that provides that '[I]n all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense'. According to King, 'It is generally understood...that the drafters [of the US Constitution] did not intend to afford those charged with crimes an affirmative right to counsel, but rather the right to retain counsel at their own expense'.¹¹ Nonetheless, though the Sixteenth

⁷ JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (Oxford University Press 2003); HARRY R. DAMMER & ERIKA FAIRCHILD, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS* (Greenwood Press 2002); RONALD BANASZAK, *FAIR TRIAL RIGHT OF THE ACCUSED* (Greenwood Press 2002), as quoted in Luong Thi My Quynh, *Guarantee of the Accused Person's Right to Defense Counsel – A Comparative Study of Vietnamese, German and American Criminal Procedure Laws* (2011) (Unpublished PhD Dissertation, Lund University and Hochiminh City University), p.14.

⁸ Charles Donahue, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 *YALE LAW JOURNAL* 1000, 1027-1028 (1964), as quoted in Luong Thi My Quynh, *supra* note 7, at 15; Chowdharay-Best, *The History of Right to Counsel*, 40 *JOURNAL OF CRIMINAL LAW* 275, 279 (1976), as quoted in Luong Thi My Quynh, *supra* note 7, at 15; Laurie Fulton, *The Right to Counsel Clause of the Sixth Amendment*, 26 *AM. L. REV.*, 1599, 1600 (1989), as quoted in Luong Thi My Quynh, *supra* note 7, at 15.

⁹ CRAIG M. BRADLEY, *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 233-237 (Carolina Academic Press 2007), as quoted in Luong Thi My Quynh, *supra* note 7, at 17.

¹⁰ Open Society Justice Initiative, *European Standards on Criminal Defence Rights: ECtHR Jurisprudence*, CASE DIGESTS 15 (April 2013), <https://www.opensocietyfoundations.org/sites/default/files/digests-arrest%20rights-european-court-human-rights-20130419.pdf>

¹¹ John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 *HARVARD CIVIL RIGHTS – CIVIL LIBERTIES LAW REVIEW* 1, 8 (2014). (All citations from this source are omitted.)

Amendment has filled this gap, its generality could not address the issues that arose after its enactment. Accordingly, the US Supreme Court has interpreted the law through successive decisions, and it is now understood to include the right to representation that apply to critical stages, more particularly at pretrial proceedings, pretrial identification procedures, and when one is subjected to police or prosecutor efforts to elicit inculpatory statements and it extends to the time when a person is taken into custody and the police has the duty to inform the person about this right.¹²

2. The South African Experience

To the best knowledge of this writer, compared to other African countries, the South African law and experience provide for comprehensive and strong guarantees and almost all forms of approaches that help in the realization of the right to defense counsel are put in practice. Because of the valuable lesson that could be drawn from it, it is worthwhile to explore the South African system at some length here.¹³

According to Mason,

The South African experience is valuable because the country has established one of the most sophisticated legal aid schemes in the developing world. ... The South African experience followed an evolutionary approach to legal aid delivery that went from pro bono to judicare to salaried lawyers'.¹⁴

The Legal Aid Act of 1969 (as amended in 1971, 1972, 1989, 1991 and 1996) established a Legal Aid Board, that is mandated to 'render or make available legal aid to indigent persons and to provide legal representation at state expense as contemplated in the Constitution as well as to provide ... legal representation at state expense ... where substantial injustice would otherwise result.'¹⁵ The Board, though accountable to the Ministry of Justice, has its own legal personality. Source of finances of the Board consist of: money appropriated by the Parliament in order

¹² For further details See WAYNE R. LAFAYE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, *CRIMINAL PROCEDURE*, at Sec.11.1(a) (3rd Ed. Westlaw Next 2012) (All citations from this source are omitted.).

¹³ *LEGAL AID: INTERNATIONAL EXPERIENCES AND PROMISING PRACTICES FOR LEGAL AID PROVIDERS* (Paul Dalton & Hatla Thelle eds., The Danish Institute for Human Rights 2010) have canvassed the laws and practices pertaining to the right to defense counsel in: China, Malawi, The Philippines, South Africa, Uganda, Zambia, Indonesia, and Russia. It can be easily noted that the South African laws and experience are better than the rest by all standards. Moreover, the fact that South Africa is an African nation that is a member of the AU and party to the relevant instruments adopted by it, and that it shares comparatively "common values" with other African nations, its laws and practices are more inspiring to other African nations than the rest, i.e., non-African nations.

¹⁴ David McQuoid Mason, *Holistic Approach to the Delivery of Legal Services - The South African Experience*, in *A HUMAN RIGHTS TO LEGAL AID* 135, 136 (Paul Dalton & Hatla Thelle eds., The Danish Institute for Human Rights 2010) (All citations are omitted.)

¹⁵ Art.2 &3 dA of the Act.

to enable the Board to perform its functions and moneys received from any other source.¹⁶

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

‘Courts can direct cases to the Board for evaluation’.¹⁸ The South African experience is known as a “holistic approach”, which means that “[T]he maximum is made not only of the public sector legal aid bodies such as national legal aid board or council, but also of legal services providers in the private sector, such as bar associations, public interest law firms, law clinics and paralegal advice offices’.¹⁹ Over all, eleven different approaches are used to provide legal aid and these are: Pro bono legal aid work, state funded *judicare* – ex-officio or referrals to private lawyers, state funded public defenders, state funded legal aid interns in rural law firms, state funded law clinics, impact litigation, cooperation agreements, public interest law firms, university legal aid clinics, street law type clinics, and paralegal advice offices. *Judicare* was the main avenue of providing legal aid before the introduction of the new constitution that made it mandatory to provide the service at state expense. This system was found to be expensive and it is now used in exceptional cases only. The state funded public defenders system employs legally qualified persons to represent the indigent and it is proved to be less expensive and successful. Other approaches, such as impact litigation, cooperation agreements, and public interest law firms are used in those places where the board has no branch offices, [or] in cases of conflict of interest or [when] the issue to be litigated demands expertise.²⁰

3. The Ethiopian Legal Regime

The 1995 Constitution of Ethiopia currently in force ²¹ is the fourth constitution in the country’s legal history. Its first written constitution of 1931 had no provision that deals with the right to defense counsel. The 1955 Revised Constitution which

¹⁶ Arts.2, 4/1, a-g, and 9/1, a & b of the Act, respectively.

