

The rights to legal counsel in Ethiopia: Evidence obtained in absence of legal counsel

Lamessa Gudeta Guder¹

Abstract

The Right to legal Counsel is a basic right of human rights as provided under different international, regional and National instruments as crucial elements of rights to fair trial. The presence of counsel serves multiple purposes, including the Redress of the power imbalance between the authorities and the detained (particularly in terms of knowledge of the law), deterrence of torture and other ill-treatment capacity to address arbitrary or improperly justified detention, and ability to provide an alternative record of interviews to ensure the integrity of any evidence gathered. In many Jurisdictions the confession obtained in absence of lawyers are inadmissible as criminal evidences. In Ethiopia, the Defendant/accused person to assist by legal counsel is a constitutional rights given by our laws at National level and at different Regional state level. However practically what we have seen in area of our courts, police custody, prison the place where this right has been implemented is allegedly different from what is said by law. In some circumstance, even the law by itself seems to be incompatible with practical application of this right. Such disparity and gap of the law and the practice regarding this defendant right has great impact on the fair trial. The inadmissibility of evidence obtained in absence of legal counsel did not provided by Ethiopian laws. Even when the detained/arrested/ person can get the legal counsel (at what time?) by itself is not clear. This in turn begs different question among legal professionals regarding the admissibility or inadmissibility of evidence obtained in absence of legal counsel. This article try to identify the position of our laws, consult different jurisprudences of the other model country and gives clue for the criminal lawyers and legal professionals as to the respectation of the rights to legal counsel as basic fair trial. And inadmissibility of any evidence obtained in absence of legal counsel since it has irretrievable effects on the defense rights.

Keywords: Legal counsel, fair trial, inadmissibility of evidences, defendant right, Ethiopia, legal professionals.

Author Affiliation: ¹Department of Legal, Bahirdar University, Ethiopia.

Corresponding Author: Lamessa Gudeta Guder. Department of Legal, Bahirdar University, Ethiopia

Email: lamgudee@gmail.com

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1. Introduction

The Right to legal Counsel is a basic right of human rights as provided under different international, regional and National instruments as crucial elements of rights to fair trial, especially in criminal matter. Because, access to a lawyer is an important safeguard against ill-treatment which is a broader concept than providing legal assistance solely for conducting one's defense. The presence of a lawyer during police questioning may not only deter the police from resorting to ill-treatment or other abuses, but may also work as a protection for police officers in case they face unfounded allegations of ill-treatment. In addition, the lawyer is the key person in assisting the person deprived of liberty in exercising his or her rights, including access to complaints mechanisms. The presence of counsel serves multiple purposes, including the Redress of the power imbalance between

the authorities and the detained (particularly in terms of knowledge of the law), deterrence of torture and other ill-treatment capacity to address arbitrary or improperly justified detention, and ability to provide an alternative record of interviews to ensure the integrity of any evidence gathered. In many Jurisdictions the confession obtained in absence of lawyers are inadmissible as criminal evidences.^[1]

In this Article, I try to assess whether the rights to legal counsel has practically seen and serving the deprived one as provided in different laws or shows disparity and impracticability of this rights. And also try to analyze the position of our laws and practice whether the confession obtained in absence of legal representatives are admissible or inadmissible. In doing so, I try to discuss the rights to legal counsel in international law, the experiences of some common

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and civil law jurisdiction, the Ethiopian legal frameworks and the practice in Ethiopia. [2]

1.1 What is Legal counsel?

The phrase Legal counsel has no single definition; in some places, it known as defense lawyer or defensive attorney. But Webster dictionary define as a lawyer who represents a person or group in a court of law, a lawyer appointed to advise and represent in legal matters an individual client or a corporate and especially a public body. So the Right to counsel means a rights of defendant/accused to have the assistance of counsel (lawyer) of his/her choice or and if the defendant cannot afford a lawyer, requires that the government appoint one or pay the defendant's legal expenses. The right to counsel is generally regarded as a constituent of the right to a fair trial. Historically, however, not all countries have always recognized the right to counsel. The right is often included in national constitutions. 153 of the 194 constitutions currently in force have language to this effect. [3]

