

**THE ROLE AND PRACTICAL APPLICATION OF PUBLIC DEFENDER
AND THE REGHT'S OF ACCUSED PERSSON IN ETHIOPIA:**

THE CASE OF ADDIS ABABA city

A SENIOR ESSAY SUBMITTED TO THE DEPARTMENT OF LAW

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THE APPROVAL SHEET OF THE SENIOR ESSAY

**ST.MARY'S UNIVERSITY COLLEGE
COLLEGE OF OPEN AND DISTANCE LEARNING**

As a member of examining board of the final senior essay presentation /defense, we certify that we have heard and evaluated this paper prepared by Assefa Girmay entitled **THE ROLE OF PUBLIC DEFENDER AND THE REGHT'S OF ACCUSED PERSSON IN ETHIOPIA**. And recommend that it be accepted as the partial fulfillment of the requirements for the degree of law.

Examiners

Signature

Department Head

Examiner (I)

Examiner (II)

LIST OF ABBREVIATIONS

PD	PUBLIC DEFENDER
PDO	PUBLIC DEFENDER OFFICE
SPO	SPECIAL PROSECUTOR OFFICE
EPRDF	Ethiopian People's Revolutionary Democratic Front
TGE	Transitional Government of Ethiopia
ICJDS	international commission of jurists
MOJ	Ministry of Justice.
Achpr	African (Bangui) Charter on Human and people's Rights
UDHR	Under the Universal Declaration of Human rights
FDRE	Federal Democratic Republic of Ethiopia constitution
ICCPR	International covenant on civil and political rights
EBA	Ethiopian Bar Association
NGO	Nongovernmental organization

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Iam grateful to those who allowed me to try out ideas suggestions , at puplic Deffense counsel's of Federal superme court; Minstry of justice ledeta branch office, Addis Ababa city Adminstration Appeal court etc. It would be difficult to list all names ,but I am most grateful to all who have provided me with information and assisted me in other ways.

ABSTRACT (EXECUTIVE SUMMARY)

The Federal Public Defender's (PD) office was established in 1995 under the Federal Supreme Court. The office provides legal services to criminal defendants, as obligated in the Constitution, and primarily defends cases involving genocide, juvenile delinquents, (young criminal) corruption, treason, and other serious allegations criminal

The right of accused person to be represented by defense counsel is one of the fundamental human rights, which is guaranteed by some international and regional human right instruments; the domestic constitution and other laws of the laws of the land. Art 20/5/ of the Federal Democratic Republic of Ethiopia constitution, states that. "Accused persons shall enjoy the right representation by defense counsel by their choice." This can be done either by the offender himself/herself or at the state expense accordingly. In practice, this guarantee has not been fulfilled because of limited resources and public awareness. Public defender and legal aid services for the poor are very limited and generally quite weak.

Ethiopia As far as the 1931 Ethiopian constitution is concerned, there was no provision which provides the right to be represented by defense counsel. As far as its development in Ethiopia is concerned, such right got recognition for the first time, under the 1955 revised constitution of Ethiopia.

Ethiopia. As far as the 1931 Ethiopian constitution is concerned, there was no provision which provides the right to be represented by defense counsel. The 1961 Criminal procedure code of Ethiopia also provides such right under Article 61 of the code.

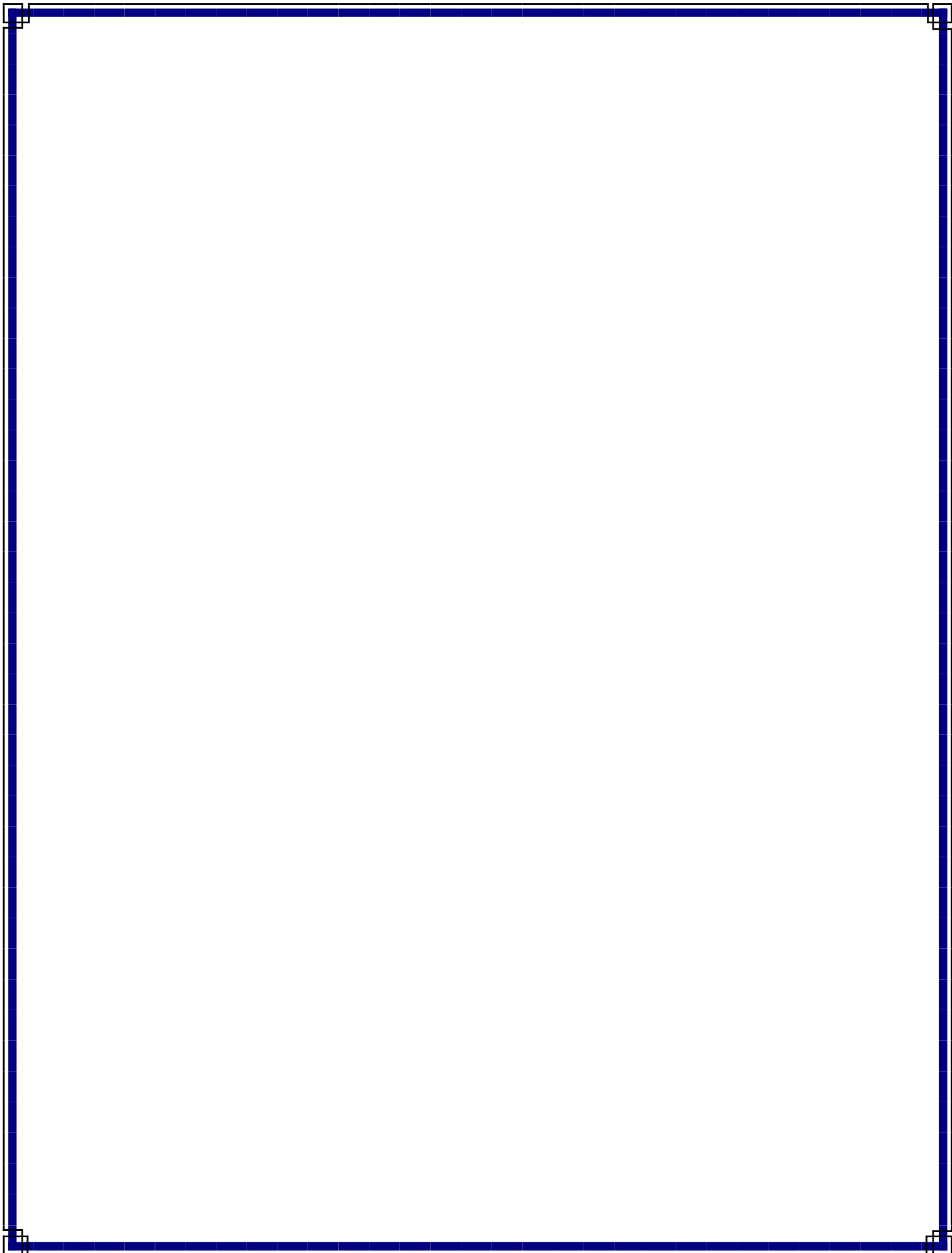
When we come to the Ethiopian system of providing assistance to the indigent accused: - during the regime of Emperor system Hail Selasse, it was an assigned counsel system in which lawyers defending the indigent accused, received no compensation for the services they render or provide and any out of pocket expense. The advocator could not refuse to take the case without good reason or cause. If he/she refuses to take the case, the court will penalize him/her for fine or in suspension from the practice.

During the Dergue regime also, there was similar way of providing counsel for the indigent accused through assigned counsel. In very rare cases they were compensated from the government but most of which were not compensated by any one.

When we come to the present case in Ethiopia – The EPDR constitution also recognizes the right to be represented by defense counsel. And established of the Public Defender's Office By Proclamation 22/1992, attorneys saw the need for establishing a Public Defender's Office (PDO).

The PDO is organized as an entity under the Central Supreme Court and headed by a Chief Public Defender and a Deputy Public Defender. To date, no legislation has been enacted to establish the legal foundation for the work of the PDO. Consequently, the exact mandate, structure and organization are not instituted by law. Since the main concern of the paper is on the right of accused person to be represented by defense counsel, it is going to deal with right given in the International, regional and national legal instrument. The area of focus is mainly on the right and scope and application of the public defender in Addis Ababa ,Ethiopia. The practice in Addis Ababa shows that counsel for an indigent accused is provided from the office Defense counsel, which is under the Federal Supreme Court in which lawyers are regular employed and paid from the public treasury on salary bases. Thus the current practice shows that the public defenders system is the major system of providing counsel for an indigent accused.

CHAPTER ONE
INTRODUCTION



CHAPTER TWO

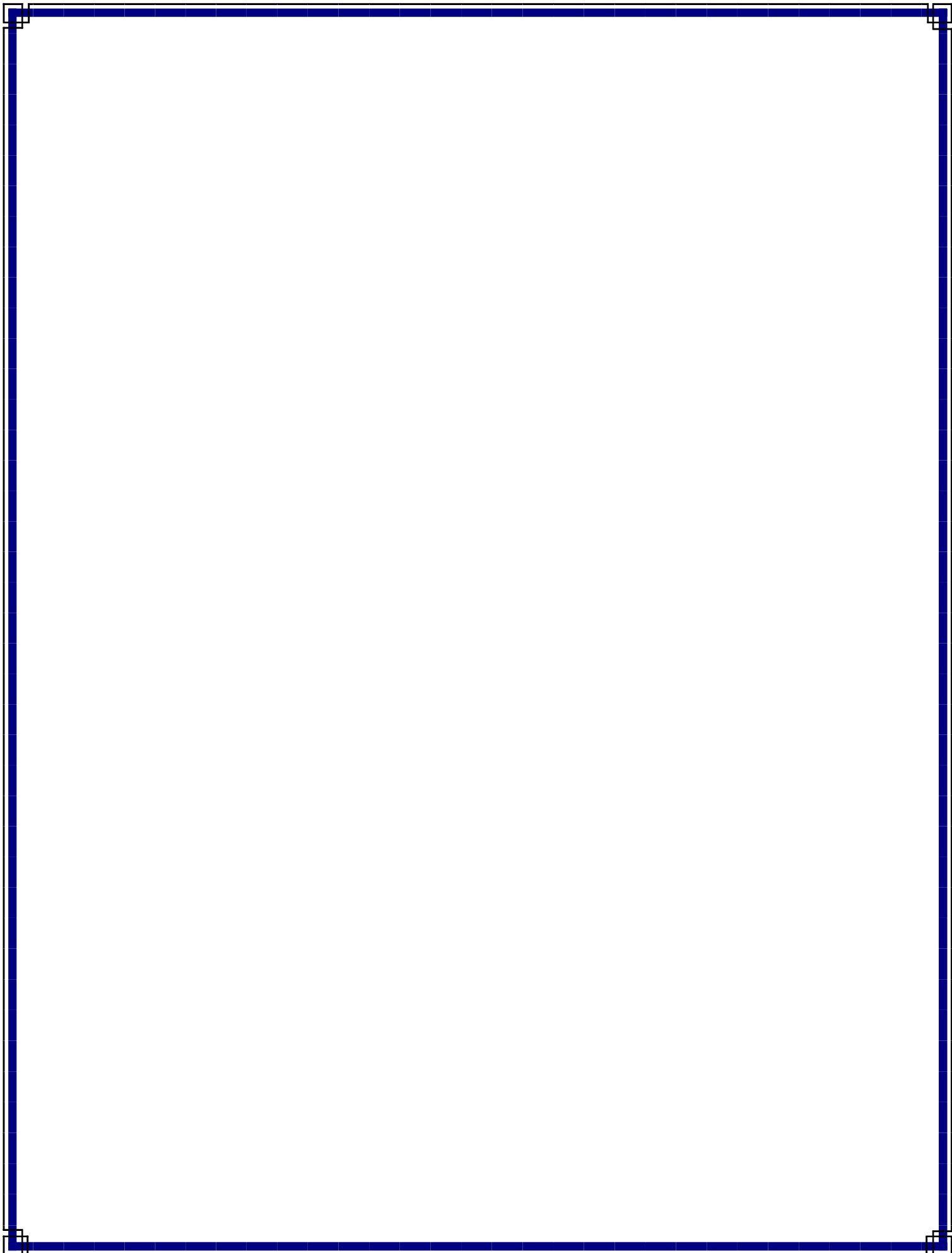
Review of Related Literatures

CHAPTER THREE

Discussion and Analysis

CHAPTER FOUR

Conclusion and Recommendation



CHAPTER ONE

1. INTRODUCTION

1.1 Back ground of the study.

In countries emerging from periods of great political confusion particularly if it has been associated with gross violations of human rights, the question of how to deal with the past has been a crucial part of the transformation process. Obviously, the nature of the transition plays major role in determining how human rights violations of the past will be dealt with. There are various models that a new state can use to deal with an atrocious history of human rights abuse. A common thread is the desire to pave (surface) the way for a future peaceful and democratic society. Therefore, the interests of the victims and of the community must be considered.

The fundamental rights and freedoms of human beings are the burning issues all over the world today likewise; the constitution of the Federal Democratic Republic of Ethiopia also has recognized these rights as basic rights of human beings. This indicates that unlike other rights, these rights cannot be amended or changed easily as one wishes. This is because they emanated from the nature of mankind and are guaranteed by the FDRE constitution. One of these rights is the right of accused person to be represented by defense counsel. This can be done either by the offender himself/herself or at the expense of the state accordingly. Where the accused is not able to afford and miscarriage of justice would result, the accused has constitutional right to be provided with legal representation at the state expense.

This right of being represented by defense counsel is given for reasons that the accused may be convicted and sentenced wrongly, due to his/her lack of knowledge of law. When the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he/she is not able to understand whether the accusation which is laid against him/her is bad to him/her or not. Moreover he/she is unfamiliar with the rules of evidence. If the accused is left without the aid of counsel, he/she may be put on trial without proper change and convicted upon incompetent evidence since he/she lacks both the skill and knowledge of law to prepare his defense adequately.

To protect those who do not have knowledge of the law and procedure, the law provides constitutional right of the accused to have lawyer. For this reason of lawyer becomes one of the methods by which an accused person's innocence and ignorance can be safeguarded.

The right of accused person to be represented by defense counsel is not only guaranteed by the **FDRE** constitution but also it is guaranteed by international and regional human right instruments. Those instrument like, **UDHR**, **ICCPR**, the African (Bangui) Charter on Human and people's Rights (Achpr). However, its practical application is not yet secured.

Since the main concern of the paper is on the right of accused person to be represented by defense counsel, it is going to deal with right given in the International, regional and national legal instrument. The area of focus is mainly on the right and scope and application.

1.1.2. LEGAL AND HISTORICAL CONTEXT

From 1930 until 1991, Ethiopia's history has been dominated by two individuals: Haile Selassie I who became Emperor in 1930. And Mengistu Haile Mariam who became the ruler after Haile Selassie was overthrown in 1974. During Haile Selassie's rule, and a growing tension grew between the various classes; He attempted to introduce a fairer tax system but was frustrated in these attempts by the nobility and by landowners. He attempted to strengthen the national government and established a national judiciary, in 1955, a new constitution was drafted, but the bicameral Ethiopian parliament and Chamber of Deputies) played no role in its drafting. The constitution itself guaranteed personal freedoms and liberties, including due process of law. In spite of these changes, there was a growing dissatisfaction with the rate of reform. On 13 December 1960, several groups initiated an overthrow, while Haile Selassie was abroad. The army and air force units remained loyal to Haile Selassie so the coup was put down. Nevertheless, this revolt led to further polarization in Ethiopia. Thus. The last 14 years of his reign were characterized by growing opposition, While Haile Selassie did attempt certain reforms, and most attempts were frustrated by the need to provide grants to military and police officers. Unable to deal with the domestic issues, he turned his interest to foreign affairs,

1.1.3 The Dergue Regime

The Ethiopian revolution began in early 1974; it was caused by a lack of reform together with rising inflation, corruption and a famine. While the urban-based new elite wanted to establish a parliamentary democracy, the revolution was initiated by the military whose conditions were poor, with underpaid personnel and insufficient food and other supplies. Many of the soldiers came from the peasantry. Which was taking the brunt of the famine many believed that the government was not taking measures to assist the people. After the revolution a new body called the Coordinating Committee of the Armed Forces, Police, and Territorial Army was established. It was to be known as the Dergue, Amharic for 'committee' of 'council'. Major Mengistu Haile Mariam was elected chairman.