¹⁷ Mason, *supra* note 14, at 137-138.

¹⁸ According to Art.3 of the Act, “Courts before deciding shall ensure that an indigent accused shall be represented by a counsel at state expense, shall take into account, *inter alia*: the personal circumstances of the person, the nature and gravity of the charge and send the case to the Board that will evaluate and report back its findings”.

¹⁹ Mason, *supra* note 14, at 135.

²⁰ For more details, see *Id.*, at 139-162.

²¹ Constitution of the Federal Democratic Republic of Ethiopia, *Proclamation No. 1/1995*.

replaced the 1931 Constitution recognized the right.²² The 1987 Constitution that repealed the latter had also recognized the right.²³

The 1995 for its part has two provisions that deal with the right under discussion and these read:

1. Art. 20(5) that provides that ‘Accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense’.
2. Art. 21(2) that provides that ‘All persons shall have the opportunity to communicate with, and be visited by...their legal counsel’.

It should be noted here that the former provision is found under Art. 20 that is entitled as “Rights of Persons Accused” and the latter under Art. 21 that is entitled “The Right of Persons Held in Custody and Convicted Prisoners”. Though the former is straight forward, it is not clear whether the right to ‘communicate and be visited’ under the latter provision, also encompasses the right to representation. In addition to the two constitutional provisions, the only provision of a subsidiary law that pertains to the right to defense counsel is Art. 61 of The Criminal Procedure Code²⁴ that provides that ‘Any person detained on arrest or on remand shall be permitted forthwith to call and interview his advocate and shall, if he so requests, be provided with the means to write’. The article comes under Chapter 2 entitled as “Remand” and the caption of the article reads as “Detained Persons Right to Consult Advocate”. The article is limited in scope, and it gives rise to an argument whether this may include representation at any other processes of the criminal justice system. It may, therefore, be concluded that the article as well as Art. 21(2) of the Constitution touched upon the right tangentially but not as their core subject.

In any case, it helps to note that under the current Constitution, ‘the Constitution is the supreme law of the land and that all international agreements ratified by Ethiopia are an integral part of the law of the land’²⁵ and that Ethiopia is a party to major international human rights conventions and regional instruments such as the Covenant on Civil and Political Rights as well as the African Charter on Human and Peoples’ Rights. It, therefore, follows that in addition to the Constitution and

²² The Revised Constitution of Ethiopia, *Proclamation No. 149 of 1955* had provided under Art.52 that ‘In all criminal prosecutions, the accused, duly submitting to the court shall have the right to have the assistance of counsel, who if the accused is unable to obtain the same by his own efforts or through his own funds, shall be assigned and provided to the accused by the court.’

²³ The Constitution of the Peoples’ Democratic Republic of Ethiopia, *Proclamation No.1 of 1987* had also provided under Art.45 (3) that ‘Any accused person has the right to defend himself or appoint a defence counsel. Where a person is charged with a serious offence and his inability to appoint a defense counsel is established, the state shall appoint one for him free of charge, as determined by law’.

²⁴ The Criminal Procedure Code of Ethiopia, *Proc. No.185 (1961)*.

²⁵ Art.9 (1&4) of the Constitution of the Peoples’ Democratic Republic of Ethiopia.

the subsidiary laws, these conventions are equally applicable and form part of the legal regime in Ethiopia.²⁶

3.1. Major Legal Gaps and their Consequences

If we leave aside the Criminal Procedure Code's provision and Art.21 of the Constitution, for it is only through a very wide legal interpretation that one can reach at a conclusion that they pertain to legal representation, the only provision that guarantees the right to defense counsel is, Art.20 of the Constitution. It should also be noted that the right is qualified, for in order to be exercised, the accused has to be an indigent and the right is available when a court feels that non-representation will result in 'miscarriage of justice' – a vague standard.

As the laws stand at present, a suspect under police detention cannot lawfully assert this right, for she has to wait till she is formally charged. Nonetheless, though a trial is a major proceeding, the pre-trial proceedings are equally important to determine guilt or innocence and this legal lacuna is just unfortunate, to say the least.

The US experience shows that such assistance shall be given at 'critical stages' in criminal prosecution.²⁷ These critical stages are *inter alia* 'those instances which will have adverse consequences as to the disposition of the charge which could have been avoided or mitigated if defendant had been represented by counsel.'²⁸ One of these stages is the time when an arrested person is taken into custody by the police which normally continues up to the trial stage and thereafter including appeal. Under the Ethiopian criminal justice system there are a number of pre-trial proceedings that demand the services of a defense counsel. Some of the major proceedings are: arrest, interrogation – by police - and appearance at the nearest court soon after arrest.²⁹ 'Trial' proper, is a proceeding wherein a suspect is formally charged, admits or denies guilt, cross examines prosecution witnesses, challenges evidences, submit defenses – if any - and appeal if aggrieved by the decision of the court entertaining the case.