2. The Rights to Legal counsel under international Laws

Different international and Regional instruments obliged states since one of the pillars of a fair trial in the criminal justice system is the right to legal representation. United Nations International Covenant on Civil and Political Rights (ICCPR) set out specific obligations of states to provide state-funded counsel for indigent persons. Article 14(3)(d) of the ICCPR requires that an accused offender is entitled to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it. The Committee, under the Optional Protocol to the ICCPR, has also found that accused persons might have a right to legal advice prior to trial requiring the state to appoint legal counsel during the pre-trial contact with the criminal justice system. [4]

In addition, the United Nations Principles for the Protection of Detention or Imprisonment provides that a detained person shall be entitled to have legal counsel assigned to him or her by a judicial or other authority in all cases where the interests of justice so require and without payment by him or her if he/she does not have sufficient funds to pay. The United Nations Standard Minimum Rules for the Treatment of Prisoners also provide for untried prisoners to be allowed to apply for legal aid. The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty provide that where juveniles are detained under arrest or awaiting trial, they have a right to legal counsel and are to be able to apply for free legal aid where such aid . [5]

The European Convention on Human Rights and

African Humans and people rights convention adopts an identical wording to the International Covenant on Civil and Political Rights. And, as a result, The European Court of Human Rights has ruled that, where deprivation of liberty is at stake, the interests of justice mandate legal representation. The spirits of these conventions manifests that, the rights to legal counsel is a basic rights of fair trial and any evidences obtained in absence of legal representations are excluded as inadmissible evidences at the court of law. [6]

2.1. Experiences of some common law and civil law criminal jurisdictions

When we see laws and practice of different common law and civil law countries, they considered that, defendant/accused representation by legal counsel is as compulsory and mandatory obligation. In France, The Napoleonic Code of Criminal Instruction, adopted in 1808 and inspiring many similar codes in civil law countries, made it compulsory that the defendant should have a lawyer when tried in the assize courts (which judged severe crimes). [7]

In Canada, the right to counsel is guaranteed under Section Ten of the Canadian Charter of Rights and Freedoms upon arrest and detention, as well as the right to habeas corpus. In America, The Sixth Amendment to the United States Constitution provides that, In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense. Subject to considerations such as conflicts of interest, scheduling, counsel's authorization to practice law in the jurisdiction, and counsel's willingness to represent the defendant (whether pro bono or for a fee), criminal defendants have a right to be represented by counsel of their choice. The remedy for erroneous deprivation of first choice counsel is automatic reversal . [8,9,10,11,12,13]

A criminal defendant unable to retain counsel has the right to appointed counsel at the government's expense. While the Supreme Court recognized this right gradually, it currently applies in all federal and state criminal proceedings where the defendant faces authorized imprisonment greater than one year (a felony) or where the defendant is actually imprisoned . This clearly manifests that, many countries give due attention for the rights of legal counsel as it is elements of fair trial by excluding confession obtained in absence of legal counsel. [14,15,16,17]

2.2. The right to legal assistance in criminal proceedings as a fundamental right

The right to counsel is generally regarded as a constituent of the right to a fair trial. If the defendant cannot afford a lawyer, requires that the government appoint one or pay the defendant's legal expenses. The right is often included in national constitutions and International Instruments. Historically, in the worlds,

many countries have always recognizes the right to counsel. As I have try to discuss so far, the rights to assisting by legal counsel is not simple rights, it is human rights of defendant/accused person. It is enshrined and recognized in different International Bills of rights in which Ethiopia is a party by ratifications.

Article 14(3)/d of International covenant on civil and political rights (ICCPR) puts it as fundamental rights of defendant's human rights. It stipulates that, the defendant/accused has a rights to defend himself in person or through legal assistance of his own choosing to be informed, if he does not have legal assistance, of this right and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;. The Universal Declaration of Human Rights (UDHR) also indicates as it is basic rights under article 11. This expressly shows that A legal counsel programme should include legal assistance at all stages of the criminal process, including investigation, arrest, pre-trial detention, bail hearings, trials, appeals and other proceedings brought to ensure that human rights are protected. Suspects, accused persons and detainees should have access to legal assistance immediately upon arrest and/or detention wherever such arrest and/ or detention occurs. A person subject to criminal proceedings should never be prevented from securing legal aid and should always be granted the right to see and consult with a lawyer, accredited paralegal, or legal assistant.