The Dergue's influence grew slowly and thus the political change that resulted has been called a 'creeping coup'. Haile Selassie was deposed and imprisoned on 12 September 1974 and died in prison in August 1975.

The Dergue was not immune from criticism and was attacked by civilian groups who demanded a 'people's government'. Some Dergue members lent support to these calls. A struggle took place in the organization, leading to the execution of some members who supported these civilian demands. During this period many individuals, including various political prisoners, as well as. On 21 May 1991 the EPRDF entered Addis Ababa and took control. Mengistu fled the country.

1.1.4. The Transitional Government of Ethiopia (TGE)

Soon after taking power In July 1991, the EPRDF and other political and ethnic groups called a conference that adopted the Transitional Period Charter of Ethiopia, which served as an interim Constitution. In 1992, the TGE established the Special Prosecutor's Office to bring those responsible for human rights violations during the Dergue regime to justice. In May 1993, the constituent assembly adopted a new constitution in.

In response, the Special Prosecutor's Office (SPO), established by the TGE to prosecute these alleged war crimes, formally charged a number of detainees in October 1994, and criminal proceedings began soon thereafter. After a long, devastating and painful civil war lasting 17 years, it took considerable commitment from the TGE to allocate scarce resources to initiate these prosecutions. In other parts of the African continent, the historical pattern has been to dispose of one's former enemies without regard to rules of law. Indeed, war crimes trials are rare on the continent. The feeling among many Ethiopian officials that they are being judged by an unreasonable standard when the international community presses for expedient trials is, therefore, an understandable one.

1.1.5 Establishment of the Public Defender's Office

By Proclamation 22/1992, the Transitional Government of Ethiopia (TGE) established the Office of the Special Prosecutor [SPO]. Its mandate is twofold:

- 1. To establish for public knowledge and for posterity a historical record of the abuses of the Mengistu regime.**
- 2. To bring those criminally responsible (In charge) for human rights violations and/or corruption to justice.**

The mandate is broad and ambitious. Implicit in this mandate is the acceptance by the TGE of their international legal obligations to investigate and bring to justice those involved in human rights crimes. Furthermore, the mandate is also a policy choice regarding how a society can productively deal with past abuses to create a more democratic future.

Indigent criminal have a constitutional right to legal representation at state expense in practice, this guarantee has not been fulfilled because of limited resources and public awareness. The Federal Public Defender's (PD) office was created in 1995 under the Federal Supreme Court. The office provides legal services to criminal defendants, as obligated in the Constitution, and primarily defends cases involving genocide, juvenile delinquents, corruption, treason, and other serious criminal allegations.

Ethiopian war crimes trials would need to establish a mechanism enabling indigent former Dergue officials, who could not afford to pay for private attorneys, to adequately defend themselves, in order to meet international standard for fair and proper trials. Some members of the TGE also shared this view. In January 1994, therefore, ICJDS(international commission of jurists) began working to establish a group of public defenders in Ethiopia that could assume the task of representing former Dergue members charged with war crimes. Due to the circumstances existing in Ethiopia at the time, the ICJDS (international commission of jurists) had to begin this effort at the ground level.

Given the economic reality in Ethiopia and it is understandable that the priority of the Ethiopian government was to first establish an SPO which would investigate and charge the alleged of human rights violations and only later consider the problem of providing legal representations for the defendants. It is also not surprising that, in the spring of 1994, few within the government, the judiciary, the SPO, or private attorneys saw the need for establishing a Public Defender's Office (PDO).

From February 1994 to February 1995, however, the PDO expanded from four or five attorneys to approximately 30 attorneys. Fortunately, this expansion was accomplished through cooperation between the Ethiopian authorities, especially the Central Supreme Court, and the international donor community. Some of these new public defenders were graduates from the Law School of Addis Ababa University, others were diploma holders, and some had served previously as judges in lower courts. The public defenders' salary was paid, for the most part, by the Ethiopian government. Offices were provided by the Central Supreme and High courts, while four donor countries financed the purchasing of office equipment and running costs.

The PDO is organized as an entity under the Central Supreme Court and headed by a Chief Public Defender and a Deputy Public Defender. To date, no legislation has been enacted to establish the legal

foundation for the work of the PDO. Consequently, the exact mandate, structure and organization are not instituted by law.

1.2 Objective of the Study

The overall objective of this Research is the problem and opportunity that require corrective measures or how properly and timely manage and systematized or arrange, consolidated and comprehensive(complete) law son Public Defender and their redressing mechanisms and on the other, to develop its future intervention towards the protection, respect and promotion of Public Defender in Ethiopia. These underlying issues clearly have an effect on the dissemination (distribution) of relevant information The opportunity on the right of accused person to be represented by defense counsel, methods of providing counsel /advice to the accused , basic principles in relation to the need of the right to be represented by the defense counsel, deferent legal system are concerned Foreign experiences, practical application of the right to be represented by defense counsel in Addis Ababa And its impact to the attachment of the overall objectives of the organization and then recommend possible solutions to the problem.

1.3 Methodology

The approach adopted to undertake this Research is a qualitative one. This enabled us to provide an interpretive measurement in the (enforcement) vital (very important) part of encouraging governments, companies and others who are regulated to meet their environmental obligation of Public Defender. Due to the fact that the issue of Public Defender is sensitive and the lack of adequate data system of the legal system, a multi-methodology approach was adopted and that includes:

1. Interview with relevant governmental and non-governmental officials to assess the weaknesses and gaps in the enforcement of Public Defended in Ethiopia and to determine how different people, especially judges, understand the concept of Public Defenders and its enforcement;
2. Literature review to compile in a form of an overview of what is currently known, and critically assess the practices experienced to date. The data to be used for the study will be collected through secondary sources of data collection methods... As for the secondary data, in addition to the Review of the related literature, websites (internet) This enabled us to point out which of the practices in implementing Public Defender correspond to wider patterns, and which are specific to the Ethiopian context.

1.4 Limitation of the Research

The research was undertaken over a period of five months. Therefore, Due to limitation of time and resources, the research could not have been undertaken over a longer period of time as to allow a thorough identification of court cases and an in-depth analysis, which might have enabled the development of a body of human rights Jurisprudence in Ethiopia. The scope of the Research is also general and broad because of which it was not possible to identify and elaborate on each and every legislation and Provisions that is inconsistent with constitutional and international human rights Principles and propose recommendations.

1.5 Significance of the study

The main objective of this paper is to provide some valuable recommendation by assessing previous conditions. The concern of the paper lies on the right of accused person to be represented by defense counsel. It is going to deal with right given in the International, regional and national legal instrument. The area of focus is mainly on the right and scope and application. On top of that the writer benefited from making the research through practical analysis of factors which are in collaboration with what is learned theoretically in the faculty and I try to make sure the quotation i.e., “practice make perfect”

1.6 Organization of the study

Following the introduction, the study will be divided in to four chapters. The first chapter tries to deal with the general back ground of the study. The second chapter deals with Reviews of related literatures remarks on the right to defense counsel, its definition, Historical background, importance and its development, the method of providing counsel to the accused and basic principles in relation to the needs of such right are deal with the right of accused person to be represented by defense counsel as far as different legal systems are concerned. Furthermore, the thread chapter is discussion and analysis about the practical application of The area of focus is mainly on the right and scope and application of the public defender in Addis Ababa Ethiopia the right to be represented by defense counsel . Generally, this chapter discusses briefly the manner how such right can be infringed, problems in implementing such rights and the like. The last chapter is on conclusion and recommendation. Under this part of the paper, it tries to summarize what have been said in the first four chapters and recommending the possible solution of the problems.

CHAPTER TWO

2 Reviews of Related Literatures

2.1 The right of accused person to be represented by defense counsel

2.1.1 An Over view of the Right to be represented by Defense Counsel

The right of accused person to be represented by defense counsel is one of the fundamental human rights, which is guaranteed by some international and regional human right instruments; the domestic constitution and other laws of the laws of the land. Art 20/5/ of the Federal Democratic Republic of Ethiopia constitution, states that. Accused persons shall enjoy the right representation by defense counsel by their choice. This can be done either by the offender himself/herself or at the state expense accordingly. This right of being represented by defense counsel is given for reasons that the accused may be convicted and sentenced wrongly, due to his/her lack of knowledge of law. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he/she is not able to understand whether the accusation which is laid against him/her is bad to him/her or not. Moreover he/she is unfamiliar with the rules of evidence. If the accused is left without the aid of counsel, he/she may be put on trial without a proper charge and convicted upon incompetent evidence since he/she lacks both the skill and knowledge of law to proper his defense adequately.

In the absence of the counsel's assistance, the accused may totally be unaware of the procedural safeguards, which a system of criminal justice affords. Also the accused ignorance may be related to the content and form of the charge which can't be consistent with the laws and procedures; it may also be related to way of providing evidences, witnesses and the like. So an absence of legal aid prevents the accused from providing a proper defense as the law requires.

Although the right to defense counsel is recognized, it can't be implemented as much as provided under the law. This may be for one reason; the altitude of some executive bodies like police and defense lawyer is not that much good. Secondly, it may be for the reason that special an attention is not given for the enforcement of this right. Moreover, some people have no awareness of their rights. These bring about the total deprivation of rights of the accused.

2.1.2 Definition

Before defining what the right of an accused person to be represented by defense counsel means, it is better to define what does counsel means. Counsel means a barrister or a lawyer conducting a law case. That is to say that, counsel is a person who has knowledge and skill of law and gives legal advice or assistance in relation to any case or matter whatever. The right to counsel is a constitutional right of criminal defendant to be advised and represented either by retained or appointed attorney in proceedings against him.

Public Defender, lawyer appointed by a local government to represent indigent Persons who are accused of a crime. Although the right to counsel varies from country to country, most have now recognized the need for defense counsel in criminal cases. Some form of assigned counsel is usually provided to the needy. The U.S. Supreme Court has upheld the right to counsel of all persons accused imprisonment the poor are guaranteed publicly provided defense lawyer during the police questioning, pretrial hearing, trial, and appeal.

Based on such definition, the accused person can be represented either by his/her own attorney (if he/she can afford the attorney's fee) or by the government defense counsel. Government defense counsel is an attorney who is appointed by the government to, be representative of a poor accused person. I.e. if the accused is financially unable to pay lawyers fee or incapable to hire lawyer by his/her own, the government will appoint for him/her lawyer.

2.1.3 Importance of the right to be represented by defense counsel

The right of an accused person to be represented by defense counsel is one of the most important rights that provide the accused an access to all other rights provide under international, regional and national human right instruments. Because it gives the accused an opportunity to have legal aid for his/her rights to be respected. I.e. accused persons have rights like, the right to be presumed innocent until they are proved guilty of an offence, the right to speedy trial, the right to be informed promptly, the right to be represented by defense counsel and other. Among those rights, the right to be represented by defense counsel has a great value for other rights to be respected. Because, most citizens of a country do not know about their rights provided under the constitution and other laws, their rights may be violated by others. But if their rights to be represented defense counsel is applicable, such defense counsel will help al their rights to be respected by giving them an advice or assistance of how their rights be respected by others.

In criminal case, the accused has no choice whether or not to proceed, but legal aid makes a significant contribution to his chance of having fair trial and hearing. This shows that an accused needs the help of counsel in criminal proceedings in order to defend him/her properly if he/she lacks legal knowledge which enables him/her to present his/her evidence completely. I.e. without counsel he/she will fully be incapable of recognizing and effectively rebutting the evidence raised against him. That is to say an accused may be convicted without being guilty. If he has no legal counsel, he himself may be unable to show his innocence, due to his ignorance of law. Moreover, he is unable to present his defense according to the required procedures. This is one of the main reasons that an assistance of counsel becomes very important to the accused person to be protected from unlawful charge against him/her.

In the absence of the counsel's assistance, the accused may totally be unaware of the procedural safeguards which a system of criminal justice affords. Also the accused ignorance may be related to the content and form of the charge which can't be consistent with the laws and procedures; it may also be related to way of providing evidences, witnesses and the like. So absence of legal aid prevents the accused from providing a proper defense as the law requires. Therefore the right of an accused person to be represented by defense counsel is a fundamental right that should be given great emphasize in all countries constitution.

2.1.4 Historical Background of the Right to be represented by Defense Council.

The concept that human beings have inalienable rights and liberties that cannot be violated by others or by the state is linked to the history of democracy. It was first expressed by the philosophers of ancient Greece. Socrates, for example chose to die rather than renounce the right to speak his mind in the search for wisdom. Somewhat late the stoic philosophers formulated explicitly the doctrine of the rights of the individual. When we come to the rights of accused person, the 17th century was marked by the growth of individual freedom in Great Britain. In common law courts for example, the judges become more concerned for the rights of those accused of crime, and procedural safeguards were established.

In the United States, the Bill of rights /fifth through Eighth amendment's of the constitution/protect persons accused of crime; they guarantee, for example the right to have legal counsel. Defendants in states as well as federal criminal cases are assured that they can't be imprisoned for an offence unless represented by a lawyer or counsel; if a defendant is impoverished, such counsel must be supplied by the government. Defendants must be warned that they may not be questioned until counsel is provided⁷.

The Canadian Charter of Rights and Freedom, adopted in 1982 as part of the Canadian constitution also provides the right of accused to be represented by counsel

As have tried to remark above, even if the right of accused person to be represented by defense counsel is part of human right its historical background is not far unlike other human rights.

As far as the inclusion of the right to be represented by defense counsel under the laws of some countries and under some International and Regional Human Right instruments are concerned, it will be discussed under chapter two of the paper.

2.1.5 Development of the Defense counsel in other countries

The right to defense counsels is a fundamental human right, which is incorporated in the constitution of many countries and international and regional human right instruments. Today its development seems latter than other right of an accused person.

2.1.5.1 United States

In the USA the right to be represented by legal counsel was recognized by the sixth Amendment of the United States Constitution, which was ratified in 1791. In this amendment, the full recognition was given to accused persons right to defense counsel, in Federal Courts. Which provides that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense? Until 1938 it was not much understood to assign counsel to an accused person, but only to entitle the defendants to assistance of retained counsel in every Federal court. This means that, the right of an indigent accused person to be represented and advised by government's defense counsel was not understood until 1938 only the right to be represented and advised by retained counsel was understood.

But in 1938 the Federal court had decided that an indigent defendant in any Federal prosecution is entitled to court appointed lawyer unless he made an intelligent waiver. Thus in the United States it is mandatory to the court for any person who is charged with criminal offences to appoint lawyer if the defendant is unable to hire a defense counsel by his own.

Different jurisdictions use different approaches in providing legal counsel for criminal defendants who can't afford private attorneys. Under the federal system and most common among the states is through a publicly funded public defender office. Typically, these offices function as an agency of the federal, state or local government and as such, these attorneys are compensated as salaried government

employees. This approach provides a substantial majority of the indigent criminal defense representation in the United States.