²⁶ Note that there are some laws enacted with the view to provide free legal aid to the indigent and these will be discussed below under a separate title.

²⁷ LAFAVE *et.al*, *supra* note 12, Sec.11.2 (b).

²⁸ *Id.*

²⁹ Art.29 of the Criminal Procedure Code provides as follows:

Procedure after arrest :

1. Where the accused has been arrested by the police or a private person and handed over to the Police..., the police shall bring him before the nearest court within forty-eight hours of his arrest or so soon thereafter as local circumstances and communications permit... [It is also provided that this court can decide on the bail right of the arrestee or that the arrestee shall be kept in custody...See Art.59. Art.19 (3) of the Constitution also guarantees the right to be brought to court within the same time limit.

The importance of assistance by a defense lawyer in pre-trial proceedings cannot be overemphasized. An arrestee may have been arrested for no lawful reason, or may be intimidated through third degree or other unlawful methods to admit guilt – self-incrimination; denied bail though she may be entitled under the law, etc. Thus, if these rights are denied at pre-trial proceedings, it will be difficult if not impossible to reverse their effects at trial. The reversal of course demands the extraordinary efforts of a vigilant defense lawyer or a judge, as the case may be. Moreover, if an accused cannot be represented at trial, for one reason or another, there will be a high probability that the trial will end in unlawful conviction.

It may be argued that the ‘exclusionary rule’ that prohibits the admissibility of evidence gathered through illegal methods, such as the third degree may help the accused individual escape unlawful conviction. Though Ethiopia has not yet enacted a separate evidence law, the Constitution and the Criminal Procedure Code clearly recognize this right.³⁰ Though the legal guarantee is laudable, it should be noted that such a challenge can be posed by an accused person who has prior knowledge about it or by a represented accused. Nonetheless, given the fact that most accused in Ethiopia are illiterate and unable to hire their own lawyers, it is very unlikely that they will raise such issues at trial and receive favorable decisions. It will be worth noting that the use of third degree during police interrogation is the rule than the exception and it has been practiced for a long time.³¹ Suffice to mention that back in 1966 Professor Fisher had noted that ‘The administration of criminal justice in Ethiopia is marred by the frequent claims that convictions are based upon coerced confessions. The present system for adjudicating such claims and for deterring the practices which generate them is inadequate’.³² Interestingly enough, the situation has not improved even thirty years after this assertion was made by Professor Fisher. A student researcher has found *inter alia* that: interrogating police officers do not tell suspects about their rights, denial of police records of admission of guilt at trial are frequent and cause delays in trial, the common practice in police stations is to call other detainees in police custody to witness admission after subduing the suspect and interrogations are held without the presence of anyone except the suspect and the interrogator.³³ Moreover, the right to be visited by one’s counsel and to have free consultation is dispensed with

³⁰ Art.19(5) of the Constitution - Persons arrested should not be compelled to make confessions or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible.

Art.27 of the Criminal Procedure Code - A person under interrogation shall not be compelled to answer and shall be informed that he has the right not to answer and that any statement he may make may be used in evidence, and any statement which may be made shall be recorded. Note also that the same guarantees are provided under Arts.80 ff. of Criminal Procedure Code that regulate ‘Preliminary Inquiry’, i.e. a pre-trial proceeding to be held in case when a person is suspected of committing the crimes of homicide or robbery.

³¹ For more details see Stanley Z. Fisher, *Involuntary Confession and Article 35, Criminal Procedure Code*, 3 JOURNAL OF ETHIOPIAN LAW 330, 330-338 (1966).

³² *Id.*

³³ See Dereje Ethicha, *The Right of the Accused to Defense Counsel under Ethiopian Law*, 25-30 (1996) (Unpublished LL.B. thesis, Addis Ababa University) (On file with the Law Library, Addis Ababa University).

in practice.³⁴ Reports of third degree use are pervasive in reports of human rights watch dogs and major media outlets that report on criminal trials. A recent research has also disclosed the use of third degree in a particular study area.³⁵

It is worth noting that the right to defense counsel is explicitly provided under the Constitution only and that the other laws of the country are silent on the point. Accordingly, except for this Constitutional provision the Criminal Procedure Code's provision on trial says nothing about the right to counsel.³⁶ Furthermore, it should be noted that the Ethiopian law does not impose any duty either on the police or the judge to inform an arrestee or an accused that she has the right to be represented by a defense counsel or that an interrogation conducted without representation shall be inadmissible. Given the fact that '[The] essence of the adversarial system is challenge ... the proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions...'³⁷ Such a challenge can be posed by the counsel of an affluent accused, but not an unrepresented illiterate and indigent accused. Thus, it can be concluded that the relevant laws should have given stronger guarantees than those discussed above.³⁸

3.2 The Case of the Indigent

Unlike civil cases that may affect the property right of a defendant, criminal cases affect and have the potential to jeopardize the life and liberty of an accused. It is for this reason that legal systems require the prosecution to prove a charge beyond any reasonable doubt, that an accused shall be presumed to be innocent till found guilty by a court of law, among others. As the old adage goes, 'Better acquit ten guilty men than punish one innocent man'. This noble idea can be realized only when the accused and the prosecution are armed equally.

³⁴ *Id.*, at 30-34.

³⁵ See Hussein Ahmed Tura, *Indigent's Right to State Funded Legal Aid in Ethiopia*, 2 INTERNATIONAL HUMAN RIGHTS LAW REVIEW 120, 142-143 (2013).