However, When we see the Ethiopian constitution, though it is paper value, conceptually it is strongly recognize defendant/accused rights to assist by defense/ legal counsel of their own choice and if they could not afford by themselves by government expenses. In the following sub-topics, I will try to discuss, the Ethiopian legal frame works, especially, International instruments ratified by Ethiopia, the FDRE constitution, Criminal justice policy and other laws regarding the rights to represent by legal counsel.

3. Ethiopian Legal frame work on the rights to legal counsel

The right to counsel up on arrest/detain/when charged with a criminal offence is integral to the right to a fair trial, which is a fundamental right recognized by the Universal Declaration of Human Rights (arts. 10 and 11), the International Covenant on Civil and Political Rights (art.14), the Convention on the Rights of the Child (art. 37(d)) and the African Charter on Human and Peoples' Rights (art 7). In the African Commission on Human and Peoples' Rights Principles and Guidelines on the Right to a Fair Trial and Access to Justice in Africa 2001, clause M.2.f also states that any person arrested or detained shall have prompt access to a lawyer and, unless the person has waived this right in writing, shall not be obliged to answer any questions or participate

in any interrogation without his or her lawyer being present .

Ethiopia is one of the signatory of these instruments in which she is party to. As a result, it is integral part and parcel of Ethiopian law according to article 9(4) of FDRE constitution. In other hand different Ethiopian laws also recognize the rights to legal counsel and I will discuss them in the subsequent sub-topics.

3.1. Ethiopian constitution (FDRE constitution)

The right to legal counsel is clearly provided under our constitution as it is fundamental rights of accused person. When we see Article 20 (5) of FDRE Constitution , it apparently says that, Accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expenses.

This indicates that the right to legal counsel is a constitutional right of defendant/accused person. If the two criteria are fulfilled the accused person can get free by state expenses. These are not having sufficient means to pay for (unable to afford themselves) and miscarriage of justice would arise and or he/she can appoint her/his choice of private legal counsel. As we have seen thoroughly, the spirit of our constitutions reveals that, the legal representation is only at the trial stages before court of law and it did not indicate about pre-trial representation especially during investigation. The constitution is also silence about the admissibility/ inadmissibility of confession obtained in absence of legal representation.

3.2. Ethiopian Criminal justice policy

When we see, the Ethiopian criminal justice policy , under section 4.7.1 it is clearly stipulates the notions of legal counsel as a right to accused and the conditions of its application at different level starting from the 1st days of arrest. Under the sub-section of (a-d) , it clearly stipulates that, whoever arrested or detained by suspicious of the committed crime has the rights to represent by the legal counsel of his/her choice from the time of arrest up to the all level of decisions. And also indicates that, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expenses.

It strongly obliged the police officer and other legal professionals to make inform them these rights promptly in a language they understand, up on their arrest or detentions and of any charge against them. This clearly manifests that, the policy strongly relies on the respectation of the rights to legal representative as fundamental rights of fair trial. But the problem is that, this is the policy, not law and this idea did not backed strongly by the laws. Thus why the investigators and legal professional divert from observances of these ideas incorporated in policy and routinely these rights

were violated from time to time.

On other hand, All states and Federal Laws consider the representation by legal counsel as a rights of accused person either private or government appointee. The Draft criminal procedure code also emphasis as the legal representation is a basic right. Even in cases of plea bargaining , it strongly prohibits any plea bargaining in absence of legal representatives. All laws acknowledge the legal counsel appointed by government/ Public defender. The Public Defender's Office provided legal counsel to indigent defendants, although its scope and quality of service remained limited due to the shortage of attorneys.