In addition to government-based offices, there are also a smaller but significant number of not-for-profit agencies, often referred to as a "Defender Service", or Legal Aid Societies that provide indigent criminal defense services. These entities tend to rely heavily on indirect sources, public funding, and charitable contributions to meet their operating costs.

Yet another, although increasingly less common method to appoint counsel for indigent criminal defendants is by way of a panel of attorneys, called court appointed attorneys, who enter agreements with the government to handle such cases. Under this system attorneys generally operate as independent contractors and are compensated at a fixed rate for the case or sometimes by the hour.

Moreover in the USA, an accused person has right to be informed that he has a right to legal counsel and waive such counsel if he does not need it. Also the accused should be informed that he has such right of legal counsel even at the time of arrest.

2.1.5.2 In United Kingdom (England)

In England the right to be represented by defense counsel is recognized after the seventeenth century.

While the right to jury trial was mentioned in the thirteenth Century Magna Carta. And the antecedents to the double jeopardy Prohibition developed at about the same time; a right to counsel was not recognized until the late seventeenth century¹¹.

That is to say that, until 1695 an accused person in England was entitled to have neither representation by retained counsel nor by government appointed counsel. In that year, an exception was made in respect to felony cases. Although the right to counsel was recognized in England in the late seventeenth century, it could not be extended to the indigent defendants who are unable to retained private lawyer by themselves. I.e. criminal defendants were not allowed to be represented by government's defense counsel they has counsel only if they can afford lawyer's fee.

In England since attitudes towards counsel were bad, it was recognized lately¹. In part, the resistance to counsel was due to the crown's fear that presence of attorney would unduly strengthen the causes of its political enemies in courts of law. But, in part it might also have been due to distaste for lawyers¹⁵. However, these attitudes changed as the counsel came to be seen as an important safeguard against tyranny. From time the capacity of the public prosecutor was becoming powerful that the need for

defense counsel was increased. This situation might have also contributed to the development of the right to counsel in England. Moreover, during the second half of the 20th century, the right to counsel was extended in scope and application from time to time.

There are a small number of Public Defender Service offices in England & Wales with lawyers employed directly by the Legal Services Commission to provide advice in police stations and representation in magistrates and crown courts. The majority of state funded criminal defense work, however, is provided by private lawyers contracted to the Legal Services Commission and paid by the case under the legal aid scheme.

In Scotland a wider network of Public Defender Solicitor Office lawyers employed by the Scottish Legal Aid Board are available to represent those accused of crimes in addition to private lawyers paid under the legal aid scheme.

2.1.6 The Development in Ethiopia

The right of an accused person to be represented by defense counsel is one of the fundamental rights, which should be respected by everybody. As far as its development in Ethiopia is concerned, such right got recognition for the first time, under the 1955¹⁸ revised constitution of E

Ethiopia. As far as the 1931 Ethiopian constitution is concerned, there was no provision which provides the right to be represented by defense counsel. The 1961 Criminal procedure code of Ethiopia also provides such right under Article 61 of the code. Under the code the presence of advocate at different criminal proceedings are included. However, there is no clear provision which states about assigned counsel and the extent to which counsel is applicable.

Even if it was not implemented as much as it is provided under the law, (due to reasons like ignorance of such right by the accused and other authorized organs) the EPDR¹ constitution also recognizes the right to be represented by defense counsel. Finally the present FDRE constitution provides that all persons have the right to be represented by legal counsel of their choice, or in the case of indigent defendants, where substantial injustice would otherwise result, to be provided with legal representation at state expense.

➤ The public defense counsel office

The public defender's office is a governmental organ which is found in the federal courts as one of its apparatusal departments. The reasons for its foundation mainly owe to the fact that the change of

government and political order after 1991 brought the subject of human right and the rule of law to the center stage, thus highlighting, the underlying principle of the provisions of international conventions, and broadly accepted customary rules which stress the necessity of appointing a defense lawyer for the criminally indicated persons in particular, for those who are indicated with heavy offences of crime as a curtail issue that should be dealt with with attention

Furthermore, in the midst of the intensive effort to prosecute and bring to justice the ex high and low ranking officials with alleged human right violations and atrocities strengthen the notion of establishing an institution with the mission of rendering proper defence as the concerned agencies of government and the international donors attached its significance with the obligation of ensuring the proceedings against the defendants be conducted as fairly and balanced as possible.

Accordingly around 1955 and 96 with few university graduates and other professional who have been working in different parts of the country, the office was handling enormous files' resulting in heavy load of task, taking in to consideration that it was at the initial stage of its career with minimum labor force. Suspects of the genocide crime and indicated of other offences such as waging war against the state, and provoking conflict among communities were some of the groups that has got legal support from the office at that time, turning in to 14 years since it has been officially inaugurated, the institution is currently consisting of 14 professionals together with few supporting staff, and was capable of serving 1375 indicated persons charged with 888 files' by 1996 Ethiopian physical calendar.

In a manner not particularly different of the death its foundation and becoming operational, the list of groups who receive defense and legal counseling aid remained those who are subjected to the long running proceedings of genocide, as well as criminal charges of conventional nature including homicide and attempts to abrogate the constitutional order.

Over and above the countries commitment to international law, especially relevant conventions of this subject, article 20/5 of the constitution states that persons indicated with charges of criminal offense should be entitled to a standing defense counselor; hence it is simple to understand how it is going to be difficult reaching out every defendant with a proper defense, especially for those who are accused of serious criminal offences in light of the cited constitutional provision, on account of which all individuals and N.G.Os. Who has shown up with good interest and action deserve our deep thanks and appreciation.

Thus so long as the government is required by the law to create the condition where up on legal counseling to all criminally charged citizens could be possible suggests that it is important to assists the governmental and other stake holders. Although such right is adopted by different constitutions and laws of the country it is not implemented as properly as the law requires. This may be for the reason that, there is no special law or legislation which has a role of enforcing or implementing the fundamental rights of accused persons, incorporated under the law. There is also some other reasons that hinder the proper implementation of such rights. Therefore, application of the right of accused person to be represented by defense counsel is not developed as much as it is expected.

2.2 Method of providing counsel /Advice to the Accused

An accused person has different, constitutionally guaranteed rights. Among those rights, the right to be represented by defense counsel is a crucial right that can protect the accused from unlawful treatment by any authorized body. It is known that most people do not know about their rights that are provided under the laws of their country.

Therefore, the assistance of counsel has a great value for the accused to be saved from unlawful charge against him/her. For this purpose, there are three primary models for providing representation to those accused of crimes and unable to afford counsel--assigned counsel, contract, and public defender programs. The assigned counsel model involves the assignment of indigent criminal cases to private attorneys on either a systematic or an adhoc basis. The contract model involves a private contract with an attorney, a group of attorneys, a bar association, or a private nonprofit organization that will provide representation in some or all indigent cases in the jurisdiction. The public defender model involves a public or private nonprofit organization with full-time or part-time staff attorneys and support personnel. From these three models for the appointment of counsel, states have developed indigent defense delivery systems, many of which employ some combination of these types. For example, even in states with a state wide public defender system, private attorneys will be appointed to cases that present a conflict of interest and in some instances to alleviate burdensome caseloads. In other states where there is less uniformity, there may be contract counsel in one county, assigned counsel in a second county, and a public defender office in yet a third county.

➤ Assigned Counsel Programs

Assigned counsel programs utilize private attorneys to represent indigent defendants. The oldest and most common type of assigned counsel program is the adhoc program, under which the appointment of

counsel is generally made by the court, without benefit of a formal list or rotation method and without specific qualification criteria for attorneys. Cases are sometimes assigned to attorneys on the basis of who is in the courtroom at a

Defendant's first appearance or arraignment, the time when appointments are typically made. Attorneys are usually paid on an hourly basis; however, in some states, attorneys are provided a flat fee per case.

➤ **Contract Attorney Programs**

In a contract program, the state, county, or other jurisdictional district contracts with private attorneys, law firms, bar associations, or nonprofit organizations to provide representation to indigent defendants. Often the contract is designated for a specific purpose within the indigent defense system, such as all cases where the public defender has a conflict of interest, or a certain category of cases, for example, felonies, misdemeanors, or juvenile dependencies. The structure of these programs varies, but there are essentially two main types of contract programs fixed price contracts and fixed-fee per case contracts.

In a fixed-price contract program, the contracting lawyer, law firm, or bar association agrees to accept an undetermined number of cases within an agreed-upon contract period, frequently one year, for a single flat fee. In a fixed-fee per case contract program, the private lawyer, law firm, or organization contracts to provide indigent defense representation. The contract specifies predetermined number of cases for a fixed fee per case

➤ **Public Defender Programs**

A public defender program is a public or private nonprofit organization staffed by full-time or part-time attorneys and is designated by a given jurisdiction to provide representation to indigent defendants in criminal cases. While there are many variations among public defender programs, the defining characteristic is the employment of staff attorneys to provide representation

2.2.1 Counsel/Advice Provided by Private Advocate

In any criminal process, usually there are people representing by government on one hand and there are an individual accused of committing an act or commission prohibited by law on the other hand¹. The government has aplenty of chance and access and access to evidence with unlimited fund and grateful power ². Most of the time an accused has no opportunity of defending himself properly, due to his/her lack of knowledge of law, he/she can't provide proper defense as the law requires. Moreover he/she lacks the techniques in talking and handling the case which enables him/her to defend himself/herself. I.e. he/she lacks knowledge how to respond to charge, how to provide whiteness and other evidences, how

to examine witnesses and the like. Government, on the other hand, has many opportunities to be the winner of the dispute. Because, it can retain experienced and well qualified prosecutors in the area of legal process and it has a great access of finding evidence. In such a wide gap between these two parties to the proceeding, it is difficult to the accused to win the case /dispute. Hence, without the defense counsel, even if he/she is not guilty, the accused person is in danger of conviction because he/she does not know the law and techniques of defending himself/herself. Therefore, the accused person is in need of legal counsel in every stages of the proceeding against himself/herself for the sake of protecting his/her rights provided under the constitution, such as the right to trial, to defend himself and due process of law. Thus, it has a significant importance for the preservation of all other guarantee endowed to him/her under the constitution.

The accused person, if he/she is able to do so can hire a legal counsel of his/her own choice starting from the very beginning of the proceedings against him/her in respective of the kind of crime he/she is charged with. This is a constitutional right and nobody can deny it. Lawyers have duty to defend the service shall be rendered on according to regulations No. 57/1999 (Federal Courts Advocates' code of conduct regulation Art 49 rendering free legal service (Probonop Public services)

Any advocate shall render at least 50 hours of legal service, in a year, free of charge or up on minimum payment. The service shall be rendered to:-

Art. 49

- (1) Persons who cannot afford to pay.
- (2) Charity organizations, civic organizations, community institutions.
- (3) Persons to who court requests legal service.
- (4) Committees and institutions that work for improving the law, the legal profession and the justice system.

According to the above proclamation lawyers have a duty to defend but in its practical application has a great problem because of the implementation of controlling mechanism were not emphasis and the concerning organ does not give concentrating and do not show. The contribution of legal aid has where the accused persons to be represented by the defense counsel its practical application is may express:- to consult or advice only not pass to go but like an example of APAP has who can't hire lawyers by their own resources because their poverty also prevents them to their private lawyer.

Therefore the contribution of legal aid has somehow well to the existence of a few defendants, because the legal aid given service has for a few number of person. But legal aid has given service more to the minors. When the lawyers to given free service persons primary they notify and registered the

institution usually meeting the lawyers are given prizes their free service. Then legal aid has can be express their contribution of practices.

The role of MOJ in the accused persons to be represented by the defense counsel and its practical application has the lawyers have duty to defend because when a lawyer or an advocate licensee of service given by the Ministry of Justice. (MOJ) so the role of MOJ in this regard has:-

- ❖ It is the main and one of the executive bodies of the state.
- ❖ It has a power to implement the law.

This institution can to implement when the law has make or regulate and the MOJ can to manage and to make the controlling mechanism where the lawyers has duty to defend this an essential and fundamental right of an accused person. Because, most accused persons usually have difficulty in the criminal proceeding. Which means that, they are unable to defend themselves properly for the change of against them due to their ignorance of law and the procedure?

As we have discussed above, the accused person has constitutionally guaranteed right to be represented by either private advocate or public defense counsel provided by private advocate is an assistance or legal advice provided to an accused by an advocate or a lawyer who is hired by the accused with proper fee of the advocate. This private advocate is representative of the accused who hired him and gives any legal advice which the accused requires.

2.2.2. counsel/Advice Provided by Public Defense counsel

2.2.2.1. The Public Defense system

It is already mentioned that, the accused person may defend himself/herself personally or to hire his/her own lawyer/attorney or to be advised by government defense counsel if he is indigent. Most criminal defenders are unable to afford lawyers fee by their own. Thus, they are entitled to government appointed counsel. For a long time, judges have been assigning counsel to poor person accused of crimes. However, such system was inadequate, providing representation for all defenders who have been of it. More ever it lays an unfair burden on the lawyers who accept its obligation requiring them to assume the cost of what might be a public service..

However, the system differs from country to country, as a general term, the counsel provided by government are of two types: - the public defense system and the assigned counsel system.

The public defense system is the system of providing legal representation for poor persons accused of crime⁵. This is recognized by many legal systems. It is defined as a regular appointment of lawyer who is compensated from the government on salary basis for indigent accused of crime⁶. Such defender can be public official having assistants and a clerical staff, whose duty is to defend indigent persons accused of crime. The public defender system is supported by government and is under public control. The public defenders are governmental employees who earn fixed salaries and are specialists in representing indigent criminal defendants. The method of selecting a public defender varies from country to country. He/she may be chosen publicly by courts, by local governing officials etc⁸.

2.2.2.2 The Assigned counsel System

The assigned counsel system is also a system recognized by different countries for providing legal representation for poor persons accused of crime. This system is defined as the appointment of private individual defendants⁹. This means if the accused in criminal prosecution is poor and unable to retain a lawyer/attorney by himself and appears in a court without lawyer, the judge appoints one for him from those who practice in the court¹⁰. Judges must let the accused know that, it is better to have counsel, because, the prosecutor is a lawyer and will have advantage over an accused who does not have lawyer that if technical matters arise during the course of the trial¹¹. In general the legal assistances should be given to poor accused of crime who can't hire his/her own defense counsel. The defense counsel can do many things in the proceeding that the accused can't do effectively. Therefore, the service of counsel is useful for fair administration of justice. No one can deny the importance of counsel in criminal proceedings.

As far as the Ethiopia case is concerned, assistance provided by both private advocate and public defense counsel are recognized. Moreover the assistance provided by some associations like women lawyers association is including.

2.2.3 Basic Principles in the right to be represented by Defense counsel

2.2.3.1. Equal protection of Law

Equal protection of the law refers to the rights of individuals to have equal access to lawyers and the courts, and to be treated equally by the law and the court system in both substantive and procedural

laws. Simply put, equal protection of the law means that state laws must provide for equal treatment of similarly situated individuals despite racial, gender or other differences. This idea is critical in maintaining civil rights because, without equal protection, states could prohibit people from employment based on skin color, gender, religion or other issues. Minorities could be denied access to the court system when their rights have been violated or to report crimes.

The right of equal protection of law is recognized by the constitution of many countries and under most of the international and regional human right instruments. For example, the Universal Declaration of Human right (UDHR) provides that:

“All are equal before the law and are entitled without any discrimination to equal protection of the Law.”