³⁶ Note that this right is mentioned incidentally in quite a few occasions, such as under Art.127 (1), wherein it is provided that "The accused shall appear personally to be informed of the charge and defend himself. When he is assisted by an advocate the advocate shall appear with him", and Art.136 (3) which provides that "[Prosecution witnesses] shall be examined in chief by the public prosecutor, cross-examined by the accused or his advocate..." See also Art.139 on re-examination. This is all about an accused that has/can afford to hire a lawyer.

³⁷ The Allen Report, Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice', pp. 5-11 (1963) as quoted in YALE KAMSAR, WAYNE LAFAVE & JEROLD H. ISRAEL, MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 66 (8th ed., West Publishing Company 1994).

³⁸ Whether or not the Ethiopian system is adversarial or inquisitive is a subject of debate. Some suggest that, the Criminal Procedure law draws heavily from the Common Law system. Nonetheless, it is clear that the Criminal Procedure Code draws from both systems. See STANLEY Z. FISHER, ETHIOPIAN CRIMINAL PROCEDURE: A SOURCE BOOK xi & xii (Oxford University Press 1969).

Given the sophistication and complexity of the substantive, procedural and evidence laws of the formal system, it is simply impossible for anyone who comes into conflict with the law to master these laws. Thus, litigating a criminal case necessarily requires the assistance of a lawyer, in the absence of which there will arise a high probability of convicting the innocent. The services of lawyers are not free commodities and one has to buy them at market price that is mostly unaffordable for the majority of service seekers. Thus, while the rich can buy the service, the indigent will undoubtedly suffer the consequences of wrongful conviction that might result from lack of representation by a lawyer. Under such scenarios, the indigent's right to equality will be violated and they will face the consequences of wrongful conviction, just because they cannot defend their cases ably. Thus, the case of the indigent is one of the troublesome issues in the criminal justice system of so many countries. The following quotes can amply show the predicaments of the indigent in criminal proceedings:

.....[I]n so far as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system...it is so clear that a situation in which persons are required to contest serious accusation but are denied access to the tools of contest is offensive to fairness and equity. Beyond these considerations, however, is the fact that the conditions produced by the financial incapacity of the accused are detrimental to the proper functioning of the system of justice and that the loss in vitality of the adversary system thereby occasioned significantly endangers the basic interests of a free community.³⁹

Back in 1835, the Supreme Court of Indiana, USA, had noted that,

[I]t is not to be thought of in a civilized community for a moment that any citizen put in jeopardy of life or liberty should be debarred of counsel because he is too poor to employ such aid ... No court could be expected to respect itself to sit and hear such a trial. The defense of the poor in such cases is a duty which will at once be conceded as essential to the accused, to the court and the public.⁴⁰

Best practices of different countries show that there are different mechanisms that are put in place to address the problem. In short these mechanisms aim at providing free legal service to the indigent.

As shown above, under Ethiopian law, free legal assistance shall be given to an indigent when a court feels that 'miscarriage of justice' will ensue if an indigent is not represented. This qualification lacks clarity and is susceptible to different interpretations. As will be shown below, the practice evinces that seriousness of

³⁹ YALE KESMAR *et.al*, *supra* note 37, at 66.

⁴⁰ National Legal Aid & Defender Association (NLDA), History of Right to Counsel, *www/M:\access to just docs\NLADA About NLADA - History of Right to Counsel.mht*, quoting the decision of the Supreme Court, *Webb v. Baird*, (6 Ind. 13), the Supreme Court (1853). (Last accessed on March17, 2016).

the crime for which one is charged is the major criterion used by courts to determine eligibility for free legal service. Moreover, the criteria to determine indigence are problematic.

Ethiopia has in fact established Public Defender's Offices that are tangled in so many shortcomings. At the federal level, the Office was established as a *de facto* institution back in 1993 when thousands of individuals were brought to justice for committing crimes such as genocide during the past military regime. Accordingly, '[It] was established by seed money gained from Danish section of the International Commission of Jurists'.⁴¹ The only piece of legislation that says something about the office is, the Federal Courts' Proclamation No.25/1996 that provides that '... [T]he President of the Federal Supreme Court shall organize the public defense office'. It should be noted that the Supreme Court is not given the power to establish but, to 'organize' which may mean that its *de facto* existence is given recognition. The office does not have its own legal personality and it is accountable to the Federal Supreme Court.⁴²

4. The Practice

4.1. Academic Researches

The practice in the realization of the right to defense counsel in general and free legal service in particular is canvassed by different local researches conducted as far back as 1965. Thus, a short summary of these researches will be in order. The researches that are accessible to this writer are six in number and these are the following:

1. Worku Tafara⁴³- According to the late Worku Tafara, there was no Public Defender Office then, and defense attorneys were assigned to indigents based on the whim of the judges who had the legal authority to take measures against those who may dare to refuse to take the assignment. Accordingly, judges assign those lawyers who were attending the trial or even those who were not there. The lawyers used to give the service *pro bono*. Defense attorneys used to

⁴¹Etitcha, *supra* note 33, at 50. According to Sarkin,

... By late 1993 it became clear that it was necessary to establish a defence system for former Dergue officials who could not afford private attorneys in order to meet international standards [sic]. Consequently, the PDO was established in January 1994 together with the courts and the Danish section of the International Commission of Jurists (ICJDS)." Jeremy Sarkin, *Transitional Justice and the Prosecution Model: The Experience of Ethiopia*, 3 LAW, DEMOCRACY & DEVELOPMENT 253, 261 (1999).

⁴² Regional states' legislations on the subject are omitted due to space limitation. Nonetheless, readers may find these in *inter alia*, Tura, *supra* note 35 and ETHIOPIAN LAWYERS' ASSOCIATION & ETHIOPIAN YOUNG LAWYERS ASSOCIATION, PUBLIC DEFENDER'S SERVICES IN ETHIOPIA (2015).