However, the problem is that, Defensive counsels are founds and assigned only in the High court's level and there is no defensive counsel at 1st instances level. They also allowed to represents only certain grave offences both at Federal and states level. For instance, In Oromia the defendant/accused person to assist by defense counsel is enshrined in the proclamation of Oromia Regional National state court Re-establishment proclamation No.141/2008. When we see Article 17(1, 2) it reads as; ... has the rights to legal counsel, the court shall assign a defense counsel to an individual who is accused of crime punishable with rigorous imprisonment not less than five years. This clearly shows that representation is allowed only for selective crimes which apparently violate the rights to legal counsel.

4. The practice of the rights to legal counsel In Ethiopia

Though, in different legislation, access to legal counsel is basic rights of fair trial as a right to defendant, Ethiopian law does not have specific, detailed provisions regulating the admissibility and exclusion of evidence obtains in absence of lawyers, including the standards that such evidence needs to meet before being admissible in a criminal case. The court exercised wide discretion on this subject. A huge amount of documentary and other evidence was ruled admissible which did not seem to be relevant in proving the relevant criminal offences including the confession obtained in absence of lawyers. The Court failed to systematically review the evidence presented by the prosecutor, partly through lack of the necessary framework determining admissibility of evidence, which is a vital part of fair trial. Instead, it accepted and based its verdict on evidence that was allegedly obtained illegally, or was of dubious veracity or even was not pertinent to the case. No attempt was made by the court to call on each defendant and/or their legal counsels to declare whether or not they would present a defense.

However, in principle, everyone charged with a criminal offence has the right to defend themselves, in person or through a lawyer. The right to defend oneself is

inherent in the principle of equality of arms and, in order to be fully enjoyed, it requires the right to have adequate time and facilities to prepare the defense. The right to defend oneself in person or through legal counsel must apply to all stages of the criminal proceedings. It has been widely recognized that prompt and regular access to a lawyer for a detainee is an important safeguard against torture, other ill-treatment, coerced confessions and other abuses . Though has implementation problem, the law permits prisoners to have visitors, but in many cases police did not allow pretrial detainees to access a visitors including legal counsel practically. And also the evidence obtained in absence of legal counsel is admissible which in turn has great impact on the right to fair trial of the defendant.

In this subsequent sub-topics I will try to discuss briefly at the conditions were the rights to legal representation are violated in our country.

4.1. Time and scope of the right to access a lawyer in Ethiopia

Undeniably, the earliest possible access to a lawyer is of paramount importance to guarantee that, the defense rights will be practical and effective than theoretical and illusory. Lawyers are not an impediment to the smooth and efficient operation of criminal investigations. An active defense lawyer not only protects the suspect from coercion and other abusive practices but contributes his part to getting the truth on the table in accordance with the law.

In many jurisdiction practices and laws reveals that, the evidence produced during police investigations in absence of participation of lawyers are ruled inadmissible and unreliable evidences. Article 6 ECHR will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stage of police interrogation. The ECtHR also supports this position by its ruling in Sainduz v. Turkey (2008) . In this case the applicant, made a statement while in police custody admitting his guilt in the absence of lawyer. But, the European Court of Human Rights held that there had been a violation of Article 6 § 3 (c) (right to legal assistance) taken together with Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights. It found that even though the applicant had been able to contest the charges at his trial, the fact that he could not be assisted by a lawyer while in police custody had irretrievably affected his defense rights.

The same ruling were passed also in case of Pishchalnikov v. Russia(2009), Brusco v. France(2010) and Mader v. Croatia(2011) . This clearly shows that the rights to representation by lawyers should be at the 1st possible time of arrest/detention.

However, when we come to Ethiopia, the 1st possible time of representation is not clear. But the spirits of our laws unequivocal manner shows that, representation is done at the trial stage. Due

consideration is not given for pre-trial stages, especially during investigation/interrogation at the police station/custody. Because, the official belief was and still is to a certain extent- that access to a lawyer at this initial stage of the proceedings and presence of the same during questioning would seriously hamper the efficiency of the investigation, minimizing the frequency of self-incrimination and confessions by suspects. For instance, the government provided public defenders for detainees unable to afford private legal counsel, but they represent only when the cases went to High court. Even, there were a different reports that while detainees were in pretrial detention, authorities did not allow them to contact with legal counsel.