The African [Banjui] charter on Human and people Rights. (ACHPR) also provides that.

“Every individual shall be equal before the law every individual shall be entitled to equal to protection of the Law”

The FDRE constitution also provides that

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation nationality or other social origin, color, sex, language, religion, political or other opinion property, birth or other status.”

So, the right of equal protection of the law, which is guaranteed by the constitution and other international and regional human right instruments, should be respected. So every individual should be treated in a manner similar to other.

It is obvious that the law requires every citizen to have the right to get opportunity or access to the court in order to defend him/her against the alleged crimes and the reason for the assignment of defense counsel is to maintain the principal of equal protection of the law. It is the general feeling that most criminal cases find the interest of the state and the accused mismatched with the state having the better of its prestige and resources¹⁵. So, the claims of individuals have to be adjusted with the claims of citizens and the welfare of the community. That means in any criminal process, usually there are people (Up on whom a certain criminal is committed) represented by government on one hand and there are an individual accused of committed) represented by government on one hand and there are an individual accused of committing an act or commission prohibited by law on the other hand. The

government has many opportunities for its interest to be protected. It has a better resources, it can retain experienced and well qualified prosecutors in the area of legal process. The accused acting as his own counsel on the other hand faces a greater obstacle in preparing and defending his or her own case.

If the accused has no counsel, he/she may be convicted not because he/she was guilty but unable to show his/her innocence according to the law. Someone who is financially well placed and hence able to their representation can be regarded as one who can enjoy the equal access to the court. Thus poverty may deprive the protection. In order to achieve equal justice, as the law requires, the availability of lawyer is essential. If the indigent defendant can't get the assistance of counsel, it makes him/her to loss whatever rights he may have to achieve equal justice in practice and to give reality to the constitutional guarantee of equal protection of the law.

The law imposes an obligation on the government to provide counsel for an indigent defendant in order to achieve the right of equal protection. The idea is that if a poor person is provided access to free representation and counseling, he is there to given equal justice. In general, the service of an attorney is beneficial /important for trial and administration of criminal justice. Denial of the right to counsel is denial of equal protection, which is guaranteed by the law.

Therefore, equal protection of law is basic principle, which has strong relationship with the needs of the right to be represented by defense counsel.

2.2.3.2 Due Process of Law

The second important legal principle that has basic relationship with the needs of the right to be represented by defense counsel is due process of law. Due process generally requires fairness in government proceedings. A person is entitled to notice and opportunity to be heard at a hearing when they have life, liberty. Or property at stake. Laws should be applied to persons equally, without discrimination on prohibited grounds, such as gender, nationality, handicap, or age. In criminal cases, fair procedures help to ensure that an accused person will not be subjected to cruel and unusual punishment, which occurs when an innocent person is wrongly convicted. Due process requirements apply to such government proceedings as trials, parole hearings, and administrative hearings involving benefits, among others. “

This principle provides that no person should be deprived of his life, liberty or property without due process of law. Such principle originated from Magana Charta of 1215. In 1215, in England the abuse of right on the people lead to armed conflict between King John and the barons. Because the king was

abusing the right of the people who had different status in the country, using different systems, but the barons were not able to tolerate this abjuration of right. And they were ready to fight against the king, but the king was not interested to fighting with them, rather he signed an agreement called Megna Crata or **chapter of Liberties**. Later the agreement became an important base in the protection of individual's rights, and this was linked with some of the most essential liberties. The establishment of certain principles of rights in the law of different countries is the contribution of Magna-Carta.

The proper enforcement of human rights provision of the law forms the corner stone of the due process of law. Due process requires fairness in the government dealing with persons. When individuals are threatened to the deprivation of their basic rights, by governmental action, due process requires that appropriate remedy be given to the individual. The principle, due process of law is applying in many cases, and it would be very important in protecting specific rights which an individuals can enjoy when governmental action threatens to deprive him/her of significant rights such as the right of opportunity to defend, the right to be judged by impartial tribunals, the right to be protected from punishment without law. Moreover hearing and notice are essential preliminary steps to the passing of an enforceable judgment and constitute basic elements of the constitutional requirements of due process of law. And a hearing includes the right to the aid of counsel and provided by the party asserting the right²⁰. Thus the opportunities to be heard and defend by counsel in many proceedings are essential element of due process of law that should be given due consideration by any authorized organ.

Therefore, the right to be represented by a lawyer in light of due process of law is most important to the accused for his/her life, liberty or property to be safeguarded. So due process of law is an important principle, which has basic relationship with the needs of the right to be represented by defense counsel.

2.3 The Right Accused Person to be represented by Defense Counsel in different Legal Systems.

2.3.1 Foreign Experiences

2.3.1.1 The United States

According to recent constitution of almost all countries, an accused person has different constitutionally guaranteed rights. Among those rights, the right to have legal counsel is the basic right for all other right. The United States constitution also has recognized the right to be represented by defense counsel

under the sixth amendment of the United States constitution which was ratified in 1791. It provides that: - in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense¹. That is to say that in any criminal prosecution the accused has a right to be represented by either retained counsel (if he/she is financially able to hire lawyer) or assigned counsel (if he/she is unable to retain his/her own defense counsel). In the United States, there are four major systems for providing counsel in any courts of the states and the Federal courts as well. These are:-

- i. Assigned counsel system- on a case-by-case basis by the court at time the accused appears before the court.
- ii. Public defender system that are compensated from public treasury on a salary basis.
- iii. Private defender system on a regular basis who are compensated from private sources such as bar associations and
- iv. Mixed private and public system where the private defender system has substantially been supported by the government². However until 1938, the sixth amendment was not understood to guarantee any right to assigned counsel, but only to entitle the defendant to assistance of retained counsel in every federal prosecution³. But in 1938, the Supreme Court as decided in one case, an indigent defendant in any federal prosecution is entitled to court appointed lawyer⁴. Similarly, rule 44 of the Federal Rules of Criminal Procedure provides that if the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign to represent him at every stage of proceedings⁵. From such rule, we can understand that the court is duty-bound to inform the accused that he/she has a right to be represented by either retained or government appointed defense counsel.

In the United States, the accused must be notified of his right to counsel yet at the time of his arrest and allowed a reasonable time and opportunity to consult with lawyer⁶.

The accused is entitled to either retained counsel or government appointed counsel, which extends to trial appeal and even during police interrogation. If the defendant is able to pay lawyer's fee, he can retain his own attorney. But if he is an indigent one the state will appoint counsel for him/her. However the way of determining indigence differs from court to court. For instance, in three-fourth of district courts, an investigation of indigence is conducted by an official. Usually the judge presides at the assignment, if the defendant is without counsel and claims indigence. He is generally believed and lawyer is assigned⁷. In several district, the indigence of defendant is determined when the defendant files an affidavit of indigence under oath⁸.

2.3.1.2 England

Since the right of accused person to counsel is one the most important safeguards granted to criminal accused by the constitution of most countries, an England law also recognizes it. The accused has a right either to be represented by defense counsel or to defended, against the charge by him. However, legal representation for the accused was not fully allowed in reason trials until 1695, and was not fully allowed in felony cases until 1837.

Recently the accused may retain his/her own counsel if he/she can financially afford, and for an indigent accused, the judge has assigned counsel and such an appointment has been considered as the work of charity by the legal profession for a long period of time¹⁰. However, the appointed lawyers by the judge were not adequate. So, in twentieth century these shortcomings have become minimized and alternative and adequate system of legal aid has been developed.

In England, the accused must also be informed or advised his/her right to counsel at the time of arrest. Where the police fail to inform his/her right to counsel, or the suspect or accused person gives his/her statement to the police without the presence of a lawyer then his/her confession is inadmissible in the trial courts¹².

The right to be represented by either retained or court appointed counsel or to have a legal advice or assistance extends to:-

- i. Police station-to has advice and assistance to people who have been arrested.
- ii. The magistrates courts-it is allowed in limited cases like making a bail application, making plea in mitigation if the suspect is in custody and wishes to plead guilty and making a plea in mitigation for a defendant who is not in custody but who wishes to plead guilty.
- iii. Crown courts and
- iv. The appellate court¹³.

As discussed above, a defendant who cannot afford for an attorney by him/her is entitled to free legal assistance. But the indigence of the accused should be recognized before government defense counsel is assigned to him/her. The court determines the eligibility of an accused person to have a legal aid, according to the legal aid Act, 1988, part v. There are two sets of criteria which legal aid application will assess. The merit test (the interest of justice) and means test (the accused financial capacity) such two requirements are interdependent i.e. even if the accused is financially unable to hire lawyer by himself/herself, assigned counsel will not be provide for him/her unless the interest of justice requires to

do so and if the accused is able to retain a lawyer, legal counsel will not be provide for him, even if the interest of justice requires to do so. In other words, the merit test provides that an accused whose indigence is recognized has a right to be represented by a legal counsel, if the interest of justice requires doing so. On the other hand, the means test provides that no accused person can have assistance of an assigned counsel unless he/she proves that he/she can't hire a legal counsel at his/her expense¹⁴.

In general, the indigence of an accused who desires a free legal advice is recognized by courts, so courts should take a great care in granting a legal counsel to an accused.

2.3.1.3 CANADA

Although bordering the united state and sharing a similar legal system, the development of civil rights and liberties in Canada has followed a different path, in large part because Canada had no equivalent to the U.S Bill of rights, until very recently provincial codes provided for several rights of the kind protected by the U.S. Bill of rights, but they did not apply throughout Canada and were far from complete¹⁵. After World War II, a political movement in Canada brought a Canadian Bill of Rights, and in the 1950^s the supreme court of Canada issued some rulings that suggested it might develop civil rights concepts on its own¹.

In 1982, the Canadian charter of rights and Freedoms were adopted as part of the Canadian constitution¹⁷. The charter established a menu of civil rights and liberties similar to those set out in the U.S. constitution. Additionally, the charter expressly provides for the right of judicial review, permitting those who claim that their rights under the charter have been infringed or denied to seek remedies in court.¹⁸

As far as the right to defense counsel is concerned, the Canada constitution provides the right to representation by counsel including the right of accused against self-incrimination, double jeopardy, cruel and unusual punishments and unreasonable search and seizure, and the rights to be presumed innocent.

In Canadian law, an accused is entitled to defend him or through legal assistance of his own choosing or through assigned counsel based on his indigence. An accused person can defend himself from any charge against him or he has a right to heir a lawyer/if he is financially well placed/ or the state can assign legal counsel for him/her, if he/she is financially unable to retain his/her own counsel.

It is already mentioned that, in Canadian law, an accused person has a right to defend himself, or to retain a legal assistant with his/her expense or to be represented by state assigned counsel. And such legal assistance extends to the pre-trial, at trial court and the appellate court. This shows that an accused should have the aid of counsel even before the case is brought to court, during court proceeding and at appellate court.

2.3.2 The Right to be represented by defense Counsel under International Instruments

2.3.2.1 Under the Universal Declaration of Human rights (UDHR)

The right of an accused person to be represented by defense counsel is recognized under some of the international human right instruments. Among those international human right instruments, the universal Declaration of Human right (UDHR), under its art 11 provides that: "Every one charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."²²

This provision indirectly shows the right of the accused person to be represented by defense counsel. Because, the phrase "all the guarantees necessary for his defense" indicates somewhat the right to defense counsel since the right to defense counsel is a guarantee necessary for defense.

Therefore, the right of an accused person to be represented by defense counsel is recognized under the Universal Declaration of Human rights.

2.3.2.2 Under the International covenant (agreement) on Civil and political rights (ICCPR)

Another international convention which gave recognition to the right to be represented by defense counsel is the International covenant on civil and political rights (ICCPR). Under its Art 14(3) d. it provides that in determination of any criminal charge against him, every one shall be entitled to be tried in his presence, and to defend himself in person 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 interest of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

This provision clearly shows that, an accused person has a right to defend the charge against him by himself or to retain lawyer and be represented by such lawyer or to be represented by an assigned lawyer. Moreover, if the accused appears without lawyer, he/she should be informed his right to defend himself through legal assistance. Even if an accused has a right to be represented by an assigned counsel, such an assigned counsel will provide where the interest of justice so require and if the accused has no sufficient means to retain a lawyer by himself. Such two requirements, (i.e. the interest of justice and the accuser's financial capacity) seem interdependent. That means legal assistance of an assigned counsel is provide for the accused only if the interest of justice so require and the accused is poor to hire a lawyer by himself. If the interest of justice so require but the accused is not poor to hire a lawyer by himself, Assigned counsel will not be provided for him/her and if the accused is poor to hire a lawyer by himself but the interest of justice not requires doing so, an assigned counsel could not be provide for the accused.

The phrase "interest of justice so require" is not defend under the International covenants on civil and political rights (ICCPR) so it open to different interpretation. That means it depends up on the personal decisions of the judges or other concerned authorities, whether granting an assigned counsel to the accused is proper or not is determined by such concerned authorities. So, it may lead such authorities to deprive the right of an accused to be represented by an assigned counsel.

Although the right to be represented by defense counsel is provide under the ICCPR, stages of the criminal proceedings at which legal assistance is provided and the remedies of the accused if his/her right to counsel is violated is not mentioned under the covenant. Also, how and by whom, the indigence of an accused be proved is not yet provided under the covenant.

With some gaps, the right of an accused person to be represented by defense counsel is recognized under the ICCPR.

2.3.3 The right to be represented by Defense counsel in Ethiopia

2.3.3.1 General Remarks

As a member of international community, Ethiopia has ratified international and regional conventions with regard to the right of accused person. These conventions, be it international or regional, imposed obligation on state parties to enact (perform) their national laws in accordance with the rules and principles of the conventions. It was this imposition; with other factors forced Ethiopia to give

constitutional guarantee of the rights of accused persons to be represented by defense counsel including other rights of the accused.

Since the main concern of criminal administration of justice is to ensure a fair and adequate criminal process, granting constitutional protection to the right of an accused is a way that facilitates a fair and adequate criminal process. So, in Ethiopian constitutional law, those important rights of accused person are recognized and also there are provisions of criminal procedure code which deals with those rights. The 1994 FDRE constitution recognizes the accused person's right such as right to be informed promptly the reasons of their arrest, their right to remain silent, the right to be presumed innocent, the right to be represented by defense counsel and other right before trial. Among those rights, the right to counsel is an essential right that protects liberties of an individual.

The right to counsel is not only a mere entitlement to justice but it needs also an effective access to it. For the reason that the accused failed to present his defense according to the required procedures, he may be convicted without having committed the alleged crime. To protect those who do not have knowledge of the law and procedure the law provided constitutional right of the accused person to have lawyer. If the accused has no means (financially) to retain private counsel, one can be assigned for him by the state. For this reason assistance of lawyer becomes one of the methods by which an accused person can be safe guarded. The constitutional of Ethiopia and the criminal procedure code of Ethiopia provide the said right.

2.3.3.2 The Right to be represented by Defense counsel under the 1931 constitution

In the constitutional development history of Ethiopia, the first written constitution was the 1931 constitution of Ethiopia. However it did not have any provision, which deals with the right of an accused person to be represented by defense counsel.

As mentioned before the right to be represented by defense counsel is fundamental right that should not be separated from other constitutional rights, which protect the accused and have recognition by the constitution of most countries. But the 1931 Ethiopia constitution did not give consideration to the right of accused person to be represented by defense counsel and other similar rights which give due consideration for the protection of accused person.