⁴³ Worku Tafara, *Indigent Defendant's Right to Counsel in High Court Trials in Addis Ababa*, (1965) (Unpublished LL.B. thesis), as quoted by Fisher, *supra* Note 38, at 261-265.

be assigned to those charged with ‘serious’ crimes and indigence was determined based on the attire or the general disposition of an accused at trials.

2. Dereje Ethicha⁴⁴ - This research was conducted almost thirty five years after the above work by Worku Tafara. The author’s findings include among others that: [In federal courts] defense attorneys were assigned after the accused enters her plea - guilty or not guilty; though counsels used to be assigned from the Public Defender’s Office, judges used to assign private attorneys who were attending trial; the Public Defender’s Office used to suffer from many shortcomings such as: huge work load, insufficient budget, and generally a substandard and unattractive working environment. Furthermore, the criterion that determines assignment of defense attorneys was, by and large, the seriousness of the crime for which one is charged and there was no uniform standard adopted by regional state courts. In some states, the criterion was a charge that entails a punishment for a minimum of five years imprisonment, while in others it was a maximum of death sentence or for crimes such as homicide, aggravated robbery, etc.
3. Muradu Abdo⁴⁵ and Dolores A. Donovan⁴⁶ - These researches are desk researches and limited in their scope. Nonetheless, they have thrown light – though incidentally – on the practice at the time of their publication. Accordingly, Abdo states that at federal courts free counsel used to be assigned to those charged with homicide, terrorism, corruption, etc. and the shortcomings of the Public Defender’s Office were the same as witnessed by Eticha. According to Donovan, ‘In the vast majority of Ethiopian criminal cases, there are no lawyers for the defense’.⁴⁷
4. Hussein Ahmed Tura⁴⁸ -Tura did his research on the state of affairs of the criminal justice system in Wollaita Zone – an administrative unit below the regional state. According to him, the Southern Nations, Nationalities and Peoples’ Regional State has enacted legislation that guarantees the right to defense counsel, and authorizes the regional Supreme Court to organize a public defender’s Office, just like the other regional states. The latter legislation has some provisions that detail the tasks of the office. It is interesting to note that the writer did not mention the service of the Public Defender’s Office but instead the services of private attorneys assigned by the local Justice Bureau when they come to renew their license. This may indicate the total absence of

⁴⁴ Eticha, *supra* note 33.

⁴⁵ Muradu Abdo, *The Indigent’s Right to Defense Counsel in Ethiopia*, 3 ETHIOPIAN HUMAN RIGHTS LAW SERIES - HUMAN RIGHTS IN CRIMINAL PROCEEDINGS: NORMATIVE AND PRACTICAL ASPECTS, 140-157 (January 2010).

⁴⁶ Dolores A. Donovan, *Leveling the Playing Field: The Judicial Duty to Protect and Enforce Constitutional Rights of Accused Persons Unrepresented by Counsel* 1 ETHIOPIAN LAW REVIEW 27-61 (August 2007).

⁴⁷ *Id.*, at 61.

⁴⁸ Tura, *supra* note 35.

the Public Defender's Office in the study area. The writer further found out among others that: there is an acute shortage of lawyers, some are conducting business unethically, the use of third degree is pervasive in police stations, and the percentage of unrepresented and convicted persons at different proceedings ranges from 95 –98 percent, in general.

5. Ethiopian Lawyers Association and Ethiopian Young Lawyers' Association⁴⁹ - The research is the first of its kind in attempting to gather and analyze data from almost all states – federal and regional. The research findings contain among others, that: almost all regional states follow the federal constitution and other subsidiary laws that guarantee the right to defense counsel and confer the authority to organize Public Defender's Offices on the respective Supreme Courts; most regions have organized their own Public Defender's Offices, though there are still some regions that have not yet done this; the performance of the Offices are as pitiful as described by other researchers above; there are no uniform standards applied to assign the services of public defenders, for in some it is the seriousness of the crime for which one is charged and in other regions it is the indigence of the accused that is taken into account; [though mentioned incidentally] in those situations wherein a defense attorney may be assigned the service is provided at trials but not at pre-trial proceedings.⁵⁰

4.2. A Ruling of the Cassation Division of the Federal Supreme Court on the Right to Defense Counsel

It helps to note here that the pertinent law on the jurisdiction of courts provides *inter alia* that: 'Interpretation of a law by the Federal Supreme Court rendered by the Cassation Division with not less than five judges sitting shall be binding on federal as well as regional courts at all levels. The Cassation Division may, however, render a different interpretation on (similar) issues some other time.'⁵¹

Based on this authority, the Cassation Division of the Federal Supreme Court rendered a ground-breaking decision in a case that involved a defendant who was sentenced to death without representation by a lawyer.⁵² The accused charged for

⁴⁹ Ethiopian Lawyers' Association and Ethiopian Young Lawyers' Association, *supra* note 41.

⁵⁰ Note: - The Ministry of Capacity Building published a research finding entitled "Justice System Reform Program Office, 'FDRE Ethiopia Comprehensive Justice System Reform Program, Baseline Study Report'" in February 2005. These 531 pages report has attempted to study almost all agencies of the criminal justice system of the country. Nonetheless, to the dismay of those who were expecting a lot, its contribution to the subject at hand is almost nil, to say the least. The only statements mentioned therein are the following: '[I]n the visited prisons and police stations, a lack/absence of affordable legal aid was obvious. This is the case for all prisoners whether sentenced, on remand or possibly eligible for parole.... The only form of legal advice available to prisoners currently is the one given by Prisoners' Committees that lack the power to represent suspects in courts.' pp.120-121.