4.2. Forced Derogations form the right to access a lawyer

As I have try to discuss earlier, Arti 14(3)/b of ICCPR clearly stipulate as to have adequate time and facilities were needed for the preparation of one's own Defence and to communicate with counsel of his own choosing. If this would not be ensured it leads to systematic and forced derogation of this rights. For example, in *Panovits v Cyprus* (2008) and *Pischalnikov v Russia* (2009) the ECtHR has set high standards regarding the validity of a waiver of the right to legal assistance, noting that ,the right to counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard.

However, when come to Ethiopia, the criminal justice policy employs the principles of "RTD" (Real time dispatch) which obliged the authority to convict the arrested person within 48 hours. In such circumstance, the arrested person has no time to assign his own legal representative, even the investigator and the court did not inform his/her rights to lawyers and did not assist in ensuring his/her rights. Defendants were also often unaware of the specific charges against them until the commencement of their trials; even if there is representation, it also caused defense attorneys to be unprepared to provide an adequate defense. This clearly reveals that, in Ethiopia there are forced and systematic derogation to the rights of lawyers which highly violates the rights of fair trial of defendants and leads to wrongful conviction by admitting inadmissible and illegal obtained confession.

4.3. Confidentiality of communications

The confidentiality of communication b/n clients and lawyers is one of the mechanisms of ensuring fair trial in which information exchanged between them must be protected.

Confidential communication with one's lawyer

is protected by the different international Convention as an important safeguard of one's right to defense. Indeed, if a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness. The right to a fair trial requires access to all materials that the prosecution plans to offer in court against the accused as well as the right to confidential communications with counsels.

However, when we see the practice in Ethiopia, There are some problems. For instance, during the Terrorism charge trial, defense counsel was not allowed to communicate with their clients in full confidentiality, and police or prison officers were present within ear-shot during the meetings. Exchanging communications and documents with their clients was also prohibited. In many of cases the private lawyers were deterred from representation rather than government appoint for the reason of Fear of punitive repercussions and harassment in cases of suspected political opponents.

This clearly shows that, the rights to ones choice of legal representative is apparently violated in Ethiopia. For instance when we see the ECtHR decision in case of *Pavlenko v Russia* (2010) the Court emphasized that the priority must be given to the lawyer chosen by the suspect over a lawyer assigned to him by state authorities. But in our country the opposite has been seen in many offences.

5. Remedy needs to be sought/my reactions

Effective remedies against breaches of the right to access a lawyer in its various aspects are of the outmost importance. No evidence acquired in violation of this right should be admitted and relied upon in subsequent proceedings to convict an accused person. All legal professional (public prosecutors and judges) including police investigators and authority should have to promptly inform this rights to arrested/accused/detainees/defendant person and ensures its respectation since it is a matter of fair trial as provided in different international, regional and national instruments. Admitting such tainted evidence undermines the fair character of criminal proceedings and opens the door for miscarriages of justice and wrongful conviction of innocent persons. Moreover, it does not de-motivate police and prosecuting authorities from applying abusive practices and systematically violating suspects' rights.

6. Conclusion

As I have discussed so far, the rights to legal counsel has been violating from time to time and it is on exacerbating circumstances in Ethiopia. Because, on one thing, there are a gaps of laws and practice, in other thing the law by itself is inefficient as we have thoroughly seen above.

There is No time and scope of representation

has been fixed by law, there is no confidentiality of communications, there are forced and systematic derogation of this rights. All legal professionals including courts are used confession obtained in absence of legal representation as admissible evidence which leads to wrongful conviction and convicting the innocent individuals. However, this is not irreversible problems, we still have a long road to travel to achieve effective defense in Ethiopia. Protecting individual rights in criminal proceedings is an ongoing project for liberty from time to time though un successful attempt till now. So all investigator, prosecutor, judges and other authorities have to be aware and ensure the applications and respectation of this right at all level of courts and investigation departments including custodial centers.

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