2.3.3.3 The right to be represented by Defense counsel under the 1955 revised constitution

In 1955, the said (the 1931) constitution was in need to be modified for reasons that social, political and economical change in the country. As a result of such changes, there was in need of incorporating some provision of the universal declaration of human rights in the revised constitution. So in Ethiopia, the right of accused person to be represented by defense counsel including other rights of the accused, got recognition under the 1955 revised constitution for the first time. Under its Art 52 it provides that:

“In all criminal prosecutions, the accused duly submitted to the court shall have the right to have the assistance of counsel for his defense, if the accused is unable to obtain the same by his own effort or through his own funds, shall be assigned and provide to the accused by the court”ⁿ²⁵

According to such provision, an accused person has a constitutionally guaranteed right to defense against him/her by himself/herself, or if he is not familiar with the rules of criminal process (i.e. how to procedure evidence and witness, how to challenge the evidence and witnesses produced against him, etc) and unable to defend by himself, he can be represented by a retained legal counsel.

Moreover, if the accused is financially unable to retain a lawyer the court will assign a legal counsel to him/her. Therefore, the government is under duty to provide a legal counsel for an indigent defendant free from any charge. However, the requirements to appoint counsel for an indigent is not clearly provided under the constitution: i.e. the right to court appointed lawyer for an indigent was recognized without specifying the type of offences whether be it grave of petty offences. It simply states that “in all criminal prosecutions” regardless of the degree of the offence. Theoretically, the 1955 revised constitution recognized the right to assigned counsel was provided for an indigent accused for all types of offences and at any stage of the criminal proceeding at pretrial, during trial and at appellate stage of the proceeding.

The 1955 revised constitution said nothing about how can the indigence of an accused be determined to have a free legal assistance. Also there was no special legislation regarding the assigned counsel for an indigent accused. So, it would create difference among the judges in determining the indigence of the accused. So, it would create difference among the judges in determining the indigence of the accused. Generally, the 1955 revised constitution recognized the right of accused person to be represented by either retained counsel or court assigned counsel or to defend by himself/herself as his/her choice and

based on his/her indigence, but there is no clear determination how to such constitutionally guaranteed right be implemented.

2.3.3.4 The right to be represented by Defense counsel under the constitution of the people's Democratic Republic of Ethiopia (PDRE)

Although the PDRE constitution was a short lived one, fundamental right and freedoms, mainly included in international instruments such as Universal Declaration of Human rights, International covenants on civil and political Rights, International convention of Economic, social and cultural Rights etc. were recognized in it.

Though during the Dergue regime individual rights and rule process of law were not practically Respected, there were a number of rights, which the PDRE constitution guaranteed to be accused person during the trial. Of all those rights and even other rights endowed to him/her during the pre-trial and post trial criminal proceedings the right to be represented by defense counsel is the most decisive right which grants him/her a meaningful access to all rights provided under the constitution. Without legal aid and counsel all other important rights, which grant the accused, a fair trial remains meaningless. So the PDRE constitution under its Art 45(3) provides that:

“Any accused persons have the right to defend him or appoint a defense counsel. Where a person is charged with a serious offence and his inability to appoint a defense counsel is established the state will appoint one for him free of charge as determined by law”

As stated in this provision, every accused person has the right to defend himself/herself personally if he/she wants, or he/she can retain a counsel by his/her own funds. Also, if the accused is unable to afford a lawyer due to his/her financial incapacity, and charged with serious offence, then the state has a duty to provide a defense counsel for the indigent defendants. The constitution seems imposed restrictive requirements regarding the right to assigned counsel. Such requirements are:-

- i. The accused should be unable to pay lawyer's fee by his/her own means /but the measurement of an indigence of an accused is not mentioned clearly/

The accused /defendant have to be charged with serious offences. If the two requirements meet, the state shall provide a lawyer to the accused based on the law. However such constitution did not make any distinction between the types of offences as far as retained counsel is concerned. That means to have the right to be represented by a retained counsel, the constitution did not state about the type of offences by which the accused is charged. And there is no other law that states about such type of offences. Moreover, the constitution provided nothing about stages of the criminal proceedings at

which the right of an accused person to be represented by either retained or court appointed counsel is available.

In addition, there is some difference between the 1955-revised constitution and the PDRE constitution as for as the right to be represented by assigned counsel is concerned. The PDRE constitution states that “an accused is entitled to a state appointed counsel where, among other things, charged with serious offences” But the 1955 revised constitution had provided such assistance in all criminal prosecutions regardless the degree of offences/ be it grave of petty/. So the 1955 revised constitution provided a wide right to an accused person as compare to the PDRE constitution.

In general one can understand from the aforementioned descriptions that, according to the PDRE constitution, the accused person may defend him/her personally or he/she has a right to hire his/her own attorney or to be advised by government’s defense counsel if he/she is indigent.

2.3.3.5 The right to be represented by Defense counsel under the Federal Democratic Republic of Ethiopia constitution

According to the recent constitution (the FDRE constitution), an accused person has different constitutionally guaranteed rights, among those rights the right to have legal counsel is the core right that protects the accused person from abuse of power of any authorized organ. The principle of protection of an accused person right will definitely be dependent on the preservation of the right to defense counsel of the accused.

The FDRE constitution recognizes the right to be represented by defense counsel under its article 20(5). It states that

“All persons have the right to be represented by legal counsel of other choice, or in the case of indigent defendants, where substantial injustice would otherwise result, to be provided with legal representation at state expense”

According to this provision, an accused person has the right to retain legal counsel and be represented by him/her as he/she wishes. And if the accused is an indigent one, the state will appoint an assigned counsel for him/her if the requirements are fulfilled. Such requirements are: - the accused should be unable to pay lawyer’s fee by his own. /But there is no rule in the country that determines the indigence of an accused person. So it may create some problems in appointing an assigned counsel to the indigent accused may be violated by authorized organs that have the role of appointing an assigned counsel for an indigent accused because there is no fixed criteria that determines of an accused.) The second requirement stated by FDRE constitution at state expense where, in the opinion of the court, substantial injustice would otherwise result. The phrase “substantial injustice would otherwise result” is open to

interpretation. Some judges is interpreted it as regard to the graveness of the offence/ crime by which the accused is charged; in some judges it depends on the complexity of the cases and the indigent defendant's background such as his education, his family status, his state of health his age; in others it has a different meaning.

The phrase "...Substantial injustice would otherwise result" indicates narrow right when compared to the 1955 revised constitution which provides assigned counsel for any indigent accused in all types of offences. So there are some restrictions under the FDRE constitution to have government assigned counsel. Moreover, the FDRE constitution seems to provide wider discretion to judges or other authorized organs to decide as to whether or not defense counsel should be provided for an indigent accused. On other hand, when we think about the scope of accused person's right to defense counsel, it fails to provide clearly the stage of criminal proceedings on which the rights to defense counsel are available.

Generally the constitution does not make distinction with regard to type of offences and stage of criminal proceedings where the right to defense counsels can be exercised. However, there can't be any doubt that the right to be represented by defense counsel should be available in judicial proceedings. As provided under the FDRE constitution, an accused person can exercise their right to defense counsel either by themselves or with assistance of defense counsel. This implies that the right of accused person to defend himself/herself personally or by defense counsel is defense counsel is given constitutional status under the constitution.

In our country of Ethiopia the right of accused persons to be represented by defense counsel and its practical application the public defense counsel office is not established by proclamation, or regulation. But when that accused person to be represented by the defense counsel of right is it addressed by FDRE constitution according to Art. 20(5) say and cited before the above described.

The public defense counsel office that who has established and organized dealing the power has given to the FDRE Federal democratic Republic of Ethiopia The Federal Democratic Supreme Court president, according to the establishment of the Federal courts proclamation No. 25/1996 Art. 16 (2) (j) say that organize the public defense office.

Then this power has given to the federal Supreme Court president. The public defense counsel office has the part in the Federal High Court building, does not stand itself the office furniture, transport, stationary's and also the other things as the same time the lack of skilled of man power.

The public defense counsel office has not the same administration between federal level and regional state level, there has different administration. The public defense counsel office by Federal level shall be responsible to the federal Supreme Court; the professional's has employers through the civil service commission regulation. Whereas the public defense counsel has differ to the regional state level, by their administration, responsible employment, salaries and so on.

At the same time by the regional state level there has different itself one to each other by the above describes. The federal public defense counsel offices have professionals and additional those have staff workers, secretaries, and record section and chief of office.

The public defense counsel by regional level has not, office, staff workers secretaries, chief of office and record section. In the regional state level the public defense counsel are appointed and there responsible has to the regional state judge administration council; the other regional state has similar to the Federal public Defense Counsel has appointed and it shall be responsible to the regional state court judge administration council office.

In the other hand like Amhara, Gambella, Tigray and Benishangule public defense counsel has the administration, the employment, shall be responsibilities are like the federal public defense counsel office. But like the Afar regional state public defense counsel has differ from out of the federal level rather than the other regional state public defense counsels, this regional state has used by the regional First Insurance Court or werda court a judge acts as a public defense counsel represented to the accused person in the appeal time. The right of accused persons represented by the defense counsel and its application in Ethiopia has not similar by many things and it has differed from one to each other. But concerned to the federal issues raising to the regional state the accused person has represented by the federal defense counsel though the moveable bench even the trial has hearing by the Federal High Court moveable brench²⁹.

2.3.3.6 The Right to be Represented Defense counsel Under the Criminal Procedure code of Ethiopia

The respect for the basic human rights in the constitution is not only enshrined in municipal; laws but also it is the international concern for human rights protection. International conventions serve as the supreme laws of the world states are under the obligation to satisfy their international commitment. There is defense for a state to raise the particulars of its status escaping responsibility. This obligation of states facilitates the enforceability of the international and regional conventions. This constitutional enforceability of the right further is secured through statutes. One being the criminal procedure code of

Ethiopia, which deals with the right of an accused person to be represented by defense counsel other than the constitution. This subsidiary law provides some provisions that are related with the right counsel.

As we have discussed before, accused person lacks the skill and knowledge of legal issue and the technique in taking and handling the case, which enables him/her to defend himself/herself. For this reason the accused person needs a legal assistance for his/her defense and that is way the constitution and other law of the country guarantees him/her to have a legal counsel of his/her own choice. According to the Criminal Procedure Code of Ethiopia, the right of an accused person to be represented by defense counsel starts from the time of his/her arrest. Art 61 of the criminal procedure code of Ethiopia states as follows.

“Any person detained on arrest or on remand shall be permitted for with to call and interview his advocate”

From this provision, we can infer(assume) that an accused has right to have a legal assistance or to communicate with an advocate during police investigation or arrest. It is know that the assistance of counsel is essential at every stage of the criminal proceedings because it helps to secure the defendant’s or accused right, like the right to remain silent and other important rights.

As far as the right to be represented by retained counsel is concerned, the law clearly provides that any accused person has the right to be represented by retained counsel during arrest at police station. However, such criminal procedure code says nothing as far as an indigent accused is concerned. This means that if an accused is an indigent to retain his/her own lawyer and be represented by such retained counsel, the code didn’t say anything whether such an indigent accused can be represented by state assigned counsel or not while he/she is at police station.

The right of accused person to be represented by defense counsel at the time of police investigation has so many importances to the accused. For example, as article 27(2) of the Criminal Procedure code provides, any person summoned by the police for an investigation or arrested, 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 be used in evidence. So the right to be represented by defense counsel helps the accused for his/her right under Article 27(2) is respected. That means is the accused has no legal counsel he himself may not apply his right of being silent during interrogation and may give unnecessary response due to his ignorance of law. But being represented by legal counsel protects the accused from response that may

be evidence against him since his legal counsel has sufficient knowledge of law defend the charge against the accused effectively.

The criminal procedure code also provides the right of accused person to be represented by defense counsel during the trial stage of the criminal proceeding. It says 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. According to such provision, an accused person can defend the charge against him/her by himself/herself or be able to assist by legal counsel at trial stage of the criminal proceeding. Moreover, the accused person can open his/her case for defense through defense counsel as provided under Article 142(2) of the criminal procedure code of Ethiopia. This shows that an accused has the right to be represented by legal counsel yet the case for defense is opened. In addition, at the time of final address the accused can be represented by defense counsel³¹.

Even during the last stage of the trial, i.e. where the prosecutor has made his submission on sentence, the accused shall be entitled to reply or call witnesses through his defense counsel. Thus it is recognized under the criminal procedure code of Ethiopia that the accused can be represented by legal counsel during the trial stage of the criminal proceeding.

According to the Criminal Procedure Code of Ethiopia, the right to be represented by defense counsel is not limited only at pre-trial and the trial stage of the criminal proceeding but also includes at the time of appeal. It is known that if an accused has any complaint on the decision given by the lower court, he/she has a right to file an appeal to a higher court. Such an appeal can be provided either by the accused himself/herself or by his/her legal counsel. As it is provided under Article (178) (1) of the criminal procedure code of Ethiopia, notice of an appeal against a judgment shall be given by the appellant or his advocate. Such provision indicates that an accused person has a right to be represented by defense counsel during an appellate stage of the criminal proceeding. Moreover, the accused person has a right to be represented by defense counsel during the hearing of appeal according to Article 193(1) of the Criminal Procedure code of Ethiopia, which says where the appellant or his advocate is not present on the day fixed for the appeal; the appeal shall be struck out. Provided that the appeal may be restored to the list where the appellant or his advocate can show that he was not present owing to circumstances beyond his control.

For an accused that is not familiar with the laws and procedures, it is difficult to identify ground for appeal and provide such appeal during the proper time and as the law and procedure requires.

Therefore, the right of accused person to be represented by defense counsel should not be defined during an appellate stage of the criminal proceeding.

It is already discussed that the Criminal Procedure code of Ethiopia provides a right for an accused to be represented by defense counsel from the pre-trial/ i.e. during police investigation or arrest/ to the appellate stage of the Criminal Proceeding.

As compared to 1955 revised constitution, the PDRE constitution, and the FDRE constitution the Criminal Procedure Code of Ethiopia clearly provides the stages of criminal proceedings at which the right to be represented by defense counsel is available is but such code says nothing whether an indigent accused has a right to be represented by state assigned counsel or not.

CHAPTER THREE

Discussion and Analysis

The previous chapter has dealt with review of related literature and this chapter will deal with results of the study and identifying the prevailing main or current constraints in the general remarks on the right to defense counsel, its definition, Historical background, importance and its development; the method of providing counsel to the accused and basic principles in relation to the needs of such right are dealt with. And the right of accused person to be represented by defense counsel as far as different legal systems is concerned; application of the right to be represented by defense counsel in Ethiopia. Generally, this discusses briefly the manner how such right can be infringed, problems in implementing such rights and the like. The data to be used for the study will be collected through secondary sources of data collection methods. In addition to the research the data collection method used in this paper is based on Interview with relevant governmental and non-governmental officials to assess the weaknesses and gaps in the enforcement of Public Defenders in Ethiopia especially in Addis Ababa and to determine how different people, judges, understand the concept of Public Defenders and its enforcement;

3 The Practical application of the Right to be represented by Defense counsel in Addis Ababa

3.1 Legal Assistance of the Defense counsel for an Accused

3.1.1 Overview

The right of an accused person to be represented by defense counsel is guaranteed under almost all countries' constitution and other international and regional human right instruments. Such right can be exercised either by the expense of the offender or the state expense accordingly. Where the accused is not able to afford lawyer's fee, he/she has the constitutional right to be provided with legal representation at state expense. This right is given for reasons that the accused may be convicted and sentenced wrongly due to his/her lack of knowledge of law. If charged with crime he/she faces the danger of conviction because he/she does not know how to establish his/her innocence.