⁵¹ Art.2 (1), paragraph 2, *The Federal Courts Proclamation Re-amendment Proclamation No. 454/2005*.

⁵² Cassation File No.37050 published in '*Decisions of the Cassation Division of the Federal Supreme Court*', (Federal Supreme Court, Ethiopia, Vol.9, November 2003 Ethiopian Calendar), pp. 173-175. The judgment is written in

committing first degree homicide, requested to be represented at the lower courts, but this could not be fulfilled, for one reason or another. After conviction and sentencing, the convict appealed to all relevant courts, including the region's Supreme Court Cassation Division, but to no avail. The Federal Supreme Court, however, noted among others that, the appellant is denied his constitutional right to defense counsel, quashed the sentence and remanded the case to the first instance court, and further ordered that the appellant shall be represented and the case shall be entertained by judges other than those who participated in it in the past.

The court, though incidentally, admonished lower courts and further ruled *inter alia*, that: the right has to be availed at all proceedings; courts have the duty to inform an accused that she has the right to be represented by a counsel of her own choice and she should also be given sufficient time to prepare her defense. The court did not expressly rule that these rights shall be availed by those charged for 'serious crimes' alone.

5. General Observations of the Law and the Practice

It is shown above that both the law and practice in Ethiopia leave much to be desired. The following part, therefore, attempts to shed more light on contemporary and very recent practices.⁵³

5.1. On the status and performance of the Public Defenders' Office⁵⁴

Both in 2013 and 2015, interviewees from the Public Defender's Office disclosed among others, that the Office suffers from shortage of skilled professionals, sufficient and independent budget, and heavy workload that is not commensurate with its human resource. Moreover, it has never represented indigents out of its own initiative, but only when ordered by court, and it has not represented suspects at pre-trial proceedings. The number of public defenders employed and working at the Office in 2013 was 17 and the number reached 22 in 2015. In the latter case only 14 were graduates with first law (LLB) degrees. This sharply contrasted with the professional resource of the prosecution office in the capital city and the Federal Ministry of Justice that had on average 200 Public prosecutors between

Amharic, the working language of the Federal Government of Ethiopia, and the translation is mine. See, Case Report, 27 JOURNAL OF ETHIOPIAN LAW 139-142 (2015).

⁵³ Some facts and figures contained herein were observed and gathered during a field research in mid-2013 and 2015. The latest data gathering effort was sponsored by Addis Ababa University School of Law's Legal Aid and Public Interest Project and the findings were presented at a workshop on December 31, 2015. See Tsehai Wada, *The Right to Defense Counsel in Ethiopia: The Law and the Practice*, *Proceedings of Seminar Series of the School of Law, Addis Ababa University*, Vol. 1, May 2016, pp. 33-44.

⁵⁴ These observations reflect the experience of the Office at the capital city that also includes the Federal Ministry of Justice that prosecutes crimes under federal jurisdiction.

2009 and 2011.⁵⁵ A significant number of these prosecutors have second degrees in law.⁵⁶ A contrast between the number of prosecutors and public defenders serving at federal level evinces a huge gap. Accordingly, the number of prosecutors was close to 200 while that of the public defenders – as shown above – was a maximum of 22 that is close to 1 public defender for each 10 prosecutors. With regard to the percentage of representation and based on the latest data, i.e. 2010/2011, the total number of individuals prosecuted for crimes was 56,256. Assuming that at least 10% of them can afford to hire lawyers, close to 50,000 accused need legal assistance and the 22 public defenders cannot by any stretch of imagination render their service to all – one for 2,300. It is believed that these figures speak volumes.

5.2. On the performance of the Federal Ministry of Justice

Art.49 of the Federal Courts Advocates' Code of Conduct⁵⁷ provides that 'Any advocate shall render at least 50 hours of legal service, free of charge or upon minimum payment. The service shall be rendered to, *inter alia*, persons who cannot afford to pay, charity organizations, civic organizations, and community institutions'. The Ministry thus assumes authority to see to it that advocates have actually rendered this service. Back in 2013 officers of the Ministry imparted to data collectors that till 2000 EC [2008 G.C], there were no much demands from the public for *pro bono* service, though the number swelled to 500 in 2005 of which it was only ten individuals who came seeking service on criminal matters.⁵⁸ Moreover, the Ministry does not have any mechanism or guideline pertaining to the control and follow up of the services of advocates.

The interviewees further mentioned that the absence of a standard to prove indigence had created problems in delivering the service and further opined that as the Ministry is in charge of prosecution, its role in assigning lawyers for *pro bono* service may give rise to conflict of interest.⁵⁹

⁵⁵ Central Statics Agency of Ethiopia, data on *Law and Order* (2012). The database contains data for the four years prior to 2012 and no data thereafter.

⁵⁶ There is no disaggregated data based on regions and the following is a national data. Accordingly, in 2010, 2011 and 2012, there were 46 LLM holders out of 5476; 24 out of 1600 and 24 out of 1910 prosecutors, respectively for each year. *Id.*

⁵⁷ Council of Ministers *Regulation No.57/1999*.

⁵⁸ The Federal Ministry of Justice has "facilitated 50 hours of free legal service for 314 citizens...[in 2012-2013]", See FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA GOVERNMENT COMMUNICATION AFFAIRS OFFICE, ETHIOPIA YEAR BOOK 2012-2013[English version] 196 (2013).