Different International or Regional Human Instruments, tried to interpret the concept of the right to be represented by defense counsel.¹ For example Inter-American Commission on Human rights interprets the right to be represented by defense counsel as "The right to counsel means that accused must be allowed to obtain legal counsel when first detained." According to this commission, legal counsel for an

accused person must be permitted when the accused gives a statement at police station or when he/she is interrogated by the police.

European commission of Human right also interprets this right as “granting the right to legal counsel is not enough for a state to appoint defense counsel for an accused/an indigent defendants, the state must also provide effective counsel and has an obligation to see that the appointed counsel is carrying out his/her duty effectively. The authorities must if necessary supervise the appointed counsel, replace him/her by others when he/she fails to exercise his/her duties adequately. Here the appointment of counsel is required by the interest of justice when expertise is necessary to conduct an adequate defense. According to the commission right to counsel includes the right to consultation with counsel, which is unsupervised by the authorities of place of detention. This right applies both to personal visits and to correspondence between a detained person and counsel. In addition to this, in some cases the right to adequate facilities for preparing a defense implies the right of reasonable access to prosecutions file. Defendants have a right to all relevant information held by prosecution that could help them exonerate themselves or reduce their sentences, and often this information will be in the prosecution’s files.

Assistance of defense counsel should be given for all accused person at all stages of criminal proceedings to secure justice. The reason is that most accused that are not represented by legal counsel are defeated on trial because of ignorance of evidence rules and procedures. Such accused can be position to identify irrelevant evidence from relevant ones; they do not have the skill as to how examine witnesses and the like for the decision to be in favor of them. Due to such reason most accused may not present their defense properly and they may be defeated in unrecoverable manner. Therefore the accused acting as his/her own counsel faces a greater obstacle in preparing; presenting and defending his/her own case. And if the accused has no counsel he/she may be convicted not because he/she guilty but unable to show his/her innocence, according to the law.

In general the defense counsel is needed because of those things, which the accused can’t perform effectively but it can be done by the defense counsel. Thus the service of an attorney is beneficial for fair trial and administration of criminal justice. This means that the importance of the assistance counsel for an accused in criminal proceeding is UN debatable.

3.1.2 Grounds for Ineffective Assistance

It is already know that an accused person needs the help of defense counsel in order to defend himself/herself properly. So he/she shall be represented by a competent lawyer and the lawyer must provide an effective and adequate legal service to the accused. When we say the right of an accused person to be represented by defense counsel, it does not mean only a mere assistance of counsel but it

includes an effective assistance of counsel through retained or court appointed counsel. The right to effective assistance of counsel is linked to the right to counsel. Only when the right to counsel attaches is there constitutionally based right to effective assistance.⁴ i.e. the right to be represented by defense counsel will be meaningful only when effective assistance is provided to the accused. The right to counsel is empty unless counsel adequately represents his clients. An attorney who does not investigate the factual basis of his client's charges, assert the relevant defenses, or attempt to cross-examine witnesses at trial can hardly be said to provide counsel at all.⁵ That is to say, the lawyer has a duty to provide legal services to the accused competently and adequately.

An accused person is entitled to effective and substantial aid of lawyer; unless his/her defense counsel defend the charge against the accused properly and adequately, the accused may meet with the danger of an ineffective assistance. In general, without an effective assistance of counsel, the right to be represented by defense counsel is meaningless. To make it meaningful the assistance must be effective.

Before discussing grounds for ineffective assistance, let us discuss the meanings of ineffective assistance as provided or interpreted by different courts. Since there is no precise definition that defines what ineffective assistance means, the criterion for ineffective assistance differs from court to court. For example, until the 1960s, the criterion for ineffective assistance of counsel by most courts of the United States was where counsel's effort was so incompetent as to render the trial a "farce or mockery of justice"⁶ i.e. an assistance provided by defense counsel is ineffective and be rejected by the court if the assistance provided by defense counsel is pointless or worthless and has nothing to do with the trial. So the criterion of ineffective assistance is the assistance's pointlessness or worthlessness in the eyes of the trial or court. Beginning in the early 1960's, the United States Court of Appeals for the District of Columbia held that the appropriate test for ineffective assistance of counsel is whether gross incompetence blotted out the essence of a substantial defense.⁷ That means, according to the United States Court of Appeals for the District of Columbia, the criterion for ineffective assistance of counsel is gross incompetence however there is no exact standard for gross incompetence. Other courts also provide the criterion for ineffective assistance of counsel on the grounds that performance which falls below the norm, on the ground of reasonable competence etc.

Although different courts interpret it differently, as its literal meaning ineffective assistance is assistance with customary skill or knowledge, which has a minimum standard of professional representation.

What are the grounds for ineffective assistance of counsel?

Ineffective assistance may result from different grounds, but the major causes for ineffective assistance are: - mistake of the defense counsel, the state interference case and conflict of interests.

3.1.2.1 Mistakes of the Defense counsel

Mistakes of the defense counsel is one ground that may result in an ineffective assistance. The defense counsel may make a mistake in different ways or situation. For example when the defense counsel provide his/her assistance to the accused, he/she by mistake, may apply a law that has no relevancy to the charge provided or he/she by miss the relevant laws; he/she may miss some points or evidence that have a core value in showing the accused innocence; he/she may not follow the required procedure whenever he/she provide evidences, witnesses or the like; he/she may also be absent during the appointment date and fail to defend the charge against the accused; he/she may not provided the necessary evidences on the accused may not find the necessary assistance, counsel or advice from the defense counsel. So mistakes of the defense counsel may be one ground for ineffective assistance of counsel.

However, the fact that the lawyer commit an error/mistake may not be a ground for claiming inadequate/ ineffective assistance of counsel unless there should be an actual damage in the effect of assistance.⁸ The seeking party trying to reverse the case due to the counsel's error or negligence is required to show the effect of the case affected by the attorney's error. The court is required that the defendants making an ineffective assistance claim affirmatively prove a reasonable probability that attorney's error affects the outcome of the case.⁹ i.e. the prejudice inquiry is necessary in such cases, the court explained, because attorney errors come in an infinitive variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial.¹⁰ From these description we can understand that only a mere error of the defense counsel may not be ground for an ineffective assistance of counsel, the accused should show the effect of attorney's error on the value of the charge.

Some of the factors that seems to be the most essential to the court in determining whether an attorney conduct constitutes ineffective assistance of counsel are:-

- i. The specificity of the ineffective assistance claim
- ii. Whether a "reasonable" explanation for the attorney's conduct exist
- iii. The extent to which the conduct affected the outcome of the case and the attorney.¹¹ so a mere error of the defense counsel does not establish ineffective assistance of the counsel, there should be some facts for an assistance to be ineffective.

When we see the practice, in the United States for example attorney's conduct that fail to provide assistance to the accused as required by the right to counsel cannot result in money damages payable by the attorney. Rather, the remedy for failing to provide effective assistance of counsel is reversal of the

convicted guilty as a result of ineffective assistance of the defense counsel, the decision of the court has to be reversed.

As far as our country's, specially the Addis Ababa's practice is concerned, the accused has no right to raise ineffective assistance claim before the court and he/she no remedy where the assistance provided by the defense counsel is ineffective.¹³ Therefore, in Addis Ababa, there is no mechanism by which the right of an accused person to have effective assistance of counsel is implemented and also there is no mechanism by which, an accused whose constitutional right to effective assistance of counsel is violated, be provided with some remedies.

Finally, the constitutional right to effective assistance of counsel should be implemented as effectively as the law requires. So courts and defense counsel has great responsibility to certain whether the defendant is provided with adequate legal service of lawyers.

3.1.2.2 The State Interference Case

The state interference case is another ground for ineffective assistance of counsel. As we have discussed before, an accused person has a constitutionally guaranteed right to be represented by either retained counsel or state appointed counsel. So the State has responsibility to provide counsel for an indigent accused and to perform laws to regulate the process of assigning counsel. If the state fails to provide counsel as provided by the law or deny counsel at which the right to counsel attaches and delay appointment of counsel may result ineffective assistance of counsel.

The major cases involving state interference are divided into three categories. They are:-

- i. Denial or late appointment of counsel
- ii. Obstruction of counsel performance and
- iii. Intrusion in to the attorney client relationship¹⁴.

These means government may fail to provide or deny counsel at a stage of the proceeding at which the right to counsel attach; the government may obstruct the defense counsel's effectiveness through a number of reasons. For example defense counsel's access to the necessary evidences. Moreover, several cases involve government eavesdropping on attorney-client conversations through the use of undercover agents or other devices. Since such government actions are result ineffective assistance of counsel, the role of government for effective assistance of counsel will be empty unless such government interferences are prevented. Therefore the state interference with counsel's assistance in the form of delay or denial appointment of counsel, obstruction of counsel's performance and the like are presumed to result in prejudice of the accused right and fair administration of criminal justice.

When we observe the practice in Addis Ababa, there is a state interference case that can be ground for ineffective assistance of counsel to some extent. Because there are only about (20) twenty defense counsels and (8) eight supporting staffs who can be representative for all accused and under all courts in Addis Ababa. When we compare the number of defense counsel with the number of cases provided to him or her, it is possible to say there is insignificant defense counsel. One defense counsel has more than (50) fifty up to (80) eighty files/cases of accused. So each defense counsel is unable to provided effective assistance for each accused. Moreover, the office that has authority to employ the defense counsel is not willing to employ further defense counsel as the case requires. So deficiency of the defense counsel is the main cause for ineffective assistance of counsel. Therefore, government interference in the form of denial or late appointment of counsel is involved in Addis Ababa. But there is no much government interference through obstruction of counsel's performance and intrusion into the attorney-client relationship.

In general there is some state interference case in Addis Ababa that can be ground to ineffective assistance of counsel partially.

3.1.2.3. Conflict of interests

The third ground for ineffective assistance of counsel is the conflict of interest between the lawyer/defense counsel and the accused .An accused is entitled to the service if an attorney devoted solely to his/her interest . But there are a number of reasons by which conflict of interest between the lawyer and an accused can be created. For example a defense Counsel who is representative of an accused, charged with a certain crime may be relative of the victim of the crime. In such case the defense counsel will not provide effective assistance for the accused by any means. Moreover when one attorney is assigned as a counsel for different defendants, there may be shown conflict of interest. Also if an attorney attempts to represent more than one co-defendant in the same trial then conflict of interest would arise (occur).

The fact that the attorney has conflicting interest which affects his representation or advice in invalidates the proceedings¹⁷. But the accused cannot complain about conflicting interest of his attorney of which she had a full knowledge at the time of retains. Conflict of interest or the part of counsel may result to deprive the accused of his/her constitutional right for effective assistance of counsel. Therefore the lawyer has a duty to provide effective assistance to the accused in accordance with the interest of his/her client and should be free of conflicting interests.

When we come to the practice in the federal level especially in Addis Ababa there is conflict of interest between the defense counsel and the accused for the reason that, relative of victim of crime or the victim of crime himself/herself or the public prosecutor exerts influence on the defense counsel by some means (e.g. By paying some amount of money) not to provide the required assistance to the accused moreover, if the defense counsel has some relation to the victim of a certain crime he does not provide the appropriate counsel/assistance for the accused of the alleged crime. In addition, private attorney who is representative of an accused may interrupt his representation at any stage of the proceeding if he is provided with another case that brings him much income. So such conflicts of interest between defense counsel and the accused result to ineffective assistance of counsel. But it does not mean that such all retained and state appointed counsels have such type of the habits but there are some who provide ineffective assistance due to the reasons mentioned above¹.

As another interviewee: "I was an accused of robbery even if I was innocent. Due to my lack of knowledge of law, I hired a lawyer and he took about 50% of his fee but he was absent during most of the appointment date and can't provide any thing or evidence which shows my innocence. Because he was busy since he had a number of clients. Due to lack of effective assistance of my lawyer I was convicted guilty. But I provided my appeal to the Supreme Court with the help of another lawyer and the decision of the Higher Court had reversed.

Therefore, there is conflict of interest between the defense counsel and the accused that may be ground for ineffective assistance of counsel to some extent.

3.1.3 Ways of Obtaining Assistance/counsel

For the reason that the accused failed to present his/her defense according to the required procedures, he/she may be convicted without having committed the alleged crime. To protect those who do not have knowledge about the law and procedure, the law provides the right to counsel. The right to counsel is the constitutional right of the accused person to have lawyer. If the accused has financial capacity to retain a defense counsel by himself/herself he/she has the right to retain and be represented by such counsel. But if the accused has no financial capacity and unable to retain his/het own lawyer he/she has a right to be represented by state appointed counsel. However ways of providing assistance for an accused by private attorney and public defense counsel is almost the same, the criteria for obtaining assistance differs to some extent as far as the private attorney and the public defense counsel is concerned.

3.1.3.1 Assistance of Private Advocate

The accused persons, if he/she has financial capacity to do so, has a right to hire a legal counsel of his/her own choice starting from the very beginning of the proceeding against him/her in respect of the kind of crime he/she is charged with. This is his/her constitutional right and nobody deny it The FDRE constitution does not make distinction with regard to types of offences and proceedings where the right to retained counsel can exercise. It is simply stated that “accused person has the right to be represented by a legal counsel of his own choice”. Of course there cannot be any doubt that the right to retained defense counsel should be available in any judicial proceeding. The practice also shows that an accused person can exercise his/her right to be represented by retained counsel regardless of the type of offences. As far as stages of the criminal proceedings at which the right to be represented by retained, counsel is concerned, the accused is unable to exercise his/her right to be represented by retained counsel when he/she is investigated by the police.

The accused is able to be represented by an attorney or private advocate at trial and appellate stage of the criminal proceeding with a certain amount of fee of the advocate according to the agreement between the advocate and its client/ the accused based on the type of crime by which the accused is charged .

Since the private advocate is representative of the accused, he/she gives grate attention to the case of the accused at each stage of the proceeding and provide effective assistance to his/her client. As compared to the assistance of public defense counsel the accused has a wide opportunity to obtain effective assistance through private attorney. Because most of the time the private advocate has detailed knowledge of law through education and along period experience on one hand and the public defense counsel on the other hand has no detailed knowledge. Because whenever the public defense counsel achieves detailed knowledge through education or experience he/she will leave his/her job/ i.e. job of the public defense counsel/and be either private advocate or an attorney for NGO or other enterprise that can a afford sufficient salary. So only the one who is less educated and experienced remains be a public defense counsel. So the assistance provided by such defense counsel is not effective. Moreover, the private advocate will be representative of an accused only when he/she is interested with it. So the accused is able to obtain effective assistance because the advocate is representative of the accused willing fully. The public defense counsel on the other hand is always representative of an accused even if he is not interested with it. So under such condition it is difficult to say that such public defense counsel provides effective assistance to the accused²².

In general an accused is able to obtain effective assistance through private defense counsel regardless of the type of crime and without any criteria. However it does not mean that there are no private advocates who do not provide effective assistance to the accused.

3.1.3.2. Assistance from public Defense counsel

In Criminal trial in order the trial to be meaningful or helpful in getting of the truth the parties must be somehow equal. There is government which is most powerful, have unlimited funds and evidence at its disposal with the talents of prosecutor on one hand and an individual accused of committing crime that is unable to retain legal advisor to assist him/her on the other hand. In such a situation there could not be justice and fairness. Thus an individual accused who is unable to retain legal advisor is entitle to court appointed counsel. This right extends to trial, appeal and even during police investigation.

The FDRE constitution under Art 20(5) guarantees the right of legal counsel to the accused person who is unable to employ the counsel for him. Therefore the government has a responsibility to provide competent legal counsel to the accused in the administration of justice. But systems of providing counsel to the accused differ from country to country. Let us take first the United States practice in this regard. Legal services for an indigent in the United States comes from three major sources. The assigned system, the public defender system and the voluntary defender system. Often there is a combination of these systems in certain states. But usually the assigned system, which is employed for the representation of the indigent in the United States, is common. Although the sources for providing assistance are different, an indigent accused is able to obtain assistance or legal services through each source.

The second example is England. In England, the traditional devices used for providing indigent accused of crime with lawyer services are. One is the "Dock brief" by which a prisoner whose case is brought on for trial in the high courts may choose any barrister. Then present in the court to undertake his defense. The second form of legal aid in the higher courts is for the out itself to ask a barrister to undertake a defense, as when the defendant has failed to apply for statutory legal aid or has applied to late. .

When we come to the Ethiopian system of providing assistance to the indigent accused: - during the regime of Emperor System Hail Selasse, it was an assigned counsel system in which lawyers defending the indigent accused, received no compensation for the services they render or provide and any out of pocket expense. The advocator could not refuse to take the case without good reason or cause. If he/she refuses to take the case, the court will penalize him/her for fine or in suspension from the practice.

During the Dergue regime also, there was similar way of providing counsel for the indigent accused through assigned counsel. In very rare cases they were compensated from the government but most of which were not compensated by any one.

When we come to the present case in Ethiopia –the practice in Addis Ababa shows that counsel for an indigent accused is provided from the office Defense counsel, which is under the Federal Supreme Court in which lawyers are regular employed and paid from the public treasury on salary bases. Thus the current practice shows that the public defenders system is the major system of providing counsel for an indigent accused. This is a recent development towards the right of accused person to counsel free of charge. The office of defense counsel is established in 1955 G.C and there are only twelve lawyers under such office. Once the defendant is charged and the case is brought before the court, the trial court decide that/if the criteria is fulfilled, /the accused should be assisted by a lawyer. Then the Supreme Court through the office of the Defense counsel represents counsel for the accused from members of the defense counsel. Then the accused will be represented by the defense counsel and the proceeding will continue through the assistance of such defense counsel.

But it is difficult to say that the accused is able to obtain effective assistance of the Defense counsel. Because there are a number of obstacles that hinder the effective assistance of counsel. For example salary and allowance of the defense counsel is less in amount and it discouraged the defense counsel from providing effective assistance to the accused.

Although there are a number of reasons that discourage the defense counsel from providing effective assistance to the accused, the accused is able to obtain assistance from such defense counsel somewhat.

3.1.4 Requirements for Obtaining Assistance from public Defense counsel

It is already discussed that an accused has a constitutionally guaranteed right to be represented by retained counsel and if the accused is unable to afford to retain an attorney by himself/herself the court appoints counsel to him/her. But the requirement for obtaining assistance from public defense counsel somewhat varies from country to country. For example in England requirements to obtain assistance from public defense counsel is based on the legal. Aid act, 1988, part V. According to such act the requirements to obtain assistance are interest of justice and the accused financial capacity. The two requirements are interdependent. In other words, a court cannot provide legal aid order even if it is in the interest of justice to do so; if the accuser's financial position is such that he is able to pay for representation out of his own resources.

In general the practice of most country shows that the requirements for obtaining assistance from public defense counsel are- indigence of the accused and the type of crime by which the defendant is charged with.

3.1.4.1 Indigence

Once the indigence of an accused is proved by the concerned authority the accused has the right to be represented by public defense counsel. But way of proving indigence of the accused varies from country to country to some extent. For example in France, The criterion to determine the indigence of an accused person for a fee legal assistance is provided under Art. 4 of the 1991 Legal Aid, Law. It provides that the beneficiary must justify monthly resources lower to a minimum wage.³³ to calculate the recourses all elements from any kind are taken in to consideration. I.e. direct and indirect resources; real estate, assets, the salary of the spouse. Moreover elements such as the apparent level of income are included. The eligibility of an accused defendant for right to free assistance is determined by the appropriate legal aid bord.³⁴ Such board is composed of civil servants and representatives of the judiciary and the legal professions. The board takes in to consideration all the information regarding the financial situation of the person concerned. The president of the board can reject demands that are obviously inadmissible or demands without legal ground or person with high financial resources. When the board has satisfied by the requirements as the law provides, and then it grants the assistance of advocate to the indigent accused person. Appeal lies against the decision of the board to the president of the relevant court.³⁵

As far as the practice of the United States is concerned, there is no uniform means to determine the eligibility of accused for free assistance of lawyer. In some districts courts an official conducts investigation of indigence. In several district, the indigence of defendant determines when the defendant files an affidavit of indigence under oath. Moreover there are guidelines used by the New York to determine indigence of the accused person. The guidelines shows a higher income limit for persons charged with more serious crimes and those charged with misdemeanors. Serious crimes are generally more to obtain adequate counsel. So persons charged with more serious crimes and have low income are provided with public defense counsel.³⁷

In the England legal system also indigence of the accused is one of the requirements to obtain assistance from public defense counsel. According to such legal system the indigence of the accused person should be determined by the appropriate court first, then the accused is entitled to a free legal assistance.³⁸

When we come to the practice of our country, particularly in Addis Ababa the accused is entitled to counsel at the expense of the government if he/she does not has sufficient means to have a retained counsel. As the practice shows, at the first hearing the court asks the accused his/her name, address and the means of income before the charge is read out to him. Moreover the court asks whether or not the accused wishes to defend himself/herself through counsel or in person. If the accused wishes to be represented by defense counsel, the court justifies the indigence of the accused through the prison administration office or by asking the accused to affirm his/her poverty by affidavit before the court.³⁹ After the accused poverty is justified through the prison administration office or through the court itself, then such indigent accused will be represented by public defense counsel.

In general the indigence of an accused is one of the requirements for an accused to be represented by or obtain assistance of public defense counsel.

3.1.4.2 Types of the Crime by which the Defendant is charged

It is constitutionally guaranteed that an accused person has a right to be represented by either retained or state appointed counsel. I.e. if the accused is able to afford the fee he/she can hire his/her own private lawyer. But if he/she is unable to hire a lawyer by his/her own means, the state will appoint a lawyer/defense counsel to him/her. The requirement for obtaining a free legal assistance is the indigence of the accused in almost all countries. But in some countries such as England there is additional requirement to obtain free assistance of counsel. Such requirement is the merit test/interest of justice. That is an accused has a right to be represented by public defense counsel if the interest of justice requires doing so.

When we come to our country, the criteria/requirement to appoint counsel for an indigent accused is provided under the FDRE constitution. Under sub-article 5 of Art.20 of the constitution, it is provided that a person is entitled to a counsel at the expense of the government only when two requirements are fulfilled. First, the accused is entitled to counsel at the expense of the state if he/she does not have sufficient means to have retained counsel. And second if the proceeding without counsel result in the miscarriage of justice. Of course what the miscarriage of justice mean depends up on the subjective evaluation of each and every judge before which the case is brought. However, the interpretation should not only be based on the serious of the crime by which an accused is charged but other circumstances such as the educational background of the accused, his health condition, his family status etc, should be considered, Even if the crime is not serious, due to the accused ignorance of law, miscarriage of justice would result specially when the accused fails to defend himself/herself properly.

The practice of the courts shows that in order to determine whether or not to appoint a defense counsel for the indigent accused the requirement is the seriousness of the crime with which the accused is charged. As indicated under the constitution, courts do not appoint the counsel in all criminal prosecution for indigent accused. So the assistance is limited only to grave offences which could result in gross injustice if the accused is tried without legal counsel assisting him/her. In other words the assistance is limited only to an accused that is charged with crime which is punishable with fifteen years and above imprisonment, e.g. first degree homicide.

Therefore, the practice of courts in relation to this right is narrower and restrictive than what the constitution endowed to the accused person.

Generally the second requirement for obtaining assistance of public defense counsel is type of the crime by which the defendant is charged. That is an indigent accused has a right to be represented by a public defense counsel only if he/she is charged with an offense punishable with fifteen years or above imprisonment

3.2 Stages of the Criminal Proceedings on which the Right to Defense counsel is available

The main purpose of the criminal administration of justice is to ensure a fair and adequate criminal proceeding. Under these proceedings the accused person has different rights which are recognized and guaranteed by different laws of different countries. One of these rights is the right of accused person to be represented by either retained or government appointed counsel. Since most accused persons are a layman who usually knows nothing about the law and are not familiar with the rules of criminal process they are unable to defend themselves properly. Therefore, an accused should have the right to be represented by defense counsel in all stages of the criminal proceedings.

3.2.1 At Pre-trial stage

Countries provide the right represented by defense counsel at different stages of the criminal proceedings and it extends to the pre-trial process. However it differs from country to country. For instance in the United States a right to be represented by defense counsel is exercised from the time he/she is arrested.⁴⁰ That is to say, an individual who is taken to custody must be informed that he has the right to consult with a lawyer and to have a lawyer with him during interrogation. Throughout the interrogation the accused must be given the opportunity to exercise these rights. The arrestee must also be told that if he/she is an indigent a lawyer will be appointed to represent him/her.⁴¹

In England also a person who is arrested is entitled to counsel whenever he/she is interrogated by the police. He/she is advised not to say anything before provided with counsel.⁴² Admissibility of confessions given by the accused in police station without being informed his/her right to counsel may be rejected by the trial judge.⁴³ This helps the arrestee not only in getting advice of the counsel but also to avoid the improper method used by the police during investigation. Counsel must also be furnished to prevent coercion and to afford the accused sufficient advice to enable him/her to make an informed choice in answering the questions of the police.

The curial time for the assistance of counsel is at the very beginning of the case. The main aim of extending the right to defense counsel to the pre-trial proceeding/during arrest is to prevent improper police practices that could result in involuntary confessions⁴⁴. In fact FDRE constitution do not indicate from where the right to defense counsel starts but the Ethiopian criminal procedure code provides that any person detained or arrested or remanded shall be permitted forthwith to call and interview his/her advocate. Under its article 61, it says 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.”

This article infers that an accused is entitled to have the assistance of counsel from the time of his/her arrest onwards. It is convincing that the accused whose fate has been put in the hand of the police must have assistance of defense counsel. So an accused person has the right to defense counsel at any stage of the criminal proceedings.

As far as the practice in Addis Ababa is concerned, the right to counsel begins during the trial stage of the proceeding. The accused is not provided with counsel at the police station. That is the right to defense counsel has no application during police investigation. As an interview, which we have conducted with one member of the police officer there is no such practice in police stations regarding the right to counsel. As an interview, there is no arrestee who is conscious to request to have assistance of counsel during police investigation. However there are few persons who are aware of their rights and raise a question to have a lawyer during interrogation but such question is not acceptable. The reason is that there is no a trend of accepting the question of such right at police station.

In our opinion, the right to defense counsel should not be separated from other constitutional rights which protect the accused and it must be started as soon as the accused is arrested. Besides the presence of this right during police investigation helps the accused to remain silent and avoids physical abuse. Therefore it should be noted that, it is illegal to refuse the demand of an accused to have assistance of counsel during police investigation.

In general, without considering the financial and manpower problems of the country assistance of defense counsel should be given at all stages of the criminal proceeding which helps to ensure justice.

3.2.2 during Trial Stage of the Proceeding

The trial stage in criminal proceeding is the time when parties to a suit exert all the necessary efforts to win the dispute. It is one of the critical stages in the criminal proceedings process in which examination in chief, cross examination, re-examination and providing the necessary evidence is required by the court, it is already mentioned that an accused who is ignorant of law meet with difficult to operate or follow the whole proceedings properly. Because he/she lacks both skill and knowledge of law and the procedure. So as to enable the accused person have/obtain fair trial, the FDRE constitution and the criminal procedure code of Ethiopian provides the right of person have/obtain fair trial. The FDRE constitution and the criminal procedure code of Ethiopia provide the right of accused person to be represented by defense counsel. For example the criminal procedure code of Ethiopia. Under its Article 127 provides that, the accused shall be appeared with his advocate to be informed of the charge and to defend him self⁴⁶. This shows that the accused person can be assisted by a lawyer at the trial stage of the proceeding to defend himself /he self.

As far the practice in Addis Ababa is concerned. The implementation of the right to be assisted by an assigned counsel is limited only to certain cases even if the trial process is critical one and needs the assistance of counsel. An assigned counsel to an indigent accused is provided only when the accused is charged with offences which carry a penalty for fifteen and above years of imprisonment ⁴⁷. Exceptionally young offenders have a right to be represented by assigned counsel, whatever the offence with which they are charged be.

However an accused that has financial capacity to hire a lawyer with his /her expense has a right to be represented by retained counsel regardless of the type of offences which the accused is charged with.

In general the FEDE constitution and the criminal procedure code of Ethiopia guarantee the right of an accused person to be represented by a retained counsel if /he/she has financial capacity to do so/, or to be represented by government appointed counsel/ if he/she is unable to retain private advocate, regardless of the type of the offence which the accused is charge with. In practice only an accused with certain type of offences have a right to be by represented public defense counsel. But there is no limitation as far as the right to be represented by retained counsel is concerned.

Finally, in order to have a fair trial the of an accused person to be represented by either retained or government appointed counsel should be respected practically regardless of the type of the offence with which the accused is charged.

3.2.3. On an appeal (application) stage of the proceeding (event)

It is known that an accused that is unhappy with the decision given by lower court is able to provide an appeal to higher court. An appeal involves an examination of the; trial court record by an appellate court in an effort ascertain whether the relevant substantive and procedural law was properly applied by the lower court⁴⁸. Such an appeal can be provided either by the accused himself/herself or by him/her lawyer or legal counsel.

The Criminal procedure code of Ethiopia provides that notice of an appeal against a judgment shall be given by the appellate or his advocate. This shows that an accused has a right to be represented by a retained counsel on an appeal stage of the criminal proceeding. But there is no clear provision that states whether or not the accused has right to be represented by public defense counsel during an appeal stage of the proceeding. The FDRE constitution also provide the right of an accused person to be represented by either retained counsel or public defense counsel based on his/her financial capacity, at all stages of criminal proceeding

When we come to the practice in Addis Ababa, the accused is able to be represented by retained counsel at an appeal stage of the proceeding regardless of the type of offence with which the accuse is changed. As far as the right to public defense counsel is concerned an indigent (poor) accused is able to represent by public defense counsel only when he/she is charge with offences which carries a penalty for fifteen and above years of imprisonment. (Protection)

Although the accused is an indigent one and the offence with which the accused is charge carries a penalty for fifteen and above years of imprisonment, the accused may not be represented by public defense counsel sometimes . The reason is that when an accused is convicted guilty by the Higher Court the defense counsel who is representative of such accused may not provide an appeal to the Supreme Court thinking that the case has no legal ground for an appeal. But the accused himself/herself provides an appeal to the Supreme Court and if the court accepts the appeal, the public defense who was representative of the accused will defend /assist the accused.

It is obvious that the accused needs the assistance of counsel in order to make meaningful appeal or to know whether or not the case contains ground for appeal. We can say that refusal to appointed counsel

for an indigent defendant at this critical stage would create a big difference between have and have not regarding their liberties which can be found at risk. That means an accused that is financially capable to retain a lawyer have the opportunity to be represented by a lawyer and can be defended properly through such lawyer. But an indigent accused who is unable to retain a lawyer himself/herself lacks the opportunity to be assisted by a lawyer, and due to his/her ignorance of law and procedure he/she may not provide his/her appeal on the appropriate time. Also even if he/she provides his/her appeal on the appropriate time, he/she may not provide the necessary evidence that ascertains his/her innocence. So due to lack of counsel he/she may be convicted guilty even if he/she is innocent.