⁵⁹ It helps to note that neither the Regulation mentioned above nor the Federal Courts Advocates' Licensing and Registration Proclamation No. 199/2000 provides that failure to provide *pro bono* service shall entail consequences. See Art.15 (1) of the latter. The 2015 interview did not elicit anything new except that there is an acute shortage of private practitioners who volunteer for the service.

5.3. Nascent Efforts in establishing Free Legal aid Centers

Prior to 2009, quite a few civil society organizations had been engaged in advocacy services that include free legal aid to the indigent and the marginalized. Nonetheless, a law enacted in 2009 curtailed their activities by requiring them among others, to raise ninety percent of their income from local sources.⁶⁰ It appears that their shrinking numbers, if not total disappearance, has created an opportunity for law schools to launch and run their own legal aid projects. Accordingly, though some law schools were originally sponsored by the Ethiopian Human Rights Commission that provided them with seed money, now many of them run such projects by their own, mostly with funding assistance from external sources. The Addis Ababa University School of Law Legal Aid and Public Interest Project is a case in point.

6. Future Prospects

There are, at least, three instruments that may throw light on the future prospects on the right to defense counsel and bode well for the future. These are the ‘Criminal Justice Policy of the Federal Democratic Republic of Ethiopia’, Megabit 2003 [2011 G.C.], the ‘Draft Criminal Procedure Code of the Federal Democratic Republic of Ethiopia’, 2009 E.C. [2016/2017 G.C.] and the ‘National Human Rights Action Plan’ (2013). The former is a policy document that needs to be incorporated into the substantive as well as the procedure laws, while the second, being a draft will have no legal effect till its formal enactment by the legislature. The third may be simply taken as a general guideline to design future laws. Despite these, it may be hoped that the proposed remedies embodied in them may see the light of day sometime in the future.

The Criminal Justice Policy provides among others that: Accused persons shall have the right to counsel who shall have equal opportunity with the prosecution; the right can be exercised at every stage of proceedings starting from arrest and free legal assistance and shall be provided to indigents and only when it is felt that justice will be miscarried if an accused is not represented. Moreover, it promises to establish a Public Defenders Office.⁶¹

The Draft Criminal Procedure Code of 2009 (EC) (2016/2017),⁶² that replaced an earlier draft issued in 2000(GC) contains some provisions pertaining to the issue at

⁶⁰ For more details on this particular point see Kumlachew Dagne and Debebe Haile Gebriel, *Assessment of the Impact of Charities and Societies Regulatory Framework on Civil Society Organizations in Ethiopia* (Task Force on Enabling Environment for Civil Society Organizations in Ethiopia, June 2012).

⁶¹ See Art.4.7 of the document. The documents are written in Amharic – the working language of the federal government of Ethiopia and translations are mine.

⁶² See Arts.10, and 18(1). There are also other provisions placed sporadically that pertain to the subject at hand. See, Arts. 23, 57, 126, 189, 193, 255, and 257. It will be interesting to note that back in 1990, during the military regime, there was an attempt to revise the major laws of the country. Accordingly, the then Ministry of Law and Justice had prepared a draft Criminal Procedure Code that contained some provisions that requires among

hand. The most prominent contribution of the draft is that it mandatorily requires that juvenile offenders, those charged for crimes punishable with imprisonment for a minimum of five years of imprisonment together with those whose right is expressly recognized by law have to be represented by defense counsel. The draft also recognizes the Office of Public Defenders as one of the institutions of the justice system. The right to representation attaches from the time a suspect is arrested or an accused is charged. The Human Rights Action Plan promises to guarantee the same rights indicated above in an almost identical manner. It also promises that efforts will be exerted to make available sufficient number of public defenders at Supreme and High Courts.⁶³

Conclusion and Implications

According to King, “[T]he right to counsel is the “master key” to all of the other rights – protecting and reliability – ensuring rules of criminal procedure...”⁶⁴ and

Of all the rights which the constitution guarantees the criminal accused, the right to counsel is possibly the most valuable. That is because having a lawyer affords meaningful access to all other rights, and without legal aid advice many other important rights are reduced to paper significance.⁶⁵

Despite this stark truth, the criminal justice system of many countries cannot yet fully achieve the full realization of the right. Even in those countries that have a long history of providing free legal service and the means to do it, the performance of the service providing agencies are found to be much below the standard. According to one writer who wrote on the situation in US,

Nobody observing the current state of indigent defense representation in the country today could credibly say that the system is functioning well. Even in that universe of cases requiring court-appointed counsel, the system has utterly failed to provide a robust and zealous defense counsel for those accused of crime.....⁶⁶

Researchers have shown that the European practice falls short of ideal standards so much so that many suspects and accused persons are left “...in a vulnerable position: without legal assistance, without knowledge of the case against them, and

others: mandatory appointment of defense counsels to the indigent and the exercise of the right at every proceedings including during interrogations. This draft could not, however, see the light of day, due to a change of government that took place in 1991. For further details see Abdo, *supra* note 44, at 143, 144 Foot Note No.12.

⁶³ *The Federal Democratic Republic of Ethiopia, National Human Rights Action Plan, 2013-2015* (July 2013, Addis Ababa). Unofficial translation. For details see Sections 2.3.5 (3)(4), 2.4.5 (2)(4) and 2.5.5(3)(6), at pp.38, 45 and 52. The document is the result of a joint effort by many stakeholders including the Ethiopian Human Rights Commission. The name of a specific author is not shown.

⁶⁴ King, *supra* note 11, at 6.

⁶⁵ FISHER, *supra* note 38, at 246.