Therefore, the right of an indigent accused to be represented by defense counsel should be respected regardless of the type of offence by which the accused is charged and the stage of the criminal proceedings.

3.3 Duty of the defense counsel

3.3.1 from the view of the accused person

An accused person is a layman who usually lacks both the skill and knowledge of law. Such person, therefore, if he/she is tried without the aid of counsel, he/she may be tried without proper charge filed against him/her: he/she may be unable to produce evidence and witness in his/her favor and there by convicted while he/she is innocent and he/she may be convicted upon incompetent evidence which may be irrelevant to the issue or inadmissible. Considering such facts the FDRE constitution and the criminal procedure code of Ethiopia guarantee the right of an accused person to be represented by or assisted with an advocate or public defense counsel based on the financial capacity of the accused person. Therefore the advocate or the public defense counsel who is representative of the accused has a duty of providing an effective assistance to the accused that is in need of such assistance.

It is practically shown that some attorneys who are representative of an accused are not exercising their duty effectively. the reason is that since they have a lot of clients, they are unable to provide effective assistance to each of their clients as effectively as it needs. Most of the time, such advocates are absent before the court during an appointment date; they have no enough time to search the necessary evidences that show the accused innocence etc, There is also the same happening as far as public defense counsel is concerned due to number reasons.

The accused who is not in position of identifying irrelevant evidences from relevant once; have no skill how to examine witnesses; cannot present their defense properly needs the assistance of counsel of

counsel. So an advocate or public defense counsel has responsibility to provide effective assistances for whom he/she is represented: - he/she should present during an appointment date, he/she should provide the available evidences to the court that ensures the accused innocence, he/she should communicate with the accused as appropriately as possible, he/she should respect his/her profession he/she should not use the profession as a source of income but as a profession.

In general the advocate or the defense counsel has a duty of providing effective assistance to the accused.

3.3.2. From the view of justice system

It is the general feeling that most criminal cases find the interest of the state and the accused mismatched with the state having for the better of its prestige and resources.⁵³ That means in any criminal trial in order for the trial to be meaningful or helpful in getting the truth, the parties must be somehow equal; there is government who have an access for evidences and talented and experienced prosecutors on one hand and an individual, accused of crime, who is ignorant of law on the other hand. In such a situation there could not be justice and fairness. Therefore a lawyer who is representative of such accused has responsibility to provide an adequate legal assistance. On the other hand an accused is a layman who has no knowledge of law and experience of law when compared to the well trained prosecutor. So in order to adjust the claim of individual with the claim of government or in order to protect justice, an accused should be provided with an assistance of the defense counsel.

Therefore lawyers, be it private or public advocate or public defense counsel has a professional and ethical obligation to serve justice and aid the administration of justice in the society by providing effective and adequate assistance to the accused for which he/she is represented.

3.4 Problems in implementing the right to be represented by defense counsel

3.4.1 As far as the procedural aspect is concerned

The constitution and the criminal procedure code of Ethiopia guaranteed that an accused person has the right to be represented by either retained or state appointed counsel, if he/she fulfills the requirements that are provide in the said laws. The right to counsel is one of the most essential rights of accused persons, since even an intelligent and educated layman has small and sometimes no knowledge of law, if

charged with crime, he/she is incapable to defend himself/herself. Therefore right to be represented by defense counsel should be implemented defectively and adequately.

However, there are several factors that may encounter the proper implementation of such rights. As far as the procedural aspects are concerned, the main problems in implementing such rights are:-

- ❖ There is no controlling mechanism where or not such private and public defense counsels are providing effective assistance to the accused. In other words, there is no law or rules of procedure that control the activities of such private advocate and public defense counsel.
- ❖ Inability of the existing laws of the country to fully go through the constitution. I.e. there are no laws which provide ways of implementing the constitutional right to be represented by defense counsel.
- ❖ There is no rule of procedures that states by states by who and how the accuser's indigence (if the accused in an indigent one and in need of free assistance of counsel,) is justified. So the proper implementation of the right of an indigent to fair legal assistance is unanswered question under such situation.
- ❖ There is no rule of procedures that provides remedy for the accused if the constitutional right of the accused is violated or not respected.
- ❖ Where the accused doesn't know that he has the right to counsel, who can inform him that has the said right, is the question that is not addressed by our legal system. For example, as far as the American law is concerned, where the accused is under police investigation, the police should inform him that he has the right to be represented by defense counsel. Confession given by the accused without being informed about such right is invalid.

Generally, the above mentioned are some of the problems for the problems for the proper implementation of the right to be represented by defense counsel as far as the procedural aspect is concerned.

3.4.2 As far as the enforcement aspect concerned

As part of human right, the right of accused person to be represented by defense counsel is not a recent phenomenon. Such right is recognized under international and regional human right instruments. This right is also adopted in almost all country's constitution. Although the right to defense counsel is recognized, it can't be implemented as much as it is provided under the law.

As far as the enforcement aspects are concerned, some of the reasons that contribute to the improper implementation of the right to be represented by defense counsel are:-

- Lack of skilled man power in that field i.e. there is shortage of trained professional who can implement the right to be represented by defense counsel.
 - Defense counsels are not well professional and lack sufficient knowledge to serve the people as expected by the law. For example, from about 20 (twenty) of the public defense counsel in Addis Ababa, about seven of them have degree in law, some are diploma holders in law and most of them are exercising their activity only through experience.
 - Some accused persons are ignorant about their rights. So such right is not able to implement properly.
 - Financial problem of the country to provide way of implementing such right properly and effectively.
- There is no sufficient facilities for the public defense counsel which in courage him/her to render the assistance adequately. According to Ato Abate Degeniy the federal supreme court of public defense counsel chief office, defense counsels are few in number but the demand of their service is very high. So it is difficult to satisfy the demands of such indigent defendants. More over salary and transport allowance of the defense counsel is minimum, there is nobody who is willing to listen problems of the institution (Office of defense counsel) has no existence. Some of the problems which hinder the proper implementation of the right to defense counsel are mentioned above. So government has a duty of providing menses by which the right be represented by defense counsel is respected. Ato Abate Degeniy says to satisfy the demands of such indigent defendants the federal supreme court of public defense counsel in the budget year 2006 E.C the number of defendants up from 20 to 40'

CHAPTER FOUR

4. Conclusion and Recommendation

4.1 Conclusion

The right to be represented by defense counsel is constitution right and it is part and parcel of human right. It is in the sense that it is originally guaranteed under different international and regional human right instruments. So the violation of this right amount to the violation of human right. The FDRE constitution and the criminal procedure code of Ethiopia also provide the right of an accused person to be represented by defense counsel among other rights.

As we have mentioned in the previous chapter of we paper the right to be represented by defense counsel is an essential and fundamental right of an accused person. Because, most accused persons usually have difficulty in the criminal proceeding. That means that, they are unable to defend themselves properly for the charge against them due to their ignorance of law and the procedure. Their poverty also prevents them to their private lawyer. As a result of the failure to have defense counsel the accused may be charged with UN proper or illegal may and convicted guilty even if he/she is innocent. So the right to be represented by defense counsel help to establish the truth and show the accuser's innocence.

To protect those who do not have knowledge of law and procedure different countries in their constitution have provision which guarantee free legal assistances by the government for those criminal defendants who can't hire lawyer by their own resources although the practice differs from country to country. As we have discussed already ,the FDRE Constitution guarantee the right of an accused person to retained counsel including the right to court appointed counsel that means the accused will be provided with a retained counsel if he /she financial capacity to do so. Or he/she will be provided with a legal representative at state expense if and only if.

- He/she is an indigent ,and
- Miscarriage of Justice would result

So the state has a duty to finish free legal assistance for those persons who quality for such legal assistance by the state.

Thus defense lawyer assist the accused in the discovery of the truth. So that the accused person would not be convicted wrongly. However, then practical application of such right is questionable because of

the defect of the law itself and relation to the improper application of the existing rules. That means, as we have discussed in the previous chapter of our paper, the law itself have gaps that may hinder the proper implementation of the right given. For example there is no law that control the activities of both the retained and state appointed counsel , there is also no rules of procedures that provide remedy for an accused whose right to defense counsel is violated there is also no laws which provide ways of implementing the right to defense counsel etc. More over some untrained persons are assigned or employed to investigate crime or administer judicial proceedings. Those persons exercise their power contrary to the constitution and other laws. For example as Rekeb Messele stated under his material “Enforcement of human Rights in Ethiopia, 31 August 2002. “In the case of state Vs one person and other, the accused was charged under Article 255 of the penal code. Facing difficulty to consult with his defense counsel, the accused complained that he was denied the opportunity to communicate with his counsel. The court noticed that any detained person has the right to freely communicate with his counsel. Also such court ordered the prison administration to revert for this kind of practice. However the accused person was not permitted to confer with his attorney. This shows that authorities, assigned to investigate crime, exercise their power contrary to the constitution and it leads to the improper implementation of the right given by the constitution. Some accused persons are also ignorant about their rights – so such right is not able to implement properly. In addition financial problem of the country hinder the proper implementation of the right to be represented by defense counsel. Also lack of sufficient facilities to the public defense counsel is another obstacle for the proper implementation of the right to counsel.

Therefore, it is under obligation to work forward finding possible solutions for the problems which hinder the effective implementation of such right. Therefore the writer of this paper recommends the following as possible solution to the problems found out as the result of this thesis.

4.2. Recommendation

- ❖ Since the right to be represented by defense counsel safeguard to an accused, it should be respected by everybody. So the activities and manner of police officers and defense counsel must be evaluated. Besides it is better to establish by the law. Institutional control against the adverse practice of such police officers and defense counsels. All the concerned authorities should control the application of constitutional provision and take administrative measures against those who violates the right given.
- ❖ There is no special legislation concerning rights of accused. The constitution and the criminal procedure code of Ethiopia provide the right of accused person in general. It needs special legislation /subsidiary law/ in relation to constitution guarantees to protect and implement an accused person's right.
- ❖ The right to have counsel is extended to pre-trial stage of the criminal proceeding including proceeding at police station. The non-existence of right to have counsel during investigation leads the accused or arrested person to involuntary confession. But there is no right to counsel at police station practically. So there should have legal counsel in police station during investigation period.
- ❖ Counsels, judges and police officers must be professional to fit to the position. For those who have less education or experience, some courses or workshop type of seminar should be given just to enlighten their mind and help them get some wise techniques to solve some common problem and respect the right of accused given by the constitution. If the assigned persons are found totally weak to fit to the responsibility given, then they must be replaced by others.
- ❖ There is problem of awareness of the society at large on the existence of the right to counsel which is guaranteed by the constitution. Because of this many accused do not raise the question of assistance of lawyer or do not oppose when their right is violated. So member of public must be educated of their right proper means such as mass media. Mass media must be put to for the purpose of the creation of awareness of citizens right in various forms for example, in the form of the drama and others forms. Moreover ,traditional and community based institutions like idirs, iqubs and mahibers be involved in advocacy works with a view of promoting and protecting such right and giving awareness about such right.
- ❖ To ensure the constitutionally guaranteed right to defense counsel, public defense counsel offices must be given the necessary attention they deserve and be organized in such a way that they are able to discharge their responsibilities. Also the institution, (office of the defense counsel should have rules of procedures and codes of conducts. Such rules of procedures and codes of conducts) should be formulated bearing in mind the objectives of concerned

institution. The existence of rules of procedure and codes of conduct would ensure accountability. Moreover sufficient facilities shall be provided for members of the public defense counsel as it is possible to encourage them to render the assistance adequately.

- ❖ However the current economic situation of the country may not allow the government to assist every accused in every stage by assigned counsel, there should be a focus on the duty of investigating police officers and judges to notify this right to the accused because this helps the accused at least to have his own retained counsel.
- ❖ In addition to those recommendation provided, if evidence is obtained without assistance of defense counsel or without notification of constitutional and procedural rights, the writer of this paper i suggests that the evidence obtained must be rejected.

Finally, the strengthening of Ethiopian Bar Association (EBA) would have contributions towards the betterment of the justice system and a means of making its members accountable. Also, the fact that civic associations that are engaged in advocacy activities are not many, however though that is engaged in advocacy works are given special attention and assistance is given by the government.

REFERENCES

1. CONSTITUTION OF THE Federal Democratic Republic of Ethiopia Neg. Gaz. 1st year No.1 proc.No.1 of 1955, Art. 20(5)
2. Charles H. white Bread, and Christopher Slobogin, Criminal Procedure an Analysis of cases and concepts (3rd, 1993), p. 838
3. Criminal Procedure code of Ethiopia (1961) proc. No 185 Negarit Gazeta Year 21. (Extra ordinary Issue No. 7 Art.61
4. Constitution of the people Democratic Republic of Ethiopia Neg. Gaz. 47th year no. 1 proc. No. 1 1987 Art 45(3)
5. The Establishment of the Public Defense Office have written statement Date 20/2/2005
6. Stanly z. Fisher, Ethiopian Criminal Procedure Source Book (1961), p. 254
7. Providing Counsel for the indigent accused, American Criminal Law Review (1975), vol. 12, p. 795
8. The Universal Declaration of Human Rights Art. 7
9. African charter on Human and People right Art. 3
10. The constitution of the Federal Democratic republic of Ethiopia Art. 25
11. Paul and claphun, Ethiopian constitutional Development. The faculty of law Hile Selasse I University (1967) vol. 1. P. 86
12. Federal court Advocates Code of conduct Regulation no. 57/1999

- 13 .The Universal Declaration of Human rights. Art. 1
- 14 The international covenant on civil and political rights. Art. 14(3)d
- 15 The 1955 revised constitution of Ethiopia. Art. 52
- 16..An interview conducted with a private advocate Ato Hileselasse G/medhene March . 19,2013
- 17 The FDRE constitution
- 18.The establishment of Federal courts proclamation no. 25/1996
- 19.The criminal procedure code of Ethiopia. Art. 127(2)
- 20.Interview with Ato Haylay W/senbet private advocate March . 14,2013
21. Interview conducted with Ato Abate Degeniy,Head of Defense counsel's chief offices of the federal Supreme Court. MAY.10, 2013
- 23 Interview conducted with Ato Bahaylu Endale and Ato Gezahge—member of Defense counsel's office of the federal supreme court. MAY.10, 2013
- 24.Robin C.white the Administration of Justice (2nd ed . 1994), P.75
- 25 .Interview with Ato Addis Haile private advocate April 5,2013
- 26 Interview with Ato Kahesay Zebraeruk Addis Ababa city Administration Vice president of Appel Court.
- 27 Interview with Ato Tsegay G/eyosuse Ministry of justice Head of Ledata Branch April 5,2013
- 28 .public defender from wikipedie,the free encyclopedia
- 29 Field Report war crimes trials and the establishment of public defender's office in Ethiopia by Peter Bach.
- 30 The international bank for reconstruction and development /the world bank Ethiopia Legal and judicial sector assessment 2004
- 31 Human rights watch /Africa 4 November 1994 Vo.16,No 11
- 32 United states institute of peace
- 33 Research sub contracted by APAP (Action professiOnals Association for the people)
By Rekeb Messele (Human Right and gender consultant 31 August 2002
- 34 Right to counsel /Encyclopedia of every day law

DECLARATION

I, The undersigned ,declare that this senior essay /project is my original work, prepared under the guidance of wr/t Tenadam Kaleab and Ato Elyab Tilahun .All sources of materials used for the manuscript have been duly acknowledged.

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