⁶⁶ King, *supra* note 11, at 42, 43.

without the ability to apply for pretrial release. This can have catastrophic impacts on a person's life."⁶⁷

If the US and European practices can be criticized so harshly, one wonders what one can say about the reality in Ethiopia, where the right to defense counsel is not taken as a serious issue both under the law as well as the practice. As discussed in this paper, the major shortcomings of the law and the practice, among others, are that:

- The right is recognized under the Constitution only and the other subsidiary laws do not provide ideal standards;
- The right is not exercisable at all proceedings, more particularly at pre-trial proceedings;
- The Public Defenders' Office suffers from multiple shortcomings, such as independent legal personality, sufficient budget, etc.;
- The provision of *pro bono* legal service by private practitioners is much more below standard and there is no guideline put in place to follow up its realization;
- The constitutional precondition, i.e. "Miscarriage of Justice" lacks clarity and is susceptible to different interpretations.

All these and more can be rectified by enacting suitable laws and creating an ideal atmosphere for the realization of the right. Nonetheless, the different documents that promised a better future have not yet seen the light of day. The Draft Criminal Procedure Code that was expected to be enacted almost twenty years ago is a case in point. Whether or not the other documents will also see the light of day in the near future remains to be seen. Given the dismal situation that prevailed for almost half a century – as witnessed by the local researches discussed above - it will not be that wrong to conclude that Ethiopian suspects/accused are so far left to stew in their own juice. But, this should not be allowed to continue for there is no benefit to be accrued. Thus, the study implies that the following measures need to be taken as soon as possible in order to take meaningful steps towards the realization of the right to defense counsel.

1. A robust Public Defenders' Office with an independent legal personality should be established. It may be argued the country's economic situation can/may not allow for the establishment of such an institution. Nonetheless, given the recently achieved two digit economic growth,

⁶⁷ Open Society Justice Initiative, *supra* note 10, at 3. For more on European practice see also Zaza Namoradze, 'The Right to Early Access to a lawyer in Criminal Proceedings in Europe: Standards and practices' (Open Society Justice Initiative, ILAG, 2009), at 17.

establishing a competent Public Defenders Office may not be that difficult if there is the will.

It will be interesting to note that elsewhere the same issue has been the subject of a court ruling back in 1963 wherein a court noted that

[G]overnments spend vast sums of money to establish machinery to try defendants accused of crime. Why would governments do this... unless the presence of a professional prosecutor was necessary for the proper functioning of the legal system? And if the presence of the prosecutor was necessary, then so too was the presence of defense counsel.⁶⁸

With regard to the predicament of the indigent, it will be worth noting that ‘While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its determination of justice.’⁶⁹ If the need to establish a vibrant Public Defenders’ Office arises, emulating the South African system will be the best option. Furthermore, lessons can be learnt from the laws and practices of Brazil that exhibit the following major features:

With constitutional amendment No. 45 of 2004, the Federal Public Defender’s Office came to have its own council, and councils were also created at state level. These councils are meant to be the highest normative and decision-making bodies of their institutions. Regarding career security, public defenders – like judges and prosecutors – are functionally independent in their roles, including in their terms of office, and there is no possibility of salary reduction. The law that governs the Public Defender’s Office provides for competition in the filling of posts, sets out the makeup of the board and established the institution’s functional and administrative independence.⁷⁰

2. The Constitution as well as the relevant subsidiary laws should be amended in such a way that requires the provision of the right at all proceedings, including pre-trial proceedings.
3. The service of private practitioners in providing *pro bono* legal service cannot be overemphasized. But, given the prevailing practice, the system cannot exploit this resource. Thus, professional associations should be urged to discharge this obligation. In this regard it will be worth to note that *pro bono* service is not necessarily favored, for “...it allows the government to avoid its obligation to pay for counsel and generally results in a lower quality of representation because the lawyer is serving unwillingly and may have no

⁶⁸ *Gideon v. Wainwright*, 372 at 344 (1963), in King, *supra* note 11, at 10.

⁶⁹ YALE KAMISAR *et al.*, *supra* note 37, at 65.

⁷⁰ Ligia Mori Madeira, *Institutionalization, Reform and Independence of the Public Defender’s Office in Brazil*, 8 BRAZILIAN POLITICAL SCIENCE REVIEW 48, 52 (2014) as quoted in ETHIOPIAN LAWYERS ASSOCIATION AND ETHIOPIAN YOUNG LAWYERS’ ASSOCIATION, *supra* note 41, at 19.

criminal law experience.”⁷¹ Be this as it may, encouraging lawyers to partake in this novel professional duty is an option that cannot be overemphasized.

4. It is also suggested that civil society organizations should be encouraged to provide free legal aid and the nascent efforts of the different law schools should continue with a view to render sustainable service.
5. All those interested in the delivery of free legal service should do their best to ensure that the binding decision of the Cassation Division of the Federal Supreme Court resonates well throughout the judicial system.
6. At last, if the need to revise the country’s pertinent laws arises, it will be advisable to draw from the principles enshrined in relevant international and regional instruments.⁷²

* * *

⁷¹ NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, INTERNATIONAL LEGAL AID AND DEFENDER SYSTEM DEVELOPMENT MANUAL: DESIGNING AND IMPLEMENTING LEGAL ASSISTANCE PROGRAMS FOR THE INDIGENT IN DEVELOPING COUNTRIES 132 (2010), as quoted in ETHIOPIAN LAWYERS’ ASSOCIATION AND ETHIOPIAN YOUNG LAWYERS’ ASSOCIATION, *supra* note 41, at 10-11.

⁷² The African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, (2001), Art. H (2) and United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, United Nations, New York, 2013, can be adopted as models, for they contain detailed standards on the right to counsel